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HOUSE OF REPRESENTATIVES.

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# 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.

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EDITED BY

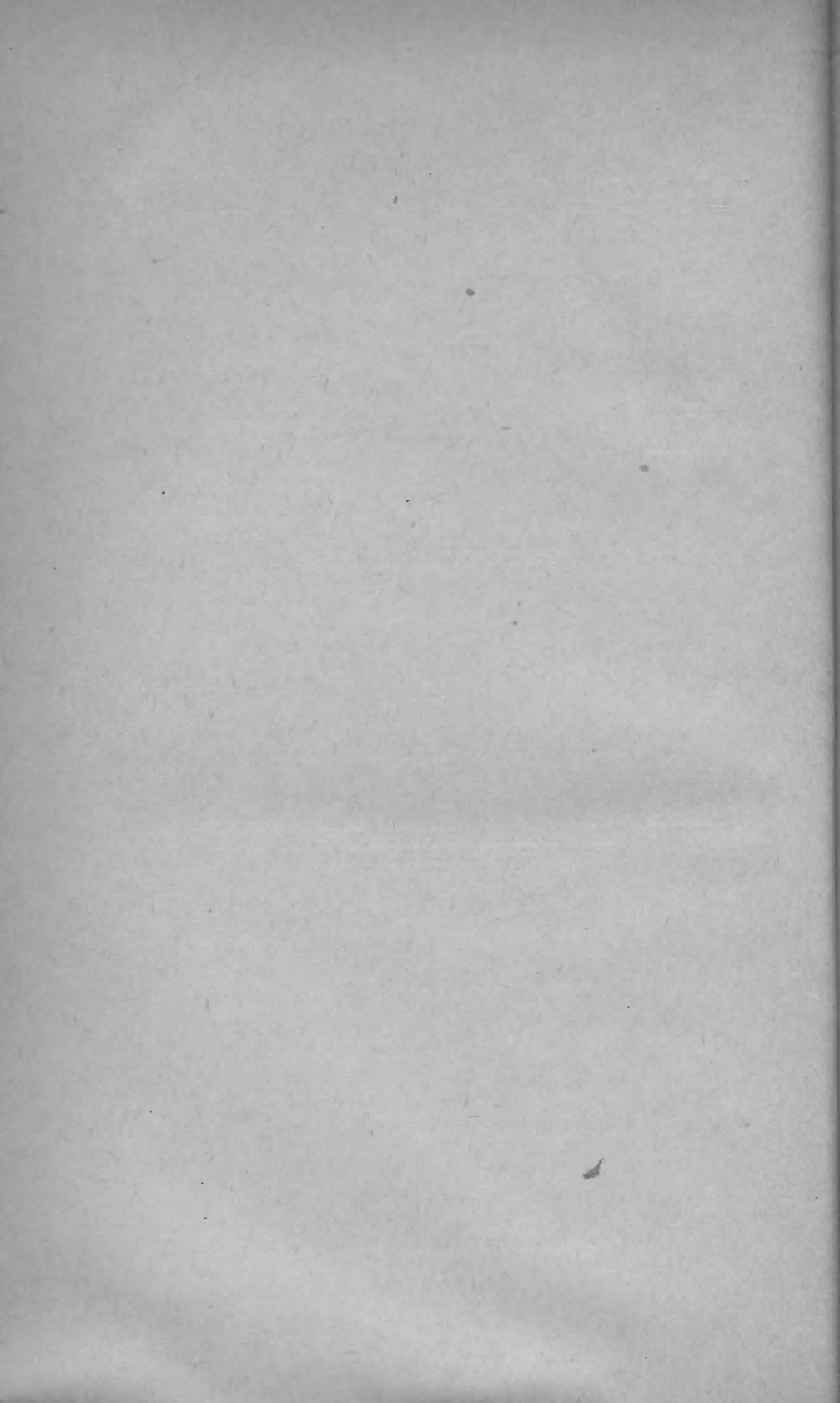
A. J. BENTLEY, Esq.

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VOLUME XVII.

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CONTAINING

OPINIONS

OF

HON. CHARLES DEVENS,  
OF MASSACHUSETTS,

HON. WAYNE MACVEAGH,  
OF PENNSYLVANIA,

AND

HON. BENJAMIN HARRIS BREWSTER,  
OF PENNSYLVANIA.

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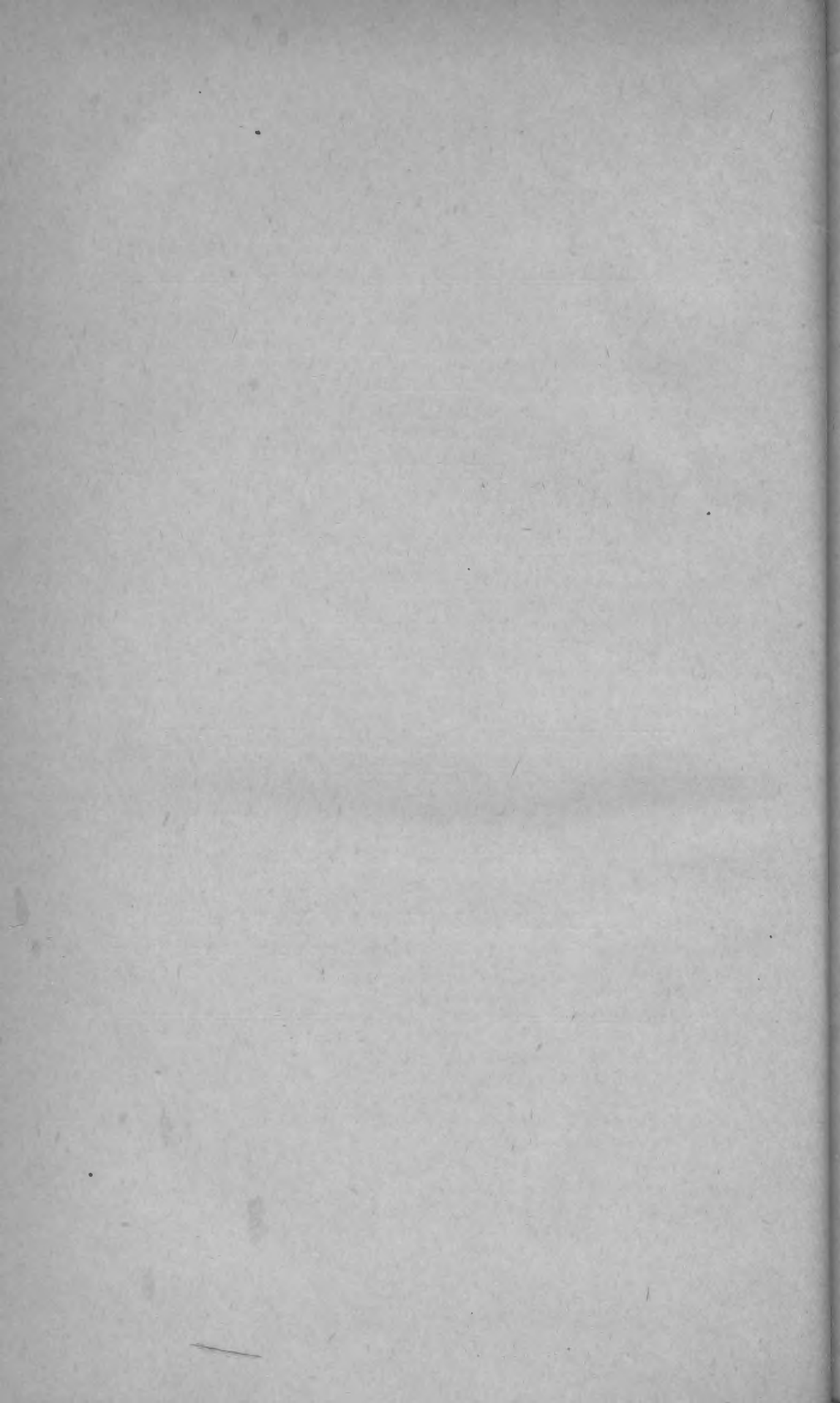
ALSO CONTAINING OPINIONS GIVEN

BY

HON. SAMUEL F. PHILLIPS, of North Carolina,  
*Solicitor-General and Acting Attorney-General.*

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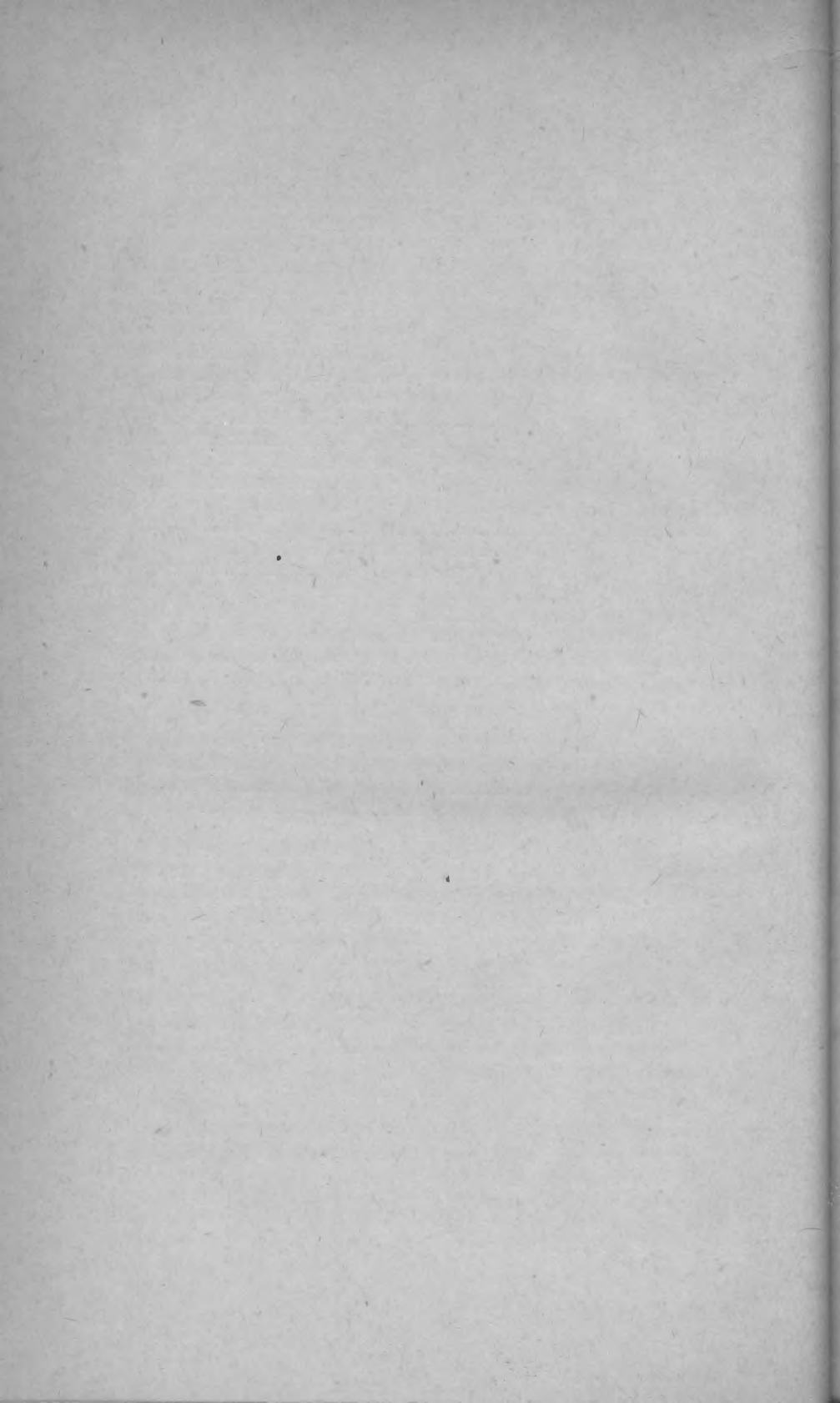
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# OPINIONS

OF

HON. CHARLES DEVENS, OF MASSACHUSETTS.

APPOINTED MARCH 12, 1877.

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## STATE PROCESS.

Writs issued by the courts of Minnesota run into and upon the military reservation of Fort Snelling, in that State.

DEPARTMENT OF JUSTICE,

*January 6, 1881.*

SIR: Referring to your inquiry whether service of writs from courts of the State of Minnesota should be allowed on the reservation of Fort Snelling, I think the question proposed is fully answered by the opinion of Attorney-General Williams (14 Opin., 33, and see the cases there cited), in which it was held that jurisdiction over the lands lying within the limits of the military reservation of Fort Leavenworth passed from the United States to the State of Kansas under the operation of the act of June 29, 1861, chapter 20, admitting that State into the Union, and that to restore exclusive jurisdiction to the United States a cession thereof by the State would be necessary.

Upon the authority of this opinion (which seems to me entirely satisfactory) I therefore reply to your question that writs from the State of Minnesota do run into and upon the reservation of Fort Snelling.

As General Terry requests immediate answer, I have not thought it necessary to delay by reasoning out the argument which leads to this conclusion.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

*Secretary of War.*

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Inspector-General's Department.

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## INSPECTOR-GENERAL'S DEPARTMENT.

The act of December 12, 1878, chap. 2, limits the nomination of brigadier-general in the Inspector-General's Department to the senior officer thereof. Provisions of that act compared with those of section 1193, Revised Statutes, and distinction between them indicated.

DEPARTMENT OF JUSTICE,  
*January 8, 1881.*

SIR: I have read the brief submitted to you.

By examining the act of December 12, 1878, it will be seen that the language is that "the rank of the senior Inspector-General of the United States Army shall be brigadier-general."

The proviso shows that the whole act is limited to the officers of the Inspector-General's Department.

I am of the opinion that General Sackett, who has now become the senior Inspector-General, is entitled to the nomination as brigadier-general. The fact that no other officers could be added to the corps (it being limited by the act of 1874 to five officers), I think, clearly shows that the senior officer must be from the Inspector-General's Department itself. By the retirement of General Marcy no vacancy was created in that department. This construction, of course, limits the act of 1878 to the right on the part of the President to nominate the senior Inspector-General. That must certainly be its construction with regard to the first appointment made under that act; and, if the authority is continuing (and I consider that it is), the same limitation subsequently exists.

I see by the papers that since the retirement of General Marcy an officer junior to General Sackett is to be, or is, retired—General Shriver; but it does not seem to me that this can affect the matter. The question is as to the construction of the act; and as until that retirement no officer outside of the Inspector-General's Department could have been appointed without violation of the provision that the inspectors-general shall be limited to five in number, it is shown that its true construction is to invest the senior Inspector-General with the rank. General Shriver's retirement will reduce the number below five. It should not deprive

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Brevet Commissions of Judge-Advocates.

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General Sackett of his rights already acquired by the retirement of General Marcy; and the vacancy which will exist in the Inspector-General's Department by the retirement of General Shriver should be filled by an appointment into that department of an officer who will be the junior officer thereof.

In the papers sent to me reliance seems to be placed on section 1193, Revised Statutes, which provides for the appointment of the Adjutant-General and certain other chiefs of corps from the corps to which they belong. It is argued that because the Inspector-General is not here named, he can be appointed from the Army generally. It is sufficient answer to this, I think, to say that the section 1193, in providing for the appointment of chiefs of certain other staff corps, gives the President the right to free selection from that corps; but the act of December 12, 1878, in regard to the Inspector-General's Department, limits the President to the senior officer thereof.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

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BREVET-COMMISSIONS OF JUDGE-ADVOCATES.

Where a judge-advocate, appointed in the volunteer service under the act of July 17, 1862, chap. 201, with the rank of major, was afterwards and prior to the act of July 28, 1866, chap. 299, as amended by the act of February 25, 1867, chap. 79 (by operation of which acts he became transferred from the volunteer to the regular service), brevetted a lieutenant-colonel and also a colonel of volunteers: *Held* that the said acts of 1866 and 1867 produced no effect upon the brevet commissions in the volunteer service previously conferred, and that such brevets can not be treated as brevets in the regular service.

DEPARTMENT OF JUSTICE,

January 13, 1881.

SIR: Your letter of December 22, 1880, incloses a communication from Maj. William Winthrop, Judge-Advocate U. S. Army, dated November 5, 1880, with the indorsements thereon and the papers accompanying the same.

Major Winthrop applies to have the entries in the Army Register as to his brevet rank so amended as that he shall

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**Brevet Commissions of Judge-Advocates.**

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appear in the next Register as a brevet colonel in the regular army.

The question raised is whether Major Winthrop, who was brevetted lieutenant-colonel and colonel in the "volunteers," is now entitled to that brevet rank in the "regular Army?"

The act of July 17, 1862, authorized the President to appoint, with the advice, etc., of the Senate, "for each army in the field a judge-advocate, with the rank of a major of cavalry, who shall perform the duties of judge-advocate for the army to which they respectively belong, under the direction of the judge-advocate general."

Under this law Major Winthrop with other gentlemen was appointed a judge-advocate. He was nominated and confirmed by the Senate for appointment in the "volunteer force." He was afterwards nominated, confirmed, and commissioned for the brevets of lieutenant-colonel and colonel of volunteers.

The act of July 28, 1866, as amended by act of February 25, 1867, retained certain of the judge-advocates (including Major Winthrop) in the service "upon the same footing in respect to tenure of office and otherwise as other officers of the Army of the United States." The act of April 10, 1869, fixed the number of judge-advocates at eight, and authorized the President, by and with the advice and consent of the Senate, to fill all vacancies which had occurred or might thereafter occur in such offices.

It has been held that the operation of this legislation was to transfer these officers into the regular Army, and that they did not need any new appointment by the President, with the advice and consent of the Senate, and no new appointment has been made.

These officers did not belong to the regular Army until they were made officers thereof by the act of February 25, 1867. While their commissions still purport to be in the "volunteer" force, this legislation operated to extend these commissions so as to make the officers holding them officers of the "regular" force.

Without discussion I assume, therefore, in this opinion that the question submitted to Attorney-General Hoar, and answered by him on June 4, 1869 (13 Opin., 96), namely, that

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**Brevet Commissions of Judge-Advocates.**

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the then incumbents of the office of judge-advocate were officers of the regular Army, lawfully appointed and commissioned, is rightfully decided.

But if the operation of the legislation is to transfer these officers into the regular Army with the rank held by them at the time, and upon the same footing in respect to tenure of office as other officers of the Army, it has no retroactive effect, and does not make them officers of the regular Army from the time when the brevets in question were received. I think there could be no question if these gentlemen had been nominated and confirmed by the Senate and afterwards commissioned as officers of the regular Army, that the commissions thus received would not carry therewith any right to have the brevet commissions held by them in the "volunteer" service treated as brevets in the "regular" service; and when legislation at a particular date transfers them from the volunteer to the regular service, although such transfer may operate in spite of the language of their commissions to make them officers of the regular service, no effect will be produced upon the brevets held by them in the volunteer service.

I do not, of course, discuss the question whether Congress might not have transferred them with their brevet rank as well as their actual rank; but there is no legislation to that effect.

The suggestion made is that this ruling would make the brevet commissions nullities. I do not so consider it. They would have the same effect as brevet commissions received by officers of volunteers who were afterward appointed to lineal rank in the regular Army similar to that held by them when in the volunteer service. Undoubtedly the brevet commission must have a commission to rest upon when conferred. When Major Winthrop was brevetted he had a commission in the volunteer service. When he is transferred to the regular Army by the legislation, although his volunteer commission ceases to exist it only does so in the same way that it would if he had been commissioned into the regular Army.

The suggestion is made on behalf of Major Winthrop (see letter of December 6, 1876), that the corps never consisted of volunteer officers in the proper sense of the term, and that as

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Martello Towers near Fort Taylor, Fla.

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to their brevet commissions those were of the same nature as the original rank to which they were incident.

In the view I take of the matter the judge-advocates were volunteer officers in the proper sense of the term. The brevet commissions were of the same nature, and they do not change their nature when the commissions themselves are changed, whether that change be effected, as in this case, by legislation or, as ordinarily, by new appointment and confirmation.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

*Secretary of War.*

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MARTELLO TOWERS NEAR FORT TAYLOR, FLA.

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In the case of certain martello towers, outworks of Fort Taylor, Fla., which were erected during the rebellion, on land then in the military occupation of the United States: *Advised*, that if the title to such land has not been acquired by the Government, but is held by individuals, and it is deemed expedient to permanently retain possession thereof for military purposes, application be made to Congress by the War Department for authority to acquire the same, instead of forcing the owners to go there for relief.

## DEPARTMENT OF JUSTICE,

*January 21, 1881.*

SIR: I have considered the case presented in your letter of the 16th of November last in regard to the sites of the advanced martello towers, outworks of Fort Taylor, on the island of Key West, Fla.

It appears by your letter that these towers were built at great cost at an early period in the rebellion, when the exigencies of the times and certain difficulties in procuring titles prevented, in the judgment of the Chief of Engineers and the Secretary of War, the purchase of the sites; and it is presumed they were occupied by the United States as an act of war in the seceded State.

The land embracing the sites was recently purchased at a tax sale by a citizen, who has since been attempting to remove sand therefrom to the endangerment of the towers. You inquire "if under the circumstances the United States can hold possession of the sites, exclude intruders, whether

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Case of Colonel Stoneman.

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they claim to be owners or not, and force the owners to enter claims for the land, either in Congress or before the Court of Claims, by which means they can obtain proper compensation for their lands."

In reply, I have the honor to state that in my opinion the United States can hold the possession of the sites, and exclude intruders therefrom, whether they claim to be owners or not; and further, that no proceedings to oust the United States from the possession of the premises are maintainable (*Carr v. United States*, 98 U. S. R., 433). Yet, if the title to the sites has not been acquired by the United States, but is held by individuals, and it is deemed advisable that the United States should permanently retain the possession of the sites for military purposes, I suggest the propriety of the Department of War applying to Congress for authority to acquire the title, either by purchase or condemnation, instead of forcing the owners themselves to go to Congress for relief.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

*Secretary of War.*

NOTE.—The Supreme Court, in *United States v. Lee* (106 U. S., 196), has since decided that where an officer or agent of the Government, holding possession of property for public uses, is sued therefor by a person claiming to be the owner thereof or entitled thereto, the lawfulness of that possession and the right and title of the United States to the property may, by a court of competent jurisdiction, be inquired into and adjudged accordingly.

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CASE OF COLONEL STONEMAN.

Upon consideration of the facts in the case of the retirement of Col. George Stoneman, U. S. Army: *Held*, that that officer was not entitled to be retired as a major-general on account of disability occasioned by wounds received in battle, under the provisions of section 32 of the act of July 28, 1866, chap. 299 (it not appearing that his disability was so occasioned), but that he was properly retired on his rank of colonel.

DEPARTMENT OF JUSTICE,

*January 28, 1881.*

SIR: By letter of January 23, 1881, Col. George Stoneman, U. S. Army, objects that his retirement as a colonel in

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Case of Colonel Stoneman.

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the Army was improperly made by the recent President, and requests a revocation of the Special Orders, No. 322, of 1871, and that he may be borne on the retired list of the Army in accordance with special orders, No. 307, current series, 1878.

By the order of August 16, 1871, General Stoneman, upon the report of an examining board, having been held incapacitated for active service by reason of wounds or injury received during the time he held the command of major-general of the United States, it was directed by the President "that his name be placed on the list of retired officers of that class in which the disability results from long and faithful service or from wounds or injury received in the line of duty, in conformity with sections 16 and 17 of the act of August 3, 1861;" and, further, that in accordance with section 32 of the act of July 28, 1866, Colonel Stoneman be retired with the full rank of major-general.

Before this order was actually executed, and before it had reached Colonel Stoneman, it was revoked by Special Orders, No. 322, August 19, 1871, which recited that the order having been based upon a recommendation of the retiring board which was made under a misconception of the law, the same was thereby revoked, and Colonel Stoneman was retired on his rank of colonel, it not appearing that he was wounded in battle, and the law requiring, in explicit terms, that an officer shall be disabled by "wounds"—not by disease—to enable the President to retire him on the rank of the command held by him when so wounded.

Section 32 of the act of July 28, 1866, is as follows:

*"And be it further enacted* That officers of the regular army, entitled to be retired on account of disability occasioned by wounds received in battle, may be retired upon the full rank of the command held by them whether in the regular or volunteer service at the time such wounds were received."

The claim of General Stoneman is, that as the disease from which he was suffering, namely, "piles," was aggravated or occasioned by jolting in the saddle during his active service, he is therefore entitled to be retired "on account of disability occasioned by wounds received in battle." He further claims that, whether erroneously construing the law or not, the construction given it by the medical board is final.

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Case of General Schuyler Hamilton.

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I am unable to concur in either of these views: The report clearly shows that the injuries received by Colonel Stoneman were not wounds received in battle, but were the ordinary series of contusions from the jolting of the saddle which aggravated the disease from which he was suffering. Nor can the opinion of the medical board be permitted to control a distinct provision of law which limits the retirement, under the section 32 referred to, to retirement "on account of disability occasioned by wounds received in battle."

Upon the whole case I am therefore of opinion that no injustice has been done to Colonel Stoneman; that the original order was properly recalled, it not having been completely executed; and that even if it had been executed and delivered to Colonel Stoneman and his name placed on the retired list as a major-general, it would now be the duty of the President to place him upon the retired list as a colonel, upon examination of the papers in the case.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

---

CASE OF GENERAL SCHUYLER HAMILTON.

Opinion of November 28, 1874 (14 Opin., 506), upon the claim of General Schuyler Hamilton to be borne on the retired list of the Army, reaffirmed.

DEPARTMENT OF JUSTICE,

January 29, 1881.

SIR: I have carefully examined the case of General Schuyler Hamilton, as exhibited in his papers referred to me by you and transmitted from the War Department.

General Hamilton, by a memorandum which I inclose, informs me that he does not now desire to press his request upon the President for a board of officers upon his case, but desires that the Attorney-General would express his opinion as to whether he (General Hamilton) is now entitled to be borne on the army list as a retired officer with the rank of lieutenant-colonel.

An examination of the fourteenth volume of the Opinions of the Attorney-General (p. 506) will show that the case of

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 Relative Rank in Paymaster's Department.
 

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General Hamilton has once been fully examined and passed upon by this Department. I do not perceive that any new facts are suggested to those which were then before the Department. I am of the opinion that such adjudication is correct, and accordingly that the claim of General Hamilton to be placed on the retired list, based upon his appointment by Brevet Lieutenant-General Scott on his staff as a military secretary, is inadmissible under the laws in force, he not being an officer on the active list by virtue of that appointment; and, further, that under the act of March 3, 1857, General Scott was entitled, when exercising command according to the rank of brevet lieutenant-general and then only, to the staff to which he had appointed General Hamilton, and that upon the retirement of General Scott from active service and consequent withdrawal from command, to wit, November 1, 1861, the appointment of General Hamilton was *ipso jure* revoked.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

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 RELATIVE RANK IN PAYMASTER'S DEPARTMENT.
 

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Relative rank in the Paymaster's Department of the Army, as between officers having the same grade and date of appointment and commission, was regulated by the act of March 2, 1867, chap. 159 (Rev. Stat., sec. 1219 and 1292), and was determined by length of service as a commissioned officer, computed according to the provisions of that act. Except as between such officers as have the same date of appointment and commission, the matter of relative rank was left by that act to be governed by the dates of the commissions under which the officers are at the time serving.

## DEPARTMENT OF JUSTICE,

February 9, 1881.

SIR: I have received the letter from your Department of the 29th of January, inclosing a communication from Maj. C. M. Terrell, paymaster, U. S. Army, dated January 25, applying for a reconsideration of the opinion of Acting Attorney-General B. F. Bristow, dated June 13, 1878 (13 Opin., 441), on the ground that said opinion was based upon an erroneous statement of facts.

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Relative Rank in Paymaster's Department.

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Neither your letter nor that of Major Terrell gives a statement of what is erroneous in the facts which were before General Bristow. Apparently there is an error in his opinion as to the rule of practice existing in the Pay Department, he understanding that by that rule a senior officer on one day might become a junior officer on the following day under the act of May 15, 1820, by which the term of office for which paymasters in the Army were appointed was limited to four years. This error (if it be one), or if it be that to which your letter refers, is obviously unimportant.

It is not the less true that the act of March 3, 1847, was intended to fix definitely the rank in the Pay Department, between officers having the same grade, in favor of the oldest in service in the Department, without regard to the date of commission under which they might be acting at the time; and the only apparent reason for such an act was to prevent the confusion which would arise from the senior officer of one day becoming the junior of another.

After the act of March 2, 1849, this provision would have lost its practical importance, as length of service would thereafter generally coincide with the date of commission.

It is not, however, necessary to carefully consider these statutes, as the subject of relative rank in the Pay Department between officers having the same grade and date of appointment and commission was dealt with by the act of March 2, 1867. This act, while it disposed of the matter of the relative rank of those officers *having the same date* of appointment and commission, left the matter of relative rank to be regulated solely according to the dates of the commissions of other officers. If, therefore, an officer has a date of appointment and commission earlier than another officer, he is entitled to take rank over that other, even if the latter officer should actually have served a longer time as a commissioned officer of the United States.

On carefully reviewing the whole opinion to which my attention has been called, I can see no error in it as matter of law nor any as matter of fact which in any way affects the accuracy of the decision.

The provisions of the first and second sections of the act of March 2, 1867 (which are the only ones which need be

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Case of Maj. Rodney Smith.

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considered in this connection) are re-enacted in the Revised Statutes, sections 1219 and 1292.

The papers which were with your letter are herewith returned.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

*Secretary of War.*

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## CASE OF MAJ. RODNEY SMITH.

This case is controlled by the opinion in Major Terrell's case, ante p. 10.

DEPARTMENT OF JUSTICE,

*February 9, 1881.*

SIR: I have your letter of the 8th instant, transmitting, at the request of Maj. Rodney Smith, paymaster, U. S. Army, certain papers relating to rank among Army paymasters, etc., for consideration in connection with the case presented by Maj. O. M. Terrell.

Previous to receiving these papers the case of Major Terrell had been passed upon by me by an opinion of even date herewith.

I have read the papers of Major Smith, which tend only to confirm me in the conclusion which I have heretofore reached without them. They further seem to show that the erroneous statement of facts claimed to have been the basis of Solicitor-General Bristow's opinion, and treated by me as unimportant in the result, was not in fact erroneous.

I should have called your attention to my opinion of July 6, 1877 (15 Opin., 330), in which it was held, in regard to a case arising in the Quartermaster's Department, that the right to promotion under existing law would be governed by seniority of commission, irrespective of the past services of the officer.

I return the papers which accompanied your letter.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

*Secretary of War.*

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Case of Walker A. Newton.

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## CASE OF WALKER A. NEWTON.

Power of the President under the act of July 15, 1870, chapter 294, to drop an officer from the rolls of the Army, considered.

Neither the act of March 3, 1865, chapter 79, nor that of July 13, 1866, chapter 176, applies to cases expressly and specifically provided for by the act of July 15, 1870, section 17.

## DEPARTMENT OF JUSTICE,

*February 16, 1881.*

SIR: In the matter of the application of Walker A. Newton for a rehearing, referred to me by you upon yesterday's request of the Secretary of War, I have the honor to report that, after a full and careful examination of all the voluminous papers (herewith transmitted, for restoration to the War Department), including the statements of the petitioner and the briefs of his counsel, I am fully satisfied of the correctness of the conclusion reached by the former Secretary of War (Mr. McCrary), that, if there is any case made for relief, there is no relief which the President or any executive branch of the Government can give.

The facts, as officially stated to you, are as follows:

"Mr. Newton received an appointment as second lieutenant Thirty-fourth Infantry, August 29, 1867; joined his regiment September 11, 1867; and continued in the performance of actual military duty until December 5, 1868—a little more than a year. On the last-named date he left his post on twenty days' leave, which was afterwards extended twenty days—to January 14, 1869—on which date he should, under Army Regulations, have been at his post. But it appears that he remained in Philadelphia, and on February 8 and March 27, 1869, he sent from that city certificates stating that he was not fit for duty by reason of a gunshot wound through the thigh. When, where, or how he received this wound is not shown by any record in this office.

In April, 1869, he left Philadelphia to join his regiment in Mississippi; but meantime his regiment had been consolidated with the Eleventh Infantry and formed the Sixteenth Infantry, leaving Lieutenant Newton supernumerary, or unassigned. July 14, 1869, an order was issued from the Adjutant-General's office assigning him to the Thirteenth Infantry; but by another order, issued August 20, 1869, upon an official

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Case of Walker A. Newton.

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report that he had, at New Orleans, La., executed two sets of pay accounts for the same month—June, 1869—his assignment to the Thirteenth Infantry was revoked, and the order directed that he report to the commanding-general in New Orleans, for trial by court-martial for the offense. It appears that he did not report for trial, and that a copy of neither of the two last-named orders was sent to him, for the reason that his whereabouts was not known to the Adjutant-General's office when these orders were issued. The Army Regulations require officers away from their regiments on leave or detached duty to report their address monthly to the Adjutant-General. Without such information it is impossible for the Adjutant-General to communicate orders or instructions, however important, to an officer.

No reports had been received from Lieutenant Newton subsequent to his departure from Philadelphia in April preceding. Under date of September 2, 1869, however, he reported from Holly Springs, Miss., that, having received no orders, he would "start immediately for Washington." As he would naturally reach Washington about as soon as his report would reach there, his orders were not, as a matter of course, sent to Holly Springs. It does not appear as a matter of record, or of fact, that he ever did, after September 2, 1869, report either in person or by letter to the Adjutant-General of the Army. It is certain, that had he reported his address to, or communicated with, the Adjutant-General, all the orders issued in his case would have been promptly transmitted to him.

By the act approved July 15, 1870, section 17, the President was authorized to drop from the rolls of the Army, for desertion, any officer who is now, or who may hereafter be, absent from duty three months without leave; and any officer so dropped shall forfeit all pay and allowances due, or to become due, and shall not be eligible for re-appointment. (16 Stats., 319.)

July 25, 1870, an order was issued by the Adjutant-General, by the direction of the President and by order of the Secretary of War, directing the dropping of the names of Lieutenant Newton and two other officers from the rolls of the Army under the provisions of the act cited.

The *gravamen* of the petitioner's complaint, and the greater part of his counsel's argument, are based upon the assumption that this order was issued "under a misapprehension of the facts." If this were so, it is not perceived how it can change the *legal effect* of the order; it still remains an authorized and authoritative act of the Executive, even if prompted by an erroneous impression.

The President was empowered "to drop from the rolls of the Army, for desertion, any officer who *is now*, or who may hereafter be, absent from duty three months without leave."

To exercise such power the President must necessarily first ascertain to his own satisfaction what officers are "now" so absent. To this end the act did not provide for nor contemplate recourse to a court-martial or other examination conducted outside of the President's own investigation (which he was left to make in such manner as he saw fit) to ascertain this fact. The law placed its ascertainment wholly in the hands of the Chief Executive, who must naturally have been expected to resort to the official records of the War Department as one source, at least, of information.

But, however to be solved, this question of fact was placed within the President's exclusive jurisdiction. The right to decide it implied the power to determine it *conclusively* either way as to any officer. (*Central Pacific R. R. Co. v. Placer County*, 43 Cal. Rep. 369.)

His decision as to any officer having been made, the President is, as to the case of that individual, *functus officio*; the statute giving him no right to review, annul, affirm, or reverse his own adjudication.

Even if his action was the mere exercise of discretion, it would be contrary to the rule laid down in the early days of the Government for any successor in office to reverse it. This rule and the urgent reasons for it are clearly and forcibly expressed in opinions given October 1, 1825, to the Secretary of the Navy, and July 28, 1828, to President J. Q. Adams, by Attorney-General Wirt, (2 Opin., 8, 110). In the earlier opinion, Mr. Wirt observed, after giving some of the reasons for the rule: "Hence, I have understood it to be a rule of action prescribed to itself by each administration to consider the acts of its predecessors conclusive, as far as

the Executive is concerned. It is but a decent degree of respect for each administration to entertain of its predecessor, to suppose it as well qualified as itself to execute the laws according to the intention of their makers; and not to set an example of review and reversal which, in its turn, may be brought to bear upon itself; and thus keep the acts of the Executive perpetually unsettled and afloat. In conversing with President Adams on this subject, I understood him to concur in the general rule of considering all acts of the preceding administration final; and although partial injuries may now and then remain unredressed by the operation of this, in common with all other general rules, yet it is better to bear that partial evil, or leave it to legislative redress, than to introduce the more extensive and incalculable evils which must result from considering all the past acts of all the past Executives as open to reconsideration, and re-adjudication at the pleasure of the individuals who were interested in them." (2 Opin., 9, 10.) In the later opinion Mr. Wirt pursued the same line of thought: "The question is, whether it be constitutionally competent for you to undo what your predecessor has done? If it be, then all the official acts of all your predecessors are open to review and reversal, and you may go back to the foundation of the Government, unsettle all that has been done by those who have gone before you, and place those transactions on the basis on which you may think they ought to rest; and your successors, in their turn, may undo all that you have done, and restore the state of things which you have changed. Thus, as long as our Constitution shall endure, executive acts instead of being done when they are done, will be perpetually afloat; and the incumbent of the office for the time being, instead of discharging the current duties which properly belong to him, will have his time consumed by this retrospective action on the acts of his predecessors. I had supposed the rule to be, that whatever purely executive measure had been *adjudged* and *decided* and *closed* during a preceding administration was considered as withdrawn altogether from the action of the succeeding President; and the rule seems to result, naturally and necessarily, from the nature of things." (2 Opin., 115).

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Mr. Attorney-General Cushing, after remarking that "the principle which would allow a matter *done* to be re-examined and reversed by a successor in office would equally allow the reversal to be reversed by a successor in office, and so in endless succession of reviews and reversals," quotes what he considers well said by Mr. Attorney-General Toucey: "There is no law which authorizes the head of any Department to supervise the acts of its predecessor. \* \* \* It might well be asked, which of the two high functionaries, exercising the same authority, would, in contemplation of law, be deemed to be in the right, the one who, at a proper time and on proper occasion, exercised his legitimate authority, according to his best judgment, or the one who undertook to go back into a past stage of administration, and to revise and reverse the *acts* of his predecessor, whose power was equal and identical with his own?" (6 Opin., 605, 606.)

In an opinion furnished by me to the Secretary of the Interior on the 20th March, 1877, after referring to the able presentation of the subject by Mr. Wirt and its frequent re-statement with approval by other Attorney-Generals, I concluded that this rule of acquiescence in what had been done by our predecessors must be considered as settled. (15 Opin., 208.)

If the act be not merely discretionery, but (as in the present instance) quasi judicial, while the above-mentioned objections apply with equal or greater force, it is more obvious that the *right* of reversal can not exist.

Congress must have intended that the authority to drop from the Army rolls any officer "*now*" absent from duty should be exercised by him who was *then* President. It could not have expected that action as to *such* officers would be taken by one succeeding to the Presidential office ten or twenty years later, or indefinitely thereafter.

At all events, whenever taken, action once had was final. General Order, No. 95, evidences the taking of such final action by President Grant. He was authorized "to drop from the rolls" certain officers. The rolls were not made up by his hand nor in his personal custody. They were made up and kept at the War Department. The only way the Presi-

## Case of Walker A. Newton.

dent could drop names therefrom was by directing it to be done at the War Department. This he did. The petitioner and his advocates treat the order reciting this direction as an *indictment*, making "a charge of desertion," which it is necessary to support, at this late day, by evidence, and which he can now refute by his own statements or otherwise. The first brief (of Mr. Neill) filed in his behalf, at the bottom of page twenty-three, uses this language: "If the charges in the indictment as recited are not affirmatively shown to be true, \* \* \* the indictment falls absolutely," etc. The statute did not contemplate any formal trial by the President, either through an "indictment" or a court-martial, before dropping an absent officer. It was left to the President to ascertain and determine who ought to be dropped, and then to govern himself accordingly. No form of procedure was prescribed, but the means of discovering the facts was left to the sound judgment of him upon whom was conferred the power to act. (*Martin v. Mott*, 12 Wheat., 19.)

When we reflect that the purpose was to purge the Army of those who for three months neglected their military duties altogether, by being absent without leave, it may well be inferred that it was anticipated that recourse would be had to the records of the War Department to discover who were thus delinquent.

But however the facts upon which it was based were ascertained, General Orders, No. 95, issued "by direction of the President," did not prefer a charge; it announced a decision, from which there was no appeal. Therefore it is useless to argue either that Mr. Newton was not technically a deserter, or even that he was not in fact for three months absent from duty without leave. If any such depository of special statutory authority go wrong upon the evidence, it is the misfortune of the parties. (*Birdsall v. Phillips*, 17 Wend., 463; *Gibbs v. Co. Commrs.*, 19 Pick., 299.) It is not intended by this remark to assume or concede that there was any mistake as to the existence of the statutory fact of absence without leave; but to say that if there were, it can not now be rectified by the President. That Congress intended to make the determination absolute is apparent from the concluding clause of section 17 of this act of July 15,

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1870, chapter 294, which declares that no officer so dropped shall be eligible for re-appointment. (16 Stats., 319.)

The petitioner claims that the action of President Grant was void because not authenticated by his sign-manual. Neither the enabling act nor any Army regulation applicable to cases like this expressly required such signature. Nor was it customary for him to sign similar orders. In those tribunals, above justices of the peace, in which civil and criminal causes are daily litigated and determined, the record is never verified by the signature of the judge, but by that of the clerk. As to military matters, the Secretary of War has always been recognized as the organ of the President, promulgating whatever orders he received from the latter. (Act of August 7, 1789, found in Revised Statutes, section 216.) "The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation, and the rules and orders publicly promulgated through him *must be received as the act of the Executive*, and as such be binding upon all within the sphere of his legal and constitutional authority." (*U. S. v. Eliason*, 16 Peters, 302; *Wilcox v. Jackson*, 13 Peters, 513; *Hickey v. Huse*, 56 Maine, 495.)

In the present case, instead of resting upon the implication of authority inferred from their respective official relations, the order expressly recites that it is issued "by direction of the President." This is a sufficient verification of official action under the act of July 15, 1870, section 17.

Upon the 1st day of December, 1879, Mr. Newton, for the first time, makes application, professedly based upon the provisions of Revised Statutes, section 1230, for a court-martial, alleging that he was wrongfully dismissed in July, 1870. That section is a reproduction of the act of March 3, 1865, in somewhat different phraseology. (13 Stats., 489, § 12.)

That law was passed while the war was flagrant, and while the President had authority under the act of July 17, 1862, chapter 200, section 17 (12 Stats., 596), "to dismiss and discharge from the military service either in the Army, Navy, Marine Corps, or volunteer force, in the United States service, any officer for any cause which, in his judgment,

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either renders such officer unsuitable for, or whose dismissal would promote, the public service." Neither the act of March 3, 1865, nor that of July 13, 1866, chapter 176, section 5 (14 Stats., 92), declaring that "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," etc. (Rev. Stat., § 1229), apply to cases expressly and specifically provided for by the act of July 15, 1870, section 17, authorizing the President to drop from the rolls those officers absent from duty without leave for three months. (16 Stats., 319.)

Even if he originally came within the purview of the act of March 3, 1865, section 12, Mr. Newton's application for its benefits was not seasonable. Though no time is limited in the act for making the application, the general rule of law would require the claim to be made within a reasonable time. It is not reasonable to wait until the statute of limitations has run against the offense, witnesses have disappeared, and memory failed; or until we may naturally expect these things to have occurred.

By the printed copy of his petition, filed May 4, 1880, in the Court of Claims (which I inclose to you, because no reference is made to it in any way in any of the other papers) you will see that Mr. Newton has pending in the Court of Claims a suit to recover \$16,800 compensation as second lieutenant, from May 31, 1869, to May, 1880, when his petition was filed. That suit proceeds upon the same theory as does his application to you, *i. e.*, that he is still, and has ever been, in the Army, because President Grant's sign-manual is not affixed to the order of dismissal, because he was not a deserter, and because he has asked for a court-martial under section 1230 of Revised Statutes. He is thus in a position to obtain a judicial construction of these statutes and determination of his cause, and can, upon appeal, obtain that of the highest tribunal. The facts upon which his claim rests can be much more satisfactorily established in such a proceeding, with its opportunities for investigation and cross-examination, than they can upon the *ex parte* statements of the applicant. He will there have the opportunity to explain, if he can consistently with the proper and prompt discharge

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Case of Paymaster Caswell, U. S. Navy.

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of his military duties, how it was that from the 5th day of December, 1868, up to the date of the order of July 25, 1870, directing his name to be dropped, he had rendered no service to the Government; and why, from September 2, 1869, to the time he was dropped, he sent no communication to the War Department; or, in short, whether or not he was in fact absent without leave, if that question is still open for debate anywhere.

In my opinion, the present Executive has no right to take the action requested by Mr. Newton; but if the right existed, I am convinced it would be better to leave him to the judicial remedy which he has invoked.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

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## CASE OF PAYMASTER CASWELL, U. S. NAVY.

Upon the facts of this case, as set forth in the opinion, it is held that Paymaster Thomas T. Caswell is entitled to a position on the list of paymasters in the Navy next above that of Paymaster John H. Stevenson; the position of the latter officer, as borne on the Navy Register, being affected by the restoration of the name of Paymaster Edward Bellows to said list, from which it had been illegally dropped.

DEPARTMENT OF JUSTICE,

*February 18, 1881.*

SIR: Your letter of the 4th instant submits to me an application of Paymaster Thomas T. Caswell, U. S. Navy, for a correction of the Navy Register, in which he claims that he is entitled to a position in the list of paymasters next above that of Paymaster John H. Stevenson, who is now borne on the Register as the senior officer of that grade, and to examination for promotion to fill an existing vacancy in the next higher grade in the Pay Corps.

The following facts in the case are stated to appear by the records of the Navy Department:

On the 6th of April, 1870, Paymaster John H. Stevenson was nominated by the President "to be advanced fifteen numbers in his grade for extraordinary heroism during the war of the rebellion, as particularly set forth in the accompanying report from Captain N. B. Woolsey, U. S. Navy, so

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as to take rank from the 4th of May, 1866, and next after Paymaster F. H. Hinman."

This nomination was confirmed by the Senate June 23, 1870, when Paymaster Stevenson was advanced and commissioned accordingly.

Paymaster Stevenson was nominated April 9, 1879, "for advancement fifteen numbers in his grade, and to take rank next after Paymaster George Cochran, for eminent and conspicuous conduct in battle and extraordinary heroism, in accordance with the provisions of section 1506, Revised Statutes."

This nomination was confirmed by the Senate April 30, 1879, when a commission was issued to Mr. Stevenson, with rank as a paymaster from the 13th of June, 1863, next after Paymaster George Cochran.

In accordance with his advancement, and with the date of his commission, Mr. Stevenson's position in the list of paymasters (as registered) is next above that of Thomas T. Caswell, who takes rank as a paymaster from the 17th of September, 1863, as stated in his commission.

On the 22d of January, 1880, about nine months after the second advancement of Paymaster Stevenson, the following order was addressed by the Secretary of the Navy to Paymaster Edward Bellows, U. S. Navy:

"The order of January 28, 1869, dismissing you from the naval service, having been issued in consequence of the facts appearing upon the record of the naval general court-martial before which you were tried November 16, 1868, and not in pursuance of the sentence of a general court-martial, was illegal, and contrary to the provisions of the fifth section of the act of Congress approved July 13, 1866 (Rev. Stat., § 1624, art. 36). The said order and dismissal are therefore declared illegal and void, and the same are, by direction of the President of the United States, hereby revoked and annulled."

Mr. Bellows's name was thereupon restored to the list of paymasters on the Navy Register next after that of Paymaster George A. Lyon, the original relative position held by him on that list, and to which he is entitled by virtue of his commission.

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During the time intervening, that is, from January 28, 1869, the date of the order of dismissal of Paymaster Bellows, and January 22, 1880, when his name was restored to the Navy Register, the following-named paymasters, whose original rank was below that of Paymaster Bellows in that grade, were advanced by the President, with the consent of the Senate, to positions on the list of paymasters above that held by Mr. Bellows at the time his name was removed therefrom :

(1) L. G. Billings, February 25, 1871, "fifteen numbers in his grade, for eminent and conspicuous conduct in battle during the war of the rebellion, to take rank from the 20th of October, 1864, next after Paymaster James Hoy, jr."

(2) Francis H. Iwan, February 25, 1871, "fifteen numbers in his grade, for extraordinary heroism during the war of the rebellion, to take rank from the 31st of August, 1865, next after Paymaster Forbes Packer."

(3) Charles F. Guild, April 17, 1871, "ten numbers in his grade, in accordance with the provisions of the second section of the act of Congress approved January 24, 1865."

(4) James E. Tolfree, February 3, 1875, "ten numbers in his grade."

(5) John H. Stevenson, April 30, 1879, "fifteen numbers in his grade," as above stated.

These officers remain (as registered) in the relative positions to which they were thus advanced, in order of rank as follows :

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|-------------------------|----------------------|
| 1. John H. Stevenson.   | 7. Francis H. Iwan.  |
| 2. Thomas T. Caswell.   | 8. Charles F. Guild. |
| 3. James Hoy.           | 9. James E. Tolfree. |
| 4. Luther G. Billings.  | 10. George A. Lyon.  |
| 5. Arthur J. Pritchard. | 11. Edward Bellows.  |
| 6. Albert S. Kenny.     |                      |

You also transmit for my consideration, in connection with the case of Paymaster Caswell, a similar claim, filed in the Navy Department by Paymaster George A. Lyon.

There is now a vacancy existing in the grade of pay-inspector, caused by the retirement of Pay-Inspector George L. Davis, on the 18th of January last, and under the provisions of section 1458, Revised Statutes, "the next officer in

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Case of Paymaster Caswell, U. S. Navy.

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rank shall be promoted to the place of a retired officer, according to the established rules of the service." \* \* \*

Your letter requests my opinion upon the following questions:

(1) Does the restoration of the name of Paymaster Bellows to the list of paymasters in the Navy, from which it was illegally removed, affect or disturb Paymaster Stevenson and others in their right to retain the relative positions to which they have been respectively advanced in that grade?

(2) Is Paymaster Stevenson entitled, as the next officer in rank, to examination for promotion, and, if found qualified, to nomination to fill a vacancy in the next higher grade, caused by the retirement of an officer therefrom?

The answer to the inquiries proposed by you assume that Paymaster Bellows was not legally dismissed from the service of the United States, and that the order of the President above referred to was simply declaratory of his existing rights. The case of Bellows was made the subject of an opinion from this Department, dated April 30, 1879, to the Secretary of the Navy (16 Opin., 312), and is there fully discussed. The order of the President did not operate to restore Bellows to the Navy. In a legal sense he was always there, although by error there was an omission of his name in the Register, and a failure for some years to recognize him as an officer of the Navy.

The practical difficulties which are found in rectifying an error such as occurred in the case of Bellows, in his relation to other officers and in the relations which such officers bear to each other, are undoubtedly considerable; but the only rule that can be adopted is to treat him as having always been nominally what he always was actually and really, an officer of the United States. If positions have been arranged in regard to the rank of other officers upon the theory that he was not an officer, those positions should, whenever possible, be altered so as to rectify the error committed by treating him as out of the service. Where an officer is illegally dropped, he can only find his place again in the grade from which he was dropped, as it would not be in the power of the President alone to give him the rank of a

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higher grade. It is not necessary to consider here to what extent it would be possible to rectify such an error, so far as higher grades are concerned.

When he is returned only to his original grade, and when officers still exist there who are superior to him in rank, the difficulty does not seem to be insuperable. He is to take rank according to his original position in the grade. If there have been promotions or advancements above him which would properly place officers above him had his name been upon the Register, such officers must be treated as having been thus advanced.

But if his case were that if his name had actually been upon the roll there would have been no advancement of an officer above him, that effect should not be permitted merely on account of an illegal absence of his name from the list.

The same rule would apply to other officers. Whenever a difference would have been made by reason of the existence of his name on the roll (on which the case supposes it has now rightfully found its place), that difference should be recognized. These principles satisfactorily dispose of the cases before us.

In regard to the position of Paymaster Stevenson, it is argued that it was not within the power of the President to advance him fifteen additional numbers on account of the same act of heroism. It is sufficient for this case to say that the papers do not show that it was the same act of heroism. But I am not prepared to decide, even if we assume that it was the same act of heroism, that the President and the Senate may not properly make such advancement. So far as the executive department is concerned, this may fairly be considered as having been decided in the present instance.

The second nomination of Paymaster Stevenson was to be advanced fifteen numbers, to take rank next to Paymaster George Cochran. If the name of Bellows is counted, this is an advance of sixteen numbers. The accidental absence of Bellows's name from the list can not give authority thus to advance, as this authority depends entirely upon statute.

It would seem, from the various instances cited in your letter, that the advancements are sometimes made by a definite number only, and at other times by a definite number

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with the additional statement to take rank after a particular person named. In either case the controlling word of the nomination is the number of "numbers" which the officer is proposed to be advanced. Had the name of Mr. Bellows been actually upon the list, this would not be doubted in the case of Mr. Stevenson. Examination would then have clearly shown that to place him next after Mr. Cochran would be to advance him sixteen numbers; and if such a nomination had been made and confirmed by the Senate, the only way in which it could have been held valid would have been by rejecting as surplusage the latter portion of the sentence referring to Mr. Cochran. When it clearly appears that Mr. Bellows, though not nominally, was actually a paymaster, the nomination and confirmation must be construed in view of that fact, and thus construed, Mr. Stevenson has the full benefit of the fifteen numbers which it was intended to advance him, and which was the extreme limit of the provision in that regard.

These principles dispose also of the case of Paymaster Lyon. The officers whose claims come in conflict with his are to have their nominations now construed with reference to the conceded fact that Mr. Bellows was also an officer of the Navy. They are to have the benefit of the numbers which they were nominated to be advanced; and in those cases where the nomination defined a particular place upon the Register before an officer named, the matter is to be modified by the controlling word which had relation to the number of officers over whom they were to be advanced.

To reply to your questions in direct terms, I am of opinion, first, that the restoration of the name of Paymaster Bellows to the list of paymasters in the Navy, from which it was illegally removed, affects and disturbs Paymaster Stevenson and others in their present relative positions as arranged by the Navy Register; and, second, that Paymaster Stevenson is not entitled, as the next officer in rank, to examination for promotion to the vacancy in the next higher grade.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. NATHANIEL GOFF,  
*Secretary of the Navy.*

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Swamp-Land Act—Indemnity.

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## SWAMP-LAND ACT--INDEMNITY.

The decision of the Secretary of the Interior, in November, 1855, that those lands which had been reserved by the President under the act of September 20, 1850, chap. 61, granting lands to the State of Illinois to aid in the construction of a railroad, did not pass to the State by virtue of the swamp-land grant of September 28, 1850, chap. 84, is to be treated as *res adjudicata* as to all the lands embraced within the belt of territory to which it specifically relates and refers.

DEPARTMENT OF JUSTICE,

February 21, 1881.

SIR: Referring to your letter of July 17, 1880, I would say that the delay in answering it has been occasioned largely by the request of parties interested in the questions involved.

By an act of September 20, 1850, lands were granted to the State of Illinois (which were afterwards granted by it to the Illinois Central Railroad Company) to aid in the construction of a certain railroad. This grant was of every alternate section, designated by even numbers, for six sections in width on each side of said road and branches; and in cases where the same had been sold, or the right of pre-emption had attached at the time the line of the road was definitely fixed, indemnity was granted from the most contiguous tier of alternate sections within 15 miles of the line of the road.

It was further enacted that the sections and parts of sections which by such grant should remain to the United States within 6 miles on each side of said road and branches should not be sold for less than double the minimum price of the public lands when sold.

By an act of September 28, 1850, Congress granted to the several States then in the Union all the unsold swamp and overflowed lands within their respective limits.

By an act approved March 2, 1855, all entries and locations of swamp or overflowed lands theretofore made, either with cash or land warrants, were confirmed to the purchasers or locators, "any decision of the Secretary of the Interior or other officers of the Government of the United States to the contrary notwithstanding;" and by the second section of said act indemnity was granted to the several States for the lands lost to them by such confirmation.

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Swamp-Land Act—Indemnity.

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Upon an application for indemnity for certain lands within the 6 miles limit of the grant to the State of Illinois for railroad purposes aforesaid, it was held by the Hon. Robert McClelland, Secretary of the Interior, in November, 1855, that those lands which had been reserved by the President under the act of September 20, 1850, did not pass to the State by virtue of the swamp-land act.

Your letter first presents the question whether or not the matter now before the Department is to be treated as *res adjudicata*.

It is contended that the revision of the laws by sections 2479 and 2482, Revised Statutes, change the state of the law as enacted by the act of September 28, 1850, and the indemnity act of March 2, 1855, so as to remove the element of *res adjudicata* from the case as now presented.

This position is not tenable, and I adopt the conclusion stated in your letter of June 28, 1880. The scope and the description of this grant are identical in the two acts. The revision, by the same terms respecting the thing granted, refers to the same date for the investiture of title and measure of extent. The grant by the first act was of the entire interest of the United States in the thing granted at that date, and the second, by reference to the same thing granted and to its condition at the original date, declares that it is granted and belongs to the same original grantee.

Section 2482, Revised Statutes, in defining the right of indemnity selection, fixes its basis by specific reference to the act of 1850, and not to the enactment by way of revision—thus clearly indicating an intent to bound the new declaration of the grant by the limitations of the original statute, and not to modify or enlarge its provisions.

Section 2479, Revised Statutes, declares that "the whole of the swamp and overflowed lands made unfit thereby for cultivation, and remaining unsold on or after the 28th day of September, A. D. 1850, are granted and belong to the several States."

The act of 1850 granted the whole of those swamp and overflowed lands, unfit for cultivation, which should remain unsold at the date of its passage.

It is further contended that the decision of Mr. Secretary

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Swamp-Land Act—Indemnity.

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McClelland has the force of adjudication only upon those parcels within the belt of territory to which it refers, such as were specifically and for the proper presentation of the question in dispute set out by description in the lists then claimed as selections; and your second question is as follows:

“Whether or not the decision of Mr. Secretary McClelland has the force of adjudication upon all the lands embraced within the belt of territory to which it specifically relates and refers, or is only to be considered as binding and effective upon those parcels within such belt as were specifically and for the purpose of the argument and the proper presentation of the question in dispute set out by description in the lists then claimed as selections?”

It would give to the wise doctrine which holds that a matter once adjudicated is not again to be disputed in a Department an exceedingly limited construction to hold that it only affected an individual tract of land when precisely the same question was presented in reference to other tracts of land. A decision previously rendered must be binding upon other tracts of land, even if they have not been specifically named, which come within the particular class to which the decision relates. A decision that lands described and included within a grant by boundary or quantity within boundary (such as railroad grants), by any form of appropriation, are thereby excluded from the operation of a subsequent grant which would otherwise appropriate them, excludes necessarily all claims for specific tracts depending upon conditions prescribed by the subsequent statute, when such tracts are found to lie within the territory to which the law has been decided to have no application. Whether a particular tract is or is not swamp land must be decided in each individual case; but when it is decided that certain parcels of land do or do not come within the limits of a grant, all other parcels similarly situated have their legal status adjudicated by the decision. If this is not so, each individual tract must become the subject of controversy.

I am therefore of opinion that the decision of Secretary McClelland has the force of adjudication upon all the lands embraced within the territory to which it specially relates and refers, although there was before him, set out by descrip-

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 Pay Accounts of Army Officers.
 

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tion, only certain defined tracts, which are individually but not legally different from those which are now the subject of inquiry.

It is exceedingly important, in connection with this question, to observe that the rule laid down by Secretary McClelland, in November, 1855, has been the rule of adjudication in the Department for twenty-five years, with but a single exception, and that apparently an inadvertance.

Under these circumstances, I have no hesitation in advising that the decision of the head of the Department is binding upon yourself in the matter in which application is now made. In this view it of course becomes unnecessary to consider whether or not the decision itself was correctly made. If it has not conformed to the intention of Congress, that body has had ample time to rectify it by declaratory legislation.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHUEZ,

*Secretary of the Interior.*

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 PAY ACCOUNTS OF ARMY OFFICERS.

Where an Army officer assigned his pay accounts in payment of certain indebtedness, which accounts the Paymaster-General declined to pay, for the reason that on the maturity thereof the officer was in arrears to the United States, *held* that the refusal of the Paymaster-General was in accordance with section 1766, Revised Statutes.

The statute does not require that, before payment is withheld, the officer shall be adjudged in arrears in a suit brought against him.

DEPARTMENT OF JUSTICE,

*February 21, 1881.*

SIR: By your letter of December 27, 1880, it appears that Thomas H. Norton & Co. claim, by assignment, certain pay accounts of Maj. J. H. Nelson, paymaster, U. S. Army, which he has transferred to them in payment of certain debts. The Paymaster-General declines to pay these accounts, for the reason that, on the maturity thereof, Major Nelson was and still is in arrears to the United States, and it is

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Sentence of Court-Martial—Continuing Punishment.

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abundantly proved by official records that Major Nelson was and is thus in arrears.

The act of January 25, 1828 (sec. 1766, Rev. Stat.), directs that "no money shall be paid to any person for his compensation who is in arrears to the United States, until such person shall have accounted for and paid into the Treasury all sums for which he may be liable." The refusal of the Paymaster-General is, therefore, in direct accordance with the provision of this section of the Revised Statutes.

The suggestion is made that under this statute money can not be withheld until by some legal proceedings the officer is adjudged to be in default to the United States. But this is untenable, because the latter clause of the section (1766, Rev. Stat.), directing proceedings by suit against delinquents, clearly contemplates that the former clause is to be made effectual upon the determination of the proper Department that the person claiming compensation is in arrears to the United States.

Of course any person claiming by assignment can have no higher rights.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,  
*Secretary of War.*

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SENTENCE OF COURT-MARTIAL—CONTINUING PUNISHMENT.

C., a lieutenant-commander in the Navy, was sentenced by a court-martial to suspension for one year, and to retain his then present number on the list of lieutenant-commanders for that time. The sentence having been executed, he applied to be restored to the number on said list which he thereby lost: *Held*, that the restoration could not be effected by the President otherwise than by a pardon.

The punishment imposed (loss of numbers), being a continuing one, is still subject to the pardoning power, which, when exercised, would have the effect to restore the officer to his former rank according to the date of his commission.

DEPARTMENT OF JUSTICE,

*February 21, 1881.*

SIR: I have received the petition of Lieutenant-Commander Joseph B. Coghlan, U. S. Navy, with other papers, from the Navy Department, referred to me by you.

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Sentence of Court-Martial—Continuing Punishment.

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The petitioner states that in April, 1876, he was tried by naval court-martial and sentenced to be suspended for one year, to retain his (then) present number on the list of lieutenant-commanders for that time, and to be publicly reprimanded by the Secretary of the Navy. He requests the restoration of the numbers which he thus lost, which the petition represents to be thirteen. He makes certain legal objections to the action of the court, which do not seem to me to be tenable, nor does it appear that he can be restored to the position upon the Navy Register which he held previously to the approval of the action of the court-martial unless the President should deem his case a proper one for pardon. Where a sentence has been executed, it is not in the power of the President, from the nature of the act, to afterwards revise the matter; but where a punishment which is continuing is imposed upon a party, it is conversely always subject to revision by the pardoning power. Degradation from or diminution of relative rank and position is such a continuing punishment.

The law of the service assigns to each officer a rank in his grade and in the line of promotion corresponding with the date of his commission, and "when this order or disposition is interrupted, as in the case under consideration, through the intervention of a court-martial proceeding, it can only remain so by the continuing operation of the penalty imposed, which may be said to act as a punishment from day to day so long as the officer affected is excluded from the enjoyment of his previous status."

It has therefore been held that a pardon of the President will restore an officer, whose rank has been reduced by a court-martial, to his former relative rank according to the date of his commission, the officer losing, of course, such opportunities for promotion as might in the mean time have occurred. (12 Opin., 547.)

Under these circumstances the case is presented for the President to determine whether or not it is one in which the pardoning power is to be exercised. Upon that subject I do not express an opinion, because it does not fall within the class of punishments for civil offenses concerning which the advice of the Attorney-General is often asked by the Presi-

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Purchase of Patented Articles.

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dent, and also for the reason that the papers themselves do not afford me sufficient data.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

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## PURCHASE OF PATENTED ARTICLES.

When articles are to be bought for the Government, and it is doubtful whether officers of the United States in using them will or will not be exposed to suits for the infringement of a patent: *Advised* that a bond of indemnity to the Government be taken from parties who offer to furnish such articles, for the protection of the officers.

DEPARTMENT OF JUSTICE,

February 21, 1881.

SIR: Your letter of January 24, 1881, incloses a letter from the Chief Signal Officer, and inquires "whether the property and disbursing officer of the Signal Service is authorized to purchase from any citizen of the United States, who may agree to furnish, at the lowest rates, the material (as per sample herewith), in loose sheets not registered and stitched in book, tablet, or pack."

An examination of the papers indicates to me that the inquiry is intended to embrace an examination of whether such purchase would be that of an article covered by a patent "Improvement in producing prices-current bulletins," etc., and if so, whether such purchase should properly be made. It necessarily involves the determination of the validity of the "improvement" in question, and also of whether the purchase in loose sheets of similar material could be considered as a violation of the patent. Both of these questions are apparently debatable. I only, therefore, renew the recommendations I have heretofore made in regard to a similar subject, viz, that when articles are to be bought by the United States, and it is doubtful whether officers of the United States in using such articles will or will not be exposed to suits for the infringement of patents, a bond of indemnity to the Government be taken from bidders and

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Relative Rank in the Army on Promotion.

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others who desire to furnish such articles, in order that the officers may be protected. (16 Opin., 36.)

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

*Secretary of War.*

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RELATIVE RANK IN THE ARMY ON PROMOTION.

Y., B., and S. were second lieutenants in different infantry regiments, ranking in the order named according to dates of their respective appointments and commissions. They were all promoted to be first lieutenants in their respective regiments as of the same date, June 28, 1878. S., who was the junior second lieutenant, claimed to be the senior first lieutenant under section 1219, Revised Statutes, because of the greater length of service as a commissioned officer prior to date of promotion: *Held* that the rule prescribed by that section for determining relative rank as between officers of the same grade and date of appointment and commission applies to appointments on promotion as well as to original appointments; and, consequently, that S. ranked the other first lieutenants referred to.

DEPARTMENT OF JUSTICE,

*February 21, 1881.*

SIR: Your letter of January 20, 1881, incloses a report of the Adjutant-General in reference to the claim of George K. Spencer, first lieutenant Nineteenth Infantry, to take precedence in rank over certain other first lieutenants of infantry promoted to that grade on the same date, June 28, 1878.

Lieutenants Young (second lieutenant March 7, 1867), Bottsford (second lieutenant, May 29, 1867), Scott (second lieutenant June 19, 1867) and Spencer (second lieutenant August 17, 1867) were second lieutenants in different infantry regiments, ranking in the order named according to dates of their appointments and commissions. They were all promoted to first lieutenant in their respective regiments as of the same date, viz, June 28, 1878. Lieutenant Spencer, who was the junior second lieutenant of the four, claims to be now the senior first lieutenant, because of greater length of service as a commissioned officer prior to date of

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**Relative Rank in the Army on Promotion.**

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promotion. This claim is based on the act of March 2, 1867 (section 1219, Rev. Stat.). This section provides that, "In fixing relative rank between officers of the same grade and date of appointment and commission, the time which each may have actually served as a commissioned officer of the United States, whether continuously or at different periods, shall be taken into account," etc. This provision has always been considered by the War Department as applying to original appointments in the service as distinguished from promotions, and it has, therefore, been held that although officers may be of the same grade and have the same date of commission and of appointment to the rank of promotion held by them, yet that this statute is not to have any operation as between them, as it is deemed to have exhausted its force in the determination of their rank at the time of their original appointment. The ground upon which this has been held is that there is such a distinction between promotion and appointment, that notwithstanding the operation of the rule may be to place officers of the same grade and commission under and inferior to officers who have rendered less service, yet that this was contemplated by the statute. This position does not seem to me tenable. Promotion is a mode of appointment, and it is not the less an appointment because the person promoted has previously held another appointment in the service. When a second lieutenant is promoted to the rank of first lieutenant, he is appointed to such rank by and with the advice and consent of the Senate.

The construction adopted by the War Department requires the interpolation of the word "original" before the word "appointment." Such construction is not in accordance with the spirit of the act towards the officers whom it affects. By the system of regimental promotion, all officers up to the grade of captain are promoted very irregularly, such promotions varying with the casualties in each regiment. The intention of the statute is to apply a rule which will give the benefit of their previous services to those officers who are of the same grade and date of commission whenever it shall be necessary to determine relative rank between them. Nor does it seem probable that any particular difficulty will re-

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 Promotion on the Naval Retired List.
 

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sult from the re-arrangement of rank according to the important principle of length of service when officers of the same grade find themselves commissioned of the same date.

While I recognize fully that any construction which has long been adopted and practiced upon by a Department is entitled to great consideration, it is to be observed that the statute in question is of recent date, and such construction should not be deemed conclusive.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,  
*Secretary of War.*

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## PROMOTION ON THE NAVAL RETIRED LIST.

Section 1461, Revised Statutes, gives to naval officers on the retired list a right to promotion on that list as their several dates on the active list are promoted.

DEPARTMENT OF JUSTICE,  
*February 21, 1881.*

SIR: The letter of the Secretary of the Navy of the 2d instant, addressed to you and by you referred to me, incloses a letter addressed to Hon. Samuel J. Randall, Speaker of the House of Representatives, from Capt. D. Lynch, U. S. Navy, in regard to the matter of promotion upon the retired list.

The promotion of officers on the retired list of the Navy was authorized by the act of March 2, 1867, which is embodied in section 1461, Revised Statutes, as follows:

"Officers on the retired list of the Navy shall be entitled to promotion as their several dates upon the active list are promoted: *Provided*, That no promotion shall be made to the grade of rear-admiral upon the retired list while there shall be in that grade nine rear-admirals by promotion on that list, exclusive of those so promoted by reason of having commanded squadrons by order of the Secretary of the Navy, or of having performed other highly meritorious service. No promotion to the grade of rear-admiral on the retired list while there shall be in that grade the full number allowed by law."

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Promotion on the Naval Retired List.

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And section 1591, Revised Statutes (from the same act) provides that "no officer heretofore or hereafter promoted upon the retired list shall, in consequence of such promotion, be entitled to any increase of pay."

It was subsequently held by the Navy Department that the law authorizing such promotions was not strictly imperative, but left the matter, in some degree, subject to the discretion of the President to select such officers as in his opinion might be "entitled" to promotion on the retired list. And although a few such officers were afterwards promoted, no general promotions of retired officers have since been made.

A number of officers of the staff corps were promoted on the retired list to the higher grades created in such corps by the act of March 3, 1871 (secs. 1474, 1475, and 1476 of the Revised Statutes), since which time no promotions of retired staff officers have been made.

There are about forty-three line officers now on the retired list who would be entitled to promotion should a general promotion of the retired officers be made as in 1867. Of this number it appears that three would be advanced to the grade of master, seven to lieutenant, two to lieutenant-commander, nine to commander, eight to captain, and fourteen to commodore. And in the staff corps about sixty-seven officers would also be entitled to promotion to the grades on the retired list held by officers of their respective dates on the active list.

In the ruling made by the Navy Department it appears to have been influenced by the consideration already mentioned, that the President was allowed by the law to exercise his discretion in determining who are and who are not entitled to promotion on the retired list. And when, in view of the fact that there are officers retired from active service by reason of mental, moral, and professional disqualifications, who in case of war would be entirely unfitted for any duty, this interpretation seemed to the Department to be justified, inasmuch as the law makes no discrimination, and authorizes no examination in the cases of retired officers to determine their fitness for advancement to higher grades than those in which they were retired for causes disqualifying them for active service.

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Promotion on the Naval Retired List.

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In reply to this view, taken by the Navy Department, I would suggest that the language of section 1461, Revised Statutes, that "officers on the retired list of the Navy shall be entitled to promotion as their several dates upon the active list are promoted" is explicit and distinct in its character, subject, of course, to the proviso of the same section.

The word "entitled," which it is thought may be construed as giving a right of selection to the President, will hardly bear that interpretation, when the rest of the sentence so distinctly shows that the title proceeds from the fact that their several dates on the active list are promoted.

There is undoubtedly force in the argument which is suggested against this system of indiscriminate promotion; but it is not a question of what the law ought to be, but of what the law is. A practical effect of the law which would be undesirable cannot be allowed to overcome its express terms. Such operation presents a question for the legislative and not the executive branch of the Government.

It will also be observed that, while this promotion is thus given, no corresponding increase of pay and allowance is permitted; and the legislation appears to have sufficiently guarded against any mischiefs that are suggested as likely to arise by reason of calling retired officers into active duty. This can only be done in time of war by the President, by and with the advice and consent of the Senate. It is not to be presumed that the President, in connection with the Senate, will exercise the power in regard to such retired officers unless upon full examination he shall be satisfied that they are competent for the higher grade on the active list which they have reached on the retired list. Such investigation will undoubtedly be made, in view of the fact that these promotions on the retired list are not accompanied with the careful examinations which attend those upon the active list. This power of the President, with the consent of the Senate, is in reality (although not in form) a power to give a new commission to a retired officer in time of great public emergency. It is difficult to see why that power is not wisely reposed with the President, or to understand how any danger can result from its exercise.

It will be observed also that retired officers thus called

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Brevet Rank—Assignment to Duty According to.

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upon active duty do not return to the active list unless under circumstances of a peculiar character. (Secs. 1462, 1463, 1464, 1465, Rev. Stat.)

In regard to the statement in the letter from the Secretary of the Navy that officers mentally, morally, and professionally disqualified are often found upon the retired list, I would suggest that it was never contemplated by the legislation that the retired list would to any extent be occupied except by those who had performed honorable service and were retired by reason of disability incurred in that service.

I am therefore of opinion that the first clause of section 1461, Revised Statutes, gives to officers on the retired list a right to promotion as their several dates upon the active list are promoted.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

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BREVET RANK—ASSIGNMENT TO DUTY ACCORDING TO.

Where an Army officer is placed on duty according to his brevet rank by special assignment of the President, he is, while thus assigned, entitled to precedence and command according to his brevet commission, even over an officer holding a full commission of the same rank as the brevet, but of junior date. Thus a colonel who holds a brevet commission as major-general of the date of March 2, 1867, and who is by the President specially assigned to duty according to his brevet rank, takes precedence over an officer who holds a full commission of major-general dated November 25, 1872.

DEPARTMENT OF JUSTICE,

*February 23, 1881.*

SIR: Your letter of January 3, 1881, submits to me a memorandum of brevet assignments of department commanders, with an indorsement thereon of the General of the Army, and invites my attention to the cases stated by him and proposes the following question: "Does not the full commission of major-general or brigadier-general exceed the brevet commission of major-general or brigadier-general even of older date?"

The question undoubtedly assumes that the officer holding a brevet commission is to be deemed to have been assigned

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Brevet Rank—Assignment to Duty According to.

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to duty by the special assignment of the President according to his brevet rank. If he were not thus assigned no question would arise, as until such assignment the brevet rank is purely honorary.

The President is authorized, by and with the advice of the Senate, to confer commissions by brevet upon commissioned officers of the Army for distinguished conduct and public services in the presence of the enemy. These bear date from the particular occasion or services for which the officer is breveted; but they entitle the officer to no precedence or command except when specially assigned to duty according to the brevet rank by the President; nor do they entitle the officer, on account of being breveted, to wear, while on duty, a uniform, or to be addressed in orders or official communications by any title other than that of his actual rank. See sections 1209–1212, Rev. Stat.

These sections seem to state with great clearness the effect of the brevet commission, and, although negative in its form, the clause which says that brevet rank shall not entitle an officer to precedence or command except when assigned to duty according to such brevet rank, necessarily implies that when thus assigned he is to have precedence and command according to such rank. The power given by this provision is one highly proper to be lodged with the President, as it enables him in times of emergency to avail himself of the services of officers in a rank higher than their actual rank where such officers have so distinguished themselves in action as to have received from the appointing power brevet commissions.

The words, “by special assignment of the President,” indicate that it is not a daily exercise of power that is contemplated on the part of the President in assigning officers to duty according to brevet rank.

When thus assigned I can see no reason why all the benefits that follow from the rank are not to be enjoyed by the officer possessing it, and why he is not entitled to precedence and command according to the date of the commission, which must bear the date of the services for which he was breveted.

The case stated by the General of the Army is thus:

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 Commutation of Quarters.
 

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"General McDowell, commanding the Division of the Pacific, including Arizona, has full commission as dated November 25, 1872, and he holds a brevet commission as major-general of the date of March 13, 1865, which commission has no force unless by assignment of the President of the United States. Colonel Wilcox is colonel of the Twelfth Infantry, but commands the Department of Arizona by order of the President according to his brevet rank of major-general, dated March 2, 1867. "We thus have," says the General, "the absurdity of a colonel actually ranking a major-general commanding a division, of which the Department of Arizona is but a small part.

If there be any absurdity in this it is not the fault of the law, which enables the President to deal readily with the matter in two ways: either by assigning General McDowell to duty and command according to his brevet rank, or by withdrawing the order assigning Colonel Wilcox to duty according to his brevet rank.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,  
*Secretary of War.*

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## COMMUTATION OF QUARTERS.

An officer in the enjoyment of quarters in kind at the commencement of leave (cumulative) taken under the act of July 29, 1876, chapter 239, does not become entitled to commutation upon the commencement of the leave.

Nor does he become entitled to commutation if, during such leave, he voluntarily abandons the use of the quarters in kind; nor if he vacates his quarters in kind at the command of his superior; nor if there are unoccupied quarters at the post or station that might properly have been assigned to him had no leave been granted.

DEPARTMENT OF JUSTICE,

*February 23, 1881.*

SIR: Your letter of February 14 refers to me claims of certain officers for commutation of quarters, and asks my opinion upon certain questions in connection therewith which are suggested by the Second Comptroller.

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Commutation of Quarters.

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The matters to which your letter relates have been a subject of consideration in two recent opinions from me. (16 Opin., 577 and 619.)

Without elaborating my reply in consequence of my recent full discussion of the subject, I answer your inquiries directly. The first is as follows: "If an officer is in the enjoyment of quarters in kind at the commencement of leave taken by him under the act of July 29, 1876 (cumulative leave, 19 Stat., 102), does he become entitled to commutation upon the commencement of the leave?" To this I reply that an officer in the enjoyment of quarters in kind in the case proposed does not become entitled to commutation upon the commencement of the leave. Quarters in kind are not an allowance within the meaning of the statute permitting officers on leave to enjoy the same without deduction of pay or allowance, so as to entitle the officer to commutation. Officers upon leave in such cases, while entitled to the quarters in kind, are not entitled to commutation therefor.

(2) "If the leave does not of itself entitle him, does he become entitled to commutation if during such leave he voluntarily abandons or surrenders the use of the quarters in kind?"

In my opinion he does not.

(3) "Does he become entitled to commutation if during such leave he vacates his quarters in kind at the command of his superior?"

If he vacates his quarters in kind at the command of his superior, he does so either voluntarily or because such circumstances have arisen as to entitle the superior officer to direct him to vacate them, but in neither instance is he entitled to commutation. His leave does not result in a deduction of any allowance that he previously had.

(4) "In the case last stated, will he be entitled to commutation if there are unoccupied quarters at the post or station that might properly have been assigned to him had no leave been granted?"

In my opinion he would not.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,  
*Secretary of War.*

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 Dismissal by Sentence of Court-martial.
 

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## EXTRA PAY.

Where an officer in the ordnance department, in addition to his regular duties as ordnance store-keeper, acted as assistant commissary at the Watervliet Arsenal by virtue of post orders: *Held* that under section 1261, Revised Statutes, he was entitled to receive \$100 per year in addition to the pay of his rank during the time he performed services as assistant commissary.

DEPARTMENT OF JUSTICE,

*February 23, 1881.*

SIR: It appears from your letter of December 16, 1880, that Capt. D. J. Young, ordnance store-keeper, acted at various times, in addition to his regular duties, as assistant commissary, by virtue of post orders at the Watervliet Arsenal, which assigned him to such duty.

Section 1261, Revised Statutes, provides that an acting assistant commissary shall receive \$100 per year in addition to the pay of his rank for the period during which he was thus regularly assigned to and on duty and duly performed services as assistant commissary.

Captain Young claims extra pay at the rate of \$100 per year.

In my opinion this claim of Young is properly made.

The opinion in the case of the *United States v. Morrison* (96 U. S., 232) seems conclusive of the question.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

*Secretary of War.*


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 DISMISSAL BY SENTENCE OF COURT-MARTIAL.

Where a paymaster in the Navy was sentenced to dismissal by court-martial, and it appeared by the order of the Secretary of the Navy that the President approved the finding of the court and directed the sentence to be carried into effect: *Held* that the officer was legally dismissed from the naval service.

DEPARTMENT OF JUSTICE,

*February 24, 1881.*

SIR: I have carefully examined the papers in the case of Judson S. Post, referred to me by you upon the 15th instant, and herewith return them.

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 State Taxes.
 

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Thirteen years ago (*i. e.*, September 15, 1868), Paymaster Post was, by order of that date, dismissed from the naval service upon the approval by the President of the finding of a court-martial.

The only ground that need be discussed upon which he asks you to direct his name to be replaced upon the rolls is that President Johnson's own signature does not appear indorsed upon the approval of the proceedings of the naval court-martial, or in confirmation thereof.

It distinctly appears by the statements of the Secretary of the Navy that the then President approved the finding of the court-martial, confirmed the same, and directed it to be carried out.

For the reasons set forth in the opinion submitted June 6, 1877 (15 Opin., 290), I am of the opinion that Paymaster Post was legally dismissed from the naval service of the United States.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

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 STATE TAXES.

Where the title to land in Cincinnati, Ohio, was acquired by the United States by condemnation, and jurisdiction over the land so acquired was ceded to the United States by the State: *Held* that taxes theretofore assessed upon the land by the city authorities, and remaining unpaid, ceased thereafter to be a lien on the land, and did not become a proper charge against the United States.

## DEPARTMENT OF JUSTICE,

*February 24, 1881.*

SIR: The letter from your Department of January 28, 1881, submits for consideration the claim made on behalf of Hamilton County, Ohio, for taxes, amounting to \$6,008.63, upon the custom-house and post-office site in the city of Cincinnati, Ohio.

The title to this property was acquired by proceedings in condemnation in the circuit court of the United States for

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State Taxes.

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the southern district of Ohio during the last part of the year 1873, the final decree bearing date December 24, 1873. By an act of the legislature of Ohio, of April 20, 1872, jurisdiction over this tract of land was ceded to the United States, to vest when the United States should acquire title to the same. The United States therefore have the title to, and jurisdiction over, the tract in question.

The claim is that the taxes heretofore assessed by the municipal authorities of Cincinnati, under the laws of the State of Ohio, are a lien upon this property which the United States is bound to discharge.

The question has been distinctly decided by this Department, in an opinion rendered September 13, 1876 (15 Opin., 167). The United States in 1872 acquired title to a lot of ground in the city of St. Louis, Mo., by condemnation under a State statute, by the provisions whereof the jurisdiction of the State over the premises at the same time passed to the United States. Thereafter certain bills for unpaid taxes for 1872 and 1873, and previous years, were presented to the Treasury Department for payment, a lien on the premises being claimed.

It was held that the State, in parting with its jurisdiction, virtually relinquished whatever lien it may have had on the land for the taxes, and that they were not a proper subject for charge against the United States.

The lien depended for its enforcement solely upon the methods and agencies provided for that purpose by the State law, which of course ceased to be available after the land itself, by the transfer of jurisdiction, ceased to be within the sphere of the operation of that law.

It is not perceived in the present case that any injustice can have been done the city, which, in proceedings for condemnation, had opportunity to assert its claim upon this land.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN, .  
*Secretary of the Treasury.*

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Brevets of Major Winthrop.

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## BREVETS OF MAJOR WINTHROP.

On reconsideration, the opinion of January 13, 1881 (*ante*, p. 3), holding that the brevets of Major Winthrop, judge-advocate, in the volunteer force, could not be treated as brevets in the regular Army, re-affirmed.

DEPARTMENT OF JUSTICE,  
*February 24, 1881.*

SIR: Yours of the 4th instant incloses a letter of the Judge-Advocate-General of January 21, 1881, and requests reconsideration, in view of that letter, of my opinion heretofore delivered, in which it was held by me that the brevets of Major Winthrop in the volunteer force could not be treated as brevets in the regular Army.

I have reconsidered the question, in deference to the views of the Judge-Advocate-General and yourself, but remain of the opinion which I have heretofore expressed.

Major Winthrop was in distinct terms nominated to and confirmed by the Senate for appointment in the volunteer force, and was afterwards commissioned, his commission not using the words "in the volunteer force," but using the words "in the service of the United States."

He was afterwards nominated and confirmed and so commissioned for the brevets of lieutenant-colonel and colonel in the volunteer force.

It is claimed now, upon his behalf, that he is entitled to have these brevets treated as brevets in the regular Army, and to such brevet rank therein.

In my view, this position can not be maintained. If the form of his original commission assumes to extend or enlarge the nomination and confirmation, it is erroneous. The power of the President does not authorize such action, But it is not thus enlarged. The military service of the United States was composed of what were known familiarly as "volunteers" and "regulars." That the judge-advocates were originally of the volunteer force is shown by all the legislation in the matter, especially by the later legislation, which transfers them into the permanent force of the United States, and which entitles Major Winthrop now to be treated as an officer of the regular Army.

The argument based upon the contention that his original commission was a commission in the regular Army, is, that

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Enlistments in Colored Regiments.

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as such was his commission, his brevets in the volunteer force must annex themselves to it, as otherwise they would be inoperative. As I do not view his original commission to be that of an officer in the regular Army, it is unnecessary to consider the force of this argument. That neither by the appointing, confirming, or commissioning him as lieutenant-colonel and colonel by brevet in the volunteers was it contemplated to give him brevet rank in the regular Army is as clear as words can make it. It certainly was not contemplated by the appointing or confirming power that Major Winthrop, at the time he received these brevets, was an officer of the regular Army.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

*Secretary of War.*

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## ENLISTMENT IN COLORED REGIMENTS.

Sections 1104 and 1108, Revised Statutes, prohibit, by implication, the enlistment of white men in the colored regiments therein mentioned and provided for.

DEPARTMENT OF JUSTICE,

*February 24, 1881.*

SIR: Your letter of November 26, 1880, inclosing a copy of a letter from Lieut. Col. N. A. M. Dudley, Ninth Cavalry, requests my opinion on the question as to whether a white man can legally be enlisted in a colored regiment.

The two sections of the Revised Statutes which need be considered are section 1104: "The enlisted men of two regiments of cavalry shall be colored men," and section 1108: "The enlisted men of two regiments of infantry shall be colored men." These sections seem to be explicit. The enactment that the enlisted men of the regiments in question shall be colored men is necessarily a prohibition against the enlistment of white men in those regiments.

It is suggested that this legislation is unconstitutional. Without deeming it necessary to discuss this point, I would, however, say that it is a regulation made by Congress for

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Promotion in the Medical Corps of the Navy.

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the organization of the Army under its authority as to raising and supporting armies; and that until it is pronounced unconstitutional by the only body which can determine it so to be, it is the duty of the recruiting officers of the Army to follow it.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The SECRETARY OF WAR.

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PROMOTION IN THE MEDICAL CORPS OF THE NAVY.

The custom and practice of the Navy Department requiring competitive examinations of assistant surgeons, and assigning them positions on the Navy Register in the order of relative merit as ascertained and reported by the board of examiners authorized by existing law and regulations, is not under the present law (section 1480, Revised Statutes; act of February 27, 1877) correct; the effect of such law being to adopt the rule of seniority in regard to promotions from one grade to another in the Medical Corps of the Navy.

DEPARTMENT OF JUSTICE,

*February 25, 1881.*

SIR: Your letter of January 25 submits to me the claim of Howard E. Ames, a passed assistant surgeon in the Navy, that he has been unlawfully deprived of his original relative position in the Medical Corps by reason of the action taken upon the result of his examination for promotion.

The facts in his case are as follows:

Dr. Ames was appointed assistant surgeon in the Navy April 10, 1875, and assigned a position (No. 8) in the class of assistant surgeons appointed during that year, which class was arranged according to date of appointment of the members thereof.

Under the law and regulations of the Navy, assistant surgeons are entitled to examination for promotion after three years' service. The class of 1875, having completed three years' service in the grade of assistant surgeon, in 1878, were, as required by law, examined as to their qualifications for promotion to the grade of surgeon.

At the conclusion of the examination of the officers of that class, Dr. Ames, with others who were found qual-

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Promotion in the Medical Corps of the Navy.

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ified for promotion, was assigned a position on the list of passed assistant surgeons, according to the relative merit as ascertained and reported by the board of examiners, and now occupies the relative position on the list of passed assistant surgeons, which was assigned him in accordance with the finding and recommendation of the board of examiners upon competitive examination.

The practice of the Department requiring competitive examinations to determine the relative position of medical officers of the Navy, preparatory to promotion to the grade of surgeon, which originated prior to the act of May 24, 1828 (sections 1370 and 1371 of the Revised Statutes), was recognized and confirmed by a clause in the act of Congress approved March 3, 1835, which is embodied in the Revised Statutes, as follows :

SECTION 1372. "When any assistant surgeon was absent from the United States, on duty, at the time when others of his date were examined, he shall, if not rejected at a subsequent examination, be entitled to the same rank with them ; and if, from any cause, his relative rank can not be assigned to him, he shall retain his original position on the register."

The system of competitive examinations to determine the relative merit of assistant surgeons preliminary to promotion, and thus to define their rank by seniority, has, under this authority of law, been continued to the present time, and the uniform practice of the Navy Department has been to assign to the members of each class of assistant surgeons, examined and found qualified for promotion, positions in accordance with their relative standing, as determined and reported by the board of medical examiners.

You request my opinion upon the following question :

"Is the custom and practice of this Department requiring competitive examinations of assistant-surgeons preliminary to promotion, and assigning them positions on the Navy Register in the order of relative merit as ascertained and reported by the board of examiners, authorized by existing law and regulations ?"

The construction adopted as to the clause in the act of Congress approved March 3, 1835, has been so long practiced upon by the Navy Department, that I do not consider it nec-

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Promotion in the Medical Corps of the Navy.

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essary carefully to consider whether or not it was originally correct. Certainly there is much in the clause to countenance the system of competitive examination for the grade of passed assistant surgeon, and great and controlling weight must be attributed to the fact that those charged with the duty of executing the statute have given to it their sanction, which should not be overruled without urgent reasons.

Were this the only statute upon the subject, I should therefore be of opinion that the system as now adopted in the Navy was in accordance with the provisions of law.

It is necessary, however, to consider some additional legislation.

The act of March 3, 1871, chap. 117, sec. 10 (16 Stat., 536), is as follows:

"That the foregoing grades (the Medical Corps being included) hereby established for the staff corps of the Navy shall be filled by appointment from the highest numbers in each corps according to seniority, and that new commissions shall be issued to the officers so appointed, in which commissions the titles and grades herein established shall be inserted; and no existing commission shall be vacated in the said several staff corps except by the issue of new commissions required by the provisions of this act, and no officer shall be reduced in rank or lose seniority in his own corps by any change which may be required under the provisions of this act." \* \* \*

This section contemplated, it seems to me, by the use of the words "highest numbers in each corps according to seniority," that the promotions should be by seniority, and not by competitive examination; and the provision that "no officer shall be reduced in rank or lose seniority" etc., contemplated also, that unless this provision were inserted changes would be made in grades or numbers which had been theretofore fixed, which it was not the intention of Congress to disturb. This clause did not find its way into the original edition of the Revised Statutes, but is found in the second edition, section 1480. It was, however, re-enacted in the act of February 27, 1877, chap. 69 (19 Stat. 249), in the following terms:

"The grades established in the six preceding sections for

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Promotion in the Medical Corps of the Navy.

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the staff corps of the Navy shall be filled by appointment from the highest members in each corps, according to seniority, and new commissions shall be issued to the officers so appointed, in which the titles and grades established in said sections shall be inserted ; and no existing commission shall be vacated in the said several staff corps except by the issue of the new commissions required by the provisions of this section ; and no officer shall be reduced in rank or lose seniority in his own corps by any change which may be required under the provisions of the said six preceding sections." \* \* \*

It will be observed that this is a substantial re-enactment, with the exception that the word "members" is used instead of "numbers," and the words "under the provisions of the said six preceding sections" are substituted for the words "under the provisions of this act." These changes apparently have no other object than to adapt the statute to its place in the revision. The effect of it is to adapt the rule of seniority in regard to promotions from one grade to another in the staff corps, the section 1480 including, among other corps referred to, the Medical Corps.

Your letter informs me that the relative positions in the Medical Corps of the Navy of all the officers of that corps now on the active list above the grade of assistant surgeon, were determined after a competitive examination for promotion.

I will observe, however, that the statute last cited is prospective in its character, and is only to take effect from the date of its enactment. Its language contemplates that the rule prescribed by it may not have heretofore always been followed in reference to rank or seniority.

In direct answer to your question, I am of opinion that the custom and practice of the Navy Department, requiring competitive examination of assistant surgeons and assigning them positions on the Navy Register, in order of relative merit as ascertained and reported by the board of examiners authorized by existing law and regulations, is not correct under the present law.

Having passed the necessary examination for promotion,

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Relative Rank in the Army.

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the claim of Mr. Ames to be promoted according to seniority is in my opinion well founded.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. NATHAN GOFF, Jr.,

*Secretary of the Navy.*

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## RELATIVE RANK IN THE ARMY.

In fixing the relative rank of officers of the same grade and date of commission, under the act of March 2, 1867, chap. 159 (sec. 1219, Revised Statutes), constructive service as a commissioned officer is not to be considered.

The terms of the statute, "actually served," are used *ex industria*, and are intended to prevent any service purely constructive in its character from affecting the relation between officers of the same date.

DEPARTMENT OF JUSTICE,

February 25, 1881.

SIR: Your letter of December 16, 1880, incloses the papers, correspondence, etc., relative to the claim of Capt. Samuel B. M. Young, Eighth Cavalry, to a place on the lineal list of captains of cavalry next below Capt. F. W. Benteen, Seventh Cavalry.

Captain Young claims that his name should appear above those of Captains Nolan and Carpenter on the lineal list of captains of cavalry as published in the Army Register for 1875, and in support of his claim makes the following statement of his service as an officer:

As an officer of volunteers from September 6, 1861, until muster-out, July 1, 1865, *three years nine months and twenty-five days*, and as an officer of the regular Army from May 11, 1866, until appointed captain Eighth Cavalry, July 28, 1866, *two months and seventeen days*; total service claimed, *four years and twelve days*.

The facts as summarized by your letter are as follows:

The service of Captain Young as an officer of volunteers is correctly stated at three years nine months and twenty-five days.

On May 11, 1866, he was nominated to the Senate (he received no letter of appointment) for the appointment of

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Relative Rank in the Army.

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second lieutenant Twelfth Infantry. This nomination was confirmed *July 23, 1866*; he was commissioned *July 27, 1866*, to rank from *May 11, 1866*; his commission was forwarded to his home, Pittsburgh, Pa., *September 4, 1866*; and he reported for duty to the commanding officer Twelfth Infantry in this city, *September 15, 1866*.

The act of March 2, 1867 (sec. 1219, Rev. Stat.), provides that, in fixing the relative rank of officers of the same grade and date of commission, "there shall be taken into account and credited to such officer *whatever time he may have actually served \* \* \** as a commissioned officer," since April 19, 1861, etc. (This refers to appointments made under the act of July 28, 1866.)

Captains Nolan and Carpenter (named above) were each appointed second lieutenant Sixth Cavalry July 17, 1862, and served continuously in that regiment until appointed captains in the Tenth Cavalry on November 8, 1866, with rank from July 28, 1866, making the service of each of them as officers up to July 28, 1866, *four years and eleven days*.

The other officers were therefore commissioned as captains, to rank from the same date; and, in determining their relative rank, it must be taken in consideration how long they were continuously or at different periods commissioned officers of the United States in actual service.

The claim of Captain Young is, that as Captains Nolan and Carpenter have served four years and eleven days, he has served one day longer. In order to make this out, he is necessarily compelled to claim service for two months and seventeen days which he did not actually serve, but for which time he did hold, by commission accepted at a later date, rank in the Army.

The only question, therefore, is whether or not the constructive service implied by holding a commission accepted on September 11, 1866, to rank from May 11, 1866, can aid him by being placed to his credit in fixing the relative rank between himself and other captains of the same date.

The statement of the case seems to present the only argument that can be made in the matter. The words of the statute, "actually served," are used *ex industria*, and are intended to prevent any service purely constructive in its

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Court-Martial—Admissibility of Evidence, etc.

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character from affecting the relation between officers of the same date.

I am therefore of opinion that the rulings heretofore made in Captain Young's case are correct, and that he now holds his proper position in the Army.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

*Secretary of War.*

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COURT-MARTIAL—ADMISSIBILITY OF EVIDENCE, ETC.

It is not the official duty of the Secretary of War to give to the judge-advocate, and thus to the court-martial, an opinion as to the admissibility of certain evidence in the trial of a case before the court, nor as to the construction of a statute. Such questions should be left to the decision of the court-martial itself.

DEPARTMENT OF JUSTICE,

*February 25, 1881.*

SIR: Your communication of the 18th instant submits to me a letter from Maj. A. B. Gardner, judge-advocate of the general court-martial convened by the President for the trial of Cadet J. C. Whittaker, U. S. Military Academy, dated the 16th instant, and requests my opinion as to the admissibility at the trial of this case of certain evidence offered by Whittaker, and in connection therewith as to the construction to be given to the one hundred and twenty-first Article of War and section 860 Revised Statutes.

Although not in terms, your communication necessarily submits in connection with these questions the preliminary inquiry, whether it is the official duty of the Secretary of War to give to the judge-advocate, and thus to the court-martial, assembled by authority of the President, the opinion requested.

Unless the questions now proposed by you have occurred in the administrative course of business in the War Department there is no occasion for any reply by me, and my opinion would be extra-official. On careful reflection it appears to me that the judge-advocate is not empowered to call for the opinion of the Secretary of War as to the admissibility of evidence to be tendered to the court-martial. He is to con-

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Court-Martial—Admissibility of Evidence, etc.

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duct the proceedings upon his own responsibility, and under the direction of the chief of his bureau. An opinion of the Secretary of War, rendered to him in response to his questions, might be treated as mandatory upon the court-martial. This court, although limited in its jurisdiction, is authorized to decide all questions in relation to the cases properly before it, and in the first instance its authority is exclusive. When the court has concluded its labors, its proceedings may come before the President for approval. At that time, if the President chooses, questions such as are here proposed may properly be submitted for the opinion of the Attorney-General, as they may be of importance, in the view of the President, in connection with his revision of the decision. He may also consult the Secretary of War and other Cabinet officers upon the same subject. Opinions given in advance, which it is reasonably to be feared might be treated by the court-martial as a direction, might become extremely embarrassing.

It is also to be considered, that the opinion requested would be given without hearing the parties concerned, to whom it may be a vital matter, as cases not unfrequently turn upon questions of admissibility of evidence.

Another suggestion is important in connection with the present case. When a court-martial is convened, it sustains toward the convening authority a certain official relation in regard to many matters of detail. The *court* in the present instance sustains no such relation to the War Department. It is convened by the authority of the President. Certainly no other officer can intervene to direct the mode in which it shall proceed.

In view of these considerations, I therefore respectfully advise that the question proposed should be left to the decision of the court-martial summoned by the President, and that the Bureau of Military Justice should proceed before that tribunal upon its own official responsibility in offering or objecting to evidence.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,

*Secretary of War.*

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 Relative Rank in the Navy.
 

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## RELATIVE RANK IN THE NAVY.

Under the act of July 25, 1866, chap. 231, R., who had entered the naval service October 5, 1850, and stood No. 77 on the list of lieutenant-commanders, was promoted to the grade of commander; while L., who had entered the service February 17, 1841, and stood at the date of said promotion No. 7 on the said list, was not among those advanced under that act, and after the promotions thereunder were completed stood No. 2 in his grade (lieutenant-commander). Subsequently, by promotion in due course, both R. and L. attained the rank of captain, the former being senior by date of commission. In estimating length of service for the purpose of determining their precedence with officers of the staff corps holding the relative rank of captain: *Held*, that (under sec. 1486, Rev. Stat.) R. should be considered as having gained length of service according to his promotion, but that L. should not be considered as having lost anything in length of service—the effect of the promotion of the former officer upon the latter being purely an incidental one.

## DEPARTMENT OF JUSTICE,

February 25, 1881.

SIR: Your letter of the 12th ultimo submits to me a question which has arisen as to the application of the concluding clause of section 1486, Revised Statutes, to certain officers of the line in the Navy who were promoted by selection under the provisions of the "Act to define the number and regulate the appointment of officers in the Navy, and for other purposes," approved July 25, 1866. (14 Stat., 222.)

The first section of this act enlarged the number of line officers in higher grades of the Navy, created original vacancies in each grade above that of lieutenant, and provided that appointments to fill such vacancies be made as follows: "That the increase in the grades authorized by this act shall be made by selection from the grade next below of officers who have rendered the most efficient and faithful service during the recent war, and who possess the highest professional qualifications and attainments."

The vacancies thus created were accordingly filled by the selection and advancement of officers, without regard to seniority, from the grade below the one to which they were promoted.

As an illustration of the operation of the first section of this act, your letter cites the cases of two officers whose relative positions on the Navy list were affected by the pro-

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Relative Rank in the Navy.

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motions made by selection, in conformity with its provisions, viz:

Richard L. Law, who entered the service February 17, 1841, and stood, at the date of said promotions, No. 7 on the list of lieutenant-commanders, was not among those selected and promoted under the act.

Francis M. Ramsay, who entered the service October 5, 1850, stood, at the date of said promotions and when selected for advancement under the act referred to, No. 77 on the list of lieutenant-commanders; and, when said promotions were completed, he stood No. 90 on the list of commanders, while Lieutenant-Commander Law stood No. 2 in his original grade (lieutenant-commander).

Since that time, by promotion in due course, these two officers have attained the rank of captain, Captain Ramsay being the senior by date of commission.

Your letter requests my opinion upon the question whether, in estimating the length of service of Captains Ramsay and Law for the purpose of determining their precedence with officers of the staff corps holding the relative rank of captain (under the provisions of secs. 1485-1486, Rev. Stat.), the former should be considered as having been advanced in numbers on the Navy Register and gained length of service accordingly; or the latter be considered as having lost numbers and length of service accordingly.

The object of the act of 1866 was, by an increase of rank in connection with an increase of numbers in certain grades in the Navy, to compensate officers who had rendered special meritorious service. This was not to be done by inflicting any injury upon officers who had been less fortunate perhaps in their opportunities, but by conferring promotion upon certain officers which would incidentally, in almost all cases, operate also to benefit officers not actually advanced. Thus, in the case stated in your letter, while Lieutenant-Commander Law was not nominally advanced, he was actually advanced by the promotions made, so that instead of standing seventh on the list of lieutenant-commanders he stood second on that list when they were completed. When officers were advanced in numbers it was necessary, in determining their relative rank with other grades of the Navy, that

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Relative Rank in the Navy.

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they should also be treated as having constructively gained length of service to a sufficient extent to place them above the officers over whom they were thus advanced. But in no case did the officers over whom they were thus advanced lose anything in the length of service which he had actually rendered. The proceeding itself was one of advancement strictly, and in no case operated to degrade any officer or deprive him of anything which he had already obtained by length of service. Cases might be supposed in which it might do him incidental injury by placing above him an officer who stood below him; but his own position with reference to all grades of the Navy would be that which it originally was. When, therefore, by section 1486, Revised Statutes (act of March 3, 1871, chap. 117, sec. 10, 16 Stats. 537), provision was made for regulating the relative rank of the staff corps and line, no officer in the line would be found to have lost anything of his actual length of service. A constructive length of service was necessary to be attributed to the officers who had been advanced to a higher number above him in the same grade or to a higher grade. It is true the expression of the last clause of section 1486 is that "officers who have been advanced or lost numbers on the Navy Register shall be considered as having gained or lost length of service accordingly." Whether this phrase is intended to use the words "gained" and "lost," as terms which are the converse of each other and refers to such incidental loss as occurs by change in relative position between two officers, or whether the expression "lost length of service" is to be considered as referring to those officers who may have been degraded (as by sentence of court-martial), it is not necessary now to determine. It seems to me quite clear that this clause can not receive a meaning in connection with the facts stated by you that would in any way operate as a degradation of the officer over whom another had been promoted, or to deprive him of a right already acquired by honorable length of service.

In estimating, therefore, length of service for the purpose of determining their precedence with officers of the staff corps, I would say, in direct answer to your inquiry, that the officer promoted will be considered as having gained length

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Soil Under Navigable Waters.

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of service according to his promotion, but that the other officer will not be considered as having lost anything in length of service, the effect of the promotion upon the latter officer being purely an incidental one.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. NATHAN GOFF, Jr.,

*Secretary of the Navy.*

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## SOIL UNDER NAVIGABLE WATERS.

*Seem* that the proprietors of land adjacent to Lake Huron, Michigan, have no legal right to stone taken from the bed of that lake, in front of their property, by other persons, and delivered by the latter on the Government works—the ownership of such bed being apparently in the State. Under the circumstances presented, the claim of such proprietors for the stone so taken and delivered may properly be resisted by the United States officer in charge of the works.

DEPARTMENT OF JUSTICE,

*February 26, 1881.*

SIR: Your letter of December 18, 1880, transmits a communication addressed to Maj. G. Weitzel, Corps of Engineers, by C. P. Gilbert, assistant engineer, stating that several times during the past season loads of bowlder-stone, which have been delivered on the Government works in charge of Major Weitzel, and credited to the party bringing them, have been claimed by other parties, on the ground that the stone had been picked from the water in front of land belonging to them, and requests my opinion as to whether the owners of land adjacent to Lake Huron have any legal claim on the stone taken from the lake in front of their property.

This question depends upon the much discussed inquiry as to who is the owner of the soil under navigable waters, which include the Great Lakes of the United States.

In *Barney v. Keokuk*, (4 Otto, 324), it was authoritatively settled that, in the absence of any special legal rules adopted by the States, the title to the land under navigable waters (whether tidal or not) belonged to the States. The title to the land in question may, therefore, be regarded as in the State of Michigan, unless by the law thereof the ownership

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Case of Lieutenant-Colonel Freudenberg.

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of the riparian proprietor extends to it. I can find no decision of that State which recognizes the land under the waters of the Great Lakes on its borders (of which Lake Huron is one) as belonging to the proprietors of the shore, although there have been cases affecting the soil under streams and small interior lakes.

In the absence of any such decision, or any grant by that State of such lands, or of an exclusive right to the stone thereon, it may well be presumed that any citizen is privileged to take stone therefrom, and, having such right, may properly sell the stone to the United States. Under the circumstances, the claim of the owner of the land adjacent to the part of the lake from which the stone is taken may properly be resisted by the United States engineer.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. ALEXANDER RAMSEY,  
*Secretary of War.*

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CASE OF LIEUTENANT-COLONEL FREUDENBERG.

The President has no power to retire Lieutenant-Colonel Freudenberg with the rank and pay of colonel of infantry from the date of his first retirement, December 15, 1870.

Mistakes, if any, made in the execution of an act which is subsequently repealed, can not be rectified by executive action after such repeal.

DEPARTMENT OF JUSTICE,  
*February 28, 1881.*

SIR: On examining the case of Lieutenant-Colonel Freudenberg, I am of opinion that the President of the United States has no power to retire this gentleman, as requested by him, with the rank and pay of colonel of infantry, from the date of his first retirement, December 15, 1870.

Whether the application of the thirty-second section of the act of July 28, 1866, was rightly or wrongly made in Colonel Freudenberg's case, that is not now a matter that can be corrected by any executive action, as the section itself is repealed by the act of June 20, 1872. (17 Stat., 378.) Mistakes, if any, made in the execution of an act which is repealed can not be rectified by executive action after such repeal,

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Case of Lieutenant-Colonel Freudenberg.

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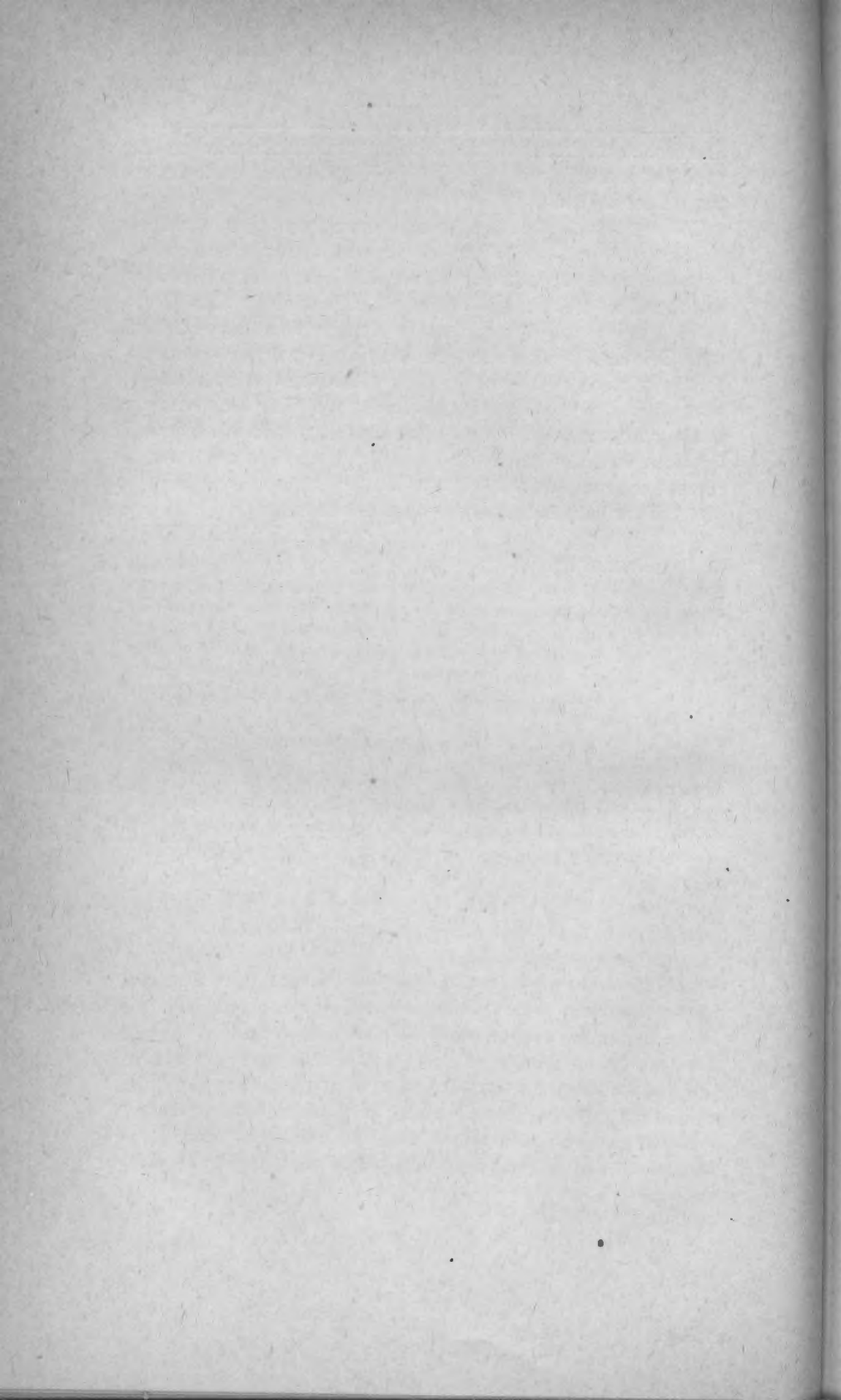
and it is impossible in the absence of that section to retire any officer under it.

Colonel Freudenberg's case was made the subject of a special act (of March 3, 1877), which placed him on the retired list with the rank of lieutenant-colonel, which promotion was to take effect from and after the passage of that act. This special act certainly assumes to deal by legislative action with Colonel Freudenberg's case, and to repair any injustice that may have been done to him. This legislation contemplates that the construction given by the War Department to the retirement of Colonel Freudenberg (viz, that it was for wounds and disease, and not for wounds alone), was a correct construction.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.



# OPINIONS

OF

HON. WAYNE MACVEAGH, OF PENNSYLVANIA.

APPOINTED MARCH 5, 1881.

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## APPROPRIATION FOR BUILDING SITE.

The appropriation made by the act of March 3, 1881, chapter 133, "for the purchase of a suitable site in the city of Washington for the erection of a brick building to be used and occupied by the Pension Bureau," etc., is to be construed as applying solely to the purchase of a site. The language of the clause contains no ambiguity necessarily giving rise to the inference that Congress intended it to embrace more than its terms express.

DEPARTMENT OF JUSTICE,

*April 13, 1881.*

SIR: Your letter of the 17th ultimo, calling my attention to the clause in the sundry civil appropriation act of March 3, 1881, which provides "for the purchase of a suitable site in the city of Washington for the erection of a brick and metal fire-proof building, to be used and occupied by the Pension Bureau," etc., and inclosing a communication from the Quartermaster-General and other papers relative thereto, which favor the view that the Committee on Appropriations of the Senate (in which the provision originated) intended to make the appropriation applicable as well to the erection of a building as to the purchase of a site, and that the clause in question should be construed as if it read "for the purchase of a suitable site in the city of Washington *and* for the erection of a brick and metal fire-proof building," etc. That it was contemplated by said committee that the appropria-

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Appropriation for Building Site.

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tion should apply to both those objects is perhaps true; and, as corroborative of this, certain statements and explanations appearing in the proceedings of the Senate, made by the Senator (Mr. Beck) who had charge of the bill, may be cited. (See Cong. Rec., March 3, 1881, p. 45; *ibid.* for March 5, 1881, p. 32.) But, on the other hand, in the proceedings of the House, a member of that body inquired "whether the act should be interpreted as providing for the purchase of a site alone, or whether the sum appropriated may be used for the erection of the building as well as the purchase of the site."

Upon consideration, I am of opinion that the provision referred to must be construed to apply solely to the purchase of a site, and that, to authorize the money appropriated to be also used for the additional object mentioned by you, the erection of a building, further legislation is necessary.

It is suggested that the word "and" was inadvertently omitted after the word "Washington" in the act. With the Committee on Appropriations of the House, judging from the explanation made by the member (Mr. Blount) who was one of the conferees on the bill and had charge of it in that body, the understanding would seem to have been that the appropriation was to apply to but one of the objects stated above, namely, the purchase of a site. Thus, in response to an inquiry made pending the consideration of the conference report on the bill, the member referred to, said: "The \$250,000 relates alone to the site for the building. There is no proposition for a building other than that contained in the purchase of a site. The building is to be a matter for future consideration." (Cong. Rec. for March 4, 1881, p. 53.)

From this diversity of view as to the purpose of the appropriation, which existed between those who were in immediate charge of the bill in the two houses, it is manifest that what was said by them pending its passage can afford no aid in ascertaining the meaning of the clause in which the appropriation is contained.

Nor, even if such diversity of opinion had not existed, should the interpretation which was then placed upon it be allowed to influence the judgment in this matter. "In construing an act of Congress" says the Supreme Court in 91 U. S. Reports, page 79, "we are not at liberty to recur to the

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Promotion in the Army.

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views of individual members in debate, nor to consider the motives which influence them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used."

There does not appear to me to be foundation enough in the context to warrant the addition of the word "and," as suggested. The language of the clause, as it now reads, contains no ambiguity necessarily giving rise to the inference that Congress intended it to embrace more than its terms express. In the construction of a statute, words can not be added thereto for the purpose of supplying an omission which, on merely conjectural grounds, is thought to have been inadvertently made.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. ROBERT T. LINCOLN,  
*Secretary of War.*

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PROMOTION IN THE ARMY.

The rule prescribed in paragraph 20, Army Regulations of 1863, by which "promotions to the rank of captain shall be made regimentally," is not in conflict with the provisions of section 1204, Revised Statutes, and remains in full force.

The regulations and legislation concerning the promotion of subaltern company officers, from the year 1801 to the present time, reviewed, and the practice thereunder stated.

DEPARTMENT OF JUSTICE,

*April 14, 1881.*

SIR: I have considered the letter of Second Lieut. George P. Borden, Fifth Infantry, on the subject of promotion in the Army, which was referred to me by your direction on the 9th ultimo, and which I have the honor to return herewith.

It is claimed by Lieutenant Borden that paragraph 20, Army Regulations, in so far as it applies to subaltern officers of the line of the grades of first and second lieutenant, is in conflict with section 1204, Revised Statutes, and to that extent has ceased to be legally operative as a rule for promotion—that under said section such officers are entitled to be

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Promotion in the Army.

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promoted *lineally* in each arm, and not *regimentally* as the said paragraph provides.

The rule as stated in paragraph 20, namely, that "promotions to the rank of captain shall be made *regimentally*," was adopted by executive regulation at a very early period. By an order issued by the Secretary of War, May 26, 1801, it is declared that promotions to the rank of captain shall be made *regimentally*, and to the rank of major and lieutenant-colonel in the lines of the artillery and infantry respectively."

That order was supplemented by another, issued May 7, 1808, making the above rules for promotion in the infantry and artillery applicable to the cavalry and riflemen.

The earliest Congressional action on the subject of promotion in the Army is contained in the fifth section of the act of June 26, 1812, chapter 108, which provided that thereafter "the promotions shall be made through the lines of artillery, light artillery, dragoons, riflemen, and infantry respectively, according to established rule." The rule therein referred to is that which was established by executive regulation as above stated, and the effect of the statute was to give it a legislative sanction. Subsequently, by section 12 of the act of March 30, 1814, chapter 37, it was provided "that from and after the passing of this act, promotions may be made through the whole Army in its several lines of light artillery, light dragoons, artillery, infantry, and riflemen respectively." Since the enactment of this last provision, which continued in force down to the revision of the statutes, promotions to the rank of captain have uniformly been made *regimentally*; so that the construction given thereto, in practice, has been that it made no change or modification of the previously existing rules. According to this construction (which was acted upon for about sixty years) the act of 1814, while it contemplated that promotions should be made in the several lines or arms through the whole Army, and that officers should be promoted only in their respective lines or arms, did not prescribe how promotions within the arms or lines should be made, whether *regimentally* or *lineally*. As thus understood—and the language of the act is susceptible of that interpretation—there was no conflict between it and the rule adverted to.

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 Discharge from Military Academy—Re-appointment.
 

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Section 1204, Revised Statutes, contains substantially a re-enactment of the provision above quoted from the act of 1814. When embodying that provision in the Revised Statutes, it is reasonable to presume that Congress was familiar with the construction which had been placed thereon and so long acted upon by the executive department, and that if it had been the intention of that body to introduce a different rule on the subject of promotion, different phraseology would have been chosen to signify such design. By adopting the language of the previous statute the fair inference is that its construction was acquiesced in, and that no change in the law of promotion was intended.

I am accordingly of opinion that the rule laid down in paragraph 20, Army Regulations, by which "promotions to the rank of captain shall be made regimentally," is not inconsistent with the provisions of section 1204, Revised Statutes, and that it remains in full force.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

The PRESIDENT.

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## DISCHARGE FROM MILITARY ACADEMY—RE-APPOINTMENT.

Where a cadet was, by order of the Secretary of War, on the recommendation of the Academic Board, discharged from the Military Academy for deficiency in studies: *Held*, (1) that the order, having been completely executed, is beyond the power of revocation; (2) that section 1325, Revised Statutes, prohibits the returning or re-appointing of the cadet to the Academy, excepting upon the recommendation of said Board; (3) that Congress may thus limit or restrict the authority of the President to appoint cadets; (4) that accordingly it is not competent to the President to revoke the said order or to restore the cadet to the Academy, irrespective of the recommendation of said Board.

DEPARTMENT OF JUSTICE,

April 14, 1881.

SIR: Your letter of the 22d ultimo presents for my consideration the following case and question:

A cadet in the first class at the Military Academy was declared deficient by the Academic Board at the examination in January, 1881, and the Board recommended that he be discharged. An order for his discharge was thereupon made by

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Discharge from Military Academy—Re-appointment.

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the Secretary of War; but it was suspended, and the case referred back to the Board for reconsideration. The Board, however, adhered to their former recommendation; and by order of the War Department, dated February 26, 1881, the cadet was discharged, and is now out of the service.

The question proposed is, "Whether it is within the authority of the Executive to revoke the order for his discharge and restore him to the Academy, to take his place in the next succeeding first class, notwithstanding the adverse recommendation of the Academic Board and the provisions of section 1325, Revised Statutes.

In regard to so much of this question as relates to the order of discharge, I submit, in reply, that that order, having been completely executed, is now beyond the power of revocation. The discharge, consequent upon its execution, is an accomplished fact, which can not be annulled and the previous condition of things restored simply by means of an act of the Executive assuming to revoke the order.

The remainder of the question calls for an examination of section 1325, Revised Statutes, and the consideration of its effect upon the authority of the Executive to make appointments to the Military Academy. That section provides: "No cadet who is reported as deficient, in either conduct or studies, and recommended to be discharged from the Academy, shall, unless upon recommendation of the Academic Board, be returned or re-appointed, or appointed to any place in the Army, before his class shall have left the Academy and received their commissions."

It is plain that the case of the cadet in question is within the provisions of the section just quoted, and that the Executive is by those provisions prohibited from returning or re-appointing him to the Academy, except upon recommendation of the Academic Board. The only inquiry that suggests itself in this connection is whether it is competent for Congress thus to limit or restrict the authority of the President to appoint cadets. In an opinion of one of my predecessors, dated January 9, 1873 (14 Opin., 164), in which the subject of appointments in the Army is considered, it is observed: "It may be regarded as definitely settled by the practice of the Government, that the regulation and government of the

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Discharge from Military Academy—Re-appointment.

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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 deems 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." The view here taken of the power of Congress to regulate the appointment of officers in the Army (in which I fully concur) applies with even greater force to the power of Congress to regulate the appointment of cadets to the Military Academy. The prohibition in section 1325, adverted to above, which forbids the re-appointment of a cadet who has been discharged from the Academy on the report and recommendation of the Academic Board for deficiency in conduct or studies, unless such re-appointment is made upon recommendation of the Board, must accordingly be deemed to be valid and binding upon the President.

In direct answer to your question, I have therefore the honor to state, that in the case mentioned it is in my opinion not within the authority of the Executive to revoke the order for the discharge of the cadet and restore him to the Academy, to take his place in the next succeeding first class, notwithstanding the adverse recommendation of the Academic Board and the provisions of section 1325, Revised Statutes.

I am, sir, very respectfully,

WAYNE MACVEAGH.

HON. ROBERT T. LINCOLN,

*Secretary of War.*

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 Mail Contract.
 

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## MAIL CONTRACT.

A proposal made by M. to carry the mail over a certain route during the fiscal year ending June 30, 1882, for \$1,140, that being the lowest bid received, was accepted; but he subsequently asked to be released therefrom, on the ground that the bid which he intended to make was \$2,140: *Held* that the proposal and its acceptance constitute one agreement, of the same force and effect as if a formal contract had been written out and signed by the parties; that it is the duty of the Postmaster-General to require the execution of such agreement according to its terms; and that he is not at liberty to allow the contractor to withdraw from it upon the allegation that a mistake was made in the proposal submitted.

DEPARTMENT OF JUSTICE,

*April 14, 1881.*

SIR: In complying with your oral request for an opinion upon the subject to which the papers containing the "bids" or proposals of B. Magoffin and of Wm. C. Duxbury relate, I shall, in accordance with the rule laid down and followed by my predecessors (9 Opin., 82), give no opinion as to any abstract question of law, but shall confine myself strictly to the facts of the cases presented, in determining the legal rights of the parties and of the Government.

For carrying the mail during the fiscal year ending June 30, 1882, route 33,350, nineteen bids were received, of which that of B. Magoffin (\$1,140) was the lowest, and was accepted on the 1st ultimo. He asks to be released, upon the ground that he intended to make his bid \$2,140. Of the nineteen bids for route 31,710, that of Mr. Duxbury was the lowest, and was accepted. It was but \$22, but upon his affidavit that it was intended to be \$2200 he was released. Thus, as to him, the question of the right of the bidder to ask to be released on account of his own mistake ceases to be practical, and any expression of opinion upon the facts of his particular case unnecessary. (9 Opin., 421, 422).

I will say, however, that it is difficult to perceive any difference, in legal principle, between the two cases stated, especially in view of the accompanying suggestion, that nominal bids are sometimes put in by proprietors of conveyances over established routes to exclude competition.

The bid or proposal, and its acceptance by the Depart-

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Posse Comitatus.

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ment, constitute an obligation "of the same force and effect as if a formal contract had been written out and signed by the parties." (*Garfield v. United States*, 93 U. S., 242.)

The question, then, resolves itself into the right of a person to withdraw from a contract upon the ground that he made a mistake in stating the terms to which he agreed.

It is quite clear that no such right can be recognized with safety by an Executive Department of the Government, for to do so would simply be to invite the commission of grave frauds upon it.

I have therefore no hesitation whatever in advising you that it is your duty to require the execution of the contract in question according to its terms, and that you are not at liberty to allow the contractor to withdraw from it upon the allegation that a mistake was made in the proposal submitted.

I return the papers submitted to me by you upon the subject.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. THOMAS L. JAMES,

*Postmaster-General.*

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POSSE COMITATUS.

Troops of the United States can not, without violating the provisions of section 15 of the act June 18, 1878, chapter 263, be employed as a posse comitatus, to aid the United States marshal or his deputies in arresting certain persons in the State of Kentucky charged with robbing an officer of the Government.

DEPARTMENT OF JUSTICE,

*April 16, 1881.*

SIR: In reply to the inquiry of the Adjutant-General this day referred to me by your direction, as to whether it would be proper, in view of the provisions of section 15 of the act of June 18, 1878, chapter 263, to furnish a detachment of troops to aid the civil authorities in arresting certain persons in the State of Kentucky who are charged with the recent robbery of the clerk of the engineer officer superintending the Government works on the Tennessee River, I have the honor to state that in my opinion the civil author-

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 Removal of North Carolina Cherokees.
 

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ities referred to (the marshal or his deputies) can not, without violating the provisions of that section, be thus aided by the military forces of the United States as a posse comitatus, and that it would therefore not be proper to furnish a detachment of troops to be employed by those authorities as a posse in the case mentioned. In this connection I beg to refer to an opinion of my predecessor, Attorney-General Devens, dated October 10, 1878 (16 Opin., 162), wherein, upon consideration of a case not materially differing from the present, a similar conclusion was reached.

The papers referred to me are herewith returned.

I am, sir, very respectfully,

WAYNE MACVEAGH.

The PRESIDENT.

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## REMOVAL OF NORTH CAROLINA CHEROKEES.

In the case of certain Cherokee Indians of North Carolina, who left their homes in that State on the supposition that they would be furnished by the United States with transportation to the lands owned by their tribe in the Indian Territory: *Advised* that there is no authority under existing legislation to effect the removal of these Indians in the manner supposed, as above.

DEPARTMENT OF JUSTICE,

April 16, 1881.

SIR: The memorial of James Taylor, on behalf of certain North Carolina Cherokees, addressed to yourself on the 5th instant and subsequently referred to the Attorney-General, by his direction has been considered by me, and herewith I submit a reply.

The memorial in brief sets forth that about eighty of the Indians above mentioned have left their homes and are now "at and near London, Tenn., in a destitute and suffering condition," having been led to believe that upon reaching that point they would be furnished by the United States with transportation to the lands owned by their tribe in the Indian Territory. Thereupon application is made to you, under, as is said, the provisions of the treaty of 1835-'36 (7 Stat., 478) and the act of July 29, 1848 (9 Stat., 264).

Upon this case you ask whether, under existing legislation, there be any power to make the removal requested.

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Removal of North Carolina Cherokees.

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I have examined the matter, and am of opinion there is no such power.

Mr. Taylor suggests that inasmuch as the above-cited act of 1848 authorized the payment of \$53.33 and interest to each one of certain North Carolina Cherokees therein particularly described, who should thereafter remove to the country west of the Mississippi, such statute became operative for all time thereafter, and therefore is in force now.

Admitting that in general the meaning of the act would be as is thus suggested, it is observable that even before the passage of certain statutes, to which I will call attention further on, Congress seems to have treated the above disposition as obsolete, so far as the principal sum is devoted to purposes of transportation; for the Revised Statutes fail to make any permanent appropriation for paying out this principal, at the same time that they contain such an appropriation for the interest, which by the act of 1848 is payable thereupon. (Sec. 3698, p. 728, near bottom.)

This presumption is confirmed by the act of 1875, chapter 132 (18 Stat., 447), which directs that the fund created by the act of 1848 shall be used in paying certain costs and expenses incident to recent litigation on behalf of the North Carolina Cherokees, and then "for the education, improvement, and civilization of the said Indians." (See also, to same purpose, the acts of 1876, chap. 289, and 1877, chap. 101, 19 Stat., 197 and 201.)

It is not necessary in this place to discuss the power of Congress to give this new direction to the fund in question; for, whatever may be urged against such power, it is enough to say here that the acts are effective at all events to prevent any present appropriation for the purposes to which the principal money was set apart by the act of 1848.

A waiver of this discussion will be understood as without prejudice to the assertion of such power.

Mr. Taylor suggests also that the late act of March 3, 1851, (sec. 4) contains an appropriation applicable to the purpose of his prayer. But upon an inspection of that section, it is plain that the sum therein mentioned is to be applied to certain contingent *subsistence* only, and that, as regards tribes

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 ight of Fishery in Lake Champlain.
 

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and in other respects, wholly unconnected with the matter in hand.

Another intimation by Mr. Taylor is important in another aspect of this question, *i. e.*, that such principal is due *under the provisions of the treaty of 1835-'36*, above cited—for in that case an appropriation might be found in section 2094 of the Revised Statutes. But this intimation is met by decisions to the contrary, made before the passage of the acts of 1848 cited above, by both Commissioner of Indian Affairs and the Attorney-General (see Report of Commissioner, appended to President's Message of April 13, 1846, and 4 Opin., 435). The title to the sums in question rests originally upon the act of 1848, which is remedial, and was passed, as seems probable, because of a suggestion in the opinion of the Attorney-General just cited.

I have replied to these latter points specifically, although in the presence of the acts of 1875, 1876, and 1877, mentioned above, it was hardly required.

Upon the whole, I submit that there is no power under existing legislation to effect the removal in the manner supposed.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

*Solicitor General.*

The PRESIDENT.

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 RIGHT OF FISHERY IN LAKE CHAMPLAIN.

The waters of Lake Champlain, within the limits of the United States, being partly in New York and partly in Vermont, the right to take fish from these waters depends solely upon the laws of the one or of the other of those States, according as the *locus* is within the boundaries of the one or of the other. The General Government has nothing to do therewith.

DEPARTMENT OF JUSTICE,

*April 23, 1881.*

SIR: I have examined the opinion (herewith inclosed) of Mr. Henry O'Connór, the law officer of your Department, in regard to the right of certain citizens of Benson, Vt., and Putnam, N. Y., to fish in the waters of Lake Champlain lying

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Right of Fishery in Lake Champlain.

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within the limits of the United States, which was by you referred to me yesterday.

While I am unable to concur in some of the views expressed therein, I agree with Mr. O'Connor in holding that the subject is one with which the Government of the United States has properly nothing to do.

The waters of Lake Champlain, within the limits above mentioned, are partly within the territorial jurisdiction of the State of Vermont and partly within the territorial jurisdiction of the State of New York, the boundary line between the two states being "through the middle of the deepest channel of Lake Champlain to the eastward of the island called the Four Brothers, and the westward of the islands called the Grand Isle and Long Isle, or the Two Heroes, and to the westward of the Isle La Mott, to the line in the forty-fifth degree of north latitude, established by treaty for the boundary line between the United States and the British dominions" (Rev. Stat. of N. Y., chap. 1, title 1), and the right to take fish in these waters depends solely upon the laws of the one or of the other of those States, according as the *locus* is within the boundaries of the one State or of the other.

If the persons in whose behalf the accompanying application is made claim such right, and are interfered with or hindered by others in its exercise, their remedy is with the local courts.

The case is not one in which the General Government can afford relief.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. JAMES G. BLAINE,

*Secretary of State.*

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Advancement in the Navy.

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## ADVANCEMENT IN THE NAVY.

Where, under the provisions of section 1506, Revised Statutes, an officer was advanced by the President in numbers, with the advice and consent of the Senate, for eminent and conspicuous conduct in battle or extraordinary heroism: *Held* that such action of the President and Senate is conclusive upon the executive department of the Government, and that the grounds thereof are not subject to re-examination.

## DEPARTMENT OF JUSTICE,

*April 23, 1881.*

SIR: I have the honor to submit herewith, in response to your request, my opinion as to the application of Paymaster Thomas T. Caswell for such a correction of the Navy Register as will place him above Paymaster John H. Stevenson.

So far as the application rested on the proposition that the name of Edward Bellows should have entered into the computation when Paymaster Stevenson was advanced fifteen numbers, it can not now be successfully urged.

L. A. Frailey was, prior to 1879, appointed successor to Bellows, by and with the advice and consent of the Senate. As Bellows has not since been appointed paymaster, the recent decision of the Supreme Court, in the case of *Blake v. The United States* (103 U. S., 227) is decisive that he is not in the service.

Under section 1506 of the Revised Statutes, which reads as follows: "Any officer of the Navy may, by and with the advice and consent of the Senate, be advanced not exceeding thirty numbers in rank for eminent and conspicuous conduct in battle or extraordinary heroism," Paymaster Stevenson has been twice advanced fifteen numbers.

Paymaster Caswell insists that both advancements were for the same act of heroism, and that the eminent and conspicuous conduct in battle occurred at such a time as would not entitle Stevenson to the benefits of the law.

A rational interpretation of the section I have quoted is, that Congress has left to the discretion of the President the determination of what acts of heroism should be recommended to the Senate for reward, and, in providing that the Senate must advise and consent to the advancement, has indicated the only forum which may inquire into the wisdom with

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Exclusion of Lotteries from Postal Facilities.

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which that discretion has been exercised. The nomination for the advancement of 1879 is regular and in due form, as are also the resolution of the Senate and the commission. The advancement being an accomplished fact, and within the terms of section 1506, in my opinion it is not in your power to inquire what was the act of heroism, or where and when it was committed, which induced your predecessor and the Senate, in 1879, to advance Paymaster Stevenson fifteen numbers.

I am of the opinion that their action in that matter is conclusive upon the Executive Department, and that, therefore, it is not subject to your re-examination or revision.

I am, very respectfully, your obedient servant,

WAYNE MACVEAGH.

The PRESIDENT.

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EXCLUSION OF LOTTERIES FROM POSTAL FACILITIES.

Where the Postmaster-General finds, upon evidence satisfactory to himself, that a person is engaged in conducting a fraudulent lottery, he may and should forbid the delivery of registered letters and the payment of money-orders to such person. It is not in terms all fraudulent lotteries, etc., that are excluded from the use of the registry and money order systems; those only are denied such use which are found to be fraudulent by the Postmaster-General.

DEPARTMENT OF JUSTICE,

April 27, 1881.

SIR: Upon the question of the right of the Postmaster-General to prohibit the delivery of *registered* letters and the payment of postal *money-orders* addressed and payable to M. A. Dauphin, I have the honor to submit the following legal conclusions, based upon the subjoined statement of the material facts and statutes.

Mr. Dauphin is secretary of the Louisiana State Lottery, an institution to which the legislature of Louisiana has, for a very large moneyed consideration, granted the exclusive privilege of carrying on the lottery business in that State. It is the *only* lottery conducted under the sanction of law in the United States.

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Exclusion of Lotteries from Postal Facilities.

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Originally the larger portions of these registered letters and money-orders were addressed to "M. A. Dauphin, secretary," etc., but noticing the advertisements found in the newspapers all over the country, asking that lottery orders (if sent by mail) be "addressed *only* to M. A. Dauphin," by registered letter or money-order, it may safely be assumed that the bulk of all such correspondence, so addressed, relates to the business of the Louisiana State Lottery.

The act of March 3, 1855, chapter 173, section 3 (10 Stat., 642,) reproduced in Revised Statutes, section 3926, authorized the Postmaster-General to establish "a uniform system" for the registration of valuable letters.

Chapter 335 of the laws of 1872, approved June 8, revising, consolidating, and amending the postal laws, in section 102, empowered the Postmaster-General to establish "a uniform money-order system." (17 Stats., 297; Rev. Stats., sec. 4027.)

Section 300 of this revisory statute of June 8, 1872, provided: That the Postmaster-General may, upon evidence satisfactory to him that any person, firm, or corporation 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, forbid the payment by any postmaster to any such person, firm, or corporation of any postal money-order drawn to the order, or in favor of him or of them; and may provide by regulations for the return to the remitters of the sums named in such money-orders. (Rev. Stat., sec. 4041.) And the Postmaster-General may also, upon like evidence, instruct postmasters, at any post-offices at which registered letters shall arrive directed to any such person, firm, or corporation, to return all such registered letters to the postmasters at the office at which they were originally mailed, with the word "fraudulent" plainly written or stamped upon the outside of said 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: *Provided*, That nothing in this act contained shall be so construed as to authorize

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Exclusion of Lotteries from Postal Facilities.

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any postmaster or other person to open any letter not addressed to himself. (17 Stats., 322, 323.)

On compiling the revision the foregoing section was so divided as to place the latter portion among the provisions relating to registered letters (Rev. Stat., sec. 3929), and the former, with those relating to the money-order system (Rev. Stat., sec. 4041). Section 149 of the act of June 8, 1872, declared "That it shall not be lawful to convey by mail, nor to deposit in a post-office to be sent by mail, any letters or circulars concerning illegal lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intending to deceive and defraud the public, for the purpose of obtaining money under false pretenses," under a prescribed penalty. (17 Stats., 302; Rev. Stat., sec. 3894.)

The act of July 12, 1876, chapter 186, section 2, struck the word "illegal" out of this section, so that the law now prohibits the deposit or carriage in the mails of any letters concerning lotteries. (19 Stats., 90.)

The power conferred upon Congress by the eighth section of Article 1 of the Constitution, "to establish post-offices and post-roads," and to make all laws necessary and proper for carrying into execution that power, gives full, sovereign control over the whole subject, to be exercised by any appropriate means.

The Supreme Court have held the last-cited section (Rev. Stat., sec. 3894, amended), excluding from the mails *all* letters, etc., concerning lotteries, to be constitutional, declaring that "The power possessed by Congress embraces the regulation of the entire postal system of the country. *The right to designate what shall be carried necessarily involves the right to determine what shall be excluded.*" (*Ex parte Jackson*, 96 U. S., 732.)

If the right exists to deny to lotteries the benefit of the means of transportation and methods of distribution existing at the time the Constitution was adopted over mail-routes established by positive statute, *a fortiori* must it exist as to those recent systems which Congress permits the Postmaster-General to establish (or not) and to regulate at his pleasure.

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Exclusion of Lotteries from Postal Facilities.

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In the absence of statutory provisions upon the subject it might be inferred that the Postmaster-General could so exercise his power of regulating the money-order and registry systems as to exclude all morally contaminating as well as physically dangerous articles by mere rules, though where the statute expressly excludes anything he can, of course, make no contravening rule that will admit it.

Those who deny the power of the Postmaster-General to forbid delivery of money-orders and registered letters to Mr. Dauphin, rest their denial upon the qualifying adjective "fraudulent" in the statutes which permit the Postmaster-General to instruct postmasters to withhold such letters and orders from any person whom he finds upon evidence satisfactory to him to be "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," etc. (Rev. Stat., sec. 3929 and 4041.)

In almost every other State than Louisiana (if not in all) the transactions of the lottery business, *including those pertaining to the operations of this very company*, are illegal. Notwithstanding its charter, throughout almost the entire extent of the country traversed by mail-routes established by Congress, the sale of its tickets is prohibited by law. The sphere of action appropriate to the United States is as far beyond the reach of the *legislative* action of the State "as if the line of division was traced by landmarks and monuments visible to the eye." (*Ableman v. Booth*, 21 How., 506.) The fact that a State has legalized certain acts within its limits, no more prevents the Federal Government denying validity to those acts *as to matters within its sphere*, than it precludes another State from prohibiting them within its territorial limits. In the present case, however, the Government only denies certain postal facilities to those lotteries, etc., found by the Postmaster-General to be fraudulent; not to those which are illegal. What is or is not legal is purely a question of law; what is fraudulent is either one of pure fact or of mixed law and fact.

It is further argued that a lottery authorized by a law of the State in which it has its chief office can not be fraudulent. If we concede that the word "fraudulent" qualifies those

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Exclusion of Lotteries from Postal Facilities.

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words succeeding "lottery" in the statutes, it by no means follows that a *legalized* lottery "or scheme for the distribution of money by lot, chance, or drawing of any kind" may not be *fraudulent* at least as to every body outside the jurisdiction of the State which charters it.

The one hundred and forty-ninth section of the act of June 8, 1872 (Rev. Stat., sec. 3894), until amended by act of July 12, 1876, as already noticed, forbade putting into the mail letters, etc., relating to "*illegal*" lotteries. Doubtless prior to the approval of the amendatory act, section 3894, Revised Statutes, did *not* apply to the lottery legalized by Louisiana. But in the other section of the revision (Rev. Stat., secs. 3926 and 4041) Congress speaks of "*fraudulent*" and not of "*illegal*" lotteries.

But whatever its nature, the question is one solely for the determination of the Postmaster-General. It is not in terms *all* fraudulent lotteries, etc., that are excluded from the use of the registry and money-order systems; it is those *found to be fraudulent* by the Postmaster-General that are denied these privileges. He is the sole arbiter of law and fact upon this subject. I conclude that if the Postmaster-General finds upon evidence satisfactory to *him*, whatever its probative force with other minds, that Mr. Dauphin is engaged in conducting a fraudulent lottery, he may and should forbid the delivery of money-orders to him, and instruct postmasters to return to the senders all registered letters addressed to Mr. Dauphin.

Very respectfully, yours,

WAYNE MACVEAGH.

Hon. THOMAS L. JAMES,

*Postmaster-General.*

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Clearance of Vessels.

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## CLEARANCE OF VESSELS.

A collector of customs may lawfully refuse a clearance to a vessel whose master is alleged to be amenable to the penalty provided by section 2809, Revised Statutes, for bringing into the United States merchandise not included in the manifest required and described in the preceding sections. Such refusal is not a seizure, and the act of February 8, 1881, chap. 34, is inapplicable.

## DEPARTMENT OF JUSTICE,

*April 28, 1881.*

SIR: Yours of yesterday requests my opinion as to the right of a collector of customs, under the provisions of the Revised Statutes as modified by the act of February 8, 1881, to refuse a clearance to a vessel whose master is alleged to be amenable to the penalty declared by Revised Statutes, section 2809, for bringing into the United States merchandise not included in the manifest required and described in the two preceding sections.

This inquiry arises upon the application of Messrs. John E. Ward and others, owners of the steam-ships *Santiago* and *Niagara*, plying between New York and Cuba, for the restoration to them of certain moneys (equal in amount to the value of non-manifested goods found on board of these vessels upon recent arrivals in New York) exacted by the collector as a condition of granting the clearances necessary to enable the ships to start upon their outward voyages. The course pursued by the collector was that enjoined upon him by instructions of the Secretary of the Treasury, issued upon a similar state of facts February 21, 1881, No. 4782, as mentioned in your letter to me. It being conceded in that case that the master, owner, and agent were not implicated in the violation of law, it was held that, though under the act of February 8, 1881, the seizure or forfeiture of the vessel was forbidden. "there was no prohibition as to the detention or refusal of clearance to a vessel pending the legal determination of the liability of either the owner or master."

The present petitioners consider the collector's refusal to clear their vessels as a seizure of the ships, forbidden by the act of February 8, 1881, unless the masters or owners

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Clearance of Vessels.

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were party or privy to the alleged illegal act. This is an erroneous view of the law. Such refusal is not a seizure. A seizure implies an actual caption of the thing seized; "open, visible possession" taken and maintained. (*The Josefa Segunda*, 10 Wheat., 325.)

The act of February 8, 1881, refers to offenses for which the vessel is liable to be seized and wholly forfeited to the United States, such as are mentioned in Revised Statutes, sections 2497, 2868, 2874, and other like provisions; it does not refer to the lien created by Revised Statutes, section 3088, upon vessels to secure payment of penalties incurred. (*The Missouri*, 3 Ben., 508, 511, affirmed, 9 Blatch., 434; and *The Queen*, 4 Ben., 237). This recent statute having no applicability to the present case, the sole question is as to the right of a collector to withhold a clearance from a vessel upon which he knows the Government has a lien for a penalty.

Is he bound to clear the ship, even if the effect be to defeat the lien, and prevent service of a libel to perfect it, because proper papers to authorize the departure of the vessel under ordinary circumstances are presented to him? The petitioners answer this inquiry affirmatively, because Revised Statutes, section 4197, declares that upon the production of the verified outward manifest, "the collector shall grant a clearance for such vessel and her cargo," etc.

A perusal of this section shows that it is merely meant to establish the ordinary routine for clearing a ship; not to declare that extraordinary circumstances shall create no exception. A slaver, or a vessel going out to aid the enemy, is not entitled to clearance simply because her papers are regular upon their face. As to this last supposed case, Washington, J., said: "The collector had two conflicting duties imposed upon him; one to the individual who asked a clearance; the other to his country. If the destination of the vessel was the enemy, *he had a right to refuse a clearance*; if not, and he had not circumstances to warrant his suspicion, he had no such right. He was to judge upon circumstances," etc. (*Bas v. Steele*, 1 Wash. C. C., 394, 395.) Section 4191 Rev. Stat., so far as the imperative language relied upon is concerned, is an exact transcript of the act of March 2, 1799,

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Contract for Furnishing Postal Guide.

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chapter 22, section 93 (1 Stat., 698), in force when the above-mentioned case was determined.

A like authority to withhold clearance till the libel for a penalty the collector knows to have accrued is filed is believed to exist in cases like that of the *Santiago* and *Niagara*. To relieve the vessel from this legal liability the penalties were paid. They were properly received, under the instructions of your circular of the 21st of February last, No. 4782, which correctly states the law upon this subject. I have confined this opinion to the cases of the ships named, under section 2809, because the facts stated all relate to them, and I prefer not to discuss section 2873 unless some actual case of dispute or difficulty requires you to present it for my consideration.

The seven papers accompanying your letter are herewith returned.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

HON. WM. WINDOM,

*Secretary of the Treasury.*

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CONTRACT FOR FURNISHING POSTAL GUIDE.

A contract for furnishing the Post-Office Department with copies of the Postal Guide, under the act of March 3, 1881, chap. 130, making an appropriation for "publication of copies" thereof, does not come within the provisions of section 3709, Revised Statutes, and the Postmaster-General is not required to advertise for proposals previously to making such a contract.

The object of that section, in requiring advertisement for proposals before making purchases and contracts for supplies, is to invite competition among bidders, and it contemplates only those purchases and contracts where competition as to the article needed is possible, which is not the case with the Postal Guide.

DEPARTMENT OF JUSTICE,

May 13, 1881.

SIR: Your letter of March 26 last submitted to me an opinion of the Assistant Attorney-General for the Post-Office Department, dated the 23d of same month (to the effect that in purchasing copies of the Official Postal Guide under the pro-

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vision in the act of March 3, 1881, making an appropriation of \$23,000 for "publication of copies of the Official Postal Guide," you are not required to advertise for proposals to furnish the same), and also requested me to advise you whether or not I concur in the conclusion reached by that officer. A subsequent letter from you, dated April 6, inclosed a communication from the publishers of the Official Postal Guide touching the same matter, which you desired to be considered in connection therewith.

The inquiry involved is, whether a contract for furnishing the Post-Office Department with copies of the Official Postal Guide during the fiscal year next ensuing, under the above-mentioned provision of the act of March 3, 1881, falls within section 3709 of the Revised Statutes.

That section provides: "All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold or such services engaged between individuals."

You state that the publication of the Official Postal Guide was originally authorized by the following provision in the act of June 25, 1874, chapter 455, viz: "To enable the Postmaster-General to pay for not exceeding thirty thousand copies quarterly of the Official Postal Guide, to be compiled and published under contract not to extend more than five years, to be made with parties doing said work at the lowest rate, twenty thousand dollars;" that prior to the passage of this act, by advice of House Committee on Appropriations, the Postmaster-General had, by letter, invited proposals, accompanied by specimen volumes showing the style of work to be furnished, from ten or twelve of the leading printers and publishers in the United States; and that after the passage of the act, upon the advice of the then Assistant Attorney-General for the Post-Office Department that no fur-

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Contract for Furnishing Postal Guide.

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ther advertisement was required, immediate performance being necessary, a contract for furnishing copies of the Guide was made with H. O. Houghton & Co., of Cambridge, Mass., for five years, expiring June 30, 1879.

By the act of June 21, 1879, chapter 34, an appropriation of \$20,000 was made for "publication of copies of the Official Postal Guide" for the fiscal year ending June 30, 1880; and by the act of June 15, 1880, chapter 225, an appropriation of the same amount was made for "publication of copies of the Official Postal Guide" for the fiscal year ending June 30, 1881. Under these appropriations annual contracts were made with the publishers of the Guide (*i. e.*, with Messrs. Houghton, Osgood & Co., successors to H. O. Houghton & Co., the former contractors, and with Houghton, Mifflin & Co., successors to Houghton, Osgood & Co.), for each of the years ending June 30, 1880, and June 30, 1881, without previous advertisement for proposals. But in each of these cases the appropriation was not made until very near the beginning of the fiscal year for which it was intended, and in each immediate and continuous delivery of the necessary number of copies was required.

You further state that the Guide is neither edited nor published by or at the expense of the Post-Office Department; that the contents are made up from the official records of the Post-Office Department at the expense of the publishers, subject to the approval of the Postmaster-General; that the publication is copyrighted; that the publishers have a large subscription list from the public, in addition to the copies furnished to the Post-Office Department, as well as an extensive advertising patronage; and that the price at which copies are now furnished to the Department, and at which they are offered for the next year, is about the cost of manufacture, the expense of editing and the profit of the publishers coming from the subscriptions of the public and from advertising.

Upon the foregoing facts I am of opinion that a contract for furnishing the Post-Office Department with copies of the Guide, under the act of March 3, 1881, does not come within the provisions of section 3709, Revised Statutes. The design of this section, in requiring advertisement for proposals be-

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*Lease of Building for Geological Survey.*

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fore making purchases and contracts for supplies, is to invite competition among bidders, and it contemplates only those purchases and contracts where competition as to the article needed is possible. The Official Postal Guide being a copyrighted publication, edited, printed, and owned by a particular firm, it is manifestly not an article for the furnishing of which there could be any competition between that firm and other persons. Nor does this circumstance appear to work any disadvantage to the Government in the present case, as the article is supplied by the firm at about the cost of manufacture.

I accordingly concur in the conclusion reached by the Assistant Attorney-General for your Department, namely, that in purchasing or contracting for copies of the Guide under the act of March 3, 1881, you are not required to advertise for proposals.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. THOMAS L. JAMES,

*Postmaster-General.*

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LEASE OF BUILDING FOR GEOLOGICAL SURVEY.

The appropriation made by the act of June 16, 1880, chapter 235, "for the expenses of the Geological Survey, and the classification of the public lands, and examination of the geological structures, mineral resources, and products of the national domain, to be expended under the direction of the Secretary of the Interior," is not applicable to the payment of rent of the building in Washington, D. C., leased from Dr. J. W. Bulkley, July 9, 1880, and used as offices for the Geological Survey.

That appropriation not being "in terms" made for the rent of any building or part of any building in the District of Columbia to be used by the Geological Survey, and no provision therefor being made elsewhere, the lease of July 9, 1880, was forbidden by the act of March 3, 1877, chapter 106, and is void.

DEPARTMENT OF JUSTICE,

*May 13, 1881.*

SIR: I have considered the question submitted to me in your letter of the 16th ultimo, viz: Whether you have authority to pay the rent of building No. 803 G street, in Washington, D. C. (used as offices for the Geological Survey),

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Lease of Building for Geological Survey.

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under the lease made by your predecessor with Dr. J. W. Bulkley, July 9, 1880.

It appears that among the appropriations made by the act of June 21, 1879, chapter 34, for the legislative, executive, and judicial expenses of the Government for the year ending June 30, 1880, and for other purposes, was one the object of which was to enable the Secretary of the Interior "to provide offices for the Geological Survey," etc.; and that under this provision the premises were leased from Dr. Bulkley, to be used as offices for the Geological Survey, for the term of one year from July 1, 1879, at a certain yearly rent, payable in monthly installments. This lease expired June 30, 1880.

The act of June 16, 1880, chapter 235, making appropriations for the sundry civil expenses of 1881, and for other purposes, contained an appropriation "for the expenses of the Geological Survey, and the classification of the public lands, and examination of the geological structures, mineral resources, and products of the national domain, to be expended under the direction of the Secretary of the Interior."

On July 9, 1880, a new lease of the building (similar to and for the same purpose as the former lease) was entered into with Dr. Bulkley for the term of one year from July 1, 1880, and the Geological Survey is now in occupation of the premises thereunder.

The question submitted relates to payment of rent under the last-mentioned lease, and the answer thereto depends upon whether the appropriation made by the act of June 16, 1880, is applicable to such payment.

By the act of March 3, 1877, chapter 106, it was declared that thereafter no contract should be made "for the rent of any building or part of any building to be used for the purposes of the Government in the District of Columbia until an appropriation therefor shall have been made in terms by Congress, and that this clause be regarded as notice to all contractors or lessors of any such building or part of building." This law was in force when that lease was entered into.

The appropriation in the act of June 16, 1880, is not "in terms" made for the rent of any building or part of any building in the District of Columbia to be used by the Geological Survey; and no such provision therefor being found

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Lease of Building for Geological Survey.

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elsewhere, it must be deemed that the lease of July 9, 1880, was prohibited by the act of March 3, 1877, and that a claim for rent thereunder is inadmissible.

It seems to me from an examination of previous legislation relating to the Geological Survey that the phrase "expenses of the Geological Survey," employed in that appropriation, was not used in so broad a sense as to include an expenditure for the rent of any such building or part of building. Thus, on referring to the act of March 3, 1879, chapter 182, making appropriations for the sundry civil expenses of the Government for the fiscal year ending June 30, 1880, etc., it will be observed that a similar appropriation for the Geological Survey is there made in which the same phrase occurs. That the words "expenses of the Geological Survey," in the appropriation made by this act, were not meant by Congress to include the rent of any building or part of building for the Survey, is shown by the fact that a separate provision was made for that object, for the same fiscal year, by the act of June 21, 1879, cited above, and we may reasonably presume that when, subsequently, these words were used in the appropriation made by the act of June 16, 1880, they were not intended to have a broader or more comprehensive signification.

The conclusion at which I arrive is, that the lease of July 9, 1880, is void, and that the appropriation in the act of June 16, 1880, is not applicable to the payment of the rent of the building referred to. In direct answer to your question I accordingly reply, that in my opinion you have no authority to pay the rent of the premises under said lease.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. S. J. KIRKWOOD,

*Secretary of the Interior.*

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Case of Steamboat Joseph Pierce.

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## CASE OF STEAMBOAT JOSEPH PIERCE.

Upon consideration of the facts submitted in this case, in connection with section 3483, Revised Statutes: *Held* that the steamer *Joseph Pierce*, at the time of her destruction by fire, July 31, 1865, was not in the military service of the United States either by contract or impressment, and accordingly that the accounting officers of the Treasury have no jurisdiction under that section to allow the value thereof to the owners.

DEPARTMENT OF JUSTICE,

May 13, 1881.

SIR: Yours of the 4th instant asks whether or not, upon the facts found by the Second Comptroller, whose statement of them you inclose, the steamer *Joseph Pierce*, at the time of her destruction by fire, July 31, 1865, was so in the military service of the United States as to give to the accounting officers of the Treasury jurisdiction under the Revised Statutes, section 3483, to allow the value of the boat to her owners.

That section reads: "Every person who sustains damage by the capture or destruction by an enemy, or by the abandonment or destruction by the order of the commanding general, the commanding officer or quartermaster, of any horse, mule, ox, wagon, cart, sleigh, harness, steamboat or other vessel, railroad engine or railroad car, while such property is in the military service, either by impressment or contract; or who sustains damage by the death or abandonment and loss of any horse, mule, or ox, while in the service, in consequence of the failure on the part of the United States to furnish the same with sufficient forage, or or whose horse, mule, ox, wagon, cart, boat, sleigh, harness, vessel, railroad engine, or railroad car is lost or destroyed by unavoidable accident while such property is in the service, shall be allowed and paid the value thereof at the time when such property was taken into the service, except in cases where the risk to which the property would be exposed was agreed to be incurred by the owner: *Provided*, It appears that such loss, capture, abandonment, destruction, or death was without any fault or negligence on the part of the owner of the property, and while the property was actually employed in the service of the United States."

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Case of Steamboat *Joseph Pierce*.

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The meaning of the phrase "in the service" of the United States, if it needs exposition, has been authoritatively determined by the Supreme Court of the United States, per Hunt J.: "That the statute of 1849, under which this claim is made, was intended for the indemnity of those engaged in the *actual* military service of the United States—that is, for enlisted men while in the performance of their duties as such—is plain enough." *Stuart v. United States*, 18 Wall., 89. The learned judge, in considering the second section of that act, further observes: "This military service is the same as that spoken of in the first section, to wit: in battle, or service as soldiers under the command of officers of the Army. \* \* \* And the same rule is applicable whether the property was in such *actual* service by the consent and agreement of the owner, as by hire, or whether it had been forcibly seized by the Government; that is to say, either by impressment or contract, unless the owner had agreed himself to bear the hazard of the loss." *Ibid*.

That the boat *Joseph Pierce* was hired or chartered by the Government is not pretended. The able counsel who have presented the claim of her owners to reimbursement under section 3483, base it upon the assumption that she was "impressed" into the service of the United States.

The law dictionaries of Abbott, Bouvier, and Burrill contain no definition of the word "*impressment*." The earlier English dictionaries show that the term is derived from the compulsive entry of men or consumption or use of property in the actual military service of the state.

Was the *Joseph Pierce* impressed in this sense?

Certainly she was not taken as the *J. H. Russell* was, in the case relied upon by the claimants, reported in 13 Wallace, 623. The *Russell* was prohibited from taking private freight, and her voyage was determined entirely by military authority. This constituted an impressment of that vessel into the military service of the United States, she having been taken out of the service of private parties as a common carrier.

The *Joseph Pierce*, on the contrary, was on her way to Vicksburg when signaled to stop at Davis Bend. Upon reaching the landing the master is required to take on board the men and ammunition of the Sixty-fourth United States

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Case of Steamboat Joseph Pierce.

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Colored Troops for transportation to Vicksburg. They were to be transported, as were the private persons and property already on board, to her destination. The captain refused to take the troops and powder. The reason assigned for the refusal is not distinctly stated by you, but counsel inform me that it was because it would make the number of passengers exceed what she was licensed to carry; and that she had no license to carry powder, and to take it avoided the policy of insurance upon the vessel. But whatever his reasons, Captain Richardson refused to take on the men and property. Colonel Meatyard, the officer then in command at this point, then said to him: "Unless you take me and my troops on board I will seize;" to which the master responded, "I will be compelled to submit."

This is supposed by the claimants to constitute an impressment. I think it does not. The threat is to seize (or impress) the vessel, unless a certain thing is done; and to avoid seizure or impressment the master does the thing required. He selects the other offered alternative in preference to an impressment.

Again, if Captain Richardson had, at once and voluntarily, acceded to the demand for transportation, it could hardly be said that his steamer—though to that extent serving the United States—was "in the service" of the United States by hire. Every vessel having a military passenger, or large number of them, is not therefore in the service of the Government to whose establishment these persons may belong. Then his consenting, reluctantly and under threat, to take such persons as passengers and their ammunition as freight, did not put the vessel into the service by impressment.

It is alleged that the owners of the *Joseph Pierce* have lost her, and been precluded from recovering any of the insurance upon her, because of these acts of Colonel Meatyard, acting under orders of superior military authority, representing the United States. If so, the case would be one of great hardship, and might furnish the basis of an appeal to Congress; but it does not make out a case under Revised Statutes, section 3483, of which the accounting officers of the Treasury have jurisdiction.

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 Longevity Pay.
 

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The papers in the case, which were forwarded at the request of the claimants, are herewith returned, for restoration to the files of the Second Comptroller.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WM. WINDOM,

*Secretary of the Treasury.*

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## LONGEVITY PAY.

In computing the longevity pay of officers of the Army, under the provision in the act of February 24, 1881, chap. 79, declaring that "the actual time of service in the Army or Navy, or both, shall be allowed all officers," etc.: *Held*—(1) That the actual time of an officer's service as a cadet at the Military Academy should not be allowed. (2) That where an officer served in the Medical Corps of the Navy the actual time of his service in that corps should be allowed. (3) That where an officer served as a captain's clerk in the Navy, the actual time of his service as such clerk should be allowed. (4) That where the officer served as an assistant civil engineer in the employ of the War Department on the Florida coast and elsewhere, the actual time of his service in that capacity should not be allowed.

DEPARTMENT OF JUSTICE,

May 14, 1881.

SIR: Your two letters of the 6th instant direct my attention to a clause in the act entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1882, and for other purposes," approved February 24, 1881, which reads as follows: "Additional pay to officers for length of service, to be paid with their current monthly pay, *and the actual time of service in the Army or Navy, or both, shall be allowed all officers in computing their pay,*" and also submit for my consideration whether in certain cases, hereinafter stated, officers of the Army are entitled to the benefit of that part of the above provision which declares that in computing their length of service or longevity pay "the actual time of service in the Army or Navy, or both, shall be allowed."

The cases referred to and the particular inquiries arising thereon are these:

(1) Where the officer was appointed a cadet at the Military

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Longevity Pay.

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Academy, and served as such, whether the actual time of his service as cadet should be allowed in computing his longevity pay.

(2) Where the officer was appointed an officer in the Medical Corps of the Navy, and served as such, whether the actual time of his service as an officer in that corps should be allowed in computing his longevity pay.

(3) Where the officer served as a captain's clerk in the Navy, whether the actual time of his service as such clerk should be allowed in computing his longevity pay.

(4) When the officer served as an assistant civil engineer in the employ of the War Department on the Florida coast survey and elsewhere, whether the actual time of his service in that capacity should be allowed in computing his longevity pay.

Previous to the passage of the act of July 15, 1870, chapter 294, all commissioned officers of the Army were allowed an additional ration, called "longevity ration," for every five years of service. This allowance was authorized by the fifteenth section of the act of July 5, 1838, chapter 162, amended by section 9 of the act of March 2, 1867, chapter 145, and (the ration being commuted in money) it was virtually a periodical increase of the officer's compensation. The act of 1838, as amended, provided that every commissioned officer of the line or staff "shall be entitled to receive an additional ration per diem for every five years he may have served or shall serve in the Army of the United States." According to the construction which was given to this provision only service rendered as a *commissioned officer in the regular Army* could be computed in determining the right of an officer to the benefit thereof.

The act of 1870 did away with the longevity ration, but provided (sec. 24) that there should be "allowed and paid to each and every commissioned officer below the rank of brigadier-general, including captains and others having assimilated rank or pay, ten per centum of their current yearly pay for each and every term of five years of service: *Provided*, That the total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of his grade as established by this act."

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Longevity Pay.

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This provision is embodied in sections 1262 and 1263, Revised Statutes, and the construction which it received in practice corresponded to that placed upon the former provision giving the longevity ration—that is to say, in allowing the ten per centum increase of pay, *length of service as a commissioned officer in the regular Army only* was taken into account.

Further provision on the subject was made by the seventh section of the act of June 18, 1878, chapter 263, which declared that thereafter “all officers of the Army of the United States who have served as officers in the volunteer forces during the war of the rebellion, or as enlisted men in the armies of the United States, regular or volunteer, shall be, and are hereby, credited with the full time they may have served as such officers and as such enlisted men, in computing their service for longevity pay,” etc. By this section, service as a *commissioned officer in the volunteer army during the war of the rebellion*, and also service as an *enlisted man* in either the volunteer or regular army *at any period*, were brought into the account, and required to be credited equally with service as a commissioned officer in the regular Army, in computing an officer's longevity service; but service as a *cadet* at the Military Academy does not come within the section. (16 Opin., 611.)

The act of February 24, 1881, provides that, in computing the pay of officers for length of service, “the actual time of service in the Army or Navy, or both, shall be allowed.”

The question submitted by you is, Whether the period passed by a cadet at West Point, receiving his military and other instruction at that Academy, is to be computed as “actual time of service in the Army;” and I have no difficulty, whatever, in answering this question in the negative.

Attorney-General Cushing (7 Opin., 333) said: “We see by the statute that the internal military organization of the Academy is for the purpose of military instruction. *It is not actual service in the Army.*”

If it had been the intention of Congress to enact that the period passed by cadets at West Point should be placed upon the footing of *actual service in the Army*, it would have been perfectly easy to have said so by language incapable of

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Longevity Pay.

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being misunderstood ; and it seems to me that it is extremely undesirable to torture the language of Congress in order to find in it, by relation to some other statute, a technical effect, when the apt words to express such intention readily occur to every unbiased mind. It is very true that the corps of cadets at West Point constitute part of the Army, but it does not follow that a cadet pursuing his studies at West Point is in *actual service in the Army* within the meaning of the clause in the Army appropriation bill ; and if Congress at any time desires to add this advantage to those already possessed by the young men who are educated at the public expense at the Military Academy, it will be very easy for it to do so, by declaring that the time passed by cadets at the Military or Naval Academy shall be computed as "actual time of service in the Army or Navy ;" but, until language clearly indicative of this meaning is used, it would be, in my judgment, very unwise to endeavor to extract it from a clause in the Army appropriation bill, treating only of the Army as in actual service in the ordinary meaning of the phrase.

With respect to naval service, this was not within the legislation referred to which was enacted previously to the act of 1881, but is first introduced and required to be taken into account by that act. The terms "service in the Navy" are not less general or comprehensive than "service in the Army." They include service in the naval forces, whether regular or volunteer, and whether a commissioned officer of the line or staff, or as warrant or other officer, or as an enlisted man ; and for such service the act of 1881 entitles an Army officer to credit in computing his longevity pay.

I am, accordingly, of opinion that under the act of February 24, 1881, in each of the *second* and *third* cases above enumerated, the officer should be allowed, in computing his longevity pay, the actual time of his service in such case described, but that in the remaining case, the *fourth*, the officer should not be allowed the actual time of his service therein described in computing his longevity pay. The negative answer in the latter case rests on the ground that his service as an assistant civil engineer in the employ of the War De-

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 Reappointment of Chaplain Blake.
 

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partment in the survey mentioned was not actual service in the Army.

The papers which accompanied your letters are herewith returned.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. ROBERT T. LINCOLN,

*Secretary of War.*

NOTE.—Since the foregoing opinion was rendered, the Supreme Court has held that, in computing an officer's longevity pay, the time of his service as a cadet in the Military Academy at West Point is to be regarded as "actual time of service in the Army," within the meaning of the act of February 24, 1881 (*United States v. Morton*, 112 U. S., 1).

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 REAPPOINTMENT OF CHAPLAIN BLAKE.

It is not competent to the President, with the concurrence of the Senate, now (in May, 1881) to reappoint Rev. Charles M. Blake a post chaplain in the Army as of the 28th day of September, 1878, so as to entitle him to pay from that date.

DEPARTMENT OF JUSTICE,

May 18, 1881.

SIR: The question presented for my opinion by yours of the 14th instant is, Whether or not it is competent for the President to nominate and, with the concurrence of the Senate, to appoint Rev. Charles M. Blake a post chaplain in the Army, the appointment to take effect from September 28, 1878, so as to entitle him to pay from that date, he having since then actually performed the duties of that position under the hereinafter-mentioned order of President Hayes.

Prior to and upon the 24th day of December, 1868, Mr. Blake was a chaplain in the Army. On that day he wrote a letter tendering his resignation. It was accepted March 17, 1869. His successor was nominated, confirmed, and commissioned in July, 1870, to take rank from July 2, 1870. When he wrote that letter Mr. Blake was insane. Upon the 28th day of September, 1878, President Hayes issued an order declaring such resignation void, revoking its acceptance, directing his assignment to duty, and that he be paid from May 14, 1878, when the number of Army chaplains was re-

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 Reappointment of Chaplain Blake.
 

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duced to that authorized by law (counting Mr. Blake in); leaving his right to pay between March 17, 1869, and May 14, 1878, to be determined by the Court of Claims, in which a suit therefor was pending. The decision of that court was adverse to the claimant (*Chaplain Blake's case*, 14 C. Cls. R., 462). Upon appeal the Supreme Court of the United States, at its last term, affirmed the judgment of the Court of Claims, holding that by the nomination, confirmation, and appointment of his successor Mr. Blake ceased to be an officer of the Army from and after July 2, 1870, without regard to his mental condition or his letter of December 24, 1868 (*Blake v. United States*, 103 U. S., 227), and that, having thus ceased to be an officer of the Army, he could not re-enter the Army as post chaplain otherwise than by a new appointment, with the concurrence of the Senate (same case, citing *Miminuck v. U. S.*, 97 U. S., 437; 4 Opin., 306.) The order of President Hayes of September 28, 1878, was therefore void and ineffective.

Upon consideration, I am of opinion that it is not competent for the President, with the concurrence of the Senate, now to reappoint Mr. Blake to his former position in the Army as of the 28th day of September, 1878, *with pay from that date*.

The President, under section 3, Article II of the Constitution, has the right to "commission all officers of the United States," and no others. "The acts of appointing to office and commissioning the person appointed can scarcely be considered as one and the same, since the power to perform them is given in two separate and distinct sections of the Constitution" (*Marbury v. Madison*, 1 Cranch, 156; 2 Story on Const., § 1548). The commission is merely evidence of the appointment. (*Ib.*) It is to show *when* and to what office the bearer of it has been appointed. Of itself it confers no right. It merely shows what right a person has by virtue of the appointment it evidences. But a man can not *now* be appointed to an office three years ago. The Executive and Senate of 1878 alone had the right of determining the fitness of the appointees of 1878 to offices to be filled by Presidential nomination. (4 Opin., 217.)

In 1842 Mr. Attorney-General Legaré expressed an opinion

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Reappointment of Chaplain Blake.

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to the effect that "The President can restore a suspended naval officer, and can confer rank from and after his appointment; but he can not cause an individual out of service to be paid from the public Treasury the same as if he were in it; nothing short of an act of Congress can have that virtue. He may, to elevate an officer once out of the service, nominate him to a particular rank in it of the same dignity as that which he would have held had he not fallen out of it; and, to effect that result, may issue a commission having relation back to a prior date; yet the pay of such restored and promoted officer does not attach to the post until the incumbent enters upon its duties. A surgeon put out of the naval service by the exercise of executive power, and subsequently restored to the rank he would have had by virtue of his commission, is not entitled to pay for the time he was out of the service, but only for the time of his restoration." (4 Opin., 123.)

In 1847 Attorney-General Clifford gave a similar opinion upon the same case, that of Surgeon Du Barry. (*Ib.*, 603.)

Subsequently, in the case of a lieutenant in the Revenue Service, who had been dismissed in December, 1842, and re-commissioned in April, 1843, to take rank from the date of his original appointment, Attorney-General Johnson held that the officer was not entitled to pay during the time he was out of service, remarking that "pay is never allowed except while the officer is in service, unless there be some act of Congress providing for the particular case." (5 Opin., 132.)

In 1858 Attorney-General Black gave an opinion in which he said: "An officer of the Army or Navy who is dismissed, and afterwards restored to the same rank which he would have held if not dismissed, can not be paid for the intermediate time, unless by act of Congress." (9 Opin., 137.)

In an opinion of the Solicitor-General, approved by my immediate predecessor, January 27, 1880, it is said: "The fiction familiar to lawyers under the phrase *nunc pro tunc* has no application in cases of appointments to office. Such executive action can not in the nature of things act *by relation*." (16 Opin., 656, 657.)

The view which I have already expressed upon the ques-

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Commissioners of the District of Columbia.

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tion presented is so fully sustained by the opinions of my predecessors above referred to, that I deem it needless to cite additional authority on the subject.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. ROBERT T. LINCOLN,

*Secretary of War.*

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COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

The power given the Commissioners of the District of Columbia by the sixth section of the act of March 3, 1881, chapter 134, "to sell to the highest bidder at public auction" all the right, title, and interest of the United States in and to a certain lot of ground situated in the city of Washington, carries with it authority to make a conveyance to such bidder, as an incident to the execution of the power.

DEPARTMENT OF JUSTICE,

May 18, 1881.

GENTLEMEN: Your communication of the 20th ultimo directs my attention to the sixth section of the act of March 3, 1881, entitled "An act making appropriations to provide for the expenses of the government of the District of Columbia," etc., by which the Commissioners of the District of Columbia are authorized "to sell to the highest bidder at public auction" all the right, title, and interest of the United States in and to a lot of ground described therein, situated in the city of Washington, in said District, and to apply the proceeds of sale to the use mentioned in section 3 of said act. My attention is also directed to an opinion of the attorney for the District of Columbia, in which that officer apparently holds that, although authority "to sell" the premises is by said sixth section conferred upon the Commissioners, they derive no authority thereunder to convey the same to the purchaser. You remark in this connection, that "the property has been sold, and if there be no way by which the title of the United States can be conveyed without further legislation by Congress, the Commissioners will be unable to avail themselves of the benefits of this sale until the next Congress shall have organized and passed an amendatory act." And you request to be advised by me whether, in my opinion, a conveyance can be made to the purchaser under the statute as it now exists.

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Commissioners of the District of Columbia.

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After careful examination of the subject, I am led to adopt a different view from that of the attorney of the District of Columbia stated above. I think the power "to sell to the highest bidder at public auction," which is given to the Commissioners by the sixth section of said act, carries with it authority to make a conveyance to such bidder as an incident to the execution of the power.

It is a general and familiar principle of law, that where power is conferred to do any act, it is to be construed as including all necessary, or usual, or proper modes and means of accomplishing the act; since to authorize the doing of an act, and at the same time to deny the proper means of doing it, would be idle and absurd. (Story on Sales, § 70.) This principle has been acted upon by the courts in cases where powers similar to the one under consideration have been granted. Thus, in *Decker v. Freeman* (3 Greenl. 338) it was held that a vote of township proprietors, authorizing a committee to sell lands, empowered them also to make deeds in the name of the proprietors. So, in *Valentine v. Piper* (22 Pick., 85) where a power of attorney to sell land, and to dispose of the proceeds according to the future instructions of the constituent, did not in express terms authorize the attorney to execute a deed, it was held that the attorney had authority to execute the proper instrument required by law to carry the sale into effect. In the latter case Chief-Justice Shaw (delivering the opinion of the court) observes: "When the term 'sale' is used in its ordinary sense, and the general tenor and effect of the instrument are to confer on the attorney a power to dispose of real estate, the authority to execute the proper instruments required by law to carry such sale into effect is necessarily incident. It is in pursuance of a general maxim that an authority to accomplish a definite end carries with it an authority, so far as the constituent can confer it, to execute the usual legal and appropriate measures proper to accomplish the object proposed." (See also *Yale v. Edmes*, 1 Metc., 488.)

By section 3749, Revised Statutes, the Solicitor of the Treasury is authorized, with the approval of the Secretary of the Treasury, "to sell at public sale any unproductive lands or other property of the United States acquired under

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Commissioners of the District of Columbia.

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judicial process or otherwise in the collection of debts," etc. Here authority to convey to the purchaser the property purchased at such sale, though not conferred on the Solicitor in express terms, is undoubtedly to be implied; and the practice has been in conformity with this view.

Sometimes, where a power to dispose of real estate is conferred by statute, authority to convey is expressly given to the officer empowered to sell. Thus, by the act of December 15, 1868, chapter 2, the Secretary of War was authorized to make sale at public auction of certain lands, etc., belonging to the United States, and "on receiving the purchase money in full to execute all necessary deeds therefor to the purchaser or purchasers thereof on behalf of the United States." The sale here authorized was one on credit, and the force of the provision giving authority to execute deeds lies mainly in the restriction as to the time of exercising such authority (viz, "on receiving the purchase-money in full"). So, in section 4 of the aforesaid act of March 3, 1831, authority is given to the Chief of Engineers "to sell and convey by good and sufficient deed" to the parties described therein certain real estate of the United States; but it is provided that "no conveyance shall be made until all the purchase-money is paid." In this case the sale was to be partly on credit.

I may here remark that the circumstance that authority to "convey" is expressly given the Chief of Engineers by the section just mentioned does not warrant the construction that the sixth section of the same act (wherein such authority is not expressly given) confers upon the Commissioners a more limited power. The sale contemplated by the latter section is a sale for cash, the proceeds of which are to be applied by the Commissioners to a particular purpose, and, in the absence of restrictive words indicating a contrary intention, it is reasonable to infer that the design of Congress was to confer upon them authority to transfer the property, this being necessary to accomplish the end in view.

I accordingly answer your inquiry by saying that in my opinion a conveyance can be made to the purchaser under the statute as it now exists.

I am, gentlemen, very respectfully,

WAYNE MACVEAGH.

The COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

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Naval Academy.

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## NAVAL ACADEMY.

The heads of the departments of ethics and English studies, of Spanish and other modern languages, and of drawing, should be commissioned as "professors of mathematics" (sec. 1528, Rev. Stat.), after passing the examinations required by the act of January 20, 1881, chapter 24.

## DEPARTMENT OF JUSTICE,

May 18, 1881.

SIR: In reply to yours of yesterday I would say that although the title conferred by law is a misnomer, I think the heads of the departments of ethics and English studies, of Spanish and other modern languages, and of drawing, *should* be commissioned as professors of mathematics, under section 1528, Revised Statutes, after passing the examinations required by the act of January 20, 1881.

Section 1528, Revised Statutes, provides that "*Three professors of mathematics* shall be assigned to duty at the Naval Academy, one as professor of ethics and English studies, one as professor of the Spanish language, and one as professor of drawing." The purpose that persons known to the law and the Naval Register as "professors of mathematics" should be engaged in teaching these other branches of learning is too obvious for construction. That the name did not indicate the sole duty of the office is further apparent from the express declaration of the act of August 3, 1846, section 12 (now secs. 1399-1401, Rev. Stat.) "that the number of professors of mathematics in the Navy shall not exceed twelve; that they shall be appointed and commissioned by the President of the United States, by and with the advice and consent of the Senate, *and shall perform such duties as may be assigned them* by order of the Secretary of the Navy at the Naval School, the Observatory, and on board ships of war in instructing the midshipmen of the Navy, *or otherwise.*" Section 1528, Revised Statutes, shows that, certainly as to three of these professors, the duties to be assigned were not to be mathematical in their nature.

Very respectfully,

WAYNE MACVEAGH.

Hon. WM. H. HUNT,

*Secretary of the Navy.*

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Indian Trust Funds.

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## INDIAN TRUST FUNDS.

The Secretary of the Interior, as trustee for certain Indian tribes, has authority, under the act of April 1, 1880, chapter 41, to sell United States 5 per cent. called bonds, held in trust for such tribes, in order that the fund may receive the benefit of the premium.

DEPARTMENT OF JUSTICE,

May 23, 1881.

SIR: Your verbal inquiry as to your right to sell the United States 5 per cent. called bonds, held in trust for Indian tribes, in order that the fund may receive the benefit of the premium, led me to examine the acts of September 11, 1841; June 10, 1876; and of April 1, 1880. The question turns upon the intent of the last-named act. This authorizes the Secretary of the Interior to deposit in the Treasury "all sums now held by him, *or which may hereafter be received,*" as trustee of various Indian tribes, "on account of the redemption of United States bonds," etc., \* \* \* "and the sales of stocks lately purchased for temporary investment, whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments." (21 Stats., 70.)

In reporting the bill Mr. Pendleton said: "The Secretary of the Interior would be at liberty to change the investment. The bill provides that this change shall be made whenever in his judgment it is thought best to do so." (10 Cong. Rec., pt. 1, p. 213, Jan. 7, 1880.)

The Secretary of the Interior acts as trustee. The bonds are called for redemption; the moneys received will be taken by him on account of this call and liability to redemption. It is his duty to realize the most he can for the benefit of his *cestuis qui trust*. I think you *have* the right to sell, as proposed by you.

Very respectfully, yours,

WAYNE MACVEAGH.

Hon. S. J. KIRKWOOD,

*Secretary of the Interior.*

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Duties on Imports.

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## DUTIES ON IMPORTS.

Shellac varnish, composed of a mixture, made in a Canadian bonded warehouse, of the gum with alcohol distilled in this country and exported without payment of any internal revenue tax here and no exaction of duty upon it in Canada because in bond there, is dutiable under Schedule D, of section 2504, Revised Statutes, which declares that "on all compounds or preparations of which distilled spirits is a component part of chief value there shall be levied a duty not less than that imposed upon distilled spirits," namely, \$2 per proof gallon. In determining which is the component of chief value, the value of each ingredient in the domestic markets of the United States should be the guide.

DEPARTMENT OF JUSTICE,  
May 28, 1881.

SIR: Yours of the 3d instant requires my opinion as to the rate of duty properly collectible upon "importation of a shellac varnish composed of a mixture, made in a Canadian bonded warehouse, of the gum with alcohol distilled in this country and exported without payment of any internal revenue tax here and no exaction of duty upon it in Canada because in bond."

Revised Statutes, section 2504, Schedule M, "Sundries," places upon "varnish" *eo nomine* a specific duty of 50 cents per gallon and an *ad valorem* duty of 20 or 25 per cent., according as it is worth a dollar and a half or over per gallon. Schedule D, "Liquors," of the same section, declares that "on all compounds or preparations of which distilled spirits is a component part of chief value there shall be levied a duty not less than that imposed upon distilled spirits," which is \$2 per proof gallon.

Your letter presents two inquiries: First. Under which of these cited clauses is the varnish made as above stated dutiable? Second. How is the value of the alcoholic ingredient to be determined (if the last quoted is the applicable provision), the *compound* not being sold (out of bond) or used in Canada—all dealings in it being confined to purchases and sales of it in bond, for the purposes of exportation?

Each of these questions is difficult of solution with the absolute certainty of conviction. It is, therefore, a fair consideration, to influence the action of an administrative officer of the

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Duties on Imports.

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Government, that an erroneous decision adversely to the United States would practically be permanent and irremediable, so long as the law remained unchanged; while an importer can easily have a mistaken construction, injurious to him, corrected by the court.

To support their claim that Schedule M contains the governing clause, the importers invoke the well-known principle of tariff construction that a specific designation should prevail over a general descriptive classification. This is merely one reason for adopting a particular construction, and while it is persuasive to a certain extent, as applied to different enumerations of the same statute, reflection shows its inapplicability to the present case.

The duty upon varnish, in the precise phraseology now used in the revision, is declared in the alphabetical enumeration of dutiable articles in the fifth section of the act of July 14, 1862, chapter 63. (12 Stats., 549.)

Varnish is defined to be the solution of a resinous substance in some volatile liquid. We know that spirits of ether and oil are most commonly employed to dissolve the gum in the manufacture of varnish. Alcohol is not the sole, if the principal, solvent.

Since the close of the war tobacco and spirits have become the chief sources of internal revenue. July 28, 1866, an act (chap. 298) was passed, entitled "An act to *protect* the revenue, and for other purposes." Its first section opened by fixing the import duty on cigars, placed "on cotton three cents per pound," and concluded with the before-quoted declaration that "On all *compounds* or *preparations* of which distilled spirits is a component part of chief value there shall be levied a duty of *not less* than that imposed upon distilled spirits" (14 Stats., 328), and a proviso as to the quantity to be contained in packages of imported brandy. This general declaration must have been intended to embrace all such compounds and preparations—medical, mechanical, or other—irrespective of the alphabetical arrangements or specific designations of earlier statutes, with the exception that no article of which alcohol was an ingredient, paying a *higher* duty than distilled spirits, should have the benefit of any reduction through this provision.

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Duties on Imports.

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The purpose of the revision being to reproduce, in a consolidated form, the laws in force December 1, 1873, as they then existed, such a construction must be given to the language of the Revised Statutes, wherever it can reasonably be done, as will preserve and continue the effective operation of each statute incorporated therein. The accomplishment of this design should overrule any theory or distinction between specific designations and descriptive clauses. Accordingly, I conclude that, *if the alcohol is the component part of chief value* in this compound, the latter is dutiable under Schedule D at the rate imposed upon distilled spirits, and not as varnish under Schedule M—or, rather, as a varnish of which distilled spirits is the component of chief value.

How to ascertain this fact, of the relative value of the ingredients, is the second question you propound to me.

It is to be noticed that the value to be ascertained is that of the components, and not the *dutiable* value of the compound. As to the latter, Revised Statutes, section 2906, provides that it shall be "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." The importers of this varnish assume that the value of its ingredients is to be determined in the same way, taking the alcohol at its worth, duty and tax free, in the Canadian bonded warehouse—say, at about 30 cents per gallon, and the shellac (entitled to free entry in both countries), at 36 cents a pound—2 pounds being used to each gallon of spirit.

Thus the alcohol, at the time and in the particular building of mixture, is *not* the component of chief value.

But, in the first place, the wholesale price abroad is taken as the standard of *dutiable* value only because the law specially prescribes it, while it makes no such requirement as to the determination of component value; nor do I understand that, when this inquiry has come before the courts, it has been customary to confine it to the comparative value of the components in the country of exportation. In the absence of statutory provision, it would seem more proper and pertinent to inquire what is the wholesale price of each ingredient to the purchaser in the domestic markets of the United

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Duties on Imports.

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States, in order to ascertain which is to be deemed the component of chief value. I am informed that it is so ruled in the United States circuit court for the southern district of New York.

In the second place, to whichever market, foreign or domestic, our attention is directed for this purpose, I should suppose the value of each material or ingredient was to be discovered by finding out what it was worth in the market overt, as a chattel actually passing from owner to owner, with the full right to use it for any purpose; and not its value under peculiar circumstances and narrow conditions, to wit, in a given building, from which it can only be removed (at the price stated) for the single purpose of exportation.

Either in this country or Canada our alcohol can only be sold and delivered to the consumer after payment of the internal-revenue tax or import duty; which therefore becomes *a part of the article itself*. *Jones v. Van Benthuyssen*, 103 U. S., 87.

Adding this element of value, as I think it should be added, and the alcohol becomes the component of chief value in this varnish, which therefore I conclude to be dutiable under the clause of Schedule D as a compound of distilled spirits.

This opinion has been delayed that the importer's counsel might be heard.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WM. WINDOM,

*Secretary of the Treasury.*

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Improvement of Navigable Waters.

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## IMPROVEMENT OF NAVIGABLE WATERS.

Under the authority of an act of Congress (river and harbor act of March 3, 1881) making an appropriation for "improving James River, Virginia," it was proposed to place wing-dams in the river near Varina, Va., at which point the river is a tidal water. The riparian owner forbade the construction of the dams in front of his land above the line of low water: *Advised* that the United States, with a view to the improvement of navigation, have a right to place a wing-dam in the river in front of the land referred to without the owner's consent, and that such right extends even to the limit of high water—i. e., the line of the water at ordinary high tide.

DEPARTMENT OF JUSTICE,

*June 1, 1881.*

SIR: Yours of the 21st of April last calls my attention to a communication, inclosed therewith, from General Parke, Acting Chief of Engineers, by which it appears that the owner of land bordering on James River, near Varina, in the State of Virginia, has forbidden the construction of wing-dams in that river in front of his property (for which work provision is made in the river and harbor act of March 3, 1881, by an appropriation for "improving James River, Virginia") above the line of low water, and at the suggestion of that officer you request my opinion upon the following questions:

(1) Whether the United States have a right to place a wing-dam in the river in front of the land referred to without the owner's consent.

(2) Whether the United States have a right to place wing-dams or jetties in the James River, even to the limit of high-water mark, having in view the improvement of the navigation of the river, as provided for by Congress.

These questions are similar in character to those which were considered by my predecessor in two opinions addressed to the Secretary of War, dated April 27 and June 28, 1880 (16 Opin., 479, 534), and appear to be governed by the same principles of law which were there applied, namely, that under the authority given by the Constitution to regulate commerce among the several States Congress has the right to regulate navigation, and to that end has power to make im-

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Improvement of Navigable Waters.

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provements in the beds of navigable rivers of the United States, to divert the water from one channel to another, and to plant or remove obstructions therein at its will, and that the title of an individual proprietor to any part of the bed of a navigable river of the United States is subject to the right of Congress thus to regulate, control, and divert the flow of the water therein in the interests of navigation. 'These principles are fully recognized by the Supreme Court in the case of *South Carolina v. Georgia*. (93 U. S., 4.)

The James River, at the point where it is proposed to place the wing-dams, is a tidal water; and I presume that the "limit of high-water mark" mentioned in the second question above refers to the line of the water at ordinary high tide. The space between that line and the water's edge at low tide, commonly called beach or shore, is properly a part of the *alveus* or bed of the river, which is defined as including the space between the banks subjacent to and occupied by the river at its fullest flow (Heuck on Rivers, sec. 9.) It would seem that by the law of Virginia the right of a riparian proprietor upon tidal waters extends to ordinary low-water mark (2 Minor's Inst., 20 ; Code of Va., 1873, chap. 62, sec. 2). But this right, in so far as it touches the bed of a navigable stream, must be deemed to be subject to the public right of navigation, and to the right of the Government to use such bed in erecting works for the improvement of the navigation of the stream. For this purpose the stream and the bed thereof are the public property of the nation, and subject to all the requisite legislation of Congress. (*Gilman v. Philadelphia*, 3 Wall., 725.)

Upon the foregoing considerations I answer both the above questions affirmatively.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. ROBERT T. LINCOLN,  
*Secretary of War.*

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Hamilton-Brooks Cigar Stamp.

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## HAMILTON-BROOKS CIGAR STAMP.

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may adopt the device known as the Hunter-Brooks cigar stamp, and prescribe regulations for its use, cancellation, and destruction, in accordance with the design of its inventor, if deemed expedient.

Any failure to use, cancel, and destroy such stamp, as directed by such regulations, would make the party chargeable with the failure amenable to the penalties existing March 1, 1879, as to the stamps then in use.

DEPARTMENT OF JUSTICE,

*June 2, 1881.*

SIR: Yours of 20th ultimo requests a reconsideration, upon its restatement, of the question submitted to my immediate predecessor (16 Opin., 443) relative to the right of the Commissioner of Internal Revenue to adopt the device known as "The Hamilton-Brooks cigar stamp," and (especially) the amenability to punishment of any dealer who should fail to use, cancel, and destroy the stamp (if adopted) in the manner intended by the inventor, if that method were prescribed by the Commissioner of Internal Revenue.

The Hamilton-Brooks cigar stamp has attached to the ordinary form of stamp, as heretofore used, as many coupons as there are cigars in the box to be stamped. The coupons are to be folded into the box when closed by the cigar manufacturer. When opened for sale, the dealer is to detach a coupon for every cigar sold, so that the number of attached coupons shall always correspond with the number of cigars remaining in the box, the last coupon being detached when the last cigar is sold.

The act of March 1, 1879, chapter 125, section 18 (20 Stats., 351), amends Revised Statutes, section 3446, so as to read thus: "The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may establish, and from time to time alter or change, the form, style, character, material, and device of any stamp, mark, or label used under any provision of the laws relating to internal revenue. Such stamps shall be attached, protected, removed, canceled, obliterated, and destroyed in such *manner* and by such instruments and other means as he, with the approval of the Sec-

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Hamilton-Brooks Cigar Stamp.

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retary of the Treasury, may prescribe; and he is hereby authorized and empowered to make, with the approval of the Secretary of the Treasury, all needful regulations relating thereto; and *all pains, penalties, fines, and forfeitures now provided by law relating to internal revenue stamps shall apply to and have full force and effect in relation to any and all stamps which may or shall be so established by the Commissioner of Internal Revenue: Provided, Such stamps, or device, or instrument, or means of removal or obliteration shall entail no additional expense upon the persons required to affix or use the same.*"

The precise inquiry put by you is, "Whether there is any fine, penalty, or other punishment imposed by existing laws upon a dealer in tobacco for willful refusal or neglect to detach the coupons from the stamp known as the Hamilton-Brooks stamp at the time contemplated by the device, should that device be adopted and duly prescribed by appropriate regulations."

The above-quoted statute certainly authorizes the adoption of this (or of any other) peculiar character of stamp, not entailing any additional expense upon the parties using the same; the making of all needful regulations relating thereto which when approved and promulgated have all the force of law (*Gratiot v. U. S.*, 4 How., 117); especially regulations as to the *manner* in which the prescribed stamp shall be attached, protected, *removed, canceled, obliterated, and destroyed*. Attorney-General Devens held (*ubi supra*) that no liability to punishment was incurred by a failure to remove a coupon upon taking a cigar from a box, because Congress had fixed by section 3397 the time when the stamp prescribed should be attached to the box, to wit, before its removal from the factory, and, by Revised Statutes, section 3406, the time when it must be removed or destroyed, viz, when the box is emptied; hence, that in determining the *manner*, means, or implements of attachment, or of removal and destruction, the Commissioner could not change the *time* established by law for doing these acts. His argument seems to be that, if the Commissioner can alter the date of removal or destruction, he can that for affixing the stamp, and thus hasten or delay the payment of the tax, which

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Hamilton-Brooks Cigar Stamp.

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could not have been contemplated by Congress; that the word "manner," as employed in the act of March 1, 1879, chapter 125, section 18, could not be intended to include the "time" of affixing or destroying whatever stamp is used.

The provisions of law other than those already mentioned, pertaining to the power of the Commissioner and the collection of revenue from cigars by stamps, are these:

Section 321, Revised Statutes, gives the Commissioner "general superintendence" over the assessment and collection of all internal-revenue duties and taxes, and charges him with the duty of preparing and distributing "all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue."

Section 3395, after requiring the Commissioner to have prepared, "for the payment of the tax upon cigars, suitable stamps denoting the tax thereon," provides for their distribution among those who are required to use them.

Section 3396. "The Commissioner of Internal Revenue may prescribe such regulations for the inspection of cigars, cheroots, and cigarettes, and the collection of the tax thereon, as he may deem most effective for the prevention of frauds in the payment of such tax."

Section 3397 denounces penalties for removing from the place of manufacture unstamped cigars; for using false, fraudulent, or counterfeit stamps; and for various other offenses, including the making of a second use "or *any other fraudulent use*, of any stamps intended for cigars."

Section 3406 requires that "when ever any stamped box containing cigars, etc., is emptied, it shall be the duty of the person in whose hands the same is to destroy *utterly* the stamps thereon," and affixes a penalty to the failure to do so.

Counsel for the owners of the Hamilton-Brooks stamp called my attention to section 3424, whereby "the Commissioner of Internal Revenue is authorized to prescribe such method for the cancellation of stamps as a substitute for or in addition to the method prescribed in this chapter as he may deem expedient and effectual, and he is authorized, in his discretion, to make the application of such method imperative

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Hamilton-Brooks Cigar Stamp.

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upon the manufacturers of proprietary article or articles included in schedule A."

I do not consider this applicable to the case in hand, because the method of cancellation prescribed "in this chapter" relates to stamps upon bank checks and other written instruments; and the express authority conferred to extend it to articles mentioned in schedule A (medicines, perfumery, and playing cards) is a negative of the right to require such additional or substituted method of cancellation to be applied to cigars and tobacco, or to distilled or fermented liquors.

Sections 3445 and 3446 seem to be those most pertinent to the present inquiry. The full text of each is therefore given; that of the former below, and that of the latter as amended by the act of March 18, 1879, chapter 125, section 18, at the commencement of this opinion.

"Section 3445. The Commissioner of Internal Revenue may make such change in stamps, and may prescribe such instruments or other means for attaching, protecting, and cancelling stamps for tobacco, snuff, cigars, distilled spirits, and fermented liquors, or either of them, as he or the Secretary of the Treasury shall approve; such instruments to be furnished by the United States to the persons using the stamps to be affixed therewith, under such regulations as the Commissioner of Internal Revenue may prescribe."

To meet the objection raised, that to anticipate the time for destroying the stamps by requiring the tearing off of a coupon to accompany each sale of a cigar would imply the right to delay the time for purchasing and affixing the stamp originally, two suggestions offer themselves:

First. That section 344 provides that "whenever the mode or time of assessing or collecting any tax which is imposed is not provided for the Commissioner of Internal Revenue may establish the same by regulation;" clearly implying what would naturally be understood even without this clause, that where the time is fixed by statute the Commissioner cannot change it.

Secondly. It is the utter destruction of the stamp that is required by section 3406 upon the box becoming empty. This is to prevent it, or the box upon which it is placed, being again used in fraud of the revenue. This is distinguishable

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Hamilton-Brooks Cigar Stamp.

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from a *partial* destruction, which may be prescribed as one method of cancellation, or as a regulation in aid of the inspection of cigars for the purpose of effecting the collection of the tax thereon, as mentioned in section 3396, hereinbefore quoted.

The act of March 1, 1879, chapter 125, section 18, is the latest expression of legislative will upon this subject. It allows the Commissioner, with the approval of the Secretary of the Treasury, not only to adopt from time to time such different devices of stamps as to him seems good, but to cause them to be attached, protected, removed, canceled, obliterated, and destroyed in such manner and by such instruments, or other means, as he, with the approval of the Secretary, may prescribe. The destruction may be gradual and accomplished by repeated acts, or the immediate result of a single act, except that it must be completed—"utterly" done—when the box is emptied.

There is this exception, too, that the stamp is necessarily partially destroyed when first affixed to the box. That is to say, it then has to receive the cancellation marks prescribed by law and the regulations, and it then ceases to have any value independently of the commodity to which it is attached, and of which, as an article of commerce, it then becomes for the first time an indispensable part (*Jones v. Van Benthuyssen*, 103 U. S., 87). This case holds that until stamped the tobacco may be sold (at the factory or in bond) separately from the stamp, and, of course, the stamps may be also sold independently of any merchandise, to be subsequently applied to the payment of the tax upon any article for which it is designed, or rather to evidence that payment. Its value then becomes completely merged into and an inseparable part of the value of the merchandise whose free sale and delivery its presence alone can authorize; it loses its separate value and transferability; this quality of it is destroyed by its attachment to the article taxed.

Its legitimate use to indicate the payment of a tax as to any *other* article is then completely gone; but to prevent its *false* and *fraudulent* use for this purpose, its physical destruction must be "utterly" accomplished when the article to which it is attached is consumed. To insure this being done,

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Hamilton-Brooks Cigar Stamp.

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it may be demanded by a properly approved regulation that its destruction shall proceed *pari passu* with that of the taxable commodity of which it has become commercially an integral part. Then, when the last cigar in a box is sold and the last coupon removed, so far as any fraudulent second use of the stamp is concerned (which is all this provision of law is designed to effect) it is "utterly" destroyed. Anything less than its entire destruction is not in law a cancellation, nor is it in fact, since it leaves it susceptible of a second use. "Cancel," says Abbott's Law Dictionary, "to obliterate, nullify, strike out of existence," etc. "The agreement to cancel must be held to include the promise to do whatever should be necessary to effect the cancellation" (*Auburn City Bank v. Leonard*, 40 Barb., 134).

It is apparent, I think, that the use of such a device as is now presented is an effective "manner" or method of securing an utter destruction of the stamp when the time for it to be so destroyed has arrived—of compelling the process of its destruction to keep pace with that of the commodity to which it is attached. I conclude, therefore, that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may establish this character of stamp, and prescribe the manner of its cancellation and destruction, in accordance with the design of its inventor, if deemed expedient. If legally established, and its manner of use, cancellation, and destruction properly prescribed and regulated, any failure to use, cancel, and destroy, *as directed* by such regulations, would make the offender amenable to those penalties existing March 1, 1879, as to the stamps then in use. Certainly the Commissioner could denounce no *new* penalty; but those affixed by Congress to a willful neglect or refusal to comply with the requirements of law and of existing regulations as to the stamp now established, could be extended and applied to such refusal or neglect as to the Hamilton-Brooks stamp, if adopted.

The papers and samples which accompanied your letter are herewith returned.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WM. WINDOM,  
*Secretary of the Treasury.*

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Promotion in the Marine Corps.

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## PROMOTION IN THE MARINE CORPS.

There is no law requiring an officer of the Marine Corps, before promotion, to be examined as to his physical qualification for duty at sea. A board of naval surgeons, constituted under section 1493, Revised Statutes, is not by law invested with authority to examine and pronounce upon any other cases than those of officers on the active list of the Navy.

*Seem* that the examination, physical or other, of a retiring board, constituted under section 1623, Revised Statutes, is the only one to which an officer of the Marine Corps is by law subjected in order to determine his fitness for active duty; and unless the officer is by *this* board found incapacitated for active service, and the finding is approved by the President, he remains in the line of promotion on the active list as he previously was, and is entitled to all the rights which belong to his position.

DEPARTMENT OF JUSTICE,

June 11, 1881.

SIR: The case of Capt. George P. Houston, of the marines, which you were pleased to refer to me on the 19th ultimo, involves the inquiry, whether an officer of the Marine Corps is, by the law applicable to this branch of the service, made subject to examination as to his physical qualification for duty at sea before promotion. I have now the honor to submit to you my opinion thereon.

Previous to the act of July 16, 1862, chapter 183, there was no law which required officers in any branch of the naval service, including the Marine Corps, to pass a physical examination as a preliminary to promotion. The fourth section of that act directed the Secretary of the Navy to appoint an advisory board of naval officers, whose duty it was to carefully scrutinize the active list of line officers in the Navy, above and including the grade of master, and report to the Secretary in writing those found to be worthy of promotion. The board, in recommending an officer for promotion, was to certify that he "has the moral, mental, physical, and professional qualifications to perform efficiently all his duties, both at sea and on shore, of the grade to which he is to be promoted." By the sixth section of the same act a similar advisory board was to be appointed at least once in every four years. These provisions, which applied solely to *line* officers of the Navy, were

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Promotion in the Marine Corps.

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superseded by other provisions on the same subject contained in the act of April 21, 1864, chapter 63. The latter provisions are embodied in section 1493 *et seq.* of the Revised Statutes. They include both line and staff officers, but in terms extend to those only who are "on the active list of the Navy." I am unable to find any statutory provision of this character which expressly or impliedly includes officers of the Marine Corps.

Section 1493, Revised Statutes, forbids the promotion of an officer to a higher grade on said list (with the exception therein mentioned) "until he has been examined by a board of naval surgeons and pronounced physically qualified to perform all his duties at sea." It is clear, from the language of this section, that the cases which a board of naval surgeons constituted thereunder is authorized to examine and pronounce upon are cases of officers in the line of promotion *on the active list of the Navy exclusively*, unless the authority of the board is enlarged by virtue of some other statutory provision. The only other provision deemed necessary to notice in this connection is that contained in section 1621, Revised Statutes, which declares that "the Marine Corps shall at all times be subject to the laws and regulations established for the government of the Navy, except when detached for service with the Army by order of the President; and when so detached they shall be subject to the rules and articles of war prescribed for the government of the Army." The obvious purpose of the section just quoted is to provide rules for the discipline of the corps in the different spheres of duty (military and naval) in which it is liable to serve. When serving with the land forces, it is to be subject to the rules established for the government of the Army; when serving with the naval forces, to the rules for the government of the Navy. The language of the provision does not warrant the inference that it was intended thereby to subject that corps to any other laws and regulations of the Navy than such as relate to discipline and its maintenance. Within this category section 1493 does not fall.

I am accordingly of opinion that a board of naval surgeons, constituted under section 1493, Revised Statutes, is not, by law, invested with authority to examine and pronounce upon any other cases than those of officers on the active list of the

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Promotion in the Marine Corps.

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Navy, and furthermore, that there is no law requiring an officer of the Marine Corps, before promotion, to be examined as to his physical qualification for duty at sea.

As with the Army, so with the Marine Corps, Congress appears to have thus far regarded the provision made for *retiring* officers who are incapable of performing their duties as sufficient to insure efficiency of the service therein. By section 1622, Revised Statutes, officers of the Marine Corps may "be retired in like cases, in the same manner, and with the same relative conditions, in all respects, as are provided for officers of the Army;" and section 1623 makes provision for the appointment of a retiring board to inquire into the disabilities of officers of that corps who may be ordered to go before it. The examination of such retiring board, physical or other, seems to be the only one to which an officer of the corps is by law subjected, in order to determine his fitness for active duty; and unless the officer is by *this* board found incapacitated for active service, and the finding is approved by the President (in which case he must be retired), he remains in the line of promotion on the active list as he was before, and is entitled to all the rights which belong to his position.

It results from the foregoing that the recent nomination of Captain Houston for promotion, "subject to the required examination before being commissioned" (which examination is understood to be that provided for by section 1483, Revised Statutes), was irregular; that officer not being within or subject to the requirements of the section last mentioned. It is true, instances of examinations such as that here referred to, and perhaps of similar nominations, in the case of marine officers, have heretofore occurred; but none, as I learn, date farther back than the latter part of the year 1877, a period too brief to entitle them to any weight in point of usage; and they doubtless originated in a misconception of the scope and effect of the statutory provisions already adverted to.

I am, sir, very respectfully,

WAYNE MACVEAGH.

The PRESIDENT.

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Tonnage Dues.

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## TONNAGE DUES.

The "tax of fifty cents per ton" imposed by section 4219, Revised Statutes, as amended by the act of February 27, 1877, chapter 69, is not a *penalty* capable of being remitted by the Secretary of the Treasury under sections 5292 and 5293, Revised Statutes.

## DEPARTMENT OF JUSTICE,

June 14, 1881.

SIR: Yours of 11th instant (9388, D. L.) directs my attention to Revised Statutes, section 4219, imposing tonnage dues, the last clause of which, as amended by the act of February 27, 1877, chapter 69 (19 Stats., 250), declared that "any vessel, any officer of which shall not be a citizen of the United States, shall pay a tax of fifty cents per ton," and asks whether the additional duty attaching to a vessel by reason of non-citizenship of an officer is a penalty which can be remitted by the Secretary of the Treasury under Revised Statutes, sections 5292 and 5293?

The effect of these last-cited sections is to permit any person who has "incurred any fine, penalty, or forfeiture, or disability, or who may be interested in any vessel or merchandise which has become subject to any seizure, forfeiture, or disability," to file his petition before the judge of the proper district, "setting forth the circumstances of his case," and praying that the same may be mitigated or remitted; upon which the judge is to ascertain the facts, and report them, annexed to the petition, to the Secretary of the Treasury, who, in accordance with general rules by him prescribed under section 5293, may "mitigate or remit such fine, forfeiture, or penalty" if "the same was incurred without *willful negligence* or *intention of fraud* in the person incurring the same;" and the Secretary may "direct the *prosecution*, if any has been instituted for the recovery thereof, to cease and be discontinued," etc.

The power of remission is confined to persons who have incurred a fine, penalty, forfeiture, or disability under specified provisions of law. None of these terms can properly be construed to include the imposition of a *discriminating tax* upon vessels having a foreign officer. Such a case is not one

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 Withdrawal of National Bank Notes.
 

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to which the power of *mitigation* could well extend, yet this power, under section 5292, is co-extensive with that of remission, according to the discretion of the Secretary.

I conclude that the tax accruing under section 4219, as amended, is not a *penalty* capable of being remitted or mitigated under sections 5292, 5293.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WM. WINDOM,

*Secretary of the Treasury.*

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 WITHDRAWAL OF NATIONAL BANK NOTES.

Under section 4 of the act of June 20, 1874, chapter 343, a national banking association, desiring to withdraw its circulating notes and take up the bonds deposited with the United States Treasurer as security therefor, may do so by depositing with the Treasurer the required amount in *lawful money*, whether this consists of coin or of legal-tender notes.

DEPARTMENT OF JUSTICE,

June 14, 1881.

SIR: Yours of the 6th instant desires my opinion "as to whether, under the provisions of section 4, act of June 20, 1874, national banks desiring to withdraw circulating notes are required to deposit *legal-tender notes* with the Treasurer of the United States before the surrender by him of United States bonds held to secure said circulating notes?"

The act of June 20, 1874, chapter 343, section 4, reads:

"SEC. 4. That any association organized under this act, or any of the acts of which this is an amendment, desiring to withdraw its circulating notes, in whole or in part, may, upon the deposit of *lawful money* with the Treasurer of the United States in sums of not less than nine thousand dollars, take up the bonds which said association has on deposit with the Treasurer for the security of such circulating notes; which bonds shall be assigned to the bank in the manner specified in the nineteenth section of the national bank act; and the

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Withdrawal of National Bank Notes.

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outstanding notes of said association to an amount equal to the legal-tender notes deposited shall be redeemed at the Treasury of the United States, and destroyed as now provided by law." (18 Stats., 124.)

From the papers accompanying your letter I learn that the query suggested arises from the fact that, while the first clause of section 4, as above quoted, permits the withdrawal of bank notes upon the deposit of *lawful money*, the concluding one authorizes the redemption and destruction of such notes only "to an amount equal to the *legal-tender notes* deposited;" and that while the United States Treasurer considers his authority to surrender and assign bonds, as well as to redeem and destroy bank notes, to be thus limited "to an amount equal to the legal-tender notes deposited," the Comptroller of the Currency, on the contrary, holds that the banks may withdraw their bonds upon a deposit of anything that is "lawful money to the requisite amount."

The latter appears to me to be the correct view, even if the result should be that the Treasurer's power to redeem circulation would be more limited than that of the banks to withdraw their bonds.

The language of this section is almost too unambiguous for construction. It expressly confers upon these banking associations the right to deposit sums of not less than \$9,000 in lawful money and take up the bonds deposited as security for circulating notes. That these words, as here used, possess their ordinary signification, is apparent from the phraseology of concomitant and other provisions of law, and from considerations touching the general subject. The first of the latter to suggest itself is the purpose for which the bonds are originally deposited with the Treasurer of the United States. As observed by my predecessor (16 Opin., 666), this purpose is to secure the bill-holders; to insure performance by the bank of its promise to redeem its issues in lawful money; *i. e.*, in coin or legal-tender bills of the United States. This purpose is accomplished, if the bank desires to take up its bonds, equally by depositing coin or legal-tender notes, which are now equivalent to coin.

Such is the requirement in case any association wishes to take up all its bonds and withdraw from business. Revised

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Withdrawal of National Bank Notes.

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Statutes, section 5222, says that "within six months from the date of the vote to go into liquidation the association shall deposit with the Treasurer of the United States lawful money of the United States sufficient to redeem all its outstanding circulation." What is "*lawful money*" is stated in Revised Statutes, sections 3585, 3586, amended by act of February 28, 1878, chapter 20, and Rev. Stat., secs. 3588, 3589.

Revised Statutes, section 5224, provides that "whenever a sufficient deposit of *lawful money* to redeem the outstanding circulation of an association proposing to close its business has been made, the bonds deposited by the association to secure payment of its notes shall be reassigned to it."

Section 5226 permits notes which any such institution "fails to redeem *in the lawful money* of the United States" to be protested. Under the next section (5227) a special agent is "to ascertain whether it has refused to pay its circulating notes in the lawful money of the United States when demanded;" and if he reports such to be the case, its bonds are forfeited to the United States, and it is prohibited (by section 5228) from continuing business.

Thereupon, under section 5229, the Comptroller of the Currency is to notify "the holders of the circulating notes of such association to present them for payment at the Treasury of the United States, and the same shall be paid as presented in *lawful money* of the United States."

Of like purport are the other sections of the act of June 20, 1874, chapter 343, of which the fourth section is under consideration. Section 7 requires the Comptroller of the Currency to make requisitions upon certain of these banks to withdraw and return a stated portion of their circulation, "or, in lieu thereof, to deposit in the Treasury of the United States *lawful money* sufficient to redeem such circulation, and upon the return of the circulation required, or the deposit of *lawful money*," a proportionate amount of their bonds is to be restored to them (18 Stats., 124). The following section (8) authorizes a sale of the bonds, upon failure to return circulation or deposit lawful money, as required under the preceding section.

I can come to no other conclusion than that a deposit of lawful money to the amount mentioned in the act will au-

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Disbursement of Public Money.

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thorize the banking association making the deposit to receive a proportionate amount of its bonds, although the lawful money so deposited be coin instead of legal-tender notes.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WM. WINDOM,

*Secretary of the Treasury.*

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## DISBURSEMENT OF PUBLIC MONEY.

Where B., not holding any office under the United States requiring him to give bond, was appointed an agent to disburse funds appropriated to build the custom-house and post-office building in the city of Philadelphia, Pa.: *Held* that, in view of the provisions of sections 3657, 3658, and 255, Revised Statutes, the appointment of B. was improvidently made; that he was not lawfully empowered to receive or disburse the public funds placed in his hands; and that, under existing legislation, he is not entitled to any compensation for his services as such disbursing agent.

DEPARTMENT OF JUSTICE,

June 15, 1881.

SIR: Before I could reply satisfactorily to yours of the 21st ultimo, relating to the commission to be allowed to Hon. H. H. Bingham, as disbursing agent of the sums appropriated to build the custom-house and post-office building at Philadelphia, it became necessary for me to know whether or not (May 9, 1873) he held any office under the United States requiring him to give bond. Accordingly I addressed you upon this subject on the 29th ultimo, and learn from yours of the 6th instant that he held no such office; nor were you able to direct me to any law, nor can I find any, authorizing the appointment conferred upon him.

In the margin of the several sections of the Revised Statutes, to which I refer as pertinent to the present inquiry, will be found noted the earlier statutes in force May 9, 1873, upon which each such section is based. As the revision adopts substantially the language of the earlier acts reproduced, I refer to its sections in this letter, because more readily and conveniently consulted, though I have carefully examined the original statutes.

Revised Statutes, section 3657, *requires collectors of customs* "to act as disbursing agents for the payment of all mon-

## Disbursement of Public Money.

eyes that are or may hereafter be appropriated for the construction of custom-houses," etc., "with such compensation, *not exceeding* one-quarter of one per centum, as the Secretary of the Treasury may deem equitable and just."

"SEC. 3658. *Where there is no collector* at the place of location of any public work specified in the preceding section, the Secretary of the Treasury may appoint a disbursing agent for the payment of all moneys appropriated for the construction of any such public work, with such compensation as he may deem equitable and just."

There was a collector at Philadelphia, so this section can not apply to the present case.

"SEC. 255. The Secretary of the Treasury may *designate* any *officer of the United States*, who has given bonds for the faithful performance of his duties, to be disbursing agent for the payment of all moneys appropriated for the construction of public buildings authorized by law *within the district* of such officer."

Mr. Bingham does not come within the terms of either of these provisions. I can find no other. I therefore conclude that his appointment was improvidently made; that he was not entitled to receive or disburse the public funds which were placed in his hands without warrant of law, to the custody of which another person was entitled by law; and that, under existing legislation, he is not entitled to *any* compensation for his services as such disbursing agent.

I regret being constrained to announce this conclusion, since I have no doubt the appointment was made and accepted in good faith, without knowledge that the expiration of Mr. Bingham's term as postmaster affected his eligibility, and that he has well and faithfully performed the duty of receiving and disbursing the funds applied to the construction of the public building at Philadelphia while he acted as agent for that purpose. But the law is so clear, that I can give no different opinion, leaving it to Congress, if it sees fit, to relieve from any hardship which a rigid adherence to the statutes may impose under the facts of this particular case.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WM. WINDOM,  
*Secretary of the Treasury.*

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Civil Engineers in the Navy.

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## CIVIL ENGINEERS IN THE NAVY.

Civil engineers in the naval service are officers in the Navy, possessing defined relative rank with other naval officers.

They may be retired from active service and placed on the retired list under the statutory provisions (see secs. 1443 *et seq.*, Rev. Stat.) regulating the retirement of officers in the Navy.

## DEPARTMENT OF JUSTICE,

*June 17, 1881.*

SIR: Your letter of the 12th of April last, inclosing a communication from B. F. Chandler and others, civil engineers in the Navy, requests my opinion upon the following questions:

"(1) Are civil engineers of the Navy officers in the Navy or civil officers connected with the Navy?"

"(2) If it be held that civil engineers are officers in the Navy, are they entitled to be retired from active duty and placed on the retired list under the provisions of law regulating the retirement of officers of the Navy?"

In submitting these questions you state that prior to the act of March 2, 1867, civil engineers were appointed by the Secretary of the Navy, and that since then, under authority of that act (sec. 1413, Rev. Stat.), they have been commissioned by the President, by and with the advice and consent of the Senate; that they were appropriated for as part of the civil establishment at the several navy-yards and stations under the control of the Bureau of Yards and Docks until 1870, when their pay was regulated by the third section of the act of July 15 of that year (sec. 1556, Rev. Stat.), fixing the annual pay of officers of the Navy on the active list, and that appropriations for their pay have been made since 1870 under the head of "Pay of the Navy."

You further state that the authority of the President, under the act of March 3, 1871, chapter 117 (sec. 1478, Rev. Stat.), "to determine and fix the relative rank of civil engineers," was not exercised until the 24th of February last, when their rank was by him fixed as follows: One with the relative rank of captain, two with the relative rank of commander, three with the relative rank of lieutenant-commander, and four

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Civil Engineers in the Navy.

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with the relative rank of lieutenant, which action was promulgated by a general order issued by the Secretary of the Navy on that day.

The appointment of civil engineers is now regulated by section 1413, Revised Statutes, which provides that "The President, by and with the advice and consent of the Senate, may appoint a civil engineer and a naval storekeeper at each of the navy-yards where such officers may be necessary."

Referring to this provision, Attorney-General Devens, in an opinion dated November 18, 1878 (16 Opin., 203), remarks that it "indicates that the appointment is to some extent a local one, and that the appointee can not be a naval officer in the full sense of the term." However, on examining section 1480, Revised Statutes, as amended by the act of February 27, 1877, chapter 69, I find that civil engineers there appear to be distinctly recognized by Congress as one of the "staff corps of the Navy." Thus that section, as amended, declares that "the grades established in the six preceding sections for the *staff corps of the Navy* shall be filled," etc. One of the "six preceding sections" is section 1478, which provides for fixing the relative rank of civil engineers. These officers are plainly included among those contemplated by the amended section 1480 as belonging to the "staff corps of the Navy." Viewing, then, this legislation in connection with that to which you refer, I am led to the conclusion that the civil engineers in the naval service must be regarded as a staff corps of the Navy; that they are "officers in the Navy," possessing (under the recent order made pursuant to section 1478, cited above) defined relative rank as such with other officers in the Navy, and are not merely "civil officers connected with the Navy."

The next inquiry is, Are they within the law providing for the retirement of naval officers from active service?

Originally, under the act of February 28, 1855, chapter 127 and its supplements, only line officers of the Navy were authorized to be retired, that is to say, placed on a list called in that act "the reserved list." By the act of February 21, 1861, chapter 49, authority was given the President to retire medical officers of the Navy found permanently incapable of further service at sea. The act of August 3, 1861, cha-

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Civil Engineers in the Navy.

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pter 42, made other and more enlarged provision for the retirement of both line and staff officers, which superseded the previous provisions on the subject; and additional provision was made by the act of December 21, 1861, by which any naval officer in the service, after he "shall have been borne on the Naval Register forty-five years, or shall be of the age of sixty-two years," was to be retired. The two last-mentioned acts, as it would seem, were construed to extend generally to the line and staff officers, including among the latter chaplains, professors of mathematics, and naval constructors.

The law at present in force is contained in section 1443 *et seq.*, in chapter 3, title 15, Revised Statutes. The language of that and the following section—"any officer of the Navy," "any officer below the rank of vice-admiral"—embraces by its generality officers in the several staff corps of the Navy as well as officers in the line. So, likewise, the words "any officer," in section 1448. The provisions of these sections (it is deemed unnecessary to particularize others) are not less comprehensive than those which were previously in force. If civil engineers constitute, as I think they do, a staff corps of the Navy, these officers fully come within the terms and scope of this legislation. I am accordingly of opinion that they may be retired thereunder from active service and placed on the retired list of the Navy.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. WM. H. HUNT,

*Secretary of the Navy.*

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Agricultural College Lands.

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## AGRICULTURAL COLLEGE LANDS.

Under the act of June 2, 1862, chapter 130 (donating public lands to establish agricultural colleges), the State of Kansas became entitled to a certain quantity (90,000 acres) of public lands lying within her borders subject to private entry at the minimum price of \$1.25 an acre; and by the same act it was declared that if such lands are selected from those which have been raised to double minimum in consequence of railroad grants, they shall be computed at the maximum price and the number of acres diminished proportionately. Subsequently the Secretary of the Interior, pursuant to the provisions of the railroad land-grant act of July 1, 1862, chapter 120, made a withdrawal of lands for 15 miles on each side of the general route (as designated) of a certain railroad within the scope of the act, part of which lands (the even-numbered sections) were afterwards restored to market and raised to double minimum lands, in accordance with the act of March 3, 1853, chapter 143. Thereafter, in September, 1865, 7,682.92 acres of these double-minimum lands at \$2.50 an acre were certified to and accepted by the State of Kansas, in lieu of 15,365.84 acres at the minimum price of \$1.25 an acre, which last completed the quantity to which the State was originally entitled: *Held* that the claim of the State under the said act of July 2, 1862, is fully satisfied, and that it is not entitled to a further allowance thereunder (as claimed) of 7,682.92 acres.

## DEPARTMENT OF JUSTICE,

*June 17, 1881.*

SIR: Upon the 7th instant the Acting Secretary of the Interior asked my opinion whether the State of Kansas has now the right to select 7,682.92 acres to make up the full quantity of land granted to her by the act of July 2, 1862, chapter 130 (donating public lands to establish agricultural colleges), or whether she had already received it, upon the state of facts and legislation mentioned substantially as follows:

Under the method of apportionment established by that act (12 Stats., 503) Kansas became entitled to 90,000 acres, in sections or subdivisions of not less than a quarter section, of land lying within her borders subject to private entry at the minimum price of \$1.25 an acre. The fifth section stated the conditions of the grant, among which is the following:

"Fifth. When lands shall be selected from those which have been raised to double the minimum price, in consequence of railroad grants, they shall be computed to the States at the

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Agricultural College Lands.

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maximum price and the number of acres proportionally diminished." (12 Stats., 505, sec. 5, item fifth.)

Thus while the original basis of apportionment is of minimum lands, distributed among the States according to Senatorial and Congressional representation, every State is given the option of selecting, in lieu of these minimum lands, one-half as many acres of maximum lands, for the whole or any portion of her grant. In locating her grant Kansas is assumed at the Land Office to have selected 7,682.92 acres of maximum lands, charged to her as equivalent to 15,365.84 of the 90,000 acres of minimum lands accruing to her under this act. The correctness of this assumption is the point in controversy.

On the day before the approval of the principal statute to be construed, the act of July 1, 1862, chapter 120, was approved, granting (inter alia) to the corporation of which the Kansas Pacific Railway Company is now the legitimate successor and representative the odd-numbered sections within 10 miles on each side of the road it was to build "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." (12 Stats., 492, sec. 3; 494, sec. 9.)

By the seventh section of this act, the Union Pacific Railroad Company was required to file an assent to its provisions with the Secretary of the Interior within one year; and "within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of the said designated route or routes to be withdrawn from pre-emption, private entry, or sale; and when any portion of said road shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off, as fast as may be necessary, for the purposes herein named." (12 Stats., 473, sec. 7.)

By the ninth section, the Leavenworth, Pawnee and Western Railroad Company—the first predecessor in title of the present Kansas Pacific Railway Company—was authorized to construct a railroad between specified points "upon the same

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Agricultural College Lands.

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terms and conditions in all respects as are provided in this act for the construction of the railroad and the telegraph line first mentioned," with the further condition that "the route in Kansas west of the meridian of Fort Riley to the aforesaid point on the one-hundreth meridian of longitude is to be subject to the approval of the President of the United States, and to be determined by him on actual survey." (12 Stats., 493, 494, sec. 9.)

Between the 1st and 17th days of July, 1862, the railroad company filed in the Interior Department a map of its contemplated route, and thereupon, on the last-named day, the Secretary of the Interior caused all the public lands (regardless of whether the sections were odd or even numbered) within 15 miles of said designated route to be withdrawn from preemption, private entry, and sale, conformably to the requirements of the seventh section of said act, as then interpreted by him.

But in the following September he approved the action of the Commissioner of the General Land Office in restoring to market, as *double-minimum lands*, the even-numbered sections within said limits; and thereafterwards these sections were, from time to time, as they were sought after, pre-empted, entered, and sold as double-minimum lands.

Upon the 16th day of September, 1865, the 7,682.92 acres in question, made up of even-numbered sections within the 15 miles limit of said railroad, were certified to and accepted by the State of Kansas as double minimum lands, at \$2.50 an acre, and in lieu of 15,365.84 acres at the minimum price of \$1.25 an acre.

Assuming to do so by virtue of the first section of the act of July 3, 1866, chapter 159 (14 Stats., 79), the railroad company in that year changed the western portion of its line so as to run up the Smoky Hill Fork instead of the Republican Fork of the Kansas River; but these 7,682.92 acres were within 15 miles of the later as well as of the earlier location.

The State now contends that *no* lands should have been withdrawn from market until the line of the railroad was established by visible marks upon the face of the earth; that until this was done, the sections selected and certified to her were all in the market at \$1.25 an acre, so that only the

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Agricultural College Lands.

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quantity (7,682.92 acres,) actually certified on the 16th day of September, 1865, instead of twice that number of acres, should have been deducted from the balance of the 90,000 acres then due her, leaving her still entitled to another 7,682.92 acres.

The rulings of earlier Land Commissioners and the decisions of the Supreme Court, to which my attention was invited by the elaborate printed brief, as well as by the oral argument of counsel for the State, have no decisive effect upon the question now to be determined, because those rulings were under statutes of different phraseology from that employed in the railroad act of July 1, 1862; or else, like all of the judicial decisions cited, relate entirely to the determination of the question when the title to the *odd*-numbered sections granted vested in the grantee (12 U. S., 733, and 97 U. S., 491).

The opinion in this last case notices that an act like that of July 1, 1862, chap. 120, operates both as a law and as a conveyance. As a law it bestows a present interest, though as a conveyance it can not vest title in the grantee to any particular section until by actual designation of the railway line it is shown that such section falls within the prescribed limit of distance.

Upon the designation within two years from July 1, 1862, of the general route of the road and the filing of a map of the same, the Secretary of the Interior was bound to cause to be withdrawn from pre-emption, private entry, and sale the land within 15 miles of said designated route. It was the exclusive right of the functionary upon whom that duty rested to determine when the contingency had arisen which demanded its performance (*Martin v. Mott*, 12 Wheat., 19); and it is of no consequence whether any map can now be found in the Department certified by him or otherwise authenticated, since no such authentication is required by the statute. The Secretary's order of withdrawal communicated July 17, 1862, through the Land Commissioner, the ordinary and proper medium, is sufficient evidence of the due performance of all requisite preliminaries.

Whatever may have been the rulings or decisions under other statutes, the seventh section of the act of July 1, 1862,

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Agricultural College Lands.

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chap. 120 (12 Stats., 493), made it imperative upon the Secretary to withdraw from private entry the lands within the stated distance immediately upon the designation of the general route and the filing of the map, although such lands were to be surveyed and set off only as each portion of the route was *finally located*, which may be considered equivalent to the other term "definitely fixed." No language could more clearly show that the withdrawal from private entry of the odd-numbered sections was to precede the final location of the road.

By the act of March 3, 1853, chap. 143 (10 Stats., 244), it was enacted, "That the pre-emption laws of the United States, as they now exist, be, and they are hereby, extended over the *alternate* reserved sections of public lands along the lines of all the railroads in the United States wherever public lands have been or may be granted by acts of Congress \* \* \* and provided further that the price to be paid shall in all cases be two dollars and fifty cents per acre," etc.

When the odd-numbered sections, for a distance of 15 miles each side of a given line, are withdrawn as granted to aid a railroad to be built upon the so designated route, the even-numbered sections should immediately be raised in price to \$2.50 an acre, as being "the alternate reserved sections" along the line of such road, within the meaning of the act of March 3, 1853, chap. 143; and when Kansas has selected lands accurately described in the fifth conditional clause of the fifth section of the donating statute as "those which have been raised to double the minimum price in consequence of railroad grants," she can not properly complain that they are computed to her as there directed, "at the maximum price, and the number of acres proportionately diminished." (12 Stats., 505.)

She has now no further claim to lands under this act of July 2, 1862, chap. 130.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. S. J. KIRKWOOD,

*Secretary of the Interior.*

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Intruders on Lands of the Choctaws and Chickasaws.

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INTRUDERS ON LANDS OF THE CHOCTAWS AND CHICKASAWS.

The Interior Department has power to remove intruders from lands of the Choctaws and Chickasaws in the Indian Territory, and it is its duty to do so under the provisions of the treaty of June 22, 1855 (11 Stats., 612-613.)

All persons (other than Choctaws or Chickasaws by birth or adoption) not comprised within some one of the excepted classes described in article 7 of that treaty, or article 43 of the treaty of April 28, 1866 (14 Stats., 779), are intruders.

The permit laws of the Choctaws and Chickasaws are valid; and those persons who are permitted thereunder to reside within their territory, or to be employed by their citizens as teachers, mechanics, or skilled agriculturists, may enter and remain on the lands of these tribes; but the right to remain there ceases when the permit expires.

Teachers, mechanics, and skilled agriculturists, not in the employ of the Government, and who are on such lands without permits from the Indian authorities, are intruders, and should be removed therefrom.

DEPARTMENT OF JUSTICE,

*June 25, 1881.*

SIR: Upon the 22d instant you presented for my consideration the following questions:

"First. Has the Department of the Interior the power, and is it its duty, to remove from the lands of the Choctaw and Chickasaw Indians in the Indian Territory all intruders?"

"Second. In view of article 13, treaty of October 18, 1820, (7 Stats., 213), articles 7 and 14, treaty of June 22, 1855 (11 Stats., 612, 613, 614), articles 38 and 43, treaty of April 28, 1866 (14 Stats., 779), and the laws of the United States relating to the subject, who are to be deemed intruders?"

"Third. Are the Choctaw and Chickasaw permit laws valid?"

"Fourth. What whites, other than officers, agents, and employés of the Government and of any internal improvement company, and persons traveling through or temporarily sojourning in the said nations, are privileged to enter and remain on the said Indian lands?"

"Fifth. Is this Department bound to remove teachers, mechanics, and skilled agriculturists, not in the employ of the United States, who are on the lands of said Indians without permits from the Indian authorities?"

(1) Your first question I answer affirmatively.

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Intruders on Lands of the Choctaws and Chickasaws.

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The seventh section of the treaty of June 22, 1855 (11 Stats., 612-613), stipulates that intruders shall be removed from and kept out of the Territory by the United States agent (a subordinate of the Interior Department), assisted, if necessary, by the military. See also article 14 of the same treaty. (*Id.*, 614, bottom.)

While article 43 of the treaty of April 28, 1866 (14 Stats., 779), defined anew the meaning of the word "intruders," the forty-fifth section (*ib.*) preserves to the Indians, as towards those coming within the existing definitions, "all the rights, privileges and *immunities* heretofore possessed by said nations or individuals, or to which they were entitled under the treaties and legislation heretofore made and had," which are "declared to be in full force, so far as they are consistent with the provisions of this treaty." (*Id.*, 779, 780.)

The method of removal provided in the earlier treaty is strictly in harmony with the provisions of the later. It may be observed that, on the contrary, article 21 of the treaty of June 22, 1855 (Statutes 615), expressly declares that it supersedes all prior negotiations, so that of October 18, 1820, will not come directly under consideration in answering your inquiries.

(2) All persons (other than Choctaws or Chickasaws, by birth or adoption) not comprised within some one of the excepted classes, described in article 7 of the treaty of June 22, 1855 (11 Statutes, 612, 613), or article 43 of the treaty of April 28, 1866 (14 Statutes, 779), are intruders. Those excepted are: (1) the employés of the Government and their families and servants; (2) employés of any internal improvement company; (3) travelers or temporary sojourners; (4) those holding permits from one of these Indian tribes to reside within their limits, or *white persons* who (under their laws) are employed as "teachers, mechanics, or skilled in agriculture."

Everybody else is an intruder, to be removed as aforesaid.

(3) The permit laws of the Choctaws and Chickasaws are valid. While the last treaty, article 43, is not to be construed so as "to *prevent* the employment, *temporarily*, of white persons who are teachers, mechanics, or skilled in agriculture," it does not compel their engagement, "nor prevent

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Intruders on Lands of the Choctaws and Chickasaws.

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the legislative authorities of the respective nations" from legislating upon the subject by imposing such terms and conditions upon the employment of whites by their own subjects as to them seemed good.

The validity of such permits is recognized by the concluding clause of article 7 of the treaty of June 22, 1855 (11 Statutes, 613), which is not inconsistent with the terms of the later treaty.

(4) Replying to your fourth question: it seems from what has been already said that, besides those persons or classes mentioned by you, only those who have been permitted by the Choctaws or Chickasaws to reside within their limits, or to be employed by their citizens as teachers, mechanics, or skilled agriculturists, have a right to enter and remain on the lands of these tribes; and the right to remain is gone when the permit has expired.

(5) It is a further corollary, from what has been premised, that a white person, whose employment by Choctaws or Chickasaws as a teacher, mechanic, or skilled agriculturist has not been sanctioned by the legislative authorities of the respective nations, has no more right to remain in the Territory without a permit than has a person of a different vocation; consequently, such an one would be an *intruder* to be removed in the same manner and by the same means that all are who fall into this category.

I am with great respect, your obedient servant,  
WAYNE MACVEAGH.

Hon. S. J. KIRKWOOD,  
*Secretary of the Interior.*

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South Pass of the Mississippi.

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## SOUTH PASS OF THE MISSISSIPPI.

Upon consideration of the statutes relating to the improvement of the South Pass of the Mississippi: *Held* (1) that a navigable depth of 26 feet is thereby required to be maintained through the shoal at the head of the Pass; (2) that a navigable depth of 26 feet is required to be maintained through the Pass itself; (3) that, in view of the facts set forth by the engineer officer charged with the duty of ascertaining the depth of the channel at these points from time to time, Captain Eads is lawfully entitled to payment for maintenance of the required depth there during the quarter ending May 9, 1881.

## DEPARTMENT OF JUSTICE,

*June 27, 1881.*

SIR: In reply to yours of the 23d of May relating to the South Pass of the Mississippi, I submit the following opinion:

All questions betwixt the United States and Captain Eads, in respect to the securing of the depth of water stipulated for under his contract, having happily ended, such as may arise in future will probably concern only the *maintenance* for a specified period of what has thus been secured. Such in general is the matter under consideration.

Referring to the statutes upon the subject and certain inclosed papers containing the measurements by Captain Heuer, U. S. Army, of the depth of water through the South Pass and the channel external thereto for the quarter ending May 9, 1881, and an indorsement thereupon by General Wright, Chief of Engineers, etc., you ask whether it is required—

(1) That a navigable depth of 26 feet be maintained through the shoal at the head of the Pass.

(2) That a navigable depth of 26 feet be maintained through the Pass itself.

(3) In view of the facts set forth on the certified statement herewith, is Captain Eads lawfully entitled to payment for maintenance during the quarter ended May 9, 1881?

The certificate of Captain Heuer is, "that between the dates of February 10, 1881, and March 23, 1881, both dates inclusive, a channel having a navigable depth of 26 feet was maintained through the Pass itself, but from March 24,

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South Pass of the Mississippi.

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1881, to May 9, 1881, such navigable depth did not exist in the Pass at a point about  $1\frac{3}{8}$  miles below Head of Passes light-house, when depths are reduced to a plane indicated by a reading of 1.8 feet on gauge at Head of Passes light-house; considering the stage of the river during this latter period the actual depth would be 1.7 feet more at high tide, 1.2 feet more at low tide, and 1.5 feet more at mean tide than when reduced to the plane above referred to.

If a plane of reference in conformity with the opinion by Special Orders 229, Headquarters Acting Adjutant-General's Office, November 2, 1876, be used, that is, if the measure of depths be from the level of average tides occurring during the stage of the river when the volume is least, then the depth would be 0.6 feet more than if reduced to a plane indicated by a reading of 1.8 feet on gauge.

The following are therefore the results, according to the above statements, viz:

First. In the first case, that is, when depths are reduced to a plane indicated by 1.8 feet on gauge, the distance over which "a navigable depth of 26 feet" did not exist from March 24, 1881, to May 9, 1881, was 240 feet, and the least depth over this area was 25 feet.

Second. If the stage of river at the time the soundings were made be considered, then "a navigable depth of 26 feet" did exist throughout the quarter from February 10 to May 9, 1881, inclusive, for in this case the plane of the river surface at low tide was 1.2 feet above the plane to which the depths were reduced (1.80 feet on gauge).

Third. If the depths are reduced to a plane which is the mean of the high waters of the river at this place, taken for one or more lunations, when the river is at what is known as its low stage, then the least depth would be 25.6 feet, and the distance over which "a navigable depth of 26 feet" did not exist would be 240 feet.

I need not repeat the general outline of the acts of Congress (1875, chap. 134, secs. 4, etc.; 1878, chap. 313, and 1879, chap. 181, sec. 9) under which the work of deepening the South Pass of the Mississippi and the channel betwixt that Pass and deep water in the Gulf has been done, especially as they have already formed the subject of several

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South Pass of the Mississippi.

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communications betwixt the Attorney-General and Secretary of War. It is enough to say that, in carrying out their purpose, the depth of water to be obtained by Captain Eads should be a *permanent* depth. Congress required that it should be *maintained* by him during a probationary period of twenty-five years after completion.

The general question now presented is how far this *maintenance* was to extend, both as regards distance and depth. Conceding that the external channel was to be maintained, Captain Eads insists that no condition as to maintenance was imposed in regard to the Pass itself, including the bar at its head.

A perusal of the legislation and the transactions, by reports, etc., attending upon this *improvement* shows that the principal matter desired and stipulated for was the creation and maintenance of a channel outside of the mouths of the Pass. It was as to this matter that anxiety was exhibited, and conflicting opinions betwixt experts were pronounced. This entirely overshadowed other particulars in the general object of Congress, which undoubtedly was to provide a suitable commercial passway betwixt the deep water in the Mississippi River and that in the Gulf of Mexico. The structure of the *Act of Concession* of 1875, as it is called, faithfully respects this state of things: so much so, indeed, that Captain Eads, who had borne a principal part in the preliminary discussion and in promoting the act of 1875, came to doubt whether he was required to *secure* a passway anywhere except outside the mouth of the Pass, and although that doubt, after the adverse decisions of Attorneys-General Taft and Devens thereupon, can no longer be entertained in this Department, it seems still to be held speculatively, and during the discussion of the questions now under consideration has been suggested as reasonable by the learned gentleman who has so well conducted Captain Eads's claim.

This denial, although yielded *practically*, so far as regards *securing* the channel through the Pass, is now urged against a claim upon behalf of the United States that such channel shall be also *maintained* during the twenty years mentioned in the statute.

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South Pass of the Mississippi.

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At first blush, perhaps, it might be considered that Congress must have intended that Captain Eads should guaranty the permanence, as well of one essential part of the line to be created as of another. This at least is what seems to be demanded by the interests of that *commerce* which authorized the legislation.

Still it may be that as the exceptionally difficult and engrossing engineering problem concerned the outer bar alone, and as the bar at the Head of the Pass and any obstruction that may arise within it were probably regarded as controllable by the ordinary resources of the Government, these might designedly have been left to be dealt with in the same way as ordinary obstructions in other parts of the river.

And, even if this had not been in fact concluded, and the failure to provide for the *maintenance* of the whole line of work were by mere inadvertence, still Captain Eads will be entitled to the benefit of the omission, his contract and its obligations being determinable, of course, only by what appears *within the four corners* of the different acts: such four corners being ascertainable, however, in the way prescribed for all statutes which confer conditional *privileges* upon particular persons.

The legislation in question, then, has for its general object a single result—*i. e.*, the securing of a transit which in its nature was *individual*, or, in other words, one part of which was useless except in connection with the others. That transit, as conclusively defined by Congress, required *necessarily* a final depth of 26 feet in some parts and of 30 in others. I think that it is not unreasonable to conclude that, considering the class of statutes to which this belongs, provisions for the permanence of any substantive fraction of this unit must be taken as applying to every substantive portion not expressly or by strong implication excepted. In saying this I also bear in mind that although it appears on the face of these statutes that Congress meant to require Captain Eads *to secure the whole line*, such was its engrossment with the problem as to the *outer bar* that it was with some difficulty that such meaning was to be gathered. A provision, therefore, that in words expressly applied to the *overshadowing part only*, where the context or reason of the thing does not contradict, may well be applied to the whole.

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South Pass of the Mississippi.

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Again, upon the face of the legislation, Congress regarded the water which flows through the South Pass as the principal power for securing and maintaining the channel through the outer bar. That Pass, including its *head* as *secured*, was to have a navigable depth of 26 feet throughout. In this condition it was to be not only necessarily subsidiary to the navigation of the outer channel, but also may be considered as a part of the *auxiliary works* for maintaining that *channel*. The *water* passing through is the power, but the channel through which it flows, so far as required to be secured, is a part of the *works*. As the natural configuration of land may in a general sense be included in the military "works" which avail themselves thereof, so where a statute requires of a civil engineer that a certain pass shall be 26 feet in depth throughout, the whole of it may be spoken of as his work, although the larger part had that depth by nature. In the present case, Congress having specified the depth necessary, it is no longer a question for speculation whether an auxiliary work of less depth might not have accomplished the same result upon the outer bar. It is upon this point only that the discretion in respect to means, etc., which was so well intrusted to Captain Eads by Congress, was abridged, and that probably because here the means was also itself to be a part of the general substantive end in view.

In this connection it is necessary to add only that in stipulating expressly for the maintenance of a particular depth over the outer bar, Congress has deliberately required that depth to continue to be the result of Captain Eads's general works: the *end* must be one accomplished at all times by certain *means*, for the act of 1875, section 6, provides "That after said channel of 30 feet in depth, etc., shall have been secured, \$100,000 per annum shall be paid in equal quarterly payments during each and every year that said channel, etc., shall have been maintained by said Eads and his associates by the effect of said jetties and auxiliary works aforesaid in said Pass for a period of 20 years after said depth shall have been secured. Although later legislation has affected some of the details of this section, the provision underlined remains intact.

All the works, therefore, necessary to secure the depth over the outer bar are equally required to maintain that depth.

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Suits in Revenue Cases.,

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I have already said that *the South Pass*, as defined in the particular conformation thereof specified by Congress, is to be reckoned as a part of those works.

As regards the depth of water to be maintained through the South Pass—specified as a *navigable depth of 26 feet*—it will be seen by an opinion of Attorney-General Devens that the word *navigable* refers here to the width and practicability otherwise of the water spoken of rather than to its perpendicular measurement. The question here is as regards the latter. This, by the statute, is to occur from quarter to quarter. The payment at the close of any quarter is to be defined by the state of things during such quarter. Taking, then, the rule laid down by General Wright, on the indorsement mentioned above as being correct for the depth of a river in general, it seems to me that when the question is as to such depth during a specified portion of time, this latter element must be added to the former. I conclude that the proper measurement for any quarter is “from the level of average high tides occurring during the stage of the river within such quarter” when the volume is least.

Upon the whole, therefore, I hope you will understand me as answering each of the above questions in the affirmative.

Very respectfully, your obedient servant,

S. F. PHILLIPS,  
*Acting Attorney-General.*

The SECRETARY OF WAR.

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SUITS IN REVENUE CASES.

The remedy by suit against a collector, provided by section 3011, Revised Statutes, is given to an importer only who has paid the duties to the collector whom he proposes to make defendant in the suit; it does not apply to cases in which, by reason of the failure of the importer to pay the collector, the payment is sought to be enforced by suit against the former.

There is no statute giving the Secretary of the Treasury any direct control over suits instituted for the collection of unpaid duties.

DEPARTMENT OF JUSTICE,  
*June 29, 1881.*

SIR: Yours of the 20th instant states that the Union Manufacturing Company imported on March 3, 1867, an invoice

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Suits in Revenue Cases.

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of wool. Entry was made in the custom-house within a few days thereafter, and the collector assessed duties on the wool under the act approved March 2, 1867. Protest and appeal against such assessment were made upon the ground that said act, although bearing the record that it was signed on March 2, 1867, was, in fact, not signed until March 4, 1867. The decision of the collector was affirmed.

A case involving a like point was tried in court, and it was decided upon the testimony of Ex-President Johnson, that the act was really not signed until March 4, 1867. A writ of error was taken in the case to the Supreme Court, but it was subsequently abandoned by the Attorney-General, and the writ was dismissed by the court.

The Union Manufacturing Company failed to pay the additional duties due under said original liquidation, and the matter lay until 1878 without action, when a suit was brought to enforce payment of such duties, which suit is now pending.

Upon the foregoing facts you propound these two questions:

"First, whether the said company still has the right to pay the duties demanded and recover the amount unjustly exacted by suit from the collector.

"Second, whether the Secretary of the Treasury has the legal right and power to order a nonsuit in this action, or that the suit be dismissed."

(1) The remedy by suit against a collector, provided by Revised Statutes, section 3011, is given only to an importer who pays the duties assessed upon his importations to the collector whom he proposes to make defendant in the suit to recover them. It does not apply to cases in which, by reason of a failure and refusal to pay the collector, the matter has been transferred to a district attorney for enforcement by process of the courts.

(2) A careful examination of the statutes fails to discover any provision of law giving to the Secretary of the Treasury any direct control over suits instituted for the collection of unpaid duties.

Revised Statutes, section 379, places these matters in charge of the Solicitor of the Treasury, who is there given "power to instruct the district-attorneys, marshals, and clerks

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 Redemption of National Bank Notes.
 

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of the circuit and district courts in all matters and proceedings appertaining to suits in which the United States is a party or interested," as he may see cause. As matter of prudent administration, in my judgment, this discretion of the Solicitor of the Treasury should be exercised under the supervision and with the approbation of the Secretary or the head of the Department to which the Solicitor is attached as subordinate. The power to release alleged legal claims of the Government upon the citizen for revenue is one to be exercised with the utmost caution, and the responsibility for such action ought not to rest entirely upon any subordinate departmental officer.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WM. WINDOM,

*Secretary of the Treasury.*

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 REDEMPTION OF NATIONAL BANK NOTES.

A national banking association may, under section 3 of the act of June 20, 1874, chapter 343, deposit coin in the Treasury for the redemption of its circulation.

The Treasury, while privileged under sections 3 and 4 of that act to redeem such circulation in United States notes, has also the right to redeem the same circulation in coin.

DEPARTMENT OF JUSTICE,

June 30, 1881.

SIR: To your inquiry of the 6th I replied on the 14th instant, that a national bank has the right, under the act of June 20, 1874, chapter 343, section 4, to deposit coin for the purpose of withdrawing bonds and reducing circulation; whereupon, on this latter date, you address to me these two additional questions:

(1) Whether, under section 3 of the act approved June 20, 1874, chapter 343, a national banking association may deposit any lawful money other than United States notes for the redemption of its circulating notes?

(2) Whether the holders of the notes of any solvent national banking association may demand of the Treasurer of

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Redemption of National Bank Notes.

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the United States, under the provisions of sections 3 and 4 of that act, redemption of such notes in United States notes?

First. Inasmuch as section 3 of the act of June 20, 1874, chapter 343, only requires that the banks "shall at all times keep and have on deposit in the Treasury of the United States, in the *lawful money* of the United States, a sum equal to 5 per centum of its circulation, to be held and used for the redemption of such circulation," I think for the reasons indicated in my opinion of the 14th instant, construing similar language in the next section, that a bank *may* deposit coin for the purpose mentioned in the third section, as above quoted.

Second. I think the Treasury, while having the privilege under section 3 and 4 of said act to redeem bank circulation in United States notes, has the *right* to pay them in coin.

The Government notes are promises to pay dollars; for such promises the thing promised may properly be substituted by the promissor.

Again, this act of June 20, 1874, chapter 343, was not intended to repeal or affect the general provisions of law (Rev. Stat., secs. 3585 *et. seq.*) making the coins of the United States a legal tender in all payments. These statutes fix the medium in which, as well as in United States notes, the banks may redeem its circulation at its own counter; and it gives the same privilege to the Treasurer, paying them at the Treasury of the United States.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WM. WINDOM,

*Secretary of the Treasury.*

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Status of Officers and Enlisted Men of the Signal Corps.

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STATUS OF OFFICERS AND ENLISTED MEN OF THE SIGNAL CORPS.

Officers and enlisted men of the Signal Corps (other than those who are *detailed* for service therein) are a part of the Army only in this sense, namely, that in general they are liable to such duties and entitled to such privileges, appertaining to the Army, as can be performed and enjoyed without severance from the Signal Service.

They belong to a special service in the Army, and are subject to military government; but they are not by law transferable to ordinary military duty, and are organically separate and distinct from the Army proper.

DEPARTMENT OF JUSTICE.

July 1, 1881.

SIR: Herewith I submit a reply to yours of the 23d of May, addressed to the Attorney-General, in regard to the status of certain officers and privates of the Signal Corps.

After referring to a recent communication addressed to you by the Chief Signal Officer, recommending that Sergeants Wright and Green, of the Signal Corps, be appointed "second lieutenants Signal Corps, U. S. Army," you ask for an opinion, whether—

(1) Officers engaged in the performance of duties under sections 221 to 223 of the Revised Statutes, other than the Chief Signal Officer and officers detailed from the Army, as organized by chapter 1, title 14, of the Revised Statutes, are a part of the Army of the United States?

(2) The enlisted men engaged in the performance of the duties under sections 221 to 223 of the Revised Statutes, not detailed for such duties from any branch of the Army named in section 1094 of the Revised Statutes, but having indorsed on their enlistment papers the words "enlisted for the Signal Corps, U. S. Army," are a part of the Army of the United States?

The conclusion which I have reached is that *such officers and enlisted men form a part of the Army of the United States, in the sense that in general they are liable to all army duties and entitled to all army privileges that can be performed or be enjoyed without severing them from the Signal Service.* In other words, as regards all such persons there is no such

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Status of Officers and Enlisted Men of the Signal Corps.

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*circulation*, so to say, betwixt this *member* of the Army and other *members* thereof as exists betwixt those other members *inter se*. This state of *separation* between persons who be long to the same Army may be anomalous, but results, nevertheless, from the legislation upon the subject: legislation which, concerning as it does a novel department of public administration, may well be expected to present novel features of detail. At all events, nothing occurs, or has been suggested, to indicate that such details are unsuitable to the general purposes of Congress as regards the Signal Service, or are beyond its legislative competency. The question is one of statutory interpretation only, and seems not difficult. It will require a consideration only of certain brief statutes recently enacted, beginning with the acts of 1866, as found in sections 1195 and 1196 of the Revised Statutes.

These sections create a *signal force*, to consist of one chief signal officer, having the rank of colonel of cavalry (*now* brigadier-general, act of 1880, chap. 235), and of six officers from the Corps of Engineers, and not exceeding one hundred non-commissioned officers and privates from the Battalion of Engineers.

By a resolution adopted February 9, 1870 (17 Stats., 369), the Secretary of War was authorized and required to provide for taking certain meteorological observations and for giving notice of the approach and force of storms. This (or it may be some other action of Congress which has not been brought to my attention), was in practice construed as giving the Secretary authority to enlarge the *Signal force*, as above expressly defined; and other departures perhaps were made under *orders*, so that at the time of the passage of the act of 1874 (below) the force, other than commissioned officers, consisted, as I gather (although that point is not material here), of about three hundred men—one hundred and fifty of them being sergeants—who had been recruited for that special purpose, under promise by the Secretary that they should not be transferred to any other part of the Army. (See papers inclosed with your communication.)

In this state of things the act of 1874, chapter 285 (18 Stat., 72), after providing that no money therein appropriated should be paid for recruiting the Army beyond 25,000 en-

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Status of Officers and Enlisted Men of the Signal Corps.

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listed men, added as follows: "Nothing however in this act shall be construed to diminish the Signal Service, which shall be maintained as now organized under the authority of the Secretary of War."

It seems probable that as regards *enlisted men* (the only object of the above restrictive legislation, including the *exception* thereto) this act substituted the method adopted by the Secretary for recruiting the Signal Service as above *in place of* that specified in the act of 1866; *i. e.*, that it provided that thereafter there were to be no enlisted men *detailled* from the Army into that service, but that *special enlistment* therefor was to take the place of detail.

The policy of the act of 1874, in confining the number of enlisted men in the Army proper to 25,000, coupled with the *exception*, as above, in favor of the Signal Service, has been kept up in all later Army appropriation acts. (See 18 Stats., 452; 19 *id.*, 97; 20 *id.*, 146, and the Acts of 1880, chap. 81, and of February 24, 1881.)

Of these *exceptions* it will be necessary to quote only that contained in the act of 1880, chapter 81, as modified by the act of 1880, chapter 235, and the act of 1878, chapter 359, 20 Stat., 219. After inserting such modifications into its text, the exception in the statute first cited is as follows: "Nothing, however, in this act shall be construed to prevent enlistments for the Signal Service, which shall hereafter be maintained as now organized and provided by law, with a force of enlisted men not exceeding five hundred, viz: One hundred and fifty sergeants, thirty corporals, and three hundred and twenty privates; and two sergeants may in each year be appointed to be second lieutenants."

The act of February 24, 1881, is to precisely the same effect.

(1) Upon a perusal of the above legislation it appears that under the act of 1866 the enlisted men of the Signal Service were merely *soldiers of the United States Army under a special detail, that was liable to be revoked at any moment*. Subject to whatever modification the promise by the Secretary that they should not be transferred to ordinary military duty could effect, this status continued until after the act of 1874. Since then it has been plain that *by law* they can not be so

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 Status of Officers and Enlisted Men of the Signal Corps.
 

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transferred. But that in other respects they continue to belong to the United States Army seems equally plain: *Exceptio probat regulam*. For, to omit many details that concur to the same end, they continue to be *enlisted*. Enlistment is rendered necessary by all the statutes. The phrase is, no doubt, "enlisted *for* the Signal Service." But this phrase is elliptical, and suggests the question: Enlisted *into* what? Although the statutes *express* the purpose of the enlistment, they leave to be implied a portion of the effect of that ceremony. (Rev. Stat., secs. 1111, 1112, 1118, 1119; see also secs. 1608, 1610, etc). Therefore the effect *ordinarily* produced by enlistment is to be implied—the more so when the history of the legislation upon this subject is considered; so that the answer to the above question will be, *enlisted into the United States Army*.

The *practice* in enlisting men has been to the same effect. The same general form is used by the Government for ordinary enlistments into the Army and for those into the Signal Service; the person enlisted being required in both cases to acknowledge in terms that thereby he becomes "a soldier in the Army of the United States of America."

Upon the whole, it seems that this point needs no further elaboration.

(2) But that these enlisted men became members of only a special service in the Army seems equally certain.

The adoption by Congress in 1874 of the Secretary's engagement not to *transfer* to ordinary military duty persons enlisting for Signal Service did not create a mere *personal privilege*, which might, as *jus pro se introductum*, be *waived* by such persons with the consent of the Secretary. The statute gave the consent of the *United States* to the *condition* required by the enlisted man, viz: that he should not be transferred to ordinary military duty. And thereupon a special statute was created which could not be gotten rid of by either party to the enlistment without the consent of the other; the Secretary, in the mean time, not being empowered, either impliedly or otherwise, to represent the United States in giving that consent.

I apprehend that, in the present state of legislation, the only way in which a person enlisted for the Signal Serv-

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Status of Officers and Enlisted Men of the Signal Corps.

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ice can enter the ordinary military service, is by being discharged from the former, and thereupon re-enlisting in the latter as usual.

That the ordinary military force cannot, without further legislation, be recruited by transferring or detailing there into the signal force, is a proposition which, as it appears to be a proper deduction from the acts themselves, so also is strongly fortified by recalling the history of the half-dozen statutes since 1874, which contain the provisions under consideration. It will be recollected by all that the number of the ordinary force of enlisted men in the Army (25,000) was the result of prolonged and heated discussions in Congress, turning upon objections made by one party to any larger number *subject to the ordinary duties of soldiers*. The contest upon this point did not involve men enlisted in the Signal Service. No party seemed to suppose that the force of *soldiers*, in the general sense of the word, was larger either in *esse* or in *posse*, because of the Signal Corps. Indeed, the particular jealousy of Congress in regard to the Army proper was so far from manifesting itself in regard to the Signal Service, that whilst the members of the former were diminished, or by compromise rigidly held at a certain figure, those of the latter since 1874 have been once and again *increased nem. con.*, as it were. I gather from this that Congress was of opinion that the number in the Army proper could not by mere executive action, and without their consent, be increased beyond the 25,000, by transferring thereto the 500 or other number of the Signal Service. In other words, that it was the intention of Congress to create for that service a distinct order of soldiers—*i. e.*, of persons whom it is best for the public service to be subject to military rules and government, but who nevertheless are organically separate from the general mass of enlisted soldiers.

It follows that the second lieutenants spoken of in the act of 1880, above, do not belong to the Army proper. The enactment upon this point is in general terms; but Congress must be taken to have had in view the creation of a higher rank *of the same sort* as that from which the person *appointed* was to come.

If I have rightly construed this legislation in other re-

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Status of Officers and Enlisted Men of the Signal Corps.

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spects, it is an alteration not so much of *rank* as of military *quality* that is required to change a Signal Service sergeant into a second lieutenant in the Army proper. The general scope of the enactment in which this clause is found concerns the Signal Corps, and in the absence of express qualification to the contrary, that scope must define the extent of any otherwise indefinite term therein found: *nos citur a sociis*.

Besides this observation, it is noticeable that at the same time that this act was pending before Congress that body was maturing another (1880, chap. 263, secs. 3 and 4, 20 Stat., 150), applying in terms to non-commissioned officers and second lieutenants of the Army proper, and very much more restricted in operation. It is hardly supposable that the legislature intended in both cases to meet and remedy *the same* evil. This circumstance renders more certain the above conclusion, that *the evil* sought to be remedied in the eighty-first chapter of the act of 1880, by the creation of second lieutenants, was one affecting the Signal Service alone, and therefore that *the remedy* therein devised is to be restrained in its effect to that.

Upon the whole I have to repeat, as an answer to the questions stated by you, the qualified language first above employed.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

*Solicitor-General.*

The SECRETARY OF WAR.

Approved:

WAYNE MACVEAGH.

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Pay of Charles M. Blake.

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## PAY OF CHARLES M. BLAKE.

The amount drawn by Charles M. Blake for pay as chaplain in the Army from May 14, 1878, to the date of his acceptance of appointment as post chaplain, with advice and consent of the Senate (May 23, 1881), may be charged against him and withheld from his pay thereafter accruing.

*Semble*, however, that he may be allowed the benefit of his actual service from June 21, 1878, to March 4, 1879, for longevity.

## DEPARTMENT OF JUSTICE,

*July 5, 1881.*

SIR: Yours of the 16th instant, addressed to the Attorney-General, is as follows:

"In a letter addressed to this Department, under date of the 9th instant, the Second Comptroller of the Treasury states that 'in consequence of Special Order No. 212, War Department, Adjutant-General's Office, October 2, 1878 (copy inclosed), Rev. Charles M. Blake drew pay as post chaplain, U. S. Army, from May 14, 1878, to a date later than the 1st of January of the present year,' and 'in view of the decision recently made by the Supreme Court in the suit brought by said Blake against the United States, and his subsequent appointment as post chaplain by the President, by and with the advice and consent of the Senate,' requests that the following questions be submitted for his opinion to the honorable the Attorney-General:

"(1) Should the amount drawn by said Blake as pay for the period, or any part of the period, from May 14, 1878, to the date of the acceptance by him of said appointment, by and with the advice and consent of the Senate, be charged against him, and withheld from his pay hereafter to accrue, or otherwise collected?"

"(2) Is said Blake entitled to be credited with said period, or any part thereof, in computing his service for longevity pay?"

"I have the honor to ask that you will please favor this Department with an opinion upon the questions submitted by the Second Comptroller, as above quoted."

The *order* referred to above gives effect to certain action by President Hayes, September 28, 1878, pronouncing Mr.

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Pay of Charles M. Blake.

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Blake's resignation *void*, for insanity, and restoring him to his place as post chaplain, with pay from May 14, 1878, at which time a vacancy "not since filled" had occurred in that class of officers.

With all due deference to the grave official action by which President Hayes sought to rectify the miscarriage which he considered to have taken place in Mr. Blake's case, since the decision by the Supreme Court, alluded to by you, that must be assumed to have been a *nullity*, at least for the special purpose intended. It is true that there is ground—*ut res magis valeat*, etc.—to consider such action as substantially a reappointment of Mr. Blake to a vacancy then existing. But legislation has greatly narrowed the effect of such *reappointment*. It is probable that *both* section 1756 and section 1761 of the Revised Statutes will be found to forbid his receiving *pay* thereunder. For, as it must be assumed under the decision by the court that he was then entirely denuded of all official character under his previous appointment, it was necessary that he should have taken the *oath of office* again after his *restoration* in order to be entitled to *pay*; and so also, inasmuch as *the Senate was in session* at the time of the origination of the vacancy so filled, any receipt of salary under the circumstances, upon that account, was expressly forbidden.

(1) I therefore answer your first question in the affirmative, remarking that obviously it can make no difference that the payments during the period mentioned were *by consent of the executive department*. That consent was official *laches*, and does not affect any otherwise just claim of the United States.

(2) In reply to the second question: I am of the opinion that the more probable conclusion is that the intended restoration was virtually an appointment to fill a vacancy, which, although it originated while the Senate was in session, still also "happened" to exist during the recess next ensuing, and therefore was valid, except for the purpose mentioned above, until the end of the next session of the Senate—*i. e.*, from the 21st of June, 1878, until the 4th of March, 1879, no relation of the operation of such appointment being admissible for any part of the period during

## Retired List of the Navy.

which the Senate was in session. Nothing occurs to me to prevent Mr. Blake's being allowed the benefit for longevity pay of this period of eight months and eleven days of actual service under the above action of President Hayes.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

*Solicitor-General.*

The SECRETARY OF WAR.

Approved :

WAYNE MACVEAGH.

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 RETIRED LIST OF THE NAVY.

Where W., while holding a commission as captain in the Navy, was appointed to the office of Chief of the Bureau of Navigation, with the relative rank of commodore: *Held* that in case of his retirement by reason of a disability incident to the service, or on his application, during his incumbency of that office, and whilst he is borne on the Navy Register as a captain, he should be placed on the retired list with the rank of captain, and that, on being thus retired, he would be entitled to 75 per centum of the sea-pay of officers of that rank.

DEPARTMENT OF JUSTICE,

*July 8, 1881.*

SIR: Your letter of the 1st of July submits to me two questions:

First. In the event of a finding by the retiring board, in the case of Commodore Whiting, that he is incapacitated for active service, and that his incapacity is a result of an incident of the service, or of his application for retirement, under the provisions of section 1443, Revised Statutes, can he be placed on the retired list, with the rank which he now holds, that of commodore?

Second. If Commodore Whiting should be retired under either of the conditions stated in the preceding question, would he be entitled to 75 per centum of the sea-pay of officers of the rank which he now holds, that of commodore? (Sec. 1588, Rev. Stat.)

In my opinion both questions must be answered in the negative.

It is stated in your communication that on the 11th of June, 1878, William D. Whiting was appointed Chief of the

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Retired List of the Navy.

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Bureau of Navigation, and it appears from the Navy Register that he is borne on the list of captains by virtue of a commission dated 19th August, 1872.

The appointment by the President, by and with the advice and consent of the Senate (under secs. 421 and 422, Rev. Stat.), of Captain Whiting to be Chief of the Bureau of Navigation was an investiture of him with an additional office.

While Chief of the Bureau of Navigation he remains a captain in the Navy (10 Opin., 378). By virtue of the former office, his orders have the force and effect of an order emanating from the Secretary of the Navy (sec. 420), and while he continues to hold *said office* he has the relative rank of commodore (sec. 1472.) The first question you suggest is as to the meaning of the words "grades to which they belonged respectively at the time of their retirement and continue to be borne on the Navy Register" in section 1457. The real question is, if Captain Whiting should be retired while holding the office of captain of the United States Navy and the office of Chief of the Bureau of Navigation, does he belong to the grade of commodore or of captain?

The discussion by my predecessor (16 Opin., 414) of the words "grade" and "relative rank" leave little to be said on the difference in their meaning. While this case is not in strict analogy with the one then under consideration, the principles controlling in that opinion seem applicable here, and I am of opinion that the grade to which Mr. Whiting belongs for the purposes of section 1457 is that of captain, and not that of the relative rank incidental to his temporary occupation of another and distinct office. For it is by virtue of his office of captain, and not of chief of a bureau, that he is entitled to examination for promotion and that he is entitled or subject to retirement. It may further be remarked that within the language of section 1457 he "continues to be borne on the Navy Register" as captain, and that the moment he ceases to be chief of the bureau he loses his relative rank of commodore.

Congress has expressly provided (sec. 1473) that the chiefs of four bureaus shall on retirement retain their relative rank of commodore. *Expressio unius exclusio alterius.*

This difference between the relative rank of the chief of

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the bureau and his actual grade is still further recognized in the provision for his compensation.

The pay of chiefs of bureaus in the Navy Department shall be the highest pay of the grade to which they belong, but not below that of commodore. (Sec. 1565.)

It is under section 1583 that your second question arises; that section provides that the pay of officers retired under certain circumstances "shall be equal to 75 per centum of the sea-pay provided by this chapter for the grade or rank which they held respectively at the time of their retirement." The answer to the former question goes far to solve this; for in the absence of express provision it would be an imputation of inconsistency to hold that Congress meant to retire an officer as captain with the pay of commodore.

The retirement of Commodore Whiting will find him holding the actual grade of captain and the relative rank of commodore.

The selection of a line officer for the chiefship of a bureau is not limited to commodores and those lower in rank, and if (sec. 1472) the office is filled by a line officer above the rank of commodore, he acquires no relative rank. Similarly he is to be paid (sec. 1565) according to the highest pay of his grade, and when retired, will receive (sec. 1588) 75 per centum of the sea-pay for the grade or rank which he held. The interchangeability of the words rank and grade throughout the statutes leads me to the conclusion that whatever may have been their original differences in meaning, they are now to a great extent used synonymously—especially when we find them, as in section 1588, connected by a disjunctive, and with no indication that either shall control. Of course the words "relative rank" bear an entirely different meaning, as pointed out by Attorney-General Devens, (*supra*), and it seems to me that if relative rank was meant instead of actual rank or actual grade, it would have been so expressed.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

The SECRETARY of the NAVY.

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Soldiers' Home.

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## SOLDIERS' HOME.

The Soldiers' Home is not entitled to bounty land-warrants belonging to the estates of deceased soldiers which remain unclaimed for the period of three years after their decease.

## DEPARTMENT OF JUSTICE,

*July 9, 1881.*

SIR: Your communication of the 28th June, 1881, requests my opinion as to the right of the Soldiers' Home to certain bounty land-warrants which have been turned over as part of the effects of deceased soldiers. An examination of the warrants (furnished me by the Second Auditor) shows them to have been issued in the years 1848, 1851, and 1852, under the act of 11th February, 1847, sec. 9, (11 Stat., 125.)

Section 7 of the act of March 3, 1850, (9 Stat., 596) provided "That for the support of the said institution [the Military Asylum, now the Soldiers' Home], the following funds shall be set apart, and the same are hereby appropriated, \* \* \* all moneys belonging to the estates of deceased soldiers which now are or may be hereafter unclaimed," etc.

An examination of the other sources of revenue enumerated in that section shows them all to be, as indicated in the opening sentence, "funds." The act of 1847 provides (sec. 9) that the certificate or warrant may be located by the warrantee or his heirs at law, and it was not until 1852 that they were made assignable, and not until 1858 that they were declared to be personal chattels. It is clear, therefore, that when the act of 1851 was passed these certificates were not meant to be included in the word "moneys." Subsequent legislation, while it has changed their character somewhat, still leaves them chattels personal, assignable by an instrument in writing, but has not made them money.

It is suggested by the commissioners of the Soldiers' Home that the certificate might be converted into money and the proceeds held by them until demanded by the heirs or legal representatives of the deceased. Apart from the absence of any express enactment authorizing the transfer by the commissioners of such warrants, it seems to me that section 4818, Revised Statutes, does not contemplate the

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Commissioner of the District of Columbia.

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transfer to the commissioners of any part of the estates of deceased soldiers except money. The certificate is not even a right to demand money; it is merely a "right to locate said warrant on any quarter section of land subject to private entry." The personal effects which would perish with the using are not "transferred" to the Soldiers' Home, but money, having no ear-marks, can at any time be returned in kind. Land warrants, or any other species of personal property which, to become available, would have to be sold, might or might not be replaced in kind, and, when demanded, might command in the market a very different price from that obtained by the commissioners.

I am of opinion that the Soldiers' Home is not entitled to bounty land-warrants belonging to the estates of deceased soldiers and which remain unclaimed for the period of three years subsequent to the death of such soldiers.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

The SECRETARY OF WAR.

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COMMISSIONER OF THE DISTRICT OF COLUMBIA.

Under the act of June 11, 1878, chapter 180, with the exception of the first two, *all* appointments to the office of Commissioner of the District of Columbia are to be for the term of three years.

DEPARTMENT OF JUSTICE,

July 11, 1881.

SIR: The commission of Hon. Thomas P. Morgan, Commissioner of this District, was issued December 16, 1879, and expires in three years from that day.

The act of June 11, 1878, chapter 180, section 1, concluding paragraph (20 Stats., 103) declares that "The official term of said Commissioners appointed from civil life shall be three years, and until their successors shall be appointed and qualified, but the *first* appointment shall be one Commissioner for one year and one for two years and at the expiration of their respective terms their successors shall be appointed for three years."

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Dutiable Matter Transmitted by Mail.

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It is seen that neither of the first appointments were to be for three years; but *all* subsequent ones are to be for that term.

The word "term," or "terms," in this statute, was construed by my predecessor to mean "term of service," and by his direction a letter from this to the State Department was written December 22, 1879, to the effect that Mr. Morgan's commission should be made to run for three years from date, and it was accordingly so framed.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

The PRESIDENT.

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## DUTIABLE MATTER TRANSMITTED BY MAIL.

Foreign magazines and newspapers transported by mail from Canada into the United States, addressed to dealers, for the purpose of sale by them, or of being by them distributed among subscribers, are dutiable. The postal convention with Canada and the act of March 3, 1879, chapter 180, section 15, were not intended to affect existing tariff laws.

DEPARTMENT OF JUSTICE,

July 11, 1881.

SIR: Yours of the 1st instant, with accompanying papers, states, substantially, that tons of foreign English magazines and newspapers are constantly being shipped by mail over the Grand Trunk Railway from Toronto, Canada, into this country, addressed to dealers, for the purpose of sale by them, or of being by them distributed among individual subscribers in the United States. The collector at Detroit wishes to know from you whether these magazines and newspapers are subject to duty, or are entitled to free entry, if received here by mail, they being clearly dutiable if otherwise brought into this country.

In my opinion, such matter, so addressed and forwarded, *is* subject to the established rate of duty. The postal convention with Canada and the act of March 3, 1879, chapter 180, section 15 (20 Stats., 359), in stipulating for the transmission and delivery of such matter through the mails "at the same *rate* as if published in the United States," were not

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 Reservation of Land for Public Uses.
 

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intended to affect existing tariff legislation, but simply to say that the postage should be the same wherever published, leaving other charges to be determined by other statutes.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WM. WINDOM,

*Secretary of the Treasury.*

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 RESERVATION OF LAND FOR PUBLIC USES.

Where public land subject to homestead settlement has been duly entered under the homestead law, it thenceforth ceases to be at the disposal of the Government so long as the entry of the settler subsists. Hence it cannot, whilst such entry stands, be set apart by the President for a military reservation.

Where, however, a pre-emption filing has been made of public lands, the land covered thereby may be set apart by the President for such reservation at any time previous to payment and entry by the settler under the pre-emption law.

DEPARTMENT OF JUSTICE,

July 15, 1881.

SIR: By a letter received from the chief clerk of your Department, dated the 27th of May last, inclosing papers relative to the proposed withdrawal of lands for a military reservation on the Rio de la Plata, in Colorado, I am informed that you desire my opinion upon this question, "Where public lands have been surveyed, and pre-emption filings or homestead entries have been made in accordance with law, may the Executive, prior to the completion of full title in the settler, set apart and declare a military reservation embracing the lands of said settler?" I have now the honor to state to you my views thereon.

That the President has power to reserve from sale and to set apart for public uses such portions of the public domain as are required by the exigencies of the public service to be appropriated to those uses is too well established to admit of doubt. In the case of *Grisar v. McDowell* (6 Wall., 381) the Supreme Court remark: "From an early period in the history of the Government it has been the practice of the President to order from time to time, as the exigencies of the public service required,

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parcels of land belonging to the United States to be reserved from sale and set apart for public uses. The authority of the President in this respect is recognized in numerous acts of Congress." The question submitted indeed assumes the existence of the power, and suggests that there is doubt only as to whether it can be exercised with respect to lands which at the time are included in a pre-emption filing or homestead entry, and to which steps have thus already been taken by an individual to acquire title under the general land laws.

The power of the President above adverted to extends to lands which belong to the public domain of the United States, and are subject to sale or other disposal under the general land laws. It is capable of being exercised with respect to such lands so long as they remain unappropriated and unsevered from the public domain, but no longer. When an *entry* thereof is made under those laws (whether pre-emption, homestead, or other) the particular land entered thus becomes segregated from the mass of public lands and takes the character of private property. "In no just sense," observe the Supreme Court in *Witherspoon v. Duncan* (4 Wall., 218) "can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property."

In regard to the case of a homestead settlement, the claim of a settler is initiated by an *entry of the land*. This is effected by making an application at the proper land office, filing the affidavit and paying the amount required by section 2290, Revised Statutes, and also paying the commissions as required by section 2238, Revised Statutes. It is true a certificate of entry is not then given, the certificate being, under section 2291, Revised Statutes, withheld "until the expiration of five years from the date of such entry," at the end of which period, or within two years thereafter, upon proof of settlement and cultivation during that period and payment of the commissions remaining to be paid, it is issued. But upon the entry a right in favor of the settler would seem to attach to the land, which is liable to be defeated only by failure on his part to comply with the requirements of the homestead law in regard to settlement and cultivation. This right amounts to an equitable interest in the land, subject to the future perform-

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ance by the settler of certain conditions (in the event of which he becomes invested with full and complete ownership), and until forfeited by failure to perform the conditions, it must, I think, prevail not only against individuals, but against the Government. That, in contemplation of the homestead law, the settler acquires by his entry an immediate interest in the land, which (for the time being, at least) thereby becomes severed from the public domain, appears from the language of section 2297, Revised Statutes, wherein it is provided that in certain contingencies "the land so entered shall revert to the Government."

The result to which this leads is, that where public land subject to homestead settlement has been duly entered under the homestead law, it thenceforth ceases to be at the disposal of the Government so long as the claim or entry of the settler subsists.

The case of a settlement on public land with a view to acquire a right of pre-emption, where a declaratory statement has been filed, and other preliminary steps taken by the settler, but by whom payment for and entry of the land have not yet been made, which remains to be considered, is relieved of much of its difficulty by the doctrine laid down by the Supreme Court in *Frisbie v. Whitney* (19 Wall., 187), and in the *Yosemite Valley case* (15 Wall., 77), respecting the right of the settler in such case as against the Government. It was there held that under the pre-emption laws mere occupation and improvement of any portion of the public lands of the United States, with a view to pre-emption, do not confer upon the settler any right in the land occupied *as against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper; that the power of regulation and disposition, conferred upon Congress by the Constitution, only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler; that until such payment and entry the acts of Congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner—that is, the privilege to purchase them in that event in preference to others; and that the legislation

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thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale or to appropriate them to any public use. "It seems to us little less than absurd," remark the court in the case last cited, "to say that a settler or any other person by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires a right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition."

Thus it is no longer an open question that public land, covered by a pre-emption filing, but as to which there has been no payment and entry by the settler, may be appropriated by Congress to public purposes or otherwise disposed of without thereby involving a collision with, or invasion of, any right or interest of the settler in and to the land.

The inquiry now is, can the President in such case, under his power to reserve and set apart lands of the United States for public uses, make a similar disposition of the land for such uses. It should be borne in mind that the power of the President here referred to is recognized by Congress (*Grisar v. McDowell*, *supra*). Such recognition is equivalent to a grant. Hence, in reserving and setting apart a particular piece of land for a special public use, the President must be regarded as acting by authority of Congress, and unless this authority is so restricted as not to extend to land covered by a pre-emption filing (and I am not aware of any restriction of that sort), I do not see why such land may not be as effectually reserved and set apart by the President thereunder as by the direct action of Congress. Land so covered, where payment and entry have not been made, is subject to appropriation or disposal by Congress simply because, although occupied with a view to pre-emption, the settler has not by virtue of his occupancy acquired any interest whatever therein as against the Government, and it still remains a part of the public domain, over the disposition of which Congress has full control. Upon the same ground (namely, the absence of any right in the settler to the land as against the Government, and the fact that it continues in the absolute ownership of the latter) such land would seem to be sub-

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Postage on Newspapers and Periodicals.

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ject to reservation for public uses by the President when acting by authority of Congress.

I am therefore of opinion that where a homestead entry of public lands has been made by a settler, the land so entered cannot, whilst such entry stands, be set apart by the President for a military reservation, even "prior to the completion of full title in the settler;" but that where a pre-emption filing has been made of public lands, the land covered thereby may be set apart by the President for such reservation at any time previous to payment and entry by the settler under the pre-emption law.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. ROBERT T. LINCOLN,  
*Secretary of War.*

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## POSTAGE ON NEWSPAPERS AND PERIODICALS.

Where there is a letter-carrier office at the place of publication of a newspaper or periodical, and at another place, within another postal district, a news-dealer is employed by the publisher to mail at the latter place copies of the newspaper or periodical intended for distribution to subscribers at the former place, such copies are not entitled to transmission through the mail at pound rates.

DEPARTMENT OF JUSTICE,  
July 19, 1881.

SIR: Your letter of the 7th ultimo, directing attention to the opinion of my predecessor, dated December 19, 1878, in regard to the rate of postage chargeable on the *Missionary Herald* in the case there stated (16 Opin., 232), requests my views upon a point not considered in that opinion.

It was there held that the *Herald*, a paper issued less often than once a week, the publication office whereof is in Boston, Mass., but its subscription list as to Boston and the adjacent towns was owned by a news-dealer in Brookline, Mass., from whence all copies intended for subscribers in Boston were mailed by him, was chargeable only with pound rates on the copies so mailed. It was also observed in that connection that there was no suggestion that the ownership of the subscription list by the news-dealer was a mere pretense, or that

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Postage on Newspapers and Periodicals.

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he was simply an agent of the publishers of the paper; and as to what the law might be in such case (this is the point above referred to) no opinion was expressed.

In the case just adverted to, *i. e.*, where there is a letter-carrier office at the place of publication of a paper, and a news-dealer at another place, within another postal district, is employed by the publishers to mail at the latter place copies of the paper intended for distribution to subscribers at the former place, I am of opinion that under the existing law the copies would not be entitled to transmission through the mail at the pound rates.

Under section 11 of the act of March 3, 1879, chapter 180, such copies would be entitled to transmission at pound rates if "sent from a news agency to actual subscribers thereto, or to other news agents." But by "actual subscribers thereto," as there used, is meant those who have in fact subscribed for the paper, and who, in subscribing, have dealt directly with the agency, or whose subscriptions have been obtained for or in behalf of the agency, the subscription list being in all cases owned by the news-dealer. To give this provision a more enlarged construction, and hold that it entitles a news-dealer to mail from his agency, at the pound rates, to actual subscribers to a paper where the subscription list does not belong to him, and where he acts merely as an employé or agent of the publishers, would open the door to an evasion of the proviso in section 25 of same act, by which special rates are prescribed for newspapers (excepting weeklies) and periodicals, when the same are deposited in a letter-carrier office for delivery by its carriers. It would enable publishers of newspapers and periodicals, where the office of publication is at a place at which there is a letter-carrier office, to obtain delivery to their subscribers in such place by the letter-carriers without payment of the special rates, simply by employing a news-dealer in some adjacent town or village to do the mailing there.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. THOMAS L. JAMES,  
*Postmaster-General.*

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Compensation for Expedited Postal Service.

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## COMPENSATION FOR EXPEDITED POSTAL SERVICE.

The *proviso* in the second section of the act of April 7, 1880, chapter 78, limits the power of the Postmaster-General to allow increased pay for expedited service to fifty per centum of the compensation expressed in the original contract. The *original letting*, and not any subsequent increase of service and pay, under section 3960, Revised Statutes, is made the standard of limitation.

DEPARTMENT OF JUSTICE,  
July 20, 1881.

SIR: Referring me to sections 3960 and 3961 of the Revised Statutes, yours of the 6th ultimo asks whether the act of April 7, 1880, limits an allowance for expedition in carrying the mail to an amount not exceeding fifty per cent. upon the original compensation expressed in the contract, or to such contract price as increased by any additional allowance for increased service ordered under Revised Statutes, section 3960.

I understand *increase* of service mentioned in Revised Statutes, section 3960, to mean an additional number of trips above that originally contracted for, and expedited service to mean a speedier performance of each trip than was originally stipulated for.

Revised Statutes, section 3960, relating to increase of service, reads as follows:

"Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service, and when any such additional service is ordered, the sum to be allowed therefor shall be expressed in the order, and entered upon the books of the Department; and no compensation shall be paid for additional regular service rendered before the issue of such order."

The next section (3961), as to expediting service, reads thus:

"No extra allowance shall be made for any increase of expedition in carrying the mail unless thereby the employment of additional stock and carriers is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily

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Compensation for Expedited Postal Service.

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employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution."

The second section of the act approved April 7, 1880, chapter 48, contains this proviso :

"*Provided*, That the Postmaster-General shall not hereafter have the power to expedite the service under any contract either now existing or hereafter given, to a rate of pay exceeding fifty per centum upon the contract *as originally let*." (20 Stats., 72.)

The language of the proviso to the act of April 7, 1880, is entirely unambiguous. It limits the power of the Postmaster-General to pay for expedition to "fifty per centum of the contract as originally let."

The *original letting*, and not any subsequent increase of service and pay, is made the standard of limitation. To set up any subsequent increase of the original letting as such limitation would defeat the very purpose of the statute.

For instance, under this provision not more than \$500 additional compensation can be paid to expedite the service under contracts originally let for weekly trips at \$1,000 per annum. If this service should be increased to daily trips, with a proportionate increase of compensation, such compensation would be \$7,000 per annum. If, then, such increased service could be expedited to the extent of 50 per cent. of the increased sum, the sum allowed for expedition would be 350 per cent. of the rate of pay upon the contract as originally let, instead of 50 per cent. of that sum, the limit declared in the proviso to the act of Congress of April 7, 1880.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. THOMAS L. JAMES,

*Postmaster-General.*

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Military Reservation at Fort Fetterman.

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## MILITARY RESERVATION AT FORT FETTERMAN.

Where a part of the public domain has once been reserved by the President for military or other public purposes, and subsequently the land so reserved becomes unnecessary for such purposes, it can not be restored to the public domain without authority from Congress.

DEPARTMENT OF JUSTICE,  
*July 20, 1881.*

SIR: Your letter of the 11th of May last, inclosing a communication from the General of the Army and other papers in relation to the "hay reservation" at Fort Fetterman, Wyoming Territory, propounds the following question: "When a reservation of public lands is made by the President for military purposes, and at some subsequent period such lands become no longer necessary for the purposes for which they were reserved, may the President by a revocation of his order restore the lands to the public domain?"

This question, it is presumed, has especial reference to the above-mentioned reservation at Fort Fetterman, which your letter states "was duly declared and formally set apart by the President August 29, 1872."

Upon consideration I am of the opinion that the question propounded must be answered in the negative. In an opinion dated August 10, 1878, Attorney-General Devens observes that "if lands have been once set apart by the President in an order for military purposes, they can not again be restored to the condition of public lands or sold as such except by an authority of Congress" (16 Opin., 123). And a similar view of the subject is taken by Attorney-General Bates in an opinion dated November 8, 1862. (10 Opin., 360.)

The power of the President to reserve and set apart lands for public uses is recognized by Congress (*Grisar v. McDowell*, 6 Wall, 381). When, therefore, in the exercise of that power, the President creates a military reservation, he is to be regarded as acting by authority of Congress. The land included in the reservation thus becomes severed from the mass of public lands and appropriated to a particular public use by authority of Congress, which alone can authorize such disposition of the public domain. It cannot, therefore, be di-

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Commutation of Quarters.

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verted from that use or be reunited to the public domain and made subject to disposal under the general land laws except by the same authority. With this view accords the practice of Congress (indicating its adoption by that body, which is a controlling circumstance) as shown by numerous acts, passed from time to time, providing for the disposal of particular reservations which were abandoned or deemed no longer needed for the public service. The following are some of the more recent of these acts: Act of May 18, 1874, chapter 182; act of June 9, 1874, chapter 261; act of June 19, 1874, chapter 323; act of June 22, 1874, chapter 415; act of July 21, 1876, chapter 220; act of August 14, 1876, chapter 266; act of February 28, 1877, chapter 74; act of March 3, 1877, chapter 129; act of January 30, 1879, chapter 36; act of March 3, 1879, chapter 189; act of April 1, 1880, chapter 40; act of June 10, 1880, chapter 187; act of June 15, 1880, chapter 221.

In the case presented by your question, I am accordingly of the opinion (concurring in the views of my predecessors above referred to) that the lands cannot be restored to the public domain by the Executive without authority from Congress.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. ROBERT T. LINCOLN,  
*Secretary of War.*

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COMMUTATION OF QUARTERS.

An officer of the Army placed on waiting orders is not entitled to commutation for quarters under the *proviso* in section 9 of the act of June 18, 1878, chapter 263.

The word "places," as used in that *proviso*, comprehends only military posts and stations.

DEPARTMENT OF JUSTICE,

July 21, 1881.

SIR: I have examined the opinion of the Judge-Advocate-General, which was submitted to me under cover of your letter of the 17th ultimo, upon the question whether General Schofield (who was "placed on waiting orders" by an

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order issued from the Headquarters of the Army, dated May 6, 1881) is entitled to commutation for quarters while waiting orders, and I concur in the view there taken, namely, that General S. is not entitled to such commutation.

By section 24 of the act of July 15, 1870, chapter 294, commutation for quarters was abolished. Previous to that act the right to this allowance depended upon paragraph 1080 of the Army Regulations of 1863, which provided: "When public quarters can not be furnished to officers at stations without troops, \* \* \* quarters will be commuted at a rate fixed by the Secretary of War," etc. In the case of *United States v. Phisterer* (94 U. S., 219), it was held that an officer at his own home awaiting orders, and having no public duty to perform, was not entitled to commutation under that regulation, his home not being a "station" within the meaning thereof. But in the subsequent case of *United States v. Lippitt* (100 U. S., 663), where an officer on duty with his regiment was ordered away from his regiment to report in person to the headquarters of a department at another place, there to await further orders, it was held that (quarters, etc., in kind not having been furnished the officer at such headquarters), he was entitled to commutation. The latter case is distinguished from the former in this, that the place to which the officer was ordered was a military station, where it was his duty to go and remain, being subject to assignment to duty there, until ordered back to his regiment or otherwise relieved.

Commutation for quarters was afterwards restored by section 9 of the act of June 18, 1878, chapter 263, and it is now regulated by that section and by the first *proviso* in section 1 of the act of June 23, 1879, chapter 35. Section 9 of the act of 1878 provides "that at all posts and stations where there are public quarters belonging to the United States, officers may be furnished with quarters in kind in such public quarters, and not elsewhere, by the Quartermaster's Department, assigning to the officers of each grade, respectively, such number of rooms as is now allowed to such grade by the rules and regulations of the Army: *Provided*, That at places where there are no public quarters, commutation therefor may be paid by the Pay Department to the officer entitled

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to the same at a rate not exceeding \$10 per room per month," etc. The *proviso* in the act of 1879 declares that "no allowance shall be made for claims for quarters for servants," and makes the rate of commutation per room per month for officers' quarters \$12, instead of \$10, as provided by the act of 1878.

Whilst the *rate* is fixed by the *proviso* in the act of 1879, the allowance of commutation for officers' quarters is in every other respect governed by the ninth section of the act of 1878. In determining the meaning of the word "places," as used in the *proviso* in that section, the phrase in which that word occurs, viz, "that at places where the reare no public quarters," etc., should be viewed in connection with the language of the first clause of the section, viz, "that at all *posts* and *stations* where there are public quarters," etc.; and when thus viewed, it is obvious that military "posts" and "stations" are alone meant to be comprehended by the word "places." So that the *proviso* in said section, on which commutation for officers' quarters now depends, is to be construed as if it read, "that at *posts* and *stations* where there are no public quarters," etc.

As thus construed, the law under which commutation for quarters is at present allowable does not materially differ from the regulation under which such commutation was allowable previous to the act of 1870; and the ruling of the Supreme Court in the case of *United States v. Phisterer*, cited above, which arose under the regulation, seems to me to apply to the case of General Schofield now under consideration, which arises under the statute, and which is essentially the same as the other. The ground upon which the officer in the former case was held not to be entitled to commutation also exists here, and it, in my opinion, forms a sufficient bar to an allowance of commutation to General S. while on waiting orders.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. ROBERT T. LINCOLN,  
*Secretary of War.*

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Pension for Disability Incurred in Line of Duty.

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## PENSION FOR DISABILITY INCURRED IN LINE OF DUTY.

Consideration of legal principles applicable to the case of a claim for pension, where the injury followed the use of abusive language of the claimant towards his assailant.

DEPARTMENT OF JUSTICE,

July 22, 1881.

SIR: Your letter of the 22d of June states that Henry S. Wetmore, formally volunteer lieutenant, U. S. Navy, on the 4th of August, 1864, while in the service of the United States, and under orders to proceed to Columbus, Ohio, on public business, went to the depot of the Little Miami Railroad, at Cincinnati, and while expediting the checking of his baggage was struck by the baggage-master (Halpin) on the head with a hatchet, from the results of which he was, and has continued to be, seriously disabled.

You add, "While the assault was altogether unjustifiable, the evidence tends to show that the conduct of Mr. Wetmore may have led to the difficulty between himself and the baggage-master, and that before the blow was struck by Halpin Wetmore used towards him abusive language." My opinion is requested as to whether the injury was connected with Wetmore's service in such a manner as to justify the allowance of his claim for a pension.

I have refrained from an examination of the evidence to ascertain what is established by the preponderance of testimony, because my advisory powers do not extend so far. At the same time, your statement that the evidence tends to show that the conduct of Mr. Wetmore may have led to the difficulty is too indefinite to form the basis for a legal opinion. Instead of directly answering your inquiry, I will confine myself to an exposition of what I conceive to be the legal principles applicable to a claim for pension where the injury followed the use of abusive language by the claimant towards the assailant.

The subject of disability in the line of duty has received the attention of two of my predecessors. In the case of Eaton, the claimant alleged that he was assaulted *without any provocation* by an officer of the guard, while attempting

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Pension for Disability Incurred in Line of Duty.

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to pass the guard under the sanction of a written permit granted him by the commanding officer. Attorney-General Butler (2 Opin., 590) was of opinion that *such an assault* might justly be considered as coming within the terms of the law, provided that the War Department shall be satisfied "that the wounds were given without sufficient justification; for if the assault was brought on the claimant by his own misconduct, he cannot be said to have been disabled while in the line of duty."

The phrase, "in the line of duty," has been uniformly used in the statutes from 1799 to the present time in defining the right to pensions. It received elaborate discussion from Mr. Attorney-General Cushing in 1855 (7 Opin., 149), and as Congress, since the publication of that opinion, has not seen proper to substitute any other expression, we are justified in concluding that it stands in the statutes invested with the meaning expressed by Mr. Cushing.

Mr. Cushing says (p. 161): "In fine, the phrase 'line of duty' is an apt one to denote that an act of duty performed must have relation of causation mediate or immediate to the wound, the casualty, the injury, or the disease producing disability or death." Again he says: "Was the cause of disability or death a cause within the line of duty or outside of it? Was that cause appertaining to, dependent upon, or otherwise necessarily and essentially connected with, duty within the line, or was it unappurtenant, independent, and not of necessary and essential connection? That, in my judgment, is the true test-criterion in the class of pension cases under consideration." This criterion, he says, will "bestow disability or death pensions only in those cases, but in all those cases, where the cause of disability or death is the logical incident or probable effect of duty in the service." It is thus seen that the real question in the case is as to the *cause* mediate or immediate of the injury.

The question of remote and proximate cause, although frequently treated as a question of law, is in reality one of fact, and which, in an individual case, can receive but little light from the numerous adjudications. In every chain of circumstances each step is, to a greater or less degree, the consequence of its predecessor. Mr. Wetmore's assumption of the

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Pension for Disability Incurred in Line of Duty.

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duties of his office caused him to be subject to orders; the order caused him to come in contact with the baggage-master. If there did not intervene between this contact and the injury an adequate and sufficient cause for which Mr. Wetmore was responsible, he is entitled to his pension. If while in the performance of his duty he had been injured by the fall of a carelessly piled lot of baggage, the performance of his duty would have been the mediate cause, for no responsibility would rest on him for the intervening cause. Otherwise, if in interference with the baggage-master's province and duties he had seized a trunk and brought it down on his head.

But it seems that while expediting the checking of his baggage he used abusive language; as he was responsible for this, the question arises whether it was an adequate efficient cause of the injury. If he attempted or threatened violence, or if, after an altercation, he used such gestures, or placed his hands in such a position as to lead his opponent to apprehend immediate personal danger, his conduct would be the immediate adequate cause of the injury, and performance of duty could not be treated as the cause, either mediate or immediate. It is impossible to lay down a general rule which will be applicable to cases of this kind, or to the different aspects which the present claim might present as the facts shall be developed by the evidence. It cannot be said on the one hand that a soldier is entitled to a pension unless the provocation he gave was such as to acquit the assailant in a court of law, nor on the other that the slightest departure from the rules of proper conduct, followed by an injury, shall preclude allowance of his claim. Between the two are an infinite variety of supposable cases involving different degrees of provocation, which cannot be measured so as to determine as a matter of law their adequacy to produce the result. It is in determining not the legal justification of Halpin, but the adequacy of the provocation, that, in view of the benevolent purposes of the law, a wise and liberal discretion is to be exercised. The scene, the nature and difficulty of Halpin's labors, the reasonableness or unreasonableness of Wetmore's request, his sobriety, the pressure for time as it affected each, whether Wetmore's abusive language was brief and separated from the blow by an interval

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Pension for Disability Incurred in Line of Duty.

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of time, or whether, having excited Halpin's anger and arousing it, he persisted, only to be stopped by a blow of the hatchet, whether he aggravated by further and more violent language an anger which he had already enkindled, whether he invaded the space reserved for performance of the baggage-master's duties or unduly interfered therewith, are all circumstances to be considered in determining what, in my judgment, is the real question, whether Wetmore's conduct in the baggage-room was reasonably calculated *to lead to violence dangerous to himself*. If it was so calculated, his misconduct brought its own punishment, and if the punishment was greater than he deserved, legal proceedings against Halpin would furnish him his remedy. If his misconduct caused the injury, he is not entitled to a pension.

You are to determine whether the assault was the *natural and reasonable consequence* of Wetmore's actions or language, natural in view of the infirmities of human nature, reasonable in view of what a reasonable man would anticipate from manifestations of Halpin's anger to be the consequence of Wetmore's course. Did the latter continue the controversy after ordinary prudence should have warned him to desist? Certainly a wound from a hatchet in the hands of a baggage-master, at a depot remote from the scene of war, where passengers were peaceably making preparations for travel, is so improbable an effect of duty in the service as to throw upon the applicant the burden of showing that his misconduct was not the cause of the injury, but if he has done so to a reasonable certainty his claim should be allowed.

As I have stated, I have not examined the evidence transmitted by you, conceiving that it would be a usurpation of your powers for me to pass upon the weight and credibility of the testimony; but if you desire it I will examine the evidence and unofficially express the conclusions I arrive at as to the merits of the case.

I return herewith the papers transmitted.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. S. J. KIRKWOOD,

*Secretary of the Interior.*

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Apollinaris Mineral Waters.

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## APOLLINARIS MINERAL WATERS.

In the light of the information presented, Apollinaris mineral water is regarded as an artificial mineral water, and dutiable as such.

DEPARTMENT OF JUSTICE.

*July 26, 1881.*

SIR: I return herewith the papers submitted to me with the letter of Acting Secretary French, requesting my opinion whether Apollinaris mineral water is entitled to admission free of duty.

In reply thereto I have the honor to state that I have carefully investigated the subject, and have been greatly aided in such investigation by oral arguments and very full printed briefs, submitted on the one side by Mr. Webster, and on the other side by Mr. Ashton and Mr. Saville. The question at issue, in my judgment, is wholly a question of fact, and the evidence upon it is so contradictory and conflicting, that it appears to me to be indispensable that it should be submitted to a court and jury.

I entertain no doubt whatever that mineral waters "not artificial," in the meaning of the act of Congress, are natural mineral waters, bottled substantially as is stated in the affidavit of Mr. Shehan, included in the papers submitted to me, to be the method employed at Congress Spring, Saratoga, N. Y. He says that "the water from the natural mineral spring fountain known as Congress Spring is taken directly from the spring as it flows from its veins in the earth and immediately bottled, without adding any substance thereto, and without any change, alteration, or modification whatever." The Apollinaris water, on the contrary, is not bottled as it flows from the spring, but it is in the first place heavily surcharged with carbonic acid gas and ten parts of salt are added to ten thousand parts of water. It is alleged, on behalf of the importers, that not only is the carbonic acid gas such as escapes from the spring itself or from fissures in the rock immediately around the spring, but that this water when being bottled is charged with no greater portion of such gas than it possesses at a depth of 50 feet below the sur-

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Apollinaris Mineral Waters.

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face, and that the process is merely to restore to it the gas which has thereafter escaped. This contention is, however, vehemently denied, and it is insisted that not only is there no evidence that the quantity of gas is the same, but that the evidence clearly establishes that the water as bottled contains a very considerable excess over the water in the spring.

As to the salt, the importers allege that it is simply added to preserve the water in its natural state, and to prevent contact with the cork from altering it. This, however, is also as earnestly denied; and it is insisted that the salt is added, like the alleged excess of carbonic acid gas, for the sole purpose of altering the natural character of the water as it flows from the spring and of enhancing its value as a sparkling and palatable beverage.

In view of this conflict of testimony, and of the fact that Special Agent Adams, of your Department, Mr. Sharer, the chemist selected by him, as well as Appraiser Howard and Collector Merritt, of the port of New York, have, after thorough consideration, concurred in finding that the water in question is subjected to such alterations after it leaves the spring as to render it an artificial mineral water, I am of the opinion that it ought to be so regarded and held to be liable to duty.

I can not say that the question is free from doubt; but I have less hesitation in reaching the conclusion I have stated, because it will be subject to review, if the importers desire it, and the question will then reach the only tribunal which, in my judgment, is entirely competent to decide it.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. WILLIAM WINDOM,  
*Secretary of the Treasury.*

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Case of Surgeon Thomley.

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## CASE OF SURGEON THOMLEY.

Surgeon T., having been examined by a board of medical officers, and found totally disqualified for the performance of his duties, was retired under section 3 of the act of February 21, 1861, chapter 49. Subsequently, in November, 1878, a board of medical officers was convened, by order of the Secretary of the Navy, to examine and report whether, in their opinion, Surgeon T.'s disability did, or did not, originate in the line of duty; and the finding of this board was that his disability had its origin in the line of duty. Such finding was approved by the Secretary of the Navy January 1, 1879, who directed that thereafter Surgeon T. be regarded on the records of the Department as retired on account of disability occasioned while in the line of duty. *Held*, that the Secretary of the Navy was not authorized by law to submit the case of Surgeon T. to a medical board for re-examination as to the origin of the disability for which he was retired, and that the Secretary's action, based on the report of such board, is without any legal effect as regards the cause for retirement in the case of that officer or his right of pay.

## DEPARTMENT OF JUSTICE,

*July 27, 1881.*

SIR: Your letter of the 29th ultimo requests my opinion upon certain questions suggested by the Second Comptroller in his communication to you of the 7th ultimo (which accompanied that letter), arising in the matter of a claim made by Surgeon John Thomley, U. S. Navy, retired, for the difference between one-half of sea-pay and 75 per centum thereof, from March 3, 1873, to the present time.

It appears that Surgeon Thomley was retired under section 3 of the act of February 21, 1861, chapter 49. Previous thereto he was examined by a board of medical officers, convened pursuant to an order of the Secretary of the Navy dated May 24, 1861, and found totally disqualified for the performance of his duties; the board stating in their report, which bears date May 29, 1861, that in their opinion "his disability did not occur in the line of his duty."

By section 5 of the act of July 15, 1870, chapter 295, it was provided: "That from and after the thirtieth day of June, eighteen hundred and seventy, the pay of all officers of the Navy now on or hereafter placed on the retired list shall, when not on active duty, be equal to one-half of the highest pay (*i. e.*, sea-pay) prescribed by this act for officers on the active list whose

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Case of Surgeon Thomley.

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grade corresponds to the grade held by such officers respectively at the time of such retirement," etc. Subsequently, by the act of March 3, 1873, chapter 230, it was provided: "That those officers on the retired list, and those hereafter retired, who were, or who may be, retired after forty years' service, or on attaining the age of sixty-two years, in conformity with section one of the act December 21, eighteen hundred and sixty-one, and its amendments, dated June twenty-five, eighteen hundred and sixty four, or those who were, or may be, retired from incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, from sickness or exposure therein, shall, after the passage of this act, be entitled to seventy-five per centum of the present sea-pay of the grade or rank which they held at the time of their retirement." These provisions (the former as modified by the latter) are embodied in section 1588, Revised Statutes.

Early in November, 1878, Surgeon Thomley made application for a further examination of his case, based on new evidence, tending, as he alleged, to show that the opinion of the board of medical officers in 1861, that his disability did not occur in the line of duty, was erroneous. Thereupon the Secretary of the Navy ordered a board of medical officers to convene at the Navy Department on the 12th of the same month, or as soon thereafter as practicable, and "examine such documentary evidence as may be offered by Dr. Thomley, and after a careful examination of all the evidence in the case to report to the Department whether, in their opinion, his disability did, or did not, originate in the line of duty." The finding of the board, which convened pursuant to this order, was that "the disability causing the retirement of Medical Director John Thomley, U. S. Navy, had its origin in the line of duty," etc. This finding was on January 1, 1879, approved by the Secretary of the Navy in the following terms: "In accordance with the within proceedings and finding it is the opinion of the Department that Medical Director John Thomley was, at the time of his retirement, incapacitated on account of causes occasioned while in the line of duty, and he will be so regarded on the records of the Department from this date."

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Case of Surgeon Thomley.

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Surgeon Thomley has never received the higher rate of pay (*i. e.*, 75 per centum of sea-pay) provided by the act of March 3, 1873, also by section 1588, Revised Statutes.

The questions suggested by the Second Comptroller are these: "Whether the action of the Secretary of the Navy last above quoted is a valid decision in favor of Dr. Thomley, and if it is such, from what date the claimant is entitled to receive the higher rate of pay."

The answer to the questions depends upon the result of a preliminary inquiry which arises here, namely, whether the action of the Secretary of the Navy in 1878, in ordering a board to reinvestigate the case of Surgeon Thomley, then on the retired list, and to report upon the origin of his disability, was authorized by law.

As already stated, Surgeon Thomley was retired under section 3 of the act of February 21, 1861, chapter 49, which authorized the President "to place on a retired list any medical officer of the Navy who is now, or may hereafter be, proved to be permanently incapable from physical or mental infirmity of further service at sea," etc. Under this provision it was immaterial whether the infirmity of the officer originated in the line of duty or not. Whatever the origin of the infirmity might be, if he was thereby rendered permanently incapable of further service at sea, that was sufficient. Hence, so far as the *cause* for retirement thereunder is concerned, the statement in the report of the board of medical officers of May 29, 1861, that Surgeon Thomley's disability "did not occur in the line of duty," must be deemed to be mere surplusage. An allegation of error in such statement, therefore, furnished no ground for re-examination of his case, if indeed a re-examination could have been had on any ground after his retirement.

Subsequently to the retirement of Surgeon Thomley, Congress, by the twenty-first, twenty-second, and twenty-third sections of the act of August 3, 1861, chapter 42, made new and enlarged provisions for the retirement of naval officers, both of the line and staff. These provisions superseded all others previously in force; but they had no application to officers already retired under former laws, except (in section 22) as to the pay of captains, commodores, and lieutenants

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Case of Surgeon Thomley.

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then on the retired list. Section 23 provided for the constitution of a retiring board, which, on finding an officer incapacitated for active service, was required to "report whether, in its judgment, the incapacity resulted from long and faithful service, from wounds, or injury received in the line of duty, from sickness or exposure therein, or from any other incident of service; if so, and the President approve of such judgment, the disabled officer shall thereupon be placed upon the list of retired officers, according to the provision (in section 22) of the act; but if such disability or incompetency proceeded from other causes, and the President concur in opinion with the board, the officer may be retired on furlough pay, or he shall be wholly retired from the service, with one year's pay, at the discretion of the President." Here the statute divides the *causes* for retirement into two classes, making separate provision for each class. These classes are (1) where the incapacity results "from long and faithful service, from wounds or injuries received in the line of duty, from sickness or exposure therein, or from any other incident of service;" (2) where the disability or incompetency proceeds "from other causes."

The provisions of the act of August 3, 1861, just adverted to, are reproduced in the Revised Statutes in sections 1448 to 1455, inclusive.

It is to be observed that officers who had been already put on the retired list under previous laws do not come within those provisions; that the retiring board constituted under the latter is not authorized to inquire into the nature and disabilities of such officers, but only into cases of officers on the *active list* which are referred thereto for examination. Nor am I able to find any provision of law which authorizes the case of an officer who was retired under the act of February 21, 1861, by reason of being "permanently incapable, from physical or mental infirmity, of further service at sea," and who remains on the retired list by virtue of such retirement, to be investigated by a board with a view to determine whether his incapacity resulted "from long and faithful service, from wounds or injury received in the line of duty, from sickness or exposure therein, or from any other incident of service," etc. A reinvestigation in such case, with-

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Case of Surgeon Thomley.

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out authority of Congress, even if the fact found thereby were that the infirmity resulted from some one or more of the last-mentioned causes, could not be made the basis of any change in regard to the cause of the officer's retirement, nor confer upon him any rights to which he would not otherwise be entitled.

By the acts of July 15, 1870, and March 3, 1873, cited above, regulating the pay of retired officers, the provisions of which, as hereinbefore stated, are embodied in section 1588, Revised Statutes, two rates of pay are established, viz: *75 per centum sea-pay, and one-half of sea-pay*. The former rate applies to (see 'sec. 1588) all officers of the Navy (1) "who have been retired after forty-five years' service after reaching the age of sixty-two years"—these officers were retired under section 1 of the act of December 21, 1861, chapter 1, amended by the act of June 25, 1864, chapter 152; (2) "or who have been or may be retired after forty years' service upon their own application to the President"—retirement in such case was formerly provided for by section 21 of the act of August 3, 1861, and is now by section 1443, Revised Statutes; (3) "or on attaining the age of sixty-two years"—retirement in this case was formerly provided for by section 1 of the act of December 21, 1861, and is now by section 1444, Revised Statutes; (4) "or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein"—under section 23 of the act of August 3, 1861, section 1453, Revised Statutes. The latter rate is applicable to "all other officers on the retired list"—terms which are, undoubtedly, broad enough to comprehend those who were retired under the act of February 21, 1861, as being "permanently incapable, from physical or mental infirmity, of further service at sea."

In reference to the last-mentioned act, I have already remarked that it was not material to inquire whether the infirmity of the officer originated in the line of duty or not. Such inquiry cannot now be deemed material in the case of an officer retired thereunder, from the fact that, by subsequent legislation, provision has been made for the different rates of pay, of which the higher rate applies to officers who

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Penalty-Envelope.

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were retired under later acts for specific causes, including (*inter alia*) wounds or injuries received in the line of duty, while the lower rate applies to all other retired officers not embraced in that class. If the *cause* for retirement under the act of February 21, 1861 (*i. e.*, permanent incapability, from physical or mental infirmity, of further service at sea), does not place the officer among those who are entitled to the higher rate, nothing can be done by executive action to put him there without the aid of further legislation.

Upon the whole, I am of opinion that the Secretary of the Navy, in 1878, was not authorized by law to submit the case of Surgeon Thomley to a medical board for re-examination as to the origin of the disability for which he was retired, and that the Secretary's decision, based on the report of that board, is without any legal effect as regards the cause for retirement in the case of that officer or his right to pay.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. WM. H. HUNT,  
*Secretary of the Navy.*

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PENALTY-ENVELOPE.

United States commissioners are "officers of the United States," within the meaning of section 29 of the act of March 3, 1879, chapter 180, and as such are entitled to use the penalty-envelope provided for by sections 5 and 6 of the act of March 3, 1877, chapter 103, in the transmission to the Departments at Washington of mail matter relating to their accounts for fees payable by the Government and other official business.

DEPARTMENT OF JUSTICE,

July 29, 1881.

SIR: I have considered the inquiry proposed by United States Commissioner James C. Strong, of Buffalo, N. Y., and by you sometime since referred to me, viz, whether he is entitled to use the penalty-envelope for the transmission of letters to the Department at Washington relating to his accounts for fees payable by the United States.

The commissioners appointed by the circuit courts of the United States, commonly called United States commission-

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Extradition.

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ers, are "officers of the United States," within the meaning of section 29 of the act of March 3, 1879, chapter 180, and consequently are thereby given the privilege of using the penalty-envelope provided for by sections 5 and 6 of the act of March 3, 1877, chapter 103, in the transmission of official mail matter between them and "either of the Executive Departments or officers of the Government." By official mail matter is meant that which relates to the business of the Government. The accounts of such commissioners for fees payable by the United States are required to be forwarded to, and settled at, the Treasury Department. This is business of the Government, and for correspondence between the commissioner and the Department concerning the same the penalty-envelope may be used.

The inquiry proposed I accordingly answer in the affirmative.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. THOMAS L. JAMES,

*Postmaster-General.*

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EXTRADITION.

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Under section 5272, Revised Statutes, the Secretary of State has power to review the proceedings in an extradition case certified to him, and this power extends to the review of every question therein presented.

DEPARTMENT OF JUSTICE,

*August 3, 1881.*

SIR: Yours of the 26th ultimo, addressed to the Attorney-General, transmits the record and evidence in the extradition case of one Ormay, certified to you by Judge Nelson, of the district court for Massachusetts, together with a letter from Godfrey Moore, esq., of Boston, who acted as counsel for Ormay before Judge Nelson, and who now desires to be heard again by you upon several matters, amongst others, in order to show "that there was not sufficient evidence to warrant any finding by the court for the further detention of Ormay."

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Extradition.

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In this connection you say that you "incline to the belief that the powers conferred upon you by section 5272 of the Revised Statutes (although not expressly mandatory in its terms), taken in conjunction with the provisions of the extradition treaty with Austria-Hungary of July 3, 1856, make the examining tribunal the ultimate resource for determining as to *the sufficiency of the evidence to warrant extradition*, and that your action thereafter is executive merely under the treaty itself."

In distributing the duties arising from extradition treaties amongst the officers of the Government, Congress has assigned the judicial duties of arrest and hearing upon the charge of crime to certain officers of the courts, leaving the further execution of the treaty, in case the party upon such hearing be deemed guilty under its provisions, to the Secretary of State.

This partition of duties at once suggests the question which you state.

There can be no doubt that the treatment of such cases is intended to be merely *judicial* up to a certain point, and after that merely executive. Executive duties, however, as you suggest, require the exercise of discretion, and are generally not merely mandatory. In some cases it is not easy to say that this discretion differs substantially from the discretion which is confided to courts. The question here is, how far executive discretion extends in reviewing the judgment and testimony directed by the statute (Rev. Stats., sec. 5270) to be certified before you by the judicial officer who hears the charge in the first instance.

I am of the opinion that the proceedings below come before you upon a *quasi certiorari*, and that your discretion extends to a review of every question therein presented.

The due execution of the treaty, *including its not being abused so as to include persons who are not within its terms*, is after all an executive question, and after attentive consideration I am unable to restrain your powers within any narrower bonds.

It is difficult to see why the judicial officer should certify the *testimony* before him as well as his *judgment* thereon; unless for the purpose of affording an opportunity for a recon-

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Extradition.

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sideration of the effect of that testimony. It is the testimony alone which shows whether the crime charged is an extradition crime. I suppose that a Secretary would not surrender the person in case he were of opinion that the *crime* given in evidence was not within the treaty. Ought he then to do so in case the evidence, in his judgment, shows a clear miscarriage as regards the person's presumed *guilt* of such crime? It may be said this is to beg the question, which is, whether the Secretary can look into the evidence for the purpose of passing upon such question; *i. e.*, whether such inquiry be not *coram non judice* as to him. It is upon this point that the express statutory requirement, that the testimony shall be certified to the Secretary, together with the judgment below, is to my mind significant.

It seems to me that in sending the person charged before a judicial officer for hearing the legislature means only that he shall not be extradited *without* such an examination as in other criminal charges is required before holding for trial; but that the discretion of the executive (distinguishing this from mere *ministerial* functions) usual in dealing with interests of persons or property, remains unaffected.

Upon the *requisition* being made for extradition, *the whole matter* comes before the Secretary, with the advantage that in a matter of local law, concerned in the case, he has had the assistance of a magistrate more or less expert therein.

The treaty requires that "the evidence of criminality" shall be such as, "*according to the laws of the place where the fugitive or person charged shall be found*, would justify his apprehension and commitment for trial, if the crime or offense had there been committed."

In a country like ours, where crimes in general are the subject of State and not Federal cognizance, the above provision for their hearing will render the conclusions thereupon by the magistrate of great value to the Secretary, who is hardly to be expected, even after an argument before him, to be as capable of administering the questions therein as accurately as has already been done. At least this would be so where the hearing below, as in the present case, was before a judge of superior jurisdiction.

Cases might occur in which the hearing had been before

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Printed Matter Mailed from Foreign Countries.

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some officer not so well versed in law; and in these a *power* to review the whole matter might even be *desired* by the Secretary.

You will have noticed in this opinion I concur with the views of Judges Blatchford and Woodruff in Stupp's case (12 Blatchf., 501).

Stupp had been before a commissioner, and thereupon sued out a writ of habeas corpus and a certiorari, returnable before the circuit court for the southern district of New York. In the course of an argument to show that it could not review questions upon the effect of evidence, etc., decided by the commissioner, the court said repeatedly that the power to do this was vested by the statute in the Secretary of State.

Upon the whole, repeating that very great respect is due to the decisions of the tribunal which hears the case in the first instance, especially under such circumstances as this presents, I am of opinion that the law gives to the party charged the double protection of a concurrence of views upon all questions affecting his guilt under the treaty by the magistrate and the Secretary before he is to be surrendered.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

*Solicitor-General.*

The SECRETARY OF STATE.

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PRINTED MATTER MAILED FROM FOREIGN COUNTRIES.

By section 17 of the act of March 3, 1879, chapter 180, printed matter, other than books, received by mail from foreign countries, under the provisions of postal treaties or conventions, is declared free of duty; and no distinction is there made between such as is mailed to subscribers for their own use and such as is mailed to dealers for sale.

Books which are admitted to the international mails, exchanged under the provisions of the Universal Postal Union Convention, may be delivered to addresses upon the payment of the duty thereon.

DEPARTMENT OF JUSTICE,

*August 6, 1881.*

SIR: In reply to your favor of July 28, in reference to the duties upon printed matter shipped by mail to the United

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Printed Matter Mailed from Foreign Countries.

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States for sale from foreign countries in large quantities, I beg to say that your previous letter upon the same subject was referred to Mr. Smith, Assistant Attorney-General, for examination and reply.

I regret to say that he seems to have entirely overlooked the seventeenth section of the act of March 3, 1879, which specifically provides that printed matter other than books received in the mails from foreign countries, under the provisions of postal treaties or conventions, shall be free of customs duty. No distinction is made by this provision between such printed matter when mailed to subscribers for their own use, or when mailed to dealers for sale.

The whole question seems, therefore, to be one of administration for the Postal Department. If the printed matter in question is properly carried in the mails under the provisions of the postal treaties or conventions, it is free of customs duty. If it is not within the terms of such treaties or conventions, it should be excluded from the mails; but in nothing do I discover any warrant in the law for inquiry by your Department as to whether such printed matter is received as merchandise, nor for the imposition upon it of any customs duty.

In reply to your second question, I beg to say that such books as are admitted to the international mails, exchanged under the provisions of the Universal Postal Union Convention, may be delivered to addresses upon the payment of the duty thereon.

In this answer I have, indeed, used the very terms of the statute, for it is singularly clear and unambiguous. It authorizes the Postmaster-General and yourself to agree upon proper regulations for the collection of such duties, and it limits the books which may be thus carried and delivered to such books as are admitted to the international mails, exchanged as already stated.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WILLIAM WINDOM,

*Secretary of the Treasury.*

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Case of Paymaster Barton.

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## CASE OF PAYMASTER BARTON.

Construction of section 1412, Revised Statutes, as given in 14 Opin., 192, 358, and 15 Opin., 45, namely, that it gives to transferred officers the full benefit of their former sea-service only in so far as this may go to complete the period of such service required in their respective grades previous to examination for promotion, and in so far as it ought properly to be taken into account in the matter of assignment to duty—reaffirmed.

## DEPARTMENT OF JUSTICE,

*August 11, 1881.*

SIR: I have the honor to reply to the question submitted to me in your favor of August 6, 1881, as to the claim of Passed Assistant Paymaster Jonathan R. Barton, U. S. Navy, for advancement on the list of officers of the Pay Corps, under the provisions of section 1412 of the Revised Statutes.

In deference to your wishes I have reconsidered the question submitted by Mr. Barton, and have carefully examined the argument enclosed by you in support of the position assumed by him; but I can not forbear saying that if any question ought to be considered settled, as between the Executive Departments of the Government, the proper construction of section 1412 of the Revised Statutes is certainly within that category.

The true meaning of the provision in question was first considered by Attorney-General Williams in the case of Lieutenant-Commander Dyer, and his opinion was rendered March 3, 1873, in a letter to your predecessor, Secretary Robeson. It was again considered by Attorney-General Williams at the instance of the Treasury Department, and an opinion upon it rendered January 24, 1874. It was again brought for review before my immediate predecessor, and an elaborate opinion upon the subject was rendered by him June 12, 1878.

These several opinions are in entire agreement upon the question raised in your communication to me. They declare that the provision in question was designed to give the transferred officers the free benefit of their former sea-service, in so far as it might go to complete the period of

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 Payment of Accrued Pension.
 

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such service required in their respective grades previous to examination for promotion, and in so far as it ought properly to be taken into account in the matter of assignment to duty, and that it conferred no advantages beyond these.

It necessarily follows, as Attorney-General Devens decided, that a volunteer officer transferred to the regular Navy is not entitled to hold a commission dated as of the date of his volunteer commission, but that he must take his place upon the Register according to the rank given him by his commission as an officer of the regular Navy.

In this construction of the provision in question I entirely concur, and I therefore advise you that Mr. Barton's claim of a position in the regular Pay Corps above all officers in that corps who entered the regular service after June 2, 1864, is invalid, and should not be allowed.

I return herewith the papers which you enclosed to me.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WILLIAM H. HUNT,

*Secretary of the Navy.*

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 PAYMENT OF ACCRUED PENSION.

T. died while his application for pension was pending, leaving a widow and a daughter under sixteen years of age; the mother died after the daughter attained the age of sixteen years; and subsequently the pension was allowed and a certificate therefor issued: *Held*, that under section 4718, Revised Statutes, the daughter is entitled to the pension which had accrued up to the death of the father.

DEPARTMENT OF JUSTICE,

August 12, 1881.

SIR: You have asked my opinion upon the following case:

Francis Thierry died while his claim for pension was pending, leaving a daughter under sixteen years of age and a widow. After the child attained the age of sixteen years the mother died, and still later the pension was allowed and certificate therefor was issued.

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Payment of Accrued Pension.

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Your inquiry, whether the pension which had accrued up to the death of the father can now be paid to his daughter, Frances B. Thierry, I answer in the affirmative.

Section 4718 of the Revised Statutes provides that when any person entitled to a pension shall die while his application is pending "his widow, or if there is no widow, the child or children of such person under the age of sixteen years, shall be entitled to receive the accrued pension to the date of the death of such person, \* \* \* and if no widow or child survive, no payment whatsoever of the accrued pension shall be made or allowed."

Section 25 of the act of March 3, 1873, chap. 234 (17 Stats., 574), of which this is a substantial re-enactment, provided that: "If any person entitled to a pension shall die during the pendency of his application therefor, his widow, or if no widow, his child or children under sixteen years of age at the time of his death, shall be entitled to receive the accrued pension to the date of death," etc. The verbal change made by the revisers was the omission of the words "at the time of his death."

The effect of this is not to fix some other period as the one at which the child is to be under sixteen years of age and thus preclude reference to the original statute, but is to leave it a matter of some doubt as to whether the date of the death of the father or the time of the allowance of the pension is to determine the rights of the child. A careful reading of section 4718, Revised Statutes, affords little assistance in solving this doubt, and the section may be as fairly construed to mean that the child shall not be over sixteen when the father dies as when the pension is allowed.

In the case of the *United States v. Bowen* (100 U. S., 513), it was held that resort might be had to the law which was the subject of revision to interpret anything left in doubt by the language of the revisers, and that where there is a substantial doubt as to the meaning of the language used in the revision, the old law is a valuable source of information. Mr. Justice Miller, delivering the opinion, said: "If, then, in the case before us the language of section 4820 was fairly susceptible of the construction claimed by the Government, as well as of the opposite one, the argument from the pro-

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Payment of Accrued Pension.

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vision of the statute as it stood before the revision would be conclusive."

Applying this rule, it is clear that the attainment of sixteen years of age by Frances B. Thierry prior to the death of her mother, and prior to the allowance of the pension, in no way militates against her right to the accrued pension.

If the mother had died before the father, there would be no question as to the child's rights; if the widow had survived until the time came for payment, there would be no question as to her right. The peculiarity of the case is that there was a widow at the time of the death of the claimant, and there is none now when payment is to be made. In determining whether this fact should prevent payment of the pension to the child no aid is obtainable from the original statute, and as the revision is not explicit, we are left to the reason and spirit of the law for its interpretation. I can not imagine any reason why the child should receive the accrued pension where the claimant survived the mother that would not apply with equal force to a case where the death of the mother intervened between that of the claimant and the allowance of the pension. The prohibitory clause of the statute is limited to where "no widow or child survive," meaning, of course, "no widow or child under sixteen years of age." Here a child who was under sixteen years of age at the death of the claimant has survived until the allowance of the pension.

The purpose of the statute was to give the accrued pension to the widow or the child; and in my opinion, at the death of the father, each acquired a distinct contingent interest; the widow's being contingent on her survival until allowance and payment, the child's being contingent on the death of the mother prior to, and its own survival until, payment.

In your communication of the 10th instant you request that, in connection with the case of Frances B. Thierry, I give my opinion as to how far the jurisdiction of the accounting officers of the Treasury extends in the matter of the revision of allowances made by the Commissioner of Pensions.

As this case was referred by you to me at the request of

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 Graduates of the Naval Academy—Relative Rank.
 

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the Second Comptroller, no question of the jurisdiction of the accounting officers of the Treasury arises. How far they may revise the decisions of the heads of Departments and of other officers in whom discretion is vested by law, is a question of great gravity and of long standing. I trust, on reflection you will agree with me that it is more desirable to have my opinion on specific cases which directly present the question than a general opinion on the whole subject.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. S. J. KIRKWOOD,

*Secretary of the Interior.*

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 GRADUATES OF THE NAVAL ACADEMY—RELATIVE RANK.

Opinions of August 7, 1877 (15 Opin., 637), and March 31, 1879 (16 Opin., 296), referred to, and suggested that copies thereof be sent by the Secretary of the Navy to the Senate in response to a resolution of that body in regard to the subject of relative rank of graduates of the Naval Academy.

DEPARTMENT OF JUSTICE,

*August 12, 1881.*

SIR: I beg to acknowledge your favor asking my opinion upon the legal question involved in the resolution of the Senate directing you to inform that body "what alteration, if any, has been made in the relative rank of graduates of the Naval Academy, as originally established at graduation, under the provisions of sections 1483 and 1521 of the Revised Statutes, in any classes graduating since the year 1870, and if so, under the provisions of what act the said alteration or re-arrangement of rank was made?"

In reply I beg to say that I have carefully considered the facts stated in your letter, and in that connection the opinion of Solicitor-General Phillips of August 7, 1877, approved by Attorney-General Devens, and the opinion of Attorney-General Devens himself of March 31, 1879, re-affirming the former opinion.

In these two opinions the entire subject of your letter is elaborately considered and clearly and distinctly decided, and I am sure you will agree with me that it is not com-

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Civil Service Examinations.

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patible with the proper administration of this Department that a third opinion upon the legal questions involved should be rendered unless very exceptional circumstances should exist requiring so unusual a course to be pursued.

In the present case I am unable to discover any circumstances which would justify me in considering the question in these opinions, twice considered and twice decided in the same way, as open questions for my examination and decision; and I feel constrained, therefore, to advise you that the only answer you can properly make to that portion of the resolution of the Senate which asks for the legal authority for the changes which were made is in the submission to that body of copies of the two opinions already mentioned.

I return the papers forwarded to me by you.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WILLIAM H. HUNT,

*Secretary of the Navy.*

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## CIVIL SERVICE EXAMINATIONS.

The joint resolution of March 3, 1865 (sec. 1754, Rev. Stat.), considered in connection with the act of March 3, 1871, chapter 114, and held that honorably discharged soldiers and sailors are not exempt from liability to examination for admission into the civil service, but that they are entitled to a preference for appointment as against other persons of equal qualifications for the place.

## DEPARTMENT OF JUSTICE,

August 13, 1881.

SIR: I beg to acknowledge the receipt of a letter of Collector Merritt, forwarded to me by you, inclosing a petition from John Collins, who was honorably discharged from the military service by reason of disability from wounds incurred in the line of duty.

The letter of the collector states that Mr. Collins has been serving as night inspector in the New York custom-house during the past six months, and has shown himself a capable and competent man for the position.

Mr. Collins claims to be appointed a permanent night

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Civil Service Examinations.

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inspector without reference to the civil service rules now in force in the New York custom-house by virtue of the orders of the President of March 6, 1879, and of June 30, 1880, which orders prescribe regulations for the admission of persons into the public service in that custom-house.

You desire my opinion upon the law governing this subject.

I have the honor to state that in my opinion Congress has very plainly expressed its will upon the question you submit to me. The joint resolution of March 3, 1865 (Rev. Stat., sec. 1754), is as follows:

“Persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices.”

The act of March 3, 1871, provides as follows: “The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as will best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service.”

These two expressions of the legislative will form one harmonious system. They do not exempt honorably discharged soldiers and sailors from liability to examination, but they do prescribe that of two or more applicants found to be equally qualified by such examination for appointment the preference shall be given to any such applicant who has been honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty.

In direct reply to your question, I therefore advise you that Mr. Collins is not exempted from the operation of the regulations prescribed by the President, but that he is

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Relative Rank in the Army.

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entitled to a preference as against any civilian of equal qualifications for the place he seeks.

I return you the papers you inclosed to me.

I need hardly say that I have not thought it necessary in this instance to consider the extent of the power conferred upon the President by the Constitution in the matter of appointments to office.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WILLIAM WINDOM,

*Secretary of the Treasury.*

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RELATIVE RANK IN THE ARMY.

The word "appointment," as used in section 1219, Revised Statutes, comprehends only the appointment of an officer on his original entry into the regular service, and does not include his appointment on promotion thereafter made. Opinion of Attorney-General Devens, of February 21, 1881 (*ante*, p. 34), dissented from.

DEPARTMENT OF JUSTICE,

*August 17, 1881.*

SIR: Your favor returning to me the opinion of Attorney-General Devens, of February 21, 1881, on the question of relative rank between officers of the same grade and date of appointment and commission, has been received; and in deference to the urgency of your request, and the importance attaching to the matter in the proper administration of your Department, I have felt constrained to reconsider the question therein decided.

I find less difficulty, in the present instance, in departing from the rule of this Department to decline to reconsider questions once formally decided, because it concerns exclusively a question of administration in your Department, and adherence to the opinion of my predecessor will require the reversal of the practice of your Department ever since the passage of the law in question, covering the very considerable period of fourteen years.

The act of March 2, 1867, section 1219, Revised Statutes, provides that in fixing relative rank between officers of the

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Relative Rank in the Army.

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same grade and date of appointment and commission the time which each may have actually served as a commissioned officer of the United States, whether continuously or at different periods, shall be taken into account; and in computing such time no distinction shall be made between service as a commissioned officer in the regular Army and service since the 19th day of April, 1861, in the volunteer force, whether under appointment or commission from the President or from the Governor of a State. The act also contains these words, which are not found in the Revised Statutes: "And the provisions herein contained as to relative rank shall apply to all appointments that have already been made under the 'act to fix the military peace establishment of the United States,' approved July 28, 1866."

The act of July 28, 1866, was an act reorganizing and increasing the regular Army; and the provisions quoted from the act of March 2, 1867, have been construed, as I understand, in your Department, from the passage of the law until now, as applying to all appointments that had already been made under the act of July 28, 1866, as well as to all appointments made subsequently thereto, giving to each appointee *at the date of his commission as an officer of the regular Army* the full benefit of any service he might have rendered in the volunteer forces.

The contention is as to whether the provisions quoted apply not only to the original appointment of such officer, but to all subsequent promotions in the regular Army.

In the opinion of my immediate predecessor, which you have returned for my reconsideration, it is held that the words "appointment" and "commission" in this act of Congress include not only the original appointment and commission as an officer of the regular Army, but all subsequent promotions in that service. After most careful and respectful consideration, I am unable to concur in this conclusion.

As I understand it, a clear and well-defined distinction between appointment and promotion has existed and been recognized in the War Department continuously since the establishment of the Army. Appointment is the selection of persons, not now in the Army, as officers of it, or the

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Relative Rank in the Army.

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designation by *selection* of an officer already in the Army to a vacancy which is not required by the law or the regulations to be filled by promotion according to seniority. Promotion is the advancement of officers already in the Army, according to seniority, to vacancies happening in the different arms of the service, and according to rules prescribed by law or by regulations having the force of law.

I understand also that since the passage of the act of March 2, 1867, it has been the uniform practice of your Department to fix the relative rank of officers receiving appointments, within the meaning of that term as herein defined, at the time of such appointment; and that their relative rank, thus fixed, is not thereafter disturbed by any subsequent promotion; but that subsequent promotion and rank is by seniority in the regular service.

In the construction of statutes which have been practically administered by one of the great Departments of the Government for a considerable period, I know of no safer rule than that prescribed by the Supreme Court in the case of the *United States v. Moore* (95 U. S. R., 763): "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. \* \* \* The officers concerned are usually able men and masters of the subject, and frequently they are the draughtsmen of the laws they are afterwards called upon to interpret."

There are not wanting instances of recognition by Congress also of the distinction between appointment and promotion upon which the regulations and practice of your Department rests.

The Revised Statutes, section 1132, provides that all appointments in the Quartermaster's Department shall be made from the Army, while it is well known that promotions in that department are made according to seniority in the department itself; and section 1194 provides that until otherwise directed by law there shall be no new appointments and no promotions in the Department of Adjutant-General, or of Inspector-General, or in the Paymaster's, Quartermaster's, Subsistence, Ordnance, or Medical Depart-

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Relative Rank in the Army.

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ments; and section 1204 provides that promotions in the line shall be made through the whole Army in its several lines of artillery, cavalry, and infantry, respectively. Promotions in the staff of the Army shall be made in the several departments and corps respectively; and as recently as March 3, 1877, Congress, in restoring a lieutenant to the Army, provided: "And the law of promotion in the line is hereby suspended in this case for the purpose of allowing such restoration."

The Committee on Military Affairs of the Senate, reporting May 21, 1880, adversely upon a bill to change the method of promotion among lieutenants of the line, say: "The terms 'appointment' and 'promotion,' as used in the laws and in the Army, are arbitrary and technical. Literally, 'appointment' is authority conferred by virtue of which the duties of an officer may be performed; 'promotion' is advancement by seniority to a higher office. Advancement to a higher office confers new authority necessarily, and hence every promotion is an appointment. From long usage promotion is often used in a sense which largely excludes the idea of the appointment that accompanies it."

I have also examined the Congressional debates at the time the law in question was upon its passage, and I discover nothing in them to support the view that it was intended that the benefit of previous service in the volunteer forces should recur to an officer upon each occasion of his promotion in the regular service.

I am constrained, therefore, to advise you that the word "appointment" in section 1219 of the Revised Statutes applies only to the original entry of the officer into the regular service, or subsequent appointment by selection; but that it does not apply to promotions by seniority as defined in the Regulations of the Army.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. ROBERT T. LINCOLN,

*Secretary of War.*

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Treaty with the Kansas Indians.

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## TREATY WITH THE KANSAS INDIANS.

Authority to issue certificates of indebtedness under the treaty with the Kansas Indians is to be considered as conferred upon the date of the proclamation of the treaty, March 16, 1863, and not before.

Such certificates were of two classes, viz: First, those issued to persons who had settled and improved lands within the reservation to an amount not exceeding \$29,421 in the aggregate; second, those issued to persons having claims against the Indians to an amount not exceeding in the aggregate \$36,394.47.

The Secretary of the Interior is not at liberty to accept in payment of lands any certificates of the first class issued after the limitation upon the amount of such certificates prescribed in the treaty had been reached, nor any certificates of the second class issued in advance of the ratification and proclamation of the treaty.

DEPARTMENT OF JUSTICE,  
*August 18, 1881.*

SIR: In reply to your letter asking my opinion as to the excessive issue of certificates of indebtedness under the treaty with the Kansas Indians, I beg to state the facts, as I understand them, are as follows:

The treaty was proclaimed March 16, 1863, and any authority conferred by its provisions upon the officers of the Government to issue certificates of indebtedness must be considered as conferred upon that date, and not before. The negotiation of the treaty by the agent of the Indian Bureau could certainly confer no such authority. The insertion by the Senate of amendments in the treaty thus negotiated could certainly confer no such authority, for those amendments required the assent of the Indians, and it is indeed entirely clear that the earliest date at which certificates of indebtedness could be lawfully issued was the date of the proclamation already mentioned.

The certificates were of two classes. Those of the first were to be issued to persons who had settled and improved lands within the reservation to an amount not exceeding in the aggregate \$29,421. Those of the second class were to be issued to persons having claims against the Indians to an amount not exceeding in the aggregate \$36,394.47. There is not the slightest ambiguity either as to the date when the power to issue the certificates in question was conferred or

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*Treaty with the Kansas Indians.*

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as to the character and extent of the authority itself. After the ratification of the treaty, and not before, certificates might lawfully be issued, and the certificates of each class might lawfully aggregate, but could not exceed, the respective amounts designated in the treaty itself.

As matter of fact, however, certificates of the second class were issued not only before the proclamation of the treaty, but even before the amendments inserted by the Senate had received the assent of the Indians; and not only to the entire amount allowed by such amendments but considerably in excess thereof. As there was no authority to issue them on the part of anybody when they were issued, I am obliged to advise you that they were absolutely null and void, and, as I am unable to discover any subsequent action which acknowledges or ratifies them, they continue so to be.

No certificates of the first class were issued until after the proclamation of the treaty, March 16, 1863; but after that date such certificates were issued to the amount of \$42,901.03, being an excess of \$13,480.03 over the amount limited by the treaty. As there was not even a pretense of authority for the issue of the certificates representing such excess, and as I can discover no subsequent action acknowledging or ratifying them, they also are null and void.

You inform me, however, that a practical difficulty may arise in distinguishing between the certificates so issued and those issued within the limitation prescribed by the treaty, and that difficulty is probably increased by the following provision in the treaty itself:

“That all such certificates shall be receivable as cash to the amount for which they may be issued in payments for lands purchased or entered on that part of the first assigned reservation outside of said diminished reservation.”

Under this provision, certificates issued in settlements of claims of the first class to the amount of \$27,533.48 have been actually redeemed in lands, leaving outstanding certificates of this class to the amount of \$15,367.55.

In dealing with the certificates of this class it has occurred to me that it will be possible to distinguish between the certificates lawfully issued and those issued without authority by their respective dates; that is, beginning with the date of

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Treaty with the Kansas Indians.

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the treaty, all certificates of this class thereafter issued would be lawful and valid to the amount limited by the treaty itself, to wit, \$29,421. Certificates issued after that limit had been reached would be unlawful and invalid. If, however, as has probably happened, you discover that a portion of the certificates already redeemed in lands were issued after the limit prescribed in the treaty had been reached, and a portion of those now outstanding were issued before that limit was reached, such fact would not alter the character of the certificates themselves, and it would still be your duty to recognize as lawful and valid such certificates of the first class as had been issued within the limitation mentioned.

In reaching these conclusions, I have not been unmindful of the hardship, real or apparent, which may be inflicted upon the present holders of unredeemed certificates. If, however, the hardship is real, relief will doubtless be afforded by the legislative department of the Government, and it would be dangerous to the last degree and subversive of all the settled principles of law applicable in such cases to protect even innocent holders for value of such certificates from loss by holding that an Executive Department of the Government may create obligations binding upon the Government in advance of any authority conferred upon it to do so, or in disregard of plainly expressed limitations upon the extent of such authority.

I am constrained, therefore, to advise you, that you are not at liberty to accept, in payment of the lands mentioned in your letter, any certificates of the first class, issued after the limitation upon the amount of such certificates prescribed in the treaty had been reached, nor any certificate of the second class, issued in advance of the ratification and proclamation of the treaty, to wit, March 16, 1863.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

HON. S. J. KIRKWOOD,

*Secretary of the Interior.*

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Importation of Fruit.

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## IMPORTATION OF FRUIT.

The terms "quantity" and "whole quantity," as employed in Schedule M (Rev. Stat., 2d ed., p. 476), are not to be understood as covering all the fruit imported in any one vessel shipped to one consignee, if coming from different consignors. Each consignment, not only from one party, but of each separate kind of fruit specified in the statute, is to be considered as the "quantity," and as the "whole quantity," therein specified.

DEPARTMENT OF JUSTICE,

*August 19, 1881.*

SIR: I have carefully considered the question raised by your letter, calling my attention to such portion of Schedule M, of the law imposing duties upon imports, as imposes certain rates of duty on oranges and other fruits therein mentioned. It provides that no allowance shall be made for loss by decay on the voyage, unless the loss shall exceed 25 per centum of the quantity, and that the allowance then made shall be only for the amount of loss in excess of 25 per centum of the whole quantity.

This provision was inserted as an amendment, and it does not seem to me probable that its draughtsman considered the change in the mode of expression. I have not been able to discover any reason for changing the expression from "quantity" to "whole quantity;" nor is there any reasonable effect which can be given to the word "whole" by attaching any special emphasis or import to it. It seems to me that as used in this proviso "quantity" and "whole quantity" mean precisely the same thing.

Possibly a clearer view of the meaning of the section in question will be had by extending the paragraph to its proper legal form. It would then read: Oranges, 20 per centum ad valorem; lemons, 20 per centum ad valorem; pine-apples, 20 per centum ad valorem; grapes, 20 per centum ad valorem. And the same extension should be applied to the fruits liable to a duty of 10 per centum ad valorem. When thus read, it will be apparent, I think, that each fruit is to be considered alone in estimating the proportion of injury to it, for each fruit is, in itself, a separate object of duty; and

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Importation of Fruit.

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the allowance for the percentage of injury should be as separate as the duty itself.

It seems to me also equally clear that even in the same kind of fruit, each separate invoice, in which a loss occurs, is to be considered in estimating the allowance to be made. If the provision is construed otherwise, it would present the practical anomaly that the allowance upon a shipment by one consignor at one port would depend not at all upon the state of preservation in which the fruit shipped by him arrived, but upon the accident whether some other consignor at some other port shipped to the same consignee a particular quantity of fruit, and it arrived in a particular condition.

It must also be remembered that if the words "quantity" and "whole quantity" in this section blend together all fruit in one cargo, or even in one invoice, they must be held to do so without reference to the difference of duty upon the different kinds of fruit mentioned in it. If they blend all the fruit in one cargo into one quantity for the purpose of estimating the allowance, certainly very great practical confusion would arise in applying the different rates of duty and ascertaining the proper per centum of allowance; and the same would be true if they put together the different kinds of fruit in a single invoice. If, for instance, lemons, oranges, limes, and bananas are imported either in the same invoice or in the same cargo, and they are to be considered as a common fruit and a common quantity for the purpose of the allowance, provided by this section; if 25 per centum of the limes should be lost by decay, it would be necessary to hold that the oranges should be benefited by such decay, not at the rate of the duty upon the limes injured, but at the rate of the duty upon the oranges uninjured. If a like percentage of the lemons was lost by decay, the bananas which were uninjured would only receive benefit at the lower rate of duty imposed upon them.

Such consequences can not have been intended; nor do they, in my judgment, result from the natural reading of the provision itself.

I have, therefore, to advise you, in direct answer to your question, that these terms "quantity" and "whole quantity" are not to be accepted as covering all the fruit imported in

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 Patents for Inventions.
 

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any one vessel shipped to one consignee if coming from different consignors; but that each consignment, not only from one party but of each separate kind of fruit specified in the statute, is to be considered as "the quantity" and as the "whole quantity" therein specified.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WILLIAM WINDOM,

*Secretary of the Treasury.*

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## PATENTS FOR INVENTIONS.

By virtue of the supervisory power conferred on him by section 441, Revised Statutes, over the public business relating to patents for inventions (see also section 481, Revised Statutes), it is within the competency of the Secretary of the Interior to review a decision of the Commissioner of Patents made in an interference case under Rule 110, Rules and Practice of the Patent Office, upon a motion to amend a preliminary statement.

## DEPARTMENT OF JUSTICE,

*August 20, 1881.*

SIR: Your letter of the 3d instant states that you have before you on appeal, or on petition in the action of appeal from the decisions of the Commissioner of Patents, the cases of *Henry C. Nicholson v. Thomas A. Edison* (duplex telegraph), and of *F. V. Le Roy v. D. A. Hopkins* (journal bearings). From the papers transmitted by you I learn that the status of the cases is as follows:

In March, 1879, an interference was declared between Edison and Nicholson, and during that month Edison filed a preliminary statement under oath showing the date of the original conception of his invention, of its illustration by model or drawing, of its disclosure to others, of its completion, and of the extent of its use.

In September, 1880, testimony in the case was commenced. In the following November Edison moved for leave to amend his preliminary statement by adding a reference to a certain caveat, accompanying his motion with affidavits explanatory of its omission from the preliminary statement and of his delay in making the motion.

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Patents for Inventions.

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This motion was successively refused by the examiner in charge of the interferences and by the Commissioner. From the decision of the latter Edison has appealed or petitioned in the nature of an appeal. The case of *Le Roy v. Hopkins* is not materially different so far as it gives rise to the questions upon which you request my opinion.

Your first inquiry is whether you have the power to allow this amendment.

This question of how far the Secretary of the Interior has controlling or appellate power over the Commissioner of Patents is one which has assumed greater importance and received more and more attention as the expansion of the business of that office and of the other bureaus of the Department has rendered less and less practical the personal exercise by the head of the Department of the powers vested in him by law. Secretary Chandler (9 Official Gazette, 403) disclaimed any appellate powers; Secretary Schurz (13 *ibid.*, 771; 16 *ibid.*, 220) concurred in this view, but the latter directed the Commissioner to prepare for issue (12 *ibid.*, 478) certain letters patent which the Commissioner had decided should not be issued until a bill in equity then pending in the supreme court of the District should be disposed of.

I shall not attempt to distinguish the cases before me from the ones considered by these eminent Secretaries, but will state my opinion and the reasons therefor.

I think that the key to the whole question is found in sections 441 and 481 of the Revised Statutes. By the former the Secretary of the Interior is charged with the supervision of the public business relating to (*inter alia*) patents for inventions, and by the latter it is provided that "the Commissioner of Patents, under the direction of the Secretary of the Interior, shall superintend or perform *all* duties respecting the granting and issuing of patents directed by law." To my mind every section imposing a duty or conferring a power on the Commissioner of Patents should be read as if the words "under the direction of the Secretary of the Interior" were inserted.

It is not necessary to the validity of all the acts of the Commissioner that the direction of the Secretary should be expressed. That will always be presumed except in the cases

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which require his express approval, to wit, the adoption of regulations (sec. 483, Rev. Stat.), the refusal to recognize a person as patent agent (sec. 487), and the actual granting of a patent (sec. 4883).

The latter section requires the patent to be signed by the Secretary of the Interior, while the name of the Commissioner appears only by way of counter-signature.

Lexicographers unite in defining countersign to mean "to sign what has already been signed by a superior, to authenticate by an additional signature."

This distinction between the duties of the two officers palpably means that the Secretary's signature is not for mere purposes of authentication. It would be absurd in face of sections 441, 481, and 4883 to say that the act of the Secretary in issuing the patent is purely ministerial, the act of a clerk of a court registering the decree delivered by some tribunal. I find no clause or section relieving the Commissioner from the directing powers of the Secretary, and I am irresistibly led to the conclusion that the final discretion in all matters relating to the granting of patents is lodged in the Secretary of the Interior. In the case of a collision between himself and the Commissioner (as in *Sargent's case*, 12 Official Gazette, 475) he may direct the latter to prepare letters patent for his signature and may further direct him to attach his counter-signature.

From the right and power of the Secretary to withhold his signature from the patent, unless he is satisfied of the claimant's title thereto, plainly follows an equal right to direct the Commissioner while the proceedings are pending to receive an amendment which will open up a line of evidence that may throw light on that title.

Considerable confusion has arisen from the use of the word "appeal" in describing the applications made to the Secretary by persons dissatisfied with the acts of the Commissioner, and because Congress has expressly provided in sections 4909, 4910, and 4911 for appeals to the board of examiners-in-chief, to the Commissioner, and to the supreme court of the District of Columbia, it is argued that there are no rights of appeal except those given by statute, and no power of review except by appeal. The latter proposition came before the supreme court of the District on the application of Hull

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for a mandamus to compel the Commissioner to grant him a patent (2 McArthur, 90). The board of examiners-in-chief decided in favor of his claim, but the Commissioner refused to issue the patent, contending that there rested in him a discretion in determining whether the patent should issue, and that in his judgment it should not. The relator insisted that the only right to appeal from the examiners-in-chief was in him, and that he was satisfied with their decision. The court held that the Commissioner by virtue of his supervisory power might refuse to issue a patent although the examiners-in-chief decided that it should be granted. The principles there laid down seem especially applicable to the supervisory powers of the Secretary over the whole business of patents for inventions, his directory power over the Commissioner of Patents, and his right to withhold his signature from the letters patent. The language of Judge Olin (page 108), if for "*Commissioner*" be substituted "*Secretary of the Interior*," and for examiners-in-chief" be substituted "*Commissioner of Patents*," I adopt as my own. He says: "I think the right of appeal was omitted because it was unnecessary to confer it; for the Commissioner's supervisory power over acts of the subordinates in the office is such as to preclude any necessity of his 'appealing' from the examiners-in-chief. He can refuse to grant the patent."

Edison, therefore, is not appealing to you from a decision of the Commissioner, but is invoking the exercise of your directory and supervisory powers.

It is also argued that a dual right of appeal should not exist; that because an appeal from the Commissioner to the supreme court of the District of Columbia (in cases not of interference) is provided by statute (Sec. 4911), the Secretary of the Interior has no control over the Commissioner and his subordinates. I have already shown that an application for your interference is not an appeal in the sense in which the word is used in the laws providing for the Patent Office. The right of appeal to the supreme court of the District in no way conflicts with the directory and supervisory powers of the Secretary, and sections 481 and 4911 may easily be read together without any inconsistency.

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As I have already observed, every act of the Commissioner is presumed to be done with the knowledge and by the direction of the Secretary until or unless the contrary appears. By the decision of the Commissioner in section 4911 is meant not his personal opinion, but the act of deciding in accordance with the direction of the Secretary. It would not be the entertainment or expression by the Commissioner of views hostile to the issue of a patent that would furnish grounds for an appeal to the court, but it would be the act of deciding, which, theoretically, is the act of the Secretary.

Two supposed cases will illustrate my meaning. The Commissioner is of opinion that A should not have a patent, and declines to prepare letters patent, until the Secretary, entertaining a different view, directs him to do so. The Secretary affixes his signature, and directs the Commissioner to authenticate them by his counter-signature. His refusal to do this would not entitle A to an appeal to the court, whatever might be A's rights to a mandamus.

On the other hand the Commissioner considers B entitled to a patent, prepares and countersigns the letters, but the Secretary manifests his disapproval of the Commissioner's act by refusing to sign. Persistence in this refusal would be tantamount to a direction to the Commissioner to cancel the counter-signature. No mandamus would lie against the Secretary, and B would be entitled to appeal to the supreme court of the District of Columbia, although as a matter of fact he would be appealing from a decision of the Secretary and asking the court to maintain that of the Commissioner.

It is admitted that the responsibility of seeing that the work is properly done by the Commissioner of Patents is with the Secretary of the Interior, but an effort is made to draw a line between the ministerial or administerial or administrative duties of the Commissioner and those requiring the exercise of discretion, and to confine the directory and supervisory power of the Secretary to the former class. But the directory power of the Secretary by statute comprehends all duties of the Commissioner; and, to say the least, the Secretary is vested with powers of discretion equal to those of the Commissioner.

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Patents for Inventions.

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The Commissioner of the General Land Office (sec. 455), of Indian Affairs (sec. 463), of Pensions (sec. 471), and of Patents (sec. 481) perform their respective duties "under the direction of the Secretary of the Interior," while the Superintendent of Public Documents (sec. 508), whose duties are mainly mechanical, is "subject to the general direction of the Secretary of the Interior."

I do not see why if the directory power of the Secretary over patents is to be confined to the ministerial or administrative duties of the Commissioner, it should not by a parity of reasoning be equally circumscribed in the Land, Indian, and Pension Offices, and the Secretary become only nominally the head of the Interior Department.

It is true that within the bounds of the discretion reposed in these several commissioners their decisions are accepted as final by the courts, and they will not interfere by mandamus to direct how that discretion shall be exercised. This, however, is because the act of the Commissioner is constructively the act of the Secretary, and not because the Commissioner may exercise his discretion independent and in defiance of the head of the Department.

These observations I think sufficiently answer your first inquiry, which is as follows:

"Has the Secretary of the Interior jurisdiction to review decisions of the Commissioner of Patents, rendered under rule 110, Rules of Practice of the Patent Office, overruling motions to amend preliminary statements in interference cases?"

I am not unaware of the vast amount of labor which must result if you personally review all the acts and decisions, discretionary as well as administrative, of the Commissioner of Patents. Indeed it would be physically impossible for you to do this. The argument *ab inconvenienti*, however, addresses itself rather to you when you prescribe regulations under section 161, Revised Statutes, for the performance of the business of the Department.

It by no means follows that you are required to exercise in every case the directory power invested in you, and from the nature of things you must sign many papers and do many acts in confidence that your subordinates have acted honestly

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and wisely. In order that the business of the Department may be accomplished, and that it may be conducted in an orderly manner, it will be perfectly proper for you by regulations to define the class of cases or disputes in which you will specially exercise your directory powers, leaving all others to your general directions; you may also prescribe the stage of the proceedings at which they may be invoked.

I have confined myself in this opinion to your first inquiry; the other three will form the subject of a subsequent communication.

I return herewith all inclosures except the pamphlets containing the Patent Laws of the United States and the Rules of Practice of the Patent Office.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. S. J. KIRKWOOD,  
*Secretary of the Interior.*

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GOVERNMENT HOSPITAL FOR THE INSANE.

The provision in section 4851, Revised Statutes, that "if any person charged with crime be found in the court before which he is charged to be an insane person, such court shall certify the same to the Secretary of the Interior, who may order such person to be confined in the hospital for the insane," etc., applies only to persons charged with crime before the courts in the District of Columbia; it does not extend to persons indicted in United States courts elsewhere.

DEPARTMENT OF JUSTICE,

August 22, 1881.

SIR: I beg to acknowledge the receipt of your favor of the 18th instant, inclosing a certificate of the district court of the United States for the northern district of Texas, setting forth that Buford Kennett, who was indicted in said court for violation of the laws of the United States, was found to be insane; and asking whether the facts stated in such transcript authorized the issue by you of an order that Kennett be confined in the hospital for the insane in this District.

Section 4851 of the Revised Statutes provides: "If any person charged with crime be found in the court before which he is charged to be an insane person, such court shall certify the same to the Secretary of the Interior, who may order such

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Government Hospital for the Insane.

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person to be confined in the hospital for the insane; and if he be not indigent, he and his estate shall be charged with expenses of his support in the hospital."

This provision is found under Chapter IV of title 69, which chapter is headed "The Government Hospital for the Insane," and the first section under this title provides that "there shall be in the District of Columbia a Government hospital for the insane, and its objects shall be the most humane care and enlightened curative treatment of *the insane of the Army and Navy of the United States and of the District of Columbia.*"

This chapter is in substance a condensation of the provisions of the acts of Congress of March 3, 1855, and of the supplement thereto of February 7, 1857, and, like those acts, is clearly intended to apply to the insane of the Army and Navy and of the District of Columbia. Neither in the Revised Statutes nor in the acts already mentioned is there to be found the slightest indication of any purpose on the part of Congress to authorize the reception into the hospital of this District of insane persons resident in any State. The language of the section in question is general, inasmuch as it speaks of any person charged with crime being found in the court before which he is so charged to be an insane person, but I have no doubt that the generality of this language is, by the force of the title and the accompanying provisions, limited to courts in this District. Sufficient reasons will suggest themselves to every mind why Congress should make such provision for the insane of the Army and Navy and of this District, as the States are expected to make for the insane persons residing within their borders; but no reason can be suggested why an insane resident of Texas should be brought and maintained here.

In the case you have submitted it is evidently supposed that the mere fact that an insane resident of Texas has been indicted for an offense in a court of the United States renders him a proper subject for the issue of an order by you for his maintenance in the hospital under your charge. I am unable to concur in that view.

I am strengthened in the conclusion I have reached by the provisions of the act of June 23, 1874, 18 Statutes at Large, 251. That act recognizes the duty of the United States to

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Authority of the Secretary of the Treasury to Compromise Cases.

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take care of convicts who may become insane while in her custody. It authorizes the Attorney-General to apply to the Secretary of the Interior for the transfer of such insane convict to the hospital of this District, or if there shall not be accommodation for such person in said hospital, or if for other reasons the Attorney-General is of opinion that such insane person should be placed at a State insane asylum rather than at said District asylum, then he is empowered to contract with any State insane asylum within the State in which such convict is imprisoned for his care and custody while remaining so insane.

The express legislation upon the subject is found, therefore, to be in accordance with reasonable expectation. The Government provides for the insane of its military and naval services, the insane of this District, and such persons as may become insane while in its custody and undergoing imprisonment under its authority; but it does not authorize the maintenance here of residents of States who have become insane after indictment but before conviction and imprisonment.

I have therefore to advise you that you are not at liberty in this case to issue the order provided in section 4851 of the Revised Statutes.

I return herewith the papers forwarded to me.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. S. J. KIRKWOOD,

*Secretary of the Interior.*

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AUTHORITY OF THE SECRETARY OF THE TREASURY TO COMPROMISE CASES.

In passing upon cases submitted to him for compromise, under sections 3229 and 3469, Revised Statutes, the Secretary of the Treasury, while he is not at liberty to act from motives merely of compassion or charity, may consider not only the pecuniary interests of the Government, but take into view general considerations of justice and equity and of public policy.

DEPARTMENT OF JUSTICE,

August 26, 1881.

SIR: In accordance with our verbal understanding, I have delayed until this time an answer to your note of May 9, last, inclosing a memorandum from Assistant Secretary

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Authority of the Secretary of the Treasury to Compromise Cases.

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French upon the extent of your authority to compromise cases, and asking my opinion thereon.

I beg now to state that I have very carefully considered the subject, and I regret to say that I do not find myself able to agree entirely with the former opinions of this Department referred to in the memorandum of Judge French. Those opinions appear to hold that the only consideration that the Secretary of the Treasury is at liberty to take into account in deciding upon the advisability of any proposed compromise, either of a claim not in suit, or of a suit pending, is whether the Government can realize more money by its prosecution than by accepting the settlement proposed. While the language of the Revised Statutes is general, using only the word "compromise," it is supposed that the language of the original act incorporated into section 3229 of the Revised Statutes affords support for this opinion in using these words: "All cases where it may appear to the Commissioner of Internal Revenue to be *for the interest of the United States* to compromise the same." But I have not been able to satisfy myself that, even if these words had been incorporated into the Revised Statutes, they would change what seems to me to be the natural meaning of the language used; nor am I able to discover sufficient basis for such construction in section 3469 of the Revised Statutes, providing that a report by a district attorney, or any special attorney or agent, having charge of any claim in favor of the United States, recommending that such a claim should be compromised, shall state in detail "*the condition of such claim,*" and the terms upon which the same may be compromised. I do not see that any special import is to be attached to either of the expressions I have quoted, and I think they leave the question you ask to be decided upon general considerations. The grant of authority is, as has already been stated, general and comprehensive in its language. In the one case the Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws instead of commencing suit thereon, and with the advice and consent of the said Secretary, and with the recommendation of the Attorney General, he may compromise any such case after a suit thereon has been com-

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Authority of the Secretary of the Treasury to Compromise Cases.

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menced. Upon such report, as has already been mentioned, by a district attorney, or any special attorney or agent, having charge of any claim in favor of the United States, recommending a compromise, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise such claim upon the terms recommended. In both cases it has been required that detailed statements of the claim and of the compromise made shall be placed upon file.

In construing these provisions, the first thought which naturally occurs to the mind is that Congress has placed ample safeguards around the exercise of this authority. It not only requires that the grounds of the action of each officer in each case shall be placed upon file and left open to inspection, but that, in cases in which suits are not pending, the Solicitor of Internal Revenue, the Commissioner of Internal Revenue, and the Secretary of the Treasury shall all concur before the compromise can be made. Where a suit is pending or the claim is in charge of counsel, such counsel or the Attorney General of the United States must also concur before such compromise can be effected.

The second thought which naturally occurs upon reading the provisions is, that if Congress had desired to impose any limit upon the considerations which the Secretary of the Treasury was at liberty to entertain in reaching his conclusion, it was very easy to do so. Congress having provided these safeguards with the greatest care, and not having imposed the limitation mentioned, I do not feel at liberty to do so by construction.

I do not fail to see that such discretion as I believe is lodged in the Secretary may be abused; but I do not think that any probable abuse of the discretion in question could be as serious to the public interests as the abuse of discretion lodged in him with reference to other and graver matters. Confidence must be reposed somewhere, and Congress has in many most important respects reposed almost unlimited confidence in the proper exercise of the discretion confided to the head of the Treasury Department.

I am also unable to imply from the provisions of the law under review any intention on the part of Congress that the

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*Authority of the Secretary of the Treasury to Compromise Cases.*

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Secretary of the Treasury should be compelled to pursue litigations out of which the United States might undoubtedly realize smaller or greater sums of money, but which in his judgment ought not to be further prosecuted. As an illustration, if a person has been guilty of a technical violation of the internal revenue laws, and upon being informed of it, offers to compromise the case by the payment of the costs and of any other sum justly due the Government, I see no evidence in these sections of the Revised Statutes, or in the laws from which they were draughted, that Congress intended to require that a suit shall be commenced and prosecuted to extort the penalty intended only for willful violators of the law, and the same considerations would apply to a great variety of cases, some of which must be of frequent occurrence in the administration of the Treasury Department, where the rigid enforcement of the technical legal rights of the Government would work manifest and plain injustice by taking from citizens money which, in the forum of conscience and good morals, they did not owe to it. It is not necessary to hold that the Secretary of the Treasury is in the matter of compromise a fountain of the compassion of the Government or an almoner of its charity. Those are considerations which do not belong to the administration of a business department. But, on the other hand, it is to my mind as clearly unnecessary to hold that the Secretary is bound to be an instrument of manifest injustice, and to ask himself only in every case this question, Will the prosecution of the claim in question probably bring to the Treasury more money than its compromise upon the terms proposed?

I have, therefore, to advise you that while, in considering any compromise submitted to your judgment, you are not at liberty to act from motives merely of compassion or charity, you are at liberty, until Congress sees fit to limit your authority, to consider not only the pecuniary interests of the Treasury, but also general considerations of justice and equity and of public policy.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WILLIAM WINDOM,  
*Secretary of the Treasury.*

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Proceeds of School-Farm Lands.

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## PROCEEDS OF SCHOOL-FARM LANDS.

The investment of trust funds (money derived from the sale of school-farm lands) made by the Secretary of the Treasury, under the provisions of the act of March 3, 1873, chapter 260, and section 3 of the act of May 7, 1878, chapter 96, in 5 per cent. bonds of the United States, which have since been called for payment, may be continued by him in the same bonds at  $3\frac{1}{2}$  per centum, in accordance with the circular of the Treasury Department of May 12, 1881, or he is at liberty to pay off such bonds and invest the proceeds in any other bonds of the United States for the benefit of the trusts mentioned in the provisions aforesaid.

## DEPARTMENT OF JUSTICE,

*September 2, 1881.*

SIR: In your letter of August 26 you call my attention to section 6, act of March 3, 1873, chapter 260, providing that certain moneys should be turned over to the Secretary of the Treasury, to be by him invested in bonds of the United States, and the interest to be applied to the support of certain schools therein mentioned. You also refer me to section 3 of the act of May 7, 1878, chapter 96, for the establishment of a sinking fund in the Treasury, the investments to be made by the Secretary in the bonds of the United States, preference to be given to 5 per centum bonds, unless for good reasons appearing to him, and which he shall report to Congress, he shall at any time deem it advisable to make said investments in other bonds of the United States. You then state that both the funds in question have heretofore been invested in registered 5 per centum bonds which have been called for payment, but on which you have reserved a right of continuance at  $3\frac{1}{2}$  per centum in accordance with the circular of your Department of May 12, 1881. You then ask my opinion whether you have the right to pay off the bonds in question at maturity and to invest the proceeds in any other bonds of the United States for the benefit of the respective trusts mentioned, and also whether you have a right to continue the bonds at  $3\frac{1}{2}$  per centum per annum as provided in the circular already mentioned.

In reply to these questions I beg to state that the difficulty about them is only apparent, and is due to the fact that you

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Proceeds of School-Farm Lands.

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are acting in the dual capacity of Secretary of the Treasury and of trustee for certain investments.

As Secretary of the Treasury, you have undoubted authority to call and pay the bonds in question precisely as if they were held by other parties. As trustee of the investment, you have undoubted authority to invest the moneys you receive upon their payment in such other bonds of the United States as may seem to you advisable. So far as the investments for the sinking fund are concerned, it would be your duty to report the change made and the reasons therefor to Congress at its next session.

As in your capacity of trustee you may be compelled to take the money for the called bonds, and will then be at liberty to buy in open market the bonds now bearing interest at the rate of  $3\frac{1}{2}$  per centum, I can not see any difficulty in advising you that you have also the right to accept bonds bearing interest at the rate of  $3\frac{1}{2}$  per centum; or, in other words, to agree, as other holders of like bonds have done, to a reduction of the interest, so as to save to the trusts you represent the premium those bonds are now bringing in the open market. I need hardly say that if you think it would be more to the pecuniary advantage of the trusts you represent to accept the money for the bonds now held for them, and to reinvest it in the 4 per centum or  $4\frac{1}{2}$  per centum bonds of the United States, it would be your duty to do so. But if, as a matter of fact, you believe the most advantageous arrangement you can make of the trust moneys in your care is to agree to the reduction of the interest upon the bonds now held to  $3\frac{1}{2}$  per centum, then in my opinion you are at liberty, and it is your duty, to do so.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

Hon. WILLIAM WINDOM,

*Secretary of the Treasury.*

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Compensation for Disbursing Public Moneys.

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## COMPENSATION FOR DISBURSING PUBLIC MONEYS.

In March, 1873, J., a postmaster, was appointed by the Secretary of the Treasury an agent to disburse money appropriated for the erection of a public building. The compensation for such service was then regulated by the act of March 3, 1869, chapter 123, which limited it to not exceeding one-eighth of 1 per centum, and by the terms of his appointment J. was to receive the maximum compensation allowed by law. Subsequently, by the act of March 3, 1875, chapter 131, it was declared that the provision in the act of March 3, 1873, above referred to, should be held to limit the compensation to be allowed for such services to three-eighths of 1 per centum. Thereupon the Secretary of the Treasury increased J.'s compensation to one-fourth of 1 per centum; but the latter claims that he is entitled, under the terms of his appointment, to three-eighths of 1 per centum from the date of the act of 1875: *Held* that one-fourth of one per centum, as allowed by the Secretary under the provision of the act of 1875, is all that J. is entitled to for his services.

DEPARTMENT OF JUSTICE,

October 15, 1881.

SIR: In your letter of the 5th ultimo you state that "under the provisions of section 255, Revised Statutes, authorizing the Secretary of the Treasury to appoint any bonded officer of the United States to disburse moneys appropriated for the construction of public buildings, the Hon. Thomas L. James was appointed disbursing agent for the funds appropriated for the construction of the United States court-house and post-office building at New York, with the maximum compensation allowed by law, he at that time, and during the whole period of his service as such disbursing agent, holding the office of postmaster at New York City."

The letter of appointment is dated March 23, 1873, at which time the law authorized a compensation *not exceeding* one-eighth of 1 per centum to be allowed such agent for disbursing moneys. (See Act of March 3, 1869, chap. 123; sec. 3654, Rev. Stat.)

By the act of March 3, 1875, chapter 131, it was declared that the provision in the above-cited act of March 3, 1869, limiting the compensation to be allowed for the disbursement of moneys, "shall be deemed and held to limit the

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Compensation for Disbursing Public Moneys.

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compensation to be allowed to any disbursing officer who disburses moneys appropriated for and expended in the construction of any public building, as aforesaid, to three-eighths of 1 per centum for said services."

You further state: "In this case Secretary Sherman decided upon an allowance of one-fourth of 1 per centum, but Mr. James claims that the discretionary action contemplated by law was exercised by the Secretary of the Treasury in his letter of appointment, granting the maximum compensation allowed by law, and that under it he is entitled to three-eighths of 1 per centum upon disbursements made by him during his period of service."

Upon the foregoing facts you request my opinion "as to what allowance, if any, Mr. James is legally entitled to."

I have now the honor to submit to you my views upon the subject of your request.

The act of March 3, 1869, (sec. 3654, Rev. Stat.,) while limiting the compensation to be allowed for the disbursement of moneys to an amount not exceeding one-eighth of 1 per centum, left it discretionary with the Secretary to allow any amount within that limit. The act of March 3, 1875, extended the limit to three-eighths of 1 per centum. Its effect is not to *fix* the amount of compensation to be allowed for disbursing moneys, but to "limit" it. It enlarges the discretion of the Secretary, by enabling him to allow as compensation for such services any amount not exceeding the increased per centum therein designated. He may under this act, as he might have done under the former act, allow a less per centum than that specified in the statute, but not a greater.

At the time Mr. James received his appointment as disbursing agent, the maximum compensation allowable by law for his services in that capacity was one-eighth of 1 per centum; and his letter of appointment must be deemed to contemplate that (*viz*, one-eighth of 1 per centum) as the measure of his compensation. When, afterwards, the maximum was increased, it was discretionary with the Secretary to allow an increase of compensation either up to the new limit imposed or at any intermediate rate. Secretary Sherman, as it seems from your statement, allowed Mr. James

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 Half-Pay Pensions.
 

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one-fourth of 1 per centum under the act of 1875. In my opinion this allowance is all that the latter is legally entitled to.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. WILLIAM WINDOM,  
*Secretary of the Treasury.*

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 HALF-PAY PENSIONS.

The provision in section 4713, Revised Statutes, declaring that where an application for pension shall not have been filed "within three years of the termination of a pension previously granted on account of the service and death of the same person, the pension shall commence from the date of filing, by the party prosecuting the claim, the last paper requisite to establish the same," is applicable to half-pay pensions allowable under section 4725, Revised Statutes.

DEPARTMENT OF JUSTICE,

October 17, 1881.

SIR: I have considered the inquiry contained in your letter of the 1st ultimo, touching the claim of Mrs. Savilla Athey. The case as stated by you is as follows:

"Mrs. Athey is pensioned as the widow of Joseph Athey, who was a soldier in the war with Mexico. Said Joseph Athey died on the 10th of December, 1847, and his widow was granted a half-pay pension under the act of July 21, 1848, for five years from the date of his death. In November, 1853, she filed a claim for an additional five years' half-pay under the act of February 3, 1853, which was allowed and paid. Her pension under this act terminated on the 10th of December 1857. In April 1870, she filed a claim under the act of June 3, 1858, for renewal or continuance of the half-pay pension. Under this act the Pension Office granted her pension from the 20th of April, 1870, the date of filing the claim for continuance. She then (in 1875) made a claim for arrears of half-pay for the period from the 10th of December, 1857, the date to which she had been paid under the act of 1853, to the 20th of April, 1870, the date from which she was paid under the act of 1858. This claim was rejected by the

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Half-Pay Pensions.

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Pension Office because of the limitation as to filing contained in section 4713 of the Revised Statutes."

Your inquiry is, "Whether sections 4713 and 4725, Revised Statutes, are in conflict on the question involved; and if so, which should govern the case?"

The "question involved" seems to be, whether the provisions of section 4713, which limit the commencement of pensions when the cause of disability or death originated in the service prior to March 4, 1861, apply to half-pay pensions allowable under section 4725. By the latter section, surviving widows and minor children, who have been allowed five years' half-pay, under the provisions of any general laws passed prior to June 3, 1858, are granted a continuance of such half-pay, "to commence from the date of last payment, under the respective acts of Congress granting the same," etc. The former section, on the other hand, declares that "in all cases" in which the cause of disability or death originated as aforesaid, and "an application for pension shall not have been filed within three years from the discharge or death of the person on whose account the claim is made, or *within three years of the termination of a pension previously granted on account of the service and death of the same person*, the pension shall commence from the date of filing, by the party prosecuting the claim, the last paper requisite to establish the same."

The clause in section 4713, underscored above, is by its terms especially applicable to claims for *renewed* pensions, within which class is comprised the half-pay granted by section 4725. Pensions of that sort allowed by special acts are not within the scope of this clause (see sec. 4720, Revised Statutes), and, so far as I am advised, the general pension laws make no provision for the renewal of pensions, other than that contained in section 4725, to which it might be referred. Unless, then, the clause applies to applications for half-pay pensions under that section, it would have nothing to operate upon in the existing state of the law. But we can not regard it as having been embodied in the statute without a purpose, and, under all the circumstances, the inference seems fair and reasonable, if not a necessary one, that Congress thereby intended to subject such pensions to the limita-

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Statuary and Other Works of Art.

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tion prescribed by section 4713. I am accordingly of opinion that the limitation just mentioned applies to pensions allowable under section 4725.

No conflict really arises between sections 4713 and 4725 as thus construed. The half-pay pensions continued by the latter section commence at the period indicated therein, excepting in cases where the application therefor has not been filed within three years of the termination of the previously granted half-pay pension; in such cases, by the former section, the pension must commence from the date of filing the last paper requisite to establish the same.

I am, sir, very respectfully,

S. F. PHILLIPS,  
*Acting Attorney-General.*

Hon. S. J. KIRKWOOD,  
*Secretary of the Interior.*

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STATUARY AND OTHER WORKS OF ART.

The tariff on statuary and other works of art considered in connection with the treaty of 1871 between the United States and Italy.

That treaty makes no provision, in letter or spirit, as regards the importation, exportation, or prohibition of articles, the produce or manufacture of Italy, where dealt in by Italian citizens residing in Italy, excepting that such importations, etc., shall be upon as favorable a footing as like commerce by English, French, German, or other *foreign* citizens whatsoever.

In the administration of the tariff there has been due observance of the legal rights of Italian citizens, arising either under said treaty or under statute provisions of Congress.

DEPARTMENT OF JUSTICE,

October 17, 1881.

SIR: Yours of the 26th of July last, with its several inclosures, was duly received and had immediate attention. However, as after some reflection it seemed probable that the question raised by the Government of His Majesty the King of Italy could not receive a solution in the sense there desired without an intervention of Congress, it was thought better not to reply at once, but to retain the papers for further consideration.

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Statuary and Other Works of Art.

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That consideration has been given, and I have now to submit my opinion, that the only redress for the matter complained of is with Congress.

That matter concerns the operation of the tariff laws of this country upon "statuary," "works of art," and "manufactures of marble."

It is said that, as between American citizens residing in Italy and Italian citizens *also residing there*, an improper difference as regards the duties upon the above articles is enforced—a difference greatly to the disadvantage of the latter. This administration of duties is suggested to be as well (1) in violation of the treaty of 1871 betwixt the United States and Italy, as (2) questionable under the statute law of this country considered alone.

Allow me to ask your attention to what has occurred to me upon each of these suggestions.

I. As regards the treaty of 1871:

It will be borne in mind that the present reclamation is on behalf of Italian citizens *residing in Italy*.

The correspondence which you have inclosed in your communication makes reference to the *first* and *sixth* articles of the treaty as those which bear upon this matter.

But the only *citizens* in behalf of whom stipulation is made in the *first* article are expressly defined therein as "Italian citizens *in the United States* and citizens of the United States *in Italy*." Such of the subsequent sentences of that article as begin with "they," plainly refer only to citizens limited and defined as above; that is, to citizens of Italy who reside in the United States and citizens of the United States who reside in Italy; and, therefore, to those only is to be applied the clause providing against "paying other or higher duties or charges than are paid by the *natives*."

The general provision in the first sentence of that article, for "a reciprocal liberty of commerce and navigation 'between the territories of the high contracting parties'" is not to be relied upon, as I understand, in this connection, and certainly does not concern the question before me, as appears, amongst other considerations, from the circumstance that immediately afterward in the same article, as has just been said, an *express* provision against "paying other and

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Statuary and Other Works of Art.

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higher duties," etc., is confined to a minute fraction of the citizens of each country, viz, such as may be found residing within the territory of the *other*; a context which of course suggests the pregnant question, Why should the treaty contain a plain and express stipulation for this privilege on behalf of a *minute fraction* of citizens, clearly defined, if it be true that other parts thereof confer the same privilege upon *all* citizens? *Expressio unius est exclusio alterius*. The same observation applies to the language of the second article of the treaty, which also has not been referred to in this connection, but which contains like general language as to trading "upon the same terms as the *natives* of the country." Whatever this "liberty" and these "terms" may be, they do not concern the *tariff laws*, inasmuch as that topic is at another place, as above, specifically introduced with its own express limitations, that exclude the parties now in question.

The *sixth* article of the treaty, which is also cited in confirmation of the immunity from taxation now claimed, forbids each of the high contracting parties to impose upon the importation or exportation of articles that are "the produce or manufactures" of the other party any higher duties or charges than are payable in like case upon similar articles coming from any other *foreign* country; and such also is its operation as regards the *prohibition* of such articles.

There is in the papers which you have submitted no statement that any part of the produce or manufactures of Italy has been subjected to *duties* or *prohibitions* that have not been equally extended to the produce or manufactures of other foreign countries. The only statement therein is that a discrimination is made between certain and *certain other* articles manufactured within the territory of Italy, a discrimination turning upon the circumstance that one class of these manufactures has been produced by American citizens residing in that kingdom. No stipulations of the treaty forbid this. I may add that it is a difference intended to encourage artistic excellence amongst our own citizens, and so falls under a policy which in one way or other is generally recognized amongst nations. I add this remark merely to show that a reason exists beyond that of the bare words of the treaty to indicate that (*ex. gr.*) *Italy* may have wished

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to remain free to encourage by *peculiar* bounties or immunities such of her citizens residing in the United States as might establish factories here as a basis of profitable commerce to be carried on by themselves with their native country, and equally that *the United States* did not intend to debar themselves from like encouragement of their citizens to resort to Italy, and avail themselves of the long-known and unrivaled advantages there enjoyed for developing genius within the circle of the fine arts. It may be that upon reconsideration both parties may be willing to surrender or to suspend the exercise of this right. As to the propriety of that, of course I am not, in this connection, to express an opinion. As regards the United States, it is a matter within the competency of Congress or of the treaty-making power alone.

I am of opinion, therefore, that the treaty of 1871 makes no provision in letter or spirit as regards the importation, exportation, or prohibition of articles, the produce or manufacture of the Kingdom of Italy, where dealt in by Italian citizens residing in Italy, except that such importation, etc., shall be upon as favorable a footing as like commerce by English, French, German, or other *foreign* citizens whatsoever. Consequently, with all proper deference, I conclude that that treaty affords no ground for the reclamation made in the correspondence before me.

II. It remains to inquire whether the tariff statutes of the United States have been improperly construed in this connection. I say improperly *construed*, inasmuch as no doubt, under the free constitutional government of Italy, the principle that executive officers must carry out the law as they find it is as well understood and obeyed as here, and that therefore the full extent of the complaint under this head is as to the *administration* of the statutes; any suggestion as to the policy of such legislation being suspended for consideration by Congress.

The statutory provisions in question are as follows :

- (1) "All manufactures of marble, not otherwise provided for, fifty per centum ad valorem." (Rev. Stat., p. 478, top.)
- (2) "Paintings and statuary, not otherwise provided for, ten per centum ad valorem." (*Id.*, p. 478, bottom.)

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Statuary and Other Works of Art.

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(3) "Paintings, statuary, fountains, and other works of art, the production of American artists," "shall be exempt from duty." (*Id.*, comparing pp. 489, near bottom, and 482, beginning of section 2505.)

There is some discrepancy in the statements contained in the papers inclosed by you as to the manner in which these provisions have actually been administered by the Treasury Department. Your predecessor, Mr. Evarts, seems to have understood that the Treasury had held that *copies of original* statuary, no matter of what merit, had been held at the Treasury to be mere "manufactures of marble" and not "statuary." However, Mr. Sherman, the late Secretary of the Treasury, states explicitly that this is not so. In such state of the case I shall assume that Mr. Evarts was misinformed.

I believe that it will be admitted that, taken together, the provisions above quoted recognize a distinction betwixt "statuary" and "works of art," and "manufactures of marble." The term last mentioned is a generic term, and includes the other two; whilst the *second*, in turn, includes the *first*. All *statuary* is a *work of art*, but there are works of art in marble that are not statuary; so, again, all works of art in marble are *manufactures of marble*, but there are manufactures of marble that are not works of art.

So far as regards an *imposition of duties* by the above paragraph, only *two* of the classes of manufactures of marble are recognized, viz, such as are "statuary" and such as are *not*. Upon the former, the duty is ten per centum; upon the latter, *fifty*. It follows, as matter of course, that all works of art that are not statuary are by such paragraph confounded into the general class of the "manufactures of marble" at a duty of fifty per centum.

As regards *exemption from duty* also only two of those classes are recognized; but these are such *works of art* of Americans as are *statuary*, and such as are *not*. There is no *exemption*, whether on behalf of Americans or others, for such *manufactures of marble* as are not works of art. But it is plain by inspection that the terms of exemption do include some of the articles, which, when produced by foreigners, are dutiable at *fifty* per centum, as well as of such as are dutiable at ten.

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State of Kansas and the Direct Tax.

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It therefore affords no just cause for complaint against the manner in which the statutes have been administered, that citizens of Italy find that not only such productions of theirs as are taxed at 10, but also other that are taxed at 50 per centum, are in favor of American citizens residing in Italy admitted into this country *free*. For the statutes are plainly to that effect.

And here again I have to say that whether the principle which, as regards *American* products, draws the distinction between exemption and duty at the boundary that separates *art* from operations merely *mechanical* might not properly be recognized as well in imposing the less and greater duties which affect productions by *foreigners*, is a question exclusively for the legislature. Possibly, upon further consideration, Congress may conclude that the same principle which excludes statuary from the operation of the policy of *protection* applies as well to other works of art in marble, often equally indicative of highly cultivated and extraordinary powers. That at this point there may be some ground of complaint by Italy, I have no occasion either to affirm or to deny.

In the meantime, however, it appears that there has been due observance at the Treasury of the legal rights of Italian citizens in this connection, arising either under the treaty of 1871, or under statutory provisions of the United States.

Very respectfully, your obedient servant,

S. F. PHILLIPS,  
*Solicitor-General.*

The SECRETARY OF STATE.

Approved:

WAYNE MACVEAGH.

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STATE OF KANSAS AND THE DIRECT TAX.

*Advised* that the amount claimed to be due from the State of Kansas to the United States on account of the direct tax be retained out of the amount appropriated for payment to that State by the act of March 3, 1881, chapter 132.

DEPARTMENT OF JUSTICE,  
October 21, 1881.

SIR: I have the honor to return herewith the communication of the First Comptroller, dated the 6th of August last,

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State of Kansas and the Direct Tax.

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and the accompanying papers, relative to the application in behalf of the State of Kansas for payment of the full sum of \$190,268.27 appropriated by the act of March 3, 1881.

It appears that as far back as 1868 the First Comptroller, having decided that the State of Kansas had assumed the direct tax apportioned to that State by the direct tax act of August 5, 1861, and was indebted to the United States for the amount thus apportioned (\$71,743.33), stated an account in favor of the United States and against the State, in which that amount was found due from the State to the United States, and it was accordingly charged to the State on the books of the Treasury.

Subsequently, certain indebtedness on the part of the United States to the State of Kansas, on account of war expenses, was credited to the State against the amount charged as aforesaid. And recently, in stating an account for the amount appropriated by the act of 1881, above mentioned, the sum of \$62,382.51, which is the balance remaining charged against the State on account of the direct tax, was directed by the Comptroller to be retained out of that amount, and to be applied to the credit of the State on account of such tax.

It is claimed by the attorneys acting in behalf of the State of Kansas that the State never assumed the tax, and was never indebted therefor to the United States, and they declare that the State does not consent to have the same set off against her claims against the United States. They accordingly ask that, in view of all the facts, and also of the provisions of the act of March 3, 1875, chapter 149, the Secretary of the Treasury cause suit to be brought against the State under that act to establish the validity of the indebtedness of the State for the direct tax.

At the suggestion of the Comptroller you, on the 5th instant, referred his communication, with the other papers, to this Department for such action in regard to the question of bringing suit as may be thought proper.

Without expressing any opinion upon the general question whether the United States can sue a State (as to which the Comptroller entertains "serious doubts"), I am inclined to the view that such a proceeding is not contemplated by the act of March 3, 1875, and that consequently no duty devolves upon

Reservation of Land for Public Purposes.

you under that act to institute a suit in this case against the State of Kansas. In this connection I would suggest that the State may have a remedy in the Court of Claims. There are two instances, I understand, wherein suits have been brought in that court by a State against the United States; and although neither of them proceeded to judgment (each being dismissed for want of prosecution), yet in neither was any point raised as to the jurisdiction.

I deem it proper, under the circumstances, to recommend that no suit be brought by the United States, but that the amount claimed to be due from the State to the United States on account of the direct tax be retained, leaving the State to its remedy in the Court of Claims should it deem that course advisable.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. WILLIAM WINDOM,

*Secretary of the Treasury.*

RESERVATION OF LAND FOR PUBLIC PURPOSES.

Mineral lands belonging to the public domain, which are reserved from sale under section 2318, Revised Statutes, may be reserved for military or other public purposes by the President.

Where such lands are included in a military reservation, they are not open to exploration and purchase under section 2319, Revised Statutes.

It is otherwise where a right has once attached to mineral land, under the laws relating thereto, in favor of the locator of a mining claim. Here the land, during the existence of such right, is not subject to reservation by the President; and if it be subsequently reserved, the locator may nevertheless perfect his title.

DEPARTMENT OF JUSTICE,

October 21, 1881.

SIR: By your letter of the 30th of August, 1881, and the inclosures received therewith, relating to the military reservation of Fort Maginnis, in Montana Territory, it appears that this reservation was set apart by an executive order, dated the 8th of April last; that certain miners of Parker, Meagher County, Mont., now allege that mineral was discovered and a mining camp established by them on land

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Reservation of Land for Public Purposes.

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included in the reservation several months previous to the location of the post by the military authorities; and that inquiry is made by them whether they can "hold the mines and the surface ground connected therewith, though they be on the reservation," and whether mineral land can be located and patented on a military reservation after the establishment of the reservation.

Agreeably to a suggestion of the Secretary of the Interior, contained in his letter to you of the 16th of August, 1881 (one of the inclosures above mentioned), you request an opinion upon the following questions:

"(1) Whether or not mineral lands reserved from sale under section 2318, Revised Statutes of the United States, can be reserved for military purposes by order of the President?

"(2) Where mineral lands are included within the limits of a military reservation, are such lands open to exploration and purchase under section 2319, Revised Statutes?

"(3.) Where an inchoate title to mineral lands has been acquired, as shown in the letter of the Secretary of the Interior and the accompanying report of the Commissioner of the General Land Office, and such lands have subsequently been included within a military reservation, can the title to said mineral lands be perfected by the private owner?"

For convenience the first and second questions will be considered together.

In an opinion heretofore given by this Department, addressed to you on the 15th of July last, wherein the subject of the authority of the President to reserve lands for public purposes came under consideration, it was observed that the power of the President to set apart, for those purposes, such portions of the public domain as are required by the exigencies of the public service to be thus appropriated, is too well established to admit of doubt, citing in this connection the case of *Grisar v. McDowell* (6 Wall., 381), in which the Supreme Court remarks: "From an early period in the history of the Government it has been the practice of the President to order from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. The

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Reservation of Land for Public Purposes.

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authority of the President in this respect is recognized in numerous acts of Congress." This power is in the above-mentioned opinion regarded as extending to any lands which belong to the public domain, and capable of being exercised with respect to such lands so long as they remain unappropriated. As thus defined the power is broad enough to include mineral lands belonging to the public domain, at least whilst they remain unaffected by any private right acquired under the laws relating thereto. I am satisfied with that view of the subject, and accordingly answer the first question in the affirmative. This necessarily involves a negative answer to the second question; since, after public lands have once been lawfully reserved by the President for public uses, the lands so appropriated become severed from the public domain, and are thenceforth not subject to occupation and purchase under the general law.

The answer to the third question depends upon whether land covered by a mining claim, where the locator of the claim has taken no steps to obtain a patent and the premises still constitute a part of the public domain, may be lawfully reserved and set apart by the President for public uses. Under the laws providing for the exploration, occupation, and disposal of the mineral lands, the locator, so long as he complies with the conditions imposed by those laws, is clothed with a possessory right, which entitles him to the exclusive right of possession and enjoyment of all the surface included within the lines of his location. (Secs. 2320, 2322, 2324, Rev. Stat.)

The object of those laws is to promote the development of our mining resources rather than the sale of the mineral lands, and to that end "Congress has by statute and by tacit consent," as is remarked by the Supreme Court in *Forbes v. Gracey*, (94 U. S. R., 762), permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the Government, without exacting or receiving any compensation for these ores, and *without requiring the miner to buy or pay for the land*. It has gone further, add the court, "and recognized the possessory rights of these miners, as ascertained among themselves by the rules which have

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Appropriation for Artificial Limbs.

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become the laws of the mining districts as regards mining claims." The rights thus recognized by Congress are property of great value. Very large amounts are invested in mines, the ownership of which rests solely upon the possessory right referred to.

It seems to me that where such right has attached to mineral land in favor of the locator of a mining claim, the land during the continuance of the claim (*i. e.*, so long as it is maintained in accordance with law) becomes by force of the mining laws appropriated to a specific purpose, namely, the development and working of the mine located; and, unless *Congress* otherwise provides, it can not while that right exists, notwithstanding the title thereto remains in the Government, be set apart by the Executive for public uses.

If, then, the possessory right of the miners in the case under consideration was full and complete previous to the establishment of the military reservation of Fort Maginnis, I am of opinion that the inclusion of their claim within the limits of the reservation was without authority of law and could not legally divest them of such right, or of the further right (on compliance with the requirements of the statute concerning the issue of patents for mining claims) to acquire title to the land.

I am, sir, very respectfully,

WAYNE MACVEAGH.

Hon. ROBERT T. LINCOLN,  
*Secretary of War.*

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APPROPRIATION FOR ARTIFICIAL LIMBS.

The appropriation of \$175,000 for artificial limbs, etc., made by the act of March 3, 1881, chapter 133, should be expended under the direction of the War Department.

The First Comptroller has no revisory power over the decisions of the Secretary of the Treasury respecting the issue of warrants; such decisions are binding upon the former officer.

DEPARTMENT OF JUSTICE,

October 22, 1881.

SIR: In your letter of the 11th instant, you request my opinion on the following questions: "First, Whether the

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Appropriation for Artificial Limbs.

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appropriation of \$175,000 for artificial limbs, etc., under the act of March 3, 1881, should legally be expended under the authority of the Department of War or the Department of the Interior." "Second, Whether the requisition for \$20,000, authorized and granted in the manner above stated [in your letter], can be legally rescinded upon the opinion of the First Comptroller." "Third, Whether, as claimed by the First Comptroller, the question of the legality of warrants or requisitions is wholly within his jurisdiction, he being the only officer who countersigns warrants; and whether the Secretary of the Treasury is legally bound by the opinion of the First Comptroller upon this point."

Although the first question is not entirely free from doubt, I am of the opinion that the \$175,000 appropriated by act of March 3, 1881, chapter 133 (making appropriation for sundry civil expenses), for furnishing artificial limbs and appliances, or commutation therefor, and transportation, should be expended under the direction of the War Department.

An examination at the Department of State shows that the words "miscellaneous objects under War Department," which precede, and the words "under the Department of the Interior," which succeed this appropriation in the printed volume of the statutes, are found in the enrolled bill in the same juxtaposition. In addition to this, we have the fact that the appropriation in question was asked for by the Secretary of War in his annual estimates, and not by the Secretary of the Interior.

The Book of Estimates submitted to Congress at each session is provided for by law (secs. 3660-3672, Rev. Stat.), and in this particular estimate the Secretary of War, in compliance with section 3660, referred to sections 4787 and 4791, Revised Statutes, and the act of August 15, 1876 (19 Stat., 203), as the laws authorizing the expenditure.

The attention of Congress was thus called to the very acts which have given rise to this controversy.

It is not necessary to express any opinion as to how far such arrangement in the statute, based upon such an estimate, would supersede or override the plain meaning of a general statute, but taken by itself it certainly is persuasive evidence of the intention of the law-makers.

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Appropriation for Artificial Limbs.

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By section 2 of the act of 17th June, 1870 (16 Stat., p. 153), the money commutation was to be paid by the Commissioner of Pensions in the same manner as pensions were paid.

Until June 30, 1876, the commutations were paid in accordance with that law (sec. 4789, Rev. Stat.), and the appropriations therefor were invariably found in the acts appropriating for the payment of pensions. But the appropriation for the fiscal year ending 1877 was expended by the War Department under the act of March 23, 1876, providing for the payment of pensions (vol. 19, p. 8), as follows: "Also for furnishing artificial limbs or apparatus for resection, with transportation or commutation therefor, fifty thousand dollars: *Provided*, That the same shall be expended and disbursed under the direction of the Surgeon-General of the Army, and in accordance with existing laws." No question can arise as to the propriety of the expenditure of that appropriation under the War Department. Before another annual appropriation was made for furnishing artificial limbs the act of August 15, 1876, was passed, which provides that every officer, soldier, etc., shall receive an artificial limb or appliance, or commutation therefor, as provided and limited by existing laws, "under such regulations as the Surgeon-General of the Army may prescribe." Since which act the appropriations for artificial limbs, or commutation therefor, have been in the sundry civil bill under the head of "War Department," instead of, as theretofore, in the appropriation for payment of pensions, and have been called for each year by estimates from the Secretary of War. In fact, under estimates and legislation identical with those for the current year, the appropriations for this purpose for the fiscal years ending June 30, 1878, 1879, 1880, and 1881 have been expended under the War Department.

The repeal of section 4789 ("the Commissioner of Pensions shall cause the same to be paid to such soldiers in the same manner that pensions are paid") by the act of August 15, 1876 (the limbs shall be furnished or commutation paid "under such regulations as the Surgeon-General of the Army may prescribe"), is not as clear as it might be; but the interpretation put upon it, not only by executive officers (see Moore

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Appropriation for Artificial Limbs.

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v. The United States, 95 U. S. R., 763), but by Congress itself, leads me to the conclusion that the purpose of that act was to unite under the Surgeon-General the payment of commutation with the issue of the artificial limbs, and to discontinue the anomaly of the Surgeon General expending so much of the appropriation as was necessary to pay for the limbs and appliances required, and the Commissioner of Pensions disbursing so much as was needed for those who elected to receive commutation.

It might, of course, be consistent with the regulations prescribed by the Surgeon-General that he should furnish to the Commissioner of Pensions a list of those who elect to receive commutation; but the better view—the one more consistent with subsequent legislation—is, that the act of 1876 gave him plenary powers in making the regulations.

Should you adopt the foregoing opinion, your second question becomes unimportant. I learn from your letter and inclosures that the following action has been taken by the various officers with reference to the appropriation in question:

The Secretary of the Treasury signed an appropriation warrant, which the First Comptroller countersigned, crediting the whole appropriation for expenditure under the War Department. Thereupon (sec. 3673) the Secretary of War made an accountable requisition for \$20,000, which was countersigned by the Second Comptroller (sec. 273) and registered by the Second Auditor. Upon this the Secretary of the Treasury granted a warrant for \$20,000 (sec. 248), which was countersigned by the First Comptroller (sec. 269). This warrant, in substance, directed the Treasurer of the United States to place that sum to the credit of Lieutenant-Colonel Swift, to be charged to the appropriation in question, and the money has been placed to his credit on the books of the Treasurer.

But the First Comptroller, being of the opinion that the appropriation should be expended under the Secretary of the Interior, advises that all these proceedings be invalidated, and that a new requisition be made by the Secretary of the Interior, which shall pursue the same course as that of the Secretary of War.

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Appropriation for Artificial Limbs.

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Should you adopt his opinion, I think, in answer to your second question, that if the Secretary of the Interior will make the proper requisition, you may grant a warrant thereon, and request from the Treasurer a return of the former warrant for cancellation.

Your third inquiry, "whether, as claimed by the First Comptroller, the question of the legality of warrants or requisitions is wholly within his jurisdiction, he being the only officer who countersigns warrants, and whether the Secretary of the Treasury is legally bound by the opinion of the First Comptroller upon this point," I answer in the negative.

The Secretary of War, by making a requisition for the \$20,000; the Secretary of the Interior, by omitting to make such requisition; the Second Comptroller, by countersigning the requisition; and the Secretary of the Treasury, by granting the warrant, have all passed upon the legal point presented by your first inquiry. The First Comptroller, by requesting the return of the warrant, seeks to restore the case to the position which it had reached before he countersigned the warrant. Among the duties of the First Comptroller, prescribed by section 269, Revised Statutes, are: "First, To examine all accounts settled by the First Auditor except \* \* \* and to certify the balances thereon to the Register." \* \* \* "Third, To countersign all warrants drawn by the Secretary of the Treasury, which shall be warranted by law."

He contends, I understand, that the clause requires him to *examine* into the legality of warrants granted by the Secretary, and by his counter signature to *certify* to that legality; in other words, that his duties are the same as to matters which have already received the decision of the Secretary of the Treasury as they are to accounts which pass through him from the Auditor to the Secretary. And, furthermore, he contends that, by implication of the third clause, his decisions under it are as binding upon the head of the Department as are, by expression of section 191, Revised Statutes, his decisions under the first clause.

By Section 23, Revised Statutes, the Secretary of the Treasury is made the head of an Executive Department, to be known as the Department of the Treasury, and section

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Appropriation for Artificial Limbs.

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268 provides that there shall be in the Department of the Treasury a First Comptroller and a Second Comptroller. Heads of Departments, if not created by the Constitution, are in two instances expressly recognized. The President may require their opinion in writing upon any subject relating to the duties of their respective Departments. In view of this, the care the President shall exercise in having the laws faithfully executed and his investiture with the whole executive power of the Government, I cannot assent to the proposition that a subordinate officer, created by statute, can do any act binding upon the head of his Department until that force is *expressly* given to his decisions by plain and unambiguous law. It is suggested that the expression "which shall be warranted by law" is pregnant with all that is expressed as to the binding effect of the balances certified by him. In the present instance, I think that language may be satisfied by his inquiry whether any warrant for payment for artificial limbs is warranted by law, and that he should accept the decision of the Secretary of the Treasury as to the proper party in whose favor the warrant should be drawn.

In a recent opinion concerning the relations of the Secretary of the Interior and the Commissioner of Patents, I have considered the force of the words signature and counter-signature. The latter term, so far as I have discovered, conveys only the sense of attestation, and by countersigning the present warrant the First Comptroller attests to the Treasurer that an accountable requisition had been issued by the Secretary of War; that it had been duly countersigned by the Second Comptroller and registered by the Second Auditor; that the signature of the Secretary is genuine (see Bouvier's Law Dictionary, title *Counter-signature*); that the proper charges have been made under section 3675 in the books of the Secretary, First Comptroller, and Register (or Auditor); and that the appropriation therefor has not been exhausted—so that the Treasurer will be authorized, under section 305, to disburse the amount of the warrant without other evidence of the legality of the payment than the signature of the Secretary and the counter-signature of a Comptroller, and will not be required to inquire into the condition of the ap-

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Appropriation for Artificial Limbs.

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appropriation, or whether the forms required by law antecedent to the signature and counter-signature have been complied with.

The present controversy would be fairly presented if there were before the Secretary of the Treasury two requisitions, one from the Secretary of War and the other from the Secretary of the Interior, for this appropriation. Now, if the law meant that the First Comptroller were to decide between the two, and the Secretary of the Treasury was to have no discretion, but simply register the decrees of the First Comptroller, the language of the law would be more apt if it directed the First Comptroller to sign and the Secretary of the Treasury to countersign; and it would contribute greatly to the expedition of business if the law required the requisition to go to the Comptroller first (as in the case of accounts), instead of having the Secretary sign a warrant, which, upon the refusal of the Comptroller to countersign, must be returned to the Secretary for cancellation and reissue.

The language of the Supreme Court in the case of *United States v. Jones* (18 Howard, 95) seems to me applicable to the present question:

"The Secretary of the Navy represents the President, and exercises his power on the subjects confided to his Department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions on subjects submitted to his jurisdiction and control by the Constitution and the laws do not require the approval of any officer of another Department to make them valid and conclusive. The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of Departments."

In the *Real Estate Savings Bank of Pittsburgh v. The United States* (16 Ct. Cls. R.) Richardson, J., in delivering the opinion of the court, quotes section 191, Revised Statutes, and adds: "In other respects the Comptrollers are as much subject to the rules, regulations, and general directions of the Secretary of the Treasury, and as much bound to obey and be governed by them, as are all other subordinate officers in the Treasury Department."

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Mail Transportation.

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In conclusion, I would say that, upon the matter in controversy, the decision of the Secretary of the Treasury is binding upon the First Comptroller.

I return herewith all inclosures.

Very respectfully, your obedient servant,

WAYNE MACVEAGH.

The SECRETARY OF THE TREASURY.

NOTE.—The purpose of the counter-signature is best told by Hamilton (page 77, vol. v, Works of Hamilton): "The spirit of the constitution of the Department is, that the officer who is to settle the accounts by countersigning the warrants for receipts and payments shall have an opportunity to observe their conformity with the course of business as it appears in the accounts; and shall have notice, in the first instance, of all payments and receipts, in order to the bringing all persons to account for public moneys. This reason operates to make the Auditor, who is the coadjutor of the Comptroller in settlements, his most fit substitute in this particular view."

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MAIL TRANSPORTATION.

The case submitted being one in which it is proposed not to expedite the service, but to reduce the speed thereof as fixed by the now existing contract: *Advised* that the act of April 7, 1880, chap. 48, has no application thereto, and imposes no restriction upon the Postmaster-General in dealing therewith.

When a reduction of speed is proposed, he is left at liberty to act as in his judgment the good of the service and the interests of the public may demand, without any limitation upon the exercise of his authority.

DEPARTMENT OF JUSTICE,

November 2, 1881.

SIR: I have considered the question presented in your letter to the Attorney-General of the 26th ultimo, which appears to arise upon the following facts:

Mail-route 46213 was originally let for service six trips a week, according to a schedule of seventy-two hours in summer and ninety-six hours in winter, at \$11,000 per annum. Subsequently, October 1, 1879, one more trip per week was

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Mail Transportation.

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added, at an additional cost of \$1,833.33 per annum, and the service was at the same time expedited by reducing the schedule to thirty-six hours in summer and seventy hours in winter; at a further additional cost of \$30,581.55 per annum, making the present cost of the service \$13,414.88 per annum. The contractor now proposes to perform the service according to a schedule of forty-eight hours in summer and eighty hours in winter for \$23,500 per annum, which is a reduction of \$19,914.88 upon present cost.

The question is whether you are authorized to accept the contractor's proposition without requiring evidence as to the additional stock and carriers that would be required in excess of the number required under the original contract; or whether you are restricted by the act of April 7, 1880, to an allowance for expedition in this case to a sum not exceeding 50 per centum of the original contract rate.

In regard to the act of April 7, 1880, I submit that the present case does not fall within its provisions under the *now existing contract*. The service schedule is thirty-six hours in summer and seventy hours in winter. What is proposed is not to expedite the service, but to reduce the speed thereof by changing the schedule so as to make it forty-eight hours in summer and eighty hours in winter. The act of 1870 does not apply to a case of this kind; it comes into play only where the modification of an existing contract involves increased expedition of the service. I am therefore of opinion that it places no restriction upon the Postmaster-General in the present case.

With respect to the other branch of the question, I think the proposition of the contractor may be accepted by the Postmaster-General without requiring the evidence referred to, if he is satisfied that the public interests will be benefited thereby. Section 3961, Revised Statutes, prohibits any additional compensation for increase of expedition, unless such increase makes it necessary to employ additional stock and carriers; in which case the additional compensation is to bear no greater proportion to the additional stock and carriers so employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution. And by a regulation of the Post-Office Depart-

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Suppression of Unlawful Organizations in Arizona.

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ment the contractor, in a case where the speed is increased, is required to state under oath "the number of horses and men required to perform the service according to the contract schedule and the number required to perform it with the increase of speed." Both the statutory provision and the regulation just referred to appear to cover by their terms only cases where the speed is to be increased beyond that required by the existing contract, and not to include cases like the present, where a reduction of speed is proposed. The latter seem to be left to be dealt with by the Postmaster-General as in his judgment the good of the service and the interests of the public may demand without any limitation upon the exercise of his authority.

I am, sir, very respectfully,

S. F. PHILLIPS,  
*Acting Attorney-General.*

Hon. THOMAS L. JAMES,  
*Postmaster-General.*

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SUPPRESSION OF UNLAWFUL ORGANIZATIONS IN ARIZONA

Section 15 of the act of June 18, 1878, chapter 263, renders unavailable the aid of the military forces of the United States for the suppression of unlawful organizations, unless the state of facts be such as to enable these forces to be used under the provisions of section 5287 or of sections 5298 and 5300, Revised Statutes.

DEPARTMENT OF JUSTICE,  
November 10, 1881.

SIR: Your communication of the 1st instant, in relation to bands of outlaws in Arizona Territory known as "Cow Boys," which was accompanied by a copy of a letter dated the 20th ultimo from the Secretary of State, together with a copy of a letter addressed to the latter by the Mexican minister, under date of the 10th ultimo, and also a copy of a letter from the General of the Army, dated the 26th ultimo, requests information as to what action has thus far been had and the results accomplished under the instructions already issued by this Department to the United States attorney and the United States marshal of that Territory respecting the arrest of said outlaws and the bringing them to justice; and, in view of the facts disclosed by the papers above men-

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Suppression of Unlawful Organizations in Arizona.

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tioned, a further request is made for an opinion "whether it would be lawful, and to what extent lawful, to use the military forces of the United States for the suppression of the unlawful organizations referred to."

In reply, I have the honor to state that this Department is not officially advised that any action resulting in the arrest of the parties complained of has thus far been taken under the instructions mentioned. Recently, a report was received from the marshal of the Territory, presenting an estimate of the expense which would necessarily be incurred by the employment of a sufficient force (a *posse* composed of residents of the Territory) to effect and secure the arrest of the outlaws. This was found to greatly exceed the amount available for that purpose under the control of this Department, and he was so informed. Nothing further in that direction has since transpired so far as I know.

In regard to the use of the military forces of the United States, the act of June 18, 1878, chapter 263, section 15, prohibits the employment of any part of the Army "as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be *expressly authorized* by the Constitution or by act of Congress."

This legislation renders unavailable the aid of the military forces of the United States for the "suppression of the unlawful organizations" referred to, unless the state of facts be such as to enable these forces to be used under the provisions of section 5287 or of sections 5298 and 5300 Revised Statutes.

By section 5287, in every case in which any military expedition or enterprise is begun or set on foot contrary to the provisions of the statute (see sec. 5286), the President may lawfully employ the military forces "for the purpose of preventing the carrying on of any such expedition or enterprise from the Territories or jurisdiction of the United States against the territories or domains of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace." An armed body of men, organized with a view to invade the territory of a neighboring people with whom we are at peace, and forcibly resist the public authorities there if opposed, may well be deemed a military enterprise in contemplation of the statute, though

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Mail Contracts—Withholding Pay.

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the ultimate object is plunder. If the organizations referred to are of this character, I think the troops may be lawfully employed to prevent them making predatory raids into the territory of Mexico, and in this way to suppress them.

The other sections cited (5298 and 5300) provide for a state of things in which it is impracticable, in the judgment of the President, to enforce the laws through the ordinary course of judicial proceedings, by reason of "unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States."

Here the President may lawfully employ the military forces in enforcing the laws, after having first issued a proclamation as required by section 5300. Whether such a state of things exists in the Territory of Arizona as would justify advising the President to proceed under these provisions, I am unable to gather from the information before me, and express no opinion thereon.

I am, sir, very respectfully,

S. F. PHILLIPS,

*Acting Attorney-General.*

Hon. ROBERT T. LINCOLN,

*Secretary of War.*

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MAIL CONTRACTS—WITHHOLDING PAY.

A. and B. had each a separate contract for transporting the mails, and the latter was also a surety for the former. A. incurred indebtedness to the Government by reason of fines, penalties, and forfeitures beyond the amount due him; and the pay of B., his surety, was withheld for the protection of the Government against loss. Prior to the performance of the service by B., for which his pay was withheld, he gave a pay draft to C., which was placed on file in the Auditor's office "subject to fines, etc., in accordance with the act of Congress approved May 17, 1878, and any claim or demand the Post-Office Department may have against the contractor:" *Held*, that payment of an amount due B. under his contract, sufficient to meet his liability as surety on the contract of A., might lawfully be withheld; and that the draft given by the former on his pay conferred upon the holder thereof no right which prevents such pay being thus withheld.

DEPARTMENT OF JUSTICE,

*November 17, 1881.*

SIR: I have considered the case presented in the accompanying letter of the Auditor of the Treasury for the Post-

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Mail Contracts—Withholding Pay.

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Office Department, dated the 1st instant, which was referred to the Attorney-General by the Hon. H. F. French, Acting Secretary of the Treasury, on the 3d instant, with a request for an opinion upon the question suggested therein.

The letter states:

“In a case pending in this office [*i. e.*, office of the Auditor], the pay of a contractor is held to be applied to indebtedness incurred by reason of fines, forfeitures, and penalties certified to the Auditor by the Postmaster-General, in accordance with the law and a contract entered into with J. E. Reeside for the transportation of the mails, for the proper performance of which contract Edwin Reeside was one of the sureties. Edwin Reeside is also a contractor for the transportation of the mails, and there not being enough due J. E. Reeside to cover the indebtedness, the pay of Edwin Reeside, surety, has also been withheld, with the view to protecting the Government from loss on account of the principal.

“Before the service was performed by Edwin Reeside, for which payment is withheld, he gave a pay draft to Joseph Lockey for money had and received by Reeside to his use, as has long been a custom and usage with contractors for the transportation of the mails, and Mr. Lockey feels aggrieved, and protests against the action of the Auditor in withholding the payment of this draft with a view to meeting Edwin Reeside's liability to the Government as the surety of J. E. Reeside. As no appeal from the action of the Auditor can be taken to the Comptroller in this case, I desire that you obtain the opinion of the Attorney-General upon the right of the Auditor to withhold payment to a surety to protect the Government from loss and the rights of the parties interested upon the facts as herewith submitted.”

The draft given by Edwin Reeside, contractor, is dated February 17, 1881. It is drawn upon the Auditor in favor of Joseph Lockey, or order, and calls for the payment of \$987.50 out of any moneys due the drawer on route 11093 “for the quarter ending 30th June, 1881.” By the regulations of the Auditor's office, drafts of mail contractors on their quarterly pay are not “accepted,” but are simply received and placed on file; and they are moreover filed “subject to fines, deductions, collections, the amount due the sub-contractor, in accordance with the act of Congress approved May 17, 1878,

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Mail Contracts—Withholding Pay.

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and *any claim or demand* the Post-Office Department may have against the contractor." These regulations are printed on the blank form of draft furnished by the Auditor, which was made use of in preparing the draft above mentioned, so that Mr. Lockey must be presumed to have had notice of their purport when he took the draft.

At the time said draft was drawn by Edwin Reeside he was a surety on the contract of J. E. Reeside for transporting the mail on route 13095. In adjusting the account of J. E. Reeside for service performed under that contract for the quarter ending March 31, 1881, the Auditor has found a balance of \$1,750.64 due the United States, arising from fines, penalties, and forfeitures incurred by the contractor under the same contract, and certified to the Auditor by the Postmaster-General. For this balance, assuming it to be a valid claim against the contractor, Edwin Reeside is liable as his surety.

I am of opinion that the Auditor may lawfully withhold payment of an amount due Edwin Reeside under his contract sufficient to meet his liability for indebtedness to the Government as surety on the contract of J. E. Reeside (see *McKnight v. United States*, 98 U. S., 179), and that the draft given by the former upon his quarterly pay confers upon the holder thereof no right which prevents such pay being thus withheld. In the first place, the draft is void as an assignment of the fund upon which it was drawn (*Spofford v. Kirk*, 97 U. S., 484); and, secondly, the regulations of the Auditor's office under which the draft was received and placed on file there and of which the holder had notice, preclude any obligation thence arising that would bind the Government to apply the fund to the payment thereof, in preference to retaining the same as a measure for its own protection, to offset a liability of the drawer. There was not only no acceptance of the draft by the Auditor, but it was received and filed by him, subject to "*any claim or demand*" of the Post-office Department against the drawer.

I am, sir, very respectfully,

S. F. PHILLIPS,

*Acting Attorney-General.*

Hon. C. J. FOLGER,

*Secretary of the Treasury.*

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Fees of Witnesses in Pension Cases.

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## FEES OF WITNESSES IN PENSION CASES.

The fees of witnesses subpoenaed under section 184, Revised Statutes, on application of the Pension Bureau, to testify before a United States commissioner, and also the fees of the commissioner by whom their testimony is taken, may properly be allowed out of the judiciary fund. The former should be paid by the United States marshal of the district on the certificate or order of the commissioner; the latter, as in ordinary course, on settlement of the commissioner's accounts at the Treasury.

DEPARTMENT OF JUSTICE,

December 7, 1881.

SIR: Your letter of the 19th ultimo submits the following inquiry: From what fund and by whom are the expenses in obtaining testimony in pension cases under section 184, Revised Statutes, to be paid? This inquiry, as appears by the accompanying papers, has reference to payment of the fees of witnesses subpoenaed under that section on application of the Pension Bureau to testify before a United States commissioner in such cases, and also the fees of the commissioner by whom their testimony is taken.

By section 185, Revised Statutes, it is provided that witnesses thus subpoenaed "shall be allowed the same compensation as is allowed witnesses in the courts of the United States." The compensation of the commissioner before whom they are subpoenaed to appear is regulated by section 847.

I do not find any statutory provision *specially* applicable to the payment of expenses incurred as above. The appropriation at the disposal of the Pension Bureau "for actual and necessary expenses of clerks detailed to investigate suspected frauds and attempts at fraud" is apparently intended to cover only the personal expenses of the officers so detailed, among which witness fees and the like are not included. I gather from the papers accompanying your letter that such fees are not deemed by the Pension Bureau to be within that appropriation, and in this view I concur.

There being no special provision for defraying the expenses in question, I am of opinion that they may properly be allowed out of the judiciary fund, that is to say, out of the appropriations respectively "for fees of witnesses" and "for

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Patents for Mining Claims.

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fees of United States commissioners," belonging to that fund (see 21 Stat., 454). In regard to the mode of payment, the witnesses' fees should be paid by the United States marshal of the district on the certificate or order of the commissioner, while the fees of the commissioner should be paid, as in ordinary course, on settling his accounts at the Treasury. (Secs. 855 and 856, Rev. Stat.)

I am, sir, very respectfully,

S. F. PHILLIPS,  
*Acting Attorney-General.*

The SECRETARY OF THE INTERIOR.

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## PATENTS FOR MINING CLAIMS.

No legal objection exists to the practice of the Land Department, in issuing patents for mining claims upon veins or lodes, to insert in the patent a clause excepting from the grant all town-site rights in the premises, where it appears that the surface ground of any such claim lies wholly or partly within the limits of a previously located, entered, or patented town site.

DEPARTMENT OF JUSTICE,  
*December 24, 1881.*

SIR: I have considered the application of James H. Mandeville, esq., made in behalf of the Vizina Consolidated Mining Company of Arizona relative to the patenting of a mining claim to that company, which was on the 9th instant, by your direction, referred to the Attorney-General for an opinion thereon.

The applicant states in his communication to you of that date, that a patent to said company for the Vizina mining claim has been prepared against his protest, with a reservation in favor of the city of Tombstone, Ariz., and now lies on the table of the Commissioner of the General Land Office ready for delivery. He claims that the insertion of such reservation in the patent is contrary to law; and he asks the President to direct that another patent to said company be prepared without the reservation.

In issuing patents for mining claims upon veins or lodes, it is the practice of the Land Department, where it appears

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Patents for Mining Claims.

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that the surface ground of any such claim lies wholly or partially within the limits of a previously located, entered, or patented town site, to insert in the patent a clause (as has been done in the present case) excepting from the grant all *town-site* rights in the premises. The clause is in these words: "Excepting and excluding, however, from these presents all town property rights upon the surface, and there are hereby expressly excepted and excluded from the same all houses, buildings, and structures, lots, blocks, streets, alleys, or other municipal improvements on the surface of the above-described premises not belonging to the grantees herein, and all rights necessary or proper to the occupation, possession, and enjoyment of the same." The insertion of this clause does not rest upon any express statutory requirement, but is founded upon the view that the previous location, entry, or patent of the town site, while not conferring any right to the underlying veins or lodes (sec. 2392, Rev. Stat.), gives, nevertheless, to the town-site occupants *surface* rights, to which those of the subsequent mineral claimant are necessarily subject, and that by giving the latter a patent, with a reservation saving the rights of the town site, all that the law contemplates to be granted by the patent in such case is expressed therein.

I perceive no legal objection to the practice of the Land Department as above. There are instances, dating as far back as 1838, of similar reservations inserted in patents issued under the pre-emption laws, where a part of the lands patented was found to be subject to rights claimed under other acts of Congress (see *Bryan v. Forsyth*, 19 How., 334; *Meehan v. Forsyth*, 24 How., 175.) In the latter case the court remarks that the saving clause in these patents "was designed to exonerate the United States from any claim of the patentee in the event of his ouster by persons claiming under the acts referred to." This would be sufficient ground for the insertion of a reservation in patents for lode claims in cases where prior rights to the surface are found to exist in favor of town sites.

In the case under consideration a town site entry in favor of the city of Tombstone was patented in September, 1880, the patent containing a proviso that no title shall be thereby acquired to any mine of gold, silver, cinnabar, or copper, or to

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Patents for Mining Claims.

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any valid mining claim or possession held under existing laws (sec. 2392, Rev. Stat.), etc. Part of the Vizina mining claim, which I understand to be a vein lode claim, and for which a patent is now sought to be obtained without a reservation, lies within the limits of the town site so patented. Unless it should be established to the satisfaction of the Land Department that this claim existed and was possessed throughout its entire extent prior to the town-site location, and that the possessory right of the mineral claimant has since been continuously held and maintained in accordance with the mineral land laws, the fact that a patent has already been issued for such town site, covering a part of such claim, must be deemed sufficient to warrant the insertion of a reservation (like that above described) in a subsequent patent for the claim.

The papers referred to me do not show that priority of right in favor of the mineral claim, as against the town-site, has been established, and my opinion is that they present no case calling for any special directions from the President to the Land Department, and that the application in behalf of the mining company should be denied.

I have the honor to be, very respectfully,

S. F. PHILLIPS,  
*Acting Attorney-General.*

The PRESIDENT.

# OPINIONS

OF

BENJAMIN HARRIS BREWSTER, OF PENNSYLVANIA.

\*APPOINTED DECEMBER 19, 1881.

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## ATLANTIC AND PACIFIC RAILROAD.

The recommendations of the Secretary of the Interior as to the acceptance of certain sections of the railroad and telegraph lines of the Atlantic and Pacific Railroad Company should be approved by the President.

DEPARTMENT OF JUSTICE,

*January 4, 1882.*

SIR: I have examined the letter and accompanying paper of the Secretary of the Interior of the 3d instant, recommending the acceptance of certain sections of railroad and telegraph lines of the Atlantic and Pacific Railroad Company, and the patenting of lands earned by this road, for the reason that such action by you would be in accordance with the rulings of the Supreme Court of the United States, the opinion of the Attorney-General, and the action of the Interior Department heretofore.

My predecessor, Mr. Attorney-General Devens, when the same question involving the right of the same company to lands along the line of the road was submitted to him, gave it as his opinion, "That it would be within the power and duty of the Executive to appoint commissioners to examine

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\* NOTE.—The commission of Mr. Brewster, as Attorney-General, is dated December 19, 1881; but he did not qualify and enter upon the duties of the office until January 2, 1882. His predecessor, Mr. MacVeagh, ceased, by resignation, to be an incumbent of the office on November 12, 1881, from which date up to January 2, 1882, it remained vacant, the duties thereof being discharged by the Solicitor-General, Mr. Samuel F. Phillips, under the provisions of the statute (section 347, Rev. Stat.).

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Expenses of Board of Heavy Ordnance, etc.

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the section of road submitted by the Atlantic and Pacific Railroad Company, to accept the same if completed in all respects as required by the act of July 27, 1886, and to cause patents to be issued to said company for lands situated opposite to and coterminous with the section of the road if completed."

His opinion, in Volume XVI of Opinions, page 573, discusses the legal proposition involved, and I see no good reason why it should not be accepted as controlling your action on the sections of railroad submitted at this time for your approval, not only because of the views of Mr. Attorney-General Devens referred to, but because of the decisions of the Supreme Court and the action of the Interior Department with regard to this road and other roads similarly situated. I deem the matter to be *res adjudicata*, and am of the opinion that the recommendations of the Secretary of the Interior should be approved.

I am, sir, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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EXPENSES OF BOARD OF HEAVY ORDNANCE, ETC.

The appropriation made by the act of March 3, 1881, chapter 135, in the provision authorizing the creation of a board of Army officers to make examinations of improvements of heavy ordnance and projectiles, is applicable to expenses necessarily incurred by the board in performing the duties devolved thereon, among which the actual and necessary expenses of its members for board and lodging and for traveling while so engaged can be fairly included.

DEPARTMENT OF JUSTICE,

January 6, 1882.

SIR: Your letter of the 16th ultimo, inclosing a communication from General Getty, president of the Board of Heavy Ordnance and Projectiles, constituted under the act of March 3, 1881, chapter 135, and assembled in the city of New York, submits for consideration the following inquiries:

(1) "May the members of said Board who are not stationed in New York City be reimbursed for their actual expenses of board and lodging while in said city attending the sessions

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Expenses of Board of Heavy Ordnance, etc.

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of the Board, the said expenses to be paid from the appropriation of \$25,000 made in the act of March 3, 1881, (21 Stat., 468)?"

(2) "May the actual cost of journeys made by said Board to such places as may be deemed expedient be paid from such appropriation?"

The provision in the act of 1881, upon which these inquiries arise, reads as follows: "And the President is authorized to select a board, to consist of one engineer officer, two ordnance officers, and two officers of artillery, whose duty it shall be to make examinations of all inventions of heavy ordnance and improvements of heavy ordnance and projectiles that may be presented to them, including guns now being constructed or converted under direction of the Ordnance Bureau; and said board shall make detailed report to the Secretary of War, for transmission to Congress, of such examination, with recommendation as to what inventions are worthy of actual test, and the estimated cost of such test; and the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated for such purpose."

Obviously, the purpose of this appropriation is to meet the expenses necessarily incurred by the Board in performing the duty devolved thereon, among which the actual and necessary expenses of the members thereof for board and lodging and for traveling, while engaged in the performance of such duty, can be fairly included. The expense of the "actual test" which the Board may recommend in their report, and of which the "estimated cost" is to be stated therein, is clearly contemplated to be provided for by further legislation, should Congress (for whose information such report is intended) deem it advisable to direct the test to be made; and, unless the present appropriation is applicable to the expenses of the Board, as above, it would remain without an object.

I accordingly answer both your inquiries in the affirmative.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,

*Secretary of War.*

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Communications to Congress.

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## COMMUNICATIONS TO CONGRESS.

Requests made on heads of Departments by Congressional committees, or by either House of Congress, for information on matters relating to ordinary and current legislation, may with propriety be answered directly, without passing through the executive office; otherwise as to communications which concern radical changes in existing laws affecting public policy.

Subordinate officers of the several Departments should communicate with Congress through the heads of their Departments respectively.

DEPARTMENT OF JUSTICE,

*January 7, 1882.*

SIR: On the question suggested by the Secretary of the Interior I have the honor to submit the following:

Requests made on the heads of Departments by committees of Congress, or by either House, for information on matters relating to ordinary and current legislation, might with propriety be answered directly, without passing through the executive office. But it would seem proper that communications involving radical changes in existing general statutes, affecting public policy, should be submitted through the President for his information and opportunity for expression of his views if desired, the head of each Department to determine the necessity of such manner of transmission.

Subordinate officers of the several Departments ought not to communicate directly with Congress, its committees or members, on matters involving legislation, except through the heads of the Departments.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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Penalty-Envelope—Official Postage-Stamps.

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## PENALTY-ENVELOPE—OFFICIAL POSTAGE-STAMPS.

Indian agents and registers and receivers of land offices are (by virtue of section 29 of the act of March 3, 1879, chap. 180) entitled to use the penalty-envelope for the transmission of official mail matter between themselves and other officers of the United States or between themselves and the Executive Departments, but not for the transmission of such matter to private persons.

These officers are not "departmental in their character" within the meaning of sections 5 and 6 of the act of March 3, 1877, chapter 108.

When supplied with official postage-stamps by the Departments, they may use them for the transmission of official mail matter as well to private persons as to other officers of the Government.

DEPARTMENT OF JUSTICE,

January 10, 1882.

SIR: Your letter of the 22d ultimo, directing attention to certain papers therewith inclosed and also to section 3915, Revised Statutes; sections 5 and 6 of the act of March 3, 1877, chapter 108; and section 29 of the act of March 3, 1879, chapter 180, requests an opinion upon the following questions:

"First. Whether officers of the Government subordinate to this [the Interior] Department, appointed not by the Secretary but by the President, whose offices are located without the District of Columbia, of which Indian agents and registers and receivers of land-offices may serve as examples, are *departmental in their character*, and *therefore* entitled to use the penalty-envelopes in transmitting official mail matter both to other offices or officers of the Government and to private persons.

"Second. If not departmental in their character, whether they are entitled to use the penalty-envelope for the same purpose and to the same extent, or, if not thus entitled, what precisely are the restrictions upon their use imposed by the law.

"Third. If the penalty-envelope may not be used by such officers of the Government for transmission of all official mail matter, both to other officers of the Government and to private parties, whether said officers are authorized to use official postage-stamps for such purpose."

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Penalty-Envelope—Official Postage-Stamps.

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The provisions of sections 5 and 6 of the act of 1877, relating to the transmission of official mail matter, were examined by one of my predecessors soon after the passage of that act, with reference to the question whether the use of the penalty-envelope, thereby authorized, was limited to the Executive Departments and the bureaus or offices therein at the seat of Government, or extended to officers throughout the country, such as postmasters, collectors of internal revenue, registers of land-offices, etc., between whom and these Departments an official relation exists. In the opinion then given it was held that the use of the envelope was by those provisions restricted to the Executive Departments and the bureaus or offices therein at the seat of Government. (15, Opin., 262.)

Afterwards, by section 29 of the act of 1879, the same provisions were "extended to all officers of the United States Government, and made applicable to all official mail matter transmitted between any of the officers of the United States, or between any such officer and either of the Executive Departments or officers of the Government, the envelopes of such matter in all cases to bear appropriate indorsements containing the proper designation of the office from which the same is transmitted, with a statement of the penalty for their misuse." This section, while impliedly confirming the construction placed on sections 5 and 6 of the act of 1877, as above, in effect confers upon all officers of the United States the right to use the penalty-envelope, but to a more limited extent than that given by those sections. Thus the right so conferred is explicitly confined to the transmission of official mail matter between such officers, or between any such officer and either of the Executive Departments or officers of the Government; whereas under the act of 1877 the Executive Departments and the bureaus or offices therein may use the penalty-envelope in transmitting to private persons, as well as to officials; any letter or package relating exclusively to the business of the Government.

Coming now to the questions submitted, the result at which I arrive as regards the use of the penalty-envelope is that the officers described in your first question are not

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Penalty-Envelope—Official Postage-Stamps.

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within the provisions of sections 5 and 6 of the act of 1877, viewing these sections alone, that is to say, irrespective of the act of 1879, but that they are brought within those provisions by section 29 of the latter act, their right to use the penalty-envelope depending upon and being controlled by this section.

To your first and second questions, which for convenience are taken together, I accordingly reply that, in my opinion, the officers referred to therein are entitled to use the penalty-envelope for the transmission of official mail matter between themselves and other officers of the United States or between themselves and the Executive Departments, but are not entitled to use such envelope for the transmission of mail matter to private persons. These officers, as already intimated, are not "departmental in their character;" *i. e.*, officers of the Executive Departments, or of the bureaus or offices therein; as comprehended by sections 5 and 6 of the act of 1877. Their right to use the penalty-envelope resting, as it does, upon section 29 of the act of 1879, cannot be extended beyond the limits thereby imposed.

The remaining question relates to the use of official postage-stamps. Upon examination of section 3915, Revised Statutes, as amended by the act of February 27, 1877, chapter 69, I find no restrictions such as those contained in section 29 of the act of 1879.

Any officer who is supplied with these stamps by the Department may use them for the transmission of official mail matter, as well to private parties as to other officers of the Government.

Assuming, then, that the officers referred to in the question are thus supplied with official postage-stamps, I answer the same in the affirmative.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. S. J. KIRKWOOD,

*Secretary of the Interior.*

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Indian Reservations.

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## INDIAN RESERVATIONS.

*Semble* that the President has power to make a reservation for occupation by Indians from public domain lying within the limits of a State.

DEPARTMENT OF JUSTICE,

January 17, 1882.

SIR: I have examined the question which seems to arise upon the papers placed in my hands by you a few days since in relation to a proposed order by the President to reserve a body of land situate in the State of Nebraska as an addition to the great Sioux Reserve, the southern limit of which is the northern boundary of Nebraska.

The question may be thus stated:

Has the President authority to make reservations for the occupation of Indians from the public lands lying within the boundaries of States?

The Constitution has not conferred this power upon the President, but to Congress is given the power to dispose of and make all needful rules and regulations respecting the territory belonging to the United States.

From an early period, however, it has been the practice of the President to order from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. (*Grisar v. McDowell*, 6 Wall., 363, see page 381.)

This practice doubtless has sprung from the authority given by Congress to the President early in the history of this Government to appropriate lands for purposes more or less general. As in the act of May 3, 1798, in which an appropriation was made for the purpose of enabling the President to erect fortifications in such place or places as the public safety should, in his opinion, require (1 Stat., 554). So, by the act of 21st of April, 1806 (2 Stat., 402), the President was authorized to establish trading houses at such posts and places on the frontiers or in the Indian country, on either or both sides of the Mississippi River, as he should judge most convenient for carrying on trade with the Indians, and by act of June 14, 1819 (1 Stat., 547), he was authorized to

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Indian Reservations.

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erect such fortifications as might, in his opinion, be necessary for the protection of the northern and western frontiers. These instances are taken from the opinion of the court in *Wilcox v. Jackson* (13 Peters, 498).

Moreover, the authority of the President in this regard has been recognized in several acts of Congress. Thus in the fourth section of the pre-emption act of May 29, 1830 (4 Stat., 421), it is provided that "the right of pre-emption contemplated by the act shall not extend to any land which is reserved from sale by Congress, or by order of the President," etc. So also in the act of September 4, 1841 (5 Stat., 456), lands included in any reservation by treaty, law, or proclamation of the President, are exempted from entry under the act.

In *Wilcox v. Jackson* (13 Peters, p. 512, 513), the court says: "At the request of the Secretary of War, the Commissioner of the General Land Office, in 1824, colored and marked upon the map this very section as reserved for military purposes, and directed it to be reserved from sale for those purposes. We consider this, too, as having been done by authority of law; for amongst other provisions in the act of 1830 all lands are exempted from pre-emption which are reserved from sale by order of the President. Now, although the immediate agent in requiring the reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several Departments in relation to subjects which appertain to their respective duties." See also 15 Peters, 430, where an order of the President is spoken of as a valid reservation.

It appears from these authorities that not only has the President the power to make reservations of public lands for public uses, but if the reservations are made by the heads of Departments it will be presumed that the President has acted through them.

In 5 Wallace, page 68, where the reservation in question was for the improvement of the Des Moines River in Iowa, the court says that the President was competent through the Secretary of the Interior to make the reservation, and that he had this power ever since the establishment of the Land Department.

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Indian Reservations.

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It has been shown above that the President has the power *generally* to reserve lands from the public domain for public uses.

In the cases cited the reservation has been for military purposes or for public improvements. Is a reservation for occupation by Indians a reservation for a public use?

By the acts of July 9, 1832 (4 Stat., 564), and 30th of June, 1834 (4 Stat., 738), a bureau of Indian affairs was established, and extensive powers were given to the President in the control and management of the Indians, and our statute-book abounds with legislation concerning the Indian and Indian tribes. The regulation of the relations of the Government with these tribes is a great public interest, and their settlement upon reservations has been considered a matter of great importance. Indeed it has been the settled policy of the Government for many years.

A reservation from the public lands therefore for Indian occupation may well be regarded as a measure in the public interest and as for a public use. Congress has in numerous acts of legislation recognized it as such. These statutes need not be particularly referred to; they are scattered through the statute-book; indeed the annual Indian bill is full of such recognitions.

But, again, may the President reserve lands within the limits of a State for Indian occupation?

My answer to this is that *it has been done*; it has been the practice for many years. I have found no case where the objection has been raised that a reservation could not be made within the boundaries of a State without the consent of the State.

I think there is no such case, and I say this the more confidently, because recently in the case of the United States against John Leathers, tried and decided by Hillyer, district judge for the district of Nevada, an order of reservation made March 23, 1874, of lands in the State of Nevada for Indian occupation was passed upon.

It was a criminal case, in which the indictment charges that the defendant attempted to introduce goods and to trade in the Indian country without a license, contrary to section 2133, Revised Statutes, and that he introduced liquor into

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Indian Reservations.

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the Indian country contrary to section 2139, Revised Statutes. The Indian country in this case was "Pyramid Lake Reservation."

The order of reservation is as follows :

"EXECUTIVE MANSION, *March 23, 1874.*

"It is hereby ordered that the tract of country known and occupied as the Pyramid Lake Indian Reservation in Nevada, as surveyed by Eugene Monroe in January, 1865, and indicated by red lines, according to courses and distances given in tabular form on accompanying diagram, be withdrawn from sale or other disposition, and set apart for the use of the Pah-Ute and other Indians residing thereon.

"U. S. GRANT."

This case was thoroughly and vigorously contested, but the argument derived from the jurisdiction and sovereignty of the State is not noticed in the decision of the judge. It makes no figure in the case.

He does decide that the reservation was legally and rightfully made by the President, and this after a thorough examination of the authorities.

I will close this paper by citing some instances of reservations by the President for the use of Indians of lands lying within State limits.

In California. The Yule River Reserve, January 9, 1873, and October 3, 1873, by President Grant.

In Michigan. The Ontonagon Reservation, by President Pierce, September 25, 1855.

Reservation of lands in Isabella county, Michigan, for Indians, by President Pierce, May 14, 1855.

In Nebraska. The Niobrara Reserve, by President Johnson, February 27, 1866; also July 20, 1866.

In Nevada. Carlin Farms Reserve, by President Hayes, May 10, 1877.

Duck Valley Reserve, by President Hayes, May 16, 1877.

In Oregon. Grand Rancho Reserve, by President Buchanan, January 30, 1857.

The Malheur Indian Reservation, by President Grant, January 28, 1876.

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Ute Indian Reservation.

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These instances I have taken from the annual report of the Commissioner of Indian Affairs for 1878, in which there are many more of like character. This statement of "Executive orders relating to Indian reserves," occupies pages 230-279 of said report.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE INTERIOR.

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UTE INDIAN RESERVATION.

The lands of the Ute Indian reservation in Utah Territory can not be declared open for settlement and disposal, under the act of June 15, 1880, chapter 223, before allotments provided for in that act are made. If, previous to such allotments, it is thought advisable that any land within the reservation should be opened to settlement and disposal, additional legislation will be necessary to enable this to be done.

DEPARTMENT OF JUSTICE,  
*January 17, 1882.*

SIR: Your letter of the 12th instant presents for my consideration the following case and questions:

"By section 3 of the act of June 15, 1880 (21 Stat., 203), it is prescribed that whenever the report and proceedings of the Ute commissioners therein provided for are approved by the President of the United States, he shall cause patents to be issued to each and every allottee for the lands so allotted, \* \* \* and all the lands not so allotted, the title to which is by the said agreement, etc., released and conveyed to the United States, shall be held and deemed to be public lands of the United States, and subject to disposal under the laws providing for the disposal of the public lands at the same price and on the same terms as other lands of like character, except as provided in this act, etc.

"By the agreement in question it was contemplated that two of the three classes of Indians named, viz, the Southern Utes and the Uncompahgre Utes, would be provided for and receive allotments within the bounds of Colorado if suitable lands could be found therein, and the White River Utes were to remove to the Uintah Reservation in Utah, and that

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Ute Indian Reservation.

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the residue of lands in the old reservation not required for such allotment would be left for release to and disposal by the United States, in which event, according to the terms of the statute just recited, I understand that the condition that the same shall be deemed public lands would only take effect from the date of the completion and approval of the allotments and the direction to issue patents thereon.

"In the work of the Commission, recently reported, it was found impracticable to locate the Uncompahgre Utes upon the proposed lands on Grand River, and they were accordingly removed to a new reservation in Utah, which has by executive order of the 15th ——— been set apart for their use with the purpose of making allotments to them in severalty therein.

"The White River Utes have also been removed to the Uintah Reservation in Utah, but no allotments have yet been made to them.

"The Southern Utes yet retain a separate portion of the original reservation.

"By resolution of the Senate of the United States on the 10th instant I am directed to transmit to the Senate any information in my possession touching the opening for settlement under the pre-emption laws of the United States of that part of the late reservation in the State of Colorado not assigned to the Southern Ute Indians by the provisions of the act of June 15, 1880.

"To enable me to give intelligent answer to the request, I desire an authoritative opinion whether or not, the Indians having been entirely removed therefrom as stated, said lands can by executive authority be declared open for settlement and disposal under the act prior to the making and approval of the allotments in severalty contemplated in the agreement as confirmed thereby; or whether, in case it be deemed advisable to open the lands to immediate settlement and disposal, it will not be necessary to invoke further legislative action."

In reply, I have the honor to state that the lands of the Indian reservation in Colorado, to which your inquiries refer, can not, in my opinion, be declared open for settlement and disposal, under the act of June 15, 1880, before the allot-

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 Use of Penalty-Envelopes.
 

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ments in severalty are made, as provided by that act. The language of the act is, "And all the lands *not so allotted* \* \* \* shall be held and deemed to be public lands of the United States, and subject to disposal under the laws providing for the disposal of the public lands," etc. As the lands not allotted can not be precisely known until after the allotments are made—which take place in contemplation of the statute when the report and proceedings of the commissioners are approved by the President and not before—it results *ex necessitate* that previous to that period the provision just quoted can have no effect upon the lands within the reservation. In accordance with these views I am further of opinion that if, under the circumstances stated in your letter, it is thought advisable that any lands within the reservation be opened to immediate settlement and disposal, additional legislation will be necessary to enable this to be done.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. S. J. KIRKWOOD,

*Secretary of the Interior.*

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 USE OF PENALTY-ENVELOPES.

Opinion of May 25, 1880 (16 Opin., 501), as to the use of the penalty-envelope, reaffirmed.

DEPARTMENT OF JUSTICE,

*January 19, 1882.*

SIR: In compliance with your oral request of Tuesday, I have examined the accompanying letter, addressed to the Commissioner of Pensions, dated the 16th instant (which, though not signed, appears to be intended for your signature), and also the copy of a circular inclosed therewith, which was issued by Secretary Schurz, under date of April 8, 1880. I assume that the object of your request is to obtain an expression of my views as to whether the use of the penalty-envelope, in the manner and for the purpose stated in the circular, is in accordance with law. On investigation

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Missouri, Kansas and Texas Railway.

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I find that substantially the same question has already been considered by one of my predecessors, who, in an opinion dated May 25, 1880 (16 Opin., 501), held that where a member of Congress has addressed an inquiry about official business to a Department or any bureau thereof, the reply may properly be addressed to the person concerned in a penalty envelope and sent unsealed to the member (that he may take cognizance of its contents) to be by him forwarded to its destination; but that *in such case the use of the envelope must be strictly limited to the communication between the Department or bureau and the applicant or person concerned.*

Presuming that this opinion, in which I concur fully, meets the object of your request, I deem it unnecessary to do more than call your attention to it.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. S. J. KIRKWOOD,

*Secretary of the Interior.*

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MISSOURI, KANSAS AND TEXAS RAILWAY.

The President has power to direct, by an executive order, the manner in which shall be ascertained and determined the compensation for property taken or destroyed in the construction of the Missouri, Kansas and Texas Railway through the reservation of the Chickasaw and Choctaw tribes of Indians.

DEPARTMENT OF JUSTICE,

*January 21, 1882.*

SIR: I have the honor to state that the letter of the Secretary of the Interior, dated the 7th instant, addressed to you, together with the executive order proposed and recommended by him, and all the accompanying papers, have been carefully read and considered.

The question upon which my advice is requested in your reference of the Secretary's letter is "as to the propriety of issuing" the said order.

The proposed order is supplementary to former executive orders by the President directing the *manner* in which full compensation to the parties injured for property taken or

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EMPLOYÉS OF CENSUS BUREAU.

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destroyed in the construction of the Missouri, Kansas and Texas Railway through the reservations of the Chickasaw and Choctaw tribes of Indians shall be ascertained and determined.

The eighteenth article of the treaty of June 22, 1855, and the sixth article of the treaty of April 28, 1866, with these tribes, provided that the President shall direct as to the manner, etc., as above.

Without rehearsing the facts in the case, which are fully set forth in a communication of the 5th instant from the Commissioner of Indian Affairs to the Secretary of the Interior, I am of opinion that the order is necessary in order to the settlement of the differences between the railway company and the Indians, that it is within the authority given to the President by the treaties above cited, and I advise that it be issued.

I have the honor to return herewith the papers referred to me.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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EMPLOYÉS OF CENSUS BUREAU.

An order may be made by the Secretary of the Interior directing payment of the certificates given by the Superintendent of the Census in cases where such certificates are assigned in strict conformity to section 3477, Revised Statutes.

DEPARTMENT OF JUSTICE,

January 26, 1882.

SIR: Concerning the order addressed to Richard Joseph, disbursing clerk, directing him to make payment to the holders of certificates given by the Superintendent of the Census to certain employés of the Census Bureau who, by assignment or letter of attorney, had transferred their certificates, which order has been presented to you for signature, my advice is that *an order* so drawn as to direct payment, when the certificates are assigned in strict conformity to section 3477, Revised Statutes, may be signed by you.

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Employés of Census Bureau.

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This statute, it has been held, does not apply to cases litigated in the courts; but in transactions before the Treasury, not coming within the jurisdiction of courts, its provisions must be complied with. (See Lawrence and Crowell's case, 8 C. Cls. R., 252; and Cavender's case, *id.*, 281.)

I have been informed that a ruling has recently been made by the present Secretary of the Treasury relative to assignments by Government employés of their claims upon the Treasury.

Upon application to the clerk of that Department I am not able to obtain a copy of the order referred to and do not know its scope, or, indeed, if such an order has actually been issued.

I should very much regret if any advice given by me in this matter should be in conflict with the views of the Secretary, desirous as I am that there should be perfect agreement between the Departments upon the subject.

Upon the policy of generally disregarding assignments of such claims, my views are, I think, in harmony with those reported to have been expressed by the Secretary of the Treasury. I do not intend that the case in hand shall be considered hereafter as a precedent. It is a peculiar case.

The appropriation for the work of the census was exhausted, but the services of the persons employed to carry on that work were indispensable. They labored on upon the faith that Congress would compensate them. But meanwhile they must have the means of support. They could obtain them only by assigning their certificates, and now that Congress has passed a law for their compensation, it is a hard case, indeed, if the device by which alone they were enabled to obtain their daily bread can not be recognized by the Government.

I am of opinion that an order such as I have indicated above should be issued by you.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

Hon. S. J. KIRKWOOD,

*Secretary of the Interior.*

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Customs Laws—Additional Duty Under.

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## CUSTOMS LAWS—ADDITIONAL DUTY UNDER.

The additional duty of 20 per centum ad valorem in section 2900, Revised Statutes, can not be legally exacted on costs, charges, and commissions, but should be levied only on the "appraised value" of the merchandise imported, exclusive of such charges.

The additional duty of 20 per centum in section 2908, Revised Statutes, is a separate and distinct penalty, which can legally be exacted on the *charges as entered*, and *only* on this element of the dutiable value of the merchandise.

The legislation on the subject reviewed, and those sections construed.

DEPARTMENT OF JUSTICE,

January 27, 1882.

SIR: Your letter of the 26th of November last, addressed to the then Acting Attorney-General (the Hon. S. F. Phillips, Solicitor-General), in which attention is called to some recent correspondence between the United States attorney at New York and your Department touching the additional assessment of 20 per cent. ad valorem under sections 2900 and 2908, Revised Statutes, states that it is the practice of your Department, where the appraised value of imported merchandise is more than 10 per cent. greater than the entered value (when entry is made by certified invoice), to assess such duty "as well upon the value of the merchandise as on the costs, charges, and commissions." This practice, in so far as it relates to costs, charges, and commissions, being claimed to be erroneous by the United States attorney, you request an opinion upon the question presented. The duty of responding to this request having devolved upon me, I now have the honor to communicate to you my views upon the inquiry submitted, which I understand to be whether the additional duty of 20 per centum ad valorem imposed by sections 2900 and 2908, Revised Statutes, can be legally exacted on costs, charges, and commissions.

After careful examination of the subject, I arrive at the conclusion that the additional duty of 20 per cent. ad valorem contained in section 2900, Revised Statutes, can not legally be exacted on costs, charges, and commissions, but should be levied only on the "appraised value" of the merchandise imported exclusive of such charges, and that the additional

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Customs Laws—Additional Duty Under.

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duty of 20 per centum contained in section 2908, Revised Statutes, is a separate and distinct penalty, which can legally be exacted on the *charges as entered*, and *only* on this element of the dutiable value of the merchandise. And herein I agree with the view of the United States attorney, as expressed in his letter to you of November 19.

I am led to the above conclusions upon consideration of those sections in connection with others in the Revised Statutes, and also in connection with previous legislation relating to the same subject. By reference to this legislation it will be found that an additional duty, such as that provided by section 2900, was imposed by section 8 of the act of July 30, 1846, chapter 74, in substantially the same terms. This section authorized the importer of merchandise actually purchased, on entry of the same, "to make such addition in the entry to the cost or value given in the invoice as, in his opinion, may raise the same to the true market value of such imports in the principal markets of the country whence the importation shall have been made, or in which the goods imported shall have been originally manufactured and produced, as the case may be, and to add thereto all costs and charges which, under existing laws, would form part of the true value at the port where the same may be entered upon which the duties shall be assessed. And it shall be the duty of the collector, within whose district the same may be imported or entered, to cause the *dutiable value* of such imports to be appraised, estimated, and ascertained in accordance with the provisions of existing laws; and if the *appraised value* thereof shall exceed by 10 per centum or more the *value so declared on the entry*, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid a duty of 20 per centum ad valorem on such *appraised value*," etc. (9 Stat., 43). In the case of *Sampson v. Peaslee* (20 How., 571), the Supreme Court held that under this statute the additional duty of 20 per cent. ad valorem could be levied on the appraised value only, and not upon the charges and commissions added.

It will be observed that the act of 1846 uses the words "dutiable value" as well as the words "appraised value," and also employs phraseology signifying *entered value*. Each

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Customs Laws—Additional Duty Under.

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of these expressions has a different meaning. That act provided no mode for ascertaining the dutiable value of articles upon which an ad valorem duty was imposed, but left such value to be ascertained under the provisions of other laws. The provisions on the subject then in force were contained in section 16 of the act of August 30, 1842, chapter 270, as to imports procured by purchase, and in section 5 of the act of March 1, 1823, chapter 21, as to imports otherwise procured; and they required that, in determining the *dutiable value* of merchandise (or, in the language of the act of 1842, "the true value at the port where the same may be entered upon which duties shall be assessed"), certain costs, charges, and commissions should be *added to its appraised value*. So that "appraised value," as used in section 8 of the act of 1846, means the value ascertained by the appraisers, exclusive of costs, charges, etc.; while "dutiable value," as there used, means the value ascertained by the appraisers, together with the costs, charges, etc., required to be added thereto by the provisions of other statutes. According to the ruling of the Supreme Court, already referred to, the additional duty of 20 per cent. provided by that section was liable only on the "appraised value" as thus distinguished from the "dutiable value."

Some amendments were subsequently introduced by the acts of March 3, 1851, chapter 38, and March 3, 1857, chapter 101, the latter being amendatory of section 8 of the act of 1846. Yet the law as regards the assessment of 20 per cent. additional duty was left unchanged. Thus, by the act of 1857, the collector within whose district the articles were imported or entered was required to cause the "dutiable value" thereof to be "appraised, estimated, and ascertained in accordance with provisions of existing laws," and if the "appraised value exceeded by 10 per cent. or more the entered value, an additional duty of 20 per cent. ad valorem was to be levied, collected, and paid on *such appraised value*."

But by section 23 of the act of June 30, 1864, chapter 171, both the eighth section of the act of 1846 and the amendatory act of 1857 were expressly repealed. Provisions similar to those then repealed were, however, contained in section 23 of the act of 1864, and section 24 of the same act declared

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Customs Laws—Additional Duty Under.

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what should be deemed the dutiable value of imports, with certain exceptions, and provided how such value should be ascertained. Under the former section the importer was authorized when he entered his goods, etc., "to make such addition in the entry to the cost or value given in the invoice as in his opinion may raise the same to the true market value of such goods, etc., in the principal markets of the country whence they shall have been imported, and to add thereto all costs and charges which, under existing laws, would form part of the true value at the port where the same may be entered, upon which the duty shall be assessed." It is then made the duty of the collector to "cause the *dutiable value* of such goods, etc., to be appraised, estimated, and ascertained in accordance with the provisions of existing laws; and if the *appraised value* thereof shall exceed by ten per centum or more the value so declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid a duty of twenty per centum *ad valorem* on *such appraised value*," etc. Thus the act of 1864, in re-enacting the 20 per cent. additional duty provided by the acts of 1846 and 1857, made no change with respect to its assessment. As under the two last-mentioned acts, so under the act of 1864, the duty was to be assessed not on the dutiable value, but on the appraised value.

By section 7 of the act of March 3, 1865, chapter 80, sections 23 and 24 of the act of 1864, above mentioned, were repealed, and also "all acts and parts of acts requiring duties to be assessed upon commissions, brokerage, costs of transportation, shipment, transshipment, and other like costs and charges incurred in placing any goods, wares, or merchandise on ship-board," etc.

The same section made it the duty of the collector, in cases where an *ad valorem* duty is imposed on imported merchandise, and also where the duty is based upon the value of the square yard or of any specified quantity or parcel of such merchandise, to cause "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 shall have been imported into the United States, to be appraised, and such appraised value shall be consid-

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Customs Laws—Additional Duty Under.

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ered the value upon which duty shall be assessed." Here, for the first time (but only for a brief period, as will hereafter appear), the appraised value becomes the dutiable value, the former being made the sole basis for the assessment of duties. The provision just quoted is embodied in section 2906, Revised Statutes.

Section 7 of the act of 1865 further provided: "That it shall be lawful for the owner, consignee, or agent of any goods, wares, or merchandise which shall have been actually purchased, or procured otherwise than by purchase, at the time, and not afterwards, when he shall produce his original invoice or invoices to the collector, and make and verify his written entry of his goods, etc., to make such addition in the entry to the cost or value given in the invoice as in his opinion may raise the same to the actual market value or wholesale price of such goods, etc., at the period of exportation to the United States in the principal markets of the country from which the same shall have been imported; and it shall be the duty of the collector within whose district the same may be imported or entered to cause such actual market value or wholesale price to be appraised in accordance with the provisions of existing laws, and if such appraised value shall exceed by ten per centum or more the value as declared in the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid a duty of twenty per centum *ad valorem* on such appraised value," etc. This provision is reproduced in section 2900, Revised Statutes.

Thus, under the act of 1865, the dutiable value of imported merchandise was 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 was imported into the United States, *without any addition for costs, charges, and commissions*, such actual market value or wholesale price being ascertained by appraisement. The 20 per cent. additional duty was leviable on the value so ascertained, that is, on the appraised value, which, as already stated, was also the dutiable value.

But by section 9 of the act of July 28, 1866, chapter 298, costs, charges, and commissions were again made an element

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 Customs Laws—Additional Duty Under.
 

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of value for the assessment of duties. That section declared, "That in determining the dutiable value of merchandise hereafter imported, there shall be *added* to the cost or to the actual wholesale price, or general market value at the time of exportation in the principal markets of the country from whence the same shall have been imported into the United States, the cost of transportation, shipment, and transshipment, with all the 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 such goods are contained; commission at the usual rates, but in no case less than two and a half per centum; brokerage, export duty, and all other actual or usual charges for putting up, preparing, and packing for transportation or shipment: \* \* \* *Provided*, That all additions made to the entered value of merchandise for charges shall be regarded as part of the actual value of such merchandise, and if such addition shall exceed by ten per centum the value so declared in the entry, in addition to the duties imposed by law, there shall be levied, collected, and paid a duty of twenty per centum on such value," etc. This provision is embodied in sections 2907 and 2908, Revised Statutes.

It is to be observed that the above provision of the act of 1866 made no change in the law of 1865, excepting as regards the dutiable value of imported merchandise. This value, under the act of 1865, was the actual market value or wholesale price in the principal markets of the country whence the merchandise was imported *as appraised*. Under the act of 1866 the dutiable value was, in substance, the appraised value as required by the act of 1865, with certain costs, charges, etc., *added* thereto. The act of 1866, besides requiring such costs, charges, etc., to be added in determining the dutiable value, provided for levying an additional duty of 20 per centum where "additions made to the entered value of merchandise for charges should exceed by ten per centum the value so declared in the entry."

This additional duty does not appear to have been intended as a substitute for that provided by the act of 1865, but rather as cumulative therewith. Both have accordingly been repro-

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Customs Laws—Additional Duty Under.

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duced in the Revised Statutes (secs. 2900 and 2908). Obviously the additional duty of the act of 1865 was a penal duty, designed to enforce the entry of imports by the importer according to the actual market value or wholesale price thereof at the time of exportation in the principal markets of the country from which the same were imported. On the other hand, it would seem that the purpose of the additional duty of the act of 1866, which was also a penal duty, was to enforce a true statement by the importer on entry of his merchandise of the costs, charges, etc., thereon, which by the last-mentioned act were required to be added to the actual market value or wholesale price thereof in the foreign market in determining the dutiable value of the merchandise. The latter penal duty was leviable on the value of the costs, charges, etc., as entered by the importer, in case an addition was made thereto by the customs officer which exceeded by 10 per cent. or more such entered value; while the former penal duty was leviable on the value of the merchandise as appraised (exclusive of costs, charges, etc.), in case such appraised value exceeded by 10 per cent. or more the value of the merchandise as entered by the importer.

These provisions of the act of 1865 and 1866, as before observed, have been embodied in sections 2900, 2906, 2907, and 2908, Revised Statutes, and they remain substantially unchanged.

By section 2906, when an ad valorem rate of duty is imposed on imported merchandise, etc., the collector is required to cause "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 imported, to be appraised." To this is added, "And such appraised value shall be considered the value upon which duty shall be assessed." Such "appraised value," however, is not (in view of the provisions of the next following section) to be understood as constituting the *whole dutiable value* of the imports. What shall constitute this value is declared in section 2907, which provides that "in determining the dutiable value of merchandise, there shall be added to the cost, or to the actual wholesale price or general

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Customs Laws—Additional Duty Under.

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market value at the time of exportation in the principal markets of the country from whence the same has been imported," certain charges therein described. These charges are not contemplated to be appraised, but to be ascertained and added to the appraisement of the merchandise required to be made by section 2906. In the "appraised value" charges are not included. The "dutiable value" includes both the appraised value and the charges.

Section 2900 permits the importer at the time of entry, and not afterward, to make such addition to the cost or value given in the invoice as, in his opinion, may raise the same to the actual market value or wholesale price of the merchandise at the period of exportation. Such actual market value is then to be appraised, and if the *appraised value* exceeds by 10 per centum or more the "value so declared in the entry," it is provided that there shall be collected an additional duty of 20 per cent. ad valorem "on such appraised value." By the terms of this section the additional duty must be exacted on the "appraised value," which value, as shown above, does not embrace charges.

Section 2908 declares that "all additions made to the entered value of merchandise for charges shall be regarded as part of the actual value of such merchandise, and if such addition shall exceed by ten per centum the value declared in the entry, in addition to the duties imposed by law, there shall be collected a duty of twenty per centum on such value." By the preceding section (2907), in determining the dutiable value of merchandise, certain charges are to be computed. These charges are required to be included by the importer in his entry (see Rev. Stat., secs., 2785, 2841, 2843, 2845, 2849, 2853, 2854; compare also sec. 14 of the act of June 22, 1874, chap. 391); and when thus included *they* constitute what is described in section 2908 as "the entered value of merchandise for charges." The "additions" thereto mentioned in the same section signify those which are made by the collector; and it is declared that where any such addition exceeds by 10 per centum "the value declared in the entry" (meaning, as I take it, the *entered value* for charges), "an additional duty of twenty per cent. shall be collected on

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Deduction from Pay of Mail Contractors.

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such value." According to this construction the additional duty provided by section 2908 is applicable solely to the charges, and can be exacted on these only at their entered value.

I return herewith the papers which accompanied your letter.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

*Secretary of the Treasury.*

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DEDUCTION FROM PAY OF MAIL CONTRACTORS.

Section 3962, Revised Statutes, makes it imperative upon the Postmaster-General to deduct from the pay of mail contractors the price of the trip where, without fault on their part, the trip is not performed. And *semble* that the section has the same effect as regards the pay of companies performing "recognized service" in the case of trips not performed by such companies.

DEPARTMENT OF JUSTICE,

*February 4, 1882.*

SIR: Upon the 28th of June last a note was received here from your predecessor, asking for an opinion upon two questions which had occurred in his Department. Those questions were at once considered, and a reply was prepared upon the 11th of July last. At the instance, however, of the gentleman who had argued the matter here on behalf of the parties who had applied for certain *remissions* at the Post-Office Department, as the matter did not seem pressing otherwise than at their instance, I deferred submitting such reply until another argument might be presented in support of the application in question. That occurred in November last. Since then other engagements have prevented its consideration until during the present week.

With this explanation of the delay that has occurred, I submit the following reply to the note above referred to.

Connecting the note with statements in an opinion of the Assistant Attorney-General for the Post-Office Department,

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Deduction from Pay of Mail Contractors.

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therewith inclosed, it appears that the questions to be answered are substantially as follows :

(1) Whether section 3962, Revised Statutes, is *imperative* or merely *directory*, so far as it defines the action to be taken by the Postmaster-General in cases where *without fault* mail contractors fail to perform trips; and,

(2) Whether, if imperative as to ordinary contractors, it is so as to companies performing what is called *recognized service*.

The note requests that the opinion therewith transmitted may be "reviewed."

The established practice in this Department is *not* to review opinions of the kind submitted. It has been thought that to take such a course might lead to secondary discussions and other incidental complications, and that the most satisfactory way is to take up the principal questions themselves, without embarrassment by the manner in which they have already been treated. I shall therefore ask leave to follow this method, having at the same time had the benefit of reading the learned opinion in question.

(1) Section 3962 is 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."

I have divided the section into three paragraphs, answering to the three different topics into which, upon inspection, it appears to be divided; the *first* being that of failures and delinquencies in general; the *second* of simple non-performance of trip; and the *third* of failure occasioned *by fault* in the contractor or carrier.

I submit then that the element of fault or innocence does not enter into a question whether the penalty spoken of in the second paragraph is to be exacted, but only that of *performance* or *non-performance*. Also, it seems that the existence of *fault* is important only upon a question whether a penalty greater than that imposed by the second paragraph,

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Deduction from Pay of Mail Contractors.

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or not exceeding three times the price of the trip, is to be exacted.

The use of the word *may* does not affect any color which the section may otherwise have. That word is often employed to impose a *duty* upon public officers, a resort to the context being necessary to determine the *existence* and the *limit* of any *discretion* thereabouts. That context in the present connection has already been somewhat discussed. But it may be added that the phrase, "prices of a trip," which occurs in the section, is also important to the same purpose. For this suggests an understanding by Congress that each trip has its price, and therefore that when a trip is not performed, no matter for what reason, it should not be paid for. Even in the case of perfect innocence on the part of the non-performing contractor, inasmuch as the other party to the contract (The United States) is equally innocent, there is no reason why an unperformed trip should be reckoned as if performed; for upon the theory that each trip has its price, there is so far a total failure of consideration.

In this connection it is plain that it makes no difference that the pay of each trip is not exactly apportioned to the amount of transportation done upon that trip, *i. e.*, that the mails left over upon one day are carried on the next, for the question is as to the understanding of Congress apparent from the provision before us; and as to that, it is evident that for the purposes of section 3962 Congress assumed that each trip had its own ascertainable price, to withhold which for an unperformed trip was therefore not *punishment* but mere *equity*.

Concluding, as I do, that section 3962 makes it imperative upon the Postmaster-General to deduct the price of the trip when not performed, I am further of opinion that the provisions of section 409 have no application here. That section authorizes certain modes of proceeding by which the Sixth Auditor is to enable the Postmaster-General the better to "exercise his powers over fines, penalties, forfeitures, and liabilities under any provision of law in relation to the officers, employes, operations, or business of the postal service." This expression of course leaves the question of the existence of such *powers* at large. That he has extensive powers over

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Harbor Improvement at Chicago.

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various cases of fines and forfeitures under section 3962 is readily admitted, but not in the case before me. As has already been suggested, it is difficult to see by what considerations the Postmaster-General could make a difference betwixt parties who come under the second paragraph above, *all of them being innocent parties.*

In this connection my attention has been called to the opinions of the Attorney-General contained in Volume XIV of Opinions, page 179, and XV, page 441.

Entertaining a very high respect for the judgment of the distinguished gentleman who gave the opinion *first* cited, I confess that I am unable to concur in the argument and conclusion there announced. The *second* opinion was confined of course to the question which had been asked. It does not conflict with that now submitted. Upon the contrary, it goes a little out of its way to suggest that the word *may* in section 3962 is *imperative*.

(2) The question remains whether, supposing section 3962 to be imperative as to ordinary contractors, it be so as to companies performing what is called *recognized service*.

As a general rule it seems to me that companies performing recognized service must be regarded as contractors. The correspondence under which they came into the postal service of the United States ascertains their obligations. (*Railroad Company vs. The United States*, 101 U. S. R., 543; see p. 549, par. 2.)

Very respectfully, your obedient servant,

S. F. PHILLIPS,

*Acting Attorney-General.*

The POSTMASTER-GENERAL.

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HARBOR IMPROVEMENT AT CHICAGO.

The United States may avail itself of the remedy by injunction to protect from injury improvements in navigable waters made under authority of Congress.

DEPARTMENT OF JUSTICE,

*February 6, 1882.*

SIR: Referring to your letter of the 20th ultimo, and the papers transmitted therewith, in relation to the proposed

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Harbor Improvement at Chicago.

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construction by the Illinois Central Railroad Company, within the outer harbor at Chicago, of "a dock line about 100 feet eastward of the present shore-protection and filling the inclosed area," I have the honor to state that the question whether the ownership of the *soil* is in the company, or in the State, or elsewhere (the United States asserting no title thereto), appears to me to be unimportant in so far as the General Government is concerned, and that the only inquiry which need be entertained by your Department is whether the construction of the "dock line" will obstruct, encroach upon, or interfere with the harbor improvement, and thus injuriously affect its usefulness in the interest of navigation. If so, it would not only be your duty to withhold your assent to the prosecution of the work, but to direct that proceedings be taken in the proper court to enjoin the proposed encroachment, should the company persist in going on therewith. That the United States may avail itself of the remedy by injunction to protect from injury improvements in navigable waters made under the authority of Congress is not at all doubtful. (*United States v. Duluth*, 4 Dill., 469.)

The inquiry suggested above, however, being one of *fact*, I can afford you no aid in determining it. In its consideration the views of the officers of the Engineer Department, who have immediate charge of the harbor improvement, are entitled to very great weight, and will, I doubt not, enable you to reach a correct conclusion.

The papers above referred to are returned herewith.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,  
*Secretary of War.*

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Release of Mortgage.

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## RELEASE OF MORTGAGE.

It is competent to the Secretary of the Navy, under the circumstances stated, to release a certain mortgage given by Robert L. Stevens on the 9th of September, 1848, as security for the performance of a certain contract theretofore entered into by him for the construction of a war vessel since known as the "Stevens Battery."

DEPARTMENT OF JUSTICE,

February 13, 1882.

SIR: I have examined the papers which accompanied your letter of the 7th instant, relating to an application made to you for a release of the mortgage given by the late Robert L. Stevens on the 9th of September, 1848, as security for the performance of a certain contract theretofore entered into by him for the construction of a war vessel since known as the "Stevens Battery."

The contract, to secure the performance of which the mortgage was given, was made by the Secretary of the Navy with Mr. Stevens under authority granted by the act of April 14, 1842, chapter 22. It contained a stipulation providing for the execution of the mortgage which is recited in the latter, and also a further stipulation "that when the said Stevens shall have fully completed the said war steamer, with the engines, boilers, and their dependencies, her armament and equipment in all respects, and when she shall have been duly delivered to and received by the agent of the United States according to the terms of this contract and that of which this is explanatory, there shall then be paid to the said Stevens, etc., \* \* \* and the *Secretary of the Navy shall at the same time cancel and return to the said Stevens the mortgage deed* hereinbefore specified to be given as security for the faithful performance of this contract on the part of the said Stevens."

By later legislation of Congress (see resolution of July 17, 1862, 12 Stat., 628, and resolution of July 1, 1870, 16 Stat., 383), all interest of the United States in the construction of the said war vessel has been relinquished, and the contract referred to virtually rescinded. The mortgage, however, still appears of record as unsatisfied, though it no

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 Mitigation of Fines, Penalties, and Forfeitures.
 

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longer possesses any vitality, and you request to be advised as to your power to grant the application for its release.

Had the contractor been required to go on and perform the contract, it is very clear that upon performance thereof he would have been entitled to a release of the mortgage from the Secretary of the Navy. But performance of the contract having been waived by the United States, and the contractor released from his obligations thereunder, I submit that the matter now stands, in so far as the mortgage is concerned, precisely as it would have stood if the contract had been performed. And as in that event it would have been competent to the Secretary of the Navy, and moreover his duty, to cancel the mortgage, so in the actual state of the case now under consideration it is in my opinion within his competency and duty to do the same act.

I will add that the mode of performing this act is not material, provided it be effective under the local law. Accompanying the papers herewith is a "satisfaction" piece, which when executed and acknowledged will be sufficient for the purpose.

I am, sir, very respectfully,

S. F. PHILLIPS,  
*Acting Attorney-General.*

Hon. W. H. HUNT,  
*Secretary of the Navy.*

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 MITIGATION OF FINES, PENALTIES, AND FORFEITURES.

Under section 4751, Revised Statutes, the Secretary of the Navy has power to mitigate, before trial and conviction of the offender, any fine, penalty, or forfeiture incurred under the provisions therein referred to.

Where proceedings are already commenced, it is the duty of the prosecuting officer, upon receipt of the order of mitigation, and on the terms and conditions thereof being complied with, to carry it into effect by discontinuing the proceedings.

DEPARTMENT OF JUSTICE,  
*February 17, 1882.*

SIR: Your letter to this Department of the 18th of November last directs attention to an application made to you by R. S. Taylor, esq., on behalf of three persons charged with un-

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**Mitigation of Fines, Penalties, and Forfeitures.**

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lawfully cutting and removing timber from the public lands in Cherokee County, Ala., for mitigation of penalties and discontinuance of proceedings against them. The application is accompanied by copies of the complaint in each case, and also other papers relating to the matter; all of which are herewith returned.

You observe that the proceedings in these cases were not instituted under the direction of your Department, but that it is understood that the offenders have not yet been brought to trial. And you request an opinion upon the following questions: "Has the Secretary of the Navy, under the provisions of section 4751 of the Revised Statutes, authorizing him to mitigate fines, etc., power to direct a discontinuance of further proceedings in these cases before trial and conviction of the offenders?"

The authority of the Secretary of the Navy to mitigate fines, penalties, and forfeitures, under section 4751, Revised Statutes, was considered by one of my predecessors in an opinion dated January 23, 1878 (15 Opin., 436). It was there held that such authority extends to any fine, penalty, or forfeiture incurred under the provisions of the sections (2461, 2462, and 2463) designated in section 4751, and may be exercised by the Secretary as well where the proceedings, civil or criminal, have not been instituted with his knowledge and by his direction as where they have. But the inquiry whether it can be exercised before trial and conviction did not then arise and was not passed upon. This inquiry, however, seeming to be involved in the present case, I assume its consideration to be within the scope of your question.

Section 4751 declares: "All penalties and forfeitures incurred under the provisions of, etc., shall be sued for, recovered, distributed, and accounted for, under the directions of the Secretary of the Navy, etc., and the Secretary is authorized to mitigate, in whole or in part, on such terms and conditions as he deems proper, by an order in writing, any fine, penalty, or forfeitures so incurred."

The penalty or forfeiture is "incurred" in the sense in which this word is used in the first clause of that section, before any proceedings for the recovery thereof have been commenced. This is implied by the words, "shall be sued

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Mitigation of Fines, Penalties, and Forfeitures.

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for," etc., when taken in connection with the preceding words, "all penalties and forfeitures incurred," etc. The word "incurred," as here employed, denotes a condition of *liability* to the penalty and forfeiture; the meaning of the clause being the same as if it read, "all penalties and forfeitures to which any person has become liable under the provisions," etc.

I think that the word "incurred," as used in the last clause of the section, is intended to be understood in the same sense in which it is used in the first; and that when a person becomes liable to a fine, penalty, or forfeiture under the provisions referred to in the section, such fine, penalty, or forfeiture is "so incurred," within the meaning of the last clause, though no trial may have yet taken place. It results from this view that the authority of the Secretary to mitigate may be exercised previous to trial and conviction as well as after; the only circumstance or condition necessary for its exercise being that a fine, penalty, or forfeiture has been incurred as above.

Support for this conclusion is derived from an examination of former statutes on the same subject. By the act of March 1, 1817, chapter 22, the penalties and forfeitures thereby imposed for unlawfully taking on board, transporting, or exporting live-oak or red-cedar timber cut on the public lands were authorized to be mitigated or remitted in the manner prescribed by the act of March 3, 1797, chapter 13. Under the latter act the Secretary of the Treasury (after a summary inquiry before the district judge as there provided) had "power to mitigate or remit" certain fines, penalties, or forfeitures, where, in his opinion, the same were incurred without willful negligence, or any intention of fraud in the person or persons incurring the same, "and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued upon such terms or conditions as he may deem reasonable or just." Here it was manifestly contemplated that the power to mitigate or remit might be exercised while the prosecution was pending and before trial, if not previous to the institution of the prosecution. The provisions of the act of 1817, adverted to above, appear to have been superseded by those of the act of March 2, 1831, chapter 66, by which last-mentioned act the power to mitigate fines, penalties, and forfeitures incurred thereunder was conferred on the commissioners of the Navy pension fund, and the

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MAIL-CONTRACT BIDDER—BOND.

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same power was afterwards devolved upon the Secretary of the Navy by the act of July 11, 1832, chapter 194. In the absence of any provision in the acts of 1831 and 1832 to the contrary, it is fair to presume that the power of mitigation given thereby to the commissioners of the Navy pension fund and to the Secretary of the Navy was exercisable pending the prosecution and before trial, as under the former law. Section 4751, Revised Statutes, but reproduces the law as it stood after the passage of the act of 1832.

I am accordingly of opinion that under section 4751, Revised Statutes, the Secretary of the Navy has power to mitigate, before trial and conviction of the offender, any fine, penalty, or forfeiture incurred under the provisions therein referred to. The exercise of this power is required to be "by an order in writing," which should recite or refer to the section under which it is issued, and express the "terms and conditions" of the mitigation. Where proceedings have been instituted, it would be the duty of the prosecuting officer, upon receipt of the order, and on the terms and conditions thereof being complied with, to carry it into effect by discontinuing the proceedings.

Presuming that the foregoing furnishes a sufficient answer to the question propounded by you,

I have the honor to be, very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

Hon. W. H. HUNT,  
*Secretary of the Navy.*

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MAIL-CONTRACT BIDDER—BOND.

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The Postmaster-General may require from the bidder for a mail contract conformity to all proper and reasonable administrative regulations of the Post-Office Department; and if the bidder neglects to conform thereto, his bid may be rejected.

Case of a material change by erasure and interlineation in the bidder's bond, where no attestation by a witness appears thereon that such change was made before execution of the bond, considered.

DEPARTMENT OF JUSTICE,

*February 18, 1882.*

SIR: In your letter of the 16th instant you state that in the bond of a bidder for mail route No. 40121 there is an

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Registry of Vessels.

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erasure and interlineation changing the penalty from \$9,300 to \$19,300, and there is no attestation of the witnesses that the change was made before the bond was signed and sealed.

To your first question upon this case I answer that such interlineation does not invalidate the instrument or impair its legal effect, if *in fact* it was made prior to the execution of the bond. The attestation of witnesses is merely for convenience of proof. The law does not require that there shall be witnesses to the bond. It is, however, expedient and safe always to require them, and that a note should be made by them of any material alteration.

If a material change by interlineation or otherwise is made in a bond subsequent to its execution, the instrument is thereby rendered void, unless it can clearly be shown that after the change the parties assented to it, and still acknowledge the signing and sealing as their act.

Because of the difficulty of making proof in either case, it would seem to be extremely hazardous to accept a bond appearing upon its face to have been altered, unless by a note or in some way it is attested that the change was made with the assent of the parties.

To your second inquiry I reply, that the Post-Office Department may require conformity by the bidder to all proper and reasonable administrative regulations, and if he neglects so to conform his bid may be rejected.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

Hon. T. O. HOWE,  
*Postmaster-General.*

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REGISTRY OF VESSELS.

A vessel built in the United States, and owned wholly by citizens thereof, is entitled to be registered under the laws of the United States, although she may have formerly belonged to citizens of a foreign country.

DEPARTMENT OF JUSTICE,

*February 20, 1882.*

SIR: The question submitted to me by your letter of the 16th instant is this: Is a vessel answering the conditions of

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Registry of Vessels.

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section 4136, Revised Statutes, except that she was built in the United States and not in a foreign country, entitled to registry?

I think she is.

The statutes prescribing the terms upon which vessels may be registered should be read together in order to ascertain their true intent and meaning.

By section 4132 vessels built within the United States, and belonging wholly to citizens thereof, are entitled to the privileges of registry.

The case in hand is within this provision.

The vessel was built in the United States and is now owned wholly by a citizen of the United States.

But meanwhile she has been owned in a foreign country. If she had been built there also, she could be registered under section 4136. Does the fact that she was built in the United States deprive her of the privilege? If so, a condition which gives her registry in section 4132 takes it away in section 4136. These statutes should have a reasonable construction.

The whole tenor and drift of them from section 4132 to 4136 inclusive is, that vessels built in the United States and owned exclusively by citizens of the United States may be registered or enrolled, and may then claim the protection of the Government; and foreign vessels which shall come into the possession and ownership of a citizen of the United States in the manner and with the conditions set forth in section 4136 are also entitled to the privilege.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

*Secretary of the Treasury.*

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National Banking Associations.

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## NATIONAL BANKING ASSOCIATIONS.

National banking associations organized under the act of February 25, 1863, may amend their articles of association where this would not be in conflict with the provisions of the statute.

Where such associations are so organized for a period of less than twenty years from the date of the act they can not, by amending their articles, extend the period to twenty years from such date.

Where the articles provide for an increase of capital, and the maximum of such increase is once fixed by the determination of the Comptroller of the Currency, both his power and that of the association over the subject are exhausted. A further increase and a new maximum can not be effected by an amendment of the articles.

An amendment of the articles providing for an increase of the number of directors would not be inconsistent with the provision of section 5139, Revised Statutes, declaring that "No change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

The stockholders of an expiring association may organize a new one, and adopt for the latter the name of the former.

An association may, upon the expiration of the period limited for its duration, convert itself into a State bank under the laws of the State, provided it has liquidated its affairs agreeably to the laws of Congress; and after it has thus become a State bank it may reconvert itself into a national banking association, under section 5154, Revised Statutes, and adopt the name of the expired corporation with the approval of the Comptroller of the Currency.

## DEPARTMENT OF JUSTICE,

*February 23, 1882.*

SIR: Yours of the 1st instant inclosed a communication from the Comptroller of the Currency, dated the 10th ultimo, suggesting certain questions to which you request my attention. I have since carefully examined these questions, and now have the honor to submit my opinion thereon. They are as follows:

(1) "Can national banking associations organized under the act of February 25, 1863, amend their articles of association? (See section 12 of this act.)

(2) "If so, can associations so organized for a period of less than twenty years from the date of the act, under the terms of section 11, amend their articles of association and obtain the full period of twenty years from the date of the act? (See sections 5, 6, and 11 of the act of February 25, 1863.)

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National Banking Associations.

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(3) "Would an amendment of articles of association changing the maximum originally determined be inconsistent with law, provided the new maximum be determined by the Comptroller of the Currency?" (Sections 5133, 5139, and 5142, Revised Statutes.)

(4) "Would an amendment increasing the number of directors originally adopted be inconsistent with the terms of section 5139, Revised Statutes, which provides that no change shall be made by which the rights, etc., of creditors shall be impaired?" (See section 5145, Revised Statutes.)

(5) "When the periods of succession of national banking associations organized under any of the laws of Congress expire, is there anything in the present national banking laws of the United States to prevent those who may have been stockholders of expiring corporations from organizing new national banking associations with the same name as those formerly possessed by the expiring associations, provided such names are taken with the approval of the Comptroller of the Currency?"

(6) "Is there anything to prevent national banking associations whose periods of succession expire from converting into State banks under the enabling acts of the various States, and subsequently reconverting under section 5154, Revised Statutes, into national banking associations with names which had been previously held by the associations whose corporate existence had expired, particularly in States where there are also laws enabling State banks to convert into national banking associations? How would it be if there were no such enabling acts as the ones mentioned?"

The first two questions, which relate to the amendment of their articles of association by national banks organized under the act of February 25, 1863, may be appropriately considered together.

The *formation* of national banking associations under that act was regulated by the fifth and sixth sections thereof, which provided that persons (of whom the number was not to be less than five) uniting to form such an association should, under their hands and seals, make a certificate specifying its name, its place of business, the amount of its capital stock, and the number of shares into which the same is

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National Banking Associations.

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divided, together with the names and places of residence of the shareholders, and the number of shares held by each. This organization certificate, when duly acknowledged, was to be transmitted along with a copy of the articles of association adopted to the Comptroller of the Currency, who was required to record and carefully preserve both instruments in his office.

Section 11 of the same act declared that every association so formed "may make and use a common seal, and shall have succession by the name designated in its articles of association, and for the period limited therein, not, however, exceeding twenty years from the passage of this act," and by such name may contract, sue, and be sued, etc., and "make by-laws, approved by the Comptroller of the Currency, not inconsistent with the laws of the United States or the provisions of this act, for the election of directors, the management of its property, the regulation of its affairs, for the transfer of its stocks," etc.

Thus an association formed as above was created into a corporation of limited duration, the organization certificate and articles of association, together with the provisions of the statute by which corporate powers were conferred and their exercise regulated, constituting, as it were, its charter. Such corporations on certain preliminary requirements being complied with (see sections 7, 9, 11, 15, 16) was authorized to carry on the business of banking by issuing circulating notes, discounting bills, receiving deposits, etc., in accordance with the provisions of that act. (Sec. 17.)

The articles of association are in themselves a contract which is fundamental in its character and is binding upon all the parties thereto so far as it does not contravene the law. Yet, when regarded irrespective of the statutes, they, like articles of copartnership, would undoubtedly be subject to any modification, though they could not be varied or altered without the consent of each party unless the articles otherwise provided. By section 12 of the act of 1863 it is declared that "no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired." This provision is re-enacted in section 12 of the act of June 3, 1864,

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National Banking Associations.

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and also in section 5139, Revised Statutes. Here, in forbidding certain changes in the articles, the power to change them is impliedly recognized, and they are in this regard left to be dealt with upon the footing of a contract simply. In view of this legislative recognition of the power to change, it must be deemed that national banking associations organized under the act of 1863 may amend their articles of association, provided the amendment is not prohibited by or inconsistent with the statute.

Recurring to the provisions of section 11 above, it will be seen that a banking association formed under the act of 1863 is granted "succession by the name designated in its articles of association, and for the period limited therein," not exceeding twenty years from the passage of the act. The effect of this provision is the same as if the name designated in the articles and the period limited therein were at the time when the corporation comes into existence expressly embodied in the section. Both the one and the other become *then* fixed by force of the statute and must so remain until Congress authorizes a change. In neither can this be accomplished by an amendment of the articles alone. I remark in this connection that numerous special acts have been enacted permitting a change of name by associations particularly described therein. Such legislation is indicative of the sense of Congress on this point.

In answer to the first and second questions submitted, I accordingly reply: (1) That associations organized under the act of February 25, 1863, can, in my opinion, amend their articles where this does not conflict with the provisions of the statute; (2) that associations so organized for a period of less than twenty years from the date of the act can not, in my opinion, by amending their articles, extend the period to twenty years from that date.

The next question (the third) relates to the increase of capital stock. Section 5142, Revised Statutes, enacts: "Any association formed under this title may, by its articles of association, provide for an increase of its capital from time to time as may be deemed expedient, subject to the limitations of this title. But the maximum of such increase to be provided in the articles of association shall be determined by

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National Banking Associations.

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the Comptroller of the Currency," etc. Where articles of association provide for an increase of capital, and the maximum of such increase is once fixed by the determination of the Comptroller, I am of opinion that both his power and that of the association over the subject are exhausted, and that a further increase and a new maximum can not be effected by an amendment of the articles. The power to amend, recognized in section 3739, even if it could be used to introduce in the articles a provision for an increase of capital, under section 3742, where such provision is not already contained therein, is necessarily controlled by the terms and limitations of the latter section. I accordingly answer the third question in the affirmative.

In regard to the fourth question, I submit that an amendment of the articles providing for an increase of the number of directors would not be inconsistent with the provision of section 5139, Revised Statutes, that "no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired." Obviously such an amendment, which concerns only the government of the corporate body, would not affect the legal rights or remedies of creditors, or in contemplation of law their security.

To the fifth question I reply: The present national banking laws do not forbid the stockholders of an expiring corporation from organizing a new banking association, nor from assuming the name of the old corporation with the approval of the Comptroller of the Currency; and in the absence of any prohibition to that effect, no legal obstacle to the formation of a new association by such stockholders and the adoption of the name of the old association would, in my opinion, exist.

To the remaining question I reply, that I do not know of anything to prevent a national banking association, upon the expiration of the period limited for its duration, from being converted into a State bank under the laws of the State, provided it has liquidated its affairs agreeably to the laws of Congress; nor, after it has thus become a State bank, to prevent such bank from being converted back into a national banking association under section 5154, Revised Statutes,

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Bids for Mail Contracts.

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and adopting the name of the expired corporation with the approval of the Comptroller of the Currency. To enable a State bank so to reconvert itself into a national banking association, authority from the State is not necessary. (*Casey v. Galli*, 94 U. S. R., 673.)

I return herewith the papers which accompanied your letter.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

*Secretary of the Treasury.*

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## BIDS FOR MAIL CONTRACTS.

The statutory requirements relative to bids for mail contracts (by which, *inter alia*, every proposal must be accompanied by bond with sureties) are intended to protect the Government against imposition through worthless bids.

Where such requirements are conformed to in point of *form*, but the Postmaster-General is satisfied, from reliable information, that the bond is worthless and therefore unacceptable, he may and should treat the bid as though it were unaccompanied by a bond.

DEPARTMENT OF JUSTICE,

*February 24, 1882.*

SIR: Your letter of the 14th instant inquires: "Can the Postmaster-General, or either of his assistants, reject a bid for mail service, which bid is correct and legal in form, because in the opinion of the Postmaster General, or in the opinion of either of his assistants, the sureties upon the bond which accompanied the bid are not good and sufficient?"

To this inquiry I have the honor to submit the following in reply:

The Postmaster-General, in addition to duties more particularly defined, is charged with the general superintendence of the business of his Department (sec. 396, Rev. Stat.), and is thus invested with large discretionary powers.

The existing statutory provisions relating to bids for mail contracts are intended to secure fair competition and to

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Bids for Mail Contracts.

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prevent fictitious or "straw" bidding. To this end it is required that "every proposal for carrying the mail shall be accompanied by the bond of the bidder, with sureties approved by a postmaster," etc., and besides this, other requirements (as oaths of the sureties indorsed on the bond, and sworn answers by same to interrogatories prescribed by the Postmaster-General) are provided; all of which are designed to protect the Department against imposition through worthless bids.

These provisions are not meant to limit the discretion of the Postmaster-General, with which he is invested as above, any further than to forbid his entertaining a bid where they are not complied with. If they have been conformed to in point of *form*, but the Postmaster-General is satisfied from other sources of information that the bond is worthless, I am of opinion that he may and should treat the bid as though the bond had not accompanied it. Such action not being in conflict with the statute, but rather in furtherance of its objects, would appropriately fall within the scope of his general supervisory authority to which reference is above made.

The provision in section 3949, Revised Statutes, that contracts "shall be awarded to the lowest bidder," etc., must be construed in connection with the other provisions adverted to, by which it is contemplated that a bid in order to entitle it to consideration should have with it an acceptable bond. A worthless bond, though regular in form, can not be regarded as such, nor does the party offering it thereby become entitled to be treated as a bidder.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. T. O. HOWE,

*Postmaster-General.*

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Union Pacific Railroad, Eastern Division.

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## UNION PACIFIC RAILROAD, EASTERN DIVISION.

*Seem* that the last section of the Union Pacific Railroad Company, Eastern Division (formerly the Leavenworth, Pawnee and Western Railroad Company), was in fact completed prior to the time fixed by statute, but not accepted by the President until about four months after that time.

There is no legal objection to the issue of patents to the company for lands lying along such section; but delay in this matter suggested, in view of circumstances stated.

DEPARTMENT OF JUSTICE,  
*February 25, 1882.*

SIR: The question presented for my opinion by your letter of the 4th instant may be resolved into two:

(1) Did the Leavenworth, Pawnee and Western Railroad Company, now the Union Pacific Railroad Company, Eastern Division, finish the construction of its road in time as fixed by law?

(2) If it did not, is there any law requiring the Secretary of the Interior to withhold from the company patents to the lands granted by the act of July 1, 1862, viz, for the lands lying along the last section of constructed road not complete at the time fixed by the statutes?

It appears from the statement of the Commissioner of the General Land Office, accompanying your letter, that the time prescribed by the act of July 1, 1862, and the subsequent amendatory acts, for the completion of the road, expired June 27, 1872.

It further appears that as early as October 26, 1870, the president of the road claimed that it had been completed, and since August 15 had been in operation, and asked for the appointment of commissioners to examine and report.

The vice-president of the company also, November 9, 1870, made a similar request, accompanied by an affidavit that the road had been finished.

Commissioners, as required by the fourth section of the act, were appointed January 13, 1871, who reported that the section referred to had been completed, and recommended its acceptance. This report, however, was not approved by the President.

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Union Pacific Railroad, Eastern Division.

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A new commission was afterwards appointed, whose report, dated October 4, 1872, was approved by the President October 19, 1872—three months and twenty-three days over the time prescribed by the statute.

It appears from this statement that the last section of the road was in fact completed, though not accepted, prior to the date fixed by law.

The entire road has been accepted by the President, and the Land Office, having received notice of such acceptance, has *properly* considered the road as finished in time.

The time that elapsed from June 27, 1872, the date fixed by law, and October 19, 1872, when the President accepted the road as finished, is not sufficient in a matter of this kind to be taken into consideration. *De minimis non curat lex.*

But if, upon a very strict construction of the statutes, you should be inclined to hold that the road was not complete until so pronounced by the President, and that the three or four months is of consequence in the matter, still the patents could not be withheld without some action by Congress, or some judicial proceeding on the part of the United States with a view to a forfeiture, or an extinguishment of the claim. There has been no such action or proceeding.

No forfeiture has been incurred under the law. A condition of forfeiture, and the only condition, is provided in section 17 of the law of 1862, which is to this effect: that if the whole road was not completed by the 1st day of July, 1876, then the said roads, with all their lands and property of every sort, should be forfeited and taken possession of by the United States.

Even if the facts were such as to make this law applicable (as clearly they are not), some action by Congress would, I apprehend, still be necessary, or some judicial proceeding to declare and enforce the forfeiture.

It will be seen, by what is said above, that in my opinion there is no legal objection to the issue of the patents.

You remind me, however, that there is some agitation in Congress in respect to railroad land grants. I take the liberty to suggest, therefore, that action in the matter may be delayed so that the executive branch of the Government

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will not seem to oppose or throw obstacles in the way of any proposed measures of Congress upon this subject.

If, on the one hand, Congress will not act, the railroad company having waited so long, and by so waiting involved itself in the difficulty, some further delay will not inflict upon it serious injury; and, on the other hand, should Congress legislate touching the question of issuing these patents, and in such way as to affect the rights of the company, it has its remedy in the courts if it denies the power of Congress so to legislate in the premises.

As requested, I return herewith the Commissioner's report.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

Hon. S. J. KIRKWOOD,

*Secretary of the Interior.*

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CASE OF FITZ JOHN PORTER.

P., a commissioned officer of the Army, was tried by a general court-martial and sentenced "to be cashiered and to be forever disqualified from holding any office of trust or profit under the Government of the United States." The proceedings and sentence of the court having been approved and confirmed by the President, the officer, in execution of the sentence, was cashiered and dismissed the service: *Held*, that it is not competent to the President now to set aside and annul the finding and sentence of the court, and to nominate the officer to the Senate for restoration to his former rank in the Army.

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 revised and annulled.

DEPARTMENT OF JUSTICE,

*March 15, 1882.*

SIR: Maj. Gen. Fitz John Porter was in 1862-'63 tried and convicted by a general court-martial, and sentenced "to be cashiered and to be forever disqualified from holding any office of trust or profit under the Government of the United States." The proceedings and sentence of the court were subsequently in regular course laid before the President, who, on the 21st of January, 1863, approved and confirmed the

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same; and by his order of that date, in execution of the sentence, it was "ordered that the said Fitz John Porter be, and hereby is, cashiered and dismissed from the service of the United States, as a major-general of volunteers, and as colonel and brevet brigadier-general in the regular service of the United States, and forever disqualified from holding any office of trust or profit under the Government of the United States." Thereupon General Porter ceased to be an officer of the United States, and his name was accordingly dropped from the rolls of the Army.

Afterwards, in 1878, upon an application then made by General Porter for relief, the President (in order that he might be fully informed of the facts of the case, and be able to act advisably on said application), convened a board of Army officers "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 such application by the President."

The board so convened made a report to the Secretary of War under date of March 19, 1879, in which, after giving the results of their investigations, 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 report and proceedings 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,

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and such action as in your wisdom shall seem expedient and just."

There has since been no legislation by Congress on the subject.

General Porter has, however, in a communication dated December 23, 1881, renewed his application to the President for relief, the relief there asked for being specifically stated by him in the following words: "To annul and set aside the finding and sentence of the court-martial, and to nominate me to the Senate for restoration to my rank in the Army under act of Congress of 1868."

What hereinafter follows is addressed to the question whether it is competent to the President to afford the applicant the relief he asks, under existing law and the circumstances of this case.

On entering upon the question, we are first led to inquire as to the *source* of the jurisdiction exercised by courts-martial in our military service. That has been precisely and authoritatively determined. In the case of *Dynes v. Hoover* (20 How., 65), the Supreme Court of the United States, after citing section 8 of the first article of the Constitution, which confers upon Congress power "to make rules for the Government and regulation of the land and naval forces;" the fifth amendment which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, but expressly excepts from this requirement "cases arising in the land and naval forces;" and also section 2 of the second article which declares that "the President shall be commander-in-chief of the Army and Navy," remarks: "These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations, and that the power to do so is given without any connection between it and the third article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."

Congress, in the exercise of this power, by the act of April 10, 1806, chapter 20, enacted rules and articles for the government of the armies of the United States, and therein provided for the creation of courts-martial for the trial of

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military offenses, (see that act, articles 64, 65, *et seq.*). These rules and articles, as modified and added to by subsequent legislation, were in force when the proceedings in the case of General Porter occurred. And in this connection it may also be stated that the Supreme Court again in the recent case of *Ex parte Reed* (100 U. S., 13) observes: "The constitutionality of the acts of Congress touching Army and Navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this Courts."

It is assumed (there being no allegation to the contrary) that the court-martial in this case was constituted, convened and organized in conformity with the law of the military service as ordained by Congress, that it had jurisdiction both of the *offense* alleged and of the *person* accused, that there was no fatal irregularity in its proceedings nor any *illegality* in its sentence, and that the latter was confirmed and carried into execution agreeably to law. Upon this state of facts it may be inquired, Has the President power *now* to review the proceedings of the court-martial and to annul its sentence? Unless he possesses such power, it is submitted that this mode of relief is not available.

The sixty-fifth Article of War (act of April 10, 1806, cited above) provided that no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial, in the time of peace, extending to the loss of life, or the dismissal of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval, and orders in the case." (See also Revised Statutes, page 240, articles 105, 106, 108, in which the same provision is embodied). Under this provision it was that the proceedings in the case of General Porter were laid before and confirmed by the President; and no other statutory provision then existed or now exists giving him a power of review over such case.

In the case of Lieutenant Devlin, who was tried by a

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general court-martial in 1852, and sentenced to be dismissed, and whose sentence was afterwards approved by the President under the same provision, and carried into execution, Attorney-General Cushing considered the question whether the proceedings of that court-martial could then (in 1854) lawfully be re-opened, reviewed and set aside; and he held that they could not. He says in his opinion: "The decision of the President of the United States, in cases of this sort, is that of the ultimate judge provided by the Constitution and laws. Like that of any other Court in the last resort of law, it is final as to the subject matter. There is one, and but one, legal question, which would be competent in this case after the final decision of the President upon it; namely, *that of nullity of the proceedings, as being, for instance, coram non judice*, or, for other cause, absolutely void *ab initio*." (6 opin. 370-371.)

In another case (that of Major Howe) the same Attorney-General remarks: "Unless the memorialist show that the court-martial had no jurisdiction over the case, no cognizance of him and the offense charged, his memorial must be unavailing; for the President of the United States has not now (in 1854) any rightful authority to review and reverse the sentence of a court pronounced in a case within its jurisdiction in 1842, then duly approved by the reviewing power, and actually carried into full and complete execution. True it is that the office and powers of the President are perpetual, and every successor has all the powers which his predecessors had whilst in office. But this must be understood of matters executory, of things to be done, and not in relation to matters executed, rightfully and legally transacted." (6 Opin. 507.)

To the same effect are the earlier opinions given by Attorneys General Legaré and Nelson (4 Opin., 170 and 274), and also the later opinions given by Attorney-General Bates (10 Opin., 64; 11 Opin., 19). The latter, in his opinion last cited, uses this language: "Undoubtedly the President, in passing upon the sentence of a court-martial and giving to it the approval without which it can not be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence are the solemn acts of a court or-

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ganized and conducted under the authority and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which in the very nature of things can neither be exposed to danger nor entitled to protection from the uncontrolled will of any man, but which must be adjudged *according to law*. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence can not be executed, is as much a part of the judgment according to law as is the trial or the sentence. When the President, then, performs the duty of approving the sentence of a court-martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law. As it has to be performed under the same sanctions, so it draws with it the same consequences. Now one of these consequences is that where a judgment has been regularly entered in a case properly within the judicial cognizance, from which no appeal has been provided or taken, and it has been followed by execution, it is final and conclusive upon the party against whom it is entered; and this effect attaches, in my opinion, to the action of the President in approving the sentence of a court-martial dismissing an officer, after that approval has been consummated by actual dismissal."

Furthermore, the Supreme Court in the case of *Ex parte Reed*, above cited, referring to a general court-martial whose doings were involved in that case, says: "It 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."

Here it is proper to add that the very inquiry now under examination has been resolved in the negative by the deliberate decision of a former administration, as appears by the message of the President of June 5, 1879, hereinbefore referred to, transmitting to Congress the report and proceed-

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ings of a board of Army officers upon the case of General Porter. The conclusion then reached was that the President was "without power, in the absence of legislation, to act upon the recommendations of the report further than by submitting the same to Congress." This conclusion is a denial of the existence of any power in the President to review and "to annul and set aside the findings and sentence of the court-martial" in that case as recommended by the board; and it is entitled to great weight, as being the view not only of the President himself, but presumably that of his Cabinet, among whose members were men eminent in the profession of the law.

These opinions of my predecessors and of the Supreme Court, and also the decisions last above mentioned, all go to establish this proposition: 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 under the present state of the law be revised and set aside. The proceedings are then at an end, and the action thus had upon the sentence is in contemplation of the law *final*.

I am unable to arrive at a different conclusion, and I accordingly hold that in the case under consideration the President has no power to review the proceedings of the court-martial and annul its sentence.

It follows from this view that the President can afford the applicant no relief through a revision of the sentence in his case.

That sentence involved immediate dismissal from the Army and disability to hold office thereafter. The *dismissal* is an accomplished fact, and so far the sentence is *completely executed*; the *disability* is a continuing punishment, and in regard to that the sentence is being executed. The latter may be *remitted* by the exercise of the pardoning power, but the former can not in any way be affected thereby. Thus a pardon would not *restore* the applicant to the office in the military service from which he was dismissed. (*Ex parte Garland*, 4 Wall., 333.) This could only be done by an *appointment* under special authority from Congress; since by the

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general law of the military service appointments to the rank of general officers are to be made by *selection from the Army*, and all vacancies in established regiments and corps to the rank of colonel are required to be filled by *promotion* according to seniority, except in cases of disability or other incompetency. (Army Regulations of 1881, article 6; 14 Opin., 499.) In this connection I remark that the act of 1868, referred to by General Porter in his letter of request, was, as its title imports, only meant to be declaratory of the law, namely: that an officer cashiered or dismissed by sentence of a court-martial can not be *otherwise* restored to the military service than through a new appointment with the consent of the Senate. The law is the same as to officers of the Army who cease to be such in any other way (*Mimmack v. United States*, 97 U. S., 427; *Blake v. United States*, 103 U. S., 237.) Power to appoint is not conferred by that statute. This power remains subject to the general law already adverted to; and in the absence of special authority from Congress, it can only be exercised with respect to a person who has ceased to be an officer in the manner above stated, where it might equally well be exercised if such person had never been an officer in the military service.

Upon the general question considered, the conclusion arrived at is that it is not within the competency of the President to afford the applicant the relief he has asked for; that is to say, that it is not competent to the President to annul and set aside the finding and sentence of the court-martial and to nominate him to the Senate for restoration to his former rank in the Army.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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 Signing Land Patents, etc.
 

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## SIGNING LAND PATENTS, ETC.

The President has power to designate one of his executive clerks to sign for him, and in his name, all patents for land, etc.; and should an exigency of the public service require it, he is authorized to appoint an assistant to aid in performing that duty, so long as the exigency exists.

## DEPARTMENT OF JUSTICE,

March 16, 1882.

SIR: I have examined a question which has arisen as to the power which the President has by statute to appoint officers to sign his name to patents for lands, etc.

The provision contained in the eighth clause of part 3, section 1, of the act of June 19, 1878 (Supp. Rev. Stat., p. 378), substitutes for the secretary provided for in section 450, Revised Statutes, one of the executive clerks in the President's office, to be designated by the President.

Section 450 is not wholly repealed, but only as much of it as is repugnant to the later statute, viz, that of June 19, 1878. The provision in respect to the duty of signing, for the President, his name to patents for land, etc., is not repealed; but in respect to the officer who is to perform that duty it is repealed, being repugnant to the later statute.

"If the later statute is upon the same subject-matter with the former and introduces some new qualification or modification so that it is impossible both should be in force, then the later repeals the former; but if it be possible that both can stand by construction, the question resolves itself into an inquiry, what was the intention of the Legislature?"

"Affirmatives in statutes that introduce new laws imply a negative of all that is not in the purview. So that a law directing a thing to be done in a certain manner implies that it shall not be done in any other manner." Mr. Justice Thompson, in *United States v. Case of Hairpencils*, cited below.

See note 5, on page 155, Potter's Dwaris on Statutes; *Davies v. Fairborn*, 3 Howard, 636; *United States v. Case of Hairpencils*, 1 Paine, 400.

There is no doubt that it was the intention of Congress that one of the President's clerks should perform the duty required of a secretary in section 450. The secretary's function taken away, his office went with it.

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Claim of William G. Langford.

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Section 451 of the Revised Statutes is not, as I think, materially affected by the later legislation. It is not repealed, expressly or by implication. The officer whom the President is by that section authorized to appoint, for a temporary purpose, is called an assistant secretary. If the condition set forth in the section exists, the President may appoint an assistant to aid in the work to be done, and it is of little consequence whether he is called an assistant secretary or an assistant to the executive clerk.

As the law now stands, the President has power to designate one of his executive clerks to sign for him, and in his name, all patents for land, etc., and if patents should accumulate and the number be so large that they can not be signed within a reasonable time he is authorized to appoint an assistant to aid in performing the duty, so long as the exigency exists.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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## CLAIM OF WILLIAM G. LANGFORD.

Opinion of Attorney-General Williams, of May 3, 1875 (14 Opin., 569), as to the rights of claimant in 640 acres of land within the Nez Perces Indian reservation in Idaho Territory, re-affirmed; and *advised* that he has no such possessory interest in such land as would warrant the Interior Department in accepting the compromise proposed.

DEPARTMENT OF JUSTICE,

March 17, 1882.

SIR: In your letter of the 10th March, 1882, you request my opinion upon the question whether or not William G. Langford has such a title to, or interest in, 640 acres of land upon the Nez Perces Indian Agency in Idaho as would warrant the Interior Department in accepting a compromise, and asking Congress for an appropriation of such sum as might be required.

The report of the Commissioner of Indian Affairs, transmitted with your communication, corresponds in its statements with the state of facts upon which Mr. Attorney-Gen-

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Claim of William G. Langford.

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eral Williams expressed his opinion of May 3, 1875, and I agree with him that "the title imparted by the acts of 1848 and 1853 was at that period, and has ever since continued to be, subject to the Indian right of occupancy in said tribe, the enjoyment of which right moreover is assured thereto by the Government by solemn treaty stipulations. Such being the case, it can not be doubted that until this Indian right is extinguished the holder of said title has no right, merely by virtue of that title, to enter upon and take possession of the premises." (14 Opin., 568.)

The occupancy of the land by the American Board of Commissioners for Foreign Missions from 1836 to 1847 was by the consent and allotment of the tribe; the occupancy by the United States since 1862 has been by a similar consent, manifested by the treaties of 1855 (12 Stat., 957), and 1863 (14 Stat., 467). Chief-Justice Marshall, in *Johnson v. McIntosh* (8 Wheaton, 543), speaking of a deed poll executed by the Illinois Indians, said (p. 593): "If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages so far as to allow an individual to separate a portion of their lands from the common stock and hold it in severalty, still it is part of their territory and is held under them by a title dependent on their laws. The grant derives its efficacy from their will, and if they choose to resume it and make a different disposition of the land the courts of the United States can not interpose for the protection of the title. \* \* \* If they annul the grant, we know of no tribunal which can revise and set aside the proceeding."

It is not suggested in the present case that any grant was made by the Nez Percés to the board, and it is fair to assume that the inducement for the allotment was the appreciation by the tribe of the benefits which the agents of the board had come there to confer on them. If the presence of the board became distasteful to them, I know of no law to prevent the annulment of the allotment and the resumption of the land.

When in 1855 they reserved the premises (*inter alia*), and in 1862 permitted the establishment of the agency on the

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Claim of William G. Langford.

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*locus*, it may well be considered either that they no longer desired the presence of the board or that they deemed the board to have forfeited its rights. This view is strengthened by the fact that in article 10 of the treaty of 1855 (12 Stat., 960), express provision is made for the allotment to William Craig of a tract then occupied by him. Again in article 8 of the treaty of 1863 (14 Stat., 651), it appears that the Indians in council expressed a desire that Robert Newell should have confirmed to him a tract which had been given to him by an instrument in writing, signed by several chiefs of the tribe, dated June 9th, 1861 (very shortly after the agent of the board had made his appearance and demanded possession of the land in controversy).

The tribe again ignored the claim of the board by applying in 1868 for amendments to the treaty. These amendments, as agreed upon, provided *inter alia* for the survey of the reservation and for the allotment of all lands susceptible of cultivation and suitable for Indian farms "which are not now occupied by the United States for military purposes, or which are not required for agency or other buildings and purposes provided for by existing treaty stipulations."

Mr. Langford's present right of possession, therefore, is one which neither the courts nor the Executive may regard. Whether the tribe will confer a new privilege or will confirm the old privilege to one who holds out none of the original inducements rests in its discretion.

In addition to a surrender of all his rights and claim to the land, Mr. Langford offers in the settlement proposed a release of all claims and rights to sue for damages for acts done by any officer of the United States during the progress of the dispute. As I am not informed of any illegal acts done by officers of the United States during the dispute, this release does not seem to me of any appreciable value.

He further offers to execute a paper binding him to take no further steps to carry into execution the judgment recovered against Newell in the district court. To the immunity thus offered I attach no value, for the following reasons:

On the 12th of November, 1874, by virtue of a writ of execution under the judgment Langford was put in possession. The judgment was thus executed and satisfied. His subse-

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Claim of William G. Langford.

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quent ouster in June, 1875, was not by Newell, nor by any one acting through or under him. A new action, and not a writ on the old judgment, would be his proper remedy. As he does not assert any possession since 1874, his right of action became barred in 1879. (Sec. 5, act of January 23, 1864; Civil Code of Idaho, 1880-1881, sec. 145.)

By sections 430, 434 (Civil Code) he can only obtain a writ of execution after five years by leave of the court upon motion or by judgment for that purpose founded upon supplemental pleadings. Upon notice of such motion, or of such supplemental proceedings, the satisfaction of the judgment and the want of privity between Newell and the present occupants will prove a successful obstacle.

In the suit Newell set up no title under the United States, and if he had done so they are not bound by the judgment against him. (*Carr v. United States*, 98 U. S., 433.) In such supplemental proceedings, or on the motion, it would be set forth that "the possession attempted to be assailed was that of the United States," and as was said by Bradley, J., in *Carr v. United States*, *supra*, "when this is made apparent by the pleadings or the proofs, the jurisdiction of the court ought to cease."

These questions, however, may well be left to the courts to determine, if Mr. Langford persists in his efforts to regain possession by means of writs of execution under the judgment against Newell.

I am clearly of opinion that Langford has no such possessory interest in the land in question as would warrant the Interior Department in accepting the proposed compromise.

It remains to consider his *title* to the premises. The American Board came within the provisions of the act of 1853, and therefore the title to the land was confirmed and established in it. That title was remised, released, and quitclaimed to Langford in 1868. It is not intimated in your communication that any other title is asserted, and as the board is estopped by its quitclaim deed, and as section 33, act of January 16, 1864 (Laws of Idaho), permits a sale of real estate, notwithstanding a possession adverse to the vendor, I see no reason why all the *title* of the board is not vested in Mr. Langford. When the Nez Perces tribe cedes

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*Case of Cadet Whittaker.*

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the land in question to the United States, it would seem that they would take it for the benefit of Langford and his heirs.

Whether the United States will have any use for this property after it ceases, by virtue of a cession of the tribe, to be part of the reservation, what value should be attached to Langford's title by reason of the buildings which may be left on the premises when the cession shall occur, or what would now be a reasonable price for his statutory title, are questions which I do not discuss.

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE INTERIOR.

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CASE OF CADET WHITTAKER.

In general, courts-martial are governed by the same rules of evidence which govern the ordinary courts of criminal jurisdiction. These rules (where not provided by statute) are supplied by the common law.

Evidence of handwriting, by comparison of hands, is inadmissible on a trial by court-martial, excepting where the writing, acknowledged to be genuine, is already in evidence in the case, or the disputed writing is an ancient document.

The admission of such evidence is error, for which, if it was material to the finding of the court, the sentence of the latter should be set aside.

DEPARTMENT OF JUSTICE,  
*March 17, 1882.*

SIR: Your letter of the 6th instant states that Cadet John-son C. Whittaker, of the Military Academy, has been tried by a court-martial on two charges, the second of which is "false swearing, to the prejudice of good order and military discipline;" that among the specifications in support of this charge is one to the effect that he falsely testified before a court of inquiry that a certain note of warning was received by him, and that the same was not written by himself; and that the court-martial found him guilty of the specifications under said charge and of the charge itself, as also of the first charge, and sentenced him accordingly. You add:

"The record is now under examination by me, and I find that on the trial the court, notwithstanding the objection of the accused, admitted in evidence, to be used as standards

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Case of Cadet Whittaker.

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of comparison by experts in handwriting with the said note of warning, a considerable number of papers testified to be in the handwriting of the accused, which papers were not in evidence for any other purpose than to be used as such standards, and were so used by the experts.

"After the overruling of his objection to their admission, counsel for the accused, in reply to a question by a member of the court, said: 'I believe we can not question their genuineness.'

"A large amount of testimony adverse to the accused, by experts, based on their comparison of these standards with the note of warning, was introduced by the judge-advocate on the part of the United States.

"In preparing to submit the case to the President for final action, grave doubts have been raised in my mind as to the legality of the action of the court admitting the evidence I have mentioned, and I have the honor to invite an expression of your opinion on the subject."

It appears by your statement that, in order to prove that a certain paper (the "note of warning") which was in evidence in the case, and of which the accused swore in a former proceeding that he was not the author, had in fact been written by him, a number of other papers testified to as being in his handwriting, but *not otherwise in evidence in the case*, were allowed by the court (though objected to by him) to be used as standards of comparison by experts, whose testimony based on a comparison of the first-mentioned paper with these standards was admitted in behalf of the prosecution; and the inquiry involved is, whether the admission of this testimony was not error for which the sentence of the court should be set aside.

As no rules of evidence are specially prescribed by Congress for the observance of courts-martial, it must be deemed that such courts are contemplated to be governed in general by the same rules of evidence which govern the ordinary courts of criminal jurisdiction (2 Opin., 344; 3 Greenl. Ev., sec. 476; and compare *Moore v. United States*, 91 U. S., 270). These rules are supplied by the common law, excepting, of course, where others are provided by statute, in which case the latter prevail.

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Case of Cadet Whittaker.

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According to the rule of the common law, as laid down by the English courts, evidence of handwriting by comparison of hands is inadmissible, except where the writing acknowledged to be genuine is already in evidence in the cause or the disputed writing is an ancient document; these exceptions being allowed of necessity (*Doe, d. Perry v. Newton*, 1 N. & P., 1; 5 A. & E., 514). In a later case, Mr. Justice Patterson, referring to the one just cited, said: "This court recently has expressly determined that documents irrelevant to the issues on the record shall not be received in evidence at the trial in order to enable a jury to institute such a comparison. Much less can it be permitted to introduce them in order to enable a witness to do so?" (5 A. & E., 734.)

In the United States the courts generally adopt the same view, where not controlled by statutes. Thus the Supreme Court of the United States in *Strother v. Lucas* (6 Pet., 763), remarks: "It is a general rule that evidence by comparison of hands is not admissible where the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands. There may be cases where, from the antiquity of the writing, it is impossible for any living witness to swear that he ever saw the party write, and where comparison of handwriting with documents known to be in his handwriting has been admitted. But these are extraordinary instances, arising from the necessity of the case," etc. And in the recent case of *Moore v. United States* (91 U. S., 270), the Supreme Court again recognizes the same rule. Here the question was whether the Court of Claims may determine the genuineness of a signature by comparing it with the signature of the party to another paper. "By the general rule of the common law," observes the court, "this can not be done either by the court or a jury; and that is the general rule of this country, although the courts of a few States have allowed it, and the legislatures of others have authorized it. \* \* \* But the general rule of the common law disallowing a comparison of handwriting as proof of signature has exceptions equally as well settled as the rule itself. One of these exceptions is, that if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the

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Case of Cadet Whittaker.

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signature or paper in question may be compared with it by the jury" (see also *United States v. Chamberlain*, 12 Blatch., 390; *United States v. Craig*, 4 Wash. C. C., 729, and *United States v. Prout*, 4 Cr. C. C., 301). To these authorities may be added the following cases in the State courts, in which the general rule of the common law, as above, appears to have been adopted; (*Miles v. Loomis*, 75 N. Y., 288; *The State v. Clinton*, 67 Mo., 380; *Jones v. The State*, 60 Ind., 241; *Board of Trustees v. Misenheimer*, 78 Ill., 22; *First National Bank v. Robert*, 41 Mich., 709; *Kirksey v. Kirksey*, 41 Ala., 626; *Pope v. Askew*, 1 Ird. (N. C.) Rep., 16; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) Rep., 257; *Tome v. Park Branch R. R. Co.*, 39 Md., 36; *Clay v. Anderson's Admr.*, 10 W. Va., 29; *Kinney v. Flynn*, 2 R. I., 319; *Hanley v. Gaudy*, 28 Tex., 211; *Ront's Admr. v. Kile's Admr.*, 1 Leigh's (Va.) Rep., 216; *Clark v. Rhodes*, 2 Heisk. (Tenn.) Rep., 206; *The State v. Miller*, 47 Wis., 530; *The State v. Fritz*, 23 La., An., 55). In Pennsylvania, evidence by comparison of handwriting is not allowed as independent proof, and where allowed the comparison can be made only by the jury (*Anmick v. Mitchell*, 82 Pa. State, 211; *Haycock v. Greup*, 57 Pa. State, 438).

The rule of the common law above stated, which, as the foregoing citations indicate, has the approval of the general current of judicial authority in this country, both federal and State, must be deemed to be binding upon courts-martial as a rule of evidence; and the admission of the testimony objected to by the accused, in the case under consideration, being plainly a violation of that rule, this is error, for which (assuming such testimony to be material to the finding of the court) the sentence should, in my opinion, be set aside. Justice forbids the enforcement of a sentence which is founded upon a conviction illegally obtained.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,

Secretary of War.

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Election Laws of Utah.

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## ELECTION LAWS OF UTAH.

Persons appointed under the bigamy act of March 22, 1882, chapter 47, section 9, to perform the duties of the registration and election offices, thereby declared vacant, have authority to administer all oaths which the former incumbents of these offices were authorized to administer in the performance of the duties thereof.

DEPARTMENT OF JUSTICE,  
*March 22, 1882.*

SIR: In reply to your inquiry of yesterday, I have the honor to state that upon examination of the recent polygamy act with the election laws of Utah Territory, I entertain no doubt that those persons who may be appointed under the former to perform the duties of the registration and election offices thereby declared vacant will have authority to administer all oaths which the former incumbents of these offices were authorized to administer in the performance of the duties thereof, whether as regards the registration of voters, the conduct of elections, or the receiving or rejection of votes in that Territory. This must be the effect, as I conceive, of section 9 of the aforesaid act, which in terms devolves upon the persons so appointed "each and every duty relating to the registration of voters, the conduct of elections," etc., to be performed "under the existing laws of the United States and of said Territory."

By the Territorial law (act of February 22, 1878, chapter 12), both the registration officers and the judges of election are authorized to administer oaths wherever necessary to carry the same into effect. The recent act of Congress, while it introduces a new mode of appointing these officers, leaves unchanged their functions, duties, and powers.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. S. J. KIRKWOOD,  
*Secretary of the Interior.*

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Claim of Redick McKee.

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## CLAIM OF REDICK MCKEE.

The decision of the Secretary of the Interior of July 27, 1877, upon the claim of Redick McKee, made under the act for the relief of the latter, approved March 3, 1877, viz: that the claimant was entitled to be re-imbursed the money paid out by him as interest on money borrowed for the Government, is as far as the Secretary was authorized to go, and an allowance of interest on the amount so paid out would have been unwarranted.

It is a general rule that interest is not allowable on claims against the Government. The exceptions to this rule are found only in cases where the demands are made under special contracts, or special laws, expressly or by very clear implication providing for the payment of interest.

In view of the decision referred to, the claim should now be treated as *res judicata*.

No rule of administrative practice is better settled than that when a matter has once been passed upon and finally disposed of by the head of a Department, it should not be disturbed or re-opened by his successors, excepting under extraordinary circumstances, such as the discovery of new facts, and the like.

The fact that an application for reexamination had been made to and had not been acted upon by the head of Department by whom the decision was rendered, does not withdraw the case from the operation of the rule.

## DEPARTMENT OF JUSTICE,

*March 28, 1882.*

SIR: I have considered the question in the claim of Redick McKee, formerly disbursing agent of the Indian department in California, submitted in your letter of the 10th of January last. The facts of the case, as stated by you, are as follows:

"Mr. McKee, as disbursing officer of a commission of which he was a member, rendered an account to the Government showing a balance due him May 5, 1853, on account of disbursements of \$9,671.56, of which sum \$6,000 was money borrowed by him in 1852 to meet his disbursements, the Government not having placed in his hands a sum sufficient to meet the expenses incurred by the commissioners. His account was suspended under the rules of the Indian service and the regulations governing the accounting officers of the Treasury until the 4th of August, 1865, when he was allowed thereon \$2,234.57.

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Claim of Redick McKee.

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"In June, 1866, a further allowance of \$560.26 was made and the balance of the account remained suspended. He then applied to Congress for relief, and on the 23d of June, 1870, a joint resolution (16 Stats., 667) was passed, authorizing the Secretary of the Interior to examine the claim of Redick McKee, on account of the disbursements referred to, and to cause payment to be made of the whole, or as much thereof as he may find to be just and equitable, provided that the amount so paid shall be accepted in full discharge of the entire claim. Under this resolution he was allowed \$6,864.83, which amount was paid July 10, 1870, and was a payment in full of his account as rendered in May, 1853.

"Still claiming, however, that the settlement of the account mentioned did not make good the losses sustained by him as disbursing agent for the Government, he again memorialized Congress on the subject, and an act for his relief was approved March 3, 1877, (19 Stat., 541), providing, 'That the memorial and claims of Redick McKee, late disbursing agent of the Indian department in California, (Miscellaneous Document 102 printed February 25, 1871), be, and hereby are, referred for examination and settlement to the Secretary of the Interior. If the Secretary shall find the allegations and statements of the claimant verified by the records of the Department, or other satisfactory evidence, he shall allow him such relief as may be equitable and just, to be paid out of any money in the Treasury not otherwise appropriated.'

"Under this act my immediate predecessor examined the claim and made certain allowances, which, however, are not satisfactory to the claimant, and he asks further consideration.

"His claim, under the act of 1877, rests upon the alleged losses by reason of moneys paid out as interest on the \$6,000 borrowed from 1852 to 1857, amounting to \$8,100, sale of real estate in San Francisco to satisfy mortgage given to secure the loan mentioned, etc. All the points involved in the case seem to have been passed upon by my predecessor, unless it be the question whether, under the act of 1877, there can be allowed interest on the \$8,100 paid by McKee for the use of the \$6,000 borrowed by him for the United States.

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Claim of Redick McKee.

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"The \$8,100 was allowed by Secretary Schurz, in decision of July 27, 1877 (see inclosed pamphlet, page 13), not as interest, but as moneys actually paid out for the use and benefit of the Government. In subsequent decisions made by him in the case he allowed interest on the value of the house sold under mortgage. The question submitted for your opinion is whether, in view of the foregoing facts, it is competent under the provisions of the act of March 3, 1877, to allow interest on the \$8,100 paid out by McKee for the use of the \$6,000 borrowed by him in 1852 for the use of the Government, or should the whole matter be considered as settled and closed by the decisions of my predecessor, and therefore *res judicata*?"

A letter subsequently received from you, dated the 13th of January, inclosed House Mis. Doc. No. 102, Forty-first Congress, third session, being a memorial of Redick McKee, praying certain allowances.

By the above-mentioned act of March 3, 1877, the memorial and claims of McKee set forth in said document were referred for examination and settlement to the Secretary of the Interior, who was directed to allow the claimant "such relief as may be equitable and just" in case his allegations and statements should be found verified by the Department records or other satisfactory evidence. Among other claims stated in the memorial and thus referred was the following:

"An allowance for the interest I [the claimant] had to pay on money borrowed for the payment of Government debts, or interest at the legal rates in California on the amount admitted and paid."

The Secretary in a decision made upon this claim, dated July 27, 1877, held that the claimant was entitled to be reimbursed the money *paid out by him* as interest, and that the act of 1877 authorized a settlement with him for the money so expended, and the claimant was accordingly allowed therefor the sum of \$8,100.

The question submitted limits the present investigation to the following subjects of inquiry: (1) Whether under the act of 1877 interest is allowable on the \$8,100 so paid out by the claimant as above; or (2) whether this, in view of the aforesaid decision, is to be considered *res judicata*.

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Claim of Hedick McKee.

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Recurring to the *claim* on which the sum of \$8,100 was allowed, it will be observed that this claim was substantially for *interest paid* by the claimant on money borrowed for the Government. As stated in his memorial, it was for "an allowance for the interest he had to pay on money borrowed for the payment of Government debts." Such being the claim referred by Congress to the Secretary for settlement, and there being nothing therein which calls for or suggests the allowance of interest on the amount so paid, it seems to me that the Secretary went as far as he was authorized to go when he ascertained and allowed the amount of interest paid by the claimant on the amount borrowed, and that an allowance of interest on the amount thus paid would have been unwarranted.

The general rule is that interest is not allowable on claims against the Government. The exceptions to this rule are found only in cases where the demands are made under special contracts, or special laws, expressly or by very clear implication providing for the payment of interest (7 Opin., 523; 9 Opin., 57). "An obligation to pay it," observes Attorney-General Black in the opinion last cited, "is not to be implied against the Government as it is against a private party, from the mere fact that the principal was detained from the creditor after his right to receive it had accrued."

I am unable to discover anything in the act of 1877, regarded either alone or in connection with the claimant's memorial, which withdraws the present case from the operation of the rule above adverted to.

But even if interest on the amount paid by the claimant might have been allowed under the act, I think the claim must *now* be treated as *res judicata*. The decision and allowance of your predecessor thereon were a final disposition of the subject, and no rule of administrative practice is better settled than that when a matter has once been passed upon and finally disposed of by the head of a department it should not be disturbed or reopened by his successors, except under extraordinary circumstances, such as the discovery of new facts and the like, which form exceptions to the rule, but none of which exist in the present case (16 Opin., 489; 15 Opin., 315; 13 Opin., 387).

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Case of Master Lucien Young.

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It is urged in behalf of claimant by counsel that in the present case his letter to your predecessor, dated February 28, 1881, must be regarded as an application for a re-examination of the claim, and that said letter not having been acted upon by your predecessor, the application may now be entertained by you. But that such application was made and not acted upon, as above, does not, I think, withdraw the case from the operation of the rule just referred to, and this view is fortified by an opinion of one of my predecessors in a similar case (16 Opin., 452).

Accordingly, in direct answer to your question, I have the honor to reply that, in my opinion, interest on the \$8,100 paid out by McKee for the use of the \$6,000 borrowed is not allowable under the act of March 3, 1877, and moreover that this matter, in view of the action of your predecessor, should be treated as *res judicata*.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. S. J. KIRKWOOD,

*Secretary of the Interior.*

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CASE OF MASTER LUCIEN YOUNG.

Y. was advanced twenty-five numbers on the Navy list, under section 1506 Revised Statutes, whereby he was promoted from the grade of ensign to that of master, to which latter grade he was confirmed March 3, 1879, to take rank from November 24, 1877: *Held* that his increased pay commenced, not at the date from which he took rank as master, but at the date of his appointment as master (March 3, 1879).

DEPARTMENT OF JUSTICE,

March 29, 1882.

SIR: Your letter of the 23d ultimo, in relation to the case of Master Lucien Young, of the Navy, states: "Mr. Young was advanced twenty-five numbers on the Navy list, under the provisions of section 1506 of the Revised Statutes, which advancement promoted him from the grade of ensign to that of master, and he was confirmed in this grade March 3, 1879, to take rank November 24, 1877, from which latter date he claims to be entitled to the pay of master."

The question involved is, whether by law the pay of Mr. Young, as master, commenced at the date of his appoint-

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Case of Master Lucien Young.

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ment (March 3, 1879), or at the date from which he was to take rank (November 27, 1877).

Previous to the act of July 15, 1870, chapter 295, the general rule was that the increased pay of all promoted officers in the Navy commenced from the date of the signature of an appointment to perform the duty of the higher grade, if one was given before the issue of a commission, or from the date of the commission if no appointment was previously given. (Navy Reg., ed. of 1865, par. 1162; *ibid.* ed. of 1870, par. 1508.) But this rule was changed by that act, the seventh section thereof providing that thereafter "the increased pay of a promoted officer shall commence from the date he is to take rank as stated in his commission." The provision of the act of 1870 just quoted, which was general and applied to *any* promoted officer, was repealed by the act of June 5, 1872, chapter 306, and the following *proviso* enacted: "That if such officer shall have been promoted in course to fill a vacancy, and shall have been in the performance of the duties of the higher grade from the date he is to take rank, he may be allowed the increased pay from that date." By the latter provision only those officers who are "promoted in course to fill a vacancy," and have been in the performance of the duties of the higher grade from their ranking date, become entitled to the increased pay from that date. Officers otherwise promoted are impliedly excluded. With these officers, therefore, it must be deemed that their increased pay was contemplated to commence at the date of appointment.

The provision of the act of 1872 is substantially embodied in section 1561 Revised Statutes, and thus the law as to the commencement of the pay of promoted officers in the Navy remains what it was. As Mr. Young was not "promoted in course to fill a vacancy," his claim is obviously inadmissible under that section. The result I arrive at is, that under the law as it stood when he was advanced (which is still in force), his increased pay commenced not at the date from which he takes rank as master, but at the date of his appointment as such.

I have the honor to be, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. W. H. HUNT,

*Secretary of the Navy.*

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Eveleth's Case.

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## EVELETH'S CASE.

Under a provision in the act of June 16, 1880, enabling the Secretary of War "to cause to be constructed a fire-proof roof for the building at the corner of Seventeenth and F streets," in Washington, D. C., Mr. James Eveleth, a clerk in the office of the Chief of Engineers, was designated by the Secretary as his agent to take charge of and superintend the work, and was allowed a compensation of \$300 per month from the date of such designation until the completion of the work. For the same period the salary of E. as clerk was suspended, and in effect his duties as such also, these being performed by another person who received the pay therefor: *Held* that it was competent to the Secretary to employ E. as above, and compensate him out of the fund appropriated for the service, and that this case is not within section 1765 Revised Statutes, there being no "additional pay, extra allowance, or compensation" received by E.

## DEPARTMENT OF JUSTICE,

*April 3, 1882.*

SIR: I gather from your letter of March 1, and the accompanying papers, these facts:

In the Sundry Civil Appropriation bill approved June 16, 1880 (21 Stats., 260), was inserted the following provision:

"To enable the Secretary of War to cause to be constructed a fire-proof roof for the building on the corner of Seventeenth and F streets, twenty-five thousand one hundred and seventy-eight dollars and fourteen cents, or so much thereof as may be necessary."

The Secretary of War designated, as his agent, to advertise, make contracts with the approval of the Secretary, take charge of and superintend the construction of the roof, Mr. James Eveleth, who was a clerk in the office of the Chief of Engineers and superintendent of the Winder building.

As compensation to Eveleth for his service in the work committed to his charge as above, and in consideration of his giving the bond required by law in the sum of \$10,000, the Secretary allowed him \$300 per month from the date of his designation to the service to the time of the completion of the roof. For the same period his salary as clerk and as superintendent of the Winder building was suspended, and in effect his duties also, which were performed by other parties who received the pay for the services rendered in those positions.

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Eveleth's Case.

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Eveleth accepted these terms, entered upon and performed the duties assigned to him in respect to the construction of the roof, and has received \$2,700 for nine months' service.

He has rendered his account, in which he has credited himself with \$300 each month, and has returned to the Treasury \$278.12 which remained unexpended of the appropriation at the completion of the work.

No exception to his account is taken, except to the monthly item for his services.

The First Comptroller disallows that, and calls upon Mr. Eveleth to pay back into the Treasury the \$2,700.

Upon this statement I am of opinion—

First. That the Secretary of War having under the act full power to cause the roof to be constructed, and complete control over the fund appropriated to pay for it, he could employ such agent to superintend the work and disburse the fund as in his discretion he deemed best, and he could properly compensate the agent from the appropriation. Therefore the payment to this agent authorized by the Secretary can not be gainsaid or disallowed by any officer of the Government. (*United States v. Jones*, 18 Howard, 92.)

From the judgment of the court in the case cited I quote one sentence: "The Executive Department of the Government, to which is intrusted the control of the subject-matter, must necessarily determine all questions appertaining to the employment and payment of such temporary agents and the exigency which demands their employment."

Adapting to this case the language of the Supreme Court in case of the *United States v. Savings Bank of Pittsburgh*, decided at its present term, the allowance "by the head of a Department in cases of this kind is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of Congress."

Upon the authority of these cases, I hold that the Secretary's action in this matter is not subject to revision or reversal by the accounting officers of the Treasury.

Second. The rule of action in cases of this kind I find stated by the Solicitor-General in an opinion which was approved by the Attorney-General, and which I adopt as fol-

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Eveleth's Case.

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lows: "Where the service in question is one required by law, but not of any particular official, and compensation therefor is fixed by competent authority, and is appropriated, the officer who under due authorization performs the service is entitled to the compensation of one having authority." (*Pierce's case*, 15 Opin., 603.)

The above is a condensation of the judgment of the Supreme Court in *Converse v. The United States* (21 How., 463).

In each of these cases the claim of the officer who performed the service was upheld upon facts analagous to those of the case in hand. In the latter case he was the superintendent of a light-house district, and also was employed by the Secretary of the Treasury to purchase all the supplies for the light-house service throughout the United States, and to make the necessary disbursements therefor. The court held that he was entitled to the compensation provided by law for this purpose as well as to his salary as superintendent. In the former case Pierce was minister-resident of the United States to the Hawaiian Islands, at a salary of \$7,500. Whilst he was such minister he was employed by the proper officer of the Government to supervise and take testimony to be used in the court of commissioners of Alabama claims. It was held that he was entitled to the usual compensation given in such cases to assistant counsel. These cases, then, were not within the intent and purpose of section 1765 of the Revised Statutes.

The present case is the same in principle.

Third. This case is not within section 1765, because there was no "additional pay, extra allowance, or compensation."

During the period for which Eveleth was paid \$300 per month he held no other position than that of agent to oversee the construction of the roof and to disburse the fund appropriated for that work.

His duties as clerk, etc., as well as his pay, had been suspended, and having accepted the terms of his employment as agent, he has no claim upon the Government for compensation as clerk. He has received pay but for one service, and is entitled to pay for no other service. The pay he has received is not therefore additional to any other compensation nor an extra allowance.

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Duty of Attorney-General.

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Upon each of the grounds above stated, I conclude that the United States has no claim upon Mr. Eveleth for the money allowed him by the Secretary of War.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,  
*Secretary of War.*

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DUTY OF ATTORNEY-GENERAL.

In response to a resolution of the Senate directing the Attorney-General to investigate and report to that body who are the owners of the land and water-power at the Great Falls of the Potomac River: *Advised* that any information on the subject found in the records of the Department would be gladly furnished the Senate, but that beyond this, it was submitted, such investigation is not within the duties of the Attorney-General as prescribed by law.

## DEPARTMENT OF JUSTICE,

*April 5, 1882.*

SIR: I have the honor to acknowledge receipt of the following resolution, dated March 30, 1882:

*“Resolved, That the Attorney-General be, and is hereby, directed to investigate and report to the Senate, at the earliest day possible, who are the owners of the land on the Virginia and Maryland shores opposite Conn’s Island, above the Great Falls in the Potomac River, and who are the owners of the water, water-power and privileges at the Great Falls on said River.”*

The records of this Department furnish little information on the subject of the resolution, but I find that on the 11th of July, 1854, Attorney-General Cushing certified that the deed before him from Mrs. Ann R. Green would vest in the United States a valid title to certain land, lying in the County of Fairfax and State of Virginia, at the Great Falls of the Potomac, proposed to be purchased by the United States for the Washington City Aqueduct (Titles, p. 47). (This is the tract marked U. S. in the map accompanying Senate Report No. 242, Forty-seventh Congress, first session.)

On the 10th May and 7th July 1855, he certified that proceedings in condemnation of a tract of land in the State of

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Duty of Attorney-General.

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Maryland, called "Hard to come at," taken by the United States for the use of the Washington Aqueduct, followed the process prescribed by the statute of Maryland, and that the proceedings vested a valid title thereto in the United States. (Titles, pp. 91, 93.) This is the tract marked "Hard to come at" on said map, and is believed to include by resurvey the entire tract marked "Falls Island." It would seem that subsequently the United States took a conveyance for one moiety of this tract from Cephas Willett and wife, who had not been parties to the condemnation proceedings, for Attorney-General Bates on the 27th November, 1861, after expressing his concurrence in the opinion of Mr. Cushing, (just cited,) says: "In my opinion, the deed of Cephas F. Willett and wife conveys a valid title to the undivided half of the land therein described [Hard to come at], and the United States, as owner, succeeds to the ordinary riparian rights which attach to the ownership of lands adjoining streams not navigable." (Titles, p. 369.)

There are other opinions upon titles to land acquired by the United States, either by purchase or condemnation, for the use of the Washington Aqueduct, but none of them I think come within the resolution except those of Mr. Cushing of May 12, 1855, and December 18, 1856, in which he certifies that certain condemnation proceedings against a tract of land in Montgomery County, Maryland, called "Crawford's Lodge," condemned for the use of the Washington Aqueduct, vested a valid title thereto in the United States (Titles, pp. 93, 207). (This is the tract marked "U. S." on said map on the Maryland shore.)

As to the lands claimed by individuals or corporations on either side of, or in the river, the records of this Department show only that a suit was commenced in 1868 by the Great Falls Manufacturing Company, for the use of so much of Conn's Island (claimed to be its property) as is occupied by the present dam. On the trial in 1881, the Attorney-General disputed the claimant's title to said island, and also objected to the jurisdiction of the court. In 16 Court of Claims Reports, at page 160, will be found the findings of the court and opinions. My predecessor deemed it proper to appeal from the judgment, and the cause is now pending in the Supreme Court.

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*Duty of Attorney-General.*

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I am informed, however, that the Chesapeake and Ohio Canal Company claim to own certain portions of the Virginia and Maryland shores and water privileges within the limits described in the resolution. To investigate and report upon the rights of the above named and other possible claimants would involve not merely an examination of the records of Fairfax County, Virginia, and Montgomery County, Maryland, but also of papers and conveyances in the hands of private parties, and might necessitate as to questions of non-user and prescription the taking of testimony. Without power to send for books and papers, and to compel the attendance of witnesses, the investigation would be fruitless, besides being open to the objection of invading the proper province of the courts.

So far as I can furnish information to the Senate from the records of this Department, I will gladly do so; but, beyond this, I respectfully submit that the investigation directed is not within the duties of the Attorney-General, as prescribed by law. That this has been the uniform construction of my predecessors abundantly appears from the published volumes of their opinions.

Mr. Wirt (1 Opin., 335), Mr. Taney (2 Opin., 499), Mr. Crittenden (5 Opin., 561.), Mr. Bates (10 Opin., 164), Mr. Evarts (12 Opin., 544), Mr. Williams (14 Opin., 17, 177), and Mr. Devens (15 Opin., 475), were of opinion that it is not competent for the Attorney-General, in the absence of a statutory requirement, to give opinions concerning any matters pending in Congress upon the request of either of the Houses, or of any committee, and in this judgment I felt obliged to concur in a communication addressed by me to Hon. W. W. Crapo, chairman of the Committee on Banking and Currency of the House of Representatives, on the 26th of January ultimo.

Regretting that I can not further facilitate the labors of your honorable body by the desired investigation and report,

I am, very respectfully, your obedient servant,

S. F. PHILLIPS,

*Acting Attorney-General.*

THE PRESIDENT OF THE SENATE.

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Case of General Ward B. Burnett.

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## CASE OF GENERAL WARD B. BURNETT.

In this case it is held that General Burnett is entitled to, and should be allowed, the increase of pension granted by the act of June 16, 1880, chap. 236, to a certain class of pensioners.

DEPARTMENT OF JUSTICE,  
April 10, 1882.

SIR: The late President (Garfield) submitted to Hon. Wayne MacVeagh the question whether General Ward B. Burnett should be allowed the increase of pension granted by the act of June 16, 1880, to a certain class of pensioners. The Attorney-General referred the matter to the Solicitor-General.

In a memorandum made and submitted to the Attorney-General on the 15th of June, 1881, the Solicitor reaches a conclusion favorable to General Burnett's claim, and says that it is very meritorious, adding that it is "met by objections that are perhaps only *inter apices juris*."

On the 23d of June, 1881, the Secretary of the Interior addressed a letter to the Attorney-General, propounding several questions touching the case involving nice points of law.

This letter also was referred to the Solicitor-General, who answered each of the questions put by the Secretary in the negative without assigning reasons.

This answer went to the Interior Department as the opinion of the Department of Justice upon the whole case. Its effect was to reject General Burnett's application.

General Burnett has again appealed to the President, who again, March 25, 1882, refers the case to the Attorney-General, and noting the "seeming conflict of opinion in the two communications upon the subject from the Department of Justice," desires a *further examination*.

It is upon this second appeal to the President that the case is now before me.

After looking carefully into the case, I am inclined to concur in the *first* opinion, intimated by the Solicitor-General, in his report made to the Attorney-General on the 15th of June, 1881.

It is admitted that General Burnett was entitled to a pension of \$50 per month under the law of June 18, 1874, though

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Case of General Ward B. Burnett.

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it is under a *special act* that he has received that sum as a pension.

The intent and spirit of the act of June 16, 1880, is that all those soldiers and sailors whose *present right* it was at the time of its passage to demand and receive a pension of \$50 a month, under the law of 1874, should have the same increased to \$72. To say that only those who, on the 16th of June, 1880, were upon the pension-roll under the act of 1874, are entitled to the increase, is to put too literal and narrow a construction upon the statute. The words "*now receiving*" in the act of 1880 should be construed to mean *now entitled* to receive. For if the precise literal meaning is insisted on, only those who *on that day*—the 16th of June, 1880—actually received their pensions under the law of 1874 could have the increase; but this is absurd.

The intent and purpose of Congress in passing the act should be considered, and a reasonable and literal construction given to it. It could never have been the intention of Congress to shut out from its bounty veterans who, like Burnett—totally disabled, and helpless from wounds received in battle—had, through ignorance, neglected to put themselves upon the pension-roll.

It is, however, objected that if General Burnett's name was placed on the roll under the general law, an increase of pension could not be allowed him except from the date of an examining surgeon's certificate made under a pending claim for such increase. The objection is founded upon section 4698½, Revised Statutes. The answer is that General Burnett is within the exception of that law. His disability is, and has been for more than ten years, *specific* and *permanent*.

Again, it is objected that if General Burnett's name should be placed on the roll under the law of 1874, to receive pension under that law from a date subsequent to June 16, 1880, his pension could not be increased under the act of the latter date.

This is clearly *inter apices juris*.

If his name were placed *now* upon the pension-roll he would not receive his pension under the act of 1874, but under the act of June 16, 1880. The act of 1874 was an amendment of the fourth section of the general pension law of March 3, 1873 (Sec. 4698 Revised Statutes), in this particular *only*, that it

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 Cadet Engineers in the Navy.
 

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raised the pensions of those who were entitled to \$31.25 per month, under the law of 1873, to \$50. Then the act of June 16, 1880, comes in and simply increases the pensions of the same class of pensioners to \$72 per month. It is a substitute for the act of 1874 and abrogates it.

It appears that the pensioners who, under the *general law*, were on June 16, 1880, entitled to receive \$31.25 per month (which is General Burnett's case), are, under the act of June 16, 1880, entitled to \$72 per month. There is no doubt that this was the intention of Congress.

Cases like General Burnett's are entitled to the increase no matter when they make application for it. The facts showing his right to be upon the pension-roll, not the time when his name was placed there, are the important and governing considerations.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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 OADET ENGINEERS IN THE NAVY.
 

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McF., a cadet engineer, having completed the prescribed course of instruction at the Naval Academy and at sea June 10, 1881, and successfully passed an examination, was confirmed by the Senate as an assistant engineer December 20, 1881, to take rank from the former date: *Held* that he become entitled to the pay of assistant engineer from the date he took rank as such, if that date is subsequent to the vacancy he was appointed to fill.

Section 1 of the act of June 22, 1874, chapter 392, comprehends cadet engineers, and fixes the commencement of their pay in the grade of assistant engineer when promoted thereto.

## DEPARTMENT OF JUSTICE,

April 10, 1882.

SIR: Your letter of the 1st ultimo submits for my consideration the case of Assistant Engineer Walter M. McFarland, U.S. Navy, the facts of which, as stated by you, are as follows:

"Mr. McFarland was appointed a cadet engineer at the Naval Academy September 15, 1875, and completed the prescribed course of study (four years) at the Academy June 10, 1879. He was then assigned to duty at sea, and completed the required term of service on naval steamers (two

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Cadet Engineers in the Navy.

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years ) June 10, 1881, at which time he was on duty on board the U. S. S. *Trenton*, on the European station. Upon the return of that vessel to the United States he was detached November 9, 1881. In December following, Mr. McFarland was ordered before the Board of Examining Engineers at Philadelphia, Pa., for the final examination required of cadet engineers as to their qualifications for promotion to the grade of assistant engineer, and on the 30th of that month the board found him qualified and recommended him for promotion to that grade. He was notified of the result of his examination as follows:

“‘NAVY DEPARTMENT,  
“‘*Washington, January 9, 1882.*

“‘SIR: Having successfully passed your examination, and having been confirmed by the Senate to the grade of assistant engineer in the Navy, you will be regarded as such from the 10th June, 1881.

“‘As the standing or relative position cannot be determined until all your data shall have been examined, your commission cannot now be issued.

“‘Respectfully,

“‘ED. T. NICHOLS,  
“‘*Acting Secretary of the Navy.*

“Ass’t. Eng. WALTER M. MCFARLAND, U. S. Navy,  
“‘*Washington, D. C.’*

“The class of cadet engineers of which Mr. McFarland was a member, and the class which completed the prescribed course of instruction at the Academy and at sea in June, 1880, were confirmed by the Senate December 20, 1881, the former to take rank as assistant engineers from June 10, 1881, and the latter from June 20, 1880, to fill vacancies in that grade.

“In consequence of the absence at sea of a number of the members of each of these classes, who have not been examined, the standing or relative position of the different members of the classes, which is determined according to merit, can not be assigned until all the cadets of those dates have been examined.

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*Cadet Engineers in the Navy.*

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"It has not been practicable to assemble the classes of cadet engineers for examination at the conclusion of the required term of sea service, as they are distributed to various vessels on foreign stations; and the examinations are therefore delayed until the expiration of the cruise of the vessel to which they are attached.

"Upon the conclusion of the examinations of all the members of these classes they will be commissioned as assistant engineers, to take rank as such from June 20, 1880, and June 10, 1881, respectively.

"I inclose a communication from Assistant Engineer McFarland, transmitting a letter from the Fourth Auditor of the Treasury in relation to his claim for difference of pay.

"At the time Mr. McFarland and other officers of the classes referred to became entitled to examination, they were absent in the performance of the duties of assistant engineers, and by reason of such absence their examinations were necessarily delayed. They will be commissioned as assistant engineers, with rank from the dates they became entitled to examination, to fill vacancies which have existed in that grade since those dates.

"In view of these facts, I respectfully request that you will advise me whether the members of the classes of cadet engineers referred to, who pass successfully the examination prescribed by law and regulations and are subsequently commissioned assistant engineers, are entitled to the pay of that grade from the date they take rank as stated in their commissions."

Upon consideration I am of opinion that the cadet engineers referred to in your inquiry, who are promoted to fill vacancies in the grade of assistant engineer, thereby become entitled to the pay of that grade from the date they take rank therein, where such date is subsequent to the vacancies they are appointed to fill respectively. The words "any officer of the Navy," as employed in the first section of the act of June 22, 1874, chapter 392, comprehend cadet engineers, and that section fixes the commencement of their pay in the grade of assistant engineer when promoted thereto. It supersedes section 1561, Revised Statutes, as to officers promoted thereafter, and should be construed in connection with

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Attorney-General.

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the last-mentioned section and other provisions relating to the pay of officers in the Navy (sections 1556, 1557, 1558, 1562, Rev. Stat.), all of which are *in pari materia*.

Cadet engineers are "officers" within the meaning of section 1558, so also within the meaning of section 1557, which regulates the pay of "officers on furlough." They are furthermore "officers of a class subject to examination before promotion" within the meaning of section 1562. By section 1556 they are allowed, "after a final academic examination, and until warranted as assistant engineers, when on duty at sea, one thousand dollars," etc. This provision regulates their pay as *cadet engineers*. Upon promotion to the grade of assistant engineer their pay in that grade is regulated as to rate by another provision of the same section, its *commencement* being fixed by the act of 1874, as above.

I may add that the signification of the word "officer" in article 36 (sec. 1624 Rev. Stat.), as given in an opinion of this Department dated July 10, 1877, (15 Opin., 635), has reference to the sense in which that word is used in said article, between which and the statutory provisions cited above there is no connection. The ruling in that opinion does not, therefore, affect the subject here considered.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. W. H. HUNT,

*Secretary of the Navy.*

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ATTORNEY-GENERAL.

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The Attorney-General has no control over the action of the head of Department at whose request and to whom an opinion is given, nor could he with propriety express any judgment concerning the disposition of the matter to which the opinion relates, that being something wholly within the administrative sphere of such head of Department.

DEPARTMENT OF JUSTICE,

*April 14, 1882.*

SIR: I have the honor to return herewith the letter of the Hon. John Van Voorhis, addressed to you under date of the 3d ultimo, which by your direction was referred to me and my attention specially invited thereto.

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Suppression of Lawlessness in Arizona.

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In this letter reference is made to an opinion of the Acting Attorney-General, rendered at the request of the Secretary of the Interior in December last, concerning the insertion of reservations in patents for mining claims, and it is suggested that "there seems to be a reluctance on the part of some subordinates in the Interior Department to act in accordance with the law as stated in" that opinion, and you are requested to ask the Attorney-General if in his judgment the opinion rendered as above should be carried into execution.

With respect to this request I beg to state, that while it is the duty of the Attorney-General to give his opinion upon questions of law arising in the administration of any Executive Department at the request of the head thereof, such duty ends with the rendition of the opinion, which is advisory only. The Attorney-General has no control over the action of the head of Department to whom the opinion is addressed, nor could he with propriety express any judgment concerning the *disposition* of the matter to which the opinion relates, that being something wholly within the administrative sphere and direction of such head of Department.

I accordingly refrain from giving any advice touching the subject of the above request.

I am, sir, with great respect,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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## SUPPRESSION OF LAWLESSNESS IN ARIZONA.

Upon consideration of the facts stated: *Advised* that the military forces of the United States may be employed under section 5298, Revised Statutes, after proclamation as required by section 5300, Revised Statutes, to aid in the execution of the laws and for the suppression of combinations of outlaws and criminals in the Territory of Arizona, without the need of further legislation.

DEPARTMENT OF JUSTICE,

April 15, 1882.

SIR: In obedience to your request of yesterday, I have examined the question whether further legislation is needed to authorize the employment of the military forces of the

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Suppression of Lawlessness in Arizona.

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United States to aid in the execution of the laws in Arizona Territory under the circumstances now existing there.

By recent telegrams from the governor of the Territory, it would appear that the enforcement of the laws is obstructed and resisted to such a degree by powerful combinations of outlaws and criminals, with whom even some of the local officers are alleged to be in league, that a state of lawlessness bordering on anarchy may be said to prevail. This information is confirmed by a still later telegram from the General of the Army, dated at Tucson, Ariz., who states that "the civil officers have not sufficient forces to make arrests," etc. The governor asks that prompt action be taken to protect citizens and property. He says he has no power or means to restore order without the aid of Congress; that there is no money in the treasury of the Territory available for that purpose; and he recommends the passage of a law by Congress appropriating \$150,000 to enable him to maintain and employ a volunteer militia force to suppress insurrection and aid the civil authorities to enforce the laws, etc.

The exigencies of this case seem to me to be amply provided for by the laws of Congress now in force; and I am accordingly of opinion that there is no necessity for the legislation recommended by the governor, nor indeed for any legislation of the character referred to in the question under consideration.

Section 5298, Revised Statutes, provides: "Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory, it shall be lawful for the President to call forth the militia of any or all of the States, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed."

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Suppression of Lawlessness in Arizona.

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Section 5300 also provides: "Whenever, in the judgment of the President, it becomes necessary to use the military forces under this title, the President shall forthwith, by proclamation, command the insurgents to disperse and retire peaceably to their respective abodes within a limited time."

By the first of these sections the President is *expressly authorized* to employ the military forces of the United States to aid in enforcing the laws upon the contingencies therein stated, after having given proclamation as required by the last-mentioned section. The act of June 18, 1878, chapter 263, section 15, prohibiting the use of any part of the Army as a *posse comitatus*, or otherwise, for the purpose of executing the laws, excepts from the operation of that act cases where such employment is "expressly authorized by the Constitution or by act of Congress." The cases provided for by section 5298, Revised Statutes, are within this exception.

The contingencies contemplated by that section, upon which the authority to employ the military forces thereunder depends, seeming now to exist in the Territory of Arizona, I am of opinion that such forces may be employed, after proclamation as above, in the execution of the laws and for the suppression of the above-mentioned combinations of outlaws and criminals in that Territory, without the aid of further legislation.

I herewith inclose a form of proclamation, which is submitted as an appropriate one for the present case. It follows the form heretofore used in like cases.

I am, sir, with great respect,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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 Refund of Duties Erroneously Exacted.
 

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## REFUND OF DUTIES ERRONEOUSLY EXACTED.

Where certain importers of sugar, having made due protest and appeal but failing to bring suit afterwards, applied to the Secretary of the Treasury for a refund of duties illegally exacted, as indicated in the decision of the Supreme Court in the case of *Merritt v. Welsh* (104 U. S., 694): *Advised* that the Secretary can not grant the application under section 3012½, Revised Statutes.

## DEPARTMENT OF JUSTICE,

April 20, 1882.

SIR: In yours of the 5th instant, referring to the late decision by the Supreme Court in *Merritt v. Welsh*, it is stated that amongst the importers of sugar interested in the rule established in that case are some who, having made due protest and appeal, *did not bring suit*, it being, as I understand, now too late to do so. A question has thereupon occurred before you whether, under section 3012½ of the Revised Statutes, upon another application by these persons, you may refund the excess of duty indicated in the above-named case.

Upon consideration, I submit that you can not.

The methods by which money improperly exacted as duties may be recovered are by proceedings, in the first instance, before the Secretary of the Treasury, begun as provided in section 2931, and if successful before him, satisfied under section 3012½; but if unsuccessful before him, continued by suit at law, which, if successful, is satisfied under section 989.

That section, 3012½, in its original shape as part of the act of 1864, chapter 171, was intended to provide a satisfaction for such claims only when *otherwise regularly pending* before the Secretary, or at all events (considering the subsequent suit as a part of the same proceeding) *when not yet concluded*, seems to me evident upon inspection.

Although separated in the revision from those sections of the act of 1864 in immediate local connection with which it was originally enacted (and indeed inserted there, as its numbering indicates, somewhat by an after-thought), it seems that it does not contain a substantive grant of jurisdiction to the Secretary to hear applications not theretofore cogniz-

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 Customs Duties.
 

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able by him, but only a provision in *satisfaction* of cases otherwise regularly brought and decided. In other words, as already indicated, it plays the same part in relation to the earlier clauses of section 2931 as section 989 does to the latter.

In contemplation of law the claims in question were *abandoned* by *failure* to bring suit within the time limited after the original adverse decision of the Secretary. Not only must protest and appeal precede a proper application to the Secretary, but, to be effective, these must be followed up in the order, and with the diligence, specified. The exceptional provisions upon this matter in cases of "non-compliance" contained in section 3013 point to the same conclusion.

Very respectfully, your obedient servant,

S. F. PHILLIPS,  
*Solicitor-General.*

THE SECRETARY OF THE TREASURY.

Approved:

BENJAMIN HARRIS BREWSTER.

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 CUSTOMS DUTIES.

The word "chief," as used in the provision of the act of February 8, 1875, chapter 36, imposing a duty of 60 per cent. ad valorem on all goods, wares, and merchandise made of silk or of which silk is a component material of chief value, etc., means greater than either of the other materials; not greater than their aggregate.

DEPARTMENT OF JUSTICE,  
*April 22, 1882.*

SIR: Inadvertently yours of the 30th ultimo was not brought to my attention until yesterday. Herewith I beg to submit an answer thereto.

You state that "An appeal has been presented to this Department involving the proper rate of duty on certain merchandise composed of silk and other materials. The value of the silk in the goods is less than half of the whole, but exceeds that of either of the other materials. (The act of February 8, 1875; imposes a duty of 60 per cent. ad va-

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Customs Duties.

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lorem on all goods, wares, and merchandise made of silk or of which silk is a component material of chief value, with the condition, that cotton, flax, wool, or worsted, shall not be a component material of over 25 per cent. therein.) The question is whether the term chief value in the act of 1875 means more than half the value of the whole, or more than the value of each of the other materials. I will thank you for your opinion upon the question thus presented."

Upon consideration, I am of opinion that the word "chief" in the statute referred to by you means greater than either of the other materials; *not* greater than their aggregate. Such seems to be the force of the bare word itself, and I am not able to discover any context sufficient to control this. The phrases "the component material of chief value," "a component material of chief value," "the component part of chief value," "a component of chief value," "chief component part," "principal ingredient," "chief part" occur again and again in section 2504 of the Revised Statutes. But I do not see that they throw light one upon the other. Something may be suggested to the effect that Congress was considering *silk* as compared with the part of the compound that is *not silk*; and, in this connection, that any reasonable *policy* underlying *the condition* to which you refer excludes from the operation of the tax articles of which "cotton, flax, wool, or worsted"—*either or all*—make 25 per cent.; but upon the whole it seems that Congress has not *said* so; and its will of course depends upon its words.

Very respectfully, your obedient servant,

S. F. PHILLIPS,  
*Solicitor-General.*

The SECRETARY OF THE TREASURY.

Approved:

BENJAMIN HARRIS BREWSTER.

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Pensions.

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## PENSIONS.

Under section 4702, Revised Statutes, the surviving child (the widow and other children being dead) is entitled to the whole of the pension to which the father would be entitled were he living.

It is not within the province of the accounting officers of the Treasury to construe the pension laws and give instructions to pension agents as to the payment of pensions. This properly belongs to the Commissioner of Pensions, whose duty it is, under the direction of the Secretary of the Interior, to administer these laws.

## DEPARTMENT OF JUSTICE,

*April 28, 1882.*

SIR: The question upon which my opinion is asked by the letter of the Acting Secretary, bearing date the 18th instant, is whether, under section 4702 of the Revised Statutes, the surviving child (the widow and other children being dead) is entitled to the whole of the pension the father would be entitled to were he living, or only to such fractional part thereof as he (the survivor) would have had the benefit of if the other children or any of them were living. The language of the statute is, "if there be no widow, or in case of her death,  
\* \* \* his child or children under sixteen years of age shall be entitled to receive the same pension as the husband or father would have been entitled to," etc.

His child or children, one or many, shall be entitled. It is clear that the whole is given to the offspring of the father as a class. If there is more than one child, they have a joint estate, so to speak, in the pension. The statute disposes of the whole. No part of it reverts or falls back to the Government until the last child arrives at the age of sixteen years or until his death before reaching that age.

The pension office and the Secretary of the Interior hitherto have so construed the law, and, after considering the subject in the light of the correspondence and documents accompanying the Acting Secretary's letter, I do not see that there is good ground to depart from the practice which has so long prevailed.

The Acting Secretary inquires further, whether pension agents should receive instructions as to the meaning of the

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Pensions.

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pension laws from the Commissioner of Pensions or from the accounting officers of the Treasury.

I understand that chapter 5, under the head of "Department of the Interior," in the Revised Statutes, places the entire administration of the pension laws in the control of that Department, and that section 471 designates the Commissioner of Pensions as the officer whose special duty it is, under the direction of the Secretary, to administer and carry into execution these laws. He shall perform, to use the language of the statute, "such duties in the execution of the various pension and bounty land laws as may be prescribed by the President." By which I understand that the Commissioner of Pensions is the officer provided by law in whose hands the President, as the executive head of the nation, shall place this part of the administration, to wit, the execution of the pension and bounty land laws.

Moreover, there are scattered through the title "pensions" many sections pointing out in detail the duties of the Commissioner, and showing his authority to apply and construe these laws.

Sections 4746 and 4748 speak of the *payment* of pensions as being within his "jurisdiction." He is required to furnish instructions and forms to applicants, to issue certificates of pensions, and notify the claimant or his attorney of the *allowance made* and the *amount* thereof.

By section 4768 the Commissioner is required to forward the certificate to the pension agent who is to pay the same.

*Pension agents* are officers of the Department of the Interior, and take their instructions from the Commissioner of Pensions (sections 4779, 4784, 4785). There is no allusion in any of the pension laws to the accounting officers of the Treasury as having any authority to construe those laws, or to direct the pension agents as to the amount that shall be paid to any class of pensioners or to whom pensions shall be paid. This is matter for the supervision and instruction of the Commissioner. The certificate and his orders as to its payment are binding upon the Comptroller and Auditor.

If a payment has the authority of the Commissioner of Pensions, and especially if it has the sanction of the Secretary of

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 Eight-Hour Law.
 

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the Interior, the decision is final; for the jurisdiction of the whole matter is in these officers.

The duty of the accounting officers in respect to pensions is to audit the accounts relating to them and to certify the balances. (See sec. 277, Rev. Stat.) But this does not require that they shall take from the Commissioner of Pensions the jurisdiction with which the law clothes him to construe and administer the pension laws, or interfere with his instructions to pension agents. On the contrary, they are bound to conform to his decisions.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

Hon. H. M. TELLER,

*Secretary of the Interior.*

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 EIGHT-HOUR LAW.

The opinions of former Attorneys-General construing the provisions of the act of June 25, 1868, chapter 72, known as the eight-hour law (section 3738, Rev. Stat.), reviewed, and the following conclusions deduced therefrom :

- (1) That the act 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.
- (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.
- (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.

This exposition of the act is in harmony with the opinion of the Supreme Court in the case of *United States v. Martin* (94 U. S., 400).

DEPARTMENT OF JUSTICE,

*April 29, 1882.*

SIR: The accompanying application for the enforcement of the eight-hour law, addressed to you by Jacob M. Davis, "Secretary Executive Committee League Island Mutual Protection Association," under date of March 13, 1882, and

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Eight-Hour Law.

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made in behalf of the workingmen employed by the Government in the navy-yards and elsewhere, was subsequently referred to me by your direction for examination and report upon the merits thereof, and also for such recommendations as may be suggested by the conclusions arrived at. Having examined the application and considered the provisions of the law to which it relates, I now have the honor to submit the following report:

The application cites the act of June 25, 1868, chapter 72, entitled "An act constituting eight hours a day's work for all laborers, workmen, and mechanics employed by or on behalf of the Government of the United States" (the provisions of which are embodied in section 3738, Revised Statutes), and refers to a proclamation of the President, issued May 19, 1869, calling attention to said act and directing that from and after that date no reduction should be made "in the wages paid by the Government by the day to such laborers, workmen, and mechanics on account of such reduction of the hours of labor," and also to a subsequent proclamation of the President, issued May 11, 1872, again calling attention to said act and directing "all officers of the Executive Department of the Government having charge of the employment and payment of laborers, workmen, or mechanics employed by or on behalf of the Government of the United States to make no reduction in the wages paid by the Government by the day to such laborers, workmen, and mechanics on account of the reduction of the hours of labor." It furthermore refers to section 2 of the act of May 18, 1872, chapter 172, requiring the accounting officers in the settlement of all accounts for the services of the laborers, workmen, and mechanics employed by or on behalf of the Government of the United States between the 25th day of June, 1868, the date of the act constituting eight hours a day's work for all such laborers, workmen, and mechanics, and the 19th of May, 1869, the date of the proclamation of the President concerning such pay, to settle and pay for the same without reduction on account of reduction of hours of labor by said act, when it shall be made to appear that such was the sole cause of the reduction of wages, etc. (same provision being reproduced in section 3689, Revised Stat-

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Eight-Hour Law.

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utes), and to the debate in the Senate on the passage of the act of June 25, 1868.

These citations and references appear to be made with the view of setting forth the design of that act, as the same may be gathered from the act itself, the debate in the Senate thereon, the action of the President in the proclamations mentioned, and the subsequent action of Congress.

It is then charged that since 1877 the eight-hour law has been "openly violated and persistently disregarded" six months in each year, and in this connection reference is made to General Order No. 227, dated June 30, 1877, and circular No. 8, dated March 28, 1878, issued by the Secretary of the Navy, and also to a circular, dated September 21, 1878, issued by the Acting Secretary of the Navy, which, it is allowed, "recognizes the validity of the eight-hour law from September 22 to March 20 of each year, and then enforces the ten-hour system from March 21 to September 21 in each year."

The application concludes with the following declaration: "That we claim the strict enforcement of the national eight-hour law, as passed by Congress June 25, 1868, according to its plain meaning, that eight hours shall constitute a day's work; a day's work that should bring a day's wages."

The application does not state specifically in what way the law has been violated as charged or give the facts upon which such charge is founded; but I infer that the complaint is directed against the orders and circulars above referred to, issued by the Navy Department. These orders and circulars not being before me, I make no comment thereon. Whether they continue in force I know not.

The provisions of the act of 1868, known as the eight-hour law (section 3738, Revised Statutes), have several times been considered by my predecessors. The question, whether that act, in reducing the number of hours constituting a day's work, was intended to work a corresponding reduction in the compensation for a day's work, is discussed in an opinion of Attorney-General Evarts to the President, dated November 25, 1868 (12 Opin., 530). He holds that "there is nothing in the language of the act to indicate such intention," and that "the plain import of the law is that a laborer, workman, or

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Eight-Hour Law.

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mechanic, in the employ of the Government, whether hired by the day, week, or month, shall only be required to work eight hours a day to earn his daily, weekly, or monthly wages, whatever these may be." Yet he finds nothing in the act requiring that "employés of the Government embraced within the act must receive as high wages for their day's labor of eight hours as similar industry in private employments receives for a day's labor of ten or twelve hours," and remarks that "the act is wholly silent on the subject of wages, fixing only the length of a day's labor." And the conclusion he comes to is, that the act "does not require that the wages of the shortened day of Government labor should be reduced in the proportion of the hours of labor, and that the act as little requires that the wages of this shortened day should be as large as the wages of the longer day of private employment," and that "in this silence of the act itself on the measure of wages, while it speaks only of the hours of labor, the Departments are left to the guidance of the rule of equality of compensation for *equal worth* of labor in Government and in private employment."

Attorney-General Hoar, in response to an inquiry from the Secretary of the Navy as to the meaning and effect of the act of 1868, taken in connection with the act of July 16, 1862, chapter 184 (which latter act provided "that the hours of labor and the rate of wages of the employés in the navy-yards shall conform, as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity of the respective yards, to be determined by the commandants of the navy-yards, subject to the approval and revision of the Secretary of the Navy"), gave an opinion under date of April 20, 1869 (13 Opin., 29), in which he refers to the opinion of Mr. Evarts, and approves the conclusions there arrived at. He says: "In my opinion the statute of June 25, 1868, has nothing to do with the compensation to be paid to workmen in the navy-yards, and leaves that to be determined under the provisions of the act of July 16, 1862. The provision that eight hours shall constitute a day's labor has no tendency whatever to show whether the day's labor thus established shall be paid at a lower or higher rate than the day of ten hours labor, or at the same rate. The rate of com-

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Eight-Hour Law.

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pensation is still left by law to be determined under the rule prescribed by the statute of July 16, 1862, so as to conform, as nearly as is consistent with the public interest, with the rate of wages of private establishments in the immediate vicinity of the respective navy-yards, 'to be determined by the commandants of the navy-yards, subject to the approval and revision of the Secretary of the Navy.' If the private establishments in the neighborhood employed their hands for five hours a day only, there would, obviously, be no justice in reducing the wages of those employed in the navy-yards for eight hours to the amount paid by the day in private establishments; but the law intended no such result. On the other hand, I find nothing in the statute which requires you to pay the same price for eight hours' labor which private establishments pay for ten or twelve, unless the amount of service rendered or the quality of the work make the fewer hours in the navy-yards equivalent in value to the longer time hired in private establishments, or, for some other reason, make it consistent with the public interest."

In an opinion to the Secretary of War, dated May 31, 1871 (13 Opin., 424), Attorney-General Akerman considered the act of 1868 in connection with the President's proclamation of May 19, 1869, hereinbefore mentioned, apparently adopting the construction given that act by his predecessors.

Attorney-General Devens, in answer to an inquiry suggested by the Secretary of the Navy, whether a circular issued by the Navy Department under date of March 21, 1878 (announcing that "the Department will contract for the labor of mechanics, foreman, leading-men, and laborers on the basis of *eight* hours a day, but that all workmen electing to labor ten hours a day will receive a proportionate increase of their wages"), accords with the meaning and intent of section 3738, Revised Statutes, which embodies the eight-hour law, rendered an opinion dated July 9, 1878 (16 Opin., 58), holding that the circular is in accordance therewith. This conclusion is based on the construction given that section by the Supreme Court of the United States in the case of *United States v. Martin* (94 U. S. Rep., 400), which is regarded as decisive and binding upon the Executive Depart-

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ments. In that case, he says: "The court, after observing that the section 'was a direction by Congress to the officers and agents of the United States, establishing the principle to be observed in the labor of those engaged in its service,' holds that it only prescribes the length of time which shall amount to a day's work *when no special agreement is made upon the subject*, and that it does not forbid the making of contracts fixing a different length of time as the day's work. 'There are several things,' the court adds, 'which the act does not regulate, which it may be worth while to notice. First, it does not establish the price to be paid for a day's work. \* \* \* It does not specify any sum which shall be paid for the labor of eight hours, nor that the price shall be more when the hours are greater, or less when the hours are fewer. Second, the statute does not provide that the employer and the laborer may not agree with each other as to what time shall constitute a day's work. \* \* \*

We regard the statute chiefly 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.' The circular mentioned is in perfect harmony with this authoritative exposition of the law. It proposes to contract for labor on the basis of eight hours constituting a day's work, and herein the direction of the statute is fully conformed to. And although it provides for the allowance of a *proportionate increase* of wages where the workmen *elects* to labor ten hours a day instead of eight, yet this is not at variance with the law. On the contrary, such a provision must be deemed entirely consistent with the law."

Since the decision of the Supreme Court above referred to a joint resolution was introduced into and passed the House of Representatives during the second session of the Forty-fifth Congress, declaring that, according to the true intent and meaning of the act of June 25, 1868, "eight hours constitute a day's work for all such laborers, workmen, and mechanics; and while said act remains upon the statute-book no reduction shall be made in the wages paid by the Government by the day to such laborers, workmen, and mechanics, on account of the reduction of the hours of labor,

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but all heads of Departments, officers, and agents of the Government are hereby directed to enforce said law as long as the same is unrepealed." This resolution went to the Senate and was there postponed to the next session, but no action was afterwards taken thereon by that body. The same resolution was re-introduced in the House during the first session of the Forty-sixth Congress, and considered and laid on the table.

During the second session of the Forty-sixth Congress a joint resolution passed the House, declaring "that, according to the true intent and meaning of section 3738 of the Revised Statutes, all laborers, workmen, and mechanics employed by or in behalf of the Government, shall hereafter receive a full day's pay for eight hour's work; and all heads of Departments, officers, and agents of the Government are hereby directed to enforce said law as herein interpreted." This, however, failed in the Senate.

The legislation thus proposed, which met the approval of one of the houses of Congress, while it apparently assumes that the construction theretofore given the statute by the executive and judicial departments of the Government does not accord with the intention of Congress in enacting it, also assumes that some provision is necessary to more clearly and distinctly declare that intention, which, as expressed in such proposed legislation, was this: (1) that eight hours should constitute a *day's work* for all laborers, etc., who are within the statute; (2) that no reduction should be made in the wages paid *by the day* to such laborers, etc., on account of the reduction in the hours of labor; (3) that all such laborers, etc., should receive a *full day's pay* for eight hours' work. Neither of these propositions, however, seems to me to express an interpretation of the law substantially different from that which it has already received, as above.

Recurring to the opinions of my predecessors hereinbefore mentioned, I deduce from the views there presented the following results:

(1) That the act of 1868 (section 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

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Eight-Hour Law.

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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 interest.

(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

This exposition of the act referred to is in harmony with the opinion of the Supreme Court in the case of *United States v. Martin*, cited above. There the court say that the act "prescribed the length of time which should amount to a day's work, when no special agreement was made upon the subject," but that "it does not establish the price to be paid for a day's work;" that "it does not specify any sum which shall be paid for the labor of eight hours, nor that the price shall be more when the hours are greater, or less when the hours are fewer," and that "it is silent as to everything except the direction to its officers that eight hours shall constitute a day's work for a laborer."

"We regard the statute," remark the court, "chiefly 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."

The view of the statute here announced must be regarded as an authoritative interpretation of its provisions; and if, being thus interpreted, the statute fails to accomplish the objects which it is claimed Congress had in view when en-

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Redemption of "Continued Fives" of 1881.

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acting it, this failure can now be remedied, as it seems to me, only by additional legislation.

With respect to the charge implied in the application for an enforcement of the statute—indeed, expressly made therein—namely, that its provisions are not complied with by the officers charged with the employment of laborers, etc., for the Government, I am unable, from want of information on the subject, to form an opinion. As already intimated by me, the application does not state specifically *wherein* there is a non-compliance with the law. In this connection, therefore, I remark that no recommendations are suggested by my examination of that paper.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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REDEMPTION OF "CONTINUED FIVES" OF 1881.

In calling for redemption the new bonds issued by the Secretary of the Treasury, known as "continued fives," those which have the highest number, i. e., "the bonds of each class last dated and numbered," as provided by the third section of the act of July 14, 1870, chap. 256, should be called first.

DEPARTMENT OF JUSTICE,

May 4, 1882.

SIR: The case stated in yours of the 26th ultimo is substantially as follows:

The act of July 14, 1870, having authorized the issue of certain five per cent. bonds *redeemable at the pleasure of the United States after ten years from the date of their issue*, by its third section provided: "That the payment of any of the bonds hereby authorized after the expiration of the said several terms of ten \* \* \* years, shall be made in amounts to be determined from time to time by the Secretary of the Treasury, at his discretion, the bonds so to be paid to be distinguished and described by the dates and numbers, beginning for each successive payment with the bonds of each class last dated and numbered, of the time of which intended payment, or redemption, the Secretary of the Treasury shall

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Redemption of "Continued Fives" of 1881.

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give public notice, and the interest on the particular bonds so selected at any time to be paid shall cease at the expiration of three months from the date of such notice."

Accordingly, upon the 12th of May, 1888, a *call* was made for certain of the bonds so issued, a clause being annexed thereto, to the effect that in case any holders of such bonds (within defined limits) "shall request to have their bonds continued during the pleasure of the Government, with interest at the rate of three and one half per cent. per annum in lieu of their payment at the date specified, such request will be granted if the bonds are received by the Secretary of the Treasury on or before the 1st day of July, 1881."

Such *request* was accordingly made generally by the holders in question, and in the end bonds to the amount of \$401,504,900 were *continued*, the method of doing this being a surrender and cancellation of the old bonds and an issue of the same amount of registered bonds of like description but bearing a *new series of numbers*, and having printed across their face "At the request of, and for value received by, the owner of this bond, the same is continued during the pleasure of the Government, to bear interest at the rate of three and one-half ( $3\frac{1}{2}$ ) per centum," etc. These bonds were issued, beginning with Bond No. 1 in each denomination, in the order of the receipt at the Department of the surrendered bonds, and so of course without reference to the priority of numbers of said surrendered bonds.

Upon this state of facts you ask, whether, "in calling what are known to me as continued fives, I shall be justified by law in calling the lowest numbers first, or must I call the highest numbers first."

Upon consideration I have to submit to you my opinion that the bonds which have the highest numbers—or, to use the language of the third section of the act of 1870 (above), those of each class "last dated and numbered"—are to be called first.

The "continued fives" have no other authorization than the above act of 1870. They must therefore conform to the law of their being as therein established, subject only to such voluntary diminution of the burden upon the debtor as it might please the bondholder to accord. In contem-

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Redemption of "Continued Fives" of 1881.

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plation of law they are *the fives of 1881*; with the incident—important financially but not in point of law—that their holders have agreed to remit, virtually to pay back into the Treasury,  $1\frac{1}{2}$  per cent. of the annual interest thereupon merely to conciliate the United States so that they might not so quickly *determine their will*, and *call the bonds*.

I submit that any discussion of the character of the bonds in question must necessarily assume as its basis the fact that in the transaction by virtue of which they were issued, there was no party who was competent to bind the United States by any modification of the incidents to the original bonds. This fact was well known to all who took part in that transaction, the details of which show a scrupulous observance thereof. All that the Secretary of the Treasury did therein, or was, or could have been, understood to do, was virtually to receive for the United States a remission of a part of the original debt.

It is in accordance with this that the bondholders required no counter-stipulations, not even one for a change of that practice by which theretofore the registered fives of 1881 had been subject to change of number, and so to loss of grade, upon every occasion when an old bond was changed for a new, e. g., on an *assignment* of such bond—when by a uniform and unquestioned practice the old bond was surrendered and a new one issued *with a new number corresponding to the date of the transaction*.

Even if some party competent to bind the United States as to a change of policy had been dealt with by the bondholders when the "continued fives" were issued, it seems that a failure by the latter to insist upon a change in the previous system and effect of numbering and renumbering would be very strong in favor of the conclusion to which I have come, but when it is added that there was then present—as was perfectly well known to, and acted upon by, all—no one who could so bind the United States, such conclusion is one from which it is difficult to escape.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

*Acting Attorney-General.*

THE SECRETARY OF THE TREASURY.

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Claim of J. and R. H. Porter.

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## CLAIM OF J. AND R. H. PORTER.

The award made by the Third Auditor on the 10th of May, 1861, under the law of March 3, 1849, chapter 129, in favor of James and Richard H. Porter, was binding upon all officers of the Government. The act of July 28, 1866, chapter 297, modifying the said act of 1849, did not affect claims adjudicated by the Auditor before its passage.

## DEPARTMENT OF JUSTICE,

*May 4, 1882.*

SIR: On the 10th ultimo you referred to me papers in the case of R. H. Porter, requesting my opinion upon the question presented therein.

The facts, so far as it is deemed necessary to state them, are as follows:

The claim of James and Richard H. Porter, having been presented to the Treasury Department, was submitted by the Secretary in the year 1861 upon a report of the facts by the Third Auditor to the Attorney-General for his opinion upon questions of law. On the 25th of April, 1861, Hon. Edward Bates, Attorney-General, delivered an opinion, holding that the claim was valid under the law of March 3, 1849, and that the claimants, upon the facts as found, were entitled to payment from the Government for the cattle, mules, horses, and wagons lost or destroyed, etc. Thereupon the Third Auditor adjusted the account, and on the 10th of May, 1861, awarded to the claimants the sum of \$10,100. The same day the First Comptroller admitted and certified this balance. The award then passed to a warrant, which, however, was not signed by the Secretary. He disapproved the adjustment, and sent the case back to the Auditor.

Three years afterwards that officer took up the case, reconsidered it, and made a second award, allowing to the claimants \$750. This was never acquiesced in by the claimants. They protested, and have insisted from that day until now that the first adjudication was final. And this is the question now before me, whether the Third Auditor had power to reopen the case, after he had once adjusted the account, found a balance due to the claimants under the law, and certified his judgment; in other words, whether the decision of the Third Auditor was final.

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Claim of J. and R. H. Porter.

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The third section of the act of March 3, 1849, (9 Stat., 415) provides that claims presented under that act shall be *adjusted* by the Third Auditor. The fourth section provides that in all *adjudications* of said Auditor, "when such *judgments* shall be in favor of the claim, the claimant or his legal representatives *shall be entitled to the amount thereof* upon the production of a copy thereof, certified by said Auditor, at the Treasury of the United States." This was the law in force when the Porter claim was adjusted. It puts all claims under it in the exclusive jurisdiction of the Third Auditor. He is made the sole tribunal to decide them, and his awards are called *judgments*. The law provides no appeal from them, and for no second hearing after they have been rendered and certified. To obtain payment of them it was only necessary to produce copies certified by the Auditor at the Treasury of the United States.

It will at once be seen that a broad distinction was made between these claims as to their adjustment and final settlement and those submitted to the Third Auditor under the law of March 3, 1817, and subsequent acts. His decisions in the latter cases must be examined and reviewed by the Second Comptroller. With respect to the former there is no such requirement. In express terms the findings of the Auditor were made final.

Now, it has been held by this Department, and the authority for the proposition is ample, that where a statute imposes a particular duty upon an executive officer, and he has performed the duty according to his understanding of the law, there is no appeal from his action or his decision, unless such appeal is expressly provided by law. His decision is final and conclusive. (See 16 Opin., 317; 1 Opin., 624; 2 *id.*, 481-482; 5 *id.*, 275; 11 *id.*, 14; *United States v. Ferreira*, 13 Howard, 40.) It was said by Chief-Justice Taney in this case, where jurisdiction in a class of claims had been conferred by statute upon the Secretary of the Treasury, that his decision was "final and conclusive;" that "it would not be disturbed by an appeal to this or any other court, or in any other way, without the authority of an act of Congress."

When, therefore, the account in this case was adjudicated by the Third Auditor and he had certified his judgment, it

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Commissioners of the District of Columbia.

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became a *liquidated demand*—a demand, in the language of the law, to be paid at the Treasury of the United States. It was binding upon all the officers of the Government. The case had passed from the jurisdiction of the only officer to whom the law gave authority to consider it and had become *res judicata*. Neither the Auditor nor any other officer of the Government had control over it. The judgment belonged to the Messrs. Porter, to whom the law gave the right to demand payment of it at the Treasury.

As regards the effect of the act of July 23, 1866 (14 Stat., 327), which substitutes for the fourth section of the act of 1849 a provision that the findings of the Auditor shall be submitted to the Second Comptroller for revision, it need only be said that it can not reach back to a matter which had passed into judgment in 1861. The language of the statute of 1866 can not be construed as retroactive, so as to affect claims which had been adjusted before its passage.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,  
*Secretary of the Treasury.*

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COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

No power is expressly conferred by statute upon any two of the Commissioners of the District of Columbia to act without the third, and it seems that the three Commissioners should be present and acting when any business of importance pertaining to their office is to be transacted.

DEPARTMENT OF JUSTICE,  
May 10, 1882.

SIR: The statute concerning Commissioners of the District of Columbia authorizes the appointment by the President, with the advice and consent of the Senate, of two persons, *who, with an officer of the Corps of Engineers* of the United States Army of rank above that of captain, shall be Commissioners of the District, and shall exercise all the powers and authority which were vested in the Commissioners under the act of June 20, 1874. (Act of June 11, 1878, secs. 2 and 3, Supp. Rev. Stats., 340.)

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 Declarations in Pension Cases.
 

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No power is expressly conferred upon any two of them to act without the third.

Especial importance seems to be given to the connection of the officer of Engineers with the Commissioners from civil life, indicating a purpose in the legislative mind that the former should be a guide in many matters, and a check perhaps in others, upon the action of the latter. Hence it is provided that the Engineer officer detailed from time to time by the President for this duty shall not be required to perform any other duty.

Another provision is that "*one of said three Commissioners shall be chosen president of the board of Commissioners at their first meeting, \* \* \* and whenever a vacancy shall occur thereafter.*"

From which it is reasonably inferred that the board is to be always full when any business is to be done; for when a vacancy occurs the organization of the Commissioners as a board is dissolved. There must be a new election of chairman to constitute them a legal body. The whole tenor of the statute seems to require that the three Commissioners shall be present and acting when any business of importance pertaining to their office is to be transacted.

My decided impression is that it would be unsafe for the two remaining Commissioners, the seat of the Engineer officer being vacant, to act as if the board were full.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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## DECLARATIONS IN PENSION CASES.

The *proviso* in section 4714, Revised Statutes, is to be construed as applicable to the new limitation prescribed by section 2 of the act of March 3, 1879, chapter 187, as to date of filing pension claims; and a declaration made in accordance therewith may be accepted, to exempt a claim from such limitation.

DEPARTMENT OF JUSTICE,

May 10, 1882.

SIR: By a letter received from Acting Secretary Bell, of your Department, dated the 12th of January last, directing

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Declarations in Pension Cases.

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my attention to sections 4709 and 4714, Revised Statutes, and also to section 2 of the act of March 3, 1879, chapter 187, it is inquired "Whether the *proviso* to section 4714, which authorizes the acceptance of a declaration made before an officer duly authorized to administer oaths" for general purposes, to exempt a pension claim from the limitation as to date of filing prescribed by section 4709, a section which has been repealed, has any force or effect to exempt a pension claim from the limitation as to date of filing prescribed by the second section of the act of March 3, 1879; and if not, whether, when a declaration taken before some officer duly authorized to administer oaths for general purposes, not an officer of a court of record, was filed prior to July 1, 1880, there is otherwise sufficient authority of law to accept the same as a valid declaration to save the arrears of pension in case a declaration taken before an officer of a court of record, as required by section 4714 of the Revised Statutes, shall be filed after July 1, 1880."

To this inquiry I submit the following in reply:

Section 2 of the act of 1879 is a re-enactment of the provisions of section 4709, Revised Statutes, with some modifications thereof. Among these modifications is the introduction of a new limitation for filing applications for pensions, which affects the commencement of the pension, and which takes the place of the limitation prescribed in the latter section. The former section may well be regarded as intended by Congress to be a substitute for the latter, and such it undoubtedly is in legal effect. Thus regarded, a fair implication arises that provisions of a remedial character contained in other sections of the Revised Statutes, which previously applied to section 4709 and were left unchanged by the new legislation, were contemplated by Congress to be applicable to section 2 of the act of 1879 so far as consistent therewith. Agreeably to this view, the *proviso* in section 4714, to which reference is above made, and which is remedial in character, must be construed to apply to the new limitation introduced by the act of 1879, which, as I have already remarked, takes the place of the limitation prescribed in section 4709. Unless so construed, that *proviso* would seem to be without any operation or effect whatever—a result which should be

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Duty of Attorney-General.

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avoided where (as in the present case) an interpretation leading to a different result is admissible.

I am accordingly of opinion that the *proviso* in question authorizes a declaration made in accordance therewith to be accepted to exempt a claim from the limitation as to date of filing prescribed in section 2 of the act of 1879.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. H. M. TELLER,

*Secretary of the Interior.*

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## DUTY OF ATTORNEY-GENERAL.

Where a Senate bill was, at the request of a Senator, submitted to the Attorney-General by the head of a Department for an opinion thereon, in order that such opinion might be laid before the committee of the Senate in charge of the bill: *Held* that the Attorney-General is not authorized to give an official opinion in this case, it involving no question of Departmental administration.

DEPARTMENT OF JUSTICE,

May 11, 1882.

SIR: I have the honor to acknowledge the receipt of your letter of the 6th instant, with the inclosures, to wit: a letter of the 28th ultimo, addressed to you by Senator Cockrell, of Missouri, transmitting a copy of Senate bill No. 1798, entitled, a "Bill to quiet titles to lands in Missouri entered under the graduation act;" and also your reply to the Senator, dated the 6th instant.

The Senator asks through you that the bill be considered by the Department of Justice, and he announces his purpose to present any communication you might receive from this Department to the Committee on Public Lands.

According to your request the bill has been examined, and is found to present no question of law upon which there can be any doubt; for Congress has power to dispose of the public lands and of all claims of the United States thereto. If it chooses to do so, Congress may not only give them away, but may confirm titles in those who had obtained them by fraud.

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Duty of Attorney-General.

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The question upon the bill is one merely of policy or expediency.

Referring to section 356, Revised Statutes, I beg to suggest that the Attorney-General is not authorized to give his advice or opinion in the matter, there being no "question of law arising in the administration of your Department."

I must also, though reluctantly, assign another reason for declining to advise with reference to this bill.

My predecessors have decided, and on several recent occasions I have concurred in their decision, that the Attorney-General is not authorized to give his official opinion upon a call of either House of Congress or any committee or member thereof. It appears to me that the present case is within the spirit if not within the letter of the rule.

It is unquestionably the right of the head of any Department to call upon me for an official opinion in respect to any question of law pending before his Department, and it is my duty promptly to respond to his request; but I can not admit that a committee of Congress can directly or indirectly call for such an opinion for its use in matters of legislation. If given for that purpose, it would be entitled to no more consideration in Congress than the opinion of any person presumed to have some knowledge of the point in question. (14 Opin., 177.)

As relating to the subject of your letter, I have the honor to transmit a copy of a telegram from the district attorney at St. Louis, without comment thereon.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

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

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Professors of the Military Academy.

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## PROFESSORS OF THE MILITARY ACADEMY.

The professors of the Military Academy at West Point are commissioned officers of the Army, whose pay and allowances are assimilated to those of a lieutenant-colonel and a colonel; and in case of such disability as is described in section 4693, Revised Statutes, they are entitled to pensions at the same rate with officers of the rank of lieutenant-colonel.

DEPARTMENT OF JUSTICE,  
*May 12, 1882.*

SIR: In yours of the 4th instant you inquire: First, whether the professor of French at the Military Academy at West Point is within the provisions of the pension law; second, whether the professors at West Point are commissioned officers of the Army; and, third, if they are entitled to pensions under section 4693 of the pension law, what rate of pension are they entitled to?

The professors at the Military Academy are by law a constituent part of the Army (sec. 1094 Rev. Stat.). They receive their appointment or commission from the President (sec. 1313). The provision for their retirement is the same with that for officers of the Army (sec. 1333). They have the same pay and allowances as lieutenant-colonel for the first ten years of service, and after that time the pay and allowances of colonels. (Sec. 1336.)

I think that the intent and the effect of these provisions is to make the professors of the Military Academy at West Point commissioned officers of the Army; and as in pay and allowances they are assimilated to the rank of colonel and lieutenant-colonel, so in case of such disability as is described in section 4693, Revised Statutes, they are entitled to pensions at the same rate with officers of the rank last named.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

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

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First National Bank of New Orleans.

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## FIRST NATIONAL BANK OF NEW ORLEANS.

Consideration of the facts, as gathered from the papers submitted, concerning the indebtedness of the First National Bank of New Orleans (an insolvent bank) to the United States, and of certain questions propounded with reference thereto.

DEPARTMENT OF JUSTICE,

May 12, 1882.

SIR: In yours of the 29th ultimo the following questions are asked:

(1) "Is the United States a preferred creditor of the First National Bank of New Orleans, so that it can exact its whole demand, though other creditors get less or nothing?"

(2) "If the first question is answered in the negative, can this Department give credit to the Comptroller of the Currency for the amount that the United States has received over and above the 70 per cent. dividend declared by the Comptroller, assuming that the United States is entitled to but the amount of the avails of the sales of the vessels, viz, \$188,075.47?"

(3) "Is the assumption correct that the United States is a creditor only for that amount, or is it also a creditor for the amount of Thomas P. May's check of \$315,879.10?"

No statement of facts accompanies such questions. From the papers inclosed by you, however, I gather such facts, so far as material, to be as follows:

On the 11th of May, 1867, an official examination of the affairs of the bank had shown it to be hopelessly insolvent. Upon the 13th special agents of the Treasury of the United States had taken possession thereof, and from that time until the 27th, when it passed into the hands of a receiver, the bank remained under their charge and control. Upon the 13th it appeared by its books that Thomas P. May was a creditor of the bank, by deposits, to the amount of \$315,879.10, and for this he, being then indebted to the United States in a much larger amount on the same day, drew a check payable to a firm of which he was a member, and then as member of that firm indorsed the same and delivered it to an agent of the United States in part satisfaction of his debt. Prior to the delivery of this check, but after the bank had gone into the charge of the agents of the Treasury, May

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First National Bank of New Orleans.

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requested the acting cashier of the bank to certify it, but he declined. Afterwards, however, the word "good" was written upon its face by the receiving teller, who added his signature thereto. It turned out that at that time the bank owed May nothing.

At the time of its failure the bank owed \$188,075.47 to certain of its private creditors, and afterwards, this amount having been paid to such creditors by the United States, the latter in 1872 were subrogated to their claim against the bank.

Having considered the questions stated by you as above, I now submit answers thereto:

(1) The debt due to the United States because of the subrogation as above is not entitled to be *preferred*.

When the bank went into the hands of the receiver that debt was due to private parties. The pro rata due thereupon became immediately *fixed*, although *ascertained* only afterwards. What the United States subsequently became entitled to, therefore, was only such pro rata.

(2) Understanding that the amount received by the United States has gone into the Treasury, I submit that it can not be withdrawn for the purposes indicated. If there were other dividends payable on the same account hereafter, inasmuch as the proceedings before the Comptroller are *in fieri* until the fund is completely administered, I suppose that such an adjustment might be corrected.

(3) I have found nothing in the papers to show that the United States are creditors further than as regards the amount to which they were subrogated as above.

The certification of the May check under the circumstances, *i. e.*, the official impotence of the teller at the time, and the knowledge of the officer who received the check for the United States of the existing condition of the bank, could impart no additional validity thereto, and otherwise, not having been accepted, it could create no debt against the bank.

Very respectfully, your obedient servant,

S. F. PHILLIPS,  
*Solicitor-General.*

THE SECRETARY OF THE TREASURY.

Approved:

BENJAMIN HARRIS BREWSTER.

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Case of Dr. Brooke—Relative Rank.

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## CASE OF DR. BROOKE—RELATIVE RANK.

Previous to the act of March 2, 1867, chapter 159, rank in any grade in the Army was determined by date of commission or appointment; and where commissions were of the same date, then, as between officers of the same regiment or corps, by the order of appointment.

That act (sec. 1219, Rev. Stat.,) introduced a new rule, cumulative in its character, for determining relative rank as between officers "having the same grade and date of appointment and commission," which, as regards officers of the same regiment or corps, operates only where such officers, being of the same grade and date of appointment and commission, have (one or more) "actually served, whether continuously or at different periods, as a commissioned officer of the United States," etc. Where none of them, when appointed, had thus actually served, the former rule (*i. e.*, order of appointment) would still be applicable in fixing their relative rank in the corps.

## DEPARTMENT OF JUSTICE,

*May 18, 1882.*

SIR: In compliance with the request contained in your letter of the 6th of January last, I have considered the claim of Dr. Brooke, assistant surgeon with the rank of captain, for restoration to the position among officers of that grade in the Medical Corps of the Army which he occupied in the Army Register of 1878.

This claim involves a question affecting the relative rank in that corps of Assistant Surgeons Smart, Brooke, Gardner, and Whitehead, who appear in the subsequent Army Registers in the order here named.

These officers were appointed as assistant surgeons in the regular Army in the following order: Brooke, November 22, 1862; Gardner, November 22, 1862; Whitehead, April 13, 1863; Smart, March 30, 1864. Under the law as it then stood, which remained unchanged until the passage of the act of July 28, 1866, chapter 299, an assistant surgeon, during the first five years of his service, ranked as a first lieutenant, and after having served that period he ranked as a captain. They each, therefore, held the rank of first lieutenant up to the date of that act; their relative rank, with respect to one another, corresponding with the order of their appointment, as above. But by the effect of that act, and without any new appointment or commission, they each simultaneously, namely, on

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Case of Dr. Brooke—Relative Rank.

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July 28, 1866, became clothed with the rank of captain. And hereupon the inquiry arises, whether the relative rank of these officers, after thus attaining the rank of captain, remained the same it previously was.

By the law of the military service at that period, rank in any grade was determined by date of commission or appointment; and where commissions were of the same date, then, as between officers of the same regiment or corps, by the order of appointment. (Army Reg. of 1863, par. 4 and 5.) The act of 1866 worked no change in that regard. It is clear that, governed by this rule, the officers referred to would stand in the rank of captain precisely as they had previously stood in the rank of first lieutenant, since they each held the office of assistant surgeon with the rank of captain by virtue of the same commission or appointment by which each originally held the same office with the rank of first lieutenant.

Subsequently, by the act of March 2, 1867, chapter 159, it was provided that, "in fixing the relative rank to be given to an officer as between himself and others having the same grade and date of appointment and commission, there shall be taken into account, and credited to such officer, whatever time he may have actually served, whether continuously or at different periods, as a commissioned officer of the United States, either in the regular Army, or, since the 19th of April, 1861, in the volunteer service, either under appointment or commission from the governor of a State or from the President of the United States," and this provision was made applicable to all "*appointments*" theretofore made under the act of July 28, 1866. (See same provision embodied in sec. 1219, Rev. Stat.)

This is the only legislation, since the act of 1866, which need be considered in connection with the matter in hand. A new rule was thereby introduced for determining relative rank in the Army as between officers "having the same grade and date of appointment and commission," which was moreover to operate retrospectively upon appointments already made under the act of 1866. As regards officers of the same corps this rule, which is cumulative in its character, comes into play only where such officers, being of the same grade and date of appointment and commission, have (one or more)

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Case of Dr. Brooke—Relative Rank.

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“actually served, whether continuously or at different periods, as a commissioned officer of the United States,” etc.; where none of them, when appointed, had thus actually served, the former rule (*i. e.*, order of appointment) would still be applicable in fixing their relative rank in the corps.

To come within the terms of the legislation referred to, the case must be that of two or more officers who not only have the same grade, but who also have the same date of appointment and commission. What, then, is the present case? Not one of the officers mentioned received his appointment under the act of 1866. The commissions under which they now serve were all issued prior to that act, and all of them bear different dates, excepting those of Brooke and Gardner, between whom, however, no question of relative rank could arise under the new rule above adverted to.

It is submitted that, in view of these circumstances, the present case can not be regarded as falling within the provisions of the act of March 2, 1867 (sec. 1219, Rev. Stat.), and that consequently the relative rank of the four officers mentioned, as between themselves, stands unaffected thereby.

The result at which I arrive is, that according to the law of the military service the relative rank of those officers within their corps must be deemed to remain the same in the rank of captain which it previously was in the rank of first lieutenant; being still governed, as originally, by the date and order of their appointment. (Army Reg. 1881, pars. 10, 12, 13.)

I add that the rulings of this Department contained in opinions dated June 6, 1878, July 2, 1878, and January 21, 1880 (16 Opin., 56, 605, 651) apply to a state of facts which differs essentially from the present case, and are in nowise involved in the consideration of the latter.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,

*Secretary of War.*

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 Appointment to Civil Office.
 

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## APPOINTMENT TO CIVIL OFFICE.

K. was elected and qualified as Senator from Iowa for a term which would expire in March, 1883. He resigned in March, 1881, to accept the position of Secretary of the Interior, which office he also resigned in the latter part of the same year. Since then, by act of May 15, 1882, chapter 145, the office of tariff commissioner was created: *Advised* that the second clause of section 6 of the first article of the Constitution disqualifies K. for appointment to such office.

## DEPARTMENT OF JUSTICE,

May 26, 1882.

SIR: It having been suggested that Governor Kirkwood might not be eligible to be appointed on the tariff commission under certain provisions of the Constitution, after conference at the Cabinet the matter was referred by you to me for examination. Knowing that it was your desire to appoint Governor Kirkwood, as it was also the hope of all the members of the Cabinet that he would be appointed, I have given the subject presented to me a serious consideration and a thorough examination, in conjunction with the Solicitor-General, whose assistance I invited in conference upon the subject. The opinion that I now give is the product of that joint examination.

The Solicitor-General has deposited with me in my Department a written opinion concurring with me.

Mr. Kirkwood was elected and qualified as Senator from Iowa for a term which will expire in March, 1883. In March, 1881, he resigned to accept the position of Secretary of the Interior, and having recently resigned this office, is now in private life. Since his second resignation the office of tariff commissioner has been created by act of Congress, and the question is whether, in those circumstances, the second clause of the first article, section 6, of the Constitution of the United States disqualifies him for appointment as such commissioner. The clause is as follows:

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office

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Ute Reservation.

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under the United States shall be a member of either House during his continuance in office."

It is unnecessary to consider the question of the policy which occasioned this constitutional prohibition. I must be controlled exclusively by the positive terms of the provision of the Constitution. The language is precise and clear, and, in my opinion, disables him from receiving the appointment. The rule is absolute, as expressed in the terms of the Constitution, and behind that I can not go, but must accept it as it is presented regarding its application in this case. I caused careful search through the opinions of the Attorneys General for a precedent upon this question, but none has been found. No opinion is recorded in which the subject is considered. Neither is there any record of published cases in the reports of the United States that touch upon this point. Among the decisions of the State courts four cases only were found in which a like constitutional prohibition has been considered. They are not directly in point here, and I can obtain no help from them to avoid the conclusion I have before expressed. They maintain in effect the same principle and adopt the same rule of interpretation which I here submit disables Governor Kirkwood from receiving this appointment.

I am sir, with great respect,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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UTE RESERVATION.

Upon the facts presented: *Advised* that additional legislation is required to enable the Secretary of the Interior to treat the Uncompahgre Ute Indian Reservation as public lands.

DEPARTMENT OF JUSTICE,

May 26, 1882.

SIR: Yours of the 18th instant, in relation to the lands included in the Uncompahgre Ute Reservation in Utah, varies in some degree the detail of facts contained in a communication addressed to me in the same connection upon the 12th of January last by your predecessor, and closes with the

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Ute Reservation.

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same question, viz: "Whether, on this state of facts, additional legislation is required to enable your Department to treat such reservation as public lands."

Upon consideration I am of opinion that the variation above alluded to does not affect the answer which I am to give, and that I must advise, as heretofore, that such additional legislation is needed.

In the state of things anticipated by Congress as about to arise from the removal of the Indians in question, I think it plain that the special statutory condition precedent to the giving of the character of *public lands* to the lands contained in the reservation was to be pursued, and that no power but that of Congress could represent the United States in consenting to a change thereof. That condition, viz, the allotment to the Indians of lands in severalty, has not been performed.

Suppose, however, that the actual state of things is not that which was anticipated, the difficulty in the way of treating these lands as *public* seems removed only one stage in the discussion, inasmuch as a question arises, who has the power to apply to this *unanticipated* state of the case a conclusion which the legislature drew only upon a different hypothesis.

The statute of 1880, chapter 223, and Indian agreement thereby confirmed, bound the United States to give and the Uncompahgres to receive in severalty allotments of "lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there; if not, then upon such other unoccupied agricultural lands as may be found in that vicinity *and* in the Territory of Utah."

In executing this agreement one of your predecessors (confirming the report of a Commissioner that there is not a sufficient quantity of lands in Colorado) has located the Indians *entirely* in Utah, and these have agreed to receive their allotments there. Conceding, as I cheerfully do, that this arrangement will turn out to be one greatly to the advantage of all concerned, and therefore fit to be done, it seems that for its complete effect in point of law it should be ratified by Congress; in other words, that the willingness of the In-

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Case of Eastern Dredging Company.

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dians wholly to abandon Colorado is in point of law a mere *proposal* by them to Congress, which has the corresponding right of looking into the matter and of saying whether it is approved.

In either case, therefore, I am of opinion that a political question remains outlying, and therefore that additional legislation is necessary for the purpose which you mention.

I return herewith the letter of Mr. Belford which accompanied your communication.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE INTERIOR.

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CASE OF EASTERN DREDGING COMPANY.

The facts in this case held not to constitute sufficient grounds to justify the Secretary of War in releasing said company from the performance of its contract with the United States to do dredging in Charles River, Massachusetts, to the extent of 100,000 cubic yards at the price per cubic yard specified in the contract.

DEPARTMENT OF JUSTICE,

June 10, 1882.

SIR: I have examined the case presented in your letter of the 1st instant and in the accompanying papers, which are herewith returned.

It appears that the Eastern Dredging Company, of Portland, Me., entered into a contract with the United States, agreeing to do dredging in Charles River, in the State of Massachusetts, to the extent of 100,000 cubic yards, at 37 cents per cubic yard *in situ*.

In the advertisement of proposals, which is made part of the contract, there is this paragraph:

"The dredging must be done in such places and in such manner as the United States engineer in charge shall direct, and the material removed by the contractor and deposited by him in such places as shall meet the approval of the said United States engineer in charge. The value of the material for filling the low grounds in this vicinity must be duly considered in the prices offered for the work."

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Case of Eastern Dredging Company.

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About 12,500 cubic yards of the dredging was done below Brookline bridge, and the material taken out was disposed of on terms satisfactory to the contractor. But above the bridge, where the remainder of the dredging is to be done, there is no demand for the material to be taken out, and the proprietors of land upon the shores will not allow it to be dumped upon their grounds.

The Dredging Company now makes application to the Secretary of War to be released from the performance of its contract, because, as it alleges, there is in the language above quoted a representation binding upon the Government that the material could be sold at some price.

I am unable to see any such force in the clause referred to. The material is spoken of as having value for filling the low grounds in the vicinity, and the bidders are called upon to consider this in making their offers. Here is no warranty, no promise, not even an assurance that they will be able to sell it at any price. The subject-matter of the contract was before them. They were not deceived, or need not have been. They were told in effect to inquire, examine, and satisfy themselves as to what disposition they would be able to make of the material, and then, in view of the result of such inquiry, to make their bids.

But the company alleges that they were told by Colonel Thom, of the Engineer Corps, who executed the contract on behalf of the Government, that the material could be sold at 10 cents per cubic yard or more, and that his reports to his superior in Washington were exhibited in which he made similar statements.

The answer to this is that the statements were true. Material dredged from Charles River was sold by this company and others for more than 10 cents per cubic yard. But the whole thing was before the eyes of this company. The subject-matter of the contract was in such situation that the party undertaking the work had full opportunity to inspect and examine the truth of the representation, if any was made.

The company stood on an equal footing with the Government's officer in respect to the power of ascertaining whether the material could be disposed of and at what price.

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New Orleans, Baton Rouge and Vicksburg Railroad Company Land Grant.

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The company complains also that because of the refusal of the riparian proprietors to allow the dredged matter to be put upon their premises it is compelled to carry it a great distance, to pass through several draw-bridges, etc.

This also was a thing to be considered by the company before undertaking the work. What it agreed to do is to remove and deposit the material in such places as shall be approved by the engineer in charge. The language is very plain. The obligation is perfect. Can the company be discharged from performance because the transportation is more difficult and to a greater distance than they at first expected ?

Upon a full consideration of the case made in the papers, I am unable to discover sufficient grounds to justify the Secretary of War in releasing said company from its contract, nor do I think he has the power to do so. He can not discharge the legal and just claim of the Government upon the company that it shall fulfill its obligations undertaken with knowledge of their extent and requirements.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

HON. ROBERT T. LINCOLN,  
*Secretary of War.*

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NEW ORLEANS, BATON ROUGE AND VICKSBURG RAILROAD  
COMPANY LAND GRANT.

The assent of Congress to the transfer made by the New Orleans, Baton Rouge and Vicksburg Railroad Company to the New Orleans Pacific Railway Company of all the interest of the former company in the land grant contained in section 22 of the act of March 3, 1870, chapter 122, was not necessary to entitle the latter company to the benefit of such grant in aid of the construction of the road projected by it. The grant, by its terms, is *in present*; the interest of the New Orleans, Baton Rouge and Vicksburg Railroad Company therein, at the time of the transfer, was assignable, and the New Orleans Pacific Railway Company was such a successor or assignee as is contemplated by said act. For the 68 miles of the New Orleans, Mobile and Texas Railroad, if constructed prior to said act, no benefit can be claimed by the New Orleans Pacific Railway Company under said transfer from the grant; nor, in case of such prior construction and the non-construction of any portion of the New Orleans, Baton Rouge and Vicksburg road, has the purpose of the grant failed and the grant lapsed.

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New Orleans, Baton Rouge and Vicksburg Railroad Company Land Grant.

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If the New Orleans, Mobile and Texas road was constructed subsequently to the date of said act, so much of its road as is now owned by the New Orleans Pacific Railway Company is such a road as is contemplated for acceptance by the President, and patents may issue to the latter company for lands opposite to and conterminous with such constructed portion of the road.

DEPARTMENT OF JUSTICE,

June 13, 1882.

SIR: By a letter dated the 5th of January last, your predecessor submitted to me a number of questions arising upon an application of the New Orleans Pacific Railway Company for certain lands claimed under the land grant made to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act of Congress of March 3, 1870, chapter 122.

The land grant mentioned is contained in the twenty-second section of that act, which provides: "That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have the right to connect, by the most eligible route, to be selected by said company, with the said Texas Pacific Railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria in said State to connect with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this act granted in the State of California to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor, and opened for settlement and pre-emption, upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company within said State of California: *Provided*, That said company shall complete the whole of said road within five years from the passage of this act"

The eastern terminus of the Texas Pacific Railroad, as fixed by the same act, was a point at or near Marshall, Tex.

The New Orleans, Baton Rouge and Vicksburg Railroad Company was incorporated by an act of the legislature of

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New Orleans, Baton Rouge and Vicksburg Railroad Company Land Grant.

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Louisiana, passed December 30, 1869, which authorized it to construct and operate a railroad "from any point on the line of the New Orleans, Jackson and Great Northern Railroad within the parish of Livingston, running from thence to any point on the boundary line dividing the States of Louisiana and Mississippi," the route here indicated lying east of the Mississippi River. It was also authorized to construct and operate a branch railroad from its main line (above described) to the city of Baton Rouge; and for the purpose of connecting its railroad with the railroads of other companies, etc., it was furthermore authorized "to construct, maintain, and use, by running thereon its engines and cars, such branch railroads and tracks as it may find necessary and expedient to own and use," and such branch railroads were, for all the purposes of the act, to be deemed and taken to constitute a part of the main line of its railroad within the State of Louisiana.

On November 11, 1871, that company filed in the General Land Office a map designating the general route of a road projected thereby from Shreveport by way of Alexandria to Baton Rouge, and thereupon a withdrawal of the public lands along the same was ordered, which became effective in December following.

Subsequently, by an act of the legislature of Louisiana, passed December 11, 1872, the same company was given "full power and authority to commence the construction of their road in the city of New Orleans or Shreveport, or at any intermediate point or points on their line of road as may best suit the convenience of said company and facilitate the speedy construction of a continuous line from the city of New Orleans to the city of Shreveport, or perfect railroad communication with the Texas Pacific Railroad, or any other railroad in northwestern Louisiana, at or near the Louisiana State line: *Provided, however,* That the said company shall construct the line of its road between the city of New Orleans and the city of Baton Rouge on the east side of the Mississippi River to the corporate limits of the said city of Baton Rouge or adjacent thereto."

In the meantime, by the act of Congress of May 2, 1872, chapter 32, the Texas and Pacific Railway Company (formerly styled the Texas Pacific Railroad Company) was "au-

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New Orleans, Baton Rouge and Vicksburg Railroad Company Land Grant.

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thorized and required to construct, maintain, control, and operate a road between Marshall, Texas, and Shreveport, Louisiana, or control and operate any existing road between said points, of the same gauge as the Texas and Pacific Railroad." The same act further provided that "all roads terminating at Shreveport shall have the right to make the same running connections, and shall be entitled to the same privileges for the transaction of business in connection with the said Texas and Pacific Railway, as are granted to roads intersecting therewith."

On February 13, 1873, a second map was filed in the General Land Office by the New Orleans, Baton Rouge and Vicksburg Railroad Company, designating the general route of a road projected thereby from New Orleans to Baton Rouge, and a withdrawal of the public lands along the same was ordered, which took effect in April, 1873. The route between those places thus designated lies on the east side of the Mississippi River.

That company has not constructed any part of its road either on the route between New Orleans and Baton Rouge or on the route between the latter place and Shreveport; nor, indeed, has there been a *definite location* of its road anywhere between the points mentioned. Nothing beyond the designation of the general route thereof appears.

Pursuant to a resolution of its board of directors, adopted December 29, 1880, all the right, title, and interest of that company in and to the aforesaid grant of public lands made by the act of March 3, 1871, were deeded by it to the New Orleans Pacific Railway Company. This action of the board of directors and officers of the former company was afterwards approved and ratified by the stockholders thereof at a meeting held in December, 1881.

The New Orleans Pacific Railway Company was originally incorporated under the general laws of the State of Louisiana in June, 1875. Its charter was subsequently amended by acts of the Louisiana legislature, passed February 19, 1876, and February 5, 1878. It is thereby authorized to construct a railroad "beginning at a point on the Mississippi River at New Orleans, or between New Orleans and the parish of Iberville on the right bank of the Mississippi, and

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New Orleans, Baton Rouge and Vicksburg Railroad Company Land Grant.

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Baton Rouge on the left bank, etc., or from any point within the limits of this State, and running thence toward and to the city of Shreveport," which is made its northwestern terminus.

The route of this company, as projected, is understood to extend from New Orleans to Baton Rouge, and thence by way of Alexandria to Shreveport. Between New Orleans and Baton Rouge it lies on the west side of the Mississippi River, while the designated route of the New Orleans, Baton Rouge and Vicksburg Railroad Company between the same point lies on the east side of that river. Between Baton Rouge and Shreveport its general course and direction correspond in the main with the route designated by the last named company. It is throughout its entire length from New Orleans to Shreveport within the limits of the before-mentioned withdrawals of public lands.

In October, 1881, the president of the New Orleans Pacific Railway Company made affidavit that three sections of its road were then completed and ready for examination by the Government; whereupon a commissioner was appointed to examine the same, the result of whose examination appears in a report made by him to the Secretary of the Interior under date of the 26th of that month. One of the sections embraces 60 miles of road, beginning on the west bank of the Mississippi River, opposite New Orleans, and ending near the town of Donaldsonville; another embraces 20 miles of road, near Alexandria; and the third embraces 50 miles of road, terminating at Shreveport. For each of these sections lands are claimed by that company under the aforesaid land grant as assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company. No map of definite location of any portion of its road has been filed other than of the constructed portions.

It appears that in February, 1881, the New Orleans Pacific Railway Company purchased from Morgan's Louisiana and Texas Railroad and Steam-ship Company the road constructed on the west bank of the Mississippi River by the New Orleans, Mobile and Texas Railroad Company from Westmego to White Castle, a distance of 68 miles, and that the same has become a part of the main line of the road of the New Orleans Pacific Railway Company.

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New Orleans, Baton Rouge and Vicksburg Railroad Company Land Grant.

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The following are the questions submitted :

"(1) Was the grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company a grant *in presenti*?

"(2) Had the New Orleans, Baton Rouge and Vicksburg Railroad Company at the date of the alleged transfer of lands to the New Orleans Pacific Railway Company such an interest in the lands under said act as was assignable?

"(3) Is the New Orleans Pacific Railway Company such a successor to or assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company as is contemplated by said act?

"(4) Should it appear that the 68 miles of the New Orleans, Mobile and Texas Railroad was constructed *prior* to the act of March 3, 1871, granting lands to *aid in the construction* of the New Orleans, Baton Rouge and Vicksburg Railroad, can the New Orleans Pacific Company (its assignee) claim any benefit from the grant? Or, in case of such prior construction and the non-construction of any portion of the New Orleans, Baton Rouge and Vicksburg road, has the purpose for which the grant was made failed and the grant consequently lapsed?

"(5) If the New Orleans, Mobile and Texas road was constructed subsequently to the date of said act, is so much of its road as is now owned by the New Orleans Pacific Company such a road as is contemplated for acceptance by the President within the meaning of said act, and may patents issue to the latter for lands opposite to and coterminous with such constructed portion of road?"

These questions are accompanied by a request for an opinion upon such other questions of law as may suggest themselves touching the transfer of said land grant to which reference is above made.

Of the above-stated questions the first three may be considered together, in connection with the following inquiry, which presents itself at the outset: Whether the *assent of Congress* to the transfer made by the New Orleans, Baton Rouge and Vicksburg Railroad Company of all its interest in said land grant to the New Orleans Pacific Railway Company is necessary (by reason of anything in the provisions of the grant itself) to entitle the latter company to the bene-

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New Orleans, Baton Rouge and Vicksburg Railroad Company Land Grant.

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fit of said grant in aid of the construction of the road projected by it.

The act of March 3, 1871, passed to the New Orleans, Baton Rouge and Vicksburg Railroad Company a *present interest* in a certain number of alternate sections of public lands per mile within the limits there prescribed. Its language is: "There is hereby granted to the said company" the number of alternate sections mentioned—words which import a grant *in presenti*, and not one *in futuro*, or the promise of a grant (97 U. S., 496.) But the grant thus made is in the nature of a float. It is of sections to be afterwards located, their location depending upon the establishment of the line of the road. Until this is definitely fixed the grant does not attach to any specific tracts of lands. Upon the line of the roads being definitely located, the grant then first acquires precision, and the company becomes invested with an inchoate title to the particular lands covered thereby, which can ripen into a perfect title only as the construction of each section of 20 miles of road is completed and approved, when the right to patents for the lands opposite to and counterminous with such construction accrues.

The *provisio* in the grant that the company shall complete the whole of its road within five years from the date of the act is a condition subsequent, the failure to perform which does not *ipso facto* work a forfeiture of the grant, but only gives rise to a right in the Government to enforce a forfeiture thereof. Yet, in order to enforce a forfeiture, such right must be asserted by a judicial proceeding authorized by law, or by some legislative action amounting to a resumption of the grant (*Schulenberg v. Harriman*, 21 Wall, 44). Hence, until advantage is taken of the non-performance of the condition, under legislative authority, the interest of the grantee in the grant remains unimpaired thereby.

Such being the nature and effect of the grant and its accompanying condition, and no action having been taken either by legislation or judicial proceedings to enforce a forfeiture thereof, it follows that at the period of said transfer by the New Orleans, Baton Rouge and Vicksburg Railroad Company this company was invested with a present interest in the number of alternate sections of public lands per

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mile granted by the act of 1871, notwithstanding it was already in default in the performance of the condition referred to, and that it still retained a right to proceed with the construction of the road in aid of which the grant was made until advantage should be taken of the default. But as it had not then definitely fixed the line of its road, although a map designating the general route thereof was duly filed, that interest did not attach to any specific tracts of land, but remained a float, as it were, needing a definite location of the road before it could become thus attached. Was the interest here described assignable to another company so as to entitle the latter to the benefit of the grant in aid of the construction of its road between the places named therein without the assent of Congress?

Doubt has perhaps arisen on this point, in view of the fact that in one or two instances it has been thought expedient to obtain legislation by Congress confirming or authorizing a similar assignment (see sec. 2 of the Act of March 3, 1865, chap. 88, and sec. 1 of the Act of March 3, 1869, chap. 127), and also in view of the adverse ruling of this Department in the case of the Oregon Central Railroad Company (13 Opin., 382). However, a similar assignment made in 1868 by the Hannibal and St. Joseph Railroad Company to the Pike's Peak Railroad Company, afterwards known as the Central Branch Company, was held to be valid by Attorney-General Stanbery in an opinion given to the Secretary of the Treasury, under date of July 25, 1866.

In the latter case, the Hannibal and St. Joseph Company, which was incorporated by the State of Missouri with authority to construct a railroad between Hannibal and St. Joseph, within that State, was by the Pacific Railroad act of July 1, 1862 (sec. 13), authorized to "extend its road from St. Joseph via Atchison, to connect and unite with the road through Kansas, \* \* \* and may for this purpose use any railroad charter which has been, or may be, granted by the legislature of Kansas," etc.; and by the fifteenth section of the same act it was provided that "wherever the word company is used in this act, it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had been properly added thereto." Subsequently,

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New Orleans, Baton Rouge and Vicksburg Railroad Company Land Grant.

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in 1863, an assignment was made by that company of all its rights under said act (which included an interest in both a land and a bond subsidy) to the Atchison and Pike's Peak Railroad Company, a company previously organized under a charter granted by the legislature of Kansas. The latter company, having constructed a section of 20 miles of the proposed road west from Atchison, claimed the benefit of the grant made to the Hannibal and St. Joseph Company as its assignee, and this claim was recognized and allowed in accordance with the opinion of the Attorney-General. It will be observed, however, that the Hannibal and St. Joseph Company was authorized to "use any railroad charter which has been, or may be, granted by the legislature of Kansas," and this, together with the provision in the fifteenth section quoted above, may have been regarded as sufficient to sustain the assignment.

In the case of the Oregon Central Railroad Company, mentioned above, a grant of a right of way through the public lands, and also of alternate sections thereof, was made to that company, "and to their successors and assigns," by the act of May 4, 1870, chapter 69, for the purpose of aiding in the construction of a railroad and telegraph line between certain places in Oregon. In August following an instrument was executed by the company assigning all its interest in the grant to the Willamette Valley Railway Company, and thereupon the question arose whether the grant was susceptible of being thus transferred. The Attorney-General (Mr. Akerman), to whom the question was submitted, after reviewing the various provisions of the act, some of which (see sec. 5) imposed certain duties and required certain important acts to be performed by the company, decided in the negative, holding that upon consideration of those provisions the Oregon Central Company was alone within the contemplation of Congress in respect of the donations made and duties imposed by that act. The words "their successors and assigns," as used in the act, were regarded as words of limitation merely.

But the grounds upon which that decision appears to have been based are not found to exist in the case now under con-

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sideration. Here a grant of a certain number of alternate sections of public lands per mile is made to the New Orleans, Baton Rouge and Vicksburg Railroad Company, its successors and assigns, in aid of the construction of a road from New Orleans by the route indicated to connect with the eastern terminus of the Texas and Pacific railroad; which lands are required to be "withdrawn from the market, selected, and patents issued therefor, and opened for settlement and pre-emption, upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company." The grant is coupled with no special duties or trusts for the performance of which there is reason to believe the particular company named therein was more acceptable to Congress than any other. Its purpose is to secure the construction of a railroad between the points designated; and whether this purpose be fulfilled by that company or by another company must be deemed unimportant in the absence of any provision indicative of the contrary. The interest derived by the grantee, though it remain only a float, is a vested interest, and it is held under the same limitation which applies after it develops into an estate in particular lands. Until extinguished by forfeiture for non-performance of the condition annexed to the grant, I perceive no legal obstacle arising out of the grant itself to a transfer of such interest by the grantee to another company; and should the latter construct the road contemplated agreeably to the requirements of the grant, and thus accomplish the end which Congress had in view, I submit that it would clearly be entitled to the benefits thereof.

The question of the assignability of the interest of the grantee would be more difficult if, after definitely locating the line of its road and thus attaching the grant to particular lands along the same, it was proposed to transfer that interest to another company for the benefit of a road to be constructed by the latter on a different line, though following the general course of the other road. But in the present case the facts give rise to no such difficulty. The grant had not previous to the transfer become thus identified with a particular line of road, and was thereafter susceptible of

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New Orleans, Baton Rouge and Vicksburg Railroad Company Land Grant.

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location upon the line of the road projected by the assignee (the New Orleans Pacific Company), provided the road met the requirements of the grant in other respects, as to which no doubt is suggested.

My conclusion is that the assent of Congress to the assignment made by the New Orleans, Baton Rouge and Vicksburg Railroad Company, as above, is not necessary in order to entitle the assignee to the benefit of the land grant in question.

The remaining questions relate to the 68 miles of railroad formerly belonging to the New Orleans, Mobile and Texas Railroad Company, but now owned by the New Orleans Pacific Company, and made a part of its main line between New Orleans and Baton Rouge.

The land grant in question was, as its language imports, made in *aid of the construction* of a railroad between certain termini—contemplating a road to be constructed, not one already constructed. It has not been the policy of Congress thus to aid constructed roads. Had a constructed road existed at the date of the grant which extended from one terminus to the other, and afterwards the New Orleans, Baton Rouge and Vicksburg Railway Company, instead of entering upon and completing the construction of a road, had purchased the road already constructed, this, it seems to me, would not have satisfied the purposes of the grant so as to entitle the company to the benefit thereof. The same objection would apply where the constructed road extended over only a part of the route contemplated by the grant. So far as I am advised, the action of the Government hitherto has accorded with this view. On the other hand, if such a road was constructed subsequently to the date of the grant and is owned by the grantee or the assignee of the latter, I see no ground for excluding it from the benefit of the grant should it otherwise fulfill the requirements thereof.

Agreeably to the foregoing views, and in direct response to the several questions submitted, I have the honor to reply as follows:

The first, second, and third questions I answer in the affirmative. The fourth question (including the alternative

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Miami Indians of Indiana.

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added thereto) I answer in the negative. The fifth question I answer in the affirmative—assuming as I do the company named thereip to be an assignee of the grantee in the act referred to.

I have the honor to be, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. H. M. TELLER,

*Secretary of the Interior.*

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MIAMI INDIANS OF INDIANA.

The children of Thomas F. Richardville, a Miami Indian of Indiana, are entitled to share with other persons upon the roll of the Eastern Miamis equally, and without deduction, in the distribution of the fund (\$221,257.86) appropriated by the act of March 3, 1881, chapter 132, for the payment of the Miami Indians of Indiana.

DEPARTMENT OF JUSTICE,

June 15, 1882.

SIR: The question submitted to me by your letter of the 29th ultimo is substantially this: Whether the children of Thomas F. Richardville, a Miami Indian of Indiana, are entitled under the act of March 3, 1881, to share with other persons upon the Indiana Miami roll equally, and without deduction, in the fund distributed by that act?

It provides that the sum of \$221,257.86 belonging to the Eastern Miamis be divided among them. That all may participate who are entitled, it is provided that a census be taken and a list of the names of all the individuals belonging to the land of Eastern Miamis be made out.

This enumeration and list, distinguishing between males and females and between those over twenty-one years and those under that age, was to be reported to the Secretary of the Interior, and when approved by him it is declared "shall stand as the true list of the persons entitled to share in the payments provided for in this act." And it further declared that "each person named in said list shall be entitled to receive the *same amount*, irrespective of age or sex." No matter whether they have shared lawfully or unlawfully in other

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Miami Indians of Indiana.

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funds, all persons upon this list, approved by the Secretary, shall share equally in *this* fund. No deduction from the share of any one is provided for. Such is the law—mandatory in its terms and unmistakable in what it commands.

The children of Thomas F. Richardville are upon this list of the Eastern Miamis with the approval of the Secretary of the Interior. There is no question of their right to be upon that list. Upon this statement there can not, in my opinion, be a doubt as to the right of each of these children to receive an equal portion of the fund with every other person upon the list. The law leaves no discretion in the Secretary to make any deduction from their shares.

But it is said that these children have shared in the installments that have been paid from the fund belonging to the *Western* Miamis, and by the third article of the treaty of June 5, 1854 (their father being of the eastern band and claiming to draw for himself and children from the fund belonging to that part of the tribe), they (the children) are forbidden to receive any portion of the fund belonging to the western band; and it has been claimed that the Secretary of the Treasury, exercising a kind of equitable jurisdiction in the matter, may reimburse the Western Miami fund by deducting from the shares of these children in the eastern fund so much as they have received unlawfully, as alleged, from the western fund.

In answer to this it should be sufficient to cite the law by which alone the Department of the Interior is authorized to make any distribution at all of the fund belonging to the Eastern Miamis. Each person upon the list shall receive the same amount from that fund.

If it were necessary to pursue this subject further it might be stated that under section 4 of the act of March 3, 1873, a census of the Western Miamis was taken. \* According to the provisions of the act none were to be included unless justly entitled under the treaty of June 5, 1854. In this census and upon the lists which were to be submitted to the Secretary of the Interior for his approval the Richardville children *then* born were enrolled, and this enrollment had the approval of the Secretary. The chiefs of the Western Miamis

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Miami Indians of Indiana.

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also have since expressed their free and hearty assent that all the children, with their mother, who has always belonged to the western band, should be upon their roll and participate in their funds.

Now, it is submitted that if the children have been upon both rolls and have received benefit from both funds with the knowledge and approval of the Secretary, this was matter for the consideration of Congress. The facts being known, the act of March 3, 1881, was passed, and there is no provision in it for deductions from the shares of these children in the fund to be distributed. There is therefore no ground for the assumption that the Secretary may subtract anything from their portions.

Moreover, the Western Miamis, in whose interest the prohibition was inserted in the treaty, do not complain; they make no demand that the moneys received by these children from the western fund should be paid back. In respect to them the prohibition seems to have been waived by those who were interested in its observance.

Without continuing this discussion, I rest upon the law of March 3, 1881, and am clear in the opinion that according to its provisions the children of Thomas F. Richardville must receive without deduction equal portions with all others upon the list of Eastern Miamis of the moneys distributed under that law.

The papers accompanying your letters are herewith returned.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. H. M. TELLER,

*Secretary of the Interior.*

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Case of Zadoc Staab.

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## CASE OF ZADOC STAAB.

Where a contract for the delivery of certain supplies at an Indian agency provided for the acceptance of goods inferior in quality to the sample where the emergency demanded it, *held* that the time and place of delivery before the goods were distributed were eminently the time and place to determine their relative value.

## DEPARTMENT OF JUSTICE,

*June 15, 1882.*

SIR: In your letter of the 5th of April you transmit a communication of the Commissioner of Indian Affairs, and request my opinion upon the case of Zadoc Staab, stated therein.

The facts are as follows: By a contract dated May 9, 1881, with H. Price, Commissioner of Indian Affairs, Zadoc Staab agreed to deliver at the Navajo Agency, N. Mex., 100,000 pounds of wheat, at \$5.13 per hundred pounds. The contract being by its terms subject to the approval of the Board of Indian Commissioners and the Secretary of the Interior, their respective approvals were indorsed thereon.

Staab delivered 96,862 pounds of wheat, much of which was inferior to the sample, and the agent designated to receive the same, compelled by the necessities of the service to receive it, appointed inspectors to determine the percentage of value less than the sample. The provision of the contract under which this was done is as follows: "Provided that in the case of any article to be furnished under this contract, if the quality of that offered shall be inferior to the standard of the sample upon which the contract was awarded, and the necessities of the service be such as to compel the party of the first part, or his agents, to accept the article or articles offered, then the same may be received subject to the inspection and test of a competent inspector, to be designated by the party of the first part, to determine the percentage of value less than the sample aforesaid, and upon whose findings payment shall be made at a percentage of deduction twice greater than the difference in value between the articles so furnished and the price herein agreed to be paid."

The inspectors recommended a discount of 5 per cent. on the entire quantity of wheat delivered. The recommenda-

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Case of Zadoc Staab.

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tion was approved by the Commissioner of Indian Affairs, and a deduction of twice the difference in value, or 16 per cent., amounting to \$496.90, was made from his accounts. This action was approved by the Board of Indian Commissioners and the Secretary of the Interior. When the account reached the Second Comptroller for settlement he deducted the further sum of \$165.63 ( $3\frac{2}{3}$  per cent.), and stated a balance due Staab of \$4,306.49 instead of the \$4,472.12, allowed by the Commissioner of Indian Affairs, the Board of Indian Commissioners, the Secretary of the Interior, and the Second Auditor. Thereupon the Secretary of the Interior, pursuant to section 191 of the Revised Statutes, returned the papers for reconsideration by the Second Comptroller, who replied that he saw no reason to modify his decision.

He places his decision upon three grounds: First, "whatever necessity there may have been at the beginning to compel the acceptance of *part* of the inferior wheat, it is not shown that there was any exigency demanding an immediate supply of wheat for consumption in the future;" Second, that the two inspectors "were not appointed in a manner known to the law, nor were they designated by the party of the first part (the Commissioner of Indian Affairs);" Third, that the clause of the contract "which purports to provide that boards of survey, or other designated officers, shall determine the price to be paid for supplies, is of no force as part of a contract."

While designation by the local agent of the inspectors was not literally within the terms of the contract, the approval by the Commissioner of Indian Affairs, the Board of Indian Commissioners, and the Secretary of the Interior of the recommendations of the inspectors was an ample ratification of their appointment.

Whether the necessities of the service compelled acceptance of the articles offered was a question which, from its nature, was determinable only by the Commissioner of Indian Affairs or his agents, under the direction of the Secretary of the Interior. Speaking of section 10 of the act of March 2, 1861 (12 Stat., 220, now 3709, Rev. Stat.), Mr. Justice Miller says (*Speed's Case*, 8 Wall., 77) "that statute, while requiring

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Case of Zadoc Staab.

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such advertisement as the general rule, invests the officer charged with the duty of procuring supplies or services with a discretion to dispense with advertising, if the exigencies of the public service require immediate delivery or performance. It is too well settled to admit of dispute at this day, that where there is a discretion of this kind conferred on an officer, or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract can not be made to depend on the degree of wisdom or skill which may have accompanied its exercise." If, on account of the impossibility of readvertising or of the contractor procuring better articles in time to meet the exigencies, authority is lodged anywhere to accept supplies inferior to the requirements of a contract, it is vested in the officer or officers charged with the duty of making the purchases, and the rights of third parties are not to be affected by the correctness of the conclusions of such officers as to the necessity which compels such acceptance. That the Commissioner of Indian Affairs passed upon this question before receiving the wheat does not appear; it is sufficient that he and the Secretary of the Interior approved the deductions and allowance for payment.

It remains only to consider the agreement between the Commissioner and Mr. Staab that payment should be made upon the findings of the inspectors, for if the agreement was valid, neither party might appeal from their findings to the accounting officers.

In *United States v. Shrewsbury* (23 Wall., 508) the contract provided that a board of survey should examine the quantity and condition of stores transported, and in case of loss, deficiency, or damage, report the apparent causes, assess the damages, and state whether it was attributable to neglect or want of care on the part of the contractor, and the proceedings should be attached to the bill of lading and "conclude the payments to be made on it." Under this a board of survey recommended a deduction for a deficiency in the amount of corn delivered by the contractor. Subject to this deduction and under protest the claimant was paid. The Court of Claims, holding that the proceedings of the board failed to carry out the intent and terms of the contract, ren-

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Case of *Zodac Staab*.

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dered judgment in favor of claimant for the amount of the deduction, which judgment on appeal was reversed by the Supreme Court. Mr. Justice Swayne, in delivering the opinion, says (p. 517): "The provision of the contract touching the board was important to the Government. The points of delivery were in the wilds of the West. If there was any failure by the contractor, the time and place of delivery were the time and place to ascertain the facts and to put the evidence in effectual shape. Afterwards it might be impossible for the Government to procure the proofs, and if it were done the expense might greatly exceed the amount of the items in dispute. \* \* \* We think the reports were sufficient, and that they conform in every substantial particular to the requirements of the contract".

In *Kühlberg v. The United States* (97 U. S., 398) the contract provided that transportation should be paid according to distance, which was to be ascertained and fixed by the chief quartermaster. The quartermaster discharged this duty, and the Supreme Court held that as the difference between his estimate and the distances by air-line, or the road usually traveled, was not so material as to justify the inference that he did not exercise the authority given him with an honest purpose, his action was conclusive upon the appellant as well as upon the Government.

While nothing was said in the former case about the validity of the clause providing for a board of survey, it is apparent that its validity was involved in and essential to the decision. A distinction may be drawn between deductions for the loss of supplies caused by neglect of the transporter and the percentage of deduction to be made for the inferior quality of supplies; but I see no difference in principle, and I am of opinion that the proviso in clause 5 of the present contract is valid. If the Commissioner may accept goods inferior in quality when the emergency demands it, the time and place of delivery before the goods are distributed or consumed are eminently the time and place to determine its relative value, and I think it was perfectly competent for the Commissioner and contractor to agree that then and there the controversy should be determined. A different case might be presented if there were proof of fraud, or if the

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Tonnage Tax.

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difference between the views of the inspectors and of the accounting officers was so gross as to necessarily imply on the part of the inspectors bad faith or a failure to exercise an honest judgment; but no feature of that kind presents itself here.

I think these views answer the several inquiries of the Commissioner of Indian Affairs without taking them up in detail.

I am, very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE INTERIOR.

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TONNAGE TAX.

A foreign vessel, *i. e.*, one belonging wholly or in part to a subject of a foreign power, is not liable to the penal tax prescribed in section 4371, Revised Statutes. This tax applies exclusively to vessels belonging to citizens of the United States, which are capable of being and should be enrolled and licensed.

DEPARTMENT OF JUSTICE,

June 17, 1882.

SIR: In a letter dated the 1st instant, the Hon. H. F. French, then Acting Secretary of the Treasury, requested my opinion upon the following question:

"Does a foreign vessel, or one not licensed, enrolled, or registered as a vessel of the United States, become liable to the penal tax prescribed in section 4371 of the Revised Statutes by conveying passengers between different ports and places in this country, if the vessel does not transport goods in violation of section 4347 of the same statutes?"

By section 4371 vessels of 20 tons or upward, other than registered vessels, which are found trading between district and district, etc., without being enrolled and licensed, including also unlicensed vessels less than 20 tons and not less than 5 tons found so trading, are required to pay the same fees and tonnage in any port of the United States at which they may arrive as vessels not belonging to a citizen of the United States, if they are "laden with merchandise the growth or

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Tonnage Tax.

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manufacture of the United States only, distilled spirits excepted, or in ballast." The same section further provides that if the vessel has on board any articles of foreign growth or manufacture, or distilled spirits, other than sea stores, she shall, together with the lading found on board, be forfeited.

Section 4347 declares that "no merchandise shall be transported under penalty of forfeiture thereof from one port of the United States to another port of the United States in a vessel belonging wholly or in part to a subject of any foreign power; but this section shall not be construed to prohibit the sailing of any foreign vessel from one to another port of the United States, provided that no merchandise other than that imported in such vessel from some foreign port, and which shall not have been unladen, shall be carried from one port or place to another in the United States." The remainder of the section is unimportant in connection with the question under consideration.

This question concerns "a foreign vessel, or one not licensed, enrolled, or registered as a vessel of the United States;" and in view of the reference therein to section 4347, I understand it to mean only a vessel of the same character as is described in that section, namely, one belonging wholly or in part to a subject of a foreign power, and which is in the same section also called a foreign vessel. In reply thereto I submit that the "penal tax" in section 4371 is not applicable to such a vessel. It applies, as the context shows, exclusively to vessels belonging to citizens of the United States which are capable of being and should be enrolled and licensed, but which are found trading in the manner described without enrollment and license. Thus the penalty imposed upon a vessel so trading is payment of the "same fees and tonnage" as are paid by vessels not belonging to citizens of the United States, *i. e.*, foreign vessels. Its object is to compel American vessels employed in the coasting trade and fisheries to become enrolled and licensed. When enrolled and licensed, they are exempted from tonnage duties (sec. 4220, Rev. Stat.); when not, they are subjected, by way of penalty, to the fees and tonnage payable by foreign ves-

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Claim of General Paul.

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sels. What these charges are must be ascertained by reference to statutory provisions contained elsewhere than in section 4371. In no case, as it seems to me, can a foreign vessel become liable to a penalty under that section.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,  
*Secretary of the Treasury.*

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## CLAIM OF GENERAL PAUL.

Under the joint resolution of April 12, 1870, granting to General Gabriel R. Paul (retired) "the full pay and allowance of a brigadier-general in the Army of the United States," that officer is not entitled to an allowance of forage.

DEPARTMENT OF JUSTICE,  
June 19, 1882.

SIR: Your letter of the 9th instant submits to me the question whether Brig. Gen. Gabriel R. Paul is entitled to allowance of forage under the joint resolution of Congress granting him the "full pay and allowance of a brigadier-general of the United States Army."

The resolution was approved April 12, 1870, and General Paul claims forage from that date. General Paul is a retired officer, and was so prior to the passage of the joint resolution. He is doubtless entitled to all the allowances granted by law and regulations to officers of his rank.

But Army officers are not and have not been since the year 1816 allowed forage except for "horses actually kept by them in service when on duty, and at the place where they are on duty." (See sec. 1272, Rev. Stat., p. 221, and the acts cited in the margin.) The allowance is further modified and restricted by section 8 of the Army appropriation act of June 18, 1878. (Supp. Rev. Stats., p 362.)

The clear intent of all the acts upon the subject is to provide food for horses belonging to officers engaged in active duty with soldiers in the field or at military posts. Not since the act of April 24, 1816, if ever, have officers off duty been allowed forage. The term "allowance," as used in the resolution, means only such things as are allowed by law and reg-

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Indian Inspector—Bond,

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ulations to brigadier-generals in the same condition or status in which General Paul then was. He had no need of horses for the performance of any duty required of him. The reason for the allowance of forage failing, it can not be supposed that it was the intention of Congress that he should have it. This conclusion is strengthened by the fact that by the later acts forage must be supplied in kind, where it is allowed at all—the supposition being that there are horses in existence and in use by the officer, and necessary to the efficient performance of his duties. It certainly seems incongruous that the Quartermaster-General should issue hay, oats, and corn in quantities sufficient to feed three or four horses to an officer who can not need horses for military uses.

I agree with the Department of War, that the General's claim to the allowance must be rejected.

The papers are herewith returned.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,

*Secretary of War.*

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INDIAN INSPECTOR—BOND.

Although the general functions and duties of Indian inspectors do not include specifically the disbursement of public money, and these officers are not required by statute to give bond, yet the Secretary of the Interior may lawfully assign to them other duties relating to business concerning the Indians in addition to those prescribed whenever the exigencies of the public service require it.

Where the particular duty thus assigned to an inspector involves the receipt or disbursement of public money, it is competent to the Secretary to take a bond for the protection of the Government against loss, although such bond may not be required by statute; and the bond would be valid and binding upon both principal and sureties if voluntarily given by the officer.

DEPARTMENT OF JUSTICE,

*June 21, 1882.*

SIR: By a letter of your predecessor, dated the 4th of April last, and the accompanying papers, it appears that a requisition was issued by the Secretary of the Interior on

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Indian Inspector—Bond.

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the 22d of March, 1882, for an advance of \$950 out of certain Indian appropriations to J. M. Haworth, an Indian inspector, to be charged to the latter on the books of the Treasury under his bond dated May 11, 1880; the object of the advance being to enable that officer to defray the expenses of a delegation of Indians which he was directed by the Secretary to bring to Washington.

The bond mentioned is in favor of the United States in the sum of \$5,000, with four sureties thereon, and is conditioned that the obligor shall, during his holding and remaining in said office, "carefully discharge the duties thereof, and faithfully expend all public moneys and honestly account, without fraud or delay, for the same and for all public property which shall or may come into his hands."

The requisition was returned to the Secretary by the Second Comptroller with the remark "that as the bond is conditioned for the faithful performance of Mr. Haworth's duties as inspector, and as the disbursement of the funds in question does not appear to be part of the duty of an inspector, he entertains grave doubts as to the liability of the bondsmen for money placed in Inspector Haworth's hands" from the appropriations indicated.

Hereupon the following inquiry is presented for my consideration: Whether the inspector and his sureties would be liable on his bond for money advanced to him for the object aforesaid.

The general functions and duties of Indian inspectors are defined in section 2045, Revised Statutes. These do not include specifically the disbursement of public money, and those officers are not required by statute to give bond. Yet the Secretary of the Interior is charged with the supervision of public business concerning the Indians (sec. 441, Rev. Stat.), and may lawfully assign to inspectors other duties relating to that business in addition to those prescribed whenever the exigencies of the public service require it; and if the performance of such duties is undertaken by them, they become responsible for the proper discharge thereof. Where the particular duty involves the receipt or disbursement of public money, or the custody of public property, it is undoubtedly within the competency of the

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Union Pacific Railway Company.

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Secretary to take a bond for the protection of the United States against loss, although such bond may not be required by any statute, and the bond would be valid and binding upon both principal and sureties if voluntarily given by the officer. (*United States v. Tingey*, 5 Pet., 114; *United States v. Bradley*, 10 Pet., 343).

In the present case, the duty assigned to Inspector Haworth is of a special character, involving, as incidental to its discharge, the disbursement of public money. Whether he or some other officer should be intrusted with this duty is a matter that belongs to the Secretary of the Interior to determine. The condition of his bond, that he shall "faithfully expend all public moneys and honestly account, without fraud or delay, for the same," etc., is broad enough to cover any failure of duty on his part as regards the money proposed to be advanced to him, and in my opinion both he and his sureties would be liable on the bond (assuming it to be a voluntary one) for the money so advanced.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. H. M. TELLER,

*Secretary of the Interior.*

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## UNION PACIFIC RAILWAY COMPANY.

The allowance made to the Union Pacific Railway Company for special service, to be paid out of the so-called "special facilities" appropriation, can not lawfully be paid to the company in cash, but must be retained and applied as directed by section 2 of the act of May 7, 1878, chapter 90.

DEPARTMENT OF JUSTICE,

June 22, 1882.

SIR: In your letter of this date you inquire: "If a contract shall be concluded with the Union Pacific Railway Company for special mail facilities, to be paid out of the so-called special facilities appropriation, can the allowance be paid in cash, or must it be passed to the credit of the company as the regular mail pay is now credited?"

To this inquiry I have the honor to reply, that in my

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Reprieve of Charles J. Guiteau.

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opinion the allowance under such contract can not lawfully be paid to the company in cash, but must be retained and applied as directed by section 2 of the act of May 7, 1878, chapter 90. That section declares that "*the whole amount of compensation which may from time to time be due to said several railroad companies respectively (among which is included the company above named) for services rendered for the Government shall be retained by the United States,*" etc. This provision is very comprehensive. It includes all mail service, special or other, which may be rendered by the company either under contract or otherwise, and it forbids a cash payment thereto of any allowance for such service.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. TIMOTHY O. HOWE,

*Postmaster-General.*

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REPRIEVE OF CHARLES J. GUITEAU.

Upon examination of the papers accompanying an application made to the President asking for the appointment of a commission to examine and consider the mental condition of Charles J. Guiteau, and praying for his reprieve pending the investigation: *Advised*, for reasons stated, that the application be not granted.

DEPARTMENT OF JUSTICE,

*June 23, 1882.*

SIR: Yesterday was sent to me by your secretary the papers presented by Miss Chevaillier, of Boston, consisting of petitions and letters of physicians and experts in support of an application for the appointment of a commission to consider the mental condition of Charles J. Guiteau, and also praying for his reprieve pending such an investigation. In addition to the papers transmitted to me by your secretary, I have had presented to me to-day a written argument or statement from Dr. W. W. Godding, and also an argument signed by George M. Beard, M. D.; W. W. Godding, M. D.; and Miss A. A. Chevaillier. The whole question has been carefully and thoughtfully considered, and I have arrived at the conclusion that I can not recommend a reprieve for the

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Reprieve of Charles J. Guiteau.

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purpose requested. It is doubtful if the President, in a case like this, has the power to appoint such a commission to reverse the sentence of the law. The case of this man has been thoroughly and fairly tried in a prolonged public judicial investigation, in a court of competent jurisdiction, before an able, upright judge, and a jury of impartial men. Abundance of testimony was offered upon the question of his sanity or insanity; in fact that was the main and only issue and the only point contested. The willful, deliberate, and premeditated killing of President Garfield by the defendant, Charles J. Guiteau, was an admitted fact. It was conceded to have been done by lying in wait for his victim with a deadly weapon, carefully prepared for the purpose. The weapon was used with intent to kill, and the shooting by the defendant caused the death of President Garfield. All these facts were undisputed. The only question mooted was that of the moral, mental, and legal responsibility of the accused. The question of sanity or insanity, I repeat, was the only issue. He had a painfully protracted trial, during which latitude in every particular was allowed, almost to the straining of the law, in his behalf; more latitude than was ever known to have been given to any defendant in all of the recorded annals of the law. He was permitted to say at pleasure all that occurred to him, whether in order or out of order. The evidence was overwhelmingly against him upon this very point of insanity. The case was submitted to the jury by a judge of acknowledged learning; a discerning, cautious, upright officer, in a charge that was calm, deliberate, and fair, and within one hour after that charge the jury found the prisoner guilty in manner and form as he stood indicted. In view of this I again express my decided conviction that the requests submitted in these petitions ought not to be granted.

The application comes at a late day. It is an effort to secure by an extra judicial hearing a reversal of a solemn verdict and judgment obtained in the due administration of the law. Such attempts must be discouraged. The law must be maintained and confirmed by a strict conformity to its determinations and conclusions obtained in a regular and orderly manner.

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Reprieve of Charles J. Guitau.

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The assertion that the sense of all the best medical talent sustains this application because it believes the defendant insane is contradicted by Dr. Godding, who to-day, when heard orally by me, admitted that outside of those now applying for this reprieve the preponderance of the medical talent in this country was the other way and believed him to be sane. I will further add that the defendant has exhausted all the remedies of the law for his relief. Since his trial his cause has been heard with deliberate care before the whole bench of the Supreme Court of the District of Columbia, and no error in fact or law has been found, but that court dismissed his appeal and ordered judgment on the verdict.

After that he applied to Mr. Justice Bradley, of the Supreme Court of the United States, for a writ of habeas corpus, and again the subject was considered by that learned justice, and the careful conduct of the Supreme Court of the District commented on and applauded and the writ of habeas corpus refused.

At the last hour you are asked to reprieve this justly condemned man—to investigate in an unusual if not irregular way a fact that has been solemnly determined by the constituted authorities of the law.

I submit it ought not to be done. It will establish a dangerous precedent. It will shake the public confidence in the certainty and justice of the courts by substituting your will for the judgment of the law and its forms at the instigation of a few who assert that he was and is insane, and who press their application contrary to the "preponderance of the medical talent of the country who believe the other way and think him sane," as is admitted by one of the most conspicuous, earnest, and important of the petitioners.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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Case of W. W. Armstrong.

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## CASE OF W. W. ARMSTRONG.

The fact that one of the officers composing a court-martial is junior in rank and another inferior in grade to the accused, does not of itself render either of them incompetent to sit.

Where the approval of the proceedings, findings, and sentence of a court-martial by the President is attested by an entry on the record signed by the Secretary of War, this is sufficient evidence of such approval. (But see NOTE on page 399 *post.*)

DEPARTMENT OF JUSTICE,  
*June 28, 1882.*

SIR: I have considered the case of W. W. Armstrong, formerly a first lieutenant of the Sixteenth Regiment of Infantry, which was sometime since referred to me by your direction.

In the fall of 1870 Mr. Armstrong, while holding that office, was tried and convicted by a general court-martial, and sentenced to dismissal from the Army. The proceedings of the court having been approved, the sentence was carried into execution on the 18th of November, 1878. He now claims that the dismissal was illegal and void, on two grounds: (1) That two of the officers composing the court were incompetent to sit, inasmuch as they would, and did, become advanced in their respective grades by his dismissal; (2) That the record of the court-martial does not bear the President's signature to the approval of the proceedings.

The two officers referred to in the first of these objections are First Lieutenant Noble and Second Lieutenant Whitall, of the above-named regiment. The detail for the court originally consisted of six officers. One of these (Lieutenant Palmer) was challenged by the accused and the challenge was sustained; whereupon the officer challenged was relieved. The accused was then asked whether he objected to any of the other officers sitting, and he declared that he did not. Thus there was a waiver of his right to challenge the remaining members of the court, if any ground therefor existed.

The fact that Lieutenant Noble was junior in rank or that Lieutenant Whitall was inferior in grade to the accused, did not of itself render either of them incompetent to sit. The first objection therefore fails.

With respect to the other objection: It appears that the

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Case of W. W. Armstrong.

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approval of the proceedings, findings, and sentence of the court by the President is attested by an entry on the record, signed by the Secretary of War, under date of November 18, 1870. This is sufficient evidence of approval. The action of the President in matters relating to the Army which require his approval and direction may in general be signified through and authenticated by the head of the War Department. Where the latter acts in such matters, he in contemplation of law acts under the direction of the President, and is to be regarded as the mere organ of the executive will. (*United States v. Eliason*, 16 Pet., 302; *Wilcox v. Jackson*, 13 Pet., 513.) This principle has long and frequently been acted upon in the matter of court-martial proceedings required to be laid before the President for confirmation or disapproval. (See 7 Opin., 372; 15 Opin., 290; 16 Opin., 350.) In 15 Opinions, page 295, it is observed by one of my predecessors: "In the case of the confirmation of a sentence of dismissal by a court-martial, no formality appears to be prescribed by law for attesting the determination of the President; and as in cases of that sort the attestation of such determination by a written statement, signed by the Secretary of War, is in accordance with long usage, that mode of attesting the President's action confirming a sentence of dismissal is to be considered as sufficient." And it was there held that such statement is a sufficient authentication of the act of the President without an express averment therein that it is made by direction of the President; the presumption being always that such direction was given. It follows that, in the present case, the President's signature to the approval of the proceedings on the record was not necessary to make the sentence effectual.

I am accordingly of opinion that Mr. Armstrong was, by the execution of the sentence of the general court-martial hereinbefore referred to, lawfully dismissed from the Army, and that his application for restoration to the position therein from which he was thus dismissed should be denied.

With great respect, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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**Claim of Passed Assistant Engineer Webster.**


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NOTE.—Since the foregoing opinion of Attorney-General Brewster was given, it has been decided by the Supreme Court of the United States, in the case of *Runkle v. United States*, 122 U. S., 543, which involved the consideration of the provision in the 65th Article of War (see act of April 10, 1806, chap. 20) declaring that, in time of peace, no sentence of a general court-martial extending to the loss of life, or the dismissal of a commissioned officer, etc., shall be “carried into execution until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders in the case,” as follows:

(1) That the action required of the President by this article is judicial in its character, and in this respect differs from the administrative action considered in *Wilcox v. Jackson*, 13 Pet., 498; *United States v. Eliason*, 16 Pet., 291; *Confiscation Cases*, 20 Wall., 92; *United States v. Farden*, 99 U. S., 10; *Walsey v. Chapman*, 101 U. S., 755.

(2) That (without deciding what the precise form of an order of the President approving the proceedings and sentence of a court-martial should be, or that his own signature should be affixed thereto) his approval must be authenticated in a way to show, otherwise than argumentatively, that it is the result of his own judgment and not a mere departmental order which may or may not have attracted his attention, and that the fact that the order was his own must not be left to inference only.

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**CLAIM OF PASSED ASSISTANT ENGINEER WEBSTER.**

W. was appointed an acting third assistant engineer in the volunteer Navy February 8, 1862, and performed sea service continuously until May 20, 1864, when he was made a third assistant engineer in the regular Navy, and completed two years of sea service as such January 1, 1867. He was promoted to the grade of second assistant engineer October 6, 1869, to take rank from January 1, 1868. On July 1, 1870, he completed two years' sea service in the latter grade, and on March 12, 1875, was promoted to the grade of passed assistant engineer, to take rank from October 29, 1874: *Held*, that the credit of his volunteer service, under section 1412, Revised Statutes, does not entitle him to the benefits claimed therefor as regards promotion to or pay in his present grade.

DEPARTMENT OF JUSTICE, June 28, 1882.

SIR: By a letter of your predecessor, dated the 12th of April last, my opinion was requested upon the claim of Passed Assistant Engineer Harrie Webster, of the Navy, which (as there stated) is as follows: “that by reason of sea service performed by him as a volunteer officer (acting third assistant engineer), in which he has been credited under the provisions of section 1412, Revised Statutes, he had become en-

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Claim of Passed Assistant Engineer Webster.

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titled to examination for promotion to his present grade June 8, 1868, and to pay as a passed assistant engineer from date."

The facts of the case are thus presented in said letter:

"Mr. Webster was appointed an acting third assistant engineer in the volunteer Navy February 8, 1862, and was continuously on duty at sea until May 20, 1864, when he was appointed or transferred to the regular Navy as a third assistant engineer. He completed his two years' sea service as a third assistant engineer January 1, 1867, which was the term of such service required by the regulations then in force to qualify him for examination for promotion to the grade of second assistant engineer. Mr. Webster failed upon his examination for promotion in October, 1868; he was re-examined in July of the next year, found qualified, and warranted a second assistant engineer October 6, 1869, to take rank as such from January 1, 1868. On the first of July, 1870, he completed the period of sea service as a second assistant engineer (two years) required by regulations then in force to qualify him for examination for promotion to the grade of first (passed) assistant engineer. In February, 1875, Mr. Webster was examined, found qualified, and on the 12th of March following he was promoted to the grade of passed assistant engineer, to take rank as such from October 29, 1874, to fill a vacancy in that grade."

According to the foregoing statement the period of sea service (two years) *as a second assistant engineer*, which was necessary to qualify Mr. Webster for promotion to his present grade, was not completed until the 1st of July, 1870. His previous service in the volunteer Navy as acting third assistant engineer was not available at any time to complete that period earlier than the date first mentioned, such volunteer service having been performed in a different grade. Hence the credit of this volunteer service under the provisions of section 1412, Revised Statutes, could not entitle him to the benefits claimed therefor as regards promotion to or pay in his present grade. I am therefore of opinion that the claim is inadmissible.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. WILLIAM E. CHANDLER,

*Secretary of the Navy.*

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Pension of General Ward B. Burnett.

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## PENSION OF GENERAL WARD B. BURNETT.

Rates of pension which should be allowed General Burnett under the general laws of March 3, 1873, June 18, 1879, and June 16, 1880, and under the special act of March 3, 1879, stated; and *advised* that two pension certificates be issued—one under the general law of June 16, 1880, the other under the special act of March 3, 1879.

DEPARTMENT OF JUSTICE,

June 29, 1882.

SIR: Replying to your letter of the 24th inst. concerning the case of General Ward B. Burnett, I have the honor to advise you that, according to the opinion rendered by this Department on the 10th of April last, the rates of pension which should be allowed General Burnett are as follows: From June 4, 1872 to June 4, 1874, \$30.75 per month (act of March, 1873, fourth section); from June 4, 1874 to June 17, 1878 (act of June 18, 1879), \$50 per month; from June 17, 1878, \$72 per month (act of June 18, 1880).

Under the special act of March 3, 1879, General Burnett has drawn, and is entitled still to draw, \$50 per month. True, this was given him "*in lieu of the pension he now receives,*" but the pension he was then receiving was \$30 per month. This was not the sum he was entitled to receive under the general law.

The \$30 it is presumed was paid him under section 4695, Revised Statutes, as for total disability, and in lieu of this the special act gives him \$50. It is provided now that nothing *in this act* (the special act) shall entitle General Burnett to arrears of pension. It is not under this act that back-pay of pension is claimed, but under the general laws cited above, which entitle him to the rate of pension prescribed therein. I do not think the special act can be so construed as to deprive General Burnett of these. It should be considered as a law by itself, intended to show the estimate of Congress of the great services of General Burnett to the country, having regard also for his helpless condition.

I am of the opinion that two pension certificates should be issued to General Burnett—one under the act of June 16, 1880, the other under the special act of March 3, 1879.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

Hon. H. M. TELLER,

*Secretary of the Interior.*

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Assistant Surgeons—Relative Rank.

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## ASSISTANT SURGEONS—RELATIVE RANK.

Opinion of May 18, 1882, viz, that where certain assistant surgeons had attained the rank of captain on the same day, but whose appointments and commissions were not of the same date, their relative rank as between themselves was not determined by the provisions of section 1 of the act of March 2, 1867, chap. 159 (sec. 1219, Rev. Stat.), but by the date and order of their appointment—reaffirmed.

Under section 17 of the act of July 28, 1866, chapter 299, an assistant surgeon who served as such less than three years in the regular Army, or less than three years in the volunteer forces, did not become immediately entitled to the rank of captain, although his volunteer and regular service, when combined, may have amounted to three years. But by the second section of the act of March 2, 1867, the officer would have a right to have his volunteer service computed, and if at the date of that act this service, united with his service in the regular Army, made three years, he would *then* be entitled to the rank of captain. This provision, however, did not operate retrospectively, so as to affect or alter the previous relations of the officer in the service.

DEPARTMENT OF JUSTICE,

*June 30, 1882.*

SIR: Agreeably to the desire expressed in your letter of the 9th instant, I have reconsidered, in connection with certain communications from Assistant Surgeon Smart, referred to me therewith, the opinion which I had the honor to address to you on the 18th ultimo upon a question affecting the relative rank in the Medical Corps of that officer and Assistant Surgeons Brooke, Gardner, and Whitehead.

One of those communications presents Dr. Smart's views upon a point since suggested, which you say has not heretofore received attention so far as you know, and which is stated by you as follows: "The act of July 28, 1866, authorized a certain number of assistant surgeons in the regular Army with the rank, pay, and emoluments of lieutenants of cavalry for the first three years' service, and with the rank, pay, and emoluments of captains of cavalry after three years' service; and provided that original vacancies in that grade should be filled by selection, and that persons so selected, who had served as assistant surgeons three years in the volunteer service, should be eligible for promotion to the grade of captain. An inspection of the Army Register discloses the

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Assistant Surgeons—Relative Rank.

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fact that at the date of the passage of this act (July 28, 1866) Dr. Brooke had been an assistant surgeon in the regular Army for more than three years, but that Dr. Smart had been assistant surgeon in the volunteer service for about one and one-half years and an assistant surgeon in the regular Army a little more than two years, so that to consider him as having served three years it was necessary to combine his service as a volunteer with his service in the regular Army in order to enable him to be promoted to the grade of captain under the act of July 28, 1866. I do not find in that act," you further state, "any authority for such a combination. The act seems to require that the three years' service should have been completed either in the volunteer service or in the regular Army. No doubt if the attention of Congress had been called to this circumstance the act would have been amended so as to authorize a combination of fractional services in each branch. Dr. Smart, in his communication, argues that the second section of the act of March 2, 1867, covers this point. As at present advised I am unable to concur with him. \* \* \* If my views on this subject are correct, Dr. Smart was not entitled to be promoted to the grade of captain until the 30th of March, 1867, a date subsequent to those on which that grade was attained by Drs. Brooke, Gardner, and Whitehead respectively. If I am correct in these views, this is an additional ground on which Dr. Smart should be held not to rank Dr. Brooke or the two other assistant surgeons named."

Upon re-examination of the question considered in my opinion of the 18th ultimo, I remain entirely satisfied with the conclusion there arrived at. It appeared by the last Army Register, then before me, that the four assistant surgeons above mentioned had each attained the rank of captain on the same day (July 28, 1866), and this was assumed to be correct. Their attainment of this rank was not by virtue of any new appointments or commissions, but by operation of law. The appointments and commissions by which they hold the office of assistant surgeon and under which they are serving therein are not all of the same date. Upon this state of facts, I held that the provisions of the first section of the act of March 2, 1867 (sec. 1219, Rev. Stat.), are inappli-

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Assistant Surgeons—Relative Rank.

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cable to determine the relative rank of these officers in their corps as between themselves (those provisions applying only to officers of "the same grade and date of appointment and commission"), but that such relative rank must be determined by the date and order of their appointment. In other words, that although the officers in question are of the same grade (captain), and although the date when each gained that grade is the same (as was assumed), yet they are not within the rule prescribed by the act of 1867 (sec. 1219, Rev. Stat.) for fixing relative rank, because their appointments and commissions are not also of the same date; and that their relative rank is governed by the other rule adverted to, namely, by date and order of appointment.

This seems to me to admit of no doubt, and to be decisive of the question respecting the relative rank of the above-named officers as between themselves.

But you suggest that, on grounds hereinbefore stated, Dr. Smart was not legally entitled to the rank of captain on the 28th of July, 1866, and did not become legally entitled thereto until the 30th of March, 1867, and you request an expression of my views upon this point.

Upon consideration I am of opinion that under section 17 of the act of July 28, 1866, an assistant surgeon who has served less than three years in the regular Army or less than three years in the volunteer forces did not become entitled to the grade of captain, although his volunteer and regular service when combined may have amounted to, or even exceeded, three years. By the effect of that section all assistant surgeons then in the regular Army who at the date of that act had served three years as such became immediately entitled to the rank of captain; and the same section, after setting apart the original vacancies created by that act in the grade of assistant surgeon for persons to be selected from those who had "served as staff or regimental surgeons or assistant surgeons of volunteers in the Army of the United States two years during the late war," provided that persons who had served as assistant surgeons three years in the volunteer service shall be eligible for promotion to the grade of captain. This is the only provision in that act which makes volunteer service an element in determining the right

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Assistant Surgeons—Relative Rank.

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to promotion in the Medical Corps; and to entitle an officer to the benefit thereof it requires him to have served as an assistant surgeon three years in the volunteer service, hereby impliedly excluding such service from computation when less than that period.

It follows that the one and one-half years' service rendered by Dr. Smart as an assistant surgeon of volunteers could not legally be taken into account under the act of July 28, 1866, to make up the three years' service necessary to entitle him to the rank of captain.

Yet I think that under the second section of the act of March 2, 1867, he had a right to have his volunteer service computed. By this section it was provided "that in all matters relating to pay, allowances, rank, duties, privileges, and rights of officers and soldiers of the Army of the United States the same rules and regulations shall apply, without distinction; for such time as they may be, or have been, in the service, alike to those who belong permanently to that service, and to those who as volunteers may be, or may have been, commissioned or mustered into the military service under the laws of the United States for a limited period." This provision is materially modified in the Revised Statutes, wherein it partly appears in section 1292 and partly in the one hundred and twenty-third article of war. As thus modified, it comes into play only when there are in the military service both volunteers and regulars as distinct organizations or forces, subjecting the officers and soldiers in each of these forces in the matters enumerated to the same rules and regulations. But, as originally enacted, while it extends to no persons but those who are in the military service, its inclusion of officers and soldiers who may "have been" commissioned or mustered into the service as volunteers affords ground for the construction that where officers and soldiers belonging to the regular Army fall within the terms of that description (*i. e.*, where they have been in the volunteer service before entering the regular Army), their past service as volunteers must be estimated thereunder in all cases in which, according to the rules and regulations referred to, it would be estimated had it been performed by them as regulars. (15 Opin., 332.)

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 Central Pacific Railroad Land Grant.
 

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However, the provision of the act of 1867 here adverted to had no retrospective operation. While it might alter the status of an officer then or thereafter, it did not have the effect to alter his previous relations in the service. Hence in Dr. Smart's case the date of his rank as captain—to which rank he, in my opinion, became entitled by virtue of that provision—could not be *earlier* than the date of that act.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,  
*Secretary of War.*

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 CENTRAL PACIFIC RAILROAD LAND GRANT.
 

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Certain lands within the 10-mile limits of the Central Pacific Railroad, being parts of odd-numbered sections granted thereto by the act of July 1, 1862, chapter 120, were, under section 7 of that act, ordered to be withdrawn, and this order was received at the land office at San Francisco on the 30th of January, 1865. The map showing definite location of line of said road was filed in General Land Office February 13, 1873, and on May 12, 1874, said lands were selected by the railroad company as inuring to it under said grant. But the same lands were selected by the State of California June 13, 1865, as indemnity for deficiency of school lands granted by acts of March 3, 1853, and February 26, 1859, and a list thereof was certified and approved to the State September 8, 1870. The railroad company applies for patents for these lands: *Advised* that the Secretary of the Interior is not authorized by the general laws or the provisions of the act of July 1, 1862, to issue such patents to the company.

DEPARTMENT OF JUSTICE,  
 July 3, 1882.

SIR: Yours of July 18, 1881, addressed to the Attorney-General, states a case which is briefly as follows:

Certain lands within the State of California are in dispute before you between the State and the Central Pacific Railroad Company.

These lands are within the 10-mile limits of the road of the company, and are parts of *odd-numbered* sections granted to it by the act of July 1, 1862, section 3, (12 Stat., 489). Accordingly, upon the 23d of December, 1864, they were, under section 7, duly ordered to be *withdrawn*, and this order was

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Central Pacific Railroad Land Grant.

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received at the land office at San Francisco upon the 30th of January, 1865. The map showing the definite location of the line of road for the place in question was filed in the General Land Office on the 13th of February, 1873, and upon the 12th of May, 1874, the lands now in dispute were selected by the company as inuring to it under the grant aforesaid.

The same lands were selected by the State upon the 13th of June, 1865, as *indemnity* for actual deficiency of school lands granted by the United States by acts of March 3, 1853, sections 6 and 7, and February 26, 1859 (10 Stat., 244, and 11 Stat., 385,), and upon the 8th of September, 1870, a list thereof was *certified* and *approved* with the following clause attached thereto, "subject to any valid interfering rights which may have existed at the date of selection."

The plat of the township in question was duly filed in the proper local land office on the 10th of June, 1865.

Upon this state of facts the company applies for patents for the land above referred to; and in such connection you ask the question whether you have jurisdiction in the premises, and authority under the general laws, and the express provision of the act of July 1, 1862, section 4 (12 Stat., 492), to issue such patents.

The list above mentioned is treated by you as in substance a sort of consolidated patent, authorized by section 2449 of the Revised Statutes, which provides that in certain specified cases where lands are granted by Congress to a State or Territory a list thereof, certified by the Commissioner of the General Land Office, "shall be regarded as conveying the fee-simple of all the lands embraced in such lists that are of the character contemplated by such acts of Congress and intended to be granted thereby; but when lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as such lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby."

It is contended by the company:

(1) That under the facts of the case, the lands are not included in the list to the State, and that therefore the company is entitled to a patent.

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Central Pacific Railroad Land Grant.

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(2) That inasmuch as the land in question, at the time of the selection by the State, and of the certification and approval of the list, had been *reserved* for its own uses, as above, it was not of the "character contemplated" by the act under which the selection had been made by the State, and therefore that by the acts such list, so far as these lands are concerned, is "perfectly null and void," and should be so treated by the General Land Office, and a patent accordingly be issued as applied for.

Whatever operation is to be given to the *exception* in the above approval of the list by your predecessor, viz, that of "any valid interfering rights," and also to a like sweeping provision in section 2449 of the Revised Statutes, is to be so given *only by courts called in due course of law to consider the titles thus created*. Neither of those clauses confers upon a succeeding Secretary the power of reversing official action by which the lands therein designated have been "*certified*." This is true as regards even the *statutory* provision in question (*Moore v. Robbins*, 6 Otto, 533), whilst the words of exception in the *list* may, in addition, well be considered *superfluous*.

As to the effect of the words "shall issue," in section 4 of the act of 1862, to which you call my attention particularly, as being insisted upon by the company, I have to say that, granting its effect to be imperative, I am of the opinion that the command is not intended to operate in cases where it would come in collision with general principles, and that its meaning is that *so far as the plan of the act in which it occurs is concerned, or no other objection existing*, the patents shall issue.

Upon the whole matter you will understand me as answering your question in the negative.

Very respectfully, your obedient servant,

S. F. PHILLIPS,  
*Acting Attorney-General.*

THE SECRETARY OF THE INTERIOR.

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National Banking Associations.

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## NATIONAL BANKING ASSOCIATIONS.

A national bank whose charter is about to expire, but which has taken no steps toward going into liquidation under sections 5220 to 5224, Revised Statutes, can not withdraw all of the bonds deposited to secure its circulation, upon depositing lawful money equal to the amount of its outstanding circulation, notwithstanding the provisions of sections 5159 and 5160, Revised Statutes, and section 4 of the act of June 20, 1874, chapter 343.

DEPARTMENT OF JUSTICE,

*July 5, 1882.*

SIR: Yours of the 27th of May last communicates, for an opinion by the Attorney-General, the following question suggested by the Treasurer of the United States:

"May a national bank whose charter is about to expire by limitation of law, but which has taken no steps toward going into liquidation under sections 5220 to 5224 of the Revised Statutes, withdraw all of the bonds deposited with the Treasurer of the United States to secure its circulation, upon depositing lawful money equal to the amount of its outstanding circulation, notwithstanding the provisions of sections 5159 and 5160 of the Revised Statutes and of section 4 of the act of June 20, 1874, in regard to the amount of bonds required to be kept on deposit with the Treasurer?"

An earlier reply to this communication has been hitherto prevented by unavoidable accident.

After careful consideration thereof I now answer the question in the negative.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

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Sale of Miami Lands in Kansas.

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## SALE OF MIAMI LANDS IN KANSAS.

The lands which have been or are to be sold and the proceeds distributed by the act of May 15, 1882, chapter 144, were set apart for the sole benefit of the Miami tribe of Indians, meaning thereby those who at the time of the survey of the reservation had emigrated and settled on the lands.

This class of Miamis only are entitled to the proceeds of the sales of the residue mentioned in the second article of the treaty of June 5, 1854, being the same lands referred to in section 3 of the act of May 15, 1882. Those individual Miamis or persons of Miami blood who are named in the corrected list referred to in the Senate amendment to the fourth article of the treaty of June 5, 1854, and their descendants, have no right to or interest in the said residue or the proceeds of the sales thereof.

DEPARTMENT OF JUSTICE,  
July 7, 1882.

SIR: Your letter of the 15th instant calls my attention to the act of Congress, approved May 15, 1882, entitled "An act to provide for the sale of the lands of the Miami Indians in Kansas."

The third section of the act declares that the net proceeds of the sales shall belong to said Miami Indians and shall be disposed of as now provided by law.

In the fourth section there is a saving of the rights or claims of these individual "Miamis or persons of Miami blood or descent, who are named in the corrected list referred to in the Senate amendment to the fourth article of the treaty of June 5, 1864, or their descendants," and before any distribution is made under the act the Secretary of the Interior is required to obtain the opinion of the Attorney-General "as to what rights or interests, if any, said persons have or had in and to said lands," etc.

Hence your request for my opinion in the premises.

In order to a full understanding of the question, it will be useful to refer briefly to two treaties of the United States with these Indians, prior to that of June 5, 1854.

By article 10 of the treaty of November 6, 1838 (7 Stat., 569), the United States stipulated "to possess the Miami tribe of Indians, and guaranty to them forever a country west of the Mississippi River, to remove to and settle on when

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Sale of Miami Lands in Kansas.

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*the said tribe may be disposed to emigrate from their present country."*

The land was promised on the implied condition that the tribe would remove to and settle on it.

There is no guaranty or promise to those who should refuse to emigrate.

Then followed the treaty of November 28, 1840 (7 Stat., 582), by the first article of which the Miamis ceded all of their remaining lands in Indiana. Article second fixes the consideration at \$550,000. This was the entire consideration. By article eight it was stipulated that the tribe should, within five years, move to the country assigned them west of the Mississippi.

Hitherto, however, no lands west of the Mississippi had been assigned to them, but the Senate in consenting to the ratification of the treaty, February 25, 1841, added a section by way of amendment as follows: "The United States hereby stipulate to set apart and assign to the Miamis for their occupancy west of the Mississippi, a tract of country \* \* \* (giving the boundaries)—estimated to contain five hundred thousand acres."

This was in fulfillment of the promise made by the treaty of 1838, and was an inducement held out to the tribe to emigrate. The lands were given to them for their occupancy. Accordingly, in the year 1846, the Miamis, as a tribe, did emigrate and took possession of the lands so assigned for their use, and which were intended for the benefit of those only who should settle upon them.

Then came the treaty of June 5, 1854 (10 Stat., 1093), upon the construction of which the present question arises.

It is stated in the preamble that certain persons, whose names are given, "*being duly authorized by said tribe,*" represented the tribe of Miami Indians in making this treaty; and certain other persons, whose names are given, are styled "Miami Indians, *residents of the State of Indiana,* being present and assenting," etc.

It is plain that two classes of Indians were represented in the negotiation of the treaty; first, the Miamis who had emigrated to the west, and who still preserving the tribal organization constituted the Miami tribe proper; second, certain

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Sale of Miami Lands in Kansas.

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individuals or families of Miami blood who did not emigrate with or had separated from the tribe and remained in Indiana. This distinction runs through the treaty, the provisions thereof differing as they apply to one or the other of these classes.

By the first article the Miami tribe ceded to the United States all the tract of country set apart for them west of the Mississippi River, reserving, however, 70,000 acres for their future homes and for school purposes.

The second article, after providing for the survey of the reservation, proceeds as follows: "Within four months after the approval of such surveys, each individual or head of a family of the Miami tribe *now residing on said lands* shall select, if a single person, two hundred acres, and if the head of a family, a quantity equal to two hundred acres for each member of the family, which selections shall be so made as to include in each case, so far as practicable, the present residences and improvements of each person or family, and where it is not practicable, the selection shall fall on lands in the same neighborhood; and if by reason of absence or otherwise any single person or head of a family *entitled to land as aforesaid* shall fail to make his or her selection within the period prescribed, the chiefs of the tribe shall proceed to select the lands for those thus in default."

Thus a portion of the reservation was disposed of, and it is plain to see who were entitled to allotments, to wit: those and those only who, being of the Miami tribe, were then settled on the land; that is, at the expiration of four months after the approval of the surveys. The language excludes all who had refused to emigrate, and, of course, the Miami Indians of Indiana.

Furthermore, it is provided in the second section that, after all the selections shall have been made (the school lands as well as the allotments), "the said chiefs shall proceed to select in a compact body \* \* \* the residue of the seventy thousand acres, which body of land shall be held as the *common* property of *the tribe*, but may at any time, when the chiefs and a majority of the tribe request it, be sold by the President and the net proceeds *be paid to the tribe*."

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Sale of Miami Lands in Kansas.

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The third article provides the consideration for the lands ceded (\$200,000), which the United States agreed to pay to "the Miami tribe of Indians;" and, as if to remove all doubt, that the lands ceded, as well as those reserved and the residue thereof, after all allotments had been selected, belonged to the Western Miamis who emigrated and constituted the tribe proper, it is forbidden by the last clause of the third article that any part of the consideration money or the moneys produced by the sale of the said residue, shall ever be appropriated or paid to any person who has drawn or is permitted to draw from the annuities payable to the Miamis in Indiana.

This inhibition plainly includes those persons embraced in the corrected list spoken of in the first proviso to the Senate amendment of the fourth article of the treaty—the same who are referred to in the fourth section of the act under consideration. Articles 4 and 5 are occupied with readjustments, settlements of claims, and the equitable division, according to numbers, between the two classes, of funds, annuities, etc., provided by this and previous treaties, except the fund arising from the sale of the western lands, which is disposed of by articles 2 and 3.

Throughout these settlements and dispositions the two classes of Miamis are recognized as separate and distinct parties, with separate and distinct interests. As an example, the very clause of the treaty referred to in the fourth section of the act of May 15, 1882, in connection with the inhibition above mentioned, may be cited. That clause reads as follows:

*"Provided, That no person other than those embraced in the corrected list agreed upon by the Miamis of Indiana, in the presence of the Commissioner of Indian Affairs, in June, eighteen hundred and fifty-four, comprising three hundred and two names as Miami Indians of Indiana and the increase of the families of the persons embraced in said corrected list, shall be recipients of the payments, annuities, commutation moneys, and interest hereby stipulated to be paid to the Miami Indians of Indiana."*

That is, the Western Miamis are forbidden to participate in the funds, annuities, etc., of the Miamis of Indiana, and

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Sale of Miami Lands in Kansas.

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the latter, by the third article, are prohibited from sharing in the funds and proceeds of the sales of lands belonging to the Miami tribe of Indians.

By the foregoing statement, drawn from the treaties of the United States with these Indians, the following conclusions are in my opinion established:

First. That the lands which have been or are to be sold and the proceeds distributed by the act of May 15, 1882, were set apart, assigned to, and were for the sole benefit of the Miama tribe of Indians, meaning thereby those who, at the time of the survey of the reservation, had emigrated and settled on the lands.

Second. That this division of these Indians only are entitled to the proceeds of the sales of the residue mentioned in the second article of the treaty of June 5, 1854, being the same lands referred to in the third section of the act of May 15, 1882.

Third. That those individual Miamis or persons of Miami blood or descent, who are named in the corrected list referred to in the Senate amendment to the fourth article of the treaty of June 5, 1854, and their descendants, have no title or claim to or interest in the said residue, or the proceeds of the sales thereof.

In my judgment they never had any part or lot in the reserved lands.

Before concluding this paper it is proper that I should advert to the act of June 12, 1858, in the third section of which it is claimed that Congress gave a construction to the treaty of June 5, 1854, by which construction the persons referred to in the Senate's amendment of the fourth article, viz, the Miamis of Indiana should be allowed to share equally with the Western Miamis in the reserved lands and in the proceeds thereof.

The deduction is exceedingly broad and liberal, carrying the effect of the act of 1858 far beyond what its terms express. But I deem it sufficient, in answer to the argument, to refer to subsequent legislation, wherein Congress seems to have reconsidered that of June 12, 1858.

By the fifth section of the act of March 2, 1867, the question was submitted to the Attorney General: What persons

## General Ward B. Burnett's Case.

should be permitted to participate in the funds appropriated to the Miamis of Indiana ?

Attorney-General Stanbery, in an elaborate opinion (12 Opin., 236), decided that only those Indians named in the list referred to in the Senate amendment to the fourth article of the treaty could receive anything from those funds. Thereupon the sixty-eight names which were added to the list under the act of 1858 were stricken off.

Again, by the fourth section of the act of March 3, 1873, it was submitted to the judgment of the Secretary of Interior whether "those persons of Miami blood or descent for whom provision was made" in the act of 1858 were entitled to share in the reserved lands set apart for that portion of the tribe known as Western Miamis.

The Secretary, in an opinion dated May 9, 1873, held that they were not so entitled.

It appears therefore that by the acts last cited the third section of the act of June 12, 1858, so far as it may be supposed to affect the question in hand, is virtually repealed.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

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

## GENERAL WARD B. BURNETT'S CASE.

Where a pensioner was entitled to, though not actually receiving, a pension of \$50 a month under a general law, and while so entitled a special act was passed giving him another pension: *Held* that his right under the general law did not cease or become merged in that granted by the special act.

DEPARTMENT OF JUSTICE,  
July 7, 1882.

SIR: In the pension case of General Ward B. Burnett I have the honor to observe, in reply to your letter of the 3d instant, that the said pensioner under the general act of 1879 was entitled to, though *he was not receiving*, a pension of \$50 a month. While so entitled, Congress passed a special act giving him another pension. This did not take away his

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*Transportation of Chinese Laborers.*

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right under the general law, nor was his pension merged in that granted by the special act.

The case is exceptional. In the law, under the title "Pensions," as enacted in 1878, nothing can be so construed as to allow more than one pension at the same time to the same person. But subsequently, Congress having the power, stepping beyond the rule prescribed in section 4715, by a separate, independent law gives to a pensioner already entitled to a pension of \$50 another pension of the same amount. Section 4715 has, in my judgment, no application to a case of this kind.

The special act of March 3, 1879, has not been repealed or its force and effect taken away by any subsequent legislation.

I adhere to the opinion expressed in my letter of the 29th ultimo.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

Hon. H. M. TELLER,

*Secretary of the Interior.*

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TRANSPORTATION OF CHINESE LABORERS.

Chinese laborers coming from foreign lands cannot be transported across the territory of the United States without violating the act of May 6, 1882, chapter 126, unless such laborers were in the United States on the 17th day of November, 1880, or came here within ninety days after the passage of said act.

DEPARTMENT OF JUSTICE,

July 18, 1882.

SIR: I have duly considered the question submitted for opinion in your communication of the 12th July instant, namely, whether Chinese laborers desiring to return to their native land from other foreign lands may be lawfully transported across the territory of the United States, and have reached the conclusion that they cannot be so transported without a violation of the act of Congress of the 6th of May, 1882, entitled "An act to execute certain treaty stipulations relating to Chinese," unless the persons mentioned were in the United States on the 17th of November, 1880, or came here within ninety days next after the passage of the said act.

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Transportation of Chinese Laborers.

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The first section of the statute provides that from and after the expiration of ninety days next succeeding its passage "the coming of Chinese laborers to the United States be, and the same is hereby, suspended, and during said suspension it shall not be lawful for any Chinese laborer to come, or having so come after the expiration of said ninety days to remain, within the United States."

The second section makes it penal for the master of any vessel knowingly to bring within the United States in such vessel and land, or permit to be landed, any Chinese laborer from any foreign port or place.

The third section withdraws from the operation of the preceding sections Chinese laborers who were within the United States on the 17th November, 1880, or who should come therein within ninety days next after the passage of the act, and produce to the master of the vessel bringing them and to the collector of the port in which they shall arrive the evidence required by the act that they belong to the one or the other of the excepted classes. This section also removes from the purview of the act any master of a vessel, not bound to any of our ports, which shall come within the jurisdiction of the United States "by reason of being in distress or in stress of weather, or touching at any port of the United States on its voyage to any foreign port or place: *Provided*, That all Chinese laborers brought on such vessel shall depart with the vessel on leaving port."

As it is a rule of interpretation to which all assent, "that the exception of a particular thing from general words proves that, in the opinion of the law giver, the thing excepted would be within the general clause had the exception not been made" (*Brown v. The State of Maryland*, 12 Wheat., 438), it must be taken as clear that it was the opinion of Congress that but for the exceptions named in the third section of the act foreign-bound vessels with Chinese laborers on board coming into our ports in distress, or touching at them for any other purpose, would have been embraced by the general words of the act. If, then, it was the sense of Congress that the hospitality of our harbors would have been denied by the statute to such vessels, although entering them in a crippled or even sinking condition, but for the

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Transportation of Chinese Laborers.

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saving in their favor, it is difficult to understand how the implication could be stronger that it is the legislative will that Chinese laborers shall not be brought to our shores for the purpose of transit across our territory or for any other purpose not expressly taken out of the general words of the statute. The necessity, in the opinion of Congress, for the exception of cases so extreme seems to leave no room for argument that it was the intention to extend the prohibition of the statute to all other cases not clearly embraced by the exceptions named. Indeed it would be difficult to imagine a more forcible example of the principle that exceptions strengthen the force of a law in cases not excepted than is afforded by the statute under consideration.

Again, according to the settled canon of interpretation, applicable to all writings, *expressio unius est exclusio alterius*, the enumeration in the statute of the cases in which Chinese laborers may be brought within the United States, notwithstanding the inhibition of the first section, must, in my opinion, be held to be exclusive of all other cases not enumerated. "Where," says a well-known authority, "a general act of Parliament confers immunities which expressly exempt certain persons from the effect and operation of its provisions, it excludes all exemptions to which the subject might have been before entitled at common law. The introduction of the exemption is necessarily exclusive of all other independent extrinsic exceptions. The maxim is clear, *expressum facit cessare tacitum*. Affirmative specification excludes implication." (Dwarris on Statutes, p. 605.)

This view of the statute is confirmed by the first article of the treaty with China, which gives the United States the right not only to regulate, suspend, or limit the residence of Chinese laborers in this country, but, furthermore, to regulate, suspend, or limit their "*coming*" here. As its title indicates, the act in question is pursuant to the treaty, and thus not obnoxious to the imputation of harshness or inhospitality towards a friendly power.

I have the honor to be, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

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Member of Congress.

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## MEMBER OF CONGRESS.

A member of Congress is not an "officer of the Government" within the meaning of the provision in section 6 of the act of August 15, 1876, chapter 287, whereby "all executive officers or employes of the United States, not appointed by the President with the advice and consent of the Senate, are prohibited from requesting, giving to, or receiving from any other officer or employé of the Government any money or property or other thing of value for political purposes," etc.

That provision is intended to regulate the conduct of the inferior officers, etc., of the Government with respect to these and other officers, etc., in its service, as ordinarily understood. To place a construction thereon which would embrace among the latter those who are not "officers" in the common acceptation of the word, and thus enlarge the penal effect of the provision, would not be warranted by any sound rule of interpretation.

DEPARTMENT OF JUSTICE,

July 21, 1882.

SIR: I have considered the question suggested by Mr. Alfred Thomas, chief of a division in the office of the Second Comptroller, in his letter to you of the 6th instant, in compliance with your request indorsed thereon under date of the 8th instant.

By section 6 of the act of August 15, 1876, chapter 287, "*All executive officers or employes of the United States, not appointed by the President with the advice and consent of the Senate, are prohibited from requesting, giving to, or receiving from, any other officer or employé of the Government, any money or property or other thing of value for political purposes,*" etc.; and the inquiry is, whether a member of Congress is an "officer of the Government" *within the meaning of this provision.*

Unquestionably the station of member of Congress (Senator or Representative) is a *public office*, taking these terms in a broad and general sense, and the incumbent thereof must be regarded as an officer of the Government in the same sense. Thus provision is made for administering an "oath of office" to the members of both houses of Congress (secs. 28 and 30, Rev. Stat.) So the words, "every person elected or appointed to any office of honor or profit, either in the civil, military, or naval service," employed in section 1756, Revised Statutes, which prescribes an oath of office, includes mem-

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 Member of Congress.
 

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bers of Congress. So in section 1786, which provides that "whenever any person holding office, except as a member of Congress," etc., the station of member of Congress is distinctly recognized as an office.

But it seems that a member of Congress is not an officer of the United States in the constitutional meaning of the term. In the case of Blount, on an impeachment before the Senate in 1799, the question arose whether a Senator was a civil officer of the United States within the purview of the Constitution, and the Senate decided that he was not. This question arose under the fourth section of the second article of the Constitution.

"Other clauses of the Constitution," observed Judge Story, in section 733 of his work on the Constitution, "would seem to favor the same result, particularly the clause respecting appointment of officers of the United States by the Executive, who is to 'commission all the officers of the United States;' and the sixth section of the first article, which declares that 'no person *holding any office under the United States* shall be a member of either house during *his continuance* in office;' and the first section of the second article, which declares that no 'Senator or Representative, or *person holding an office of trust or profit* under the United States shall be appointed an elector.'" To these clauses may be added that in section 3 of the fourteenth article, which provides that "no person shall be a Senator, etc., who, having previously taken an oath, as a member of Congress, *or as an officer of the United States*," etc. These clauses show a marked discrimination between members of Congress and *officers*; the latter term, in the sense in which it is there used, not including legislators.

In the *penal legislation* of Congress a like discrimination is made. See, for example, the second, third, and sixth sections of the act of February 26, 1853, chapter 81. That the words "any officer of the United States," found in the second section of that act, do not include members of Congress, is manifest from the enactment of the third section, in which they are specially designated. In the sixth section the same words are used in a similar restricted sense. Compare, also, sections 1781 and 1782, sections 5450 and 5451, and sections 5500 and 5501, Revised Statutes. In legislation of this

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Retired List of the Army.

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character the word officer appears to be uniformly employed in a sense not more comprehensive than that in which it is employed in the Constitution, as above; that is to say, not in that broad and general sense which would include members of the legislative branch of the Government.

Section 6 of the act of August 15, 1876, being legislation of the same character as that just referred to, it is fair to assume that the word "officer" is there used in the narrower sense adverted to, and that it does not include a member of Congress. The provisions of that section are intended to regulate the conduct of the inferior officers of the executive department of the Government, etc., with respect to these and other officers, etc., who are in the public service, as ordinarily understood. To place a construction thereon which would embrace among the latter those who are not *officers* in the common acceptance of the word, and thus enlarge the penal effect of those provisions, would not be warranted by any sound rule of interpretation. Upon these considerations I am of opinion that a member of Congress is not an "officer of the Government" within the meaning of that section.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

*Secretary of the Treasury.*

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RETIRED LIST OF THE ARMY.

In determining whether the limit of four hundred, prescribed by the act of June 18, 1878, chapter 263, has been reached or not, the number retired under the act of June 30, 1882, chapter 254, must always enter into the computation.

No retirement can lawfully be made under the laws existing prior to the act of June 30, 1882, when the number already on the retired list amounts to four hundred; although, by retirements *under that act*, the list is subject to temporary augmentation beyond the limit of four hundred.

DEPARTMENT OF JUSTICE,

July 26, 1882.

SIR: I have given due consideration to your communication of the 15th July instant, asking whether the words,

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Retired List of the Army.

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"and no act now in force shall be so construed as to limit or restrict the retirement of officers as herein provided for" contained in the fourth *proviso* of section 1 of the act of 30th June, 1882, which declares that an officer of the Army who has served forty years shall, upon application to the President, "be retired from active service and placed on the retired list," and that an officer who has reached the age of sixty-four "shall be retired from active service and placed on the retired list," is without effect upon the act of 18th June, 1878, which declares that "the retired list shall hereafter be limited to four hundred in lieu of the number now fixed by law," so that no matter what may be the number of the officers retired under the above-mentioned provision of the act of 30th of June, 1882, retirements may continue to be made under the pre-existing laws, regardless of that number, until such retirements shall have reached the said limit of four hundred, or whether retirements made under the act of 30th June, 1882, although unrestricted by the said limit of the act of 18th June, 1878, must nevertheless always be included in the computation to ascertain whether the limit prescribed by the act last mentioned has been reached or not; and I am of opinion that, in determining whether the limit of four hundred prescribed by the act of 18th June, 1878, has been reached or not, the number of officers retired under the act of 30th June, 1882, must always enter into the computation, so that no retirement can validly be made under the laws anterior to the act of 30th June, 1882, if the aggregate of retirements under that act and the laws preceding it shall at any time amount to four hundred.

It is to be remarked, in the first place, that there is but *one* retired list for the Army known to law. Accordingly, the act of 30th June, 1882, declares that when an officer is withdrawn from active service under its provisions he shall be "placed on the retired list," meaning clearly the list already established by law.

And when an officer is thus placed there, it would seem that he can no more be disregarded in reckoning the number on the list than an officer put there by virtue of any previous law.

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Retired List of the Army.

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To hold that whenever the number on the retired list has reached four hundred, in consequence of retirements under the act of 30th June, 1882, such retirements may be disregarded in reckoning the number on the list as to cases for retirement arising under other laws, would be nothing less than to hold that the act of June, 1882, had repealed the limit of the act of June, 1878, in *all cases outside the former act* where the list can be brought below the maximum by eliminating retirements under that act, in the face of the declaration of the law, as it now stands, that there shall be no retirement, outside the act of June, 1882, when the list numbers four hundred, however that number may be made up.

No such reading of the act of June, 1882, is admissible, and no such result can be reached without legislation.

Congress has evinced no purpose in the act of June, 1882, to make a permanent increase of the number of the retired list. It is true that the list is subject to temporary augmentation beyond the said limit by retirements under that act, but this excess is exposed to constant diminution and destruction by the occurrence of vacancies.

A similar ruling was made by Mr. Attorney-General Devens under the old law, fixing the limit of the retired list at three hundred. He held that three officers who had been placed on the retired list, in obedience to as many special acts of Congress, must be included in any enumeration to ascertain the number on the list, notwithstanding their cases were exceptional, and they would have been entitled to retirement if the list had been full when Congress directed them to be placed there. (16 Opin., 26, 27.)

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF WAR.

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Post-Tradership at Fort Lewis, Colo.

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## POST-TRADERSHIP AT FORT LEWIS, COLO.

Where one person had been appointed post-trader for a certain military post, and subsequently, on a change in the location of the post, another person was appointed post-trader for the same post: *Held* that as the law allows but one post-trader to be appointed for a military post, the second appointment must be deemed to work a revocation of the first, and accordingly that the last appointee is entitled to the place.

## DEPARTMENT OF JUSTICE,

*July 26, 1882.*

SIR: By the papers which accompanied your letter of the 6th instant, in regard to the post-tradership of the post of Fort Lewis, Colo., it appears that early in the year 1879 the establishment of a military post called Fort Lewis was commenced at Pagosa Springs, on the San Juan River, in Colorado, under an appropriation made by the act of March 3, 1879, chapter 182. During the same year Mr. W. S. Peabody was duly appointed post-trader at the post of Fort Lewis, and entered upon the prosecution of business as such. In the following year the location at Pagosa Springs was abandoned, and a new site for the post was selected on the La Plata River, in Colorado, distant about 75 miles from the former. Here the post of Fort Lewis was finally established.

In the meantime a change had taken place in the garrison. The troops who were on duty at Pagosa Springs were ordered away before the location of the post was changed, and its establishment on the new site was accomplished by other troops. The latter, viewing the post thus established as a *new post*, took steps to have a post-trader appointed therefor, disregarding the claim of Peabody to the place under his appointment as above. And subsequently, on December 23, 1882, Mr. J. G. Price was appointed a post-trader at the post of Fort Lewis (new), on the recommendation of a council of administration, approved by the commander of the post. Price is now carrying on the business of post-trader there; but Peabody claims that *he* is legally entitled to the place.

Hereupon you submit the following question: "Who is legally the post-trader at the post of Fort Lewis, Colorado?"

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Army Officers' Pay Accounts.

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It has been held by one of my predecessors that a post-trader is simply a person licensed by the Secretary of War, with the concurrence of the council of administration and commanding officer of the post, to carry on a certain traffic at a military post; that he is removable at the pleasure of the Secretary; and that his removal would consist merely in a revocation of his license by the Secretary, in which the concurrence of the council of administration and commanding officer of the post is not required. (15 Opin., 278.) In this view I concur. And as the law allows but one post-trader to be appointed for a military post, when the appointment of a person as trader at a particular post has been made and subsequently another person is appointed trader at the same post, the second appointment must be deemed to work a revocation of the first. Accordingly, in the case under consideration, the appointment of Price as post-trader at Fort Lewis (which appears to have been made in conformity with the requirements of the statute) operated to revoke the previous appointment of Peabody as trader at the same post.

In direct answer to your question, then, I reply, that in my opinion Price is legally the post-trader at that post.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,  
*Secretary of War.*

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ARMY OFFICERS' PAY ACCOUNTS.

Where an officer's account for the same month was paid twice by different paymasters—one payment being made in November and the other in December: *Held* that the paymaster who made the last payment is chargeable with the overpayment.

In such case the Government may hold liable for the overpayment both the officer who made and the officer who received the payment.

As between two conflicting claims to a credit for a disbursement made on the same day, which might then have been lawfully made by either one of the claimants, but not by both, regard may be had to the actual time of day when the payment by each was made in order to determine which had priority.

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Army Officers' Pay Accounts.

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When the amount of overpayments to an officer are charged to the paymasters making them, and the Government afterwards recovers a part of the loss sustained by such overpayments, the balance of the loss should be apportioned to all of these paymasters *pro rata*.

DEPARTMENT OF JUSTICE,

*July, 27, 1882.*

SIR: Your letter of the 2d of March last requests an opinion upon certain questions propounded by the Second Comptroller of the Treasury, which, together with the facts giving rise to them, are contained in a statement of that officer inclosed therewith. The following are the facts and questions as thus presented:

"James L. Mast, late first lieutenant Second United States Artillery, was on duty within the limits of the Charleston pay-office prior to October 20, 1877. After that date he was on duty within the limits of the New York office. He deserted in March, 1878. His pay was drawn twice for August, 1877, three times for November, 1877, and twice for December, 1877. Charging him with the overpayments and allowing all possible credits, he remains indebted to the United States under appropriation 'Pay, etc., of the Army, 1879, and prior years,' in the sum of \$353.34; he is also indebted in the further sum of \$214.17, as charged on the books of the Third Auditor.

"*Payments for August, 1877.*—The act making appropriations for the support of the Army for the fiscal year ending June 30, 1878, did not become a law until November 21, 1877, and funds for the payment of officers for that year were not received at New York until November 24, 1877, on which day an account of Mast for August was paid to an assignee by the chief paymaster at New York. The propriety of this payment has not been questioned. Another account for August was paid to an assignee December 4, 1877, also at the New York office, by Paymaster A, who has been charged with the amount of his payment. A asks that the charge be removed. He urges that on December 4, 1877, the chief paymaster's vouchers for payments made in November had not been abstracted, and therefore that it would have been impracticable to examine those vouchers and ascertain whether a payment for August had been previously made.

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Army Officers' Pay Accounts.

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It does not appear, however, that at the time he made the payment, or for a long time afterwards, he knew whether said vouchers had been abstracted, nor does it appear that he made any inquiries concerning payments made by other paymasters at the same office.

"Question 1. Is Paymaster A chargeable with the overpayment for August?"

- I answer this question in the affirmative. Lieutenant M.'s account for his *services during August* having been previously paid, nothing remained owing by the Government for those services when the payment by A of another account for the same was made. Hence the latter, in making such payment, exceeded his authority as a disbursing agent, and thereby incurred liability to the Government for the amount so paid. Where an officer has been paid a second time for the same service, the Government may hold liable for the sum so paid both the officer who made and the officer who received the payment.

"*Payments for November, 1877.*—Paymasters A and B, at the New York office, paid accounts for Mast for November as follows: B, on the 30th of November, 1877; A, on the 4th of December, 1877. Each payment was made to an assignee of Mast. Mast was on duty at Fort McHenry, Md., and the assignee paid by B was engaged in business in Wheeling, W. Va. It is therefore held as a fact that B must have known that the account paid by him had been transferred before it had become due. (See paragraph 1349 of the Army Regulations of 1863.) The account paid by A had also been transferred before it had become due. A shows that an abstract of the payments made by B in November was not made until after the 4th of December, and that B was absent from New York on duty from the 1st to the 5th of December; but he fails, as before, to show that he knew of the existence of the difficulty suggested at the time of payment, or that he made any effort before payment to ascertain whether payment had been previously made by any other paymaster at the same post. A has been charged with the amount of the payment made by him. B has not been charged.

"Question 2. Is A liable on account of overpayment for November?"

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"Question 3. Is B liable on account of overpayment for November?"

These questions I answer, the one (question 3) in the negative and the other (question 2) in the affirmative. A is liable for the amount here paid by him upon the same ground precisely on which his liability rests in the preceding case.

"A third account for November (the statement adds) was paid by Paymaster C at Charleston, S. C., December 6, 1877, to an assignee. The account had been transferred before it became due, and C knew of that fact at the time of the payment, and knew also that Mast was not then serving in the Charleston district. (See paragraph 1348, Army Regulations of 1863, and circular on pages 28, 64, 82, and 101 of memoranda, circulars, and circular letters, Paymaster-General's Office.) C has been charged with the amount paid by him.

"Question 4. Is C liable for the overpayment made by him?"

I answer, yes. His liability rests upon the same ground as A's.

"*Payments for December, 1877.*—Paymasters A and B, both still in the New York office, each paid to an assignee an account of Mast for December, on the last day of that month. A third account was presented at a later date to B, who declined to pay it. Each of said paymasters was chargeable with notice that the account paid by him had been transferred before maturity. It does not appear that either of them made any effort to ascertain whether payment had been made by or demanded of the other.

"Question 5. Shall A be charged, shall B be charged; shall both A and B be charged on account of the double payment for December?"

Assuming, in this case, that the officer's compensation for December was lawfully payable on the last day of that month, the question here propounded turns on the *priority* of payment. If A paid first, then B is liable and should be charged, on the ground that when the latter paid there was nothing due from the Government, and so no authority in him to pay. And *vice versa*. As between two conflicting claims to a credit for a disbursement made on the same day, which might then have been lawfully made by either one of

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the claimants, but not by both, regard may well be had to the actual time of day when the payment by each was made in order to determine which was prior.

"No payment was made for January, 1878 (the statement continues), but two accounts for that month, which had been received at the New York office from assignees, were forwarded by the chief paymaster to the Paymaster-General, indorsed as follows: 'Payment refused, both accounts being for January, 1878, and received before the expiration of the month.' On the 1st of March, 1878, said Paymaster B, after inquiring in all the offices if his (Mast's) accounts for February had been either presented or paid, paid an account of Mast for February, 1878, to an assignee. Said account had evidently been transferred before maturity, and as Mast's post was Fort McHenry and the assignee resided in Wheeling, W. Va., B was chargeable with notice of the fact. Besides B knew that at least two accounts had been presented for December, and he was chargeable with notice as to the condition of Mast's account with the Government, at least so far as the same was affected by payments made to him or to his assignee through the New York office, and proper inquiry would have developed the fact that, by reason of duplication of payments, Mast was in arrears to the United States. (See sec. 1766, R. S.)

"Question 6. Is B chargeable with the account so paid by him for February, 1878?

"Question 7. If the aggregate of the charge against paymasters on account of payments made to Mast be at the end found to exceed the loss actually sustained by the United States, how will the amount of that loss be apportioned?"

To the former of these questions I reply, that if B was chargeable with notice when he paid the account for February, that Mast was then in arrears to the United States, he incurred liability for the payment so made, and the result would be the same, I think, if the facts then in possession of B were such as to put him upon inquiry as to the state of M.'s account with the Government; otherwise B would not be liable for the payment and could not properly be charged therewith.

To the other question I reply, that the apportionment of

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loss should be *pro rata*. Thus, if the amount of overpayments chargeable to A be \$200, and the amount chargeable to B \$300, and the Government should recover from M. a portion of the loss thus sustained, say \$100, the balance of the loss should be borne by A and B in proportion to the amount with which they were charged, respectively; that is to say, \$160 by A and \$240 by B.

Another case is presented as follows:

"Paymaster E paid an account of James H. Whitton, second lieutenant Fifth United States Infantry, for April, 1877, on the 9th of May, 1877, to an assignee, and another for the same month on the 31st of May, 1877, to Whitton himself. E has been charged with the amount of the overpayment. Whitton left the service May 31, 1877. He never drew his pay for January, 1877. He is charged with the sum of \$98.25 on the Third Auditor's books, and with the sum of \$673.96 on the Second Auditor's books, the latter charge being on account of ordnance and ordnance stores for which he was responsible. E asks that said January pay be so applied as to relieve him from responsibility for said overpayment. It is the practice of the accounting officers to follow the order prescribed in paragraph 1363 of the Army Regulations of 1863, and where an officer is in arrears to reimburse the United States out of his undrawn pay for public property unaccounted for to the exclusion, if necessary, of a paymaster who has made an overpayment.

"Question 8. Ought the charge against E to be removed, as he requests, or ought the practice hitherto obtaining to be adhered to?"

In reply to this question I submit that E has no right, as against the United States, to have the said January pay of W. applied for his own relief. At the time E incurred liability for the overpayment to W. (May, 31, 1877), the latter, as it would seem, already stood indebted to the United States, and on general principles, irrespective of the practice referred to, the pay mentioned should first be applied in satisfaction of such indebtedness. I accordingly answer the first branch of the question in the negative, and the alternative, or last branch, in the affirmative.

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The following case is also presented :

"An account of E. W. Maxwell, second lieutenant Twentieth United States Infantry, for March, 1878, was paid on the 30th of that month, at New York City, by Paymaster D. Said Maxwell was on duty at that place from March 2 to April 8, 1878. The propriety of the payment so made is not doubted. Paymaster E, at Washington, D. C., paid a second account of Maxwell for March on the 31st of March, and an account for April on the 30th of April, 1878. Maxwell was not serving within the limits of the Washington office on either of the dates last mentioned. Each of the accounts paid by E was held by an assignee, and had been transferred before maturity. E has been charged with the entire amount paid by him. A second account for April was paid by Paymaster F, at San Antonio, Tex. Maxwell was on duty within the limits of the San Antonio office from April 26 to May 31, 1878. He was dismissed the service by sentence of court-martial in August, 1878. It appears from the record of the court that the account paid by F was paid before the end of the month (see sec. 3648, R. S.) to an assignee to whom it had been assigned before it was due. F has been charged with the *amount* paid by him.

"Maxwell being credited with all undrawn pay, it was found by a settlement confirmed February 21, 1879, that his pay was overdrawn in the sum of \$15.65. He is indebted to the United States in the further sums of \$138.51 and \$275.48, for public property received by him April 7 and 15, 1878, for which he failed to account, as appears by a settlement confirmed February 20, 1880, since which date he has stood charged with the total sum of \$449.60.

"In May, 1881, the assignee to whom Paymaster E had paid Maxwell's account for April presented certain claims to Paymaster F for payment. From the amount of the claims so presented F withheld a sum equivalent to Maxwell's pay for April, 1878, proposing to deposit the same in the Treasury to make good the duplicate payment made to said assignee by Paymaster E for that month. Said assignee having presented the case to the Paymaster-General, that officer, on the 9th of June, 1881, asked of the Second Auditor that

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he 'be furnished with a copy of any settlement made in your (the Second Auditor's) office of the pay of Lieut. E. W. Maxwell, Twentieth Infantry, showing his present indebtedness to the United States on account of pay.' The Paymaster-General's letter was returned by the Second Auditor's office with an indorsement stating that copy of statement in the case of Maxwell was inclosed. The paper inclosed was a copy of the statement of account with the settlement confirmed February 27, 1879, indicating a balance of pay overdrawn \$15.55, and no reference was made to the settlement of February 20, 1880, nor to the balance of \$429.60. Thereupon the Paymaster-General, in July, 1881, directed F to refund to said assignee the difference between the sum withheld by him, as aforesaid, and the sum of \$15.65, the latter now being the balance found due in said settlement of February 27, 1879. F did as he was directed. It is claimed that no charge should be found against either E or F on account of payments for April, 1878.

"Question 9. Shall E be relieved from responsibility on account of his payment to Maxwell for March, and shall E and F, or either of them, be relieved from responsibility on account of said payments to Maxwell for April, 1878?"

Answer. The facts above set forth furnish no ground whatever for relieving E from his liability for the payment of M.'s second account for March. But in regard to the overpayment for April, the claim for relief therefrom seems to be well founded. The assignee of M.'s account for that month, to whom E made payment, had at the time of such payment no claim against the United States by reason of the assignment, an account of M. for the same month having then already been paid by F, and nothing being then due to M. for that period. When, therefore, the assignee subsequently presented claims for payment, an amount due on such claims sufficient to offset the overpayment for April might properly be retained, as it in fact was retained for that purpose by F. The relinquishment of this amount by the latter, which was available for the extinguishment of the liability incurred for the overpayment for April, cannot, under the circumstances stated, justly operate to the disadvantage of either F or E. They should not be made to suffer for the

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error or inadvertence of other officials. In my opinion, they are entitled to be relieved from liability for that overpayment.

I return herewith the papers which accompanied your letter.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,

*Secretary of War.*

INTERNAL REVENUE.

The 50 per centum required by section 3176, Revised Statutes, to be added to the tax upon taxable property owned by any person who neglects or refuses to make a list or return of such property, and to verify the same as provided by law, is a *penalty*, not a tax.

In the case stated, the facts bring it within the discretion of the Secretary of the Treasury, given by section 5293, Revised Statutes, to remit fines, penalties, etc.

Section 3120, Revised Statutes, affords no relief to the party, the addition to his tax having been legally made.

DEPARTMENT OF JUSTICE,

July 28, 1882.

SIR: In your letter of the 17th instant you ask my opinion as to the proper construction of the provision in section 3176, Revised Statutes, which requires the Commissioner of Internal Revenue to add 50 per cent. to the tax upon taxable property owned by any person who neglects or refuses to make a list or return of such property and to verify the same as required by law.

Is the addition a tax only, or is it a penalty? I think it is a penalty. It is referred to and called a penalty or forfeiture in the act from which section 3176 is taken. This section is a re-enactment of the latter part of section 14 of the revenue act of the 30th of June 1864 (13 Stat., 227.)

In section 110 of the act, page 278, it is provided that any refusal or neglect by banks or bankers to make the return required of them shall subject them to pay a penalty of \$200, "*besides the additional penalty and forfeitures* in other cases

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provided in the act." Now the only "additional penalty" applicable in such a case is that provided in section 14, namely the 50 per cent. added to the tax when parties neglect or refuse to return lists of their taxable property.

In other analogous cases the exaction for neglect or failure to comply with the requirement of the law is termed a penalty. Thus in the last paragraph of section 9 of the act of July 13, 1866 (14 Stat., 147), it was required that in lists or returns of objects of taxation the persons returning such lists should declare whether the rates and amounts were stated according to their value in legal-tender currency or in coined money, and a neglect or refusal so to declare brought upon the party an addition to his tax of the "penalties" imposed by law in other cases of like neglect or refusal.

There are other instances which need not be cited. Those referred to above show abundantly the legislative understanding that the addition of 50 per cent. to the tax in case of refusal or neglect, etc., provided in section 3176 is a penalty.

To the same effect the Supreme Court in *Wright v. Blakeslie* (101 U. S., 178) uses this language. "Another point made by the plaintiff against the assessment relates to the 50 per cent. added to the amount of the succession tax, and exacted by way of penalty for refusing to make a return as required by the statute. The assessor evidently thought that he was authorized to impose the penalty prescribed by the fourteenth section of the act of 1864, \* \* \* which was, it is true, a penalty of 50 per cent. of the tax for refusal or neglect to make a list or return."

Moreover, in the customs laws what is called an "addition" to the tax or duty has been treated by the courts as a penalty.

By the seventeenth section of the act of August 30, 1842 (5 Stat., 564), and by section 8 of the act of July 30, 1846 (9 Stat., 43), if the invoice of goods imported was less by upwards of 10 per cent. than the appraisal of the officer, there was "added" to the duty imposed by law upon the goods when fairly invoiced 50 per centum by the earlier law and 20 per centum by the later.

These acts have not unfrequently come before the courts,

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and though the particular question does not seem to have been raised, that is, whether the addition is a tax or penalty, still it is in almost every instance called a penalty and treated as such, as if there could be no doubt upon the point. (See *Belcher v. Lawrence*, 21 Howard, 251-256; *Manhattan Gas Light Co., v. Maxwell*, 2 Blatchford, 405; *Howland v. Maxwell*, 3 *id.*, 146; *Cames v. Maxwell*, 3 *id.*, 420; *Bannendahl v. Redfield*, 4 *id.*, 223; *Bischof v. Maxwell*, 4 *id.*, 384.) In *Spring v. Russell* (1 Lowell's Decisions), the judge calls the like provision in other acts a "penal duty." Such no doubt it is in section 3176, Revised Statutes. It is in the nature of punishment, and was intended, by fear of its exaction, to induce all persons holding taxable property to make out lists thereof and return the same within the time prescribed by law.

In the case stated in your letter of the private banker there was no fraud or willful negligence, but in ignorance of the statute he failed to make his semi-annual return. As soon as he had knowledge of the requirement he obeyed. The penalty is less than \$1,000.

In my opinion the facts bring the case within the discretion of the Secretary of the Treasury, given by section 5293, Revised Statutes, to remit fines, penalties, and forfeitures which are imposed under authority of any revenue law.

Section 3120, Revised Statutes, affords no relief to the party; the addition to his tax having been legally made. (See 10 Opin., 667.)

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

*Secretary of the Treasury.*

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Case of Charles D. Coleman.

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## CASE OF CHARLES D. COLEMAN.

The order of the President in this case, of March 3, 1869, which was rescinded March 13, 1889, being executory and in its nature revocable, and having remained unexecuted at the time of its rescission, was completely annulled thereby.

A general officer, commanding a military department in July, 1865, had no power to appoint a court-martial for the trial of an officer under his command where he was himself the "accuser or prosecutor"; nor could such power be imparted to him otherwise than by a legislative act.

## DEPARTMENT OF JUSTICE,

August 2, 1882.

SIR: I have examined the application of Mr. Charles D. Coleman, dated the 8th ultimo, in connection with his supplemental application of a subsequent date, both of which were referred to me by your direction for an opinion upon the legal questions presented therein. The facts of his case, as stated in the original application, are in substance the following:

In June, 1863, the applicant was appointed by the President provost-marshal of the first district of Missouri, under the act for enrolling and calling out the national forces, etc., and entered upon and continued in the discharge of the duties of that office until June 17, 1865, when he was placed under arrest and in close confinement upon charges preferred against him by the order of Major-General Dodge, then commanding the Department of the Missouri. He was afterwards brought to trial on such charges before a court-martial, convened by the order of General Dodge, convicted and sentenced (*inter alia*) "to be imprisoned for a period of seven months (and thereafter until he should turn over a certain sum of money), at such place as should be designated by said commanding general, and to be dishonorably dismissed from the service." The proceedings and sentence were approved by General Dodge, and the sentence carried into execution by his order; the applicant was dishonorably dismissed from the service, and imprisoned in the Missouri penitentiary, where he remained in confinement until April 28, 1866, when he was discharged by the United States cir-

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cuit court for the district of Missouri on a writ of habeas corpus.

The applicant further states in substance, that General Dodge was the actual accuser in the case, and that the court-martial was changed by his orders (in relieving some of the members thereof from longer service thereon) "subsequent to all the material evidence having been produced."

In February, 1869, the applicant presented a petition to President Johnson "praying for a reversal of such conviction and sentence," upon which the President made the following order:

"EXECUTIVE MANSION, *March 3, 1869.*

"Case of Coleman, C. D., captain. Convicted of fraud upon Government. Recommended for removal of disability.

"Respectfully referred to the Secretary of War. Let the disabilities be removed and an honorable discharge granted.

"ANDREW JOHNSON."

Upon the recommendation of the General of the Army, dated March 13, 1869, that the foregoing order be not executed (such recommendation being approved by the President), that order was rescinded by an order of the Secretary of War, attested by "Ed. Schriver, Inspector-General."

The applicant claims that the order of President Johnson was final, that its rescission was unauthorized and illegal, and should be disregarded, and that it should be executed.

This claim in my opinion is not well founded. The order referred to, being executory, was in its nature revocable at any time before the execution thereof; and as it remained unexecuted at the time of its rescission as above, such rescission being made by competent authority completely annulled it, and thenceforth the matter stood precisely as if such order had never been issued.

Some elements in the case which are only briefly adverted to in the original application are presented more at large in the supplemental application. In the latter the applicant states:

"By a report made by the Judge-Advocate-General, dated December 16, 1865, upon a review of the case, he found and determined as a question of *fact*, that General Dodge, by

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whose order the court-martial was convened for my trial, and the findings and sentence of such court were approved and carried into execution, was the *actual* accuser against me, although not appearing as the prosecutor of record, and held that all the proceedings in the case were void *ab initio* for that reason, and advised that I be released and restored to my office."

By a supplemental report made by the Judge-Advocate-General, dated January 17, 1866, while adhering to the *fact* thus found and determined by him in his previous report, that General Dodge was the *actual* accuser in the case, came to the conclusion, as a matter of law, that the action of General Dodge in thus convening such court, and in thus approving of the findings and sentence, and in thus carrying such sentence into execution, was authorized and lawful, notwithstanding he was the *actual* accuser, by reason of an indorsement upon the papers relating to the case, of which the following is a copy:

"Referred to Major-General Dodge, commanding the Department of Missouri, with directions to secure the money in question, and to bring the parties to justice. By order of the Secretary of War.

"C. A. DANA,

"Assistant Secretary of War."

Hereupon the applicant proposes the following question:

"Could General Dodge, as commandant of the Department of Missouri, in the month of July, 1865, have lawfully convened a court-martial for the trial of a subordinate officer under his command, in a case in which he was the *actual* accuser, upon such direction of the Secretary of War as herein before set forth; or could he have lawfully approved of the findings and sentence of a court thus convened, and carried such sentence into execution, extending to the dismissal of such officer from the service; and if General Dodge was the *actual* accuser, as thus found, are the findings, conviction, and sentence of such court valid or invalid?"

Under the sixty-fifth article of war (act of April 10, 1806, chap. 20), "any general officer commanding an army or colonel commanding a separate department," was authorized

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to appoint general courts-martial whenever necessary. But by the act of May 29, 1830, chapter 179, it was provided that whenever such general officer or colonel shall be the "accuser or prosecutor" of any officer in the Army under his command, the general court-martial for the trial of the accused shall be appointed by the President, and furthermore, that the proceedings and sentence of the court shall be sent directly to the Secretary of War, to be laid before the President for his approval or orders in the case. The act of December 24, 1861, chapter 3, which gave to the commander of a division or of a separate brigade power to convene general courts-martial in time of war also contained a provision that when such commander shall be the accuser or prosecutor, the court shall be appointed by the next higher commander. The purpose of these provisions in the acts of 1830 and 1861, limiting the authority vested in the officers mentioned to appoint general courts-martial, is obviously to guard against results which would not be in harmony with a proper sense of justice, and which might ensue if the officer by whom the charge is made, and who is interested in the issue, were permitted to detail the members of the court which is to try the accused, the danger being that such officer, under the influence of a strong feeling against the accused, might select those who are hostile to the latter or unduly biased in his own favor, and who, for that reason, would be less able to render a fair judgment in the case. And it is very clear that, by force of these provisions, an officer in command of an army or a department, etc., had, at the period to which the present case refers, no power to appoint a general court-martial for the trial of an officer under his command where he was himself the "accuser or prosecutor;" nor could such power be imparted to him otherwise than by a legislative act. It is unnecessary to add that the appointing of a court-martial, convened by an official without authority to appoint it, would be void and would have no effect.

I submit then, in answer to the above question (especially the last clause thereof), that if General Dodge was the actual accuser in the case under consideration, the court-martial by which the applicant was tried was illegally constituted

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Expenses of Last Sickness.

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and the findings and sentence thereof were consequently void. Whether the fact in that regard be, as it is here, hypothetically stated, is a subject upon which I express no opinion; it not being within the province of the Attorney-General to determine questions of fact.

I have the honor to be, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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## EXPENSES OF LAST SICKNESS.

The Commissioner of Pensions is not invested with power to audit and adjust accounts for the last sickness and burial of deceased pensioners arising under section 4718, Revised Statutes. This power belongs solely to the proper accounting officers of the Treasury by virtue of section 236, Revised Statutes.

DEPARTMENT OF JUSTICE,

*August 3, 1882.*

SIR: The question presented by the letter of the Second Comptroller, referred to in and accompanying your communication of the 8th July ultimo, requesting my opinion, is whether the accounts presented by persons who have borne the expenses of "the last sickness and burial" of deceased pensioners, under section 4718 of the Revised Statutes, must be audited and adjusted in the Treasury by the accounting officers after an examination of the original vouchers and papers, or whether the Commissioner of Pensions may determine finally the amount properly due for such expenses, and by withholding the original vouchers from the accounting officers compel them to audit and allow such claims upon the mere certificate of that officer.

It is conceded by the Comptroller in his letter that the Commissioner of Pensions is authorized to decide who are entitled to be pensioners and the amounts to be paid to them, respectively, as such, and that his decision is to that extent conclusive as to the accounting officers; but he insists that claimants for reimbursement of expenses of the last sickness and burial of pensioners are not in any sense on the footing of pensioners, and that the ascertainment and allowance of the different items of such expense belong exclusively to the accounting officers of the Treasury.

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Section 4718, Revised Statutes, provides that when a pensioner, or a person entitled to a pension and "having an application therefor pending," shall die, not leaving a widow or child him surviving, "no payment whatsoever of the accrued pension shall be made or allowed, except so much as may be necessary to reimburse the person who bore the expenses of the last sickness and burial of the decedent, in cases where he did not leave sufficient assets to meet such expenses."

It may be assumed as established that the decision of the Commissioner of Pensions placing a person on the pension roll, and fixing the amount of his pension, is conclusive, and consequently that in settling the accounts of pension agents the accounting officers have no authority to go behind the pensioner's certificate.

It must be taken as equally clear that, as the pension law determines the amounts to be paid the various pensioners, the action of the Commissioner of Pensions, in allowing or directing payment of a pension, cannot be said to ever involve an accounting, in any proper sense of that term.

An examination of the various provisions under the title "pensions" in the Revised Statutes will show that, with the exception of said section 4718, there is not one that calls for the auditing and settling of accounts, and that there is an entire absence of any direct or express intention that the Commissioner of Pensions should have the power to audit accounts. So far from it, indeed, the law withholds from him the power to administer oaths, which is expressly conferred on the Auditors of the Treasury that they may take testimony "in any case in which they may deem it necessary for the due examination of the accounts with which they shall be charged." (Sec. 297, Rev. Stat.)

Congress has provided an admirable system for the adjustment of public accounts (chaps. 3 and 4, Rev. Stat.), and has declared that "all claims and demands *whatever* by the United States or against them, and all accounts *whatever* in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury." (Sec. 236, Rev. Stat.) This system has been in operation from the foundation of the Government, and there can be no doubt as to the general intention of Congress

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Expenses of Last Sickness.

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that all unliquidated demands against the Government shall be adjusted by the accounting officers forming the system.

Whether we regard sections 4718 and 236 as holding the same relation to one another as when the former was section 25 of the act of 3rd March, 1873, and the latter section 3 of the act of 3rd March, 1817, or, since the enactment of the Revised Statutes, parts of one and the same statute, I perceive no ground whatever for holding that section 4718 was intended to restrict or qualify the declaration contained in section 236, that all demands and accounts *whatever* against the Government shall be audited and adjusted in the Treasury.

It is the first duty of the expounder of several cognate statutes, or of several provisions of the same statute, to give them all a harmonious interpretation, and nothing short of some irreconcilable repugnancy can justify him in imputing to the legislature confused or inconsistent intentions.

From the time of the passage of the act of 1873 until a very recent date, according to the Comptroller's letter, these two provisions have been treated as in perfect harmony, and accounts under section 4718 have been audited and adjusted by the accounting officers after an examination of the original vouchers and papers in the accustomed way, and it is only by a strained construction of this section that any collision between it and section 236 is now produced.

It follows, therefore, that the Commissioner of Pensions has no authority to audit and adjust accounts under said section 4718, Revised Statutes.

It is proper to add that my opinion of the 28th April, 1882, which the Comptroller says has been invoked as an authority for the new interpretation of section 4718, does not conflict with this opinion. In the former it was held that Congress intended that a decision of the Commissioner of Pensions as to the amount demandable by a pensioner should be conclusive, while this opinion holds that Congress had no intention to invest that officer with the power to audit and adjust accounts under section 4718. The language of each opinion must be taken in connection with its subject-matter.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

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Registry of Vessels.

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## REGISTRY OF VESSELS.

A registered vessel of the United States, wholly and continuously owned by a citizen of the United States, does not forfeit her privileges as such by having been employed under a foreign flag since the rebellion. An American built vessel, wholly and continuously owned by a citizen of the United States, but as yet unregistered, may be admitted to registry, although she has sailed under a foreign flag since the rebellion.

DEPARTMENT OF JUSTICE,  
August 16, 1882.

SIR: The questions submitted for my opinion in your communication of the 21st July ultimo are:

(1) "Can a vessel, built and registered in the United States since the close of the rebellion, but which has been employed under a foreign flag, though in the continuous ownership of a citizen of the United States, be again admitted to registry as a vessel of the United States without the authority of a special act of Congress?"

(2) "Can a vessel, built and owned as above described, which was never registered as a vessel of the United States, but which has been placed under a foreign flag immediately after having been built, be admitted to registry without such special act of Congress?"

I will consider these questions in their order.

1. A vessel to be entitled to registry under our navigation laws must have been built within the United States, or captured in war by citizens of the United States and condemned as prize, or adjudged to be forfeited for breach of the laws of the United States, or wrecked in our waters and purchased and repaired by a citizen of the United States, provided the repairs amount to three-fourths of the cost of the vessel when so repaired, and must in each case be wholly owned by a citizen or citizens of the United States and commanded by a citizen thereof.

A registered vessel of the United States may be denationalized permanently or temporarily in several ways, namely: by voluntary sale to a foreigner; or by capture and condemnation under the authority of a foreign power, saving, however, to the owner at the time of such capture and condemnation, by a sort of *jus postliminii*, the right to a new register

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Registry of Vessels.

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if he should regain his lost property in such vessel; or by having sailed under the flag and enjoyed the protection of any foreign government *during the rebellion*; or by the owner of any interest in her usually residing in a foreign country, but during such residence only, unless such owner be a consul of the United States; or the agent for and partner in some house of trade consisting of citizens of the United States actually carrying on trade within the United States; or by the owner of any interest in her, being a naturalized citizen of the United States, residing more than one year in his native country, or two years in any other foreign country, unless such person be a consul or other public agent of the United States, saving that in such case such vessel may have a new register if sold in good faith to a citizen of the United States. (Secs. 4132, 4133, 4134, 4135, 4136, 4165, Rev. Stat.)

These are the several conditions in which vessels may enjoy or forfeit the privileges of registration under our navigation laws. Considering the care with which these laws have been framed, it would seem but reasonable to conclude that if Congress had intended that a vessel with an American register, and continuously owned by a citizen of the United States, should forfeit her privileges as such by sailing under the protection of a foreign flag since the close of the rebellion, such intention would have been clearly expressed. The silence of Congress on this head, and the precision and particularity with which it has set forth the cases in which the benefits of registration may be lost, alike forbid any resort to implication for the purpose of raising other grounds of forfeiture, especially when the effect of doing so must be to abridge the rights of our own citizens and diminish our tonnage. To hold otherwise would be to violate one of the best-settled canons of interpretation, that the enumeration of excepted cases strengthens the application of a statute to cases not excepted.

I am therefore of opinion that a registered vessel of the United States, wholly and continuously owned by a citizen or citizens of the United States, does not forfeit her privileges as such by the fact of having sailed under the protection and flag of a foreign power since the rebellion.

2. The same reasoning also conducts me to the opinion,

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Contract with the Osage Nation of Indians.

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in answer to the second question, that an American-built vessel, wholly and continuously owned by a citizen or citizens of the United States, but as yet unregistered, is entitled to registry, albeit she has sailed under the protection and flag of a foreign power since the rebellion. Until Congress has said that the employment of such a vessel in the home or colonial trade of another power shall debar her from taking out an American register, her right to do so exists in full force. The statute permits registry, but does not command it.

Very respectfully, your obedient servant,

S. F. PHILLIPS,  
*Acting Attorney-General.*

Hon. CHARLES J. FOLGER,  
*Secretary of the Treasury.*

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CONTRACT WITH THE OSAGE NATION OF INDIANS.

Upon the facts stated: *Advised* that Charles Ewing, esq., is entitled to the compensation charged in his account for services rendered the Osage Nation of Indians under a contract therewith, executed in compliance with the law respecting contracts with Indians, dated February 14, 1877.

## DEPARTMENT OF JUSTICE,

*August 21, 1882.*

SIR: I have examined the case of Charles Ewing, esq., to whose letter addressed to you on the 7th instant you invite my attention, and ask for an expression of my views upon the questions arising upon the facts therein stated.

Mr. Ewing's statement shows that in a contract with him dated the 14th day of February, 1877, entered into by the Osage Nation of Indians through its duly-accredited agents (the said contract being drawn up and executed in compliance with the law regulating contracts with the Indians, section 2103, Revised Statutes), it is stipulated that Mr. Ewing should receive  $7\frac{1}{2}$  per cent. of all moneys that he should cause to be passed to the credit of said nation in the Treasury of the United States. The Osages claimed that large sums of money were due them, or should in law and justice be placed to their credit, chiefly for their lands in

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Contract with the Osage Nation of Indians.

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Kansas taken and sold or otherwise disposed of by the United States; and the services to be rendered by Mr. Ewing were, among other things, the obtaining settlements from the United States and causing the moneys which in justice belonged to the Osages to be placed to their credit at the Treasury of the United States.

The contract was duly approved by the Commissioner of Indian Affairs and by the Secretary of the Interior, pursuant to section 2103, Revised Statutes.

Under this contract Mr. Ewing has rendered very important and valuable services, and has caused large sums of money to be deposited in the Treasury of the United States to the credit of the Osages. As required by section 2104, Revised Statutes, he has made affidavit of his services and presented his accounts. The Secretary and the Commissioner have certified that he has complied with and fulfilled the contract (sec. 2104, Rev. Stat.), and they have approved the accounts for his compensation. The accounts, two in number, have been passed by the Second Comptroller and have been paid, except a portion of the last one.

This account, *approved* as aforesaid, was for \$17,706.27, which is  $7\frac{1}{2}$  per cent, upon \$236,083.88 placed to the credit of the Osages in the Treasury.

The Second Comptroller excepted from this account the percentage on an item of \$70,096.12, which he postponed for further examination.

This sum was, without agreement or treaty with or authority from the Osages, taken from their funds by the United States and paid over to the Cherokees in payment for lands in the Indian Territory purchased of them for the use and for the settlement in that Territory of the Kaw or Kansas tribe of Indians. There was no privity between the Osages and the Kaws. There was no indebtedness of the latter to the former. Clearly the United States assumed the obligation to reimburse the Osages. They had a right to look to the Government of the United States as their debtor, but they were not credited with the money in the Treasury. There was nothing to show that the United States recognized the indebtedness.

In the review of the accounts of the Osage Nation with

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Contract with the Osage Nation of Indians.

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the United States, which by the contract Mr. Ewing was bound to make, this error was discovered and brought to the attention of the Secretary, and the result was that the sum named above was passed to the credit of the Osages.

Now it is nought to the purpose to say that the Osage Nation would have been reimbursed so soon as lands enough in Kansas belonging to the Kaws could be sold. *Non constat* that this would ever happen. The first question is, upon whom was the obligation in the first instance to pay back the money? But, as already intimated, this question has been decided by competent authority, and in accordance with the decision the money has been credited to the Secretary of the Interior as trustee for the Osages.

I cannot doubt that this result was brought about by Mr. Ewing's efforts, executed in strict performance of his contract. The Secretary of the Interior in his letter of July 11, 1881, to the Commissioner of Indian Affairs, recounts at length, and with much particularity, the services rendered by Mr. Ewing, and says in conclusion that the Indians are reaping the benefits of those services, and in view of the sworn statement contained in his affidavit of May 18, 1880, accompanying his accounts, it is clear that the money of which he claims a percentage was caused to be passed to the credit of the Indians by Mr. Ewing within the intent and meaning of the contract.

I concur in this conclusion. The sum now in question is part of the account referred to by the Secretary. It was due at the date of the contract, and should in law and justice have been placed to the credit of the Osages. Through Mr. Ewing's services it has been so credited. He is therefore entitled to the compensation agreed upon—that is, 7½ per cent. upon \$70,096.12; for the full sum was deposited in the Treasury, no deduction having been made on account of Mr. Ewing's fees.

His letter of August 7, addressed to the Secretary, is herewith returned.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

Hon. H. M. TELLER,

*Secretary of the Interior.*

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Colonel Swayne's Case.

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## COLONEL SWAYNE'S CASE.

S., while a major-general of volunteers, was, in July, 1866, appointed colonel of the Forty-fifth United States Infantry, and on September 10, 1866, accepted the appointment and took the oath of office. From that time until August 31, 1867, when he was mustered out of service as a major-general of volunteers, he continued to draw the pay of a major-general: *Held*, that the settlements made by the accounting officers in the matter of his pay as major-general are conclusive upon the executive department of the Government, and can not be re-opened.

DEPARTMENT OF JUSTICE,  
*August 29, 1882.*

SIR: The case of Col. Wager Swayne, presented in your communication of the 8th instant, and in the letter of the Comptroller referred to in and accompanying it, is as follows: Colonel Swayne is entitled to a certain allowance as a percentage increase on his retired pay. On the 28th July, 1866, he being then a major-general of volunteers, was appointed colonel of the Forty-fifth United States Infantry, and on 10th September, 1866, accepted the appointment in writing and took the oath of office. From the time of his appointment as colonel to 31st August, 1867, when he was in terms mustered out of the service as a major-general of volunteers, Colonel Swayne continued to draw the pay of a major-general. The question for opinion is, whether the Government is entitled to set against his allowance for percentage increase so much of the pay received by him as major-general from the 10th September, 1866, the date of his acceptance of the appointment of colonel, to 31st August, 1867, when he was mustered out of service as a major-general of volunteers, as represents the excess of a major-general's pay over that of a colonel.

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 can not 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

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Soldiers' Home.

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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 further than to hold that the settlements with Colonel Swayne are conclusive upon the executive department of the Government.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF WAR.

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SOLDIERS' HOME.

In passing upon recommendations made by the Board of Commissioners of the Soldiers' Home under section 4816, Revised Statutes, the Secretary of War is invested with a discretionary power to approve or disapprove the same.

## DEPARTMENT OF JUSTICE.

August 30, 1882.

SIR: I have considered the question proposed in your letter of the 26th instant, and herewith send my opinion.

You ask whether you have discretion in passing upon recommendations made by Commissioners of the Soldiers' Home under section 4816 of the Revised Statutes.

The question you propound is not without its difficulties. My first impression upon reading the section you desire me to construe was that you had no discretion. A cursory reading of the act would seem to confine the power given under it to the Board of Commissioners. The language of that section, so far as important here, is:

"The officers of the Soldiers' Home shall consist of a governor, \* \* \* and the officers shall be taken from the Army, and appointed or removed from time to time, as the

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Soldiers' Home.

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interests of the institution may require, by the Secretary of War, on the recommendation of the Board of Commissioners."

After study and examination of the subject, my opinion is that "the interests of the institution" mentioned in the section are committed jointly to the Secretary and the Commissioners: that is, the Secretary of War, in acting under that section, is to act in view of those interests, as well as the Commissioners. His authority is limited to the negative upon their "recommendations," and their recommendations are limited in section 4816 to persons "taken from the Army."

This limitation, however, does in neither case forbid or prevent discretion or responsibility within the sphere of its exercise. The Secretary does not act as a mere clerk or ministerially in passing upon the recommendation of the Board. The recommendation implies that the person to whom it is addressed is to consider it. The word "recommendation" does not mean command, order, direct, or even appoint. It is equivalent to submit, suggest, or indicate. The Commissioners are officers of the Army, under the immediate control of the Secretary of War, and it would be an official anomaly to have them, by the mere force of the interpretation of the act, invested with absolute power over the discretion of their superior, the Secretary, in any matter that relates to the Army, or is connected with the Army, or the Department of War.

If these Commissioners were to recommend an officer on actual duty, and whose services were needed in the command that he held, it can not be maintained that the mere act of their recommendation would oblige the Secretary to transfer him to this position from that line of duty where he was, in the judgment of the Secretary, most useful.

The act of 1870, section 1259, provides that retired officers of the Army may be assigned to duty at the Soldiers' Home upon a selection by the Commissioners, approved by the Secretary of War. In the case presented the Commissioners have selected a retired officer, and the Secretary of War may approve or disapprove of this selection.

Again, in section 1415 of the act of 1851: "The majority of the Commissioners shall also have power to establish, from time to time, regulations for the general and internal

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Soldiers' Home.

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direction of the institution, to be submitted to the Secretary of War for approval," etc. "For approval." Thus it will be seen that in the other part of the laws or statutes relating to this institution and to the power of the Commissioners the joint authority of the Secretary of War is recognized. He has power to approve. The whole policy of this law, and of all law regulating and prescribing the relations of officers to the Secretary of War, is to make them subordinate to his command and subject to his discretion.

The Governor of the Soldiers' Home is an officer of the United States, and within the second clause of the second section of Article II of the Constitution, and as such his appointment is necessarily to be made either by the President in conjunction with the Senate, or by the President alone, or a court of law, or a head of a Department.

In view of that, it must be assumed that Congress intended the function of appointment, in the full constitutional sense, should be performed by the Secretary of War. No part of that function has been intended to be invested in the Board of Commissioners. Appointments to office under the Constitution is one of the highest executive functions, and includes discretion. To give that discretion to any other person than those named in the Constitution is in effect to vest such appointments in such other persons; and so to divest the head of a Department of any element necessarily included in an appointment to office is in effect to divest him of the power of appointment, and so to evade the constitutional provisions.

I submit that while it is competent for the legislature to define any one way or another a sphere within which an appointment is to be made, yet that the appointment itself, in the constitutional sense of that word, resides in the Secretary. Appointment, in the sense employed in section 4816, is an executive act, as meant by the court and as expressed by the court in the case of *Decatur vs. Paulding*, on page 515 of 14 Peters, and again asserted in *Gaines vs. Thompson*, in 7 Wallace, 351, and frequently elsewhere.

The presumption is that any duty imposed by statute upon a head of a Department is an executive duty as contra-distinguished from ministerial. It would require a definite assertion in the context of a statute to make such an act min-

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Soldiers' Home.

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isterial. The implication in this statute, apart from all that I have said in connection with the constitutional provision, is that the act of the Secretary was meant to be discretionary. Where a compound act is to be performed by officers of a lower and a higher grade, so much of that act as is to be performed by the latter partakes of the character suitable to his relative dignity; that is, the higher functions involved in the act remain with him. I am of the opinion that you have a discretion.

Since I have investigated this matter, at my request you caused a search to be made in the records of your Department, so that I might learn what had been heretofore done by the Commissioners and the different Secretaries that related to this subject, and you have furnished me with the record of the proceedings of the Board in 1858 in the case of Colonel Payne. In the letter of the Board, signed by its President, General Jessup, the Board expressly say that "the action of the Board, as you are aware, with regard to Colonel Plympton, is inoperative until it has received your approval." "The action" was the appointment of Colonel Plympton. This is a distinct acknowledgment by the Board of the Secretary's discretionary authority, and of his power to approve or disapprove their action.

Then, again, in the same matter it appears that Mr. Secretary Floyd exercised his discretion, for upon the back of the letter is indorsed his order, to wit, that "the resignation of the governor is accepted, for the reason of his incompetency and unfitness for the place he has occupied. The strongest proof of this fact is to be found in the reasons assigned by that officer in his tender of resignation." Here the Secretary passed upon that subject as a matter within his discretion and jurisdiction to approve or disapprove, giving reasons for his action, which would not have been done if he were merely performing a clerical or ministerial duty, for his reasons would have been unnecessary.

After which indorsement the Secretary adds: "The approval of Colonel Plympton's nomination is for the present withheld. The present lieutenant-governor of the Military Asylum will be immediately relieved, and his place supplied by the lieutenant-governor of the Harrodsburgh Branch

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 Potomac River Improvement.
 

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Asylum." Thus it will be seen that the Secretary exercised his superior authority, and used his own discretion in making a special order in the case, which was not at all in conformity with the "recommendation" of the Board.

I conclude, as I have before stated, that the proper interpretation of this act is that the Secretary has the discretion, that nothing but a positive statute depriving him of it would warrant any other interpretation, and it is doubtful under the Constitution if such an act would be valid.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF WAR.

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 POTOMAC RIVER IMPROVEMENT.

The provision in the act of August 2, 1882, chapter 375, making it "the duty of the Attorney-General to examine all claims of the title to the premises to be improved under this appropriation;" i. e., the appropriation "for improving the Potomac River in the vicinity of Washington," etc., does not forbid the commencement of the work until the Attorney-General shall have performed the said duty.

DEPARTMENT OF JUSTICE,

September 2, 1882.

SIR: Yours of the 30th ultimo incloses certain communications to yourself regarding the improvement of the Potomac river in this vicinity, ordered by act of Congress of August 2, 1882, and inquires whether there be any legal obstacle to a commencement of that work until the Attorney-General shall have concluded his action, which in the same connection the statute requires of him.

The work contemplated by the act consists of three items: *improvement of navigation, establishment of harbor lines, and raising of the flats*; and towards this the sum of \$400,000 is appropriated.

The statute then proceeds: "And it is hereby made the duty of the Attorney-General to examine all claims of the title to the premises to be improved under this appropriation, and see that the rights of the Government in all re-

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Potomac River Improvement.

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spects are secured and protected ; and if he deems it necessary he is authorized to cause a suit or suits in law or in equity to be instituted, in the name of the United States, in the supreme court of the District of Columbia, against any and all claimants of title under any patent which in his opinion was by mistake, or was improperly or illegally issued for any part of the marshes or flats within the limits of the proposed improvement."

By referring to reports mentioned in the act it appears that the improvement proposes, amongst other things, to create more than 700 acres of land upon the flats, of great value for either public or private purposes.

Inasmuch as the *claim of title* spoken of in the act is understood to apply to *the flats*, I suppose that my special duty as above directed more particularly concerns that item.

Congress takes notice that there are existing "claims of title" to the flats, as I gather, which conflict with rights of the United States, *i. e.*, with their *proprietary* rights, inasmuch as no mere claim of private title can interfere with the ordinary rights of the Government to improve *navigation*.

Nevertheless, Congress has not *expressly* made this appropriation contingent upon the proposed ascertainment of such titles, nor upon consideration do I find that the statute contains any *implication* to that effect.

I observe from the report of the Board of Engineers referred to in the statute that the proposed improvement is to cost about \$2,500,000. By comparing with this amount that of the above preliminary appropriation, it appears that operations of several years' duration are contemplated. In connection with the above matter of titles Congress therefore probably concluded that an expenditure of \$400,000, whilst substantially valuable to navigation, would probably not greatly raise the flats or increase their value, and that in any event the control which the United States have of the question by their eminent domain rendered this topic one of no great immediate importance in comparison with that of others which suggested an *absolute appropriation* and the usual course of action thereunder.

Upon the whole I answer the above question in the negative.

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The Savannah River Improvement.

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I will avail myself of this opportunity to say that I shall be greatly obliged if you will furnish me with any information in your possession or at your command that will facilitate the duty in the above connection which the act has devolved upon me.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF WAR.

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THE SAVANNAH RIVER IMPROVEMENT.

The \$1,000, authorized by the act of March 3, 1881, chapter 136, to be expended from the appropriation for improving Savannah River, Georgia, in the payment of damages for land taken for widening the channel opposite Savannah, may be so expended without a transfer of the title to the land, the purpose of the provision being to indemnify for the loss of the land, not to acquire ownership thereof.

DEPARTMENT OF JUSTICE,

September 19, 1882.

SIR: Your letter of the 5th ultimo, inclosing a communication from the Chief of Engineers, and other papers, inquires "Whether or not it will be necessary to require a transfer of the title from the State of Georgia to the United States for land taken by the United States in improvement of the Savannah River before payment of the same can be made."

This inquiry has reference to a part of Fig Island, opposite the city of Savannah, Ga., which has been cut away by the United States for the purpose of widening the channel of the river at that point.

Previous to the cutting away of the premises an act was passed by the legislature of the State of Georgia (approved October 8, 1879) authorizing and providing for the condemnation thereof for the purpose mentioned. Under that act, the object of which was to enable the United States to acquire the right to cut away the premises, proceedings were had in the superior court of Chatham County by the mayor of the city of Savannah in the name of the State, which resulted in a judgment for \$1,000 awarded the owner as

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The Savannah River Improvement.

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damages for the land, upon payment of which, by the terms of the act and of the judgment, the title to the land would pass "out of the owner into the State of Georgia."

After the judgment was rendered the question arose whether it could be paid out of the then existing general appropriation for the improvement of the Savannah River.

This question was referred to the Attorney General, who, in an opinion dated July 10, 1880 (16 Opin. 540), held that that appropriation was not available for payment of the judgment. Subsequently, on January 3 1881 (as appears by the papers submitted), the judgment was paid by the mayor of Savannah on behalf of the city.

Since then the land condemned has, as already stated, been cut away by the United States, the *locus* now forming part of the bed of the river. By the act of Congress of March 3, 1881, chapter 136, it is provided that of the sum thereby appropriated for improving Savannah harbor and river, \$1,000 may be applied to payment of damages for land taken for widening the channel opposite Savannah. The city of Savannah having presented an account against the United States for \$1,000 paid by the mayor as aforesaid for damages awarded for the land so taken, the question now proposed is whether the payment of damages authorized by that act can be made without a transfer to the United States of the title to the land.

Upon consideration, I am of opinion that payment of damages, under the above provision of the act of 1881, may be made without a transfer of title to the land. The purpose of that provision is to indemnify for the loss of land, not to acquire ownership thereof. The law under which the condemnation proceedings were had contemplates that the damages awarded for the land taken for widening the channel shall be paid by the General Government, but requires that the title to the land thus taken shall be held by the State, which is proprietor of the river bed. By the taking and cutting away the premises became a part of the bed of the river, and the title to such part, as well as to the rest of the river bed, is now in the State. In providing for payment of damages for the property so appropriated Congress must be presumed to have been aware of the proceedings

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Pension—Dependent Relation.

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mentioned and of the disposition of the title thereunder; and in the absence of any provision relating to the title, it may well be inferred that such disposition was meant to be left undisturbed.

I add, that as the city of Savannah has through its mayor wholly satisfied the judgment for damages awarded the owner of the land, and thus extinguished *his* claim (all which occurred sometime prior to the act of 1881), it may reasonably be regarded as, in contemplation of the above-mentioned provision of that act, entitled to receive the payment authorized thereby.

I am, sir, very respectfully,

S. F. PHILLIPS,

*Acting Attorney-General.*

Hon. ROBERT T. LINCOLN,

*Secretary of War.*

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PENSION—DEPENDENT RELATION.

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A contract surgeon, on entering the service, was ordered to duty in a post hospital at a distant place, and in obedience to the order went aboard a steamer to proceed thither, but before the departure of the boat became too sick to go on, and was removed to a hospital, where he died in a few days of typhoid fever, leaving a dependent mother, but no widow or child: *Held* that, under the provisions of sections 4692, 4693, and 4707, Revised Statutes, the dependent mother is entitled to be enrolled as a pensioner, on the ground that the deceased, when taken down with sickness, was "*in transitu*" under orders.

When an officer is ordered to go to a given point for duty and has set about his preparations to do so, his transitus has begun.

DEPARTMENT OF JUSTICE,

*September 26, 1882.*

SIR: Your letter of the 12th of August ultimo, submitting for opinion the case of Lydia S. Bicknell, who is an applicant for a pension as dependent mother of S. S. Bicknell, who was a contract surgeon in the United States Army, has been duly considered by me, and I have the honor to submit my opinion thereon.

The facts as given in your letter are as follows: On the 18th of October, 1863, S. S. Bicknell entered into a contract

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Pension—Dependent Relation.

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with the United States at St. Louis, Mo., for duty as a contract surgeon at Cairo, Ill., or elsewhere; on the 20th of the same month Bicknell was ordered to duty at the post hospital at Cairo, Ill. In obedience to said order he went aboard a steamer at St. Louis to proceed to Cairo, but, being too sick to do so, was, on the 25th of the same month, removed to a hospital at St. Louis, where he died, on the 29th of the same month, of typhoid fever. Bicknell left no widow or child, but did leave a mother, the applicant, who was dependent on him for support.

The question propounded on this state of facts is this:

"Granting that the disease which caused the death of Dr. Bicknell was contracted by him after the date of his contract with the Government, and while he was preparing to proceed to the place where he was ordered for duty, were the circumstances under which the disease was contracted such as to devolve upon his mother a right to pension under the provisions of the fourth paragraph of section 4693 of the Revised Statutes, in connection with the provisions of section 4707?"

Section 4707 provides that if any person embraced by sections 4692 and 4693 has died from causes which would have entitled him to an invalid pension under said sections 4692 and 4693, leaving no widow or legitimate child, but leaving relations who were dependent upon him for support in whole or in part, such relations shall be entitled to receive the same pension as such person would have been entitled to if he had been totally disabled, in the following order: first, the mother, etc.

Section 4692 provides that the persons specified in the several classes enumerated in section 4693 shall be entitled to be placed on the list of invalid pensioners.

The fourth paragraph of section 4693 provides that "any acting assistant or contract surgeon disabled by any wound or injury received or disease contracted in the line of duty, while actually performing the duties of assistant surgeon or acting assistant surgeon, with any military force in the field, or *in transitu*, or in hospital" shall be entitled as a beneficiary under said section 4692.

By sections 4692 and 4693 the dependent mother of a con-

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Pension—Dependent Relation.

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tract surgeon dying of disease is entitled to be enrolled as a pensioner if the disease was contracted in the line of duty in any one of three conditions, namely: (1) While actually performing medical duty with a military force in the field, or (2) while proceeding from one point to another under orders, or (3) while on duty in a hospital.

In my opinion these several conditions are entirely distinct and independent of one another, and were intended to define the several predicaments happening in the line of duty, in some one of which a contract surgeon must have been smitten by mortal illness in order to transmit the right to a pension.

That Dr. Bicknell had not actually begun to move physically on his way to Cairo when first stricken by the hand of death is established, but it is conceded that he had then already begun to make his preparation to do so. If, then, he is to be brought within the terms of the law, it must be on the ground that he was "*in transitu*" while making his preparations. Is this the meaning of the law? In my opinion it is. When an officer is ordered to go to a given point for duty and has set about his preparations to do so, in my opinion his *transitus* has begun. To hold otherwise would be to disregard the liberal policy on which the pension laws have uniformly been administered.

It follows that, upon the facts stated by you, the applicant, Lydia S. Bicknell, is entitled to be enrolled as a pensioner.

I have the honor to be, very respectfully, your obedient servant,

S. F. PHILLIPS,  
*Acting Attorney-General.*

The SECRETARY OF THE INTERIOR.

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Criminal Jurisdiction over Indian Reservations.

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## CRIMINAL JURISDICTION OVER INDIAN RESERVATIONS.

The State of Oregon has jurisdiction over the case of a murder of one Indian by another, committed upon an Indian reservation within the limits of the State, unless the reservation was excepted out of the State at the time of its admission, or unless its jurisdiction is restricted by the provisions of some treaty with the Indians still in force.

DEPARTMENT OF JUSTICE,  
October 13, 1882.

SIR: Yours of the 7th instant, inclosing copy of a communication from the Commissioner of Indian Affairs, presents the case of an Indian who is charged with the murder of another Indian on an Indian reservation within the State of Oregon, and who is at present in the custody of the military authorities at Fort Vancouver, Washington Territory. This case is one over which the United States court has no jurisdiction. At the suggestion of the Commissioner you request to be advised whether it is within the jurisdiction of the State courts, to the end that, if so, the accused may be turned over to the authorities of the State of Oregon for trial.

I have examined the subject of jurisdiction, and the conclusion reached is, that unless the reservation referred to was excepted out of the State at the time of its admission into the Union, or unless its jurisdiction is restricted by the provisions of some treaty with the Indians still in force, the State of Oregon has jurisdiction over offenses committed upon the reservation, whether by Indians or others. This is believed to be in harmony with the doctrine laid down in *United States v. McBratney* (104 U. S., 621; *United States v. Yellow Sun* (1 Dill., 271); *United States v. Bailey* (1 McLean, 234); and it derives additional support from a recent decision of the supreme court of Wisconsin in a case precisely in point (see *State v. Duxtater*, 47 Wis., 278). I discover no exception in the act of admission of the kind indicated, and am not aware of any treaty provision in force which excludes from the criminal jurisdiction of the State the Indians on reservations within its borders. Assuming, then, that no such provision exists, the accused is, I think, amenable to the criminal

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 Claim of Dr. J. W. Bayne.
 

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jurisdiction of the State of Oregon, and may properly be turned over to the authorities of that State, in accordance with the laws of the Territory in which he now is.

I am, sir, very respectfully,

S. F. PHILLIPS,  
*Acting Attorney-General.*

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

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 CLAIM OF DR. J. W. BAYNE.

Section 37 of the act of July 28, 1886, chapter 299 (if not already repealed by force of section 5596, Revised Statutes), was superseded by the act of March 1, 1875, chapter 115, which in effect conferred authority to modify existing Army Regulations as well as to create new ones.

The codification of "The Regulations of the Army and General Orders," under section 2 of the act of June 23, 1879, chapter 35, which was approved and published February 17, 1881, superseded the body of Army Regulations promulgated in 1863. Hence paragraph 1304, 1305, and 1306 of the latter regulations are not now in force.

B. was in the military service as a surgeon, under contract dated January 1, 1881, and on duty at the Washington Arsenal, District of Columbia, from January 1 to April 30, 1881: *Held* that he was entitled, for that period, to the commutation for quarters allowed by law to an assistant surgeon of the rank of first lieutenant, if no public quarters were available for his accommodation.

Traveling allowances, as authorized by paragraph 2280, Regulations of 1881, can be lawfully paid a contract surgeon where they constitute part of the contract.

As a general rule, a contract surgeon is entitled to pay only from the time he enters upon duty under his contract.

*Seem* that the maximum fixed by paragraph 1305 of the Regulations of 1863 for the compensation of contract surgeons continued up to February 17, 1881; but that thereafter compensation at a rate exceeding such maximum was allowable.

DEPARTMENT OF JUSTICE,  
October 21, 1882.

Sir: I have considered the questions some time since submitted by you at the request of the Second Comptroller of the Treasury, in the matter of the claim of Dr. John W. Bayne for commutation for quarters allowed by law to an assistant

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Claim of Dr. J. W. Bayne.

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surgeon of the rank of first lieutenant from January 1 to April 30, 1881, during which period the latter was in the service of the United States as a contract-surgeon, on duty at the Washington Arsenal, District of Columbia, under a contract dated January 1, 1881. The questions are these:

"(1) Can the claim aforesaid lawfully be allowed?

"(2) Was Dr. Bayne entitled to compensation at any rate exceeding the limit fixed by paragraph 1305 of the Army Regulations of 1863, viz: \$80 a month for said period or any part of it?

"(3) Can mileage (sec. 1273, Rev. Stat.) or travel pay (sec. 1289, Rev. Stat.) be lawfully paid to a physician employed under such a contract as was made with Dr. Bayne?

"(4) Under such a contract, can actual traveling expenses (18 Stat., 452), or any allowance in lieu thereof, be lawfully paid to the physician on account of travel from the place of making the contract to the place where service is to be rendered, or travel performed in returning to his home after determination of the contract?

"(5) Is the physician entitled to pay from the date the contract is made, or only from the date service begins at the place fixed in the contract for performance thereof?

"(6) Are paragraphs 1304, 1305, and 1306, as published on pages 313, 314, and 518 of the Army Regulations of 1863, now in force?"

The above questions, as you well remark, comprehend other points than those immediately involved in Dr. Bayne's claim, and are chiefly controlled by the Army Regulations.

The Army Regulations of 1863 had at the time of their promulgation a legislative recognition by virtue of the act of April 24, 1816, chapter 69, subject to any alterations the Secretary of War might adopt with the approbation of the President. By section 37 of the act of July 28, 1866, chapter 299, Congress directed a new code of regulations to be prepared and reported to Congress at its next session, "the existing regulations to remain in force until Congress shall have acted on said report." A report was subsequently made but never acted upon (13 C. Cls. R., 9). By the act of March 1, 1875, chapter 115 (modifying section 20 of the act of July 15, 1870; chapter 294), the President is authorized to

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Claim of Dr. J. W. Bayne.

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"make and publish regulations for the government of the Army in accordance with existing laws." It is to be observed that section 37 of the act of 1866 (if not previously repealed by force of section 5596, Revised Statutes) was superseded by the act of 1875, which in effect conferred authority to modify existing regulations as well as to create new ones (*United States v. Eliason*, 16 Pet., 302). By joint resolution of August 15, 1876, the President was requested to postpone all action in connection with the publication of said regulations until after the report of the commission created by the act of July 24, 1876, chapter 226, is "received and acted on by Congress at its next session." But by section 2 of the act of June 23, 1879, chapter 35, the Secretary of War was directed "to cause all the Regulations of the Army and General Orders now in force to be codified and published to the Army," etc. Under this last provision the codification of the Regulations of the Army and General Orders was approved and published in February, 1881; and this codification must be deemed to have superseded the body of Army Regulations promulgated in 1863.

On the 17th of November, 1880, a new form of contract to be used in employing a private physician, in which certain allowances are specified, was approved by the Secretary of War (see Regulations of 1881, par. 2283). This took the place of form 18, referred to in paragraph 1304 of the Regulations of 1863, and those allowances (which were not specified in that form nor authorized by the Regulations of 1863) thus became, from the date of their approval, incorporated into the Army Regulations. The contract with Dr. Bayne provides (*inter alia*) that "when on duty at a post or station where there are public quarters belonging to the United States, he shall receive the quarters in kind allowed by law to an assistant surgeon of the rank of first lieutenant; when on duty at a post or station where there are no public quarters, he shall receive the commutation for quarters allowed by law to an assistant surgeon of the rank of first lieutenant," etc. These allowances are the same as those approved by the Secretary of War, as above. They are not forbidden by any statute and are conformable to the Regulations of the Army as they stood at the time the contract was made.

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Claim of Dr. J. W. Bayne.

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Upon the foregoing considerations, I answer the first of the above questions in the affirmative, assuming the fact to be that no public quarters were available for Dr. Bayne's accommodation; and to the last question (the sixth), I reply that paragraphs 1304, 1305, and 1306 of the Regulations of 1863 are not now in force, having been superseded by paragraphs 2279, 2280, and 2281 of the Regulations of 1881.

Respecting the third, fourth, and fifth questions, the answer I submit is, that traveling allowances, as authorized by paragraph 2280, Regulations of 1881 (such allowances not falling under any statutory prohibition of which I am aware), can be lawfully paid where they constitute part of the contract, and that as a general rule a contract surgeon is entitled to pay only from the time he enters upon duty under his contract or is under orders.

The second question remains to be considered. By paragraph 1305 of the Regulations of 1863 a *maximum* was fixed for the compensation of contract-surgeons, which, so long as the same was in force, operated as a restriction upon the authority of officers contracting with private physicians. The Regulations approved and published February 17, 1881 (paragraphs 2279 and 2280), in which the provisions of said paragraph 1305 are in the main embodied, omitted such maximum; and thus the restriction above adverted to, which, as far as my information goes, continued until that date, was removed. Dr. Bayne's contract is dated January 1, 1881, and the compensation therein (\$100 per month) exceeds the maximum fixed as above. Upon this state of facts, the answer I submit to the question under consideration is, that he was not entitled to compensation at any rate exceeding the limit fixed by paragraph 1305 of the Regulations of 1863, at least for the period from January 1 to February 17, 1881; but that compensation at a rate exceeding that limit was *allowable* after the last-mentioned date.

I am, sir, very respectfully, -

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,

Secretary of War.

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Vacancy in Office of Assistant Surgeon-General.

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## VACANCY IN OFFICE OF ASSISTANT SURGEON-GENERAL.

The vacancy existing in the office of assistant surgeon-general may be filled by appointing thereto any one of the surgeons with the rank of colonel or the chief medical purveyor (all of whom hold offices of the same *grade* in the medical corps as that of the vacant office), or by promoting thereto the senior officer in the medical corps having the rank of lieutenant-colonel, which is the next grade below.

Where there are two or more offices of the same *grade* in a corps, each requiring a separate commission, on a vacancy occurring in such grade the rules of promotion do not preclude the appointing power from determining to which of these offices the senior in the next grade below shall be appointed. An incumbent of one of them may be transferred by appointment to another which is vacant without prejudicing the rights of such senior, whose claim to promotion would be fully met by appointing him to either.

## DEPARTMENT OF JUSTICE,

October 23, 1882.

SIR: Your letter of the 12th of August last, which inclosed certain memoranda from the office of the Adjutant-General, and is also supplemented by a letter dated the 2d ultimo inclosing a communication from the Surgeon-General of the Army, submits the following questions for an opinion thereon:

“(1) The office of assistant surgeon-general with the rank of colonel having been made vacant by the appointment of the late incumbent to the office of Surgeon-General, is it a position to which, under the provisions of law, the officer next in rank possesses an *inchoate* right?

“(2) Should this be determined affirmatively, which officer of the Medical Department is entitled to the promotion: J. H. Baxter, chief medical purveyor of the Army with rank of colonel, dated June 23, 1874; Robert Murray, the senior surgeon with rank of colonel dated June 26, 1876; or John F. Hammond, the senior surgeon among those holding the rank of lieutenant-colonel?”

In the consideration of these questions I have been much aided by the information contained in the memoranda and communication above mentioned.

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Vacancy in Office of Assistant Surgeon-General.

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The Medical Corps of the Army as at present established embraces the following *offices*: Surgeon-General with the rank of brigadier-general; assistant surgeon-general with the rank of colonel; chief medical purveyor with the rank of colonel; surgeon with the rank of colonel; assistant medical purveyor with the rank of lieutenant colonel; surgeon with the rank of lieutenant colonel; surgeon with the rank of major; assistant surgeon with the rank of captain or first lieutenant. (Act of June 23, 1874, chap. 458; act of June 26, 1876, chap. 61.)

The *grade* of these offices respectively in the corps must, in the absence of any provision of law otherwise providing, be deemed to correspond with the degree of their military rank. Accordingly, the offices of assistant surgeon-general, chief medical purveyor, and surgeon with the rank of colonel, having each the same military rank, are to be regarded as of one and the same grade. So the offices of assistant medical purveyor, and surgeon with the rank of lieutenant-colonel, each of which has the same military rank, are of one and the same grade. The office of surgeon with the rank of major is of itself a separate grade, while the office of assistant surgeon contains two grades.

Thus, although there are eight distinct offices in the Medical Corps, each requiring a separate commission, but six grades of officers exist therein—the latter, as already stated, corresponding to the military rank with which such officers are invested.

A vacancy exists in the office of assistant surgeon-general, and the questions submitted involve the inquiry whether in filling that office the law of the military service requires the chief medical purveyor or the senior surgeon with the rank of colonel or the senior officer holding the rank of lieutenant-colonel to be appointed thereto.

Appointments in the Medical Corps are regulated partly by statute and partly by Army Regulations having the force of law. By section 1193, Revised Statutes, the appointment of Surgeon-General is by *selection*, which moreover must be made from that corps. Section 1204, Revised Statutes, declares that "promotions in the staff of the Army shall be made in the several departments and corps respectively."

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Vacancy in Office of Assistant Surgeon-General.

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Vacancies therein to the rank of colonel are, by paragraphs 36 and 37, Army Regulations of 1881, to be filled "by promotion according to seniority, except in case of disability or other incompetency;" and such promotion is to be made according to the corps—*i. e.* the officer to be promoted to a vacancy in any corps must be taken from that corps.

It is very clear that, by these provisions, vacancies in the several *grades* of the Medical Corps, from the rank of major to that of colonel inclusive, are required to be filled by *promotion according to seniority*. Hence, in supplying a vacancy in any of the grades just adverted to, the appointee can not be taken by *selection* from an inferior grade.

In the case under consideration, the vacant office belongs to one of those grades (*viz.*, that of the rank of colonel); and standing in the same grade to which it belongs are found two other distinct offices, the incumbents whereof, by reason of their rank, do not come within the above provisions, which regulate promotion to the rank of colonel, and there stop. Having attained that rank, neither of these incumbents has any legal ground of preference over the other in respect of future appointments. If, therefore, one be eligible for appointment to the vacant office so must the other be, and the appointing power would be at liberty to confer the appointment upon either. In this connection the question suggests itself whether the vacant office referred to can be thus filled—in other words, whether the existing vacancy in the office of assistant surgeon-general can be supplied by the appointment of an officer belonging to the same grade in the Medical Corps to which that office belongs (*e. g.*, the chief medical purveyor, or any one of the surgeons with the rank of colonel).

An appointment from one office in the corps to another office of the same grade therein cannot be regarded as a promotion. This term, as applied to the military service, signifies advancement from an inferior to a superior grade, as from the grade of captain to that of major, etc., and the rules for promotion in that service deal with vacancies in certain grades therein, prescribing how such vacancies, when they exist, shall be filled. Thus under these rules the senior officer in the Medical Corps having the rank of lieutenant-

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Vacancy in Office of Assistant Surgeon-General.

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colonel is entitled (except in case of disability or other incompetency) to be appointed to fill a vacancy happening in the next grade above. But in that grade there are three separate offices. Does such officer's right to promotion require that he be appointed to fill the particular office therein which happens to become first vacant? Or would it be sufficient, so far as he is concerned, if the vacancy in the grade were filled by his appointment to any other office therein? I think the latter would be sufficient. If the three offices referred to should each become vacant at the same time, it will hardly be doubted that the senior in the next grade below might be appointed to either at the will of the appointing power; his right to promotion to fill a vacancy existing in the grade above not entitling him to any particular office therein. On the other hand, if but one of these offices should become vacant (which is the case under consideration), I entertain no doubt that it would be competent for the appointing power to fill the vacant office by the appointment thereto of an incumbent of either one of the other offices in the same grade, still leaving a vacancy in that grade to be filled by the promotion of the senior officer in the next grade below; and that the latter, upon being appointed to fill the vacancy thus left, would get all that the rules of promotion entitle him to. In a word, where there are two or more offices of the *same grade* in a corps, each requiring a separate commission, I am of opinion that, on a vacancy occurring in such grade, the existing rules of promotion do not preclude the appointing power from determining to which of these offices the senior in the next grade below shall be appointed, and that an incumbent of one of them may be transferred by appointment to another which is vacant without prejudicing the rights of such senior, whose claim to promotion would be fully met by appointing him to either.

The foregoing views lead to this result, that the vacancy now existing in the office of assistant surgeon-general may be filled by appointing thereto any one of the surgeons with the rank of colonel, or the chief medical purveyor (all of whom hold offices of the same grade in the Medical Corps as that of the vacant office); or it may be filled by appointing

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Internal Revenue.

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thereto the senior officer in the Medical Corps having the rank of lieutenant-colonel, which is the next grade below. The latter officer is by the rules of promotion in the military service entitled to the vacancy existing in the *grade* to which the office of assistant surgeon-general belongs, and, unless one of the officers of that grade above mentioned is appointed to such office, those rules require that he should be given the appointment.

Accordingly, in answer to your first question, I reply that no officer possesses an *inchoate right* to the vacant office of assistant surgeon-general. The senior surgeon among those holding the rank of lieutenant-colonel, however, has a right to the vacancy in the grade to which that office belongs; so that the office cannot be filled by an appointee from an inferior grade other than himself. The conclusion here reached seems to render an answer to the remaining question unnecessary.

I have the honor to be, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,

*Secretary of War.*

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## INTERNAL REVENUE.

The net profits of a railroad company earned in 1871, and which during that year were used for construction, or were appropriated to the payment of money borrowed for construction and actually used therefor during that year, or in a subsequent year were appropriated to the payment of money so borrowed and used, are liable to taxation under section 15 of the act of July 14, 1870, chap. 255.

## DEPARTMENT OF JUSTICE,

October 25, 1882.

SIR: Yours of August 15 incloses a communication to yourself from the Commissioner of Internal Revenue in relation to the taxation of certain *profits* made by railroad companies during the year 1871, and submits for my consideration the questions stated below.

In connection therewith the Commissioner calls attention to the difference in wording upon this subject betwixt the

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Internal Revenue.

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internal revenue act of 1870 and that of 1864 previously in force.

The words of the act of 1864 as amended in 1866 (13 Stat., 283, and 14 Stat., 138) that designate the *profits* of railroad companies liable to taxation, are profits "carried to the account of any fund, or used for construction." Those of the act which controls the question below (1870; 16 Stat., 260) are, "undivided profits of any such corporation which have accrued and been earned and added to any surplus, contingent, or other fund," omitting any express mention of *construction*.

It seems that the words "used for construction" in the former act are superfluous. If companies carry their *profits* to the account of one or another *fund* (and that is necessary to proper book-keeping, and will therefore for the purpose of such statutes be *conclusively* presumed), then of course such profits as are used in *construction* are also so *carried*; that is, the former clause of the language above quoted from the act of 1864 includes the latter.

I am of opinion therefore that the recasting of that provision in the act of 1870, in the course of which that later clause has been omitted, does not relieve from taxation "profits" (see 93 U. S., 225) *used for construction*, inasmuch as such profits must necessarily be carried to the account of—*i. e.*, "added to"—some *construction* "fund," and therefore be included in the words above quoted from that act.

The questions put by you in this connection are as follows:

"(1) Were the net profits of a railroad company, which accrued and were earned in 1871 and were used for construction in that same year, liable to taxation under section 15 of the act of July 14, 1870 (16 Stat., 260)?"

"(2) Were the net profits of a railroad company which accrued and were earned in 1871, and during that year appropriated to the payment of money borrowed for construction and actually used for construction during that year, liable to taxation under section 15 of the act of July, 1870 (16 Stat., 260)?"

"(3) Were the net profits of a railroad company which accrued and were earned in 1871, and in a subsequent year appropriated to the repayment of money borrowed for con-

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National Banking Associations.

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struction and actually used for construction during 1871, liable to taxation under section 15 of the act of July 14, 1870 (16 Stat., 260)?"

I answer these questions in the affirmative. As I do not think that profits earned and carried to construction account in 1871 are exempt from taxation, so also I do not regard as exempt profits so earned and necessarily carried to the account of some *other* fund in that year, *but* in a subsequent year changed and put to *construction* account.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

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## NATIONAL BANKING ASSOCIATIONS.

By section 5208, Revised Statutes, and section 13 of the act of July 12, 1882, chapter 290, the certification of a check drawn upon a national bank, where at the time of certification the drawer has not on deposit with the bank, and regularly entered to his credit on its books, an amount of money equal to the amount of the check, is prohibited.

Whether the check be marked by the bank "accepted," or simply "good," can make no difference; either constitutes a certification within the meaning of the statute.

The acceptance of a check, where the drawer has no funds on deposit, is a loan of the credit of the bank rather than a loan of money, and, if otherwise unobjectionable, is not within the restriction provided by section 5200, Revised Statutes.

Liabilities so incurred by a bank are within the limit imposed by section 5202, Revised Statutes.

DEPARTMENT OF JUSTICE,

November 24, 1882.

SIR: In a letter of the 5th ultimo the Hon. J. C. New, then Acting Secretary of the Treasury, submitted for my consideration the following questions, which have been suggested by the Comptroller of the Currency:

"(1) Has a national bank the legal right to accept checks drawn upon it, unless the drawer has the amount stated in the check actually on deposit in the bank?"

"(2) If a national bank has the power to make such an acceptance, would such acceptance at a time when the

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money was not on deposit to the credit of the drawer be a liability to it for money borrowed, and as such be required to be limited to one-tenth of the paid-in capital of the bank, as provided by section 5200, Revised Statutes?

"(3) If a national bank has the power to accept such checks equal in amount in any case to one-tenth of its capital, would the acceptance of any number of such checks to an amount exceeding, in the aggregate, the amount of its paid-in capital, be in violation of section 5202, Revised Statutes?"

The first of these questions, I understand, arises under section 5208 of the Revised Statutes, and section 13 of the act of July 12, 1882, chapter 290.

Section 5208, Revised Statutes, forbids any officer, clerk, or agent of a national bank "*to certify*" a check drawn upon it, unless the drawer has on deposit with the bank at the time the check is certified "*an amount of money* equal to the amount specified in such check;" and declares that the act of any such officer, clerk, or agent, in violation of this section, shall subject the bank to "the liabilities and proceedings on the part of the Comptroller as provided for in section 5234." Section 13 of the act of 1882 punishes with fine or imprisonment, or both, any such officer, clerk, or agent who shall "willfully violate the provisions" of said section 5208, or who shall "resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association."

These provisions, together, prohibit the certification of a check drawn upon a national bank where at the time of certification the drawer has not on deposit with the bank, and regularly entered to his credit on its books, an amount of money equal to the amount of the check.

What, then, is certification of a check? It is an act on the part of the bank upon which the check is drawn implying (as is observed by the Supreme Court in the case of *Merchants' Bank v. State Bank*, 10 Wall., 604) "that the check is drawn upon sufficient funds in the hands of the

## National Banking Associations.

drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of a depositor, or any other obligation it can assume."

No particular *form* is required for the certification. Ordinarily this is done by simply writing the word "good" upon the face of the check, adding thereto the signature or initials of the certifying officer. But any language employed by such officer, importing that the check is good and will be paid, would seem to be sufficient. (See 2 Daniel on Neg. Inst., sec. 1606.)

A check being an order for the payment of money addressed to a bank or banker, it is always presumed to be drawn against funds on deposit therewith. It is not, when considered with reference to its purpose, presentable for *acceptance*, but only for payment—that is to say, payment is the only acceptance which in contemplation of law enters into the arrangement of the parties. Hence, if the payee or holder of the check presents it with the view of having it certified instead of paid, he does so at the peril of discharging the drawer. (*First Nat. Bank v. Leach*, 52 N. Y., 353.)

In *Security Bank v. National Bank* (67 N. Y., 462) the court say: "The manifest object of a certification is to indicate *the assent of the certifying bank to the request of the drawer of the check that the drawee will pay to the holder the sum mentioned*; and this is what an acceptor does by his acceptance of a bill." Whether such assent is indicated by writing the word "good" or the word "accepted" upon the check can make no difference. As between the holder of the check and the bank the obligation assumed by the latter is precisely the same in either case, and thus the *legal effect* of marking a check "accepted" being the same as marking it "good," the employment of the former expression may, equally with that of the other, well be deemed to import a certification thereof. Agreeably to this view, the acceptance of a check, other than for immediate payment, is not legally distinguishable from

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its certification. In fact and effect the words are equivalents—they are for the same forbidden purpose, to produce the same forbidden result.

The aim of the statute, in prohibiting the certification of checks by national banks where the amount thereof is not on deposit to the credit of the drawer, is obviously to provide a guard against the risks and evils attending such pledging of their credit without adequate security. The mischief sought to be avoided is the *incurring of liabilities* by these banks on checks drawn upon them without sufficient funds, and inasmuch as the liability is the same whether the check be marked by the bank “accepted” or simply “good,” either of these modes of incurring it would seem to be sufficient to bring the case within the prohibition referred to. Each may properly be regarded as constituting a *certification* according to the meaning and intent of the statute. To construe otherwise would be to allow a “device” to “evade the provisions” of the law, and such too as by express terms is prohibited and punished.

In answer to the first question I accordingly reply, that in my opinion a national bank can not legally *accept* checks drawn upon it where the drawer has not on deposit therewith the amount stated in the check. To do so renders the bank subject to certain proceedings on the part of the Comptroller of the Currency (under section 5234 Revised Statutes), and the officer by whom the acceptance is made becomes liable to the penalties provided in the act of July 12, 1882.

The case presented in the second question is not, in my opinion, covered by the provisions of section 5200, Revised Statutes.

The restriction there applies only to liabilities “for money borrowed.” The acceptance of a check, where the drawer has no funds on deposit, would be a loan of the credit of the bank rather than a loan of money, and, if otherwise unobjectionable, it could not properly be regarded as within the terms of the restriction adverted to.

The third question presents the same case in connection with section 5202, Revised Statutes, which declares that “no association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock act-

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 Removal of Assistant Postmaster at Washington, D. C.
 

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ually paid in, and remaining undiminished by losses or otherwise," except on account of demands of the nature therein described. Liabilities incurred by the acceptance of checks, the drawers thereof having at the time no funds on deposit with the bank, do not appear to fall within any of the *exceptions* enumerated; and assuming such acceptance to be lawful, I am of the opinion that the limit imposed by section 5202 extends to liabilities thus incurred, and that the acceptance of checks by a bank, without the existence of funds on deposit therewith, to an amount exceeding in the aggregate the amount of its paid-in capital, would be a violation of that section.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

*Secretary of the Treasury.*

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## REMOVAL OF ASSISTANT POSTMASTER OF WASHINGTON, D. C.

DEPARTMENT OF JUSTICE,

*November 25, 1882.*

SIR: I have examined the law and decisions in the matter of the proposed removal of the assistant postmaster of this city, and am of opinion that if he holds a public office, such removal can be made by that authority only in which by law the appointment is vested.

In the case of inferior officers whose appointment is by law vested in the heads of Departments, or in officers appointed by the President, he can only act indirectly by his authority over his own appointee.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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## SUSPENSION OF POSTMASTER.

DEPARTMENT OF JUSTICE,

*November 25, 1882.*

SIR: On examination of the provision in section 3836 of the Revised Statutes, whereby a special agent may in cer-

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Commissioners of the District of Columbia.

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tain cases be put in charge of a post-office, I do not think it can properly apply to the case of suspension of a postmaster by the President under section 1768. Of course such an agent might be designated by the President to fill the place, but he would have to give a bond, as required by the last-mentioned section.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The POSTMASTER-GENERAL.

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## COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

The official term of each of the Commissioners of the District of Columbia, appointed from civil life (excepting the first two appointments), is three years; and in case of the death, resignation, or removal of the incumbent during such term, his successor should be appointed, not for the full term of three years, but for the unexpired term of such incumbent, if any remains.

## DEPARTMENT OF JUSTICE,

*December 16, 1882.*

SIR: There being a vacancy in the office of one of the two civil Commissioners of the District of Columbia on December 16, 1882, for what term should the President renominate a person to fill that office? That is the question submitted to me.

The construction of the following clause of paragraph 2, act June 11, 1878 (20 Stat., 103), is involved in the vacancy now to be filled:

"The official term of said Commissioners appointed from civil life shall be three years and until their successors are appointed and qualified; but the first appointment shall be one Commissioner for one year and one for two years, and at the expiration of their respective terms their successors shall be appointed for three years."

There are two kinds of official terms, one or the other of which Congress doubtless had in mind in this enactment. In one the term is appurtenant to the person. Thus "collectors \* \* \* shall be appointed for the term of four years" (Rev. Stat., sec. 2613), and in such cases, if the col-

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lector dies or resigns, the term which is *his* ends, and his successor begins a like term of four years.

In the other, the term is a legal fixture as to beginning and duration, and the person is, so to speak, appurtenant. Thus certain Senatorial terms commence March 4, 1883, and continue six years. The incumbent on that day may or may not fill out the term. If one dies or resigns the term remains, and some other person or persons may be put in to hold the unexpired part, but not to begin a like term.

Undeniably the former kind is that which is usually prescribed, and when the latter kind is created some apt expression of the intent will be found.

If the clause quoted had ended with the word "qualified," a term of the former kind would have been perfectly designated. In that case, if such a Commissioner had, by death or otherwise, ended his term, the President, as in the case of a collector, could have made a new appointment for the like term, the residue of the clause at least adding nothing to the legislative purpose, taken in that sense.

But Congress must be presumed to have had a definite purpose in that addition, which, if ascertained and found consistent with the preceding matter so as to give reasonable effect to all parts of the clause, should determine its true construction.

It appears by the context that there were to be on July 1, 1878, one engineer detailed and two civil Commissioners. The term of the former is at the will of the President. The terms of the latter were not limited by the original act of June 29, 1874. (18 Stat., 117.) Now Congress fixes the limit of three years, and the result might be that on July 1, 1881, two experienced officers would go out, to be replaced by two inexperienced ones.

It will be conceded, no doubt, that such a result would be in the legislative sense "a mischief to be remedied," and it is in just such cases that the scheme of arranging the several official terms in a fixed consecutive series has been long and successfully applied to official bodies in all departments of the Government.

The vital essence of such a plan is that the term is fixed, and the officer, as it were, belongs to it.

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When Congress therefore so arranges the first appointment that the full terms shall begin consecutively at the end of one and of two years, does it not substantially follow the plan on which the Sénate and like bodies are organized, and with the same intent.

The language employed is so significant that it is impossible to suppose that it had not a definite purpose; and unless it can be shown to have some meaning (and what that may be it is not easy to conceive) which more reasonably harmonizes with the opposite theory, it ought to be taken in that which the words and context and reason of the case most readily suggest.

When once in this way the legislative intent is reached, minor difficulties which may be supposed to arise from the use or absence of particular words or forms of expression will disappear. Thus the use of the word "their," in the last clause, presents no obstacle to the view taken. It occurs twice in a clause which is unmeaning, or at least unnecessary, if taken in connection with the preceding matter understood as creating a personal term. It evidently relates to the immediate context. Congress was not thinking of death or resignation of the first two appointees, but of the fact that they would, in the ordinary course, hold on to "the expiration of their respective terms of one and two years," when, with "their successors," the full term series would begin.

The fact that no express provision is made for filling vacancies which might arise by death or resignation is not significant, unless it can be shown that without such provision the power would not exist, which will hardly be contended in view of the constitutional power of the President and the provisions of the tenure-of-office acts. Such incidents as death or resignation may, of course, temporarily affect the object sought, but they are so notably rare as to be practically disregarded; at all events, Congress, when dealing with a term of three years, can hardly be supposed to have considered them.

The question has been considered as if unaffected by precedent, but it is important to observe that the opposite view was taken of it by Attorney-General Devens (16 Opin.,

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537), whose opinions must be respected as official conclusions and because of their acknowledged merit.

An examination of the opinion of Attorney-General Devens does not satisfy me, however, and with great reluctance I must express my dissent. The first impression expressed by him upon this subject was, as it appears by the opinion itself, in an off-hand oral statement which, being acted upon, he subsequently enlarged into the opinion which is published, maintaining his first impression, and standing by it probably because it had been acted upon. I have read it with great care and re-read it, and I again say I do not concur in it.

I think the policy of the law and the intent and purpose of the law creating this office would conflict with the interpretation he puts upon it; indeed, it would subvert it. *Quoad* this point, the views that I before expressed I again repeat.

The vacancy must be filled for the unexpired term, and not for an entire term of three years. The person is appurtenant to the term—not the term appurtenant to the person, and the President has constitutional power to fill this office, as he has any other office, it being vacant, during such unexpired portion of the term for which it is vacant.

I am, with respect,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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 ALLOWANCES TO DISTRICT ATTORNEYS.
 

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Opinion of Attorney-General Devens, of May 18, 1877 (15 Opin., 277), upon the subject of allowances to district attorneys under section 827, Revised Statutes, concurred in.

DEPARTMENT OF JUSTICE,

December 19, 1882.

SIR: I have the honor to acknowledge the receipt of your letter of the 16th instant, with inclosures.

In compliance with your request I have considered the matter brought to your attention by the district attorney for the southern district of New York, in his letter of the 25th ultimo, and have the honor to advise you that I abide by the opinion of my predecessor, General Devens, upon the subject. Section 827 of the Revised Statutes makes the

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compensation of district attorneys for the class of service mentioned in that statute dependent upon the approval of the Secretary of the Treasury.

The court in which the suit is brought certifies such compensation as it deems proper, but the final decision is with the Secretary, who must approve. He certainly is not bound by the action of the court. To him is given a discretionary power in determining the compensation.

In exercising that power he may well take into consideration the amount the attorney receives from other sources of emolument, and may limit his compensation in the class of cases named in the statute, so that his entire emoluments shall not exceed a reasonable sum. This, I think, is the point of your inquiry. There is no doubt in my mind that the Secretary had this power under the statute to adopt the rule which is set forth in the circular of June 4, 1877.

I return herewith the inclosures of your letter.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

*Secretary of the Treasury.*

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SUPPLIES FOR REVENUE MARINE SERVICE.

No legal obstacle exists to re-imbursing the appropriation for the Navy Department from the appropriation for the Revenue Marine Service with the cost of such heavy ordnance and ordnance stores as may be furnished by that Department to be used in said service.

Where one Department receives from another Department supplies which are within the scope of appropriations belonging to each, a re-imbursement of the appropriation of the one from the appropriation of the other, of the cost of such supplies, is not a violation of section 3678, Revised Statutes; nor do the provisions of 3618, Revised Statutes, apply to such case.

DEPARTMENT OF JUSTICE,

*December 20, 1882.*

SIR: By your letter of the 17th ultimo you inform me that it has been the practice of your Department for many years "to obtain from the Ordnance Bureau of the Navy Department such heavy ordnance and ordnance stores as are required in the armaments of Revenue Marine vessels, and to

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re-imburse the appropriation for ordnance (Navy Department) with the cost value of such stores, transferring the money on the books of the Department from the appropriation for the Revenue Marine Service." You further inform me that the Solicitor of the Treasury has rendered an opinion to the effect that a transfer of property, such as is above described, would be a sale within the meaning of section 3618, Revised Statutes, and that re-imbursement could not be made for the article thus furnished.

In directing my attention to this subject you request an opinion from me upon the following question: "Whether there is any legal obstacle to the re-imbursing, by the usual transfer to the appropriation for the Navy Department from the appropriation for the Revenue Marine, of the cost of such articles as may be furnished by the Navy to be used on revenue-cutters?"

I have examined this question, and will now briefly state my views thereon.

The only statutory provisions that seem to be involved are those found in sections 3618 and 3678, Revised Statutes. The latter section provides that "all sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others." The effect of this provision is to make unlawful the diversion of funds appropriated for one object of expenditure to another object of expenditure. It forbids an appropriation for any purpose to be thus enlarged beyond the amount thereof as fixed by Congress. The inquiry here rises whether the case under consideration falls within the prohibition contained in that section.

Where appropriations, made for different Departments, are applicable to the same objects of expenditure (*e. g.*, the same kind of supplies), it may often be advantageous to the public service and in the interest of economy for one Department to avail itself of resources and facilities at the command of another Department in obtaining the supplies needed; and in the absence of any statute forbidding it, I perceive no objection to such a course. Should one Department receive in this way from another Department supplies which are within

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the scope of appropriations belonging to each, I submit that a *re-imbursement* of the appropriation of the one Department from the appropriation of the other of the cost of such supplies would not violate the provisions of said section 3678. This could not be regarded as a diversion of funds from one object of expenditure to another, which is inhibited by that section; since the case supposes that the supplies are a legitimate object of expenditure for either appropriation. Nor would the appropriation of the Department furnishing the supplies be thereby enlarged. Such re-imbursement, indeed, implies the contrary, being the refunding of what was previously taken from that appropriation in the manufacture or purchase of the supplies furnished. I am accordingly of opinion that the case presented in your letter is unaffected by the provisions of that section.

In regard to section 3618, I am also of opinion that its provisions do not apply to that case. This section provides how moneys derived from sales of public property, with certain exceptions, shall be disposed of. Funds thus derived, where it is not otherwise provided by law, remain subject to future appropriation by Congress. They can not be placed to the credit of existing appropriations, or be applied to objects of expenditures within the same, thus enlarging such appropriations. But where articles are manufactured or purchased by one branch of the public service under an appropriation made for that purpose, and are afterwards, on grounds of administrative expediency, transferred to another branch of the service, the latter thereupon re-imbursing the appropriation of the former with the cost of the articles out of an appropriation applicable to the manufacture or purchase thereof, this transaction is not a *sale* either according to the ordinary or the legal signification of that term. It is nothing more than a transfer of the custody and use of the property and consequent accountability for the same, accompanied by a transfer of the cost thereof from one appropriation to another, within the scope of either of which the expenditure may properly come. The ownership (a transfer of which is an inseparable element in a sale of property) remains unchanged. Section 3618 extends only to such cases as relate to "proceeds of sales," receipts which are in the nature of revenue,

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belonging to no appropriation, and not available for expenditure without authority from Congress. The present case does not appear to be one of that character.

My conclusion is that there is no legal obstacle to reimbursing the appropriation for the Navy Department from the appropriation for the Revenue Marine with the cost of the articles to which your question refers.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

*Secretary of the Treasury.*

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CHINESE LABORERS.

The provisions of section 1 of the act of May 6, 1882, entitled "An act to execute certain treaty stipulations relating to Chinese," are to be construed with the provisions of the treaty referred to, wherein it is as immigrants into this country that Chinese laborers are dealt with; and thus construed, a Chinese laborer who comes to this country merely to pass through it is not within the prohibition of the statute.

## DEPARTMENT OF JUSTICE,

*December 26, 1882.*

SIR: At your request, I have deliberately reconsidered the subject of the construction of the act of Congress of the 6th of May, 1882, entitled "An act to execute certain treaty stipulations relating to Chinese." My first opinion on this subject was given under circumstances somewhat too urgent, pressed as I was by your Department because it was pressed by others, and I am gratified to have an opportunity to reconsider my former conclusions with care. The subject should not have been hastened and hurried as it was in the first instance.

The preamble of the act is in these words: "Whereas in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof;" and the first section enacts "That from and after the expiration of ninety days next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be law-

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ful for any Chinese laborers to come, or having so come after the expiration of said ninety days, to remain within the United States."

The treaty stipulations referred to in the title of the act are those contained in the treaty between this country and China, bearing date the 17th of November, 1880, which is twice referred to in the body of the act.

The preamble of the treaty recites that the necessity for "a modification of existing treaties" has become necessary in consequence of the increasing *immigration of Chinese laborers* and the embarrassments caused by such *immigration*, and the first article provides that "Whenever, in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as *laborers*, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of *immigration*, and *immigrants* shall not be subject to personal maltreatment or abuse."

There can be no doubt that the act of Congress now under consideration was intended to carry into effect the stipulation in this article that the Government of the United States might suspend the immigration of Chinese laborers to this country. But in applying the statute a serious doubt has arisen as to whether it was the intention of Congress to prohibit all persons answering to the description of Chinese laborers, and not embraced by the exceptions in the third section, who should come to our shores merely for the purpose of going through the country on their way to China, or only such persons of that class, not coming within the said exceptions, as should come here to seek occupation as laborers.

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The preamble of the act, stating that in the opinion of the Government "the coming of Chinese laborers to this country endangers the good order of certain localities within the territory," etc., would seem to have exclusive reference to the Chinese laborer as a dweller in our midst and a competitor with our own laboring classes, for it is in this way only that he is a disturbing element, and not to him as a passenger over our territory, in which character he has never been objectionable. The statute being in pursuance of the treaty, must be construed as in harmony with it, and as intending to suspend only the coming of Chinese laborers in the way contemplated by the treaty. Upon reference to the provisions of the treaty already referred to and quoted, we find that it is as *immigrants* into this country that Chinese laborers are dealt with, and that the right of the United States to suspend the coming of such persons is confined to cases in which they come "as laborers." Looking then at the mischief to which the act was directed, and the language of the treaty, I do not think that a Chinese laborer coming to this country merely to pass through it can be considered as within the prohibition of the law, he being neither an immigrant nor a laborer coming here *as laborer*.

As the prohibition of the act applies to Chinese laborers coming into the country to stay *as laborers*, and as the regulations touching certificates of identification prescribed by the fourth and sixth sections are ancillary to that end, and intended to prevent frauds upon the act, and therefore applicable only to Chinese coming here for permanent or temporary residence, I am of opinion that Chinese passing through this country to other countries are not required, before crossing our borders, to produce the specified certificates of identification, provided they competently prove in some other manner their *status* as mere transient passengers. Of course the certificate would dispense with other proof. The character of such proof may very properly be regulated by the Secretary of the Treasury.

It may be said that the exceptions in the third section in favor of vessels bound to foreign ports, and driven into our ports by distress or stress of weather, or merely touching at such ports, strengthen the prohibition of the statute as to

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all cases not excepted. But the application of this canon of interpretation proceeds on the presumption that the legislature, by excepting some cases, has manifested a purpose to subject to the statute all like cases not excepted. If, however, it appears elsewhere in the statute that it could not have been the intention of the statute to limit the exceptions to those named, the presumption that might otherwise exist can not arise.

Besides, the exceptions mentioned are such as would have been implied anyhow if Congress had not referred to them, a consideration that would greatly weaken their force as the foundation of a presumption of legislative intent. The maxim *expressio unius est exclusio alterius*, while of frequent use, requires great discrimination in its application, and, as Judge Story says, is "often incorrectly applied." (3 Howard, 313, *Ex Parte Christy*.)

Very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. F. T. FREELINGHUYSEN,

*Secretary of State.*

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ARBITRATION OF CLAIMS OF THE UNITED STATES.

Where it was proposed to submit to arbitration claims of the United States against certain mail contractors: *Advised* that the right to submit in the cases mentioned is doubtful; in view of which a different course is suggested.

DEPARTMENT OF JUSTICE,

*December 28, 1882.*

SIR: On the papers referred to me by you concerning the arbitration of claims of the United States against certain mail contractors, I have to answer as follows:

You request me to advise you whether the submission agreed to by George Bliss, esq., acting for the United States, and R. G. Ingersoll, esq., acting for the contractors, is valid. (Letter November 25, 1882.)

I have not found any opinion of my predecessors bearing on the question involved, but in the case of *United States v. Ames* (1 Woodbury and Minot 89), the circuit court held broadly that a submission by the United States attorney

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was invalid on account of the want of authority in any officer of the United States to enter into a submission in their behalf that shall be binding, saying: "All judicial power is by the Constitution vested in the Supreme Court, and such inferior courts as Congress may from time to time ordain and establish. (Constitution, art. 3, par. 1.) No department nor officer has a right to vest any of it elsewhere," etc.

The Court of Claims, however, in the case of the Great Falls Manufacturing Company (16 C. Cls. R., 195) made the following distinction as shown by the syllabus:

"Though an officer may not be authorized in terms to submit a matter to arbitration, yet if he be specially authorized by Congress to act in regard to the subject-matter of the submission, so that he will have power to carry into effect the decree which the award may direct, he has power to submit the matter to arbitration." The Chief-Justice dissented on the ground that no authority to arbitrate had been given by Congress. (Page 200.)

I have found no other Federal decision than these, and no statute authorizing such submission; but it appears that by section 4057, Revised Statutes, the Postmaster-General is required to cause suit to be brought to recover such claims as those in question.

It is apparent from the statement of Mr. Bliss that if no legal impediment exists it would be greatly to the advantage of the United States to carry out the submission, and it further appears that the contractors are not only desirous to do so, but are willing to give bond to abide by the result.

Mr. Bliss is of opinion that the submission is lawful, but enters into no discussion of the subject, and furnishes no authority for his opinion, which, in view of the decision above cited, is unfortunate. Thus far, knowing his experience in acting for the Government, I have assumed he knew of some statute or authority to warrant the course he has taken.

The circuit court proceeded apparently on the ground that where by statute a particular authority is vested, or mode of proceeding is directed, it is exclusive, and section 4057 cited gives peculiar force to the doctrine as applied to this case. It might also be said that the officers of the United States concerned in this matter, if considered either as general

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agents or as agents with designated powers, are unauthorized to bind their principal by this species of contract.

The Court of Claims does not dispute, but avoids such reasoning by holding that the delegation of authority to submit need not be express, but may be implied from the nature and extent of control over the general subject-matter expressly given. Section 4057 seems to stand in the way of taking any benefit of this distinction.

In ordinary cases it might be put on the general power of an attorney at law to act for his client, but even there the weight of authority is, I think, that the power can be exercised only after suit brought, though there are decisions upholding its exercise before. It is doubtful whether such a doctrine is applicable to the present case, for it is difficult to imply a power in the Attorney-General to submit to arbitration a case in which the Postmaster-General is specially directed to cause suit to be brought. As a question of law, therefore, the right of submission seems to me to be in serious doubt.

Assuming, however, that both parties are desirous of securing the practicable advantage of the submission, and are willing to take such measures as may avail to put the proceeding beyond question of its legality, I suggest that end would be accomplished by the formal commencement of suits in the supreme court of the District against the respective contractors, in which by their attorney they should enter their appearance. Then, upon application and by consent of parties, the court would doubtless appoint the persons named in the present agreements as arbitrators, and their award could be returned to and made the judgment of the court. This course will satisfy the reasonable doubt in your mind, and, unless open to some objection which does not occur to me, would avoid the danger of making a precedent which might under other circumstances be used to the disadvantage of the public.

In this connection I call your attention to *Alexandria Canal Company v. Swan* (5 How., 86), in which suit, brought in the circuit court of Washington County, the cause after issue was referred by a rule of court to four arbitrators upon terms specified in a written agreement filed in the case setting

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forth the manner in which the arbitrators were to be selected, etc. The Supreme Court upheld the proceeding, Chief Justice Taney declaring that "a trial by arbitrators appointed by the court with the consent of both parties is one of the modes of prosecuting a suit to judgment as well established and as fully warranted by law as a trial by jury." (See also *Newcomb v. Wood*, 97 U. S., 582.)

The proposition of the contractors to give bond to abide the result, though indicative of their good faith, does not seem to me to change the legal aspect of the case, for if, by inherent defect of authority, the promise of one side is not binding, it would, I think, affect the validity of the collateral no less than of the principal agreement.

I am, with respect, etc.,

BENJAMIN HARRIS BREWSTER.

Hon. TIMOTHY O. HOWE,

*Postmaster-General.*

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 POLICE FORCE OF THE DISTRICT OF COLUMBIA.

Under the provisions of the act of July 11, 1878, chapter 180, the Commissioners of the District of Columbia have power, in their discretion, to remove members of the police force of the District of Columbia without such trial as is contemplated by section 356 of the Revised Statutes of said District.

DEPARTMENT OF JUSTICE,

*December 30, 1882.*

SIR: Having transmitted to me the request of the District Commissioners for my opinion upon the question whether the Commissioners have power to remove, without such trial as is contemplated by section 356 (Rev. Stat. of D. C.), members of the police force of the District, I answer as follows:

A brief outline of antecedent legislation may throw light on the subject.

For a long period prior to February 21, 1871, three municipal organizations, namely, the county of Washington and the cities of Washington and Georgetown, respectively, were invested with the ordinary functions of local government (the city of Washington being governed by a mayor, aldermen, and common council), but by act of that date (16 Stat., 419)

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the District of Columbia was created a body corporate in place of those three organizations with a new form of government consisting of a governor, secretary, and legislative assembly. A board of public works and board of health were also established as auxiliary organizations.

This scheme of government proved in some respects unsatisfactory to Congress, as is shown by report of its investigating committee, and by act of June 20, 1874 (18 Stat., 116), the plan of vesting the executive power in Commissioners was substituted as a temporary expedient (the legislative assembly being abolished), and a joint committee was authorized to prepare and submit a plan for a permanent form of government.

The committee reported its scheme, but Congress rejected it and other projects, and on July 11, 1878, passed the act under consideration entitled "An act providing a permanent form of government for the District of Columbia" (20 Stat., 102), and this act has been continued to the present time without substantial modification.

Under the so-called old corporation of Washington City the power of appointment to local offices was vested in the mayor and aldermen, and that of removal in the discretion of the mayor. Under the plan of 1871, the appointment to and removal from offices created by the legislative assembly were vested in the governor at his discretion, and this power by the act of 1874 (section 2) Congress transferred to the Commissioners, authorizing their appointment and proceeding as follows: "who shall, until otherwise provided by law, exercise all the power and authority now lawfully vested in the governor or board of public works of said District, except as hereinafter limited."

But Congress saw fit to add the following plenary authority in a proviso to the section, "and said Commissioners are hereby authorized to abolish any office, to consolidate two or more offices, reduce the number of employés, remove from office and make appointments to any office authorized by law."

This provision was re-enacted in the act of 1878 (section 3) in identical terms, except that the words "under them" were inserted before the words "authorized by law."

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It can not be doubted that it was intended by the provisions cited to give the Commissioners power in their discretion to appoint to and remove from every office under their jurisdiction where a different mode of appointment or removal was not specified expressly or by legitimate inference. It is especially important to note this, since the general purpose or policy of Congress in such legislation when once clearly apprehended should have controlling effect in the construction of doubtful terms. They should be presumed, if possible, to have a meaning in harmony with such purpose rather than one opposed thereto.

Bearing this in mind, we are prepared to state the question at issue, which is in brief whether, by the sixth section of the act of 1878, Congress in bringing under the authority of the Commissioners an additional number of offices, namely, those of the police force, intended as to them to vary from its previously established policy of confiding in those officers a discretionary power of appointment and removal. It may be fairly asserted that to maintain such an intent it ought to be shown by at least a very strong inference.

The language is that from a fixed date "the board of metropolitan police and the board of school trustees shall be abolished, and that all the powers and duties now exercised by them shall be transferred to the said Commissioners of the District of Columbia, who shall have authority to employ such officers and agents and to adopt such provisions as may be necessary to carry into execution the powers and duties devolved upon them by this act." (20 Stat., 107.)

The powers and duties referred to will be found set forth in chapter 13 of the Revised Statutes of the District. The material point is that the power of removal then exercised by the police board was limited by the following provisions:

"Each person so appointed shall hold office only during such time as he shall faithfully observe and execute all the rules and regulations of the board, the laws of the United States, and the laws or ordinances existing within the District, and which apply to any part of the District where the members of the force may be on duty." (Sec. 341.)

"No person shall be removed from the police force except upon written charges preferred against him to the board of

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police and after an opportunity shall have been afforded him of being heard in his defense ; and no person removed from the police force for cause shall be re-appointed to any office in said force." (Sec. 355.)

If Congress in making this transfer had said that the powers and duties so transferred should be performed as theretofore by the police board or in accordance with the provisions of existing laws, or had made use of some equivalent expression, it would have given such evidence of its intent as under the circumstances might be expected if it intended to retain a mode of proceeding which was inconsistent with the plenary authority vested in the Commissioners since their creation.

By reference to the last clause of the section and that of the seventh section it will be seen that when it intended to preserve a particular system from the effect of consolidation the expression is apt and clear.

But aside from this, if Congress had made the transfer in the present terms and had stopped with the words "District of Columbia," the question would still be whether the express grant of power over all officers, which by its terms would clearly include the new offices, is to be limited by inference from the mere use of such words as "the powers and duties now exercised." It would not be a strained construction of these words under the circumstances to interpret them in a general sense, and as not intended to incorporate details inconsistent with the existing plan.

The objection to this which may be suggested is that this would repeal by implication the provisions as to tenure and removal above cited ; but this is met by observing that by section 15 all laws inconsistent with the provisions of the act are repealed. If found inconsistent, therefore, the repeal is express, and the practical difference is one which it is submitted is of weight in just such cases. Without such a clause the courts would feel bound to be even ingenious in preserving the said provisions ; with it they are instructed that Congress expects that such inconsistent provisions will be found and directs their repeal. They are not obliged, therefore, to struggle against an apparent inconsistency, but may at once recognize it and give effect to the repealing section.

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But it is not necessary to resort to such reasoning in view of the immediate context which must of course be taken as defining the sense in which the preceding text is used. The words are "who [the Commissioners] shall have authority to employ such officers and agents, and to adopt such provisions as may be necessary to carry into execution the powers and duties devolved upon them by this act."

The plain intent of this clause, I submit, is to give the Commissioners plenary power to retain the existing police scheme both as to its official and regulative features, or to modify or substitute without limit. So taken it is in perfect harmony with the general purpose and policy before noted, and strengthens instead of impairing the power granted to it by section 3.

It was perfectly competent, therefore, for the Commissioners, formally or tacitly, to adopt (or not) the provision for removal by trial on written charges, and to continue it so long as they should deem it necessary.

Extended argument to sustain this position is surely needless, unless it can be shown that the clause above mentioned is susceptible of some different and inconsistent interpretation. It can not be presumed that Congress intended to bind the Commissioners, by the words "powers and duties now exercised," to proceed by trial to remove a member of the police force, when they substantially say in the same sentence to them, "you may use your discretion in the entire subject-matter."

It is not claimed that the question is without difficulty, but on the whole case it seems to me that Congress did not intend to force on the Commissioners (without apparent reason) the anomaly of a mode of removal as to one class of their appointees differing from that prescribed as to all others, but wisely left the matter to their own good judgment. I think, therefore, that the Commissioners are at liberty to adopt the method of removal at their discretion in the case under consideration.

I feel less hesitation in arriving at this conclusion from the fact that in a case which seems to me to be substantially analogous the general term of the supreme court of the District decided that justices of the peace, who under sections

## Board of Fire Commissioners.

1030, 1031, Revised Statutes of the District of Columbia, could be removed only as therein prescribed, could be removed by the Commissioners in their discretion, when by subsequent legislation the appointment of justices was vested in the governor (act February 21, 1871), and that authority was by Congress transferred to the Commissioners as before stated. (*Bates v. Dennison*, 3 McArthur, 130.) A copy is inclosed.

I am, with respect,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

## BOARD OF FIRE COMMISSIONERS.

The Commissioners of the District of Columbia have power, under the act of June 11, 1878, chapter 180, to abolish a part or the whole of the board of fire commissioners of said District.

## DEPARTMENT OF JUSTICE,

December 30, 1882.

SIR: From the papers referred to me it appears that you have transmitted to me the request of the Commissioners of the District for my opinion on the question whether they have power to remove members of the board of fire commissioners of the District of Columbia, or to abolish a part or the whole of said board.

That board was created by act of the legislative assembly of the District, approved August 21, 1871 (acts first legislative assembly, 75), and that assembly was created and its powers prescribed by the act of Congress approved February 21, 1871 (16 Stat., 420).

By the former act the power of appointment and removal was vested in the discretion of the governor of the District. The powers of the governor were transferred to the Commissioners of the District, created by Congress in the act of June 20, 1874 (18 Stat., 116), and they were further empowered as follows:

"And said Commissioners are hereby authorized to abolish any office, to consolidate two or more offices, reduce the number of employes, remove from office, and make appointments to any office authorized by law."

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Retired List of the Navy.

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The same powers were substantially renewed in those officers by the act of June 11, 1878 (20 Stat., 104), the only difference in the cited clause being the insertion of the words "under them" before the words "authorized by law."

Under this authority there seems to be no doubt that Congress intended to give the power specified in the question. There is nothing, apparently, in the opinion of my predecessor, the honorable Attorney-General Devens (16 Opin., 179), in conflict with this conclusion.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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RETIRED LIST OF THE NAVY.

An officer who was retired as a commodore, and has since been promoted to the grade of rear-admiral on the retired list, under the act of August 15, 1876 (sec. 1460, Rev. Stat., as amended), is not entitled to any increase of pay by reason of his promotion.

The first section of the act of June 22, 1874, chapter 392, is *in pari materia* with the provision touching the pay of promoted officers contained in section 7 of the act of June 15, 1870, chapter 295, the act of June 5, 1872, chapter 296, and section 1516, Revised Statutes, and was designed to fix the commencement of the increased pay of promoted officers in active service only.

Section 1591, Revised Statutes, which declares that an officer promoted on the retired list shall not, in consequence of such promotion, be entitled to increase of pay, is applicable alike to officers promoted under section 1461, Revised Statutes, and to those promoted under section 1460, as amended.

DEPARTMENT OF JUSTICE,

January 9, 1883.

SIR: I have considered the question submitted to me in a letter received from the Hon. H. F. French, Acting Secretary, dated the 23d of October last, which is thus stated: "Is a commodore in the U. S. Navy, retired, who was promoted to the rank of rear-admiral, retired, under the act of August 15, 1876, entitled to the pay of a rear admiral, retired, from the date of his promotion, or for any portion of that time, under the provisions of the acts of August 15, 1876, re-enacted in section 1460, Revised Statutes, June 22, 1874 (18 Stat., 191), and the Navy appropriation acts of February 23, 1881 (21 Stat., 331),

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and August 5, 1882, notwithstanding the provisions of the acts of March 2, 1867, and July 15, 1870, re-enacted in section 1591, Revised Statutes?"

This question involves an examination into, and its answer depends upon, the law relating to retired naval officers as it stood before the passage of the act of August 5, 1882, chapter 391, which provides that thereafter "there shall be no promotions 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."

By section 1461, Revised Statutes, officers on the retired list of the Navy became entitled to promotion as their several dates upon the active list were promoted; but, by a proviso therein which imposed restrictions as regards promotions to the grade of rear-admiral upon the retired list, promotion to that grade was forbidden while it contained the full number allowed by law.

Section 1591, Revised Statutes, declared that "no officer, heretofore or hereafter promoted upon the retired list, shall, in consequence of such promotion, be entitled to any increase of pay." This provision is taken from the fifth section of the act of July 15, 1870, chapter 295.

By section 1460, Revised Statutes, as amended by the act of August 16, 1876, chapter 302, it was enacted: "There may be allowed upon the retired list of the Navy nine rear-admirals by promotion on that list: *Provided*, That this section shall not prevent the Secretary of the Navy from promoting to the grade of rear-admiral on the retired list, in addition to the number herein provided, those commodores who have commanded squadrons by order of the Secretary of the Navy, or who have performed other highly meritorious service, or who, being at the outbreak of the late war of the rebellion, exhibited marked fidelity to the Union in adhering to the flag of the United States." The amendment of this section made by the act of 1876 consists of the addition of the last clause, beginning with the words "or who, being at the outbreak of the late war," etc. Its effect was to authorize the promotion to the grade of rear-admiral of such commodores as came within the terms of the clause, notwithstand-

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ing the limitation prescribed in that section as to the number of rear-admirals allowed upon the retired list by promotion.

The question submitted presents the case of an officer who, previous to the date of that amendment, was retired as a commodore, and who afterwards was promoted to the grade of rear-admiral on the retired list under the provision in the amendment, and the inquiry is, whether by such promotion he became entitled to the retired pay of that grade.

Mention is above made of the act of June 22, 1874, chapter 392. The first section of that act provides that on and after the date thereof "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." This section is *in pari materia* with the provision touching the pay of promoted officers contained in section 7 of the act of June 15, 1870, chapter 295, the act of June 5, 1872, chapter 296, and section 1516, Revised Statutes, and must be considered in connection therewith in determining its scope. Thus considered, it was manifestly designed to fix the commencement of the increased pay of promoted officers in active service only.

Previous to the act of 1870 the general rule was that the increased pay of such officers commenced from the date of the signature of an appointment to perform the duty of the higher grade if one was given before the issue of a commission, or from the date of the commission if no appointment was previously given. (Navy Regulations, edition of 1865, par. 1162; *ibid.*, edition of 1870, par. 1508.) But this rule was changed by that act, the seventh section thereof providing that thereafter "the increased pay of a promoted officer shall commence from the date he is to take rank as stated in his commission." That this provision applied exclusively to officers on the active list clearly appears by reference to section 5 of the same act, which prohibits any increase of the pay of officers on the retired list in consequence of their promotion thereon. The provision of the act of 1870, above quoted, was repealed by the act of June 5, 1872, chap-

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ter 306, and the following *proviso* enacted: "That if such officer shall have been promoted in course to fill a vacancy, and shall have been in the performance of the duties of the higher grade from the date he is to take rank, he may be allowed the increased pay from that date." The latter provision is substantially re-enacted in section 1561, Revised Statutes, as follows: "When an officer is promoted in course to fill a vacancy, and is in the performance of the duties of the higher grade from the date he is to take rank, he may be allowed the increased pay from such date." This section extends to officers promoted on the active list only; section 1591, Revised Statutes, covering the case of officers promoted on the retired list. The sole purpose and intent of the first section of the act of June 22, 1874, was to modify the rule prescribed by section 1561, as above, fixing the period at which the increased pay of an officer on the active list, who is "promoted in course to fill a vacancy," shall begin. It in no way affected section 1591, which thereafter, as before, remained in full force.

Section 1591 contains a general provision, which, unless elsewhere restrained in its application (and no statute having this effect has come under my notice), must be deemed to extend alike to officers promoted on the retired list under section 1461 and to officers promoted thereon under section 1460 as amended. By this legislation Congress authorized promotion on the retired list of the Navy, expressly providing, however, that such promotion should not carry with it enhancement of pay, thus in the case of an officer promoted on that list separating his pay from his rank and making the former not dependent on or governed by the latter. This it was undoubtedly competent for Congress to do.

The pay of retired naval officers is regulated by sections 1588, 1590, and 1893, the two last-mentioned sections being of a special character. Section 1588, which furnishes the general rule on the subject, fixes the pay of a retired officer, when not on active duty, at one-half or three-quarters (as the case may be) of the sea pay elsewhere provided in the Revision for the grade or rank held by him at the time of his retirement. Provision is not made by that or any other section or statute, of which I am aware, for an allowance to

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the officer of an increase of pay upon his promotion to a higher grade. On the contrary, such allowance is explicitly prohibited by section 1591.

I may add, in connection with the prohibition of the section just adverted to, that the enactment of a similar prohibition in the act of August 5, 1882, does not warrant the implication that a retired officer was theretofore entitled under the law to an increase of pay upon promotion on the retired list. Such an implication could not fairly arise in the face of a previously existing statutory provision still in force, expressly declaring that such an officer should not be so entitled. By section 1589, retired officers of the class therein described, who were promoted to the grade of rear-admiral, are to be considered as retired as rear-admirals, and the effect of this provision was to entitle *them* to the retired pay of that grade. But other retired officers thus promoted fell under the operation of section 1591.

The Navy appropriation acts of February 23, 1881, and August 5, 1882, to which reference is made, in providing for the pay of retired officers, state the number appropriated for in each grade. Thus the act of 1882 appropriates "for forty-two rear-admirals, twenty commodores," etc. On examination of the estimates on which this appropriation is based it will be found that the forty-two admirals include thirty-nine at \$4,500 per annum and three at \$3,750 per annum, and the twenty commodores include eleven at \$3,750, seven at \$3,375, and two at \$2,625 respectively. These differences in the pay of officers standing in the same grade on the retired list are the result of the operation of the provisions already adverted to, by which promotion on that list was authorized, but without increase of pay in consequence of such promotion; and those acts, so far from affording ground for the assumption that all the rear-admirals enumerated (as well those who have attained that grade by promotion as others) were intended to have the retired pay of that grade (\$4,500 per annum) indicate a contrary intention.

Upon the whole, I am of opinion that an officer who was retired as a commodore and has since been promoted to the grade of rear-admiral on the retired list under the act of August 15, 1876 (sec. 1460, Rev. Stat. as amended), is not

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entitled to any increase of pay by reason of his promotion, and accordingly I answer the question submitted in the negative.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHAS. J. FOLGER,

*Secretary of the Treasury.*

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## INTERNAL REVENUE.

Where an application was made to the Commissioner of Internal Revenue for a refund of taxes paid in December, 1864, upon spirits lost by leakage or evaporation while stored in a bonded warehouse between July 1 and December 31, 1864: *Advised* that the act of June 30, 1864, chapter 173, then in force, did not authorize any allowance for leakage in such case.

DEPARTMENT OF JUSTICE,

*January 12, 1883.*

SIR: Yours of July 14 last submits questions which have occurred in your Department in connection with the application of W. T. Pate & Co. to the Commissioner of Internal Revenue (Rev. Stat., sec. 3220), for a refund of taxes paid by them in December, 1864, upon spirits lost by leakage or evaporation while stored in a bonded warehouse between July 1 and December 31, 1864.

It seems that Pate & Co. first made application for this refund in October, 1876, and that this was *rejected* by the clerk whose official duty it was to pass upon such cases in the first instance; also, that immediately afterwards the applicants brought suit therefor in the Court of Claims, alleging (a necessary jurisdictional fact) that such claim had been previously rejected by the Commissioner of Internal Revenue, and referring in that connection to an exhibit which showed the action of the clerk, as above stated.

It also appears that, according to the course of office in such matters, rejections by the clerk were brought to the attention of the Commissioner of Internal Revenue by submitting for his consideration and signature a letter certifying such rejection to the collector of internal revenue for the proper district.

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There is no evidence that this was done in the case of Pate & Co. No copy of such a letter is to be found in the proper letter book. The original application itself has disappeared; the only evidence of its existence at any time being a sort of docket entry in the register of the clerk in question, adding thereto the word *rejected*.

The *suit* in the Court of Claims was in the end dismissed for want of jurisdiction, under the decision in *Nichol's Case*, (7 Wall., 122). Subsequently the application in the Bureau of Internal Revenue was renewed before a succeeding Commissioner, and this has pended there ever since.

Thereupon you ask—

(1) "Is the application to be treated either as having been *rejected* in 1876 or as *abandoned*?"

(2) "Did the act of June 30, 1864, authorize allowance for leakage in a bonded warehouse?"

1. As to rejection and abandonment, I submit that the circumstances do not show a rejection by the Commissioner. There was none *expressly*, and it seems that what passed before the clerk did not amount to one, and also that the allegation in the Court of Claims, attended as it was by a reference to a paper which corrected it for the matter now under consideration, did not amount to an estoppel. Neither do I see proof of any *abandonment* of the claim by the parties interested.

However, the conclusion to which I have come as regards the second question renders the above unimportant, and as it is improbable that the circumstances which attend the first question will be repeated, I will not trouble you with my reasons therefor.

2. As to an allowance by the act of 1864 of "leakage" in a bonded warehouse, I submit that there is no such allowance.

I had prepared an opinion to this effect upon the 9th of August last, but upon being requested to allow opportunity for further argument on behalf of the claimants that conclusion was suspended for several months. Of late other engagements have prevented my sooner considering the arguments which have been presented by the learned gentlemen who represent the claimants.

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In May, 1880, whilst discussing the question whether warehouse leakage was allowed by the act of 1866, one argument which occurred to the contrary was the difference as to the definition of the object of taxation in that act and in the previous acts of 1864 and 1862. An *a fortiori* argument presented itself in that connection (16 Opin., 670), and by inadvertency the definition in those previous acts was spoken of as allowing such leakage. It was unnecessary to the argument to say that the *a fortiori* argument was all that was material, and that obviously would have been only *the stronger* if the previous acts had also *disallowed* of warehouse leakage.

Under the influence of the context which the act of 1864 presents in connection with the passage quoted in the opinion just alluded to, I conclude that the expression "distilled and sold or distilled *and* removed for consumption or sale," by which the act of 1864 defines the *spirits* on which the tax is to be "levied, collected, and paid" (13 Stat., 243), is to read *reddenda singula singulis*, as providing that such tax is to be levied upon the spirits when *distilled*, but is not to be collected and paid until they are *sold or removed for consumption or sale*, or, in other words, the tax which is to be *ascertained* at the former period is to be *satisfied* only at the latter.

That context consists of the detailed provisions for the government and guidance of the officials that were to be concerned in ascertaining and collecting the tax.

Three officers of the Government were to be directly concerned with this ascertainment and collection—an inspector, an assessor, and a collector. Before the spirits were removed from the distillery for any purpose the inspector was to ascertain the actual amount and proof of the spirits contained in each cask or package (p. 244). These particulars were by him to be communicated in duplicate to the assessor and the collector for the district.

Thrice in every month (p. 243) the distiller also was to communicate to each *assessor* and collector duplicate accounts taken from a book required to be kept by him showing the amounts of spirits *distilled*, and also *sold or removed*, etc., by him since his last account, and thereupon he was also to pay

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to the collector the tax due upon the amount so sold or removed.

The inspector was required to mark upon the cask or other package the quantity and proof of the spirits therein contained. These packages were to be so marked before they were removed into a warehouse.

No method of inquiry into such contents is given other than a gauging by the inspector. No other gauging by him except as above is authorized in general. In two exceptional cases an allowance for deficiency in the ascertained contents of a package and a consequent re-inspection are authorized by the sixty-first section of this act (page 245): first, for leakage upon removal to some other warehouse, and secondly, for loss upon re-distillation for the purpose of being exported. In both of these cases the deficiency anticipated, and within certain limits provided for, was such as might reasonably take place during absence from the warehouse, *i. e.*, during transit or in re-distillation. But for the fact of leakage in packages under ordinary circumstances, *i. e.*, anterior to their removal from a warehouse, or, indeed, for the official ascertainment of such fact if suggested or suspected, I find no provision of law. *Indeed, the provisions for ascertaining the deficiencies mentioned in section 61 assume the results of the official inspection first made as conclusive upon the quantity removed from the first warehouse, conclusive as to both the Government and the owner; any deficiency in relation to that ascertainment being assumed as due to transit or re-distillation, and therefore as within certain limits to be allowed.*

I therefore conclude as a general rule that the packages marked by the inspector before removal, *and as so marked*, became fixed units of one or other degree in all accounts betwixt the distiller and the Government, and that to this rule there can be no exceptions except such as are *statutory*, the only exceptions of that class to which my attention has been called being those just mentioned, neither of which affect the case before me.

No suggestion is made by you that any uniform official construction of the act of 1864 has prevailed upon this point. Such construction as to a statute of this sort no longer in

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force would be entitled to great respect. My attention has been called by the learned gentlemen who have argued this matter on behalf of Messrs. Pate & Co. to certain circulars issued by the Commissioner of Internal Revenue whilst the act of 1864 was in force, as showing a practical construction allowing warehouse leakage. Without admitting a right in any one to modify the facts of this case as stated by yourself, I may, in deference to such suggestion, be allowed to say that all of these, beginning with Circular No. 13, December 15, 1863, refer to one or both of the exceptional cases mentioned above first affected by the act of 1863, March 3, chapter 74, section 18 (12 Stat. 723); see Circular No. 15 (March 1, 1864); No. 40 (February 1, 1866); "Special" No. 1 (July 6, 1864).

I hardly need to add in reply to suggestions made upon the argument that any *general* reference in circulars or statutes to the quantity of spirits in a warehouse at the time of their *removal* is to be taken as a reference to the aggregate of *units, as above defined*.

Very respectfully,

S. F. PHILLIPS,  
*Solicitor-General.*

The SECRETARY OF THE TREASURY.

I concur with the Solicitor-General.

BENJAMIN HARRIS BREWSTER.

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 CIVIL-SERVICE BILL.
 

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Doubt suggested whether the provision in section 3 of the act "to regulate and improve the civil service," etc. (22 Stat., 403), for the employment of a "chief examiner," does not come in conflict with the constitutional rule on the subject of appointments.

The word "employ" is sometimes used in our legislation in a sense equivalent to "appoint."

DEPARTMENT OF JUSTICE,  
*January, 22, 1883.*

SIR. In the matter of the civil-service bill, having received from you a letter written by one Mr. O'Connor at the instance of the State Department, and also a paper prepared by the Secretary of State, and having been requested by you

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to consider them, I have done so, and now submit the following suggestions and reflections arising out of that consideration.

Section 3 of the act "to regulate and improve the civil service" provides 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." He is to receive a salary at the rate of \$3,000 a year, and he shall be paid his necessary traveling expenses incurred in the discharge of his duty.

Doubt is suggested whether the chief examiner, whose employment is thus provided for, does not come within the category of an *officer* of the United States.

The Constitution (sec. 2, art. 2) in providing how officers of the United States shall be appointed declares that the President shall nominate, and by and with the consent of the Senate appoint, certain officers described, and "all other officers of the United States whose appointment are not herein otherwise provided for and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of Departments."

If the chief examiner be an officer of the United States, then consistently with the above provision his appointment can not be vested in the said Commission.

Is he such officer? In *United States v. Maurice* (2 Brock., 103), Chief-Justice Marshall says: "An office is defined to be a public charge or employment, and he who performs the duties of the office is an officer." If employed on the part of the United States he is an officer of the United States.

In *Hartwell v. U. S.* (6 Wallace, 385) the Supreme Court defines an office to be a "public station or employment conferred by the appointment of the Government. The term embraces the ideas of tenure, duration, emolument, and duties." In this case the defendant was a clerk appointed under the act of July 23, 1866, by the assistant treasurer

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at Boston, with the approbation of the Secretary of the Treasury.

"The employment of the defendant," continues the court, "was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe."

The court held that the defendant "was a public officer," meaning an officer of the United States, and that he was appointed by the head of a Department within the meaning of the constitutional provision upon the subject of the appointing power.

The use of the word "employ" instead of the word "appoint" is unimportant, the former being sometimes used in our legislation in a sense equivalent to appoint. Thus in the third section of the act of March 3, 1815, chapter 94, the word "employ" is used in conferring authority to appoint inspectors of customs, who are declared to be "officers of the customs." These are officers of the United States, and though *employed* by the collector with the approbation of the Secretary of the Treasury, they are nevertheless appointed (according to the ruling in the case last cited) by a head of Department within the meaning of the provision of the Constitution above adverted to.

So, by the act of March 3, 1865, chapter 98, the Attorney-General is "*authorized to employ* in his office one chief clerk at a salary of \$2,200 per annum," etc., and by section 5 of the act of July 23, 1866, chapter 208, he is also "*authorized to employ* in his office \* \* \* a clerk to be known as the law clerk, at an annual salary of \$2,500," and by section 363, Revised Statutes, he may "*employ and retain*" attorneys and counsellors to assist district attorneys. It is under this last provision that the officers known as assistant district attorneys are appointed. The chief clerk, law clerk, and assistant district attorneys just referred to are officers of the United States, whose appointments, being conferred by the head of a Department, are made in conformity with the Constitution.

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So, if the third section of the civil service act authorized the Commission to employ a chief examiner *with the approval* of the President, or of some head of Department, or of some court of the United States, and the Commission should exercise the authority thus conferred with such approval, this would be in contemplation of the Constitution, as above interpreted, an appointment by the President or head of Department, or court, as the case might be.

In this connection I remark that the inspectors of hulls and boilers provided for by the act of August 30, 1852 (referred to in Mr. O'Connor's paper), are *designated* subject to the approval of the Secretary of the Treasury; they become officers only "when the designation is approved by the Secretary." This is an appointment by the head of a Department (*Hartwell v. United States*, 6 Wall.), who is capable of exercising the appointing power.

Whether the chief examiner is an officer or not depends therefore upon the *nature of his employment*, not upon the terms used in conferring it. If the employment is one that "embraces the ideas of tenure, duration, emolument, and duties," which latter are continuing and permanent, not occasional or temporary, it contains all the essential elements of an office.

On examination of the third section, it appears that certain duties are annexed to the employment of the chief examiner which are continuing and permanent in their character. Thus it is made "a part" of his duty, under the direction of the Commission, "to act with the examining boards, as far as practicable, whether at Washington or elsewhere, and to secure accuracy, uniformity, and justice in all their proceedings," which are at all times to be open to him. He is to secure "accuracy, uniformity, and justice in all their proceedings," which involves the exercise of powers of supervision and control over all the examining boards. This duty alone imports something more than an occasional or temporary employment; and yet it is made but a *part* of his *duty*; the statute implying that other duties are contemplated to be devolved upon him. His tenure is less indefinite. He is (as is the case with all inferior officers to whose appointment the consent of the Senate is not required) removable at the

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pleasure of the appointing power, but his tenure may survive the individual Commissioners by whom he is appointed. He is to "receive a salary" at a prescribed rate per annum, which corresponds in amount with the relative dignity of the place. But one chief examiner can be employed at a time—"authorized to employ a chief examiner" are the words of the statute.

Local boards of examiners are provided for, to be designated and selected by the Commission from persons "in the *official service* of the United States," and the Commission is empowered at any time to substitute any other person "*in said service*" in the place of any one so selected. Here, it will be observed, only persons who already hold office under the Government can be placed on these boards. The effect of the statute is simply to devolve *additional duties* upon those *officers* who may be designated and selected therefor.

Now, assuming the chief examiner to be an officer of the United States, how does the case stand? Congress has created an officer, but has not "*by law*" vested his appointment in any one capable of exercising the appointing power under the Constitution. Is such a case provided for? The Constitution declares that the President shall, with the consent of the Senate, appoint all officers whose appointments are not therein otherwise provided for, and which shall be established by law. This would seem to cover the case. The appointment of the officer might have been vested by Congress in the President alone, or in a head of a Department, or in a court of the United States; but in the absence of any statutory provision to this effect the constitutional provision just adverted to would appear to come into play, and vest the appointment in the President with the advice and consent of the Senate.

The foregoing presents grounds which are deemed by me sufficient to warrant the suggestion of a doubt whether the existing provision for the employment of the chief examiner does not come in conflict with the constitutional rule on the subject of appointments. The question thus presented, however, is one which can not be settled by executive action. Whether the functions or duties and powers of the chief examiner constitute him an officer of the United States in the

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Site for a Public Building at Minneapolis.

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sense of the Constitution, is one that can only be authoritatively determined by the courts. But should the doubt appear well founded, it may be worthy of your consideration whether it is expedient to call the attention of Congress thereto.

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

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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## SITE FOR A PUBLIC BUILDING AT MINNEAPOLIS.

The authority given by the act of April 11, 1882, chapter 75, "to purchase a site" for a public building to be erected at Minneapolis, Minn., does not include authority to acquire such site by condemnation under the eminent domain power of the United States.

DEPARTMENT OF JUSTICE,

February 1, 1883.

SIR: Referring to your letter of the 23d instant, relative to the site selected for a public building to be erected at Minneapolis, Minn., I have considered the inquiry there suggested, whether the authority "to purchase a site" given by the act of April 11, 1882, chapter 75, includes power to condemn land therefor, and the conclusion arrived at by me is that the authority mentioned does not carry with it such power.

Although the word "purchase," taken in its technical sense, comprehends all modes of acquiring land other than by descent, yet in the legislation of Congress providing for the acquisition of private property for public purposes it appears to be used not in its technical, but in its popular or vernacular sense. In *Kohl v. United States* (91 U. S., p. 374) it is remarked by the court that "generally in statutes, as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties without governmental interference." And where Congress has intended to confer authority to acquire land through the exercise of the eminent domain power of the Government other terms, clearly indicative of that intent, are made use of. See, for instance, the acts of December 21, 1871, chapter

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PENSIONS—DECLARATIONS.

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5; March 27, 1872, chapter 65; March 3, 1873, chapter 311; and June 18, 1879, chapter 26.

Attorney-General Devens, in the opinion to which you refer (16 Opin., p. 327), held that the authority given to the Secretary of the Treasury by the act of March 3, 1879, chapter 182, to "purchase" certain land at Fall River, Mass., did not include authority to acquire it by condemnation; and the correctness of this view has been impliedly recognized by Congress in the act of August 7, 1882, chapter 433, by which the provision of the act of 1879, above adverted to, was amended so as to enable the Secretary to acquire the land "by private purchase or by condemnation." I may also mention the act of March 9, 1882, chapter 28, as confirmatory of the same view.

The various acts above cited (to which others might be added) sustain the conclusion already intimated touching the inquiry suggested by your letter. I accordingly return the papers which were received therewith, deeming the institution of proceedings for condemnation in the case to which they relate unauthorized.

I have the honor to be, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

*Secretary of the Treasury.*

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PENSIONS—DECLARATIONS.

Declarations of pension claimants must be made before a court of record, or before some officer thereof having custody of its seal.

The power to fine and imprison is not in this country a distinguishing mark of a court of record, but the enrolling or recording of their acts and proceedings is; and such court must have a seal by which its acts and proceedings are authenticated and proved.

DEPARTMENT OF JUSTICE,

*February 2, 1883.*

SIR: By section 4718 of the Revised Statutes declarations of pension claimants must be made before a *court of record*, or before some officer of a court of record *having custody of its seal*, said officer being fully authorized and empowered to administer and certify any oath or affirmation relating to any pension or application therefor.

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Pensions—Declarations.

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In the case submitted Thomas S. Ewing made his application for a pension before David H. Lane, "recorder of the city of Philadelphia," and the question is whether the recorder of the city of Philadelphia holds a court of record, or is an officer of a court of record.

Wharton, in his Law Lexicon, Title "Court," page 250, defines a court of record thus:

"A court of record is one whereof the acts and judicial proceedings are enrolled for a perpetual memory and testimony, and which has power to fine and imprison for contempt of its authority."

He adds: "Courts not of record are courts of inferior dignity, which are not intrusted by law with any power to fine and imprison subjects of the realm, unless by express provision of some act of Parliament. Their proceedings are not enrolled or recorded; but, as well their existence as the truth of the matters therein contained, shall, if disputed, be tried by a jury."

The power to fine and imprison is not, I think, in this country regarded as a distinguishing mark of a court of record, but the enrolling or recording their acts and proceedings is; and a court of record must have a seal by which its acts and proceedings are held to be authenticated and proved in all courts.

If a recorder of the city of Philadelphia has an official seal which, in the higher courts and elsewhere, proves his judicial acts; if by statute or usage and custom he is a judicial officer who keeps a record book in which his official acts and proceedings are regularly enrolled for a perpetual testimony of them, I think he holds a court, and his court is a court of record.

The papers submitted do not show whether these qualities inhere in the office of the said recorder, and I am not able to lay my hands upon any authorities as to these points. Furthermore, this question as practically propounded is answered as far as I can answer it; but the subject belongs to the courts of Pennsylvania.

Very respectfully, your obedient servant,  
BENJAMIN HARRIS BREWSTER.

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

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Railroad Transportation.

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## RAILROAD TRANSPORTATION.

Under sections 5260 and 5261, Revised Statutes, it is sufficient if, previous to the payment of claims for freight and transportation over the railroads of companies to which the United States have issued bonds, the law applicable thereto has been ascertained by a judgment of the Court of Claims, or, upon appeal, of the Supreme Court. Where the law is thus ascertained in one case, it may be acted upon in all similar cases without further litigation.

DEPARTMENT OF JUSTICE,  
*February 6, 1883.*

SIR: After considering the papers inclosed in yours of the 3d instant, I understand them to present the question, whether sections 5260 and 5261 of the Revised Statutes mean that, previous to any payment of the accounts therein mentioned, they must be sanctioned by judgments in the Court of Claims, etc., *toties quoties* they arise, or only that previous to such payment the rule of right thereabouts must have been ascertained by such judgment.

The claim which the above legislation instructed the officers of the United States to assert and invited the companies to resist by suit, was, that money due by the United States for freight and transportation over the railroads of companies to which they had issued bonds should be withheld and applied to the satisfaction of interest, etc., instead of being paid over.

What the courts could do under the circumstances was to ascertain the law arising under such facts as might be submitted to them for consideration. When that law should be once ascertained, it would, in the usual course of things, become the rule for all such facts, whenever they might arise; meaning by "such facts," facts of the same character—facts essentially the same. In ordinary cases litigants acquiesce in one such solemn decision. In exceptional cases, however, they litigate the question again. But it is exceedingly improbable that the legislature intended by the words of this provision to convey a doubt whether the courts and the Treasury Department respectively could in this matter sufficiently perform their ordinary functions—the former in laying down, and the latter in applying, a working rule for the adjustment and satisfaction of these accounts.

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Railroad Transportation.

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Upon the contrary, it is to be presumed that they intended to direct litigation under the ordinary conditions and with the ordinary results; so that when the law should be made plain by a solemn judgment, it should for all facts identical in character become a rule of action for the United States to the same extent that it would have been for a private citizen.

The *direction*, therefore, to the Secretary is to pay no such money until he shall have ascertained the mind of the Court of Claims and Supreme Court in the way that other prudent litigants do. There is no appearance of an intention to substitute the courts for 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.

If the Secretary of the Treasury was dissatisfied with the rule laid down by the court upon one trial, he might, no doubt, have another case made up and reargued, but it is not intended that money shall never be paid except the courts shall again have laid down the law upon a certain statement of facts, no matter how often they may have done so before.

Whether in a new case the circumstances are essentially the same as in one already satisfactorily *determined* will be for the Secretary to say. If he find that they are, he will proceed to execute the previous adjudication; if he is not satisfied as to this, he will be governed by the *direction* in the statute, and require the matter to be determined.

I therefore understand the expression "is directed to withhold all payments" in section 5260 to refer, in the first place, to the payments due to such companies at the time of the passage of the act, but no doubt to include also, equitably, all payments thereafter of like sort, the principles governing which shall not previously have been ascertained by the Court of Claims or upon appeal by the Supreme Court.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

*Solicitor-General.*

I concur in the above opinion.

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

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Mail Contracts.

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## MAIL CONTRACTS.

The first *proviso* in the act of May 4, 1882, chapter 116, empowering the Postmaster-General to annul the contract of any contractor or subcontractor who shall sublet his contract for a less sum than that for which he contracted to perform the service, is prospective in its operation.

All subletting of contracts after the date of that act is governed thereby, whether such contracts were made before that date or not.

The fourth *proviso* in the same act, giving any person employed by a contractor or subcontractor a lien for his compensation, or any money due such contractor or subcontractor, properly extends to contracts and subcontracts existing at the date of the act.

The fifth *proviso* applies to contracts thereafter made, and has no effect upon those existing prior to the passage of the act.

## DEPARTMENT OF JUSTICE,

*February 7, 1883.*

SIR: In reply to your communication asking my opinion upon "the effect of the act of May 4, 1882, upon contracts and subcontracts for carrying the mails on star routes and steamboat routes executed prior to its enactment," I have the honor to submit the following as my conclusions:

The act of the 4th of May, 1882, entitled "An act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, and for other purposes," contains certain *provisos* qualifying and controlling the appropriation of \$7,250,000 "for inland transportation by star routes," as follows: (1) "That whenever any contractor or subcontractor shall sublet his contract for the transportation of the mail on any route for a less sum than that for which he contracted to perform the service, the Postmaster-General may, whenever he shall deem it for the good of the service, declare the original contract at an end, and enter into a contract with the last subcontractor, without advertising, to perform the service on the terms at which the last subcontractor agreed with the original contractor or former subcontractor to perform the same"; (2) that such last subcontractor shall give good security, but that the original contractor shall not be released from his contract until such bond shall have been given; (3) that thereafter, when a contract shall be declared

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Mail Contracts.

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void on account of having been sublet, the contractor shall not be entitled to one month's extra pay; (4) the next proviso secures any person performing service for a contractor or subcontractor in carrying the mail out of any money due such contractor or subcontractor; (5) the last proviso is to the effect that where any person, corporation, or partnership shall have contracts for the performance of mail service on more than one route, and shall fail to perform his contract as to one or more routes, "no payment shall be made for service on any of the routes under contract with such person, corporation, or partnership until such failure has been removed and all penalties therefor fully satisfied."

We will consider these provisos in their order in connection with the question submitted.

The first proviso, empowering the Postmaster-General, if in his opinion the good of the service requires it, to annul the contract of any contractor or subcontractor who "*shall sublet*" his contract for a less sum than that for which he contracted to perform the service, was intended clearly to be prospective in its operation. Indeed, in the absence of the most explicit language to the contrary, it can not be supposed that Congress purposed to give this proviso a retroactive operation regardless of rights that had vested under previous legislation.

By the second section of the act of 17th May, 1878 (20 Stat., 62), it is provided that a mail contractor may transfer or sublet his contract with the consent in writing of the Postmaster-General. This right is given without imposing any limitation or restriction as to the terms of such subcontracts. If, therefore, it was stipulated in any subcontract in operation at the time the act of May 4, 1882, went into effect, as it might have been lawfully, to transport the mail for a less sum than that contained in the original contract, one of the results of giving retrospective force to that act would be to put it in the power of the Postmaster-General to declare at an end the contracts of all contractors who had sublet them at a rate of compensation less than that agreed upon in the original contracts. Manifestly, there is nothing in the act of May 4, 1882, to compel a reading that leads to such injustice.

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Mail Contracts.

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But all subletting of contracts after the act of May, 1882, went into effect is governed by that act, whether such contracts were made before or afterwards. As, by the act of May, 1878, the subletting of contracts was dependent entirely upon the *consent* of the Postmaster-General, it is not perceived that this view of the law is prejudicial to rights in that behalf vested under contracts entered into before the act of May, 1882, took effect, as it might have been had the right to sublet contracts been *absolute*.

The second and third provisos do not call for any comment.

The fourth proviso, giving any person employed by a contractor or subcontractor a lien for his compensation on any money due such contractor or subcontractor, can be applied undoubtedly to contracts and subcontracts existing at the time the act of May, 1882, was approved, without impairing the obligation of such contracts and subcontracts. Indeed, this *proviso* is but an extension of the third section of the act of May, 1878, to persons employed by subcontractors, and merely gives a new sanction to certain obligations already existing or thereafter to exist.

The fifth proviso, to the effect that where any person, corporation, or partnership shall have contracts for the performance of mail service upon more than one route, and shall fail to perform their contracts for one or more of such routes, no payment shall be made for service on any of the routes under contracts until such failure has been removed and all penalties therefor fully satisfied, was obviously intended to apply to contracts thereafter to be made, and consequently has no effect upon contracts existing when the proviso became law.

After what has been said, it is hardly necessary to add that the view of the Assistant Attorney-General for the Post-Office Department as to the effect of the act of May, 1882, upon contracts and subcontracts existing at the time that act went into operation, expressed in the opinion accompanying your communication, meet with my concurrence.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The POSTMASTER-GENERAL.

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Post Tradership at Fort Lewis, Colo.

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## POST TRADERSHIP AT FORT LEWIS, COLO.

Under section 3 of the act of July 24, 1876, chapter 226, a post-trader can not be appointed by the Secretary of War excepting on the recommendation of a council of administration appointed by the commanding officer of the post, yet he may be removed by the Secretary without the concurrence of the council of administration and commanding officer.

DEPARTMENT OF JUSTICE,

*February 16, 1883.*

SIR: I have re-examined the question involved in the matter of the post tradership at Fort Lewis, Colo., to which my attention was called by your letter of the 6th of July last, and have also considered, in connection therewith, the request contained in your subsequent letter of the 9th of August, returning the papers in the case.

It appears by these papers that sometime during the year 1878 a military camp or post was located near Pagosa Springs, Colo., and known as "Camp near Pagosa Springs." By a general order from the headquarters of the military Division of the Missouri, dated December 30, 1878, the name of this post was ("in accordance with the provisions of General Orders, No. 79, current series, from the Headquarters of the Army") changed to "Fort Lewis." In January, 1879, a council of administration was convened at "Fort Lewis, Colo." (the post located near Pagosa Springs just mentioned.) This council recommended the appointment of W. S. Peabody as post trader, and its proceedings, having received the approval of the officer commanding the post, were forwarded for submission to the Secretary of War through the proper official channel. By an indorsement thereon, dated at the Adjutant-General's Office, February 17, 1879, the proceedings were submitted to the Secretary with the remark that "Fort Lewis is a regularly established military post;" and on February 21, 1879, Mr. Peabody was appointed "post trader at Fort Lewis, Colo."

It thus appears that at this period Fort Lewis (near Pagosa Springs, Colo.) was regarded by the military authorities as a regularly established military post, and that Mr. Peabody was duly appointed trader thereat. The appointment was

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Post Tradership at Fort Lewis, Colo.

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accepted, and the business of trader at the post entered upon by him.

Subsequently, by the sundry civil act of March 3, 1879, an appropriation was made "to enable the Secretary of War to establish a military post in the vicinity of Pagosa Springs, on the left bank of the San Juan River, in the State of Colorado, for the protection of the San Juan country."

Later the military authorities, in furtherance of the object of this provision, selected a new site for the post, situated on the Rio de la Plata and distant about 75 miles from Pagosa Springs, which was located with a view to the better protection of the San Juan country, and intended to take the place of the site already occupied near said springs; and in August, 1880, the latter was abandoned as a site for the post and the garrison removed to the new site.

Previous to the removal a change had been made in the command at the post; the detachment of troops originally stationed there was ordered away on other service, and was succeeded by another detachment, by which the removal was effected. The officer commanding the latter, soon after the occupancy of the new site, ordered a council of administration to assemble, which met there on the 31st of August, 1880, and recommended Mr. John G. Price for appointment as post-trader at the post. In the order convening the council, and also in the proceedings thereof, the post is styled "Cantonment on Rio de la Plata, Colo.," and appears to be regarded as a *new* post. The proceedings of the council were approved by the post-commander and forwarded to the Adjutant-General for submission to the Secretary of War. In submitting the same to the Secretary the Adjutant-General, by an indorsement dated September 11, 1880, states that "this post is to be a permanent one, and is to take the place of Fort Lewis, Colo., of which Mr. W. S. Peabody is trader."

Mr. Peabody having claimed the right to be recognized as post-trader at the post established on the new site, under his appointment hereinbefore mentioned, had in the mean time removed his stock of goods there. The papers in support of his claim, together with the proceedings of the council of administration recommending the appointment of Mr. Price, were, on the 23d of November, 1880, referred by the Secretary

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Post Tradership at Fort Lewis, Colo.

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of War to the Judge Advocate-General for a report upon the merits of the case thus presented. The Judge Advocate-General submitted his report on the 22d of December, 1880, by which, as it seems, the post on the new site was then designated and known as Fort Lewis. The conclusion reached by him is "that the present post of Fort Lewis is entirely distinct from the post of the same name for which W. S. Peabody was appointed trader, and that he is not therefore entitled under his appointment of February 21, 1879, to be recognized as the trader for the post as now established."

On the following day (December 23, 1880) John G. Price was by the Secretary of War appointed "post-trader at Fort Lewis (new), Colo.," and subsequently accepted the appointment and entered upon the business of trader there. And in General Orders No. 10, dated "Headquarters of the Army, Adjutant-General's Office, Washington, January 21, 1881," it was announced that by direction of the Secretary of War "the new post on the Rio de la Plata, Colorado, will be known and designated as 'Fort Lewis,' and the name of the temporary camp at Pagosa Springs, Colo., will be changed from 'Fort Lewis' to 'Pagosa Springs.'"

It would seem that the Secretary of War in appointing Mr. Price acted upon the view that the post then lately established on the Rio de la Plata was a new post, and not identical with the one previously existing near Pagosa Springs, and that Mr. Peabody, under his appointment of February 21, 1879, derived no right to the post-tradership there. In conformity with this view General Orders No. 10, subsequently issued, describes the former as a "new post."

By your letter of the 9th of August last my attention is specially directed to that point, and an expression of my opinion thereon requested. But I submit that the question whether the present military post of Fort Lewis, on the Rio de la Plata, is or is not the same post as that formerly known as Fort Lewis, near Pagosa Springs, is simply one of identity. It is therefore a question of fact only, and for that reason does not properly fall within the province of the Attorney-General to determine.

I conceive that the answer to the inquiry proposed in your letter of the 6th of July, viz, "Who is legally the post-trader

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Post Tradership at Fort Lewis, Colo.

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at Fort Lewis, Colo.?" (situated on the Rio de la Plata) must be the same, however the question of fact just adverted to might be determined. If the post of Fort Lewis, on the Rio de la Plata, and the post of Fort Lewis, near Pagosa Springs, were separate and distinct military posts, the appointment of Mr. Price merely filled an original vacancy in the post-tradership at the former of these posts. If, on the other hand, the two posts here referred to were in fact the same military post, the appointment of Mr. Price (having been made in conformity with the requirements of the statute) operated to revoke, by implication, the previous appointment of Mr. Peabody. In either case, Mr. Price became legally invested with the post-tradership at the present Fort Lewis, Colo.

While under the statute (section 3 of act of July 24, 1876, chapter 226) a trader can not be *appointed* by the Secretary of War except "on the recommendation of a council of administration, approved by the commanding officer," yet he is *removable* without the concurrence of the council of administration and commanding officer of the post, simply at the pleasure of the Secretary, in whom alone is the power to remove vested (15 Opin., 278; Army Reg. of 1881, par. 587); and since but one trader is allowed for each military post, where a person has, in conformity with the requirements of the statute, been appointed trader at a post at which the tradership is still held by another person under a previous appointment, the second appointment must be deemed to work a revocation of the first.

It will be observed that the result now reached by me, after a re-examination of the subject submitted by your letter of the 6th of July last, does not differ from the conclusion which I had the honor to communicate to you in my opinion of the 26th of the same month.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,

*Secretary of War.*

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Appointment to Office.

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## APPOINTMENT TO OFFICE.

An office which has become vacant during a session of the Senate may be filled during the next ensuing recess of the Senate by a temporary appointment by the President; but by section 1761, Revised Statutes, payment of the salary of the appointee, in such cases, is postponed until he has been confirmed by the Senate.

## DEPARTMENT OF JUSTICE,

*February 21, 1883.*

SIR: The office of United States attorney for the northern district of Georgia, which has become vacant during the present session of the Senate, may be filled during the next ensuing recess of the Senate by a *temporary appointment* by the President. See opinion of Attorney-General Evarts, dated August 17, 1868, in the case of the collectorship of New Orleans, where the office became vacant while the Senate was in session. It was there held that the President, in the recess of the Senate following, might fill the vacancy by granting a commission to expire at the end of the next session of the Senate. (12 Opin., 449. Also see 15 Opin., 207.)

So where the office of collector of customs for the port of Philadelphia became vacant while the Senate was in session, and the President thereupon, during the same session of that body, sent to the Senate for confirmation the nomination of Mr. Hartranft for the office, but the Senate having subsequently adjourned without acting on the nomination, the President, during the recess thereof immediately following, appointed Mr. Hartranft to fill the vacancy in said office by granting him a commission to expire at the end of the next ensuing session of the Senate, it was held by Attorney-General Devens, in an opinion dated June 18, 1880, that it was competent to the President thus to fill the vacancy by a temporary appointment. (16 Opin. 523. See further *ibid.*, 539.)

It is, however, to be observed in this connection that payment of the salary of the appointee, in such case, is by section 1761, Revised Statutes, postponed until he has been confirmed by the Senate. That section provides: "No money shall be paid from the Treasury as salary to any per-

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 Appointment to Civil Office.
 

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son appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate."

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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 APPOINTMENT TO CIVIL OFFICE.

*Seem* that the nomination and confirmation of a person who, at the time, is ineligible for the office by force of section 6, article 1 of the Constitution, can not be made the basis of his *appointment* to such office after his ineligibility ceases.

DEPARTMENT OF JUSTICE,

February 21, 1883.

SIR: Section 6, article 1 of the Constitution declares that "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time."

By the terms of this provision a Senator or Representative, in the case there mentioned, is made ineligible for *appointment* to the office during the time for which he was elected. Does it not impliedly render him also ineligible for *nomination* and *confirmation* thereto—these acts being necessary and incipient steps to an appointment? Can the President appoint a person to an office which, at the time of his nomination and confirmation, he was disqualified to fill? It is submitted that section 2, article 2 of the Constitution, which provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint," etc., contemplates that only such persons as are qualified to hold office shall be nominated, as well as appointed. Agreeably to this view, the nomination and confirmation of an in-

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Bridge Across Niagara River.

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eligible person must be treated as *null*, and not as acts upon which an appointment of the person may be afterwards made when his disqualification ceases.

I have the honor to be, with great respect,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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BRIDGE ACROSS NIAGARA RIVER.

In the absence of any act of Congress or constitutional provision conferring upon him authority so to do, the President can not officially consent to and approve the erection of the proposed bridge across the Niagara River.

DEPARTMENT OF JUSTICE,

March 10, 1883.

SIR: I have considered the memorial of the Niagara Bridge Company, which you were pleased to refer to me on the 24th ultimo, asking your consent to the erection of a bridge across the Niagara River.

It appears that by an act of the Canadian Parliament, incorporating the "Niagara Peninsula Bridge Company," it is provided that "the company shall not commence the actual erection of the said bridge until an act of the Congress of the United States of America has been passed, consenting to or approving the bridging of the said river, or until the Executive of the United States of America has consented to and thereof approved," etc. And the application for your consent to the erection of the bridge is made in consequence of that provision.

Enterprises of this kind, connecting the United States with a foreign country and facilitating commercial intercourse therewith, are matters of national concern and properly fall within the regulating power of Congress. But Congress not having legislated upon the subject, either generally or specially, and there being no constitutional provision which devolves any power or duty upon the President in reference thereto, it would seem that he can not entertain or grant the present application in the exercise of his official functions. The President can perform no act *officially* except it be authorized by the Constitution and laws. His con-

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 Depository of Mail Matter.
 

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sent in the present case, not being thus authorized, would be an extra official act.

I beg to refer, in this connection, to an opinion of Attorney-General Cushing, in a case in which a similar question arose. A legislative act of a British colony provided for certain proceedings for the arrest and punishment of deserting seamen of any foreign nation, where the government of such nation or state had by its proper officer signified its desire that the act might be enforced against the crews or ships belonging to such nation or state. The inquiry was, whether the President of the United States, as such, had authority, by so signifying his desire, to give general effect to that act. It was held that he had not. "Neither the Constitution of the United States, nor the treaties between this Government and that of the United Kingdom, nor any acts of Congress (observes Mr. Cushing) empower the President to communicate to the law of a foreign state authority or effect, which it does not possess *proprio vigore* as a law of such foreign state. \* \* \* Suffice it now to say, that, in my judgment, the Government of the United States can give express sanction to the law before me in no other way, in the first instance, save through a treaty or an act of Congress." (6 Opin. 209.)

On grounds already intimated, I am of opinion that the President can not with propriety grant the application of the Bridge Company.

I have the honor to be, very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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 DEPOSITORY OF MAIL MATTER.
 

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The top or outside of a letter-box, attached to a lamp-post, is not an authorized depository for mail matter, the taking of which therefrom is punishable under section 5469, Revised Statutes.

DEPARTMENT OF JUSTICE,

March 15, 1883.

SIR: The question presented for my consideration in yours of the 16th ultimo appears to be this: Is the top or outside of a letter box, for the deposit of mail matter, put in a place

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Depository of Mail Matter.

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designated according to law, an authorized depository for such matter; so that the taking of stamped papers or packets, left on the top of such boxes, is an offense punishable under section 5469 of the Revised Statutes? I think a negative answer must be returned.

The outside of a letter-box can not be called a receptacle or place of deposit. Section 3868, Revised Statutes, which authorizes the Postmaster-General to establish receiving boxes for the deposit of mail matter, says: "He shall cause the mail matter *deposited therein* to be collected," etc. That is, to be in the authorized depository the matter must be within the box.

Letter-boxes are attached to lamp-posts in the streets and to buildings at the corners of streets, and to make them secure and protect them as receptacles for mail matter they are made of iron, provided with locks, and fixed firmly to the iron post or building. It is apparent that the inside of the box is intended as the depository, not the outside. The top or outside is not secured or in any way protected. It can not therefore be a depository, which word carries with it the idea of protection and security.

The taking of papers or packets from such a place is like picking them up in the street or on the sidewalk. They are left open and free to the public. The statute does not make the outside of a box placed in the street a depository for anything, nor has Congress made the taking of papers and packets left so exposed a punishable offense.

If Congress has not done this, no head of a Department can do it by the force of a regulation. Section 161, Revised Statutes, which gives authority to the heads of Departments to prescribe regulations, is careful to provide that they must not be inconsistent with law, and when made they are only for the government of the Department and the conduct of its officers and the preservation of the papers and property belonging to the Department.

No authority is here given to make rules for the conduct of persons not connected with the Departments; and papers and packets put on the tops of letter-boxes have not become the property of the Post-Office Department, nor have they been placed in its custody.

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*Liability for Misfeasance in Office.*

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I am not able to say, therefore, that the Postmaster-General, when in an order to letter-carriers he directs them what to do with papers which they may find upon the *outside* of letter-boxes, makes that an authorized depository for mail matter.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. T. O. HOWE,

*Postmaster-General.*

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LIABILITY FOR MISFEASANCE IN OFFICE.

Where a person placed money in the hands of an assistant postmaster for the purchase of "special request envelopes," but the latter gave no receipt therefor, did not order the envelopes, and appropriated the money to his own use—the postmaster having no knowledge of the receipt of the money at the time, and not being chargeable with any negligence in the matter: *Held* that the person who paid the money to the assistant postmaster has no claim upon the Government for the envelopes, and that the postmaster is under no liability for the money so paid to his assistant.

DEPARTMENT OF JUSTICE,

*March 23, 1883.*

SIR: The facts briefly recited from your letter of the 6th instant are these:

A party gave into the hands of an assistant postmaster money for the purchase of "special request envelopes." The assistant gave no receipt for the money, did not order the envelopes, made no entry on the books of the post-office, but appropriated the money to his own use. The postmaster had no knowledge of the receipt of the money by the assistant until after the discharge of the latter from the service of the Government. It does not appear that the postmaster is chargeable with any negligence in the matter.

Upon these facts you inquire, first, whether the person who paid the money to the assistant postmaster is entitled to receive from the Government the envelopes; and, second, whether the postmaster is liable for the money paid to the assistant.

Both these questions must be answered in the negative.

And, first, the Government is not bound, for it has received

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Liability for Misfeasance in Office.

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no consideration for the envelopes. The money was not placed in any depository of the Government. It never came into its possession. But, it will be said, the assistant postmaster took the money, and he was a subordinate officer of the Government. This is admitted. But the Government is not answerable for the wrongful act of its agent. "The Government," says Judge Story in his work on Agency, "is not responsible for the misfeasances or wrongs or omissions of duty of its subordinate officers or agents employed in the public service." He adds, "the Government does not undertake to guaranty to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments and difficulties and losses, which would be subversive of the public interests." (Story on Agency, section 319.)

Neither, secondly, is the postmaster liable for the money taken and appropriated by the assistant. For the latter, as has been judicially determined, is not the agent of the postmaster, but an officer of the Government. (*Wiggins v. Hathaway*, 6 Barbour (N. Y.) Reports, 632; *Schroyler v. Lynch*, 8 Watts (Pa.) Reports, 456.)

And it has been held upon great authority that neither the Postmaster-General nor postmasters under him "are liable for any default, negligence, or misfeasance of any deputies or clerks employed by them, unless indeed they are guilty of ordinary negligence at least in not selecting persons of suitable skill, or in not exercising a reasonable superintendence and vigilance over their acts and doings. In this respect their responsibility does not seem to differ from that of private agents who employ subagents at the request of their principals. Indeed, the deputy postmasters are treated as independent officers of the Government."

These are the conclusions of Judge Story, after reviewing and commenting upon the leading cases. (Story on Agency, section 319 a.)

These leading cases are referred to and quoted from by Mr. Freeman, Assistant Attorney-General for the Post-Office Department, in his opinion, to which you allude, and it is unnecessary to cite them here. I agree with him that they are decisive of this case.

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CUSTOMS LAWS.

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Accordingly, I am of opinion, as indicated above, that the postmaster is not liable for the money appropriated by the assistant, either to the party who placed it in the hands of the latter, or to the Government.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. T. O. HOWE,

*Postmaster-General.*

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CUSTOMS LAWS.

Where a quantity of wool was imported at Boston from Liverpool, and two days later was withdrawn for exportation to St. John, New Brunswick, whence (having been carried thither) it was immediately brought back to Boston: *Held* that if the purpose of the above withdrawal, etc., was to create a second port of importation with the object of reducing the duty, the transaction was fictitious, and that Liverpool remains the last port or place of exportation within the meaning of the statute.

## DEPARTMENT OF JUSTICE,

*March 24, 1883.*

SIR: Referring to yours of the 9th instant, it seems that upon the 29th of January last, at Boston, some 30,000 pounds of wool were imported from Liverpool, and that two days later it was withdrawn for exportation to St. John, New Brunswick, and having been carried thither, was at once brought back, reaching Boston for the second time on the 20th of February.

The duty upon imported wool is imposed upon the value thereof at *the last port or place whence exported*. At the first of the above importations *Liverpool* was such port, and the valuation above 12 cents per pound, requiring therefor a duty of 6 cents per pound; at the second (?) importation the port is claimed to be *St. John*, and the corresponding valuation precisely 12 cents, the consequent duty being 3 cents per pound.

Upon the above state of facts my opinion is that if such goods were taken from Boston and placed upon a route the real end of which was intended to be this same Boston, the purpose of those interested being to create a second

## Penalty Envelope.

point of exportation with the object of reducing the duty, such transaction was plainly fictitious and of no effect to the purpose in view. It would, of course, be the same if the second place of importation had been any other port of the United States. In either case *Liverpool* remains the last port or place of exportation within the meaning of the statute.

In this connection I have read the opinion of Attorney-General Williams (14 Opin., 574), referred to by you, and so far as that may be thought to include the case above supposed, after due consideration, I respectfully dissent from its conclusions.

Whether such wool is forfeitable under section 3008 is a more difficult question.

However, it is not necessary that I shall take decided ground upon this question, the more as it may become my duty to represent in court whatever position may be suggested to you by your greater familiarity with the practical working of such provisions.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

## PENALTY ENVELOPE.

A marshal, upon the expiration of his term, ceases to be an officer of the United States, and is not entitled to use the "penalty envelope" in executing process (under section 790, Revised Statutes) then in his hands.

DEPARTMENT OF JUSTICE,

March 27, 1883.

SIR: I have the honor to acknowledge receipt of your letter of the 22d instant and the inclosure therewith, to wit, a letter of the 17th instant addressed to the Postmaster-General by R. M. Douglas, late marshal of the western district of North Carolina.

He raises the question (which you submit to me) whether he is entitled to the use of "penalty envelopes" in executing the process which was in his hands at the time his term of office expired?

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Appointments ad Interim.

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Officers of the United States Government only are authorized to use the penalty envelope. (See section 29 of the act of March 3, 1879, 20 Stats., 362.)

At the expiration of his term of office, a marshal ceases to be an officer of the United States. He is not authorized to hold over for any purpose.

True, by section 790 of the Revised Statutes, power is given him to execute such precepts as may be in his hands at the expiration of his office, but this does not continue him in office. Mark the words, "*expiration of office.*" The office had gone from him, though he may by virtue of the statute execute certain duties pertaining to the office after his term has expired. The mere power to execute process as given by section 790 does not make a man a marshal of the United States.

Mr. Douglas, then, being no longer an officer of the United States Government, is not, in my opinion, entitled to use the penalty envelope for any purpose.

I return herewith Mr. Douglas's letter.

Very respectfully,

S. F. PHILLIPS,  
*Acting Attorney-General.*

HON. FRANK HATTON,  
*Acting Postmaster-General.*

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APPOINTMENTS AD INTERIM.

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Sections 177, 178, 179, and 180, Revised Statutes, considered with reference to the power of the President to make *ad interim* appointments, and opinion of Attorney-General Devens (16 Opin., 596-7) concurred in.

DEPARTMENT OF JUSTICE,  
March 31, 1883.

SIR : In answer to your request that I would construe sections 177, 178, 179, and 180 of the Revised Statutes, with reference to the necessity of appointing a successor to the late Postmaster-General, I have the honor to say that those sections have received an interpretation by Mr. Attorney-General Devens, as appears on reference to volume 16 of Attorney-Generals' Opinions, pages 596 and 597.

## Indian Manual and Training Schools.

It was there held by that officer that the President has power to temporarily fill by an appointment *ad interim*, as therein prescribed, a vacancy occasioned by the death or the resignation of the head of a Department or the chief of a bureau therein, for a period of ten days only. When the vacancy is thus temporarily filled once for that period, the power conferred by the statute is exhausted; it is not competent to the President to appoint either the same or another officer to thereafter perform the duties of the vacant office for an additional period of ten days.

After carefully reading those sections and examining the history of their enactment, I concur in that opinion.

I am, with great respect,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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 INDIAN MANUAL AND TRAINING SCHOOLS.

The proceeds of sales of articles manufactured in Indian manual and training schools should not be turned into the Treasury, but be received by the Indian Bureau and used for the benefit of the Indian children in the schools.

## DEPARTMENT OF JUSTICE,

April 20, 1883.

SIR: The question submitted for my opinion in your letter of the 14th instant is whether the proceeds of sales of articles manufactured in Indian manual and training schools should be turned into the Treasury, or be held by the Indian Bureau for the use and benefit of the schools.

I am clearly of the opinion that the latter is the proper and legal disposition to be made of these funds.

Section 1, part 1, of the act of May 11, 1880 (Richardson's Supplement, 525) authorizes the Secretary of the Interior to purchase for the Indian service articles manufactured in the schools; and provides that *accounts* of such transactions shall be kept in the Indian Bureau and in the training schools, and reports thereof made from time to time. This seems to dispose of the subject. It shows that the Government does not propose to profit by the labor of these Indian boys and girls,

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Appointments in Revenue-Cutter Service.

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but that the proceeds of it are to be devoted to their own benefit and encouragement. This act, as respects the earnings of these schools, supersedes section 3618 of the Revised Statutes.

There can be no doubt, I think, that Congress intended by this act to provide that the proceeds of the labor of the schools should be received by the Indian Bureau and used for the benefit and advancement of the Indian children trained in those schools.

Very respectfully, your obedient servant,  
BENJAMIN HARRIS BREWSTER.

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

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## APPOINTMENTS IN REVENUE-CUTTER SERVICE.

Under the law at present in force, assistant engineers in the revenue-cutter service should be appointed by the President with the concurrence of the Senate.

It is a general rule that, where there is no express enactment to the contrary, the appointment of any officer of the United States belongs to the President by and with the advice and consent of the Senate.

DEPARTMENT OF JUSTICE,  
*April 23, 1883.*

SIR: In a letter dated the 14th ultimo, the Hon. H. F. French, then Acting Secretary of the Treasury, requested an opinion from me upon the question whether under the law at present in force assistant engineers in the revenue-cutter service should be appointed by the President with the advice and consent of the Senate. I have now the honor to submit my views upon this question.

By section 7 of the act of March 3, 1845, chapter 77, provision was made for the employment of six engineers and six assistant engineers in that service, the former to be appointed by the President with the advice and consent of the Senate, and the latter to be appointed by the Secretary of the Treasury. The restriction as to the number of these officers was subsequently modified by the sixth section of the act of July 25, 1861, chapter 20, and the appointment of such num-

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Appointments in Revenue-Cutter Service.

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ber, both of engineers and assistant engineers, as might be required by the steamers then or thereafter in the service, was authorized. By the first section of the act of February 4, 1863, chapter 20, it was provided that the commissioned officers of the revenue-cutter service should be appointed by the President with the advice and consent of the Senate. The object of this last provision was to change the mode of appointing the captains and lieutenants in the service, which officers were theretofore (in pursuance of section 99 of the act of March 2, 1879, chapter 22) appointed by the President alone.

Under the above legislation, while the appointment of captains, lieutenants, and engineers was vested in the President with the advice and consent of the Senate, the appointment of assistant engineers was (by express provision of the act of 1845) vested in the Secretary of the Treasury. And thus the law stood at the time of the revision of the statutes.

The Revised Statutes, however, have omitted, and thereby repealed (see section 5596), the provision of the act of 1845 which authorized the Secretary of the Treasury to appoint assistant engineers. Section 2749, Revised Statutes, enumerates the various officers of the revenue-cutter service as now established, including among them the assistant engineer; and the general rule is that, where there is no express enactment to the contrary, the appointment of any officer of the United States belongs to the President by and with the advice and consent of the Senate (6 Opin. 1; 15 Opin. 449.) In the absence, then, of any enactment otherwise providing, the appointment of the assistant engineer as well as the other officers enumerated in that section would devolve upon the President and Senate without the aid of further legislation. But by section 2751, Revised Statutes, it is declared that "the commissioned officers of the revenue-cutter service shall be appointed by the President, by and with the advice and consent of the Senate." This provision, which is a reenactment of a similar one contained in the act of 1863 above referred to, was probably intended to embrace all the officers of the revenue-cutter service described in section 2749, other than those there classified as petty officers; and, thus con-

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Navigation Laws.

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strued, it obviously leads to the same result, namely, that the appointment of the assistant engineer, equally with that of any of the other officers described as above, devolves upon the President and Senate.

I am accordingly of the opinion that, under the law at present in force, assistant engineers in the revenue-cutter service should be appointed by the President with the advice and consent of the Senate. I may add that the repeal of the former law relating to the appointment of these officers, which was made by the Revised Statutes, does not affect the right or tenure of any incumbent who had been previously appointed by the Secretary of the Treasury. (See section 5597, Revised Statutes.)

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

*Secretary of the Treasury.*

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NAVIGATION LAWS.

An alien seaman, though he has declared his intention to become a citizen of the United States, and has served three years on vessels of the United States, is ineligible to the position of an officer of an American vessel. For that, full citizenship is required.

DEPARTMENT OF JUSTICE,

May 4, 1883.

SIR: I have the honor to submit, in reply to the question put to me in your letter of the 19th ultimo, the following opinion:

The facts stated by you are these: An alien seaman has declared his intention to become a citizen of the United States, and has served three years on vessels of the United States.

The question is, can such a seaman exercise the functions of an officer of a vessel of the United States under the provisions of sections 2165, 2174, and 4131 of the Revised Statutes.

Section 4131 requires that officers of vessels of the United States shall in all cases be citizens of the United States. By which language I understand that such officers must be

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Filling Vacancies in Office Temporarily.

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citizens having all the rights, privileges, and prerogatives of full American citizenship.

It is very plain that an alien seaman having only declared his intention, etc., and served three years, etc., can not be admitted as a citizen under section 2165, which requires five years' residence in the United States.

But by section 2174, Revised Statutes, a seaman, being a foreigner, after declaring his intention to become a citizen of the United States, and after serving three years on board merchant vessels of the United States (which is this case), shall be deemed a citizen of the United States for certain purposes, to wit, for the purpose of manning and serving on board any merchant vessel of the United States and for all purposes of protection as an American citizen.

This, however, is far from being full citizenship. For all other rights and privileges of United States citizenship, including that of being eligible to the position of an officer of a United States vessel, this alien seaman must wait until he has complied with the conditions prescribed by the laws to make him a citizen generally and for all purposes.

I return, therefore, a negative answer to your inquiry.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. H. F. FRENCH,

*Acting Secretary of the Treasury.*

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FILLING VACANCIES IN OFFICE TEMPORARILY.

Section 180, Revised Statutes, applies to vacancies in office occasioned by death or resignation, as well where they are filled (under sections 177 or 178, Revised Statutes) without action by the President, as where they are filled (under section 179, Revised Statutes) by his authority and direction.

The discretionary power given the President by section 179, Revised Statutes, may be exercised after the vacancy has already been supplied under the operation of either of the two preceding sections; and in that case the ten days' limitation is to be computed from the date of the President's action.

DEPARTMENT OF JUSTICE,

May 5, 1883.

SIR : I have the honor to return herewith the note of the Secretary of the Treasury, dated the 3d instant, which was

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Filling Vacancies in Office Temporarily.

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yesterday referred to me by your direction, and to state that, upon examination of the statutory provisions for filling vacancies temporarily (sections 177, 178, 179, and 180, Revised Statutes), I concur in his view that the vacancy in the office of Commissioner of Internal Revenue caused by the resignation of Mr. Raum can not thus be filled by the Deputy Commissioner, upon whom the duties of the office have been cast by section 178, for a longer period than ten days.

Section 180 declares that "a vacancy occasioned by death or resignation must not be temporarily filled under the three preceding sections for a longer period than ten days." This applies to cases of vacancies so occasioned, as well where they are filled (under sections 177 or 178) without action by the President, as where they are filled (under section 179) by his authority and direction. The officer upon whom, in such cases, the performance of the duties of the vacant office is devolved by section 177 or 178 can not thus temporarily fill the vacancy beyond ten days; and the same limitation is applicable to an officer designated by the President under section 179 to perform such duties.

But the discretionary power conferred upon the President by the last mentioned section may well be exercised even after the vacancy has already been supplied under the operation of either of the two preceding sections. He may then "authorize and direct the head of any other Department or any other officer in either Department, whose appointment is vested in the President by and with the advice and consent of the Senate," to perform the duties of the office. The exercise of this power by the President determines the authority previously derived under those sections. And the ten days' limitation, where vacancies are so filled, is to be computed from the date of the President's action. (See 15 Opinions, 451.)

While, therefore, the Deputy Commissioner, upon whom the duties of the office of Commissioner of Internal Revenue have temporarily devolved by virtue of section 178, can not thus fill the office for a longer period than ten days under the authority imparted by that section, I am of opinion that it is competent to the President, under the provisions of section 179, to designate the same or another departmental officer

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Payment of Award to Surviving Partner.

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whose appointment is vested in the President and Senate, to perform the duties of such office, and that the officer so designated may thereafter lawfully perform those duties for a period not exceeding ten days.

I am, sir, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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PAYMENT OF AWARD TO SURVIVING PARTNER.

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Where an award was made to M., as surviving partner of the firm of M. & G., and on the subsequent death of M. the representatives of G. demanded to share in the distribution of the award: *Advised* that the administrator of M., the surviving partner in whose name the claim was presented and to whom the award thereon was made, should alone receive payment.

## DEPARTMENT OF JUSTICE.

May 14, 1883.

SIR: In yours of February 26, a claim before the Department of State, originating in an award by the American and Mexican Mixed Commission (convention of July 4, 1868) to one Mather as surviving partner of the late firm of Mather & Glover, is presented; and, under the circumstances of the subsequent death of Mather and a demand by the representatives of Glover to share in any future installments to be paid by you, the following questions are asked:

"A. Should the administrator of Mather, the surviving partner in whose name the claim was presented and the award recommended, continue to receive payment of the installments?"

"B. Have the heirs of Glover any just legal grounds for claiming to share in the distribution made in this Department?"

These questions, as I suppose, are based upon the principles referred to in the case of *Johnson v. Towsley* (13 Wall., 72), in virtue of which the Executive Departments of the United States generally deal with the party who is *legally* entitled to make a demand upon them and who therefore can give them a *voucher*, and leave all *equities* to be settled be-

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 Payment of Award to Surviving Partner.
 

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tween him and others subsequently in the proper courts. The general propriety of remitting the latter class of questions to the ordinary tribunals of justice must be apparent upon bare inspection.

It is plain that the legal right to redress for damage done to the firm vested in Mather as survivor; and if possible it is still more plain that *as against the United States, and yourself as their representative*, the claim of Glover has never had any legal quality whatever, such claim *having arisen since Glover's death*, and having been by the Commission expressly vested in Mather alone, although as quasi trustee, etc. (*Smith v. Barrow*, 2 T. R., 476.) That upon the death of a surviving partner the right at law to recover the partnership choses in action vests in his executors or administrators, seems likewise to be plain. (8 Wheaton, 642.)

Nor can a court of law listen to surmises as to the state of the firm accounts, or of admissions by the survivor, etc., as ground for holding that the legal title to partnership choses, *which remain in his hands*, has been really *distributed*, as it were, betwixt him and the representatives of his former co-partners. (*Peters v. Davis*, 7 Mass., 256.) The most that can be said of such surmises is that they indicate a right to have a legal title conferred by such tribunal as has jurisdiction so to do. But in case of differences as to the results of the connection, between the representatives of the respective partners, neither courts of law nor Executive Departments accept of any substitute for actual legal title.

Under the circumstances now existing, I therefore answer question A above in the affirmative; and question B in the negative.

The decree in the equity suit, which is mentioned in the papers as having upon some ground or other been given in favor of Mather, is therefore a matter of no consequence here.

Very respectfully, your obedient servant,

S. F. PHILLIPS,  
Solicitor-General.

THE SECRETARY OF STATE.

I concur in the above opinion.

BENJAMIN HARRIS BREWSTER.

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Internal Revenue.

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## INTERNAL REVENUE.

By operation of the repeal provision in the act of March 3, 1883, chapter 121, the taxes on capital and deposits of banks, bankers, and national banking associations, imposed by the internal-revenue law in force at the time of the passage of that act, are not assessable and collectible on the capital and deposits of banks and bankers for the interval between December 1, 1882, and March 3, 1883, nor on the capital and deposits of national banking associations for the interval between January 1 and March 3, 1883.

The words "any right accruing," etc., used in section 13 of the said act, do not include such taxes accruing at the date of the repeal, there being, as to them, no right *in esse*. It is the accruing right, not the accruing tax, that is saved.

The provisions of section 13, Revised Statutes, saving "any penalty, forfeiture, or liability incurred" under the statute repealed, do not extend to the taxes referred to; since, as to them, there are no "liabilities incurred" at the date of the act of March 3, 1883.

## DEPARTMENT OF JUSTICE,

May 18, 1883.

SIR: By a letter dated the 22d of March last, the then Acting Secretary of the Treasury, at the suggestion of the Treasurer of the United States, requested an opinion from me upon the question "whether, in view of the passage of the act of Congress, approved March 3, 1883, entitled 'An act to reduce internal-revenue taxation, and for other purposes,' any taxes are due and payable on capital and deposits of banks, bankers, and national banking associations, as having accrued since January 1, 1883." And by a subsequent letter, dated the 26th of March, the same officer, at the suggestion of the Commissioner of Internal Revenue, submitted for my consideration the question of "the liability of banks and bankers to taxation (on capital and deposits) from December 1, 1882, to March 3, 1883," in view of the provisions of the same act.

These questions involve the inquiry, whether the taxes on capital and deposits of banks, bankers, and national banking associations, imposed by the law in force at the time of the passage of the act of March 3, 1883, may be assessed and collected on the capital and deposits of banks and bankers for the interval between the date of that act and December 1,

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Internal Revenue.

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1882, and on the capital and deposits of national banking associations for the interval between the date of the same act and January 1, 1883.

At the period referred to, taxes upon the capital and deposits of national banking associations were imposed by and collected under the provisions of sections 5214, 5215, 5216, and 5217, Revised Statutes, and those upon the capital and deposits of other banks and bankers under the provisions of sections 3408, 3409, 3414, and 3415, Revised Statutes.

I shall first consider in connection with the act of March 3, 1883, the sections of the Revised Statutes above mentioned which relate to national banking associations.

Section 5214 provides: "In lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, \* \* \* a duty of one-quarter of one per centum each half-year upon the average amount of its deposits, and a duty of one-quarter of one per centum each half-year on the average amount of its capital stock, beyond the amount invested in United States bonds."

By section 5215 it is provided: "In order to enable the Treasurer to assess the duties imposed by the preceding section, each association shall, within ten days of the first days of January and July of each year, make a return, under the oath of its president or cashier, to the Treasurer of the United States, in such form as the Treasurer may prescribe, \* \* \* of the average amount of its deposits, and of the average amount of its capital stock, beyond the amount invested in United States bonds, for the six months next preceding the most recent first day of January or July." The remainder of this section imposes a penalty for failure "so to make such return," and provides for the collection thereof.

Section 5216 provides for assessing the duties where an association fails to make the half-yearly return required by section 5215, and section 5217 provides for the collection of the sums due where an association fails to pay the duties imposed by the three preceding sections.

Thus, by the foregoing provisions, each national banking association is made liable to pay, in January and July, certain duties on its deposits and capital stock. The amount so payable is to be determined by the average of the deposits

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Internal Revenue.

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and by the average of the capital stock beyond the amount invested in United States bonds, for each half-year ending December 31 and June 30, respectively. Accordingly, with a view to the assessment of the duties, the association is required, within ten days from January 1 and July 1 of each year, to make a return of the average amount of its deposits and of its capital stock beyond the amount so invested, "for the six months next preceding the most recent first day of January or July." The duties on the average of deposits and capital stock of the association for each half year as above can not be assessed or the amount thereof ascertained until the expiration of such half-year; hence no part thereof can be regarded as becoming *due* prior to that time.

The act of March 3, 1883, section 1, declares: "That the taxes herein specified imposed by the laws now in force be, and the same are hereby, repealed, as hereinafter provided, namely: on capital and deposits of banks, bankers, and national banking associations, except such taxes as are now due and payable," etc. And the same act, section 13, further declares: "That the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause, before the said repeal or modification; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made," etc.

Here, by the terms of section 1, is an *immediate repeal* of the duties in question, "except such as are now (March 3, 1883) due and payable." Standing upon that section alone, such repeal must be deemed to do away entirely with the collection of the duties referred to, excepting those then "due and payable." Were duties upon the deposits and capital stock of national banking associations due and payable on the 3d of March, 1883, for the period subsequent to December 31, 1882? The answer to this is indicated by what has been already stated. Under the laws imposing them, such duties were not assessable, much less due and payable, before the *expiration of the half year* for which they were to be levied, and which ended either on the 31st of December or on the 30th of June. Obviously, then, they were not due and pay-

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Internal Revenue.

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able on the 3d of March, 1883, for the period intervening between that date and December 31, 1882.

Does the provision in section 13, quoted above, qualify the repeal by section 1, so as to warrant the assessment and collection thereof for that period? By the former section the repeal of existing laws embraced in the act is not to affect "any right accruing or accrued" before such repeal; but all rights and liabilities under the then existing laws are to continue and be enforced in the same manner as if the repeal had not been made. The qualification of the repeal in question, if any, rests upon the words "right accruing," etc., used in that section. I do not think these words can properly be taken to include the duties referred to (*i. e.*, on the average of deposits and capital stock for the half-year beginning January 1, 1883) accruing at the date of the repeal, there being then, as to them, no right *in esse*. It is the accruing *right*, not the accruing *tax*, that is saved. The right to the duties here does not come into existence during the half-year, but only on the expiration thereof; it then accrues, although the duties are not yet assessed, and it may be said to be thenceforth accruing until the assessment of the duties and ascertainment of the amount thereof, that is to say, until payment of the duties is demandable. Thus, "debt accruing" has been held to be an existing debt *solvendum in futuro* (*Hall v. Pritchett*, 3 Q. B. Div., 215; *Jones v. Thompson*, E. B. & E., 63.)

Besides, it may fairly be inferred, from the express exception in the repealing clause of section 1, of "such taxes as are now due and payable," that this was the only qualification contemplated, and that no other taxes on the deposits and capital stock of banks, etc., not even those accruing on the then current half-year, were meant by Congress to be saved from the repeal. To repel this inference, there must be found in section 13 or elsewhere in the statute language clearly indicative of a contrary intent. I discover nothing therein showing such intent.

I pass now to the consideration of the hereinbefore mentioned sections of the Revised Statutes relative to other banks and bankers.

By section 3408, it is provided: "There shall be levied, collected, and paid, as hereinafter provided: first, a tax of

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Internal Revenue.

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one-twenty-fourth of one per centum each month upon the average amount of the deposits of money; \* \* \* with any person, bank, association, company, or corporation, engaged in the business of banking; second, a tax of one-twenty-fourth of one per centum each month upon the capital of any bank, association, company, corporation, and on the capital employed by any person in the business of banking beyond the average amount invested in United States bonds," etc.

Section 3409 declares: "The taxes provided in the preceding section shall be paid semi-annually, on the first day of January and the first day of July; but the same shall be calculated at the rate per month as prescribed by said section, so that the tax for six months shall not be less than the aggregate would be if such taxes were collected monthly."

Section 3414: "A true and complete return of the monthly amount \* \* \* of deposits, and of capital, as aforesaid, \* \* \* for the previous six months, shall be made and rendered in duplicate on the first day of December and the first day of June, by each of such banks, associations, corporations, companies, or persons," etc.

Section 3415 makes provision for estimating the amount of deposits, capital, etc., in case of default in making and rendering the return required by the preceding section, and also imposes a penalty for any refusal or neglect to make return and payment.

The duties imposed by these sections, like those imposed by the sections which relate to national banking associations, are assessed semi-annually, upon return required to be made semi-annually, and become due and payable semi-annually, at stated times; but they are estimated by monthly, not by half-yearly, periods. The tax on deposits is calculated upon the monthly average, and that upon capital upon the amount thereof employed monthly; whereas in the case of national banking associations the duty upon both deposits and capital stock is levied upon the average amount for the half-year. However, I do not think this difference in the mode of assessing and ascertaining the duties is material in connection with the subject in hand. The reasons adduced in support of the construction above placed upon the provisions of the act of

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Internal Revenue.

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March 3, 1883, considered with reference to duties on the deposits and capital stock of national banking associations, seem to me to be equally applicable to the same provisions when considered with reference to duties on the capital and deposits of other banks and bankers. There is no ground for assuming that Congress intended to discriminate between the two descriptions of banks as regards the scope and effect of the repeal. Viewed as above, it operates to relieve not only national banking associations, but other banks and bankers, from the duties mentioned, excepting such as were "due and payable" at the date of the repealing act.

I may observe here that section 13, Revised Statutes, has not been overlooked by me. The provisions of that section (which with respect to the act of March 3, 1883, seem to be superseded by those of section 13 of that act) include "any penalty, forfeiture, or liability incurred" under the statute repealed. But on the 3d of March, 1883, banks, bankers, and national banking associations were not liable for the duties in question and would not be liable therefor until the end of the then current half-year. Hence as to such duties there were at that time no "liabilities incurred"—nothing for the said provisions to save from the operation of the repeal in the act of 1883, even if they are applicable to that act. (*Railroad Company v. United States*, 100 U. S., pp. 549, 550.)

I am accordingly of the opinion that duties are not assessable and collectible on the deposits and capital stock of national banking associations for the period between the date of the act of March 3, 1883, and January 1, 1883, nor on the deposits and capital of other banks and bankers for the period between the date of the same act and December 1, 1882.

This, it is presumed, affords a sufficient answer to the questions submitted.

I have the honor to be, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

*Secretary of the Treasury.*

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Claims Against the United States.

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## CLAIMS AGAINST THE UNITED STATES.

The provisions of section 3477, Revised Statutes, touching transfers and assignments of claims against the United States, and powers of attorney, etc., for receiving payment thereof, do not apply to undisputed claims, or any claim about which no question is made as to its validity or extent.

Where a contract was made for roofing a court-house at a fixed price, and a power of attorney given to receive a part of such price as security for material purchased by the contractor: *Advised* that the power was not affected by section 3477, as no doubt existed concerning the right of the contractor to receive the amount so secured.

DEPARTMENT OF JUSTICE,

May 28, 1883.

SIR: Yours of the 3d of February last asks whether the word "claim" in section 3477 of the Revised Statutes includes claims against the United States that are *liquidated* as well as those that are *unliquidated*, and in this connection three cases are stated as illustrating the question pending before you.

The provision in section 3477 to which you refer is as follows: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

The expression "claim," as is well known, is one of the most comprehensive in the vocabulary of the law. The only question here, therefore, is how far the purview or the history of the above statute indicates that this word is employed therein in some, and if so what, more narrow sense.

The above passage comes originally from the act of 1853, chapter 81, and it remains in the words in which it was first

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 Claims Against the United States.
 

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introduced by Mr. Badger, in April, 1852, at the Congress preceding that in which it became a law. (Globe, Vol. XXIV, part 2, pp. 984, 1128.) Its author was well known as an eminent lawyer, and an especially skillful draughtsman. Originally the bill which contained it was entitled "An amendment of the act of 1846, chapter 66." When taken up at the next Congress its scope was somewhat enlarged, and the title changed. However, its connection with the act of 1846 remained apparent in the body thereof.

The act of 1846 regulated assignments, etc., of such claims as are *allowed by Congress*. Upon its passage through the House of Representatives it seems to have been under the charge of Mr. Thurman, but there is no report of debate in either house, so far as I have found. It is a part of extensive legislation upon matters of finance, which distinguishes that year, and its promise of benefit was probably universally admitted.

When first introduced Mr. Badger's bill made void not only all assignments and powers of attorney affecting claims, but likewise *all contracts whatever for compensation to claim agents*. At its second appearance this latter provision was omitted (Globe, Vol. XXVI, pp. 242, 288.) The legislature therefore *deliberately* refused to interfere in the matter of compensation as between claimants and their agents, excepting so far as the compensation operated *in rem*. It is in conformity with this principle that the act of 1853 specifies *protection of the United States* against fraud as its *sole* purpose. It should be added that such second appearance was because of its adoption by a special committee of the House, theretofore raised to inquire about and report upon the *Gardiner claim*, at that time so notorious.

By its connection with the act of 1846, therefore, as well as by that with the Gardiner claim, and by its significant omission above mentioned, the act of 1853 reminds the reader of the common law policy against *maintenance* and *champerty*; and this suggestion is strengthened by the title at length adopted, which in turn finds an analogy in the circumstance that the offenders just named are rated at common law with that class which affects *public justice*, irrespective of any in-

## Claims Against the United States.

jury to such private persons as are incidentally oppressed thereby.

Another circumstance to the same effect is to be found in the clause (above) "whatever may be the consideration therefor," which probably originated in the fact that this doctrine as to the "consideration" necessary to constitute common law champerty, *i. e.*, *maintenance of the suit*, was regarded as too narrow for public exigencies in 1852-'53. I submit that this clause is an *ear-mark*, indicating that the legislature assumed the common law as to champerty as a point of departure, and so was under an impression, and intended that, except as expressly otherwise provided, that department of the common law would give the rule for interpreting the statute in parts analogous.

To the same general effect is the exact enumeration by the statute of the circumstances under which alone assignments and powers of attorney are therein authorized; viz, "allowance," "ascertainment," and "warrant for the payment." I submit that the former words are *emphatic*. If they are not emphatic they are *superfluous*, for all "warrants for payment" are necessarily preceded by either or both; and where not by both, the above enumeration is of course to be taken distributively. But in any case if the specification of *allowance* and *ascertainment* is not *ex industria*, it is *surplusage*; a conclusion which, of course, is not to be drawn if reasonably to be avoided. If they are emphatic, this feature coincides with the others just mentioned in showing that *a general atmosphere or color derived from the doctrines of champerty affects the topics before us*. I mean that some sort of *litigation* of the "claim," either in Congress or before an Executive Department, is taken for granted. There may be no *technical difference* between the respective methods for the payment of the salary of a United States judge, and for that of a claim which in the event undergoes a course of several years' litigation in the Treasury Department. But for some purposes there is an important difference, and that not only as to the means of success employed by such as are attorneys to collect them. In point of fact where the United States are clearly debtors as claimed, the matters preliminary to warrant for payment amount to

## Claims Against the United States.

no more than a presentment of a promissory note to the debtor himself; but when doubt arises upon the claim, the officers of the Treasury assume consciously *judicial* functions; the affair loses its pro forma *ex parte* character, sides are taken by the creditor and debtor, and the auditors, comptrollers, etc., act as if inquiring into a question *inter alios*. Such also as this latter kind of proceeding is that where no law exists to authorize payment, and an application to Congress for private legislation becomes necessary. It is not singular, therefore, or merely casual, that section 3477, which is compounded of the acts of 1846 and 1853, should in accordance with a marked trait in Anglo-Saxon legislation show upon its face that it deals with a *specific evil*, to which the attention of Congress had actually at the time been drawn; and is not meant as an abstract and universal statutory provision shaped by square and compass, or as broad, say, as the word "*clameum*," spoken of by Coke as the most comprehensive in the law.

Comprehensiveness in meaning is not infrequently akin to vagueness, and consequently to obscurity; so that it is not unusual for interpreters of legal documents to color or restrain general terms occurring therein by *specific* words associated therewith, or by matters connected with their history. In the present instance, as has been shown, we may bring both of these influences to bear.

In this connection it is significant that a subsequent clause in section 3477 *expressly excludes conclusion* that the phrase "all transfers" therein means less than "all," whilst there is no such pains taken with the adjoining phrase, "any claim." Apparently, then, the latter is left of purpose to such color as the context, etc., may suggest.

It is also pertinent to the general question to observe that the second section of the act of 1853 made it indictable for officers of the United States to "prosecute any claim" as agent or attorney. I take it that "prosecution" in this place denotes any method by which "a claim" may be recovered; and therefore that it varies *secundum subjectam materiam* of the class of claims to which it may be actually applied. If the word claim here is to have the meaning assigned by Coke, then for one class *presentation* thereof is *prosecution*,

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Claims Against the United States.

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and a public officer would become indictable if in behalf of an absent friend he were to present to the Treasury, even without compensation, any account against the United States, no matter how plainly due. But I apprehend that the expression *prosecute* gives the same color to the word *claim* in this second section that in the first is reflected from the matters above suggested, and so that it aids in showing that Congress was thinking of, and except as actually therein otherwise expressed was guided by, the ancient policy as to *champerty*.

It is therefore pertinent to observe here that at common law it is not champerty to stipulate for a share in collecting a debt (from, *ex. gra.*, some distant debtor) by a mere presentation thereof. For that effect it is necessary that there should be, as the books say, a *quarrel* or *taking of sides* about the debt by the parties thereto. If no such dispute exists, either in pais or in court, compensation to a proposed collector is allowable. And even in case of suit in court it is "certain that the assignee of a bond or other chose in action, being made over to him for good consideration in satisfaction of a precedent debt, and not merely in consideration of the intended maintenance," is not champerty. *Hawkins* (Book 1, chapter 83, sec. 17), and others. That is even where there is *litigation*, unless there is also a *particular sort of consideration*, assignments of the kind just mentioned are not invalid at common law. We have seen that section 3477, following the statute of 1853, has expressly changed this rule so far as regards *consideration*. And, as already submitted, that exception concurring with other indications to the same effect *proves the rule* in other respects, and consequently that section still contemplates the existence of *litigation* (*i. e.*, some virtual *quarrel* or *sides-taking* betwixt the supposed original creditor and the United States) in order to constitute such a claim as is within its provisions.

Considerations arising from the history of a statute are of course most apt to occur to those who may be called to administer its provisions *contemporaneously*. In the present case, therefore, it is interesting to observe that contemporaneously the First Comptroller issued a circular in which he announced, as a rule of action in settling demands against

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Claims Against the United States.

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the Government, that the act of 1853 did not include *undisputed* claims.

I have carefully read the cases in the Supreme Court of the United States reported in 95 U. S. 407, 97 *ib.* 392, 484, and 102 *ib.* 556, and understand that the views above expressed do not conflict with anything there decided.

I have also attentively considered the opinion in Spaid's case (16 Opin., 161) to which you refer. There a questionable power of attorney *had been revoked*, and, as no interest was connected with the power, there was little difficulty in holding that the latter was at an end—and so Attorney-General Devens said; but he added, by the way, that the power itself (to collect installments from time to time upon a contract to dredge a river) was in violation of section 3477, and so had never been valid. It is important to say that *no question upon that point had been asked of him*, and from the passage quoted by you (16 Opin., page 263) in regard to "concurrency," as well upon the whole face of the opinion, it is doubtful whether that learned and able lawyer had thoroughly considered either the foundation or the effect of this dictum.

I hope to be understood upon the whole as advising that section 3477 does not apply to any claim against the United States about which no question is made as to its authority or extent. By "question," I mean, of course, question by some officer lawfully authorized in that behalf.

It seems, therefore, that the policy of the above section forbids that an *assignee or attorney as to the proceeds of an executory contract (ex gra., for building, dredging, etc.)* shall have more than an uncertain interest therein, *i. e.*, one contingent upon the absence of any subsequent question by the United States as regards any matter which at the time of the question is in the future—such as the amount or quality of the article to be paid for.

It is hardly necessary to add that nothing in this discussion, or in section 3477, touches those claims against the United States that arise upon instruments, such as bonds, etc., the transfer, commercial character, etc., of which have been provided for by special legislation.

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Claims Against the United States.

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To apply the above conclusion to the particular cases which you mention as pending before you :

(1) In Jones's case a contract has been made for roofing a court-house at a fixed price, and a power of attorney to receive a part of such price has been given as security for material purchased by the contractor.

Inasmuch as no doubt has arisen as to the title of the contractor to receive the amount so secured, I am of opinion that the power is not affected by section 3477.

(2) In Snyder's case the circumstances are substantially the same except that the power covers the whole price, and therefore the same result follows.

(3) Marshbank's case differs from those above, in that the contract is still executory. As I have said, it seems that nothing can be done at present upon the part of the United States which shall conflict with the operation of section 3477 at any time hereafter that a demand is made for payment upon this contract, either in whole or by installment.

If at any such time the contract is, in either of the ways suggested above, *disputed* by public officers authorized so to do, an application for payment thereunder will become a claim within section 3477, and the power consequently void. No "acceptance" can obviate this liability.

Very respectfully, your obedient servant,

S. F. PHILLIPS,  
*Solicitor-General.*

The SECRETARY OF THE TREASURY.

Having examined this case and considered the above opinion, I concur with the Solicitor-General in his answer to the questions propounded and in his interpretation of section 3477 and all of the conclusions he has arrived at and presents, and I answer as he has answered.

BENJAMIN HARRIS BREWSTER.

JUNE 7, 1883.

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Case of the Brig Mary C. Comery.

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## CASE OF THE BRIG MARY C. COMERY.

On application of the master, the American brig *Mary C. Comery*, while lying at a Colombian port, was surveyed and condemned as unseaworthy by the port officers. Meanwhile the United States consul summoned a committee, which also surveyed the vessel, and, finding her unseaworthy, recommended a sale for the benefit of all concerned. But prior to the last survey the master notified the consul that he abandoned the vessel, and thereupon left the port: *Advised* that, in the case stated, the consul is without authority to sell the vessel, but should notify the owners of the condition of their property, and in the mean time take care of it.

## DEPARTMENT OF JUSTICE,

June 7, 1883.

SIR: Yours of the 29th ultimo presents the following case for an opinion by the Attorney-General:

The American brig *Mary C. Comery* during this year became unseaworthy whilst at the Colombian port of Colon, and thereupon its master applied to the "port officers" for a survey and condemnation, which was accorded. This proceeding was without the participation of our consular officer, but it is said to conform to the legal requirements of the Government there. Meanwhile the United States consul summoned a committee, which also surveyed the vessel, and, finding her unseaworthy, advised a condemnation and sale for the benefit of all concerned. Prior to this latter survey the master had notified the United States consul that he abandoned the brig, and thereupon he secretly left Colon as a passenger of the American schooner *I. Taylor*, bound for Baltimore.

The *Comery* is now held by the United States consul, who asks immediate instruction as to the disposition he is to make of her; but before advising him in the matter I have to request that you favor me with an official opinion upon the following questions:

First. In the case stated can the consul be invested with legal authority to sell?

Second. Should the first survey and condemnation under the Colombian proceedings be respected and the consul be directed to execute it? or,

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Case of the Brig Mary C. Comery.

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Third. Should the Department approve the second survey and condemnation and instruct our consul to proceed with the sale as founded upon the same?

Attention is directed to an alleged partial ownership of a Mr. Butler, of New York, and advice is requested as to whether such fact should modify the Department's instructions in any manner.

First. Upon consideration I am unable to find any authority for the projected sale by the consul. The *Comery* seems to be lying at Colon abandoned by its master and crew. In such case it is the duty of the consul there, as soon as practicable, to notify the owners of the condition of their property, and, in the mean while, to take care of it. But he has no power to sell, nor do the terms in the Consular Regulations of 1874 (referred to, as I suppose, in the letter inclosed by you) purport to provide for such a sale. The sales there mentioned are sales under the authority of the master, the intervention by the consul being for the purpose of ascertaining the existence of that state of things (*i. e., necessity, etc.*) which under general law confers such authority. The law upon the point here involved seems to be substantially unchanged since the time (July 24, 1854) when Attorney-General Cushing discussed the general topic, in an opinion given to Secretary Marcy, in the case of the *Serene* (6 Op'n., 617.)

Second. I am not sufficiently informed as regards the circumstances which attend your second question to say whether the ordinary presumption in favor of the validity of the proceedings before the Colombian tribunals has here been *rebutted*. The *presumption*, of course, is a strong one. Nothing appears to render it the duty of the consul to do more than to see that the Colombian law as to jurisdiction, etc., is being observed.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

*Solicitor-General.*

The SECRETARY OF STATE.

I concur with the above opinion.

BENJAMIN HARRIS BREWSTER.

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Civil Service.

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## CIVIL SERVICE.

Whether there are already two or more members of a family in the public service, etc., as provided in section 9 of the civil service act of January 16, 1883, chap. 27, is not a question to be considered by the Civil Service Commission, but by the appointing power.

DEPARTMENT OF JUSTICE,  
June 12, 1883.

SIR: The communication addressed to you upon the 5th instant by the Civil Service Commission asks for an interpretation of the word "family" in section 9 of the civil service act of January 16, 1883, and, in the same connection, whether that Commission should proceed with the *examinations* provided for by that act, irrespective of the provision in section 9, leaving the administration of that provision to the appointing power alone.

Upon consideration it seems to me that the question whether there are already two or more members of a family in the public service, etc., as provided in section 9 of the civil service act of January 16, 1883, is not to be considered by the Commission, but by whatever power may be called upon subsequently to pass upon *eligibility to appointment*.

The disability in question is a fluctuating one, material only as regards "appointment." The state of things which creates it may exist at examination and disappear before appointment, or, *vice versa*, be non-existent at examination and yet have arisen at appointment.

The statute makes provision for examinations not only where vacancies exist and appointments are sought, but also for prospective vacancies; *i. e.*, as it were, for a *fund* upon which in future exigencies the appointing power may *draw*. Probably the latter will come to be a considerable, if not the more considerable, part of this function. Contingencies, therefore, like that in question, which do not continue in one stay, and the status of which at one time affords no presumption even (at least none that is *legal*) as to its status at another, are intended to await the event in connection with which they are mentioned, *viz*, the appointment.

The circumstance that the formal provision made by the statute as regards the *residence disability* created therein

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Case of Boatswain McDonald.

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differs so much from that under consideration, both in expressly assigning to the commission an incidental duty, and in requiring information thereabouts to be given to it under oath, points in the same direction.

This view, of course, renders it unnecessary to consider the meaning of the word "family."

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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## CASE OF BOATSWAIN McDONALD.

The provisions of the Navy appropriation acts of August 5, 1882, chapter 391, and March 3, 1883, chapter 97, requiring all officers of the Navy to be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Navy, etc., do not entitle such officers to any increased pay for services rendered by them prior to March 3, 1883.

## DEPARTMENT OF JUSTICE,

June 22, 1883.

SIR: I have the honor to acknowledge your letter of the 4th ultimo requesting my opinion upon the question presented in a letter of the Second Comptroller (transmitted with explanatory papers), namely, whether by reason of either of the acts of Congress mentioned Boatswain Joseph McDonald, making claim under them, is entitled to an increased rate of pay for services rendered prior to March 3, 1883, and, if such was the effect of either of said acts, during what portion of the service rendered by him prior to March 3, 1883, was his rate of pay so increased.

The enactments in question are certain clauses of the Navy appropriation acts of August 5, 1882, and March 3, 1883 (22 Stat., 287, 473), and the latter is as follows, being, except as to the portions italicized, identical in terms with the former:

"And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and *in the regular Navy in the lowest grade having gradu-*

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Case of Boatswain McDonald.

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*ated pay held by such officer since last entering the service: Provided, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: Provided further, That nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer Army or Navy."*

The claim is stated to be representative of a class considerable in number and involving in the aggregate a large amount, and the facts in the case, I understand, are substantially that McDonald first served in the regular Navy for about five years (from 1857 to 1862) as seaman and coxswain, drawing pay at the rate of, say, \$250 per annum; that he afterwards served in the volunteer Navy for about four years (from 1863 to 1867) as ensign, and received therefor the pay provided by law, which varied from \$768 to \$1,200 per annum, according to the nature of the service; that in March, 1870, he again entered the regular Navy as mate, and served as such with pay at the rate of about \$900 per annum until February 11, 1871, when he was appointed a boatswain, in which position he has served continuously to the present time. Soon after this appointment he made application to be credited with his sea service as a volunteer officer, and for the benefits of such duty as provided by section 3, act March 2, 1867 (14 Stat., 516; Rev. Stat., sec. 1412), and was credited with four years and six days' prior service on his warrant, so that he was found at the date thereof to be in his second three years of service, and has been paid from that date accordingly, as provided by section 3, act July 15, 1870 (16 Stat., 332; Rev. Stat., sec. 1556).

I do not understand that any further benefit is claimed by McDonald from the time of service so credited by reason of the statutes here in question, but that he claims to be credited with the residue of his prior service, a period of, say, five or six years, and to receive the benefit thereof in a readjustment of his settled pay accounts since February 11, 1871, with pay graduated on the basis of, say, ten instead of four years' prior service at that date and payment to him of the difference, which the Fourth Auditor has computed would amount to \$2,230.68.

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Case of Boatswain McDonald.

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The question propounded is broad enough to include the discussion of other possible constructions of the said enactments, but as the legal position taken by McDonald practically raises all the material issues it will be alone considered.

The first and vital point is to determine whether Congress intended these clauses to have the retroactive effect which is claimed and so to give McDonald, and others in like case, additional pay for services rendered long before and fully paid for at the time according to existing law.

If there is one canon of construction more firmly established than another, it is that statutes shall be construed as prospective. In the Federal, and most if not all of the State constitutions, the legislative authority is restricted in this direction; and even where the power is undisputed its exercise is so far discountenanced "that the courts refuse to give statutes a retroactive construction unless the intention is so clear and positive as by no possibility to admit of any other construction." (Sedgwick on Construction, etc, 166.) If authority for this were needed the only difficulty would be that of selection. It is enough to refer to the doctrine as laid down by the Supreme Court in *Murray v. Gibson*, 15 Howard 423, as follows:

"As a general rule for the interpretation of statutes, it may be laid down that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate on the future only."

There can be no pretence that either enactment contains an "express command" to give the officers mentioned additional pay for past service by revision of their long-settled accounts. The only question is, if that is required by necessary and unavoidable implication.

Looking first at the text of the clause above quoted, it will be observed that there is no reference to giving pay in the enacting clause, and that where referred to in the second proviso it is by way of prohibition. That the effect of it is to give pay in any case is matter of inference merely from the fact generally known that "pay" is one of the benefits of service and may justly be assumed to be in-

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Case of Boatswain McDonald.

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cluded in the terms "all the benefits of such actual service." There is no warrant, therefore, for treating the act as if it had to do solely or particularly with the matter of "pay." It is a necessary presumption, from the frame and language of the clause, that it does not regard "pay" otherwise than as one among various benefits contemplated, and this must be taken into account in reasoning as to the legislative intent.

Such giving of pay, then, as may have been intended by this act (in common with other benefits) must be assumed to be prospective, unless something within it can be shown relating to pay to which no possible effect can be given except as construed retroactively. That this would be at least difficult is apparant on the face of the provision, and yet the rule of construction will not admit of doubt. It will not do to refer to language capable of either construction, or indeed to language admitting of any construction but the retroactive one asserted.

It will hardly be pretended that this act does not operate prospectively as respects all the benefits intended. It can only be argued that it was intended to be retroactive also; but can it be maintained that language which must have prospective effect carries also what, in the eye of the law, is an incompatible intent? It may be urged that the exclusion of back pay as expressed in the second proviso would indicate its inclusion in the enacting clause; but this by no means follows, for though provisos are used to take out something otherwise plainly embraced in the enacting clause, they are also used by way of special precaution to prevent the inclusion by implication from general terms of some matter particularly obnoxious to the legislative intent, and this, as will be shown, is the more reasonable explanation of the proviso in question.

It is evident, therefore, that no such necessary and unavoidable implication is borne on the face of this provision as is requisite, and this might well be regarded as conclusive, but it is proper to consider whether by reference to other sources of construction such an implication can be made out.

It is of the first importance in such case to regard the nature of the thing which it is said Congress intended by this

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Case of Boatswain McDonald.

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act to do; and in no aspect of it, that I can conceive, is it to be viewed otherwise than as the giving of a gratuity. Congress no doubt has power to so dispose of the public money entrusted to its control, but it is surely not to be presumed that it intended to give McDonald, for instance, \$2,280.68 in addition to the pay he has received since February 11, 1871, for previously compensated service, unless it has so declared in clear language. The abuses to which a loose construction of such legislation might lead are apparent, and prove that the doctrine laid down by the Supreme Court as above cited is particularly applicable to it.

If reference is made to legislative policy as bearing on this subject, it will be found that the last statute generally regulating the pay of the Navy is that of July 15, 1870 (16 Stats., 330; Rev. Stat., sec. 1556), which, after fixing the compensation of officers in the several grades, provides (sec. 4; Rev. Stat., sec. 1558) that the pay so prescribed "*shall be the full and entire compensation of the several officers therein named, and no additional allowance shall be made in favor of any of said officers on any account whatever except as herein provided.*"

There is no pretense that McDonald and the other claimants have not been paid all the compensation to which they were entitled under this or any other existing law (unless by virtue of the clauses in question). The intent to confine them to this, so explicitly declared in the section cited, is not to be ignored nor overcome by any less clear expression of the legislative will.

If light is sought from similar provisions to those in controversy, the earliest enactment resembling them I have observed is found in the act of March 2, 1867, sec. 3 (14 Stat. 516), as follows:

"That the officers of the Volunteer Naval Service who are or may be transferred to the regular Navy or Marine Corps shall be credited with the sea service performed by them as volunteer officers, and shall receive all the benefits of such duty in the same manner as if they had been during such service in the regular Navy or Marine Corps; and all marine officers shall be credited with the length of time they may have been employed as officers or enlisted men in the volunteer service of the United States."

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*Case of Boatswain McDonald.*

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The volunteer officers referred to are apparently those mentioned in section 2, act July 25, 1866 (14 Stat. 222), the transfer of whom to certain grades of the line was authorized, but as these grades did not receive graduated longevity pay until the passage of the act of 1870, it would seem that the "benefits" conferred in this case could then have had no relation to pay, but must have been such as were available under provisions of the law concerning relative rank in the respective grades, retirement, and the like, in connection with which time of service was reckoned. I find at all events nothing in it which necessarily and unavoidably requires back pay to be given in addition to the prospective advantages conferred, and am at a loss to know on what ground it could be claimed or conceded.

The next legislation of this kind appears in the Army appropriation act of June 18, 1878, section 7 (20 Stat., 146; see, also, 21 Stat., 346). The time credit is there to be given on and after the passage of the act to officers "in computing their service for longevity pay and retirement." That this would operate prospectively alone can hardly be questioned.

It is with no color of precedent then in antecedent legislation, for the retroactive intent alleged, that the act of August 5, 1882, is to be viewed. The ordinary presumption of law is even strengthened with regard to it by such a review, and it has been shown that there is nothing on the face of it or of its successor to indicate a different intent.

The papers transmitted show that the Second Comptroller rejected McDonald's original claim upon the ground that giving him the benefit of all his service as if continuous in the regular Navy would not entitle him to increased pay as boatswain, because the prior service had not been in that grade, and the provision of 1882 did not affect section 1556, Revised Statutes, which makes increased pay depend on length of service in the grade.

The foregoing discussion shows that this is narrower ground than in my opinion may be taken. Section 1558, Revised Statutes, is a mandatory provision, and to set that, as well as the fundamental rule that statutes are to be construed prospectively, aside by inferring back pay merely from such gen-

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*Case of Boatswain McDonald.*

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eral indefinite terms as "all the benefits," "in all respects in the same manner," and so on, seems to me not tenable.

This conclusion is not affected, I think, by the amendments of 1883. Though peculiar in expression, it is impossible to say that they are incompatible with the prospective operation which the clause should have according to the established rules of law. It is perhaps unnecessary therefore to consider at length the exact or presumable intent of Congress in such additions, but it may be well to call attention to some points which are actually suggested.

If the course of previous legislation as to the Navy and Army above cited was prospective, or not clearly retrospective, it would require very different language to show that the legislative intent had undergone a radical change. If Congress really intended to give back pay to any officers, there was no difficulty in saying so in plain words. It certainly would not have used language tending rather to conceal than to express such an intent.

It may be that to credit McDonald now with his prior service would not prospectively benefit him, because he has reached the maximum compensation of his grade, but it does not follow that there are no officers who would be so benefited. It may be also that under existing legislation respecting the grades and pay of the Navy there would arise difficulties of interpretation as to giving prospective pay benefit under this clause to officers who have passed out of the lowest grade having graduated pay, but if the intent of Congress is to be determined by such possibilities, what is to be said of the possibility that a considerable number of officers who have not served in grades "having graduated pay" are deprived of any benefit of their prior services by this amendment? Is it harder to believe that Congress has not a clear apprehension of the effect of the first amendment than to believe that it intended to cut the officers in question off altogether? Where the enactment presents such anomalies a close adherence to settled rules of construction is the safest guide, and so long as no part of it is left imperative the rectification of errors or omissions, if any, is for the legislature.

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Case of Boatswain McDonald.

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It is possible or even probable that the amendment (which was inserted in the House) was framed to obviate some actual or supposed defect of the clause of 1882, and the papers show that a member of the Appropriation Committee of the House was informed of the construction given by the accounting officers to that act; but the only evidence of the actual views expressed thereon in debate that I have found is in the Congressional Record of February 23, 1883, where the matter was warmly discussed by the Senate and the second proviso proposed. The inserted words were stricken out, but restored with the proviso by the conference committee and so passed.

No one, I think, can read the debate in the Senate without being convinced that whatever else may have been intended, that body at least did not understand or intend that the clause should give back pay under any circumstances, and that the second proviso was framed and supposed to prevent the application of any such construction.

While such discussions are not as a rule referred to in judicial interpretation of a statute, they are entitled to consideration in doubtful cases where they may throw light on peculiarities of form or expression. This one, I think, explains the form and purpose of the second proviso, and so far as it goes tends to confirm the view herein expressed, and to break the force of any argument based on the views or action of the accounting officers as known to the House.

The gist of the matter lies after all in a narrow space. Officers who had, at the date of a given act, been paid all that was due them, and who therefore had no right in law or equity to more for their past service, claim that the statute gives them back pay. The law says as to all statutes that they shall operate prospectively, unless the contrary intent is expressed with irresistible clearness, and the doctrine would seem to be peculiarly applicable to the acts in question. Examination of the text shows that the intent alleged is not expressed at all, but has to be inferred from expressions more or less general and indefinite which do not relate to pay alone, and which it can not be denied operate to some extent prospectively. The intent claimed is so far from clear

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Foreign Minister.

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that there is no agreement as to the meaning of the language employed if given retroactive effect.

Under such circumstances I must answer so much of the question as asks if McDonald is entitled to an increased rate of pay for services rendered prior to March 3, 1883, in the negative, which makes an answer to the rest of the question unnecessary. I am led to this conclusion the more readily as the claimants can either test its correctness in the courts or present the matter to Congress for further legislation, if so advised, and thus relieve the accounting officers from the responsibility of action which I think they can not safely take without such judicial or legislative direction.

I am, respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

*Secretary of the Treasury.*

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FOREIGN MINISTER.

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The issuance of a writ of execution against the person or chattels of a foreign minister is a "suing out" within the meaning of section 4064, Revised Statutes, and renders the party obtaining such writ liable to the penalty prescribed.

Cases within that section should be prosecuted by the United States attorney of the proper district, as other misdemeanors are prosecuted.

DEPARTMENT OF JUSTICE,

June 23, 1883.

SIR: In the matter of the Haytien minister, already referred to by you upon the 18th instant, you further inquire, under date of the 21st, and in anticipation of what *may* occur in the sequel—

"First. Whether the *issuance* of a writ of execution by the judge against the person or chattels of a foreign public minister is a complete 'suing out' within the terms of section 4064, so as to render the parties to the suit liable to the prescribed penalties.

"Second. Whether the marshal in whose hands the writ was placed for execution is an 'officer concerned in executing it' under the statute, when in fact it was not executed,

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Foreign Minister.

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but only an attempt made to execute it, by the marshal serving notice upon the minister.

"Third. If the present case is one calling for the prosecution of the offenders, is process to be instituted on complaint of the aggrieved minister, or by the United States attorney in the minister's behalf."

Section 4064 makes the "suing out," and also the being "concerned in executing," certain writs or process a *criminal* offense; and therefore probably it will be held that to establish the charge in any given case the participation must be *actual*, and not merely *by intendment of law*.

This, however, will be for the courts to decide, and in the mean time it may be proper, out of respect to any minister who may come to be concerned therein, that in giving the "aid" which Attorney-General Black recommends (9 Opin., 7) any case of this sort *that looks reasonable* shall upon its occurrence be duly presented for such determination.

Premising this, I will answer the first question above *affirmatively*; the second, in the *negative*.

Third. Cases within section 4064, in my opinion, involve breaches of the peace that are to be prosecuted by the United States attorney of the proper district, *by the same formal methods which attend other breaches of the peace*.

Whilst the circumstance that the Secretary of State, to quote from Mr. Black again, is required to "take a deep interest" in such cases may show their importance in certain respects, nevertheless they are not distinguished in point of principle from other *misdemeanors*, and therefore are to be prosecuted in due course by the proper district attorney, after his attention shall have been called to them.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF STATE.

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Testimony of Prisoners.

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## TESTIMONY OF PRISONERS.

The President has no power, in the absence of a treaty provision, to extend to a foreign government the privilege of taking the testimony of prisoners, excepting when they are confined in prisons of such of the Territories as are not invested with authority to regulate the prisons within their limit, and in the prisons of the District of Columbia; and then only, as to the former prisons, with the concurrence of the Attorney-General, and as to the latter prisons, with the concurrence of the supreme court of the District.

## DEPARTMENT OF JUSTICE,

*June 25, 1883.*

SIR: In reply to your communication of the 7th of June, current, asking my opinion as to the power of the Executive to extend to the German Government the privilege of taking the testimony of prisoners confined in Federal and State prisons, without exercising the treaty-making power, I have the honor to submit that, in my opinion, the privilege in question can only be so extended as to prisoners confined in Federal prisons in such of the Territories as are not invested by law with authority to regulate the prisons within their limits, and in this District, these being the only prisons under Federal control, and then only, as to the Territorial prisons, with the concurrence of the Attorney-General, who is specially charged by law with the duty of making rules and regulations for the government of said prisons (Rev. Stat., 1893), and as to the jail of this District, with the concurrence of the supreme court of the District, in which is lodged by law the power to make rules for the government and discipline of prisoners confined in that jail. (Rev. Stat. D. C., 1090.)

But as to prisoners confined in State prisons, whether under sentence of Federal or State courts, they are subject exclusively to the government of rules and regulations prescribed by the several States as well in respect of Federal as State prisoners (Rev. Stat., 5539); and I am of opinion that the Executive has no power to give the German Government the privilege of access to such prisoners for the purpose named without the instrumentality of a treaty, supposing the subject to be, to its full extent, within the treaty-making power. And as to prisoners confined in those prisons which

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Crimes Committed by Indians.

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Congress has placed under the control of certain Territorial governments, the Executive cannot extend the privilege asked for by the German Government without legislation authorizing him to do so.

I have the honor to be, sir, your obedient servant,  
BENJAMIN HARRIS BREWSTER.

The SECRETARY OF STATE.

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## CRIMES COMMITTED BY INDIANS.

Where an Indian belonging to one tribe murdered an Indian belonging to another tribe within the reservation of a third tribe which has no law covering the case, *semble* that the "bad men" clause in a treaty with the tribe to which the murdered Indian belonged does not operate to bring the case within section 2145, Revised Statutes, and so give the United States courts jurisdiction over the offense.

DEPARTMENT OF JUSTICE,

June 27, 1883.

SIR: Yours of the 15th instant calls attention again to the case of Foster, a Creek Indian, who is in custody at Fort Reno under the charge of murder of one Poisal, an Arrapahoe, at a place within the Pottawatomie Reservation in the Indian Territory, the same matter having been the subject of correspondence between the Attorney-General and the Secretary of the Interior during November last.

Calling my attention to the difficulties of the case, as regards jurisdiction by an Indian tribe, as well as the outrageous character of the homicide, you ask that in connection with the case of Crow Dog, in the courts of Dakota Territory, I will reconsider the question of jurisdiction by the United States, and also that if I adhere to the intimations heretofore given, I will advise you as to the proper disposition to be made of Foster.

(1) I have reconsidered the matter as you request, and am still of opinion that there is but little ground to hope that the courts of the United States have jurisdiction of the offense in question.

That offense is the murder of one tribal Indian by another, their tribes being different, and the murder having been

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Crimes Committed by Indians.

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committed within the reservation of a third tribe, which is said to have no law covering the case.

Before going further I may here, apropos of a suggestion in your note, call attention that in Rogers' case (4 How, 567) Chief-Justice Taney says that the act of 1834 "does not speak of members of a tribe but of the race generally, of the family of Indians, and it intended to leave them, both as regards their own tribe and other tribes also, to be governed by Indian usages and customs."

It is admitted that the United States have no jurisdiction over crimes committed by one Indian against the person of another Indian. (Act of 1834, as reproduced in Revised Statutes, section 2146.) But whilst it is also admitted that in the present case the place in which the crime was committed is Indian country, and that the prisoner and the deceased are, in general, tribal Indians, yet it is suggested that inasmuch as the deceased belonged to a tribe with which the United States have expressly stipulated that "If bad men among the whites or among other people subject to the authority of the United States shall commit any wrong upon the person or property of the Indians, the United States will, etc., cause the offenders to be arrested and punished according to the laws of the United States, etc." (15 Stat., 593), that this provision excludes Arrapahoe Indians from that class which by the above statute is out of the protection of the criminal laws of the United States, and so brings crimes against them within section 2145.

The argument seems to be that Indians committing crimes within the Indian country generally are subject to the jurisdiction of the criminal laws of the United States; that their exemption therefrom in certain specified cases is not their privilege, but a privilege of the United States, depending upon the unwillingness of the latter to guaranty the peace in favor of certain persons described as Indians; but that in the present case, by reading the statute and treaty together as contexts, it is plain that the United States intend to guaranty the peace in favor of the Arrapahoes, and therefore that those are no longer included within the word "Indians" in section 2146.

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Crimes Committed by Indians.

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No doubt there is some ground for this contention, in the general intent of the "bad men" clause in the above and other Indian treaties; *i. e.*, the intent to prevent the atrocities and expensiveness of Indian wars, by providing that instead of an application of Indian law, or rather avenging outrage, to the redress of offenses committed by members of other tribes, the United States depart from their general policy, and assume such redress themselves.

There is great difficulty, however, in holding that the treaty enlarges the scope of the criminal laws of the United States as such scope might have been defined immediately preceding the ratification of the treaty. Admitting, as it seems fair to do, that the status of the criminals referred to in the bracketed clause of section 2146 depends upon an exceptional reason—he, himself, as well as the locus in quo, being subject to the sovereign jurisdiction of the United States, and his exemption depending solely upon the character of the party injured—and admitting also that the reason of that exemption is one that does not appear to apply to the deceased, yet I do not see how a court can vary the meaning of the statutory word "Indian" by an implication, so as to say that it excludes members of tribes who are parties to treaties containing what may be termed the "bad men" provision, as above illustrated. For reasons not expressed Congress has chosen to exclude persons termed "Indians" from certain forms of protection. This positive enactment may extend beyond the original reason therefor. That is often the case with statutes. In these cases they operate according to the force of the words, and not according to their original reason of existence. Positive statutes are not repealed by the mere cessation of what may be concluded to have been the purpose for which they were enacted. Congress has chosen to define the persons against whom crime by an Indian in the Indian country shall not be taken cognizance of by the courts of the United States, by the word "Indians," and it seems that no change of status which occurs to one who notwithstanding remains an Indian will prevent the application to him of that definition.

The case seems the stronger because the very treaty which is cited itself denotes the persons who shall be entitled to

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Crimes Committed by Indians.

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its privileges as "Indians." If in establishing their title to these privileges they show themselves entitled to the above appellation, do they not take it *cum onere* throughout that legislation and all other connected with it?

This case appears to be governed by Perryman's (100 U. S. 235), where the question was whether the great changes made by constitutional amendments, etc., in the condition of negroes rendered them liable under section 2154 and 2155 (Rev. Stat.) to make restitution for property stolen from Indians. The word used by the section (also originally a part of the act of 1834) to denote a party thus to be liable is, "white person." The reason for making such distinction between whites and blacks in 1834 is obvious, and as obviously had ceased at the time (1875) when the suit in question had been brought. Still the court held that the force of the terms originally used by the legislature in giving form to its will could not be avoided; and that until it chose to accommodate that form to the general effect of subsequent legislation, constitutional and other, none but one who is white, in the usual sense of the word, can be liable to make restitution.

The case here is *vice versa*; *i. e.*, whether one who was originally within the scope of a statutory term, for all purposes, and who, in the ordinary use of words, remains so still, can by the indirect effect of certain legislation, which has removed reasons that were of great weight in molding the statute in question, be now excluded from such term?

I therefore greatly doubt whether the treaty in question can be regarded as going beyond its direct terms; *i. e.*, as not only affording the protection of laws otherwise existing, but also *enlarging* the protective operation of those laws.

Having thus expressed myself, I will add that notwithstanding the above doubts, if it occurs to you as in point of administration a matter of importance that the opinion of the courts shall be taken upon this matter in the course of a vigorous prosecution of the "crime," I recognize the embarrassments of the case as so considerable that I will cheerfully execute whatever suggestions you may be pleased to make. Such prosecution, whatever be its issue, might more effectively call the attention of Congress to the general subject,

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which indeed seems to require further legislative consideration.

It may indeed be no more than proper deference to the opinion of Judge Moody in the case of Crow Dog (cited by you) to take this step, particularly in view of the peculiar circumstance now stated by you, viz: that the Pottawatomie Indians have no law that covers a crime of this sort, although committed within their boundaries.

(2) If no demand for Foster's surrender shall be made by one or other of the tribes concerned, founded fairly upon a violation of some law of one or other of them having jurisdiction of the offense in question according to general principles, and by forms substantially conformable to natural justice, it seems that nothing remains except to discharge him.

A fruitless prosecution in the courts may be the best warrant for that, in view of the great outrage committed by the prisoner; one so well calculated to rouse and to render discontented the communities concerned therein.

Very respectfully, your obedient servant,

S. F. PHILLIPS,  
*Solicitor-General.*

The SECRETARY OF THE INTERIOR.

During my absence this case was sent to the Solicitor-General. The opinion he has here given I have examined and considered, and I unite with him in all of the conclusions he has arrived at, and so approve this opinion:

BENJAMIN HARRIS BREWSTER.

JULY 2, 1883.

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Promotion in the Engineer Corps.

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## PROMOTION IN THE ENGINEER CORPS.

An officer who has unsuccessfully undergone examination for promotion under section 1206, Revised Statutes, and in consequence has been suspended from promotion for one year as provided by that section, is not, during the period of such suspension, qualified for promotion on account of continuous service under section 1207, Revised Statutes.

DEPARTMENT OF JUSTICE,

June 29, 1883.

SIR: You state that you have under consideration your own action in the following case, and ask the opinion of the Attorney-General thereupon:

"A vacancy in the grade of captain in the Engineer Corps occurred January 10, 1883, in consequence of the promotion of Captain Allen. Lieutenant Bergland, being the senior first lieutenant, was examined for promotion, as required by section 1206 of the Revised Statutes, and failed on that examination. He has since applied to be again examined for promotion to the grade of captain after the 15th of June, 1883, on the ground that he will be then entitled to promotion to the rank of captain as having served fourteen years' continuous service as lieutenant; and this Department has advised him that in consequence of his failure to pass the examination above mentioned he was, under section 1206 of the Revised Statutes, suspended from promotion for one year, and that this suspension included all right of promotion however derived."

Upon consideration I submit that this case has been properly decided.

Since the year 1814 promotion *in the line* has existed in the Engineer Corps of the Army, and since 1853, in addition thereto, promotion from the rank of lieutenant to that of captain on account of *fourteen years' continuous service* in the former rank.

The acts of 1814 and of 1853 gave this eligibility to promotion irrespective of other conditions.

However, in 1863 (12 Stat., 743), it was enacted that "no officer of the Corps of Engineers below the rank of a field

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Promotion in the Engineer Corps.

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officer shall hereafter be promoted to a higher grade before having passed a satisfactory examination," etc., according to what are now the provisions of section 1206, Revised Statutes.

By the generality of the terms of this provision, as well as by its *policy*, which apparently covers all persons who for any reason aspire to be promoted to the duties and responsibilities of captain of engineers, it seems evident that after 1863 no one who had unsuccessfully undergone an examination for promotion *in the line*, and was suffering *suspension* therefor, was during that time qualified for promotion on account of *continuous service*, and *vice versa*. The act of 1863 consolidates both kinds of promotion under one head. For its purpose both are units of the same degree.

A question remains whether this operation has been changed in the Revised Statutes.

Here, in substance, the act of 1814 is section 1204; that of 1853, section 1207; and that of 1863, section 1206.

In section 1207 the act of 1853 is changed so far as to refer to "the examination" required by the act of 1863, now section 1206, and to render the *continuous service* promotions expressly subject thereto. It refers to "examination," but says nothing as to "suspension."

The question is whether in the word "examination" are included all the consequences thereto attached in 1206, or whether there is an *exclusio alterius* under the well-known maxim.

I submit that "examination" includes all the incidents specified in 1206; and for these reasons:

(1) Professional fitness for a captaincy, as regards physique, attainments, etc., is, in the nature of things, as requisite for one promotion as another. There is no magic in the continuous service qualification. Attended by fitness otherwise, and only so, it makes a reasonable case. No reason occurs why the *continuous service* applicant should not be subjected to the same consequences for failure that attend any other applicant. These consequences are not so much a *penalty* to the officer as a *reasonable guaranty to the public against future disaster*. The words which provide them, therefore,

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are to bear a reasonable construction. Continuous service *implies* continuous and advancing merit. The former is respected and valuable on account of this presumption. Apparently, therefore, it is a presumption liable to ordinary tests, and, in view of some of the highest and most exigent interests of society, one whose *rebuttal* for promotion in the line is a rebuttal *for all promotion*; and, for all promotion, is also attended with the ordinary express statutory incidents.

(2) If the doubt were greater than it seems to be, the circumstances that the statutory law appears plainly to have been so from 1863 up to December, 1873, together with the general intent of the Revised Statutes merely to *declare that law*, is to the same purpose.

(3) The previous state of the law being ascertained, it would be singular that Congress should leave the public to ascertain such intended alteration by haphazard resort to the above cited maxim, the probability in the mean time being that readers would conclude that, in the bare allusion thereto in 1207, the word "examination" is taken *generally*, viz, as *the examination of 1206*, carrying all incidents, and that the revisers inserted that reference only *ex abundanti*, apprehending that what was clear so long as the matter of 1206 was known to be *subsequent* in point of enactment to that of 1207 might be thought doubtful after this matter (as contained in the Revised Statutes) appeared to be *cotemporary*, especially when in point of location it was to *precede*.

I repeat, therefore, that I concur in the conclusion to which you have already come.

Very respectfully, your obedient servant,

S. F. PHILLIPS,  
*Solicitor-General.*

The SECRETARY OF WAR.

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Commissioners of the District of Columbia.

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## COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

Section 4 of the act of June 11, 1878, chapter 180, requires the Commissioners of the District of Columbia to render accounts for their disbursements thereunder to the accounting officers of the Treasury for adjustment and settlement, which, by implication, may be in accordance with the laws and regulations and usages by which these officers are governed so far as the same are applicable to such accounts.

The provisions of sections 3623 and 3678, Revised Statutes, are applicable to the Commissioners, and they and their bondsmen are liable to suit on their bond for the recovery of balances found due from them on settlement of their accounts.

## DEPARTMENT OF JUSTICE,

*June 29, 1883.*

SIR. I have the honor to acknowledge the receipt of a communication addressed to you by S. L. Phelps, Josiah Dent, and William J. Twining (by John A. Baker, his administrator), late Commissioners of the District of Columbia, appealing to you for protection from the effects of alleged misconstruction of laws of Congress by the First Comptroller of the Treasury on certain stated points, and as to which you require my advice and opinion.

On my representation to the petitioners that a more specific statement of the official action of the First Comptroller was desirable, this communication was supplemented by another, to which was annexed three letters addressed by the First Comptroller to Ex-commissioner Phelps, dated, respectively, February 26, February 28, and March 6, 1883, extracts from which were quoted, as is understood, in order to point out the particular misconstruction of the laws by the First Comptroller, of which the petitioners complain; also a letter dated December 19, 1879, addressed on behalf of the Board by its president, J. Dent, to First Comptroller A. G. Porter, in answer to a communication from him as to its duties, and setting forth its views of the matter in controversy; and a letter dated April 9, 1883, of the Acting First Comptroller, addressed to Commissioner Thomas P. Morgan, transmitting a statement of differences in settlement of a certain account of Commissioners.

I do not deem it necessary to recite these extracts or to

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Commissioners of the District of Columbia.

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refer in detail to the matters contained in the several communications and exhibits. It will suffice to state briefly the essential question at issue, which turns on the effect of the following clause of the fourth section of the act approved June 11, 1878, entitled "An act providing a permanent form of government for the District of Columbia" (20 Stat. 102), namely: "All taxes collected shall be paid into the Treasury of the United States, and the same, as well as the appropriations to be made by Congress as aforesaid, shall be disbursed for the expenses of said District, on itemized vouchers, which shall have been audited and approved by the auditor of the District of Columbia, certified by said Commissioners, or a majority of them; and the accounts of said Commissioners, and the tax collectors, and all other officers required to account, shall be settled and adjusted by the accounting officers of the Treasury Department of the United States."

Since the enactment of this provision it has been construed in the Treasury Department as requiring the Commissioners to render accounts of all their disbursements of the funds mentioned in the said section of the act to the accounting officers there for settlement and adjustment in the same manner as the accounts of disbursing officers are there settled and adjusted.

It is not perfectly clear from the petitioners' statement whether they deny the right to exact any accounting from them, or whether they merely claim to be exempt from the operation of statutes relating to disbursing officers of the United States and their accounts.

The former proposition could not well be maintained in view of the explicit language above cited. The certificate of at least two Commissioners is requisite to authorize each disbursement of District funds, and this surely must constitute them disbursing officers, so far at least as that, under the law, they control and are therefore responsible for the expenditure. The statute accordingly directs how their accounts shall be settled and adjusted, and is conclusive.

Whether the effect of this is to impair the dignity of the office of Commissioner, or in anywise to reduce its supposed or actual power and authority as conferred by other provisions of law, it is needless to consider. Congress has spoken

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*Commissioners of the District of Columbia.*

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so clearly on this subject that there is no room for the use of such arguments in construction. That it acted advisedly in view of past experience with other forms of the District government might, however, easily be shown.

The other question leaves more room for discussion. The direction that the accounts of certain District officers "shall be settled and adjusted by the accounting officers of the United States" necessarily implies that the settlement and adjustment shall be in accordance with the laws and regulations and usages by which those officers are governed and guided so far as the same may be applicable to the case thus brought under their jurisdiction, and that in the absence of suitable existing provisions those officers should make and enforce such as should be reasonable and necessary.

The petitioners are very likely right in asserting that they are municipal officers, and that the funds they disburse are funds of the District; but it is none the less competent for Congress to subject them to such obligations as are imposed on disbursing officers of the United States, and that it has done so to some extent is manifest. It may be conceded that it has not done so in terms, and that the extent to which it has done so by necessary inference is open to question; but in order to obtain any practical benefit from such a discussion the petitioners should point out the particular provisions of law which, as they claim, are and should not be applied to them, for in this way only can a definite issue be presented.

The only reference made in the papers submitted to particular provisions of law deemed inapplicable are as follows:

First. In the letter of J. Dent, president, to the First Comptroller, dated December 19, 1879, occurs the following statement: "The Commissioners acknowledge the receipt of your letter of the 10th instant, and in reply have the honor to state that they do not understand sections 3623 and 3678, and kindred sections of the Revised Statutes of the United States, as having any application whatever to them, but as applicable only to officers of the United States who disburse the moneys of the United States."

The two sections mentioned merely express the proper and necessary obligations of every officer disbursing public

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*Commissioners of the District of Columbia.*

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money under and in accordance with a legislative appropriation, obligations which the courts would enforce on occasion even in the absence of such enactments. They are manifestly applicable to the Commissioners' accounts, and it is not perceived, therefore, that there is any good ground for the objection taken.

Second. The petitioners call attention to statements in the Comptroller's letters mentioned, to the effect that a certain sum was found by the accounting officers to be due from them on settlement of their accounts, and should be paid into the Treasury, in default of which it would become his duty under section 3624 of the Revised Statutes to institute suit against the Commissioners and their bondsmen for the recovery of the same; and they evidently consider that such a suit would be unwarranted.

So far as that opinion rests on the ground that nothing is due, it raises a question of fact, or at all events of administrative detail, which it is no part of my duty to determine or consider. So far as it touches the legal sufficiency of the action proposed, it may be questioned whether an opinion should be rendered on a mere contingency of action such as is above indicated. But waiving that, I must assume that the objection is one of substance, denying the right of suit on a Commissioner's bond for recovery of a balance alleged to be due, rather than excepting to action under the particular section cited.

I am unable, however, to perceive how such exemption can be claimed in view of the fact that each civil Commissioner is required by statute to give bond in the sum of \$50,000, with surety for the faithful discharge of his duty, and has given such bond to the United States. Can it be doubted that a failure to account for money chargeable to a Commissioner as a disbursing officer would be a breach of the condition of his bond and render him liable to a suit thereon by the obligee in the usual mode of procedure upon such a cause of action? If the petitioners can be so prosecuted at the instance of the accounting officers (and they have suggested no other remedy), it seems immaterial to consider whether the particular section referred to by the First Comptroller may or may not be the basis of such action.

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*Commissioners of the District of Columbia.*

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It is evident, moreover, from the petitioners' statement, that their contention is not directed to the inapplicability of any special provisions to their accounts, but rather to show by reference to various statutory provisions relating to the office and powers of Commissioners that Congress could not have intended by the legislation of 1878 respecting their accounts to limit the authority exercised by them in respect of expenditures under prior statutes cited.

The decisive answer to this line of argument has already been stated, it being in substance that reference to such considerations is admissible only where the legislative intent is so doubtful as to need construction. It seems to me that when Congress directs that the Commissioners' accounts shall be settled and adjusted by the accounting officers of the Treasury, it is too plain for argument that it intends them to be settled and adjusted in accordance with the laws and usages governing those accounting officers, and I find nothing in the statutory provisions cited by the petitioners which is incompatible with this intent.

That this enactment made a radical change in the system theretofore prevailing is quite true, but that only demonstrates more strongly that Congress acted with full consideration. It must not be forgotten that fiscal mismanagement was the chief ground of complaint against preceding forms of the municipal government, as the reports of the several investigations instituted by Congress into the District affairs abundantly prove, and no one familiar with the history of the transactions of the municipal authorities and the legislation connected therewith during the decade preceding the act of 1878 can fail to perceive that the intent of Congress to hold the local authorities to closer and stricter responsibility in fiscal affairs is continually manifest.

It is not to be presumed that this has been carried so far in the present instance as to embarrass the operations of the municipality or to unduly limit the just authority of any of its officers, but if such evils are felt or apprehended the remedy is with Congress.

There is nothing, of course, in these views derogatory to the petitioners, whose character and sincerity are beyond question. It was not unnatural that they should not readily

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 Internal Revenue.
 

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assent to what they evidently regarded as a subordination of their proper function to other authority. The questions raised are of very considerable importance to them and are earnestly urged, but I have not been able to concur in their views of the law.

I have not considered some matters to which attention is called in the papers submitted, such as the requirement of the *First Comptroller* that the accounts of the Commissioners shall be settled and adjusted at each change in the membership of the Board, the nature of his statements of difference, and the like, because, in my judgment, they relate to matters of administrative detail within the lawful jurisdiction of the accounting officers, and do not properly present any question of law for my opinion.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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 INTERNAL REVENUE.
 

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Where it was proposed to withdraw a quantity of whisky from bonded warehouse, under section 3330, Revised Statutes, and acts of June 9, 1874, chap. 259, and March 1, 1879, chap. 125, in order to ship it to Bermuda, with the purpose, after landing it there, of transporting it back to this country and entering it either for warehousing or for consumption under section 2500, Revised Statutes: *Advised*, that such shipment, with the purpose mentioned, would not be an exportation within the meaning of section 3330, Revised Statutes, and the act of 1874; nor would such shipment and the landing abroad fulfil the condition of the exportation bond, and discharge the whisky from the internal-revenue tax thereon; nor would such whisky, upon return to this country, be entitled to the rights and privileges of imported merchandise under the warehouse laws.

DEPARTMENT OF JUSTICE,

July 2, 1883.

SIR: Yours of May 21st states that large quantities of domestic distilled spirits now remain in distillery bonded warehouses, subject to a tax payable within three years from the date of their entry for deposit under the act of May 28, 1880, and that the time during which payment of the tax is suspended upon 12,000,000 gallons thereof expires within the

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present calendar year; that you are informed that the owners of a large quantity of such spirits propose to *withdraw* it (under section 3330, Revised Statutes, and acts of June 9, 1874, and March 1, 1879), in order to ship it to Hamilton, Bermuda, with the purpose, after landing there, of shipping it back to this country and entering it either for warehousing or for consumption under section 2500, Revised Statutes, claiming at the same time that under the warehouse laws such spirits may remain in warehouse without payment of duties for a period not exceeding three years from the date of their importation. (Sec. 2970, Rev. Stat.)

In pursuance of this plan several thousands of barrels of spirits are now at Newport News, Va., for the purpose of shipment.

Thereupon you ask—

First. Is such shipment of whisky, with such purpose and intention, to Bermuda, and landing it there, an exportation within the intent of section 3330, Revised Statutes, and the act of 1874 (18 Stat. 64), and does such shipment and landing there fulfill the condition of the exportation bond and discharge the whisky from the internal-revenue tax thereon?

Second. Is such whisky, upon return to this country, entitled to the rights and privileges of imported merchandise, under the warehouse laws, Chapter 7, Title 34, Revised Statutes?

To the above statement you have, June 23, added as a *variation* the following, which is also to be considered and made an additional subject of discussion.

“(1) The exporters propose to comply with all the requirements of the law in respect to the exportation of their whisky, so that the transportation and export bonds shall be canceled and the whisky exported legally discharged from the lien the Government has upon it for an internal-revenue tax.

“(2) Arrangements have been made for the storage of the whisky in Bermuda for a period of twelve months, and longer, at the option of the owners, at advantageous rates of storage, in a climate which in a remarkable degree facilitates the aging of whisky.

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"(3) No arrangements have been made for the return of said spirits, and that the same, or any part thereof, will not be returned to this country except in response to the demand of trade, and that the exportations are being made for the purpose of relieving an overloaded home market, with the intention in due course of business of making sale of all that can possibly be placed upon the British and continental markets.

"(4) It is the intention of the exporters to preserve the identity of the spirits exported, so that if a market is found in the United States for any portion of it it can be entered as domestic distilled spirits reimported, upon which a duty equal to the internal-revenue tax will be levied and collected."

Inasmuch as the statutes which are cited by you describe the transaction, in the course of which occur the details as to which the above questions arise, by one or other form of the word "export," it is important to ascertain what that word means.

Its dictionary signification is *to carry out of a country*. By the very force of language this denotes only such an act as *when completed* results in a carrying out; i. e., that no act can be so denoted if at its completion the thing carried has been returned within the country. It is no more true in common parlance than in law that a transportation of goods from San Francisco to New York is an *exportation* of them, even although between their departure and arrival they lie for some time in the ports of Callao and Rio Janeiro, and although the conversation about them occurs whilst they so lie. Furthermore, it is not because by statute coastwise transportation can only take place in *American* bottoms that such goods have not at any period of the transit been *exported*. It would be equally true of goods in the course of transportation under section 4347, Revised Statutes, in *British* bottoms from Ogdensburg, via Toronto, to Chicago, even if spoken of whilst lying at at Toronto.

It is therefore only when the executed act *results* in carrying the goods out of the country that it is even an *exportation*.

It is hardly necessary to go further upon this matter and

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say that in speaking of *an act* I include any transaction *done in accordance with original intention*, no matter how complex or how much broken into *bits*. Unity of intention unites all such details into *one whole*.

The American citizen who goes abroad for an indefinite period intending to educate his children in Germany, and in the interval or subsequently to locate himself for one advantage or another in Italy and in other countries, intending after all to return to live in America, does not lose his citizenship at any moment of his absence. The whole affair was only *one visit*. And so if a cask of Madeira is carried to Calcutta for the benefit of the voyage—such benefit to be enjoyed *after it returns*—this is not an exportation; nor, in the absence of a special context giving to such additional incident that effect, can it make any difference if in the meantime it be temporarily *landed* at one foreign port or at several.

In general, then, neither the lapse of long time nor the incidence of numerous details affects the *unity* of an act.

I find nothing in the context of the statutes under consideration to disturb this usual signification of the word *export*. Although it may be noticed that the context in the present case goes to *confirm* the above conclusion as to the meaning of *export*—as one to which the legislature was actually advertent,—for the transaction by which domestic liquors are allowed to be shipped abroad is one which such context recognizes as making them objects fit for *importation*, *i. e.*, *foreign goods*.

There may be instances in the statutes where the word *export* is shown, directly or by the context, to have been used *irregularly*—as for instance in section 1955, where the “*exportation*” to Alaska from any port in the United States is spoken of—but these are *exceptional*, their effect being, of course, limited to what is in the same connection expressly provided, and therefore without influence upon what ordinarily is the statutory use of the word.

In the case put by you in your first note, in which an intention exists to carry spirits now at Newport News, Va., to Hamilton, Bermuda, with the purpose, after landing it there, of shipping it back to this country, I am of opinion

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that there will be no *exportation*, or consequently *importation*, so far at all events as to entitle the owners to any privileges connected with *exportation* or *importation*.

Whether they may subject themselves to another class of the provisions of the custom laws is obviously a different matter, and will best be decided when a specific case arises.

(1) The *landing* specified in the bond referred to in your first question is, by its own words and by those of the statute which requires it, a landing in the course of an *exportation*. No landing at Hamilton, therefore, in the case put by you is such landing. Neither landing nor any other detail, statutory or other, can obviate the necessity of that *intention*, which is of the essence of *exportation*. I therefore answer your first question in the negative.

(2) I must add, of course, that the case in view is not within section 2500 for the purpose of your second question.

(3) Equally such spirits will not be entitled to the rights and privileges referred to in question three.

I now ask your attention to the effect of the variations of which you speak in your second note.

I premise that I understand these statements to affect cases in which *nothing else appears* as to the intention of the owners in shipping the goods out of the country. For if they accompany cases in which the intention is ascertained to be what you have already stated, I am of opinion that the main support of the theory of the owners fails them, there being no *exportation*. So if the only intention in shipping them abroad is for a twelve months' storage in Bermuda, that also is inconsistent with *exportation*.

As the legal notion of emigration is a going abroad with an intention of not returning, so that of *exportation* is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other. All emigration as above defined is attended with a chance that the intention may afterwards (*i. e.*, after actual removal) be changed. This chance does not affect the character of the act. Nor does the circumstance of an original speculation that such chance may occur, or even a resolution that upon a certain contemplated contingency the party about to emigrate will

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Internal Revenue.

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return—*e.g.*, upon a change of government or upon the loss of his health—affect the validity of an emigration otherwise bona fide. I suppose that the case may often be the same with exportations as above defined, viz, a contingent change in the state of the market, by which it may be profitable to bring them back, the *immediate* bona fide purpose as well as act, however, being to seek a foreign market. This would nevertheless be an *exportation*, and upon return of course an *importation*. Nor would such exportation be *defeated* by the incident of “preserving the identity” of the goods.

But if the only purpose were to obtain for a time the advantage which some foreign port gives for improving spirits, and meanwhile to escape some home revenue regulation upon domestic spirits, and acquire, after return, some home revenue privilege appropriate to foreign spirits, I submit that the statutory requisites for such effect would be wanting. I say *the statutory requisites*, for I admit that if those requisites are duly complied with they must have their due statutory effect, and there would in such case be no ground for suggesting *fraud*.

I cannot say that the variations above amount to more than *evidence* of exportation or of the contrary. The mere carrying goods abroad is of course strong evidence that they are being exported. Whether *proof* or not is another matter. I suppose that you do not wish a mere discussion of the *weight* or direction of the testimony contained in the *variations*. If questions shall be made hereafter in the courts upon the matters under consideration neither party will take any advantage from what may be said upon them here.

And in closing it may be well to express what no doubt is *now* understood, but may be forgotten, viz, that the Government will not be bound hereafter by any part of this discussion that may be seen to be ill-founded. There is nothing in this opinion, or I suppose in any other part of the transaction, which the owner in question can rely upon as having the force of an estoppel, or contract, in case the Government shall then be better advised as to its rights. This opinion has no force whatever, except as advice by one Department to another in a future contingency, as to which the latter Department very properly wishes to warn citizens

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CUSTOMS LAWS.

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whose interests therein are very large. With every disposition to treat the owners of these spirits with perfect candor, it must be recollected that definiteness under the circumstances is unattainable, and that it is not in the power of officers of the Government to trammel the discretion with which, in the interests of the public, these transactions will otherwise have to be considered, or the freedom with which accordingly they must otherwise be treated when the proposed "exportation" and "importation" shall have happened.

The present statements and discussion will of course go to show a disposition to deal fairly, upon the part of these owners, and for that they must always have credit; but no engagement or embarrassment will come of what is said upon the part of the Government.

Very respectfully, your obedient servant,

S. F. PHILLIPS,  
*Solicitor-General.*

The SECRETARY OF THE TREASURY.

During my absence these questions were left to the Solicitor-General, and he has passed upon them and submitted the above information and answers. Having examined the subject myself, I agree with him, and approve of his information and answers to the questions propounded.

BENJAMIN HARRIS BREWSTER.

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CUSTOMS LAWS.

The term "examiner," as used in sections 2, 3, and 4 of the act of March 2, 1883, chapter 64, signifies any officer authorized by the fifth section to act in that capacity, and nothing more.

It was not the intention of the act to create a new officer to meet its requirements regarding the examination of imported teas.

The term "appraisers" in the act does not embrace "assistant appraisers."

DEPARTMENT OF JUSTICE,  
July 5, 1883.

SIR: Your communication of the 30th June ultimo has received my consideration, and I am of opinion that it was not the intention of the act of 2d March, 1883, entitled "An

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Customs Laws.

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act to prevent the importation of adulterated and spurious teas," to create a new officer to meet the requirement of the act that all teas entered for importation shall be examined before passing from the control of the customs authorities.

The fifth section, it seems to me, refers to appraisers and revenue officers as already provided by law. Whether at the time of approval of the act some or all of the officers mentioned in the fifth section were qualified for the duty imposed by the act can have no effect, in my opinion, on its construction, it being the duty of the appointing power to so order it as that the offices in question shall be filled by persons "duly qualified."

I do not think it admissible to deduce the power to appoint a new class of officers from the power given the Secretary of the Treasury, in case he should not deem it proper or expedient that the officers named in the fifth section should act as examiners of teas, to direct "*otherwise*." It appears to me that what Congress meant by the words "unless the Secretary of the Treasury shall otherwise direct" was that the Secretary should have power to devolve the duty of examining teas on other officers of the revenue than those designated by the act. The power to create offices and fix the emoluments thereof is not to be implied where the law can have due effect without it.

I am of opinion that by the term "examine," used in sections 2, 3, and 4, Congress meant any officer authorized by the fifth section to act in that character, and nothing more.

I am, furthermore, of opinion, that the term "appraisers," used in the act, does not embrace "assistant appraisers," there being nothing in the context of the law calling for this enlarged sense of the former term.

I have the honor to be, sir, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

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Extension of the Washington Aqueduct.

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## EXTENSION OF THE WASHINGTON AQUEDUCT.

Construction of the act of July 15, 1882, chap. 294, "to increase the water supply of the City of Washington," etc.

DEPARTMENT OF JUSTICE,

July 6, 1883.

SIR: I have the honor to acknowledge receipt of your communication of the 18th of April ultimo, requesting my opinion upon certain questions relating to the extension of the Washington Aqueduct, specifically presented by Major Lydecker in his letter of the 11th of April, and repeated in the letter of the Chief of Engineers.

The act of July 15, 1882, entitled, "An act to increase the water supply of the city of Washington and for other purposes," is operative as well in the State of Maryland as in the District of Columbia; it may also affect riparian rights and the title to soil in the State of Virginia.

Of the right of Congress to appropriate private property for public use within the District of Columbia no question has ever been raised.

Its power within the States to appropriate for Federal purposes has been declared and announced by the Supreme Court in *Kohl et al. v. United States* (91 U. S. 367), where the case of *Twombly v. Humphrey* (23 Mich. 471) is cited with approval.

The courts of Maryland have been explicit that a proper supply of water for the seat of Government is a public use (*Reddell v. Bryan*, 14 Md., 444; *S. C.*, 24 How., 420), but independent of this it is well settled that the legislature is the proper and only judge of what is, and what is not, a public use.

It remains, therefore, only to inquire what is the method pointed out by Congress for this taking; for, as is said by Davis, J., in *Secombe v. Railroad Company* (23 Wall. 108), "It is no longer an open question in this country that the mode of exercising the right of eminent domain, in the absence of any provision in the organic law prescribing a contrary course, is within the discretion of the legislature."

The first step to be taken is the preparation of the neces-

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Extension of the Washington Aqueduct.

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sary survey and maps for the extension of the aqueduct, for the reservoir, for the land necessary for the dam, including the land now occupied by the dam, and for the land on which the gate-house at Great Falls stands.

When these have been completed it becomes the duty of the Secretary of War and the Attorney-General to acquire whatever outstanding title exists to said land and water rights, and to the land on which the gate-house at Great Falls stands, by condemnation. There is a seeming confusion in the statute at this point arising from the expression in the second paragraph "if it shall be necessary to resort to condemnation"; but I do not find anywhere in the statute a grant of authority to acquire in any other manner. If the Secretary of War and the Attorney-General are to purchase, they must in some way ascertain the value of the property and rights taken, and it seems to have been the intention of Congress that they should learn this from the appraisers or from the Court of Claims.

The authority over the appropriations in the statute is conferred upon them *sub modo*, and in causing compensation to be offered to the owners the only grant is to offer "the amount fixed by the appraisers as the value thereof."

As soon as resort to condemnation becomes necessary the Attorney-General must proceed to ascertain the owners or claimants of the premises embraced in the survey by making a publication describing the land embraced in the survey, with a notice that *the same has been taken*.

The effect of this is clearly stated later in the statute: "Upon the publication of the notice as above directed, the Secretary of War may take possession of the premises embraced in the survey and map and proceed with the constructions herein authorized;" that is to say, the taking for public use becomes with the publication a completed act.

It is not necessary at present to enumerate the detailed provisions relating to ascertainment of the value; for it must be plain to any one that while the fifth amendment to the Constitution says that private property shall not be taken for public use without just compensation, the taking and the compensation are distinct acts. They are certainly distinguished in this statute, for it is made lawful for the Secretary

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 Extension of the Washington Aqueduct.
 

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of War to take possession a year before title vests by reason of failure to file a petition in the Court of Claims, and entirely independent of the time that may be occupied by the appraisers and the Court of Claims in ascertaining what the compensation of those who have appeared shall be. As is said in *Kramier v. Cleveland and Pittsburgh Railroad Company*, (5 Ohio St., 140, 146), "It requires no judicial condemnation to subject private property to public use. Like the power to tax, it resides in the legislative department to whom the delegation is made. It may be exercised directly or indirectly by that body." Denio, J., in *People v. Smith* (21 N. Y., 595), says: "The power resides in the legislature. It may be exercised by means of a statute which shall at once designate the property to be appropriated and the purpose of the appropriation, or it may be delegated to public officers."

As to the separation in point of time between the taking and payment, Cooley says (p. 560): "When the property is taken directly by the State, or by any municipal corporation by State authority, it has been repeatedly held not to be essential to the validity of a law for the exercise of the right of eminent domain that it should provide for compensation before the actual appropriation. It is sufficient if provision is made by the law by which the party can obtain compensation and that an impartial tribunal is provided for assessing it. The decisions on this point assume that when the State has provided a remedy by resort to which the party can have his compensation assessed adequate means are afforded for its satisfaction, since the property of the municipality or of the State is a fund to which he can resort without risk of loss."

I think I have said enough to answer the first question of Major Lydecker, which is, in substance, "whether work on a certain portion must be delayed until Congress shall appropriate a sum equal to the assessed value of the land needed?"

The second question is: "Can proceedings looking to the condemnation of land for the reservoir be commenced in advance, to those looking to the condemnation of lands required for the aqueduct extension and the dam at Great Falls?"

In the preliminary stages I think not. It seems to me the statute contemplates but one survey and map, but one pub-

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Brig General Armstrong.

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lication by the Attorney-General, and but one day which shall bar the right of petition in the Court of Claims.

The work along the whole line need not be contemporaneous, and the Attorney-General may hand to the appraisers from time to time descriptions of separate tracts, but the notice of the Attorney-General must contain a description of the entire tract or tracts of land in the survey.

Compliance with the requirements of the statute seem to require that a single map or survey of the entire land to be occupied by the improvements should be furnished to the Attorney-General with a description of the premises sufficiently definite to inform owners or claimants along the line of improvements of the land desired. And this survey and description will define the bounds within which the Secretary of War by his officers are by law permitted and directed to enter.

Whether the appraisers will be called upon to assess the value of water rights, or whether compensation for the direct injury to property rights by reason of the United States taking water from the stream is to be ascertained solely by the Court of Claims, is a question to be considered when it arises. The inquiries presented relate only to the Secretary of War to enter upon construction of improvements. This right becoming absolute, as I have pointed out, upon publication of the statutory notice, I have confined my discussion of the statute to the steps antecedent to the publication.

The papers inclosed are herewith returned.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF WAR.

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BRIG GENERAL ARMSTRONG.

Upon the case stated: *Advised* that Samuel C. Reid, jr., is not entitled to receive the unpaid balance lying in the Treasury for the benefit of the owners and crew of the brig *General Armstrong*.

DEPARTMENT OF JUSTICE,

July 7, 1883.

SIR: I have considered the question submitted by your communication of the 15th June ultimo, namely, whether

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Brig General Armstrong.

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Mr. Samuel C. Reid, jr., is entitled to receive the unpaid balance lying in the Treasury at your credit for the benefit of the "captain, owners and crew" of the brig *General Armstrong*, and am of opinion that Mr. Reid is not entitled to receive this money. I will consider the question first as to the owners of the brig and next as to the officers and crew.

As to the owners: I am of opinion that the assignment by them to Samuel C. Reid, sr., dated the 12th of September, 1835, created, in legal effect, a personal trust in the assignee for the benefit of the owners as to one-half the claim. The instrument contains no grant of power to the assignee to transfer this trust to another, and therefore the assignment of Reid, senior, to Reid, junior, was wholly without effect in so far as it attempted to devolve the trust from the one to the other. "The office and duties of a trustee being matters of confidence," says Mr. Hill, "can not be delegated by him to another, unless an express authority for that purpose be conferred on him by the instrument creating the trust" (Hill on Trustees, 175). We look in vain for any such authority in the assignment of September 12, 1835. Certainly it can not be deduced from the power to Reid, senior, "to make such compromises and agreements as he might deem proper"—the only language in the instrument granting undefined powers.

As to the officers and crew: with the exception of the captain of the brig (Reid, senior, as to whom there is no question), Reid, junior, does not hold any express grant of authority to receive their shares of the money, and I do not think any authority in that behalf can be implied from their conduct, which is entirely consistent with an intention on their part to stand aloof and profit by the exertions of others, without contributing anything to the common object themselves.

The utmost that Reid, junior, can claim as to them is to be compensated out of their part of the fund, on the principle that no man shall enrich himself at the cost of another—the principle on which courts of equity proceed in charging a fund in which a number are interested with a reasonable

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 Timber Depredations.
 

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allowance for the counsel of the energetic few who have produced the funds.

I have the honor to be, sir, your obedient servant,

BENJAMIN HARRIS BREWSTER.

Hon. FREDERICK T. FRELINGHUYSEN,

*Secretary of State.*

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 TIMBER DEPREDACTIONS.
 

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The provisions in section 2 of the act of April 30, 1878, chapter 76, requiring moneys collected for depredations upon the public lands to be covered into the Treasury, in effect modifies section 4751, Revised Statutes, only as to that part of the penalties, etc., recovered which was payable under the latter section to the Secretary of the Navy; it does not affect the part payable thereunder to informers.

Section 5 of the act of June 3, 1878, chapter 151, applies to the Pacific States and Washington Territory, and repeals section 4751, Revised Statutes, only so far as concerns such States and Territory.

DEPARTMENT OF JUSTICE,

July 19, 1883.

SIR: Yours of the 16th instant incloses a note addressed to yourself from the United States attorney for eastern Michigan, which informs you that certain fines under section 2461, Revised Statutes, are now in the registry of the district court for his district, and that he supposes them to be *distributable* under your direction (to the informer, etc.) under section 4751.

You also inclose certain letters upon the same subject from the files of your Department (dated September 12, 1879, September 3, 1880, and October 14, 1880), in the course of which the Solicitor of the Treasury intimates a doubt whether section 4751 has not been in effect repealed by the act of April 30, 1878 (chap. 76, sec. 2), such doubt being, as he says, somewhat affected by the circumstance that this section was subsequently (act of June 3, 1878, chap. 151, sec. 5) expressly repealed *as to certain States only*.

Upon the whole matter you ask how far your powers under section 4751 have been modified by subsequent legislation, the practical question being that as to *distribution* presented above, in eastern Michigan.

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Timber Depredations.

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As my attention has not been called to any subsequent legislation other than the acts of 1878 cited in your letter, I will confine what I have to say to their operation only.

Section 4751 makes a three-fold provision as to its subject-matter, *i. e.*, *depredations* upon timber standing upon the public lands: (1) suits therefor shall be under the direction of the Secretary of the Navy; (2) one-half of any penalties, etc., recovered shall be paid to informers, and the other half to the Secretary of the Navy; and (3) the Secretary is authorized to mitigate penalties, etc., so incurred.

Thereupon the act of April, 1878, provided "that all moneys heretofore, and that shall hereafter be, collected for depredations upon the public lands shall be covered into the Treasury of the United States as other moneys received from the sale of public lands" (Sup. Rev. Stat., 316), and the act of June 3, 1878 (Sup. Rev. Stat., 328)—the main purport of which was to provide for the *sale* of the public timber lands in the Pacific States and Washington Territory—after repeating the provision just quoted for all sales so to be made, goes on immediately thereafter to expressly repeal section 4751 so far as concerns such States and Territory.

Referring to the *three-fold operation* of section 4751 above mentioned, it is plain that it is not *repealed* by the act of April, 1878. For instance, this latter enactment does not touch the powers of the Secretary as regards the superintendence of suits, or the mitigation of penalties. The opinion of the Attorney-General of February 17, 1882, referred to by you, goes upon this view, although it is one only *incidental* to the point which he there discusses.

I am now asked in effect how far this act modifies the provision designated above as "(2)".

In my judgment it applies only to that part of the penalty which is *payable to the Secretary*.

Since the year 1831, when the provisions of section 4751 were first enacted, it has become the general policy of the United States to require that all moneys collected in behalf of the United States shall be paid into the Treasury (Rev. Stats. sec. 3617.) Some exceptions thereto, not depending upon any special reason, which here and there had escaped attention, are gradually disappearing. I regard the provis-

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Timber Depredations.

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ion of the above act of 1878 merely as putting an end to one of these exceptions.

This is the more evident from the circumstance that it operates expressly upon all collections *theretofore*, as well as upon those *thereafter*. As the legislature could not have meant to disturb the informer's rights in the former cases—at all events in many of them—it appears that they were not *advertent*, or therefore *referring*, to such rights *in any case*.

So that what is meant is, that so much of such moneys as is collected *for the United States* shall be paid *into the Treasury*, and not, as theretofore, *to the Secretary*. The emphasis is upon *the disposal*—not the *proportion*—of certain moneyed interests of the United States.

That this is the true interpretation appears also from a corresponding passage in the act of June, 1878, where, although section 4751 is expressly *repealed*, yet express provision (*ex abundanti*) is added as to the payment *into the Treasury* of the proceeds of the sales therein ordered: as if it had not been enough to repeal the provision which gave what had been, to a certain extent, the equivalents of such proceeds *to the Secretary*, but were necessary also to direct expressly that the proceeds themselves shall follow the general direction of public moneys.

The two acts of 1878, therefore, have their distinct operations; that of April applying to the whole country, and merely directing that whatever moneys vest in the United States under section 4751 shall thereafter be paid into the Treasury; that of June applying to certain localities only, and for them entirely annulling section 4751 adding also a proviso that any moneys which might arise from the methods therein devised as substitutes for those referred to in section 4751 should (in like manner) be paid *into the Treasury*.

Very respectfully,

S. F. PHILLIPS,  
*Acting Attorney-General.*

THE SECRETARY OF THE NAVY.

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Claim of the State of New York.

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## CLAIM OF THE STATE OF NEW YORK.

The claim of the State of New York for reimbursement of the interest paid by that State on money borrowed and expended in enrolling, subsisting, clothing, etc., its troops employed to aid in the suppression of the rebellion is not allowable under the provisions of the act of July 27, 1861, chapter 21.

To construe the provisions of that act so as to include a claim for interest thus paid would be giving them a meaning much broader than that which has in practice been given other legislation of like character, or than seems to be warranted by any sound rule of interpretation.

DEPARTMENT OF JUSTICE,

July 23, 1883.

SIR: Your letter of the 7th of June, 1882, and the papers which accompanied it, present for my consideration the following question: Whether the claim of the State of New York for *interest* paid by that State on money borrowed and expended in enrolling, subsisting, clothing, etc., its troops employed to aid in the suppression of the rebellion is within the provisions of the act of July 27, 1861, entitled "An act to indemnify the States for expenses incurred by them in defense of the United States." Delay in answering this question has been occasioned mainly by the demands, from time to time, of other business that seemed to require immediate attention. I have now the honor to submit my views thereon.

The act of July 27, 1861, provides: "That the Secretary of the Treasury be and he is hereby directed, out of any money in the Treasury not otherwise appropriated, to pay to the Governor of any State, or to his duly-authorized agents, the costs, charges, and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers, to be filed and passed upon by the proper accounting officers of the Treasury." By a resolution passed March 8, 1862, the above provision is to be construed to apply to expenses incurred as well after as before the date of the approval thereof.

Under this legislation the State of New York has already been reimbursed the amount of money which was expended

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Claim of the State of New York.

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by it for the objects specified in the act of 1861, exclusive of interest paid on the money so expended, all of which the State was compelled to borrow. Such interest formed an item in the account rendered by the State, but was not allowed in the adjustment thereof made at the Treasury, the accounting officers not regarding it as admissible under the statute. On the part of the State, however, it is urged that the interest mentioned properly constitutes a part of the "costs, charges, and expenses" incurred for the objects above referred to, within the meaning of said act.

According to the construction originally adopted, and thus far uniformly acted upon, in settling the claims of States under the act of July 27, 1861, the provisions thereof extend only to such outlays by the State as were made *directly and specifically* on account of "enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops;" and as payments made by the State on account of interest upon a loan to it of the money thus expended, though the expenses incurred for those objects were indirectly and in a general way augmented thereby, are not strictly outlays of the above character, such payments do not come within the scope of the act.

This interpretation accords with that which prevailed in the execution of similar provisions under which States were re-imbursed for advances made by them during the war of 1812 and other subsequent wars.

By the act of April 29, 1816, chapter 160, an appropriation was made "for defraying the expenses incurred by calling out the militia during the late war," in addition to the sums theretofore appropriated to that object, which was applied to the re-imbursement of States for advances to meet such expenses. By the act of March 3, 1817, chapter 86, an appropriation was made "for the payment of balances due to certain States on account of disbursements for militia employed in the service of the United States during the late war." And by the act of April 20, 1818, chapter 109, an appropriation was made "for the payment of balances due several States, on an adjustment of their accounts, for expenses incurred by calling out the militia during the late war." Although in each of these provisions very general and comprehensive

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Claim of the State of New York.

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terms are employed, yet they were not construed to authorize the re-imbursement of expenditures made by the States on account of interest, and no claims for such expenditures were allowed thereunder. Congress subsequently provided for these claims by special legislation (thus impliedly recognizing the construction given the general provisions as above), and prescribed certain rules for their adjustment (see act of March 3, 1825, chapter 106; May 13, 1826, chapter 39; May 20, 1826, chapter 77; May 22, 1826, chapter 151; March 3, 1827, chapter 79; March 22, 1832, chapter 51).

So by the act of August 11, 1842, chapter 127, an amount was appropriated "to the payment and indemnity of the State of Georgia, for any money actually paid by said State on account of necessary and proper expenses incurred by said State in calling out her militia," during the Seminole, Cherokee, and Creek campaigns, in the years 1835 to 1838; and by the act of August 16, 1842, chapter 178, the Secretary of War was directed to audit and adjust the claims of the State of Alabama "for moneys advanced and paid by said State for subsistence, supplies, and services of local troops called into service by and under the authorities of said State," etc., during the Creek and Seminole hostilities. Under neither of these acts were allowances made for advances on account of interest. But by the act of January 26, 1849, chapter 25, in the case of Alabama, and by the act of March 3, 1851, chapter 35, in the case of Georgia, Congress made special provision for such allowances under rules and according to rates there prescribed.

By a resolution of Congress passed March 3, 1847, a provision was made for refunding to the several States, etc., the amount of expenses incurred by them in organizing, subsisting, and transporting volunteers previous to their being mustered and received into the service of the United States" for the Mexican war. This provision, it would seem, was not regarded as authorizing re-imbursement for interest paid upon moneys expended for those purposes; since it was apparently deemed necessary, in order to authorize such re-imbursement, to provide therefor by further legislation, which is found in the amendatory act of June 2, 1848, chapter 60.

Undoubtedly the interest paid by the State of New York

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Claim of the State of New York.

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on money borrowed and applied to the object specified in the act of July 27, 1861, forms a part of the burden borne by that State for the general public defense, and constitutes a just charge against the United States; and the obligation to re-imburse for payments of that kind, made under similar circumstances, has frequently been recognized by Congress, as appears by statutes above cited. But to construe the provisions of that act so as to include such expenditures would be giving them a meaning much broader than that which has, in practice, been given other legislation of like character and purpose or than seems to be warranted by any sound rule of interpretation. Where a payment from the Treasury is claimed under a statute, the payment, in order to be allowed, should appear to be authorized either expressly or by very clear implication (9 Opin., 59). The language of the act under consideration, viewed with reference to claims based upon expenditure for interest, does not satisfy that requirement; for while no authority to re-imburse the States for interest paid by them is expressly conferred thereby, such authority is not clearly to be implied therefrom. Indeed, the absence of any provision in the act expressly authorizing reimbursement for interest rather gives rise to the implication that such re-imbursement was not meant to be allowed thereunder, as in other similar cases re-imbursement for interest has generally been made the subject of express authorization where Congress intended its allowance.

I am accordingly of the opinion that the claim of the State of New York, referred to in the question submitted, does not come within the provisions of the act of July 27, 1861.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

*Secretary of the Treasury.*

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Passenger Vessel.

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## PASSENGER VESSEL.

A tug-boat, used for the purpose and in the manner stated in the opinion, can not be called a "passenger vessel" or "a vessel carrying passengers," within the provisions of sections 4464 to 4469, Revised Statutes.

DEPARTMENT OF JUSTICE,

July 26, 1883.

SIR: Yours of the 24th has been received and considered. It states the following case and questions:

"A steam-vessel used in the harbor of New York City for the purpose of towing other vessels to and fro has taken on board from time to time the masters of the vessels thus towed, and sometimes one or more members of the crew of such vessels, and has conveyed them from the shore to the vessels, or *vice versa*. No special compensation has been received for so doing. It has been a gratuity or favor to the persons thus carried. Is such a tug within the provisions of the United States Revised Statutes relating to the carriage of passengers on steam-vessels (secs. 4464 to 4469 inclusive)? Can she be called a passenger vessel or a vessel carrying passengers?"

I have also in this connection read the opinion of a former Solicitor of the Treasury (December 19, 1874), transmitted by you.

I entirely agree with the view intimated by you, that the tug-boat in question can not be called a "passenger vessel" or "a vessel carrying passengers," within the statutory provisions to which you refer.

I believe that I need not detain you by any discussion of this matter.

With great respect,

S. F. PHILLIPS,

*Acting Attorney-General.*

THE SECRETARY OF THE TREASURY.

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Brig General Armstrong.

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## BRIG. GENERAL ARMSTRONG.

Reconsideration of opinion of July 7, 1883 (*ante*, p. 590), and conclusion there reached, respecting the claim of Mr. S. C. Reid, jr., reaffirmed.

DEPARTMENT OF JUSTICE,  
July 31, 1883.

SIR : I have carefully reconsidered my opinion on the case presented by your communication of the 15th June ultimo in the light of the arguments submitted by Mr. S. C. Reid, dated the 18th of July current, and see no reason to change my opinion.

The claim of Mr. Reid to receive the money in question as the assignee or attorney of the owners of the brig *General Armstrong* must fail, unless it can be shown that Capt. S. C. Reid had power under the assignment to him by the owners of the brigade, dated the 12th of September, 1835, to devolve upon another the trusts and confidences reposed in him by that instrument.

It may be observed, before discussing the terms of the assignment, that, as its effect was to give Captain Reid unreserved control over the interest assigned, binding the assignors to accept any adjustment he might see fit to make, it would seem to be reasonable in expounding the writing to require that the asserted intention to give the trustee named the power to transfer the delicate and important trusts confided to him should be plainly manifested.

Mr. Reid's pretension to receive this money as assignee of Captain Reid is based entirely on the fact that the assignment of September, 1835, to Captain Reid is to him, "his heirs and assigns, forever." The presence of these words "heirs and assigns" he considers sufficient to have warranted Captain Reid in devolving upon him the trusts and powers of the assignment.

It is clear to my mind, however, that the terms "heirs and assigns" were used for no such purpose in that instrument, but were employed merely as words of limitation, to denote the measure of the interest assigned, and to manifest an intention to transfer all the rights the assignors had in the premises.

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Brig General Armstrong.

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An examination of the whole instrument leaves no room for doubt, in my opinion, that this view is correct.

In the first place, the real consideration of the assignment is "the undertaking of Samuel O. Reid, of New York, to bear all the expenses and charges and to perform all necessary services for the collection of the demands hereafter mentioned," and it was to induce the performance of that consideration by Reid alone that the assignment was made to him, "his heirs and assigns, forever."

But the assignment to Captain Reid, "his heirs and assigns," is made expressly subject to the payment to the parties interested of the one-half of any money "that he may receive for or on account of said vessel;" which is a somewhat remarkable provision if Mr. Reid's theory is correct, seeing that it was to be expected, in that case, that the assignment would be made subject to the payment not only of one-half of the money to be received by Captain Reid himself but of the money that might possibly be received by his heirs or assigns. The absence of any such reference to the heirs or assigns of Captain Reid is full of significance.

But the omission of all mention of the heirs or assigns of Captain Reid in the concluding paragraph of the assignment is conclusive. It is in these words: "We further authorize the said Samuel O. Reid, irrevocably as our attorney and agent, to take such legal proceedings in the premises and to receive such moneys and make compromises and agreements as to him may seem meet and proper." It is much more than improbable that the grant of these enumerated powers would have been restricted to Captain Reid alone, if the grantors had contemplated the possibility that his heirs or assigns might be called on to exercise them.

But there is still another view that seems to be absolutely fatal to Mr. Reid's claim. Admitting his pretension that it is within the purview of the assignment that the heirs or assigns of Captain Reid might be required to execute its powers and trusts, it is manifest that the possibility of their being called on for that purpose is entirely dependent on Captain Reid's dying without having accomplished the object of the assignment; for it is impossible to suppose that the parties interested could have intended that Captain Reid should

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Brig General Armstrong.

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have power to transfer these delicate personal trusts to any body in his life-time. It would be strange, in the absence of very explicit language, to impute to the parties interested in these delicate trusts the intention to empower their trustee, especially chosen for his personal character and qualifications, to abdicate the trusts in his life-time at his option and turn them over to any person he might see fit. As was said by Lord Langdale in the case of *Titley v. Wolstenholme* (7 Beavan, 435), it is not reasonable to suppose that the author of the trust intended it should be transferred to a trustee not especially trusted and chosen until after the death of the trustee who was especially trusted and chosen.

But the argument of Mr. Reid proves too much, for if it is sound as to the assigns of Captain Reid, it follows by parity of reason that it must have been in the contemplation of the authors of the trust in question that, in case Captain Reid should die without making an assignment of the trust, the persons at the time of his death answering to the description of his heirs, whoever they might be, feme coverts, infants, idiots, or lunatics, should assume the important and delicate responsibility of negotiating a settlement of the claim. Surely an interpretation which leads to such a result can not be sound.

It may be questioned whether the books furnish an instance where trusts of the character of those committed to Captain Reid have been made assignable by the trustee. I am inclined to think that it will be found that the cases in which such a power has been given the trustee involve trusts of a character largely ministerial.

As to the arguments founded on the language of the act of Congress touching the claim growing out of the destruction of the *General Armstrong*, it is sufficient to say that Mr. Reid's rights and powers as assignee of Captain Reid derive no increase from that source, it being entirely foreign to the purpose of that act to interfere with the contract relations of the claimants, their agents and assigns.

Passing now to the question of Mr. Reid's authority to receive the money coming to the officers and crew of the vessel. Mr. Reid insists that he has express authority from them to receive this money. In your communication of the

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Army Paymasters' Accounts.

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15th of June, ultimo, presenting the case on which my opinion was asked, you say, "Mr. Reid, jr., held no power of attorney or assignment or anything in the nature of such a document from the officers and crew of the vessel." Assuming this to be correct, as I must, I see no occasion for modifying my opinion on this head.

As to the question of Mr. Reid's right to be reimbursed for certain expenses incurred for the benefit of the claimants, my opinion on this point is given in my reply to your communication of the 11th of July current, which for the first time presented that question to me.

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

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF STATE.

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ARMY PAYMASTERS' ACCOUNTS.

Opinion of July 27, 1882 (*ante*, p. 246), on certain questions concerning paymasters' accounts, reconsidered.

A pay account of Lieutenant M., for the month of August, 1877 (he being on duty within the limits of the New York pay district), was paid by the chief paymaster at New York, and soon afterwards a second pay account of Lieutenant M. for the same month was paid by another paymaster there, who had no knowledge of the previous payment, nor was it practicable for him to obtain such knowledge: *Held* that the last-mentioned paymaster is not chargeable with the amount so paid by him, but that, by virtue of the Army Regulations (paragraph 1006, Regulations of 1863; paragraph 1652, Regulations of 1881) he is entitled to have the same passed to his credit.

A third account of Lieutenant M. for the same month was paid to an assignee by a paymaster at Charleston, S. C., the latter knowing that Lieutenant M. was not then serving within the Charleston pay district. Viewing this case in connection with paragraph 1348, Regulations of 1863, and certain circulars from the Paymaster-General's Office mentioned: *Held* that the payment of this account was wholly unauthorized, and that the paymaster is properly chargeable therewith.

DEPARTMENT OF JUSTICE,

October 11, 1883.

SIR: In compliance with your request of the 3d of March last, accompanying which was a letter of Maj. E. D. Judge (retired), and other papers, I have reconsidered, in connection with the additional information thereby furnished, cer-

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tain questions upon which I had the honor to communicate to you an opinion on the 27th of July, 1882.

It appears that funds for the payment of Army officers for services within the fiscal year commencing July 1, 1877, did not become available until some time in November, 1877, on the 24th of which month an account of Lieutenant M. (then on duty within the limits of the New York pay district) for the month of August, 1877, was paid to an assignee by the chief paymaster at New York; that on December 4, 1877, another account of Lieutenant M., for August, 1877, was paid to an assignee by another disbursing officer there, namely, Paymaster A., who had no knowledge of the previous payment of the account, nor was it practicable for him at that time to obtain such knowledge through official sources of information; that Lieutenant M. was not then under stoppage or other disability as to pay, but that subsequently, in March, 1878, he deserted the service, indebted to the United States for overpayment, etc., between \$500 and \$600, and that Paymaster A., having been charged with the amount paid by him as aforesaid, asks that the charge be removed. And the question hereupon presented is, whether he is chargeable with the amount so paid.

By the Regulations of the Army (paragraph 1343, Regulations of 1863; paragraph 2378, Regulations of 1881), officers are paid on accounts certified by themselves; and the same Regulations provide that "if any account paid on the certificate of an officer to the facts is afterwards disallowed for error of fact in the certificates, it shall pass to the credit of the disbursing officer, and be charged to the officer who gave the certificate." (Paragraph 1006, Regulations of 1863; paragraph 1652, Regulations of 1881.) Those provisions, which were not brought to my attention when the before-mentioned opinion was given, have an important bearing upon the above question.

The assignment by an Army officer of his pay account is not prohibited by law (10 Opin., 271). The Regulations of the Army, however, forbid him to transfer it before it is due. (Paragraph 1349, Regulations of 1863; paragraph 2380, Regulations of 1881).

Upon consideration, I am of opinion that, under the circum-

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stances above stated, Paymaster A. is not chargeable with the amount paid by him as aforesaid, but that, by virtue of the before-mentioned provision of the Army Regulations, (paragraph 1006, Regulations of 1863), he is entitled to have the same passed to his credit.

It is true, at the time of such payment there was nothing due Lieutenant M. in respect of his service for August (the same having already been paid for), and under the application of general rules of law, Paymaster A. would be liable for the overpayment. But the provision referred to renders those rules inapplicable here. It operates to protect a disbursing officer from liability where payment is made, as in the case of an officer's pay account, on the faith of the officer's certificate alone, the correctness of which the disbursing officer has no reason to question, and where the officer whose account is presented is not under stoppage.

A second question is presented upon the following facts: Paymasters A. and B., at New York, paid accounts of Lieutenant M. for November, 1877, B. on the 30th of November, 1877, and A. on the 4th of December, 1877. Each payment was made to an assignee. It is assumed that the account paid by B. had been transferred before it became due, and that he must have known this. It is also assumed that the account paid A. had been transferred before it became due. A. has been charged with the amount of the payment made by him; B. has not been charged. The question is whether A. is liable for the overpayment for November.

The provision in the Army Regulations forbidding an officer to transfer his pay account before it is due does not have the effect to render void a transfer made before the account is due; so that the payment to an assignee by B. in the above case was valid, for which he has properly received credit. The subsequent payment by A. of Lieutenant M.'s account for November was therefore an overpayment; but the circumstances under which it was made appear to have been no different from those under which the overpayment of the same officer's account for August took place. Accordingly, on considerations already stated in connection with the latter, I answer the question of A.'s liability for the overpayment for November in the negative.

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A third account of Lieutenant M. for November, 1877, was paid to an assignee by Paymaster C., at Charleston, S. C., December 6, 1877, C. knowing that Lieutenant M. was not then serving within the Charleston pay district. C. has been charged with the amount paid by him, and the question here presented is, whether he is chargeable with the overpayment so made.

In connection with this case reference is made to paragraph 1348, Army Regulations of 1863, and to Circular No. 15 from the Paymaster General's Office, dated June 18, 1864; Circular No. 49 from the same office, dated August, 9 1865; Circular No. 53, from the same office, dated January 29, 1867, reissued March 5, 1869.

Paragraph 1348 of the Regulations of 1863 provided: "As far as practicable officers are to draw their pay from the paymaster of the district where they may be on duty." The circulars cited were intended to enforce a strict compliance with that regulation, in order the better to guard against double payments and frauds.

Viewed in connection with paragraph 1348 and the circulars referred to, I think the payment by C., as above, was wholly unauthorized, and that he is properly chargeable therewith. The assignee of an officer's pay account must be deemed to take it subject to the same restrictions respecting the place of payment to which the officer himself is subject, and a disbursing officer who, disregarding such restrictions, pays the assignee, does so at his own risk.

Paymasters A. and B., at New York, each paid to an assignee an account of Lieutenant M. for December, 1877, on the last day of that month. A third account of Lieutenant M. for that month was presented at a later date to B., but payment was declined. The circumstances under which the above payments were made appear to be similar to those under which the overpayments at New York of Lieutenant M.'s accounts for August and November were made. Hereupon it is inquired: Shall A. or B., or both A. and B., be charged with the double payment for December?

In answer to this, I submit that the same considerations which negative the liability of A. for overpayments for August and November, as aforesaid, also negative the liabil-

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ity of either A. or B. for the overpayment for December, and that in my opinion neither should be charged therewith.

Some cases and questions, other than those stated in the foregoing, were passed upon in my opinion of the 27th of July, 1882. On reexamination of these cases and questions I feel entirely satisfied with the views then expressed thereon. For convenience I here repeat so much of that opinion as relates to them:

"Two accounts of Lieutenant Mast for January, 1878, which had been received at the New York office from assignees, were forwarded by the chief paymaster to the Paymaster-General indorsed as follows: 'Payment refused, both accounts being for January, 1878, and received before the expiration of the month.' On the 1st of March, 1878, said Paymaster B., 'after inquiring in all the offices if his (Mast's) accounts for February had been either presented or paid,' paid an account of Mast for February, 1878, to an assignee. Said account had evidently been transferred before maturity, and as Mast's post was Fort McHenry, and the assignee resided in Wheeling, W. Va., B. was chargeable with notice of the fact. Besides, B. knew that at least two accounts had been presented for December, and he was chargeable with notice as to the condition of Mast's account with the Government, at least so far as the same was affected by payments made to him or to his assignees through the New York office; and proper inquiry would have developed the fact that, by reason of duplication of payments, Mast was in arrears to the United States (see section 1766, Rev. Stat.) Is B. chargeable with the account so paid by him for February, 1878?

"If the aggregate of the charges against paymasters on account of payments made to Mast be in the end found to exceed the loss actually sustained by the United States, how will the amount of that loss be apportioned?"

To the former of these questions I reply, that if B. was chargeable with notice, when he paid the account for February, that Mast was then in arrears to the United States, he incurred liability for the payment so made; and the result would be the same, I think, if the facts then in possession of B. were such as to put him upon inquiry as to the state

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of M.'s account with the Government, otherwise B. would not be liable for the payment, and could not properly be charged therewith.

To the other question I reply, that the apportionment of loss should be pro rata. Thus, if the amount of overpayments chargeable to A. be \$200 and the amount chargeable to B. \$300, and the Government should receive from M. a portion of the loss sustained, say \$100, the balance of the loss should be borne by A. and B. in proportion to the amounts with which they are charged respectively, that is to say, \$160 by A. and \$240 by B.

Another case is presented, as follows: "Paymaster E. paid an account of James H. Whitten, second lieutenant Fifth United States Infantry, for April, 1877, on the 9th of May, 1877, to an assignee, and another for the same month on the 31st of May, 1877, to Whitten himself. E. has been charged with the amount of the overpayment. Whitten left the service May 31, 1877. He never drew his pay for January, 1877. He is charged with the sum of \$98.25 on the Third Auditor's books, and with the sum of \$673.96 on the Second Auditor's books, the latter charge being on account of ordnance and ordnance stores for which he was responsible. E. asks that said January pay be so applied as to relieve him from responsibility for said overpayment.

"It is the practice of the accounting officers to follow the order prescribed in paragraph 1363 of the Army Regulations of 1863, and where an officer is in arrears to reimburse the United States out of his undrawn pay for public property unaccounted for, to the exclusion, if necessary, of a paymaster who has made an overpayment.

"Ought the charge against E. to be removed as he requests, or ought the practice hitherto obtaining to be adhered to?"

In reply to this question I submit that E. has no right, as against the United States, to have the said January pay of W. applied for his own relief. At the time E. incurred liability for the overpayment to W. (May 31, 1877), the latter, as it would seem, already stood indebted to the United States; and on general principles, irrespective of the practice referred to, the pay mentioned should first be applied in satis-

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faction of such indebtedness. I accordingly answer the first branch of the question in the negative and the alternative or last branch in the affirmative.

The following case is also presented: "An account of E. W. Maxwell, second lieutenant Twentieth United States Infantry, for March, 1878, was paid on the 30th of that month at New York City, by Paymaster D. Said Maxwell was on duty at that place from March 2 to April 8, 1878. The propriety of the payment so made is not doubted. Paymaster E., at Washington, D. C., paid a second account of Maxwell's for March on the 31st of March, and an account for April on the 30th of April, 1878. Maxwell was not serving within the limits of the Washington office on either of the dates last mentioned. Each of the accounts paid by E. was held by an assignee, and had been transferred before maturity. E. has been charged with the entire amount paid by him. A second account for April was paid by Paymaster F. at San Antonio, Tex. Maxwell was on duty within the limits of the San Antonio office from April 26 to May 31, 1878. He was dismissed from the service by sentence of court-martial in August, 1878. It appears from the record of the court that the account paid by F. was paid before the end of the month (see sec. 3648, Rev. Stats.) to an assignee, to whom it had been assigned before it was due. F. has been charged with the amount paid by him.

"Maxwell being credited with all undrawn pay, it was found by a settlement, confirmed February 21, 1879, that his pay was overdrawn in the sum of \$15.55. He is indebted to the United States in the further sums of \$138.57 and \$295.48 for public property received by him April 7 and 15, 1878, for which he failed to account, as appears by a settlement confirmed February 20, 1880, since which date he has stood charged with the total sum of \$449.60.

"In May, 1881, the assignee to whom Paymaster E. had paid Maxwell's account for April presented certain claims to Paymaster F. for payment. From the amount of claims so presented F. withheld a sum equivalent to Maxwell's pay for April, 1878, proposing to deposit the same in the Treasury to make good the duplicate payment made to said assignee by Paymaster E. for that month. Said assignee

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Army Paymasters' Accounts.

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having presented the case to the Paymaster-General, that officer, on the 9th of June, 1881, asked of the Second Auditor that he be "furnished with a copy of any settlement made in your (the Second Auditor's) office of the pay of Lieut. E. W. Maxwell, Twentieth Infantry, showing his present indebtedness to the United States on account of pay." The Paymaster-General's letter was returned by the Second Auditor's office with an indorsement stating that copy of statement in the case of Maxwell was inclosed. The paper inclosed was a copy of the statement of account, with the settlement confirmed February 27, 1879, indicating a balance of pay overdrawn \$15.55, and no reference was made to the settlement of February 20, 1880, nor to the balance, \$449.60. Thereupon the Paymaster-General, in July, 1881, directed F. to refund to said assignee the difference between the sum withheld by him as aforesaid and the sum of \$15.55, the latter sum being the balance found due in said settlement of February 27, 1879. F. did as he was directed. It is claimed that no charge should be enforced against either E. or F. on account of payments for April, 1878.

"Shall E. be relieved from responsibility on account of his payment to Maxwell for March, and shall E. and F., or either of them, be relieved from responsibility on account of said payments to Maxwell for April, 1878?"

I answer: The facts above set forth furnish no ground whatever for relieving E. from his liability for the payment of M.'s second account for March. But in regard to the overpayment for April, the claim for relief therefrom seems to be well founded. The assignee of M.'s account for that month, to whom E. made payment, had at the time of such payment no claim against the United States by reason of the assignment; an account of M. for the same month having then already been paid by F., and thus nothing being then due to M. for that period. When, therefore, the assignee subsequently presented claims for payment, an amount due on such claims sufficient to offset the overpayment for April might properly be retained, as it in fact was retained for that purpose by F. The relinquishment of this amount by the latter, which was available for the extinguishment of the liability incurred for the overpayment for April, can not, un-

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Case of Lieutenant-Colonel Gibson.

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der the circumstances stated, justly operate to the disadvantage of either F. or E. They should not be made to suffer for the error or inadvertence of other officials. In my opinion they are entitled to be relieved from liability for that overpayment.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,

*Secretary of War.*

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CASE OF LIEUTENANT-COLONEL GIBSON.

Lieutenant-Colonel G., though his commission is junior in date to that of Lieutenant-Colonel B., claims that he is entitled to the next colonelcy over the latter, by reason of errors committed in his promotion in 1847 and 1867: *Advised* that such errors, if any, can not now be rectified by disregarding the fact that B., in virtue of his present commission, is senior to G. in the line of promotion, and that the claim of the latter is therefore inadmissible.

DEPARTMENT OF JUSTICE,

*October 16, 1883.*

SIR: Agreeably to your request of the 12th instant, I have considered the claim of Lieut. Col. H. G. Gibson, Second Artillery, to promotion to the rank of colonel, and now have the honor to submit my opinion thereon.

By the law regulating the military service, vacancies in established regiments and corps to the rank of colonel are to be filled by promotion according to seniority, except in case of disability or other incompetency; and promotions to that rank in the line of the Army are to be made according to the arm, as infantry, artillery, etc., and in the staff departments, and in the engineers and ordnance, according to the corps (Rev. Stat., sec. 1204; Army Regulations of 1881, paragraphs 36 and 37). Thus a vacancy in the grade of colonel occurring in the artillery must be filled by appointing thereto the senior lieutenant-colonel in that arm (where no "disability or other incompetency" exists), he standing, with reference to such vacancy, first in the line of promotion.

According to their present commissions Lieut. Col. C. L. Best, Fourth Artillery, is senior in rank to Lieutenant-Col-

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Case of Lieutenant-Colonel Gibson.

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onel Gibson in the grade (that of lieutenant-colonel) to which they both now belong, the commission of the former being dated March 15, 1881, while the commission of the latter bears date April 19, 1882. As between these officers, therefore, under the law of promotion above adverted to, the right to the next vacant colonelcy happening in the artillery arm of the service is *prima facie* in Lieutenant-Colonel Best.

But the claim of Lieutenant-Colonel Gibson is, that *he* is entitled to such vacancy over and above Lieutenant-Colonel Best. The grounds of his claim are thus stated by him in one of the papers referred to me (all of which are herewith returned) under date of September 22, 1883: "I claim that the fact of the *present* precedence of Lieutenant-Colonel Best as lieutenant-colonel is based on errors made by the War Department: first, in my promotion as second-lieutenant in 1847 (admitted as an error by the Adjutant-General in 1848 by letter to me); second, by improper and incorrect order of relative rank as majors in February, 1867; and third, because the Senate Military Committee, by its action in 1881, simply accepted the *dicta* of the War Department, without any decision as to the justice of my claim."

The errors alleged in support of this claim, if any there are, can not, in my judgment, now be rectified in the manner proposed by Lieutenant-Colonel G., that is to say, by the President disregarding the fact that Lieutenant-Colonel Best, in virtue of his commission, stands senior to Lieutenant-Colonel G. in the grade of lieutenant-colonel, and, when a vacancy occurs in the next higher grade in the artillery, appointing the latter above the former to fill it. This view coincides with that taken by one of my predecessors in the case of Lieutenant-Colonel Saxton, of the Quartermaster's Department, which was similar to the present case.

There Lieutenant-Colonel S., who stood number four in the grade of lieutenant-colonel, claimed that he had been over-slaughed by the promotion, in 1866, of the three officers standing above him in the same grade under an erroneous execution of the act of July 28, 1886, chapter 299, and he asked that the error be then (in December, 1880) rectified by the President by appointing him to fill the next vacancy occurring in the grade of colonel in the same corps over the

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 Customs Laws.
 

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three officers referred to. The President was, however, advised by the Attorney-General that he should treat the commissions signed by his predecessors as conclusive evidence of the right of those officers to the rank and authority given thereby; that while their commissions stand he should respect them, and, in making promotions in said corps, have regard to them; and that if Lieutenant-Colonel S. had sustained a wrong in the manner alleged, Congress could alone remedy it. (16 Opin. 583.)

I adopt these views as applicable to the present case, and am accordingly of opinion that the claim of Lieutenant-Colonel Gibson, as above, is inadmissible.

I am, sir, very respectfully, your obedient servant,  
 BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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 CUSTOMS LAWS.

The effect of the proviso in the act of March 3, 1883, chapter 121, declaring "that there shall be no allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits," was to repeal all the provisions previously in force which authorized such allowance; but it nevertheless permits the duties to be assessed on the actual quantity of merchandise imported, whether in casks or bottles.

Where the quantity which actually arrives is found by the customs officers to be less than the invoiced quantity, a deduction of the excess of the latter over the former, in adjusting the duties, is not an allowance within the meaning of the proviso mentioned.

DEPARTMENT OF JUSTICE,

October 26, 1883.

SIR: In your letter of the 16th instant you direct my attention to the proviso in Schedule H of the customs law of March 3, 1883, chapter 121, which declares "that there shall be no allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits," and after referring, in connection therewith, to section 59 of the act of March 2, 1799, chapter 22; section 21 of the act of July 14, 1870, chapter 255; and section 2 of the act of February 8, 1875, chapter 36, which provided for allowances of that character, you submit for my consideration the inquiry, "Whether the said

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Customs Laws.

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proviso merely does away with the arbitrary allowance in lieu of leakage and breakage, and allows the duties to be assessed on the actual quantity of merchandise imported whether in casks or bottles, or whether, if it does absolutely prohibit allowances for loss of quantity occurring on the voyage of importation, such prohibition extends to liquors in casks as well as those in bottles."

Having given this subject careful examination, I have now the honor to reply :

The act of 1799 authorized "an allowance of 2 per cent. for leakage on the quantity which shall appear by the gauge to be contained in any cask of liquors subject to duty by the gallon; and 10 per cent. on all beer, ale, and porter in bottles, and 5 per cent. on all other liquors in bottles, to be deducted from the invoice quantity in lieu of breakage, or it shall be lawful to compute the duties on the actual quantity, to be ascertained by tale, at the option of the importer, to be made at time of entry." This provision was applicable only to liquors, etc., subject to a specific duty. So much thereof as provided for allowance for leakage and breakage was expressly repealed by the act of 1870, by which a new provision was enacted namely, that "no allowance shall be made for breakage unless such breakage is actually ascertained by count and certified by a custom house appraiser." The latter provision was re-enacted in the Revised Statutes (sec. 2504, Schedule D), and thereafter remained the only provision on the subject in force until the passage of the act of 1875. This act provided "That there shall be an allowance of 5 per centum and no more, on all effervescing wines, liquors, cordials, and distilled spirits in bottles, to be deducted from the invoice quantity in lieu of breakage."

Such was the state of the law in regard to allowances on the importation of wines, liquors, etc., when the act of 1883 was passed; and the effect of the proviso in this act undoubtedly is to repeal all the provisions previously in force authorizing these allowances.

However, the prohibition of these allowances made by that proviso is not to be understood as otherwise introducing any new rule for the collection of duties. According to the principles settled by the cases of *Marriott v. Brune* (9

## Customs Laws.

How., 619); *United States v. Southmayd* (*ibid.*, 637); and *Lawrence v. Caswell* (13 How., 488), the duty is chargeable, not upon the quantity which may have been purchased and shipped abroad, but upon the quantity which actually arrives in the country.

In the first of those cases it is remarked by the court that "a deduction must be made from the quantity shipped abroad whenever it does not all reach the United States, or we shall in truth assess here what does not exist here. The collection of revenue on an article not existing would be an anomaly, a mere fiction of law, and is not to be countenanced where not expressed in acts of Congress, nor required to enforce just rights."

Accordingly, where the quantity which actually arrives at the port of entry is found by the customs officers to be less than the invoiced quantity, a deduction of the excess so appearing in the latter over the former, in adjusting the duties, would not in my view be an allowance within the meaning of the proviso above mentioned. It is only a mode of stating the quantity which is *dutiable*, in other words, the quantity of the merchandise *imported* and upon which alone the duty is imposed.

I am, therefore, of opinion that while that proviso does away with allowances of the character therein described formerly authorized by law, it nevertheless permits "the duties to be assessed on the actual quantity of merchandise imported, whether in casks or bottles."

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

*Secretary of the Treasury.*

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 Court-Martial.
 

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## COURT-MARTIAL.

H. was tried by a court-martial and found guilty of the offense charged. At the trial a witness objected to answering a question on the ground of self-crimination; but the court required him to answer, the Judge-Advocate reading in support of this requirement section 860, Revised Statutes: *Held* that if the court committed an error in compelling the witness to answer, the error is not such as to require a disapproval of the proceedings.

Whether the effect of that section is to take away from a witness the common-law privilege of declining to answer a question which tends to criminate him, when it is manifest that he could only be tried in the courts of the United States, *quære*.

## DEPARTMENT OF JUSTICE,

October 27, 1883.

SIR: I have the honor to acknowledge your communication of the 24th instant, inclosing proceedings of the general court-martial convened at West Point, N. Y., before which was tried Cadet James Hugh Hackett, fourth-class, Corps of Cadets, together with the report of the Judge-Advocate-General of the Army thereon.

It appears from the papers that Mr. Hackett was found guilty of the offense charged, that Michael Harrington, a witness, objected to answering a question propounded at the trial on the ground of self-crimination, and that the court compelled him to answer, the Judge Advocate reading to him "the section of the Revised Statutes under which the requirement was made."

You request my opinion whether the witness was improperly compelled to answer the question, and if so, whether the error is such as to require a disapproval of the proceedings.

The section read by the Judge Advocate was doubtless section 860, Revised Statutes (act 25th February, 1868), which in substance provides that no pleading, discovery, or evidence obtained from a party or witness in this or any foreign country by means of a judicial proceeding shall be used against him in any court of the United States in any criminal proceedings, etc.

This statute does not in terms take away from a witness the common-law privilege of declining to answer a question which tends to criminate him. Whether such would be its effect in this or in a foreign country, when it became manifest

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Court-Martial.

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that only in the courts of the United States could the witness be tried, is another question, and one not entirely free from doubt. Deady, J., in *United States v. Brown* (1 Sawyer, 536), is of opinion that this is the purpose of the act.

The act may have been passed merely for purposes of inducement, so that the witness, secure from adverse use of his testimony, would be willing to waive the privilege accorded by courts of foreign countries as well as of our own, or it may have been declaratory of the general rule "that evidence given or statements made by a party under compulsion or order of court tending to criminate himself cannot be put in evidence on a criminal proceeding against him." (Per Miller, J., 2 Dillon, 405.)

The act of 25th February, 1868, seems to have received very little discussion in either House of Congress, and while the debates are not authoritative in the interpretation of statutes, it is not unworthy of note that Mr. Frelinghuysen, the mover of the bill, said that it would not take away from a party the privilege of remaining silent and refusing to answer. (Congressional Globe, second session 40th Congress, 951.)

I prefer to leave the question of the effect of this statute to the courts, by whom alone it can be definitely decided, especially as it does not seem to me that the error in the present case, if one has been committed, is one of which the defendant can complain.

In *The Commonwealth v. Kimball* (24 Pick., 369) Shaw, C. J., expresses the opinion that the defendant could take advantage of an error of this kind, because, "if the evidence was incompetent and the objection reasonably taken by the proper party and by law ought to have been sustained, it could not be held that the verdict was supported by legal evidence." This expression was *obiter dictum*, and moreover is erroneous, in assuming that the evidence delivered under compulsion was "*incompetent*."

In the analogous case of an attorney testifying to the contents of a deed belonging to his client not a party to the cause, Lord Denman, C. J., held that, the evidence having actually gone before the jury, the defendants were not a privileged party, and had no right of objection even on the

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Court Martial.

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supposition that the judge below had done wrong. (*Marston v. Downes*, 1 Adolp. & Ellis, 31.)

It is decided by an abundance of authority that the privilege of refusing to testify is a purely personal one; that the witness may waive it; that no objection from the parties on the score of crimination of the witness can be entertained; and that the counsel for the witness can only be heard in defense of his right.

It would seem to follow that where this right has been violated it is for him to complain and not the defendant. Having no rights in the first instance, the defendant cannot, either on a motion for a new trial or on a writ of error, allege that he has been wronged. The question was squarely presented in *Cloyes v. Thayer* (3 Hill, 564) upon a motion for a new trial. The language of Nelson, C. J. (subsequently adopted in *Clark v. Reese*, 35 Cal., 89), is so clear, that I reproduce it:

"The court erred, also, in compelling the payee of the note to answer questions tending to criminate himself. It was expressly held in *Burns v. Kimpshall* (24 Wend., 360) that the answer in a like case might tend to subject him either to a penalty or to an indictment for a misdemeanor. But the error is not available to the plaintiff. The privilege belongs exclusively to the witness, who may take advantage of it or not at his pleasure. The party to the suit cannot object. He has no right to insist upon the privilege and require the court to exclude the evidence on that ground. The witness may waive it and testify, in spite of any objection coming from the party or his counsel. (*Thomas v. Newton*, 1 Moody & Malk., 48, note (b); *Treat v. Browning*, 4 Conn., 408; *Southard v. Rexford*, 6 Cowen, 259; Cowen & Mills's Notes to Phil. Ev., 748, (b). If ordered to testify in a case where he is privileged, it is a matter exclusively between the court and the witness. The latter may stand out and be committed for contempt or he may submit; but the party has no right to interfere or complain of the error. It would be otherwise if the court allowed the privilege in a case where the witness had not brought himself within the rule, as the party would then be improperly deprived of his testimony."

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Change of Time at Washington.

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Mr. Hackett is in no worse predicament than if Mr. Harrington had come forward voluntarily to testify, or, being compelled to attend, had failed to avail himself of his privilege. Should the findings be disapproved and a new trial ordered, it would depend, supposing the court-martial to have erred, upon Mr. Harrington's willingness to testify, whether the new trial would not result exactly as this one has.

I would therefore answer your second inquiry by saying that if the court-martial committed an error in requiring Mr. Harrington to answer, the error is not such as to require a disapproval of the proceedings.

The papers transmitted are herewith returned.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF WAR.

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CHANGE OF TIME AT WASHINGTON.

A change of time at Washington, D. C., by adopting the seventy-fifth meridian in lieu of the true meridian at that place (being a change of eight minutes and twelve seconds), can not be effected by mere executive authority. It can only be done by appropriate legislation.

DEPARTMENT OF JUSTICE,

October 31, 1883.

SIR: In your communication of the 24th of October instant, you ask if there is "any objection to adopting, on and after the 18th of November, the time of the seventy-fifth meridian as the local time in Washington, being a change of *eight minutes and twelve seconds* in the present city time."

In my opinion there is a grave difficulty in the way of effecting the change of time mentioned by mere executive authority.

When Congress has legislated with regard to time in this District, as for example in making it the duty of the heads of the several Executive Departments and heads of Bureaus to prescribe the number of hours employes shall labor, it must be presumed to have had in view the time of the meridian of the city of Washington, and it is not perceived how the time of any other meridian could be adopted without the authority of an act of Congress.

I am also of opinion that no substitution of the time of an-

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Postal Notes.

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other meridian for that of the meridian of Washington can be made operative generally in this District without appropriate legislation. In no other way can such a change be effective. To attempt to make it by executive act would be likely to introduce confusion and conflict; for some, regarding the executive order as having the force of law, would be governed by it accordingly, while others would treat it as merely recommendatory, and thus, from this want of uniformity, great prejudice might occasionally ensue to persons interested in transactions that must be carried on within certain hours or on or before given hours. The possibility, not to say probability, of such result is, in my judgment, a sufficient reason for not making the proposed change of time by an executive act.

In Great Britain the subject of establishing standards of time has been regarded as one for legislative action, and consequently, when it was sought to render definite references to time in acts of Parliament, deeds, and other legal instruments, a statute was passed for the purpose. (43 and 44 Vict., chap. 9.)

I have the honor to be, sir, your most obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE NAVY.

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POSTAL NOTES.

Postal notes, under the act of March 3, 1883, chapter 123, are required to be drawn payable only at the office selected by the remitter.

DEPARTMENT OF JUSTICE,

*November 8, 1883.*

SIR: I have the honor to acknowledge receipt of your communication of the 7th instant, requesting my opinion as to whether "postal notes" may be drawn payable at any money-order office, or must be drawn payable only at the office selected by the remitter.

The act of March 3, 1883 (22 Stat., 526), provides:

"That for the transmission of small sums under five dollars through the mails the Postmaster-General may authorize postmasters at money-order offices to issue money orders, without corresponding advices, on an engraved form to be prescribed and furnished by him; and a money order issued

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Civil Service.

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on such new form shall be designated and known as a "postal note," and a fee of three cents shall be charged for the issue thereof. Every postmaster who shall issue a postal note under the authority of the Postmaster-General shall make the same payable to bearer, when duly receipted, at any money-order office which the remitter thereof may select, and a postal note shall in like manner be payable to bearer when presented at the office of issue."

The words "which the remitter may select" are substantially the ones used in section 4028, Revised Statutes, which authorizes the issue of the ordinary postal money-orders; and while many reasons may exist why the designation of place of payment need not be contemporaneous with the issue where no letter of advice is sent, they do not seem to have been accepted by Congress, and the intention of the law is express that the remitter and not the payee should select the place of payment.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The POSTMASTER-GENERAL.

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CIVIL SERVICE.

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Departmental clerks whose salaries are \$900 or \$1,000 per annum, although not belonging to either of the classes in section 163, Revised Statutes, come within the scope of the act of January 16, 1883, chapter 27, and may be classified thereunder, for the purpose of examination, into one or more classes, as may be deemed expedient.

Under section 1753, Revised Statutes, the President may prescribe regulations for admission into the civil service, and thereby restrict original entry therein to one or more of the classes that may exist, or permit such entry to all of them as in his judgment will best promote the efficiency of the service.

If the \$900 or \$1,000 clerkships are constituted a distinct class, a promotion from such class to another class without examination, excepting where, in conformity to the act, the person to be promoted is specially exempted, would be forbidden by the act of January 16, 1883. To be eligible for appointment to any class (whether by promotion or otherwise) the applicant must have passed an examination to test his fitness for the place.

DEPARTMENT OF JUSTICE,

November 9, 1883.

SIR: The questions proposed by the Civil Service Commission, and by you referred to me for examination, are: (1)

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Civil Service.

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As to the classification of departmental clerks whose salaries are \$1,000 or \$900 per annum; (2) whether original entry to the classified departmental service is to be made at one or both of those grades only, or is also to be made at the grade of the first class, the salary of which is \$1,200 per annum; and (3) whether promotions are to be made from the \$900 or the \$1,000 clerkships to the \$1,200 clerkships without examination.

By the acts of March 3, 1853, chapter 97, and March 3, 1855, chapter 175, the permanent clerical force in each of the Executive Departments was required to be arranged into four classes (designated class 1, class 2, etc.), for each of which classes a different rate of compensation was prescribed. The annual salaries originally established (by the act of 1853) were \$900, \$1,200, \$1,500, and \$1,800 for clerks of the first, second, third, and fourth classes respectively; but by the act of April 22, 1854, the salaries of the clerks of the first, second, and third classes were fixed at \$1,200, \$1,400, and \$1,600, the compensation of clerks of the fourth class remaining unchanged. This classification, with the salaries for each class respectively as above, has been reproduced in the Revised Statutes. (Secs. 163 and 167.)

Yet since the adoption of that classification, which at first embraced the entire clerical force of the several Departments, excepting the chief clerks of the Departments and of Bureaus or offices therein and clerks temporarily employed, Congress has from time to time, as the exigencies of the public service required, not only increased that force by providing for additional clerkships of the several *classes* above named, but by providing for the employment of clerks who can not (according to the terms of the statutes authorizing their appointment) be deemed to fall within either of the classes mentioned—some at salaries above the highest, others at salaries below the lowest, compensation allowed for any of those classes. These clerks, so to speak, are unclassified, and in this category are the \$1,000 and \$900 clerkships under consideration.

Although the clerkships just adverted to do not belong to either of the classes enumerated in section 163, Revised Statutes, they nevertheless come within the scope of the act

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Civil Service.

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of January 16, 1883, entitled "An act to regulate and improve the civil service of the United States," and may be classified thereunder, for the purpose of the examination of applicants contemplated thereby, into one or more classes distinct from those enumerated as aforesaid, should this be thought expedient.

The classification called for by that act, as a correlative of the requirement that the fitness of applicants for positions in the civil service shall be tested by examination, is not restricted to that prescribed by section 163, Revised Statutes, but one commensurate with the purposes of the act is authorized. Thus the second section of the act declares that among the things to be provided for in the rules to be adopted by the Commissioners are "open competitive examinations for testing the fitness of applicants for the public service now classified *or to be classified* hereunder," manifestly referring not only to classifications already existing under section 163, Revised Statutes, but to classifications that might become necessary in order to carry out the purposes of the act.

In regard to original entry in the service, there is nothing in the act of 1883 that confines this to any particular class or grade. Authority is given the President by section 1753, Revised Statutes (which is not inconsistent with any of the provisions of said act,) to prescribe regulations for the *admission* of persons into the civil service; and under the authority so conferred original entry into such service may, in my opinion, be restricted to one or more of the classes or grades which may at the time exist, or be allowed to all of them, as in the judgment of the President will best promote the efficiency of the service.

The remaining inquiry is whether promotions from the \$900 or \$1,000 clerkships to the \$1,200 clerkships are to be made without examination. When, in 1853, the clerical force in the Departments was classified, it was provided that no clerk should be appointed in either of the four classes then established until after he was examined and found qualified by a board of three examiners. This requirement (which was re-enacted in section 1864, Revised Statutes), applied as well to cases of promotion as to cases of original ap-

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Unmailable Matter.

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pointment in the service. Whilst the provision referred to has become superseded by the civil service act of 1883, the latter preserves the requirement of an examination (to be made under its provisions) in order to be promoted to any class as well as to enter therein by an original appointment. Thus section 7 provides that "after the expiration of six months from the passage of this act no officer or clerk shall be appointed and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith."

Assuming, then, that the \$900 or \$1,000 clerkships are constituted a distinct class, it is plain that this provision forbids a promotion from such class to another class (*e. g.*, to the class of \$1,200 clerkships) without examination, unless the person to be promoted is, in conformity with the act, specially exempted from such examination. The general rule to be deduced from the provision I take to be this: that to be eligible for appointment to any class (whether by way of promotion or otherwise) the applicant must have passed an examination for the purpose of testing his fitness for the place.

I have the honor to be, your obedient servant,  
BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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UNMAILABLE MATTER.

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A circular of the World's Dispensary Medical Association, contemplating the sale of 100,000 copies of a certain book at \$1.50 per copy, and proposing to distribute among the purchasers a large amount out of the proceeds of such sale in sums ranging from 25 cents to \$6,000 per each purchaser: *Held* to be unmailable matter, it being manifestly a device to deceive and defraud the public.

DEPARTMENT OF JUSTICE,  
November 23, 1883.

SIR: I have the honor to return herewith a circular of the World's Dispensary Medical Association, submitted by you on the 22d instant, with a request for my opinion as to its mailability.

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Unmailable Matter.

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The circular contemplates the sale of 100,000 copies of a book called "The Peoples' Common Sense Medical Adviser," at \$1.50 per copy, and in substance assures the purchasers that of the \$150,000 thus resulting \$50,000 shall be set aside and returned to them in unequal sums varying from 25 cents to \$6,000. Each and every purchaser is to have at least 25 cents returned, but, as one purchaser is to have a property conveyed to him worth \$6,000, another is to have \$5,000 in cash, another \$3,000 in cash, it is manifest that a vast majority must be contented with 25 cents each in order to enrich the minority who are to receive the larger sums. Since no one is offered the opportunity to purchase at \$1, the net price to the vendors, the whole scheme is addressed to the cupidity of the public, and the desire of purchasers to participate in the opportunity of getting \$6,000 for an investment of \$1.50. If the distribution is made by lot or chance, the scheme in no wise differs from an ordinary lottery, and the thin disguise of calling the returns "presents" instead of "prizes" does not affect the matter at all.

A paragraph in the circular entitled "Plan or distribution" says that the company has decided not to make distribution by lot, but to leave the plan to a committee, without stating by whom it is to be selected, where it is to meet, or when to act. What this plan shall be is not stated, but if it is not to be the plan condemned by Congress, that is to say by lot, it must be some plan which is a still greater fraud upon the purchasers. A simple statement is the best; a committee not yet named is to take by a process not divulged 25 cents each from twenty-four thousand purchasers and give the aggregate \$6,000 to one purchaser. It would be difficult to conceive of a more transparent effort to deceive and defraud the public.

A disclaimer somewhat similar was urged in *Commonwealth v. The Sheriff* (10 Phila. Rep., 203). To this Paxton, J., said: "In *Commonwealth v. Manderfield* (27 Legal Intelligencer, 1870, p. 86), we had occasion to define an illegal lottery. Briefly stated, it may be said to be the distribution of prizes by chance. Whatever amounts to this, no matter how ingeniously the object of it may be concealed, is a lottery. This relator evidently regarded his occupation as at least ques-

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Brig General Armstrong.

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tionable by placing the words 'No lottery' upon his premises. An honest man has no occasion to place the words 'Not a thief' upon his hat."

In my opinion the circular should not be carried in the mails.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The POSTMASTER-GENERAL.

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BRIG GENERAL ARMSTRONG.

Under the power conferred by the act of May 1, 1882, chapter 115, the Secretary of State has no authority to pass upon the claim of Mr. Reid to be reimbursed expenses incurred by him as agent in the prosecution of the claims of the "captain, owners, officers, and crew" of the brig *General Armstrong*.

DEPARTMENT OF JUSTICE,

December 19, 1883.

SIR: I have considered your communication of the 29th of October, 1883, and am of opinion that inasmuch as the power conferred on you by the act of Congress of 1st May, 1882, concerning the brig *General Armstrong*, is *expressly restricted* to the claims of the "captain, owners, officers, and crew" of that vessel, I do not think you have any authority to pass upon the claim of Mr. Reid to be reimbursed for certain expenses incurred by him as agent in the prosecution of such claims.

Again, the range of your power under the act is expressly confined to "the evidence established before the Court of Claims." As this evidence has no bearing on the claim of Mr. Reid for expenses, and as you have no authority to entertain other evidence, there would seem to be no possible way of bringing this matter before you.

I have the honor to be, sir, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF STATE.

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Money-Order Business.

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## MONEY-ORDER BUSINESS.

To entitle a postmaster to receive compensation for issuing and paying money-orders under the provisions of section 4047, Revised Statutes, he must earn it by performing the service himself or having it performed by a clerk or agent employed and paid by him for that purpose.

DEPARTMENT OF JUSTICE,

*December 20, 1883.*

SIR: I have the honor to acknowledge the receipt of your letter of the 13th instant, citing section 4047 of the Revised Statutes, and stating that "this section is understood by the Post-Office Department as requiring a postmaster, in order to entitle him to receive the compensation therein provided for issuing and paying money-orders, to personally perform the services required in the money-order business at his office, in the sense that if the work is not physically executed by his hands, it must be executed under his immediate supervision by a clerk employed by him for that purpose, and who is in no way employed by the Post-Office Department proper, or paid from postal funds, as distinguished from money-order funds."

You state further that this view of the matter has not been accepted by many postmasters as a proper construction, and that it is deemed advisable to ask my opinion upon the subject.

It seems very clear to me that the section cited gives compensation to postmasters for issuing and paying money-orders only in consideration of their having earned it by their personal services (including that of their own paid agents, in case any part of that duty may be lawfully delegated). This rests on the plain doctrine that in such a contract of hiring the engagement of one party is to pay and the other to serve. The statute cited must be presumed to require this mutuality, and the postmasters who consider themselves to be entitled to pay under it without rendering or furnishing the service should produce some legislative declaration of their right.

Whether in any particular case there is foundation for such a claim will depend on the facts, and in the absence of these I can express no opinion further than to concur, as

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Inspection of Steam-Vessels.

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above, in your construction of section 4047 of the Revised Statutes.

As you state no special cases for me to pass upon, of course I must answer this on the abstract proposition which is the point and purpose of your letter.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. W. Q. GRESHAM,  
*Postmaster-General.*

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INSPECTION OF STEAM-VESSELS.

The inconvenience contemplated by section 4409, Revised Statutes, is such as grows out of the situation of the boat, or of the parties, viewed with reference to the location of the local board, whereby access to the latter is rendered difficult or expensive.

Where such inconvenience exists, the authority of the supervising inspector is, by virtue of that section, concurrent with that of the local board; and in cases acted upon by him under that authority there is no appeal.

But where the supervising inspector resides in the same city with the members of the local board, and they are not unable to act, and access to them is as easy and unimpeded as to any like board in the same locality, such inconvenience does not exist, and the supervising inspector would not be warranted in discharging the duties of the local board.

DEPARTMENT OF JUSTICE,

*January 4, 1884.*

SIR: By your letter of the 14th of November last my attention is called to the provisions in section 4409, Revised Statutes, authorizing a supervising inspector of steam-vessels, "in any district where, from distance or other cause, it is inconvenient to resort to the local board, to inspect any steam-vessel and the boilers of such steamer, and to grant certificates of approval, and to do and perform all the duties imposed upon local boards," and in connection with this provision the following questions are proposed for my consideration:

"Shall the power given by that section authorize the supervising inspector to initiate and take charge of an investi-

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Inspection of Steam-Vessels.

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gation under section 4450 of the Revised Statutes and conduct it to the exclusion of the local board and to finally revoke a license?

"If he can, what becomes of the right of appeal under section 4452 and the *review* there provided for?

"Suppose that the supervising inspector resides in the same city with the members of the local board, that they are not permanently nor temporarily unable to act, that access to them is as easy and unimpeded as to any like board in the same locality, can it be held that there is such an inconvenience in resort to the local board as warrants the supervising inspector in assuming the power of investigation and ousting the local board of jurisdiction of a case? To put the same inquiry in another form, has the supervising inspector such warrant for the reason that he deems it for the public interest and conducive to a more thorough and impartial investigation for him to investigate rather than for the local board, when that board is as accessible as he is?"

The provisions of section 4409, Revised Statutes, were in substance originally enacted in section 22 of the act of August 30, 1852, chapter 106, and afterwards re-enacted in section 27 of the act of February 28, 1871, chapter 100, from which last section they are directly taken. Under the law as it existed previous to the act of 1852 steamboat owners experienced much inconvenience in obtaining inspections, by reason of the fact that inspectors were appointed only at ports of entry or of delivery, thus making it necessary to take boats, that were brought or put in repair at other places, to some port of entry or delivery in order to be inspected, which oftentimes required a trip of several hundred miles (especially on the Western rivers) and involved considerable expense. To remedy this and provide greater facilities for inspections was the main object of the twenty-second section of that act. It provided that the supervising inspectors should "visit collection districts in which there are no boards of inspectors, if there be any where steamers are owned or employed," and that each should have "full power to inspect any such steamer or boilers of each steamer in any such district, or in any other district where, from distance or other cause, it is inconvenient to resort to the local board,

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Inspection of Steam-Vessels.

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and to grant certificates of approval according to the provisions of this act, and to do and perform in such districts all the duties imposed upon boards in the districts where they exist." Here the supervising inspector was authorized to perform the duty of inspecting steamboats, and also all other duties imposed upon the board of inspectors: first, in collection districts in which no such boards existed; second, in other collection districts where, from distance or other cause, it was inconvenient to resort to the local board.

Section 4409, Revised Statutes, invests the supervising inspector with the same authority. As regards districts wherein local boards exist, this authority is not meant to be concurrent with that of such boards under any and all circumstances. It is intended to be exercised only in cases where the local board can not be resorted to without inconvenience; and the sort of inconvenience contemplated is indicated by the express mention of "distance" as a cause thereof. It is inconvenience growing out of the situation of the boat or of the parties, viewed with reference to the location of the board, whereby access to the latter is rendered difficult or expensive. Where such inconvenience exists the authority of the supervising inspector to perform the duties imposed upon the local boards by section 4450, Revised Statutes, is, by virtue of section 4409, concurrent with that of those boards. And in cases acted upon by him under and pursuant to that authority there is no appeal or review provided for, the provisions of sections 4452, Revised Statutes, not applying thereto.

But in the case supposed by you, namely, "that the supervising inspector resides in the same city with the members of the local board, that they are not permanently nor temporarily unable to act, and that access to them is as easy and unimpeded as to any like board in the same locality," I am of opinion that there exists no inconvenience within the intent of the statute, and that the supervising inspector would not be warranted in discharging the duties referred to. Mere considerations of expediency in such case, or that the supervising inspector deems it for the public interest and conducive to a more thorough and impartial investiga-

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Penalty Envelope.

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tion for him to investigate rather than for the local board, do not in my opinion supply the conditions required by the statutes to empower him thus to act.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHAS. J. FOLGER,

*Secretary of the Treasury.*

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PENALTY ENVELOPE.

Section 29 of the act of March 31, 1879, chapter 180, so far as it relates to the indorsement to be placed on the penalty envelope, is a substitute for the corresponding provision in the fifth section of the act of March 3, 1877, chapter 103. Such envelope must be indorsed with a proper designation of the office from which the same is transmitted, and a statement of the penalty provided by the fifth section of the latter act.

DEPARTMENT OF JUSTICE,

*January 11, 1884.*

SIR: I have the honor to acknowledge the receipt of your letter of the 9th instant, calling my attention to certain provisions of the statutes in relation to penalty envelopes.

You say: "This Department having become cognizant of the fact that a portion of the provisions of sections 5, 6, and 29, Twentieth Statutes, pages 335 and 362, are not being complied with by some of the Departments, inasmuch as the proviso in section 5 (which reads: 'That every such letter or package, to entitle it to pass free, shall bear over the words 'Official business' an indorsement showing also the name of the Department, and, if from a bureau, or office, the names of the Department and bureau, or office, as the case may be, whence transmitted'), and which requirement is repeated in each of the succeeding sections, is not properly observed, it is deemed advisable to call your attention to the matter, and suggest such action as in your opinion may be warranted under the statute named."

The citations to the provisions of law is somewhat obscure, as you will perceive. I understand you to refer, however, to the fifth and sixth sections of the act of March 3, 1877, chapter 103 (19 Stat., 335), and to the twenty-ninth section of the

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Penalty Envelope.

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act of March 31, 1879, chapter 180 (20 Stat., 362), amendatory thereof. The former sections are as follows:

"SEC. 5. That it shall be lawful to transmit through the mail, free of postage, any letters, packages, or other matters relating exclusively to the business of the Government of the United States: *Provided, That every such letter or package to entitle it to pass free shall bear over the words 'Official business' an endorsement showing also the name of the Department, and, if from a bureau or office, the names of the Department and bureau or office, as the case may be, whence transmitted.* And if any person shall make use of any such official envelope to avoid the payment of postage on his private letter, package, or other matter in the mail, the person so offending shall be deemed guilty of a misdemeanor, and subject to a fine of three hundred dollars, to be prosecuted in any court of competent jurisdiction.

"SEC. 6. That for the purpose of carrying this act into effect it shall be the duty of each of the Executive Departments of the United States to provide for itself and its subordinate offices the necessary envelopes, and in addition to the endorsement designating the Department in which they are to be used the penalty for the unlawful use of these envelopes shall be stated thereon."

The latter section is as follows:

"SEC. 29. The provisions of the fifth and sixth sections of the act entitled 'An act establishing post-routes, and for other purposes,' approved March third, eighteen hundred and seventy-seven, for the transmission of official mail-matter, be, and they are hereby, extended to all officers of the United States Government, and made applicable to all official mail-matter transmitted between any of the officers of the United States, or between any such officer and either of the Executive Departments or officers of the Government, *the envelopes of such matter in all cases to bear appropriate indorsements containing the proper designation of the office from which the same is transmitted, with a statement of the penalty for their misuse.* And the provisions of said fifth and sixth sections are hereby likewise extended and made applicable to all official mail-matter sent from the Smithsonian Institution: *Provided, That this act shall not extend or apply to pension-*

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Dutiable Value of Merchandise.

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agents or other officers who receive a fixed allowance as compensation for their services, including expenses for postage."

I have placed in italics the portions relating to the particular matter to which you call attention.

I am of opinion that the provision in the act of 1879 was intended as a substitute for the provision of the act of 1877, so far as it relates to the description of the indorsement to be placed upon the envelope. The penalty envelope must be indorsed with a "proper designation of the office from which the same is transmitted" and with a "statement of the penalty" provided by the fifth section of the act of 1877. I do not find any further requirement in the law as it now stands.

I shall be happy to co-operate with you in any way you may suggest in enforcing the law. The suggestion contained in the latter part of your letter will be complied with so far as this Department is concerned.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The POSTMASTER-GENERAL.

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DUTIABLE VALUE OF MERCHANDISE.

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Review of legislation fixing the basis for estimating *ad valorem* duties, passed prior to the act of March 3, 1883, chapter 121.

The only change effected by section 7 of that act is to exclude from such basis all costs and charges which, under the law as it previously stood, were required to be *added* to the current or actual market value or wholesale price of the merchandise in the principal markets of the country whence the same was imported, or of the country of production or manufacture, as the case might be, thus making such current or actual market value, etc., the *sole basis* for estimating such duties. By current or actual market value or wholesale price, as used in the statute, is to be understood the amount of money the article commanded in the foreign market in the condition in which it is there customarily sold and purchased.

The cost of boxes or coverings with which goods are ordinarily prepared for sale in the foreign market, and in which they are usually sold and purchased there, is an element of the actual market value of the goods. What becomes of the box or covering, in the course of trade, after the importation, does not affect the question of dutiable value.

DEPARTMENT OF JUSTICE,

January 11, 1884.

SIR: I have carefully examined the following questions, which are presented for my consideration in your communication of the 26th of November last.

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Dutiable Value of Merchandise.

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"First. Whether section 7 of the tariff act of March 3, 1883, does more than repeal duties upon the charges imposed by the sections of law named in said section 7, and which are thereby repealed, and other provisions of law, if any, of the same character.

"Second. Whether that section prohibits the inclusion in the dutiable value of merchandise of the value of the boxes and coverings which are part of its preparation for sale in the markets of the country of exportation.

"Third. Is the dutiable value of merchandise its actual market value or wholesale price in such markets as enhanced by its preparation for sale in such markets by the placing in, or about, or upon such merchandise, such boxes and other coverings as are named in question No. 2?

"Fourth. Whether there is any distinction to be made in the assessment of duties as to the boxes and coverings which are part of such preparation, between the boxes and coverings which do and those which do not go to the consumer." In illustration of this question you remark: "I may say that in the case of shoe-blackening, matches, and cigars, the merchandise is inclosed in packages which go to the ultimate consumer, and to a large extent serve as receptacles for the article until entirely consumed. In other instances the boxes and other coverings do not usually reach the ultimate consumer; as in the case of stockings and handkerchiefs put up in small boxes and sold through the manufacturer by the dozen or other specified quantity, and at a value which includes that of the small boxes in which the dozens are contained. The retailer sells from the boxes in many instances in quantities less than a box, and where a whole box is sold no additional charge is made for the value of the box."

"Fifth. Whether the value of paper and trade-marks, ribbons, and ornamental devices, which form part of the preparation of each piece of silk or velvet, for such markets, is to be included in the general market value or wholesale price." In connection with this question you observe: "Silks and velvets are put up for the foreign market with trade-marks and tickets thereon, and are wound on a board and covered with a piece of paper, or a piece of cloth sewn around each piece, to protect it, and ribbons are wound on

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Dutiable Value of Merchandise.

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wooden blocks. Appeals have been presented against the insertion in the dutiable value of any of these elements of expense." The question arises:

"Sixth. Whether the wooden blocks on which ribbons are wound and the boards on which silk and velvets are wound, in preparation for such markets, shall be deemed a covering of any kind within the intent of said section 7?" In this connection you further observe: "Appeals have also been taken, in which it is claimed that there should be deducted from the dutiable value the cost of labor in putting the merchandise into boxes or coverings such as have been described. The question therein arises:

"Seventh. Whether any cost or value of labor in putting merchandise into boxes or coverings in preparation for such markets can be in any view considered a part of the value of such box or covering within the intent of said section 7?

"And, finally, what, if any, boxes or other coverings or item of labor or preparation therein described should be estimated or omitted in fixing the dutiable value of imported merchandise under said act of 1883?"

A brief review of the previous legislation fixing the basis for the estimation of *ad valorem* duties may aid in reaching correct conclusions as regards the scope and effect of section 7 of the act of March 3, 1883, upon that subject, and lead to a satisfactory solution of the questions submitted. This legislation is contained in the following statutes: Section 17 of the act of July 31, 1789, chapter 5; section 39, act of August 4, 1790, chapter 35; section 3, act of January 29, 1795, chapter 17; section 61, act of March 2, 1799, chapter 22; section 1, act of April 27, 1816, chapter 107; act of March 3, 1817, chapter 50; section 4, act of April 20, 1818, chapter 79; section 5, act of March 1, 1823, chapter 21; section 8, act of May 19, 1828, chapter 55; section 15, act of July 14, 1832, chapter 227; section 16, act of August 30, 1842, chapter 270; act of March 3, 1851, chapter 38; section 28, act of March 2, 1861, chapter 68; sections 23 and 24, act of June 30, 1864, chapter 171; section 7, act of March 3, 1865, chapter 80; section 9, act of July 28, 1866, chapter 298, and sections 2904 to 2908 inclusive of the Revised Statutes.

By the acts of 1789 and 1790 the actual cost of the mer-

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chandise at the place of importation, with the addition of a percentage thereon (20 per cent. if imported from the Cape of Good Hope or any place beyond the same, and 10 per cent. if imported from elsewhere) was made the basis for estimating ad valorem duties, and all charges were expressly excluded therefrom.

The act of 1795 made "the actual cost at the place of exportation, including all charges (commissions, outside packages, and insurance only excepted)," the basis for that purpose.

The act of 1799 made "the actual cost at the place of importation," with the addition of a percentage, as in the acts of 1789 and 1790, together with all charges (commissions, outside packages, and insurance only excepted), the basis.

The act of 1816 made "the net cost of the article at the place whence imported (exclusive of packages, commissions, and all charges)," with the addition of a percentage, as above, the basis.

The act of 1817 provides the same basis as the act of 1816, "exclusive of packages, commissions, charges of transportation, export duty, and all other charges."

By the act of 1818 the basis is the same as that prescribed by the act of 1799. All charges are included "except commissions, outside packages, and insurance."

By the act of 1823 the actual cost, if purchased, or the actual value if otherwise procured, at the time and place when and where purchased or otherwise procured, or the appraised value, if appraised, with all charges added thereto except insurance, and also with the addition of a percentage upon such cost or value and charges, as above, is made the basis.

By the act of 1828 the actual value at the time of purchase and place whence imported, with the addition thereto of all charges except insurance, and also of a percentage, as above, is made the basis.

The act of 1832 makes the basis the same as that of the act of 1823, omitting the percentage. It includes all charges except insurance.

By the act of 1842 the actual market value or wholesale price, at the time when purchased in the principal markets

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of the country from whence imported, with the addition thereto of "all costs and charges except insurance, and including, in every case, a charge for commissions at the usual rates," is made the basis.

In the act of 1851 the basis is the same as it is in the act of 1842, the only material change being that the "period of exportation" is made the time.

The act of 1861 made the "day of actual shipment" the time, but introduced no other change.

By the act of 1864 the basis is the actual value of the goods on shipboard at last place of shipment to United States, to be ascertained by adding to the value at place of growth, production, or manufacture the cost of transportation, shipment, and transshipment, with all the expenses included, from such place, whether by land or water, to the vessel in which shipment is made to United States; also "the value of the sack, box, or covering of any kind in which such goods are contained; commission at usual rate, in no case less than  $2\frac{1}{2}$  per centum; brokerage, and all export duties, together with all costs and charges paid or incurred for placing said goods on shipboard, and all other proper charges specified by law."

By the act of 1865 the actual market value or wholesale price at the period of the exportation in the principal markets of the country from whence imported is made the basis. This act repeals sections 23 and 24 of the act of 1864, and "all acts and parts of acts requiring duties to be assessed upon commissions, brokerage, costs of transportation, shipment, transshipment, and other like costs and charges incurred in placing any goods, wares, or merchandise on shipboard, and all acts or parts of acts inconsistent with the provision of this act."

The act of 1866 modifies the basis prescribed by the act of 1865, by adding thereto "the cost of transportation, shipment, and transshipment, with all the 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 such goods are contained; commission at the usual rates, but in no case less than  $2\frac{1}{2}$  per centum; broker-

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*Dutiable Value of Merchandise.*

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age, export duty, and all other actual or usual charges for putting up, preparing, and packing for transportation or shipment."

The provisions of the acts of 1865 and 1866, just adverted to, are embodied in the Revised Statutes, those of the act of 1865 in section 2906 and those of the act of 1866 in section 2907, under which sections the basis for estimating *ad valorem* duties remained as it was established by those acts until the passage of the act of March 3, 1883.

Section 7 of the last-mentioned act repeals said section 2907 leaving in full force, section 2906. This is virtually a return to the basis prescribed by the act of 1865, before the modification thereof by the act of 1866, namely, the actual market value or wholesale price at the period of exportation in the principal markets of the country from which the merchandise is imported (or in the principal markets of the country of production or manufacture, when the importation is from a country in which the merchandise has not been manufactured or produced, see section 2905, Revised Statutes), without any addition for costs or charges of any kind whatever. The above repeal, together with the repeal of section 2908 Revised Statutes, and of section 14 of the act of June 22, 1874, also made by section 7 aforesaid, sweeps away all the provisions in force at the date of the act of 1883 which required or contemplated additions of that character to the market value or wholesale price of merchandise in determining its dutiable value. The clause in section 7, declaring that "hereafter 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, nor shall the value of the usual and necessary sacks, crates, boxes, or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable," adds nothing to and takes nothing from the force and effect of the repeal of the statutory provisions mentioned. It only emphasizes the intent of Congress in making the repeal, namely, that all charges theretofore required to be estimated as part of the dutiable value of merchandise should thereafter be excluded in ascertaining such value.

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It results from the foregoing that, as regards the basis on which ad valorem duties are to be estimated, the only change effected by section 7 of the act of 1883 is to exclude from such basis all costs and charges which, under the law as it previously stood, were required to be *added* to the current or actual market value or wholesale price of the merchandise in the principal markets of the country whence the same was imported or the country of production or manufacture, as the case might be. Thus the amount or actual market value or wholesale price in those markets which is to be appraised is now made the *sole basis* for estimating such duties.

Recurring to the question presented, I submit that the answer to the first of these questions is sufficiently indicated by what has just been stated.

The second and third questions may be conveniently considered together. As already shown, the dutiable value of merchandise since the modification of the customs law made by the act of 1883 is the current or actual market value or wholesale price thereof in the foreign market at the period of exportation, to be ascertained by appraisement (secs. 2905 and 2906, Rev. Stat.). What, then, is to be understood by current or actual market value or wholesale price as used in the statute? It is the amount of money or price which the article commands in the foreign market in the condition in which it is there customarily sold and purchased. As observed by the court in *Cobb v. Hamlin* (3 Cliff., 191): "Some descriptions of goods are purchased and sold in the foreign market in bulk, and are, subsequently to the purchase and sale, put into boxes, packages, or coverings by the purchaser for the preservation of the merchandise and the convenience of shipping. Other descriptions are put into boxes, packages, or coverings by the producer, manufacturer, or wholesale merchant. The actual market value in the former case does not include the cost of the box, package, or covering within the meaning of that act of Congress [the act of 1865 hereinbefore mentioned] as the boxes, packages, or coverings in such cases are purchased by the shipper as the means of preserving the goods and for the convenience of shipment. But no doubt is entertained that the words 'actual market

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value,' without more, would include the cost of the box, package, or covering in all cases where the merchandise in question was actually purchased in the box, package, or covering, and is usually so purchased and sold for shipment in the foreign market, and where the price includes the box, package, or covering, as well as the goods therein contained."

In that case the court held that where oranges and lemons were, in conformity to the general custom in the foreign market, purchased in bulk, and were afterwards wrapped one by one in paper and packed in boxes and transported to the place of shipment, the expense of the boxes, etc., and the labor of packing the fruit did not constitute an element of its actual market value within the meaning of the act of 1865. And in a subsequent case (*Harding v. Whitney*, 4 Cliff., 96) the same court held that where wool was purchased and sold in the bale in the foreign market, the words "actual market value," in the act of 1842, include the cost of the covering as well as the goods, as the whole are sold together, without any additional charge for the covering—that such expense enters into and forms a constituent part of the market value and wholesale price of the merchandise at the place of exportation. In the first case, under the law as it existed before the passage of the act of 1883, the cost of the boxes, etc., and of the labor in packing the fruit would be charges proper to be added to the actual market value of the fruit in ascertaining its dutiable value, while in the other case the addition of the cost of baling and covering to the actual market value of the wool would not be proper, as such cost enters into and is included in the actual market value of the article.

According to the principle of these cases, which appears to me to be both sound and practicable, the cost of boxes or coverings with which goods are ordinarily prepared for sale in the foreign market and in which they are usually sold and purchased there (the price paid for the goods including the box or covering which goes therewith to the purchaser) must be regarded as entering into or as being an element of the actual market value of the goods. Section 7 of the act 1883 does not forbid the inclusion in the dutiable value of

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merchandise of that which forms a constituent of its actual market value. Hence the dutiable value of goods usually prepared for sale as above, and thus usually sold in the foreign market, is their current or actual market value or wholesale price in such market, as enhanced by the preparation thereof for sale in the manner referred to. In the language of your circular of September 27, 1883, "the dutiable value of the goods is the actual market value or wholesale price thereof in the condition of finish and preparation for sale in which they are finally offered by the foreign merchants to negotiating customers and for which they will and do sell them, though that value or price be enhanced because of that finish and preparation, and though a part of the preparation consists in the placing in or upon or about the goods, boxes, cartons, paper, cards, or other like things."

In answer to the fourth question, I submit that with respect to boxes and coverings, which are part of the preparation of goods for sale in the foreign market and are there sold with the goods as above stated, no distinction is admissible between those which do and those which do not go to the ultimate consumer. What becomes of the box or covering in the course of trade, after the importation of the goods, is unimportant and in no way affects the question of dutiable value.

The remaining questions seem to be covered by the remarks already made in answer to the second and third questions. The expense of the usual and customary preparation of silks, velvets, and ribbons for sale in the foreign market, to which the former questions refer, necessarily enters into the actual market value of those articles in that market. This being so, and the price paid for the goods in that market including such expense, the latter is not to be estimated separately for "insertion in the dutiable value," nor is any part thereof to be estimated and deducted from the dutiable value. The current or actual market value or wholesale price of the goods in the condition in which they are usually sold and purchased in the foreign market, and that alone, is required to be ascertained. Such value or price of the goods is now their dutiable value, and to add to or deduct from the latter

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 Refund of Duties Erroneously Exacted.
 

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costs or expenses of any kind which necessarily enter into and are included in the former would be unwarranted by the existing law.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,  
*Secretary of the Treasury.*

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## REFUND OF DUTIES ERRONEOUSLY EXACTED.

Opinion of April 20, 1882 (*ante* p. 326), on the power of the Secretary of the Treasury to refund duties erroneously exacted, reaffirmed.

Section 3012½, Revised Statutes, confers upon him power to refund *sub modo* only; i. e., upon appeals heard by him under section 2931, Revised Statutes, when made in the form and within the time therein specified.

## DEPARTMENT OF JUSTICE,

January 16, 1884.

SIR: In reply to yours of the 11th of September last, which refers to a claim before you by Moller, Sierck & Co., to have certain duties upon imported sugar refunded, allow me to say:

Upon reconsideration I am still of the opinion expressed to you April 20, 1882, viz, that section 3012½ of the Revised Statutes is not a substantive grant of power to the Secretary of the Treasury, but is to be read in connection with section 2931; in other words, that it constitutes the legislative provision which empowers the Secretary to repay such duties as, in appeals before him by virtue of section 2931, he has held to be excessive. It confers no authority to reverse decisions formerly made by him or his predecessors in appeals once regularly pending and since ended, even if subsequently satisfied that such decisions were erroneous. That is the case here. The Secretary is satisfied by a decision of the Supreme Court that former decisions in his Department as to the duty upon sugars were erroneous, and that, consequently, many importers have just claims against the United States on account of excessive exactions. The serious question here is not as to the debt, but as to the method of satisfaction. The Secretary, as will be admitted, has no general power to pay debts due by the United States. In every case some legislative warrant for payment by him must be shown. As re-

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Refund of Duties Erroneously Exacted.

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guards excessive exactions for duties, it is provided (sec. 2931) that he may hear appeals when made in a certain form and within a certain time therein specified, and section 3012½ confers upon him the power to repay moneys which upon such appeals he may hold to have been exacted in excess. In the present case, however, he had held the exactions in question to be *proper*, and the appeal had subsequently been ended. Whatever remedies the citizen may in such case have had to redress the consequences of this *erroneous* (104 U. S. R., 694) decision, section 3012½ confers none. For that, like all executions and quasi executions, takes for granted a previous affirmative judgment *in the same tribunal*.

If section 3012½ contains a substantive grant of power to hear complaints of excessive exactions of duties, it is plain that the limitations and restrictions upon the like grant in section 2931 are nugatory. So to conclude would be *destructive* construction. It therefore seems plain that the *showing* referred to in the first line of 3012½ must be *such a showing* as is provided for in 2931. And it follows, in the absence of a legislative grant of power to rehear decisions, that the phrase "final and conclusive," which appears about the middle of section 2931, applies, in the fullest sense thereof, to decisions upon appeals which have been ended; in other words, are conclusive even upon the Secretary himself.

In view of the serious contention upon the above point made in behalf of the complainants in the papers upon file, it seemed proper to restate my views thereupon.

In the present case, however, it also appears that in view of an adverse opinion upon their appeal the complainants have brought suit bona fide against the collector to recover the amount claimed to be excessive, and that this suit is still pending. But such suit was brought *prematurely; i. e.*, before the Secretary's decision had actually been made.

If this objection were duly brought to the attention of the court no doubt the action would fail. If it were not so brought, judgment would be duly rendered against the collector, and such judgment would then authorize its own satisfaction out of the Treasury.

In a case of a debt so plainly due by the Government, it seems that the objection of so trifling a prematurity of suit should not be raised, and that it is advisable that the com-

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 Spanish Claims under Treaty of 1819.
 

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plainants be allowed to make out such a claim for judgment by the court as *in absence of such objection* they may be able to do; such judgment in the end to warrant official action by yourself as in cases of like judgments generally.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

*Acting Attorney-General.*

The SECRETARY OF THE TREASURY.

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## SPANISH CLAIMS UNDER TREATY OF 1819.

The United States are under no obligation to allow interest on the awards made by the Florida judges in cases of claims of Spanish subjects under the ninth article of the treaty with Spain of 1819.

DEPARTMENT OF JUSTICE,

*January 24, 1884.*

SIR: Your communication touching the accountability of the Government of the United States for interest on the awards of the Florida judges in cases of claims of Spanish subjects under the ninth article of the treaty with Spain of 1819 has been received and duly considered.

By the provision of the ninth article of the treaty under which the question submitted arises the United States agreed "To cause satisfaction to be made for the injuries, if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American Army in Florida." (Public Treaties, p. 715.)

In furtherance of this provision of the treaty, Congress, in 1823, passed a law authorizing and directing the judges of the superior courts established in St. Augustine and Pensacola in the Territory of Florida, to receive, and adjust all claims under the treaty that had arisen within their respective jurisdictions. It also required that in cases decided in favor of the claimants the said judges should report the decisions, with the evidence on which they are founded, to the Secretary of the Treasury, "who, on being satisfied that the same is [are] just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favor the same is [are] adjudged." (3 Stat. 768.)

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Spanish Claims under Treaty of 1819.

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In 1834 Congress passed another act, enlarging the jurisdiction of the Territorial courts under the treaty (6 Stat., 569). It is not necessary to make more special reference to this act.

After the admission of Florida into the Union Congress passed an act transferring the unfinished business under the treaty which was pending before the judge of the superior court at St. Augustine to the judge of the district court of Florida. (9 Stat., 130).

One of the results of adjudication by the tribunals established by Congress to carry out the treaty is that claimants shall not recover interest on the sums awarded them.

The Government of Spain has been insisting for years that this decision withholding interest was unjust and in violation of the treaty.

It is difficult to see what *locus standi* the Government of Spain has in this matter, or in what respect it has an international aspect.

It is not denied that this Government provided the "process of law," required by the treaty to determine the claims in question.

It is not denied that all the claims have been adjudicated.

It is not denied that all sums adjudicated have been paid to the parties entitled to them.

What, then, is the complaint that is made by Spain? It is that the adjudication disallowing interest is erroneous. That is to say, Spain claims the right to review and reverse the judgments of the tribunals established under the treaty.

In my opinion this Government has fully discharged her obligations under the treaty. If Spain intended to give the rules of decision to the tribunals contemplated by the treaty, those rules should have been inserted in the treaty.

In my opinion Spain is concluded by the decision she now seeks to reopen. She must be held to have trusted implicitly to the tribunals to be established under the treaty. In this view of the subject the question Spain now raises is purely municipal, and has been closed long since by a series of commanding and uniform determinations.

I have the honor to be, sir, your most obedient servant,  
BENJAMIN HARRIS BREWSTER.

The SECRETARY OF STATE.

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Duty on Scrap Tobacco.

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## DUTY ON SCRAP TOBACCO.

Imported scrap tobacco is dutiable as manufactured tobacco under the act of March 3, 1883, chapter 121.

DEPARTMENT OF JUSTICE,  
January 25, 1884.

SIR: Your communication touching the rates of duty on imported scrap tobacco has received my consideration.

Schedule I, Title 33, of the Revised Statutes imposes a duty of 50 cents a pound on manufactured tobacco and a duty of 30 cents a pound on unmanufactured tobacco. By the act of the 3d March, 1883, the same classification is preserved, but the duty on manufactured tobacco is reduced to 40 cents a pound. (22 Stat. 503.)

The question is: Under which classification does scrap tobacco come?

By section 61 of the act 20th of July, 1868, entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes" (15 Stat., 125), "refuse scraps and scrapings of tobacco" are classed as *manufactured* tobacco.

Taking these acts together, they being clearly *in pari materia*, we must place scrap tobacco in the category of manufactured tobacco, irrespective of what its mercantile acceptance may be, for Congress has given it that classification, and I am informed that the Treasury Department has adopted and been acting in accordance with that view.

It appears, however, that since the passage of the act of March 1, 1879, exempting from the internal revenue tax imported scrap tobacco on which the proper customs duty has been paid, a question has arisen whether the interpretation of the provisions of the tariff now under consideration should be controlled any longer by the internal revenue law.

I see no reason why the act of March, 1879, should produce any such result. The classification in the internal revenue law of scrap tobacco as manufactured tobacco still exists in respect of domestic tobacco of that kind. But even if there was a total repeal of the tax on scrap tobacco, the repealed law might still be referred to for the purpose of ascertaining the intention of Congress, it being entirely well settled that all statutes *in pari materia*, whether repealed or not, should

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Duty on Iron Turnings.—Indian Schools.

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be taken into view in resolving a doubt as to the meaning of any one of them.

My opinion is, therefore, that scrap tobacco is still dutiable as manufactured tobacco.

I have the honor to be, sir, your most obedient servant,  
BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

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DUTY ON IRON TURNINGS.

Iron turnings are not dutiable as manufactured iron.

DEPARTMENT OF JUSTICE,  
*January 28, 1884.*

SIR: Your communication touching the rate of duty on iron turnings has received my consideration.

I concur entirely in the suggestion in your letter that iron turnings should not be dutiable as manufactured iron, being, as they are, the waste of iron in course of being manufactured; and, accordingly, I so decide.

I have the honor to be, sir, your most obedient servant,  
BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

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INDIAN SCHOOLS.

The appropriation made by the act of May 17, 1882, chapter 163, "for the purpose of further instructing and civilizing Indian children west of the Mississippi River," etc., is not applicable to the establishment of an industrial school and the erection of buildings therefor.

DEPARTMENT OF JUSTICE,  
*January 28, 1884.*

SIR: Your letter of the 17th instant directs my attention to the provision in the act of May 17, 1882, chapter 163, appropriating \$150,000 "for the purpose of further instructing and civilizing Indian children dwelling west of the Mississippi River, and in the States of Minnesota, Wisconsin, and Michigan," etc. (sec. 22, Stat., 86), and you inquire whether the money thus appropriated is applicable to the establishment of an industrial school at Lawrence, Kans., for that purpose.

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*Chiefs of Bureaus in Navy Department.*

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Upon consideration, I am of the opinion that the establishment of an industrial school, or the erection of buildings therefor, is not within the scope of that appropriation.

Omitting what is not material to the inquiry, the appropriation is for "instructing and civilizing Indian children \* \* \* in industrial schools other than those at Carlisle, etc., supported in whole or in part from treaty and other funds appropriated by Congress, or such as may be established and supported wholly from treaty or other funds so appropriated," etc. Here the statute provides for "*instructing and civilizing*" both in industrial schools *already established* which are *supported from treaty or other funds appropriated therefor*, and in "*such as may be established*" and *supported in the same way*. But this falls short of authorizing the *establishment* of schools for the instruction and civilization of Indian children. The terms "instructing and civilizing", restricted as they are in the statute, can not be taken to impart such authority.

While, therefore, the appropriation is applicable to "instructing and civilizing" the children in industrial schools already established or which may be established from other funds, the language of the statute does not appear to me to warrant its application to the establishment of such schools or the erection of buildings therefor.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

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

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CHIEFS OF BUREAUS IN NAVY DEPARTMENT.

The chief of a bureau in the Navy Department can not lawfully hold over after the expiration of the term for which he was appointed. The general rule is that where Congress has not authorized the officer to hold over, his incumbency must be deemed to cease at the end of his term, though no appointment of a successor may then be made.

DEPARTMENT OF JUSTICE,

January 31, 1884.

SIR: In compliance with your verbal request I have considered the question whether the chief of a bureau in your

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Chiefs of Bureaus in Navy Department.

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Department may lawfully hold over after the expiration of the term for which he was appointed.

Section 421, Revised Statutes, provides: "The chiefs of the several bureaus in the Department of the Navy shall be appointed by the President, by and with the advice and consent of the Senate, from the classes of officers mentioned in the next five sections respectively, or from officers having the relative rank of captain in the staff corps of the Navy on the active list, and shall hold their offices for the term of four years."

There is nothing in that section, nor in any other of which I am aware, which confers authority upon the incumbent of the office of chief of bureau to continue therein after the expiration of his term; and I am of opinion that, in the absence of a statutory provision conferring it, such authority does not exist.

Congress has in terms provided that certain officers whose appointments are for a definite term shall hold until their successors are appointed and qualified (see, for example, secs. 1841, 1843, 1875, 1876, and 4778, Rev. Stat.), from which it is plainly to be inferred that officers not thus authorized can not lawfully hold over. *Expressio unius est exclusio alterius*. So that the general rule seems to be that where Congress has not authorized the officer to hold over his incumbency must be deemed to cease at the end of his term, though no appointment of a successor may then be made.

In support of the above view I beg to refer to a remark of the Supreme Court of the United States in the case of *United States v. Eckford's Executors* (1 How., 250), viz: "Under the act of 1820 collectors can only be appointed for four years. *At the end of this term the office becomes vacant*, and must be filled by a new appointment." (See also 14 Opin., 262, 263.)

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. WILLIAM E. CHANDLER,

Secretary of the Navy.

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Collection of Duties.

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## COLLECTION OF DUTIES.

Section 10 of the act of March 3, 1883, chapter 121, extends only to goods which had not been in bonded warehouse more than three years at the date that act took effect.

Sections 2971 and 2977, Revised Statutes, place a limitation upon the privilege of exportation with refund of duties, and require that it shall be exercised within three years from the date of importation; otherwise the privilege is lost.

The provision in section 2971, Revised Statutes, requiring merchandise to be sold, is applicable to goods remaining in public store or bonded warehouse beyond three years, as well where the duties thereon have been paid as where they have not been paid. At the end of that period they are to be regarded as abandoned to the Government and sold.

The object and requirement of that provision are, however, sufficiently met by the practice of the Department, whereby, in lieu of a formal sale of the goods, the owner, consignee, or agent is permitted to pay the duties, charges, etc., that have accrued thereon and take them away.

DEPARTMENT OF JUSTICE,  
*February 7, 1884.*

SIR: I have considered the following questions, proposed in your letter to me of the 7th of November last:

"First. Whether section 10 of the tariff act of March 3, 1883, is necessarily limited to goods which had not been in bonded warehouse more than three years at the date said act went into operation?

"Second. Whether the privilege of exportation with refund of duties may still be allowed, notwithstanding more than three years have elapsed since the date of importation? and

"Third. Whether, under section 2971, Revised Statutes, goods are to be sold at the expiration of three years from the date of importation, notwithstanding the fact that duties may have been already paid thereon?"

Section 10 of the act of March 3, 1883, to which reference is above made, provides: "That all imported goods, wares, and merchandise which may be in the public stores or bonded warehouses on the day and year when this act shall go into effect, except as otherwise provided in this act, shall be subjected to no other duty upon the entry thereof for consumption than if the same were imported respectively after that

day; and all goods, wares, and merchandise remaining in bonded warehouses on the day and year this act shall take effect, and upon which the duties shall have been paid, shall be entitled to a refund of the difference between the amount of duties paid and the amount of duties said goods, wares, and merchandise would be subject to if the same were imported respectively after that date."

That the first clause of this section, which deals with imports whereon the duties have not been paid, applies only to such merchandise remaining in the public stores or bonded warehouses on the day the act takes effect as may then lawfully be entered for consumption, is indicated by the words "upon entry thereof for consumption" used therein. These words plainly show that the benefits of the provision were meant for merchandise in bond which, at the time mentioned, the importer is entitled thus to enter, and for none other.

No change in the law respecting the withdrawal of dutiable merchandise for consumption is made by the act of 1883. This subject was at the period referred to, and is now, regulated by section 2970, Revised Statutes, which provides that merchandise in bond "may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after the expiration of one year from the date of original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges and an additional duty of ten per centum of the amount of such duties and charges."

Thus, by the then and still existing law goods in bond can be entered for consumption and withdrawn at any time during the period of three years from the date of original importation. Upon the expiration of this period, however, the privilege so to enter such goods ceases, and (by section 2971, Revised Statutes) they are to be "regarded as abandoned to the Government, and sold under such regulations as the Secretary of the Treasury may prescribe," etc.

It follows that merchandise whereon the duties have not been paid, which had been in the public stores or bonded

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Collection of Duties.

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warehouses more than three years on the day the act of 1883 took effect, does not come within the operation of section 10 of that act.

The other clause of that section deals with the merchandise on which the duties had been paid, but which shall remain in bonded warehouses on the day the act takes effect. And though the language of this clause (viz: "all goods, wares, and merchandise remaining in bonded warehouses on the day and year this act shall take effect, and upon which the duties shall have been paid, shall be entitled," etc.) is very general, and according to a strictly literal interpretation would comprehend any imported merchandise actually in bonded warehouse on the day referred to, I am nevertheless, upon consideration of the whole section, inclined to the view that such an interpretation does not accord with the intent of Congress—that this clause was not (any more than the first clause) meant to apply to merchandise which on that day shall have been in bonded warehouse more than three years.

Under section 2977, Revised Statutes, merchandise upon which duties have been paid may thereafter remain in bonded warehouse in custody of the customs officers at the expense and risk of the owners. But the period during which it may thus remain subject to *withdrawal* by him is limited; for unless withdrawn for consumption or exportation within three years from the date of original importation, it becomes liable to be sold as abandoned to the Government. (Sec. 2971, Rev. Stat.)

With respect to merchandise remaining in bonded warehouse at the period mentioned, it does not seem probable that, in enacting the act under consideration, Congress meant to discriminate between goods upon which the duties were unpaid and goods upon which the duties were paid, by excluding from its provisions in the one case goods which had remained in bonded warehouse more than three years, and in the other case including within its provisions goods in that predicament. It is more reasonable to suppose that Congress thereby intended to give the importer who had already paid duties under the old law, and whose goods still remained in bonded warehouse, the same benefits and advantages, but no other or greater than are thereby given the importer

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Collection of Duties.

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whose goods still remained in bonded warehouse and on which the duties were unpaid ; and as, in the latter case, the goods must be entered for consumption within three years from the date of original importation in order to bring them under the operation of the section, so, in the former case, to bring the goods under its operation, they must be withdrawn for consumption within three years from the date of original importation.

I am thus led to the conclusion that the whole of the section is inapplicable to merchandise which, on the day the act of 1883 took effect, had remained in bonded warehouse more than three years from the date of original importation, and were then, in contemplation of law, abandoned to the Government.

In direct answer to your first question I accordingly reply, that in my opinion section 10 of the tariff act of March 3, 1883, extends only to goods which had not been in bonded warehouse more than three years at the date that act went into operation.

The next question involves an examination of the law relating to the withdrawal of goods for exportation. Under section 2971, Revised Statutes, merchandise may be withdrawn for exportation to foreign countries at any time within three years from the date of original importation, subject only to the payment of such storage and charges as may be due thereon. If duties have already been paid on the merchandise, and it still remains in warehouse in custody of the customs officers, it may, under section 2977, Revised Statutes, be withdrawn and exported to a foreign country within the same period ; in which event the owner will be entitled to a refund of the duties. These sections, with which may also be compared section 3017, Revised Statutes, place a limitation upon the privilege of exportation with refund of duties, and require that it shall be exercised within three years from the date of importation. Unless this requirement is complied with the privilege is lost. I therefore answer your second question in the negative.

Section 2971, Revised Statutes, provides: "Any goods remaining in public store or bonded warehouse beyond three years shall be regarded as abandoned to the Government,

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Collection of Duties.

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and sold under such regulations as the Secretary of the Treasury may prescribe, and the proceeds paid into the Treasury." But by section 2972, Revised Statutes, in case of any sale of any merchandise remaining in public store or bonded warehouse beyond three years the Secretary is authorized to "pay to the owner, consignee, or agent of such merchandise the proceeds thereof, after deducting duties, charges, and expenses, in conformity with the provision relating to the sale of merchandise remaining in a warehouse for more than one year." The provision in section 2971, quoted above, is in my view applicable to goods remaining in public store or bonded warehouse beyond three years, as well where the duties thereon have been paid as where they have not been paid. That provision has, I think, a double purpose: first, to enforce the collection of duties, charges, etc., upon the goods; and, second, to relieve the customs service from the care and custody thereof.

Formerly, under the warehousing acts of 1846 and 1849, the Treasury Department, by regulation, authorized goods upon which the duties were paid, either before or after the storing, to remain in public store for any period of time, so long as the usual storage was paid. But in 1852 a circular was issued by the Department containing (*inter alia*) the following instructions: "On payment of the legal duties and charges the merchandise should at once be withdrawn from warehouse, this Department being of opinion that officers of the customs have no legal authority, under existing laws, to assume, even with the consent of the owners, the custody of merchandise on which the claims of the United States, of whatever description, have been fully discharged. Consequently, any existing regulations authorizing merchandise to remain in public warehouse after payment of the duties are hereby suspended," etc. And again in 1854 the Department issued another circular on the subject, which directed that thereafter, in all cases "where goods, wares, and merchandise shall be suffered by the importer, owner, or agent thereof to remain in the custody of the officers of the customs for the period of five days after the payment of legal duties and charges thereon and the issuing of the permit for their delivery, they will be treated as unclaimed, and

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Collection of Duties.

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will, at the close of one month from the date of such permit, be disposed of in the mode prescribed by law and regulations in the case of unclaimed goods." Subsequently, however, by the twenty-first section of the act of July 14, 1862, chapter 163, it was provided "that merchandise upon which duties have been paid may remain in warehouse in custody of the officers of the customs at the expense and risk of the owners of said merchandise," and that provision has been embodied in section 2977, Revised Statutes, to which reference is hereinbefore made. Yet, as already observed, the privilege thereby conferred of letting the goods remain in warehouse in custody of the customs officers after payment of the duties thereon is subject to the limitation of three years from the date of original importation under the operation of the above-mentioned provision in section 2971. At the end of that period they are to be regarded as abandoned to the Government and sold.

While I am of opinion that your third question should be answered in the affirmative, and so answer it, I deem it proper to add that I perceive no legal objection to the existing practice of your Department respecting the disposition of goods which have remained in bonded warehouse beyond three years. The objects and requirements of the provision in section 2971, last above adverted to, are in my judgment sufficiently met by that practice, whereby, in lieu of a formal sale of goods, the owner, consignee, or agent is permitted to pay the duties, charges, etc., that have accrued thereon, and take them away. In case of a sale, the owner, consignee, or agent of the merchandise would (under section 2972) become entitled to receive the proceeds, after deducting therefrom the duties, charges, and expenses. The practice referred to accomplishes the same end, and is, indeed, a virtual sale of the goods under the power given the Secretary of the Treasury by the statute.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,  
*Secretary of the Treasury.*

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Pardon.

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## PARDON.

In September, 1882, Lieutenant N. was sentenced by a court-martial to reduction of rank in his grade, and the sentence was carried into effect. In September, 1883, the department commander remitted the sentence under the power to pardon conferred by article 112 of the Articles of War: *Held* that, the punishment imposed by the sentence being a continuing one, the sentence could be remitted by the pardoning power, and that the authority exercised by the department commander was in conformity to law.

## DEPARTMENT OF JUSTICE,

*February 11, 1884.*

SIR: In your communication of the 17th of November last you request my opinion as to the lawfulness of the authority attempted to be exercised by the department commander in the case of Lieutenant Nordstrom, by General Order, No. 45.

In September 1882, Lieutenant Nordstrom, of the Tenth Cavalry, was sentenced "to be reduced in rank so that his name shall hereafter be borne on the rolls of the Army next after that of First Lieutenant Mason M. Maxon, Tenth Cavalry." His name was so placed on the rolls by the proper officer of the War Department, and to that extent the sentence was carried out. In September, 1883, the department commander remitted the sentence.

Where, as in this case, an officer is sentenced to reduction of rank (*i. e.*, loss of steps or numbers) in his grade, the punishment imposed is a *continuing* one; since it is only by the continual operation of the sentence itself that the officer is thenceforth excluded from the place in his grade to which, under the law of the service, he would otherwise be entitled by the date of his commission, and made to occupy another place therein. So long, then, as the officer is thus excluded by operation of the sentence—in other words, whilst he is still undergoing the punishment thereby imposed—the sentence may be remitted by pardon, and a remission of it would necessarily carry with it the restoration of the officer to his pre-existing right to occupy the place in his grade corresponding with the date of his commission, he losing such opportunities for promotion as may in the mean time have occurred. (12 Opin., 547.)

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Refund of Duties.

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But you intimate that doubt is entertained whether the power to pardon conferred by article 112 of the Articles of War can be exercised after the proceedings of the court-martial have been completed by due confirmation by proper authority. There is no limitation in the article as to the time at which the pardon or mitigation may be granted, and by analogy it seems to me that completion or non-completion of the punishment would be the only test. Pardons are most usually granted after the finding of the jury has been reduced to judgment and the sentence pronounced—after the punishment has commenced or is about to be visited on the offender. Pardons can issue before trial, but instances of such are rare. Congress must have used the word pardon in its ordinary sense, and if its ordinary exercise was to be circumscribed, apt language should have been used. If the power was to operate only on the sentence before it was pronounced, Congress would have employed different language than that found in article 112.

I am accordingly of opinion that in the case under consideration the authority attempted to be exercised by the department commander was in conformity to law.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,  
*Secretary of War.*

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REFUND OF DUTIES.

The Secretary of the Treasury has power to refund excess of duties exacted in certain cases referred to.

DEPARTMENT OF JUSTICE,

*February 12, 1884.*

SIR: Yours of the 11th instant mentions cases in which certain decisions have been made as to the duty upon azo-benzole dye colors, which decisions were afterwards in other cases modified so as to impose a smaller rate of duty, the applicants in the earlier cases having in the mean time brought suit to recover the excess in the amount of duty paid by them, which suits are still pending.

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Readjustment of Postmasters' Salaries.

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Thereupon you inquire whether the excess of duties imposed in the earlier cases can be refunded by you upon dismissal of the suits brought as above?

I answer this question in the affirmative. Indeed, although probably not needed in such a case, the proviso to section 1 of the act of 1875, chapter 136, seems to cover it and go beyond it even and include redress for *erroneous views of fact* by the Secretary himself, even where no suit has been brought, so that there have been a *protest* and *appeal*.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

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READJUSTMENT OF POSTMASTERS' SALARIES.

The act of March 3, 1883, chapter 119, merely directs the readjustment of the salaries of postmasters to be made in accordance with the pre-existing law, leaving the meaning of the latter to be determined in the usual and proper methods.

By that act the Postmaster-General is required to make, on behalf of an applicant thereunder, the adjustment or readjustment of salary which he may claim and be found to have been entitled to, at any one or more of the biennial periods since the act of July 1, 1864, chap. 197, under the latter act as amended by the proviso added thereto by the act of June 12, 1866, chap. 114, crediting the applicant with any difference in his favor between the amount of the salary so readjusted for the prospective biennial period and the salary paid to him for the time of his service in such period.

DEPARTMENT OF JUSTICE,

February 13, 1884.

SIR: Your communication of August 25 ultimo submits for my opinion certain matters which are substantially embraced in the following questions:

First. Has Congress, by the act of March 3, 1883 (22 Stat., 487), directed the Postmaster-General to readjust salaries, on application under the act, otherwise than in accordance with the provisions of the acts of 1864 and 1866 therein mentioned? (13 Stat., 335; 14 Stat., 59.)

Second. If it has not, what do those provisions require of him in making such readjustment?

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Readjustment of Postmasters' Salaries.

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In answering the first inquiry it must be determined whether the act of 1883 merely directs the readjustments to be in accordance with the act of 1866 (which is in terms an amendment of the act of 1864), or whether it was intended to affect in any way the construction of those acts.

I agree with you in the opinion that it was not so intended, and for the following reasons:

The construction of statutes is more especially the function of the judiciary. Legislators may declare how an act shall in future be construed, but it will not be inferred that they have undertaken to control existing rights of parties under prior statutes.

Congress had evidently been led to believe that there were cases in which parties claiming to be entitled to readjustment of salary under the amended act of 1864 had for some reason failed to obtain the benefit of that legislation. The act of 1883 gives these parties an opportunity to apply now for such readjustment as might have been and was not obtained under the mandatory provisions of the amended act. It does not indicate by whose fault those provisions failed to be executed in these cases (and so far as chargeable to the postmasters in effect condones the fault), but it specifies certain conditions precedent to the readjustment directed and then describes the mode of readjustment.

The title of its beneficiaries rests on three requisites:

(1) That their salaries have not theretofore been readjusted under the terms of the amendment of 1866.

(2) That they made sworn returns of receipts and business for readjustment to the Postmaster-General or his First or Third Assistant on quarterly returns, in conformity with the then existing laws and regulations.

(3) That the sworn receipts or quarterly returns show that the salary allowed was 10 per cent. less than their compensation would have been under the act of 1854.

On these conditions the readjustment must be made in accordance with the mode presented in the amendment of 1866 and to date from the beginning of the quarter succeeding that in which such sworn or quarterly returns were made.

This includes all that is essential in the act. Its structure, as will be seen, is simple and its purport clear.

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*Readjustment of Postmasters' Salaries.*

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Congress was presumably advised that there had been differences of opinion between the Postmaster-General and some postmasters as to his duties under the said amended act, yet it has (judiciously, no doubt) made no declaration touching the construction of that act, but has merely directed the new readjustments to be in accordance with the former law, referring also to the classification and returns provided for by prior laws and regulations in such a way as to indicate that no deviation from the course of proceeding thereby established was intended, unless by possibility some of the returns now admissible for readjustment were not considered to be so under such laws and regulations, a detail of proceeding which does not affect the general result.

The act seems therefore to me to be in entire harmony with the general policy of the law, and to exhibit by strong internal evidence the disposition of Congress to simply carry out the former law, leaving its meaning to be determined by the usual and proper methods.

I proceed therefore to the second and principal inquiry, as to which it should be premised that as you have not included any statement of the action taken by your Department in any particular cases presented for readjustment before or since the act of 1883, I shall treat the question as one simply of construction, and without reference to any views or action of your Department in the premises which have not been officially brought to my notice. My concurrence or disagreement with the views expressed in your letter of June 9 ultimo, to which my attention is called, will sufficiently appear without undertaking to consider them in detail, as I presume it is my opinion on the point involved that you in substance desire.

A more definite statement of the question would be this: How did the act of 1864 require the salaries of postmasters of the third, fourth, and fifth classes to be readjusted, and what change in such requirement was effected by the proviso added to the second section of that act by the act of 1866?

Prior to the act of 1864 the classification provided for in it did not exist, and the compensation of postmasters was determined and awarded quarterly by the Sixth Auditor of the Treasury on the basis of returns required to be made by them to him quarterly of certain prescribed statistics of their busi-

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ness, the last preceding general regulation of the subject having been made by the act of July 1, 1854. (10 Stat., 298.)

Congress may have found some serious objection to this system of quarterly adjustments of compensation for past service when it substituted the radically different method of compensating postmasters by fixed prospective salaries, assigned by the Postmaster-General for a definite period with provisions for periodical readjustments, a system which it has ever since maintained.

So marked a change of policy is not to be ignored in determining the legislative intent in particular minor additions to or amendments of the general scheme. The presumption of a matured consistent purpose in such legislation ought to control whenever it is sought by dubious expressions to destroy or impair the integrity of the new order of things introduced by the act of 1864.

No question is presented as to the meaning of the act of 1864 standing alone, but it is important to note its main provisions in order to understand the amendment of 1866.

It declares that the *annual compensation* of postmasters shall be at a *fixed salary* in lieu of commissions, the postmasters to be divided into five classes; the salaries in the first class to be not more than \$4,000 and not less than \$3,000, and so grading the salaries on downward in the other classes.

It further declares that the compensation of postmasters of the several classes aforesaid shall be established by the Postmaster-General under the rules thereafter provided, which were in substance as follows:

First. To assign each office to its proper class by determining the *average annual* sum paid as compensation to its postmaster for the *two consecutive years* next preceding July 1, 1864.

Where this sum amounted to less than \$2,000 and not less than \$1,000, the office was to be assigned to the third class; amounting to less than \$1000 but not less than \$100, to the fourth; and when less than \$100, to the fifth class.

Second. To assign each office its salary within the limits of its class for the ensuing biennial period by taking not the exact "*average annual sum*" before determined, but for the first, second, and third classes a sum "*in even hundreds of*

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dollars as nearly as practicable in amount the same as but not exceeding" the sum so determined; and for the fourth class even tens, and the fifth even dollars in the same way.

The operation of these rules will be better understood by illustration. If, for instance, the commissions of an office for the eight quarters preceding July 1, 1864, were \$2,010 (and in the term "commissions" I intend throughout this opinion to include whatever was allowed as compensation by the act of 1854), the average annual sum \$1,005 would grade it in the third class, and the salary in even hundreds assigned would be \$1,000 per annum for the ensuing two years. If again the average annual sum for the two consecutive years was \$1,900, the office would fall in the third class, with a salary of \$1,900 per annum for the ensuing two years.

The second section of the act then requires the Postmaster-General once in two years to review and readjust, "*on the basis of the preceding section*" (that is, in the manner above described), the salary assigned by him to any office and to record in writing his order thereon, "but any change made in such salary shall not take effect until the first day of the quarter next following such order."

As compared with the system of quarterly adjustment for past service on the basis of commissions which it superseded, the new system assigning a fixed salary for future service for two years on the basis of past earnings would have been open to objection if it had not made provision for cases of unusual variation from the adopted standard; as when from temporary or permanent causes the business at a particular office should increase very rapidly within the biennial period; and so it was provided that "in special cases, upon satisfactory representation," the review and readjustment should be as much oftener than once in two years as the Postmaster-General might deem expedient.

This relieves the salary plan from the imputation of permitting a possibly wide variation between the amount of service and its just compensation, while the designation "special cases" indicates that exact adjustments in accordance with the old system were not in general intended.

There are some features of the cited provisions of the act that should be specially observed. One is that the biennial

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readjustment is *mandatory in every case*, and that the provision for additional or intermediate review in "special cases" is discretionary, which indicates that in the legislative purpose at that time these provisions were regarded relatively as the rule and the exception.

Another is that the readjustment, whether biennial or otherwise, is required to be "on the basis of the preceding (first) section," which provides, as has been shown, for a computation from the business of the two preceding years to fix the compensation of the two years ensuing, which proves that there was no idea of retrospective readjustment in any case, or of any proceeding radically inconsistent with the new system.

In the absence of evidence to the contrary it is to be presumed that the provisions of this act were observed by the Postmaster-General; indeed, the whole controversy, as I understand it, arose after the second section of the act was amended, by adding at the end of it a proviso which was enacted by the eighth section of the act of June 12, 1866, chapter 11, entitled, "an act to amend the postal laws." (14 Stat., 60.)

The section as so amended is as follows:

"Sec. 2. *And be it further enacted*, That the Postmaster-General shall review once in two years, and in special cases, upon satisfactory representation, as much oftener as he may deem expedient, and readjust on the basis of the preceding section the salary assigned by him to any office, but any change made in such salary shall not take effect until the first day of the quarter next following such order, and all orders made assigning or changing salaries shall be made in writing and recorded in his journal and notified to the Auditor for the Post-Office Department: *Provided, That when the quarterly returns of any postmaster of the third, fourth, or fifth class show that the salary allowed is ten per centum less than it would be on the basis of commissions under the act of eighteen hundred and fifty-four, fixing compensation, then the Postmaster-General shall review and readjust under the provisions of said section.*"

In considering the meaning of this proviso, it must be borne in mind that it was annexed to a provision for biennial

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readjustment before the expiration of the first biennial period therein provided for, and as the usual and proper function of a proviso is to introduce some limitation consistent with or at least not destructive of the *general intent* of the enacting clause, it must be presumed that Congress in this case intended rather to perfect the salary system than to overturn or unsettle it before it had been fairly inaugurated. If there could be any doubt of this, the fact that Congress has continued that system ever since 1864 would demonstrate it. It should require, therefore, very clear expression to justify a construction of the proviso which would destroy or impair the main purpose of the amended act.

Reading the amendment as directed by the enacting clause of section eight of the act of 1866 in connection with section two of the act of 1864 will exhibit more clearly its effect.

It is confined to three of the classes, as to which it directs two things—first when, and second how, the Postmaster-General shall readjust.

Before the addition he was commanded to readjust in every case once in two years. As to three classes, Congress then adds a provision that he shall readjust (only) when something is shown by something. The thing to be shown is that the "*salary allowed*" is ten per centum less than it would be on the basis of commissions; and the phrase quoted is the only one of possible doubtful meaning.

By the rules of construction it should have the meaning belonging to it when used or referred to elsewhere in the section or act unless good reason to the contrary can be shown. The equivalent expression "*salary assigned*" occurs in the section, and the first section is largely occupied with the mode of allowance. The "*salary*" so described is nothing less than a biennial allowance, and the phrase in question must on its face, at least, be so understood. If Congress is supposed to have meant anything else, the meaning must evidently be one that does not harmonize with the context, and is therefore not to be presumed.

But this thing, whatever it is, must be shown by "*the quarterly returns,*" and cannot therefore on the face of it be shown by any single return. Looking again at the context, it is found that the readjustment is to be made on the basis of the pre-

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ceding (first) section and that shows that it is to be on the (eight) returns showing the average of annual compensation for the two years next preceeding the adjustment (the Postmaster-General being authorized to estimate for any return not received.) It must be presumed that *these* are the returns intended by "*the quarterly returns*," unless some different meaning of the phrase can be clearly shown; for this construction is not only entirely harmonious with the context, but I am unable to see how the comparison directed can be properly made in any other way. The "salary allowed" being determined by the annual average computed from eight consecutive past quarterly returns as the established compensation of the office for the eight ensuing quarters, how can such an averaged biennial salary be shown to be ten per centum less than it would be on the basis of commissions unless by comparison with the commissions of the entire period for which the salary is allowed?

There is nothing, then, in this part of the amendment to indicate that Congress intended to set aside the biennial system. On the contrary, it is explicitly recognized, and the modification is introduced with manifest reference to it, so that thereafter the Postmaster-General should readjust at a biennial period the salaries (in the three classes) only on the showing therein prescribed.

The final direction further demonstrates this. He is, on such showing, to "review and readjust under the provisions of said section." The section referred to is shown by the enacting clause of section eight of the act of 1866 to be section two of the act of 1864, and this the Supreme Court also has affirmed (McLean's case, 95 U. S., 753.) That section provides principally for mandatory biennial readjustments, to which the amendment, being mandatory, also must refer, being equivalent therefore to a direction to the Postmaster-General to readjust *biennially* as directed in 1864 under the said amendment.

This construction excludes of course any interference with the new salary system by mandatory readjustments of more than biennial frequency, and really strengthens and solidifies that system, by dispensing in effect with the biennial readjustment (in three classes) when comparison, at the close of

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a biennial period, of the salary allowed therefor to an office with its income for such period on the basis of commissions shows that the salary differs from the commissions by less than ten per centum.

The discussion might well be closed here, for it ought to be enough to point out what the amendment declares according to the fair natural meaning of its terms and to show that this harmonizes, as it ought, with the fundamental purpose and policy of Congress in the act so amended; but as the matter has been much in controversy it may be of advantage to consider further the probable object of this provision as above construed, since it may be fairly assumed to have been intended to remedy some defect in the act of 1864.

That act in June 1866 was about to be, or was being, put into operation for the first time as respected readjustments; and the Postmaster-General on the one hand and the postmasters on the other were concerned in its mandatory provisions; the former, because he was required to readjust (according to the first section) *every* postmaster's salary in a schedule of (at that time) more than twenty-nine thousand offices; a task manifestly of great magnitude, which had not theretofore been assigned to the Post-Office Department and which would of necessity add greatly to the labor and responsibility imposed upon it; the latter, because they were for the first time graded in classes under novel regulations affecting their relation toward one another as well as to the Government.

The amendment would evidently be a measure of relief to the Postmaster-General and his Department, since it would save the labor of actual readjustment in many (probably a large majority) of the cases; in which it could be determined by mere inspection that it was not required.

This would be a sufficient legislative motive; but the amendment affects the postmasters of the three classes severally by removing an inequality which the act of 1864 had created and which can be better understood by illustration.

As the salary (of the third class, for example) was to be assigned in even hundreds as nearly as practicable, the same as but not exceeding the average annual compensation for the

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preceding two years, it is plain that a postmaster whose average annual compensation was \$1,900 would have to show an average increase of between 5 and 6 per centum of commissions only in order to get \$100 added to his salary, while a postmaster whose average annual compensation was \$1,000 would have to show an average increase of 10 per centum to get a salary of \$1,100.

Here, then, was a clear discrimination created by the act of 1864 (through inadvertence perhaps) in favor of the postmasters in each class having the higher rates of salary. The intent and effect of the proviso was that in every case the same percentage of difference should be found in order to readjust, and so the apparent injustice to the lower-salaried officers was removed.

That the amendment modifies the prior law so as to produce these two results, must, in my judgment, be conceded, and as Congress must be presumed to have intended the legitimate consequences of its declaration, (and these are in harmony with the ruling spirit and purpose of the new postal legislation,) it would seem that full and reasonable effect is given to the proviso by accepting these as its real and sufficient objects, unless some additional purpose not inconsistent therewith can be shown.

This I have not been able to discover, but it is due to the ability and earnestness with which the views of the counsel representing the postmasters have been urged upon my attention that I should briefly state my reasons for not concurring therein.

The substance of their contention is, as I understand it, that the amendment required the Postmaster-General thereafter to examine each quarterly return in the three classes, to ascertain whether the proportionate part of the biennial salary allowed which would be payable for the quarter in question was less by 10 per centum than the amount of commissions computable on the return under the act of 1854, and to readjust whenever that appeared.

This is certainly a radical change which it is supposed the amendment was intended to effect. It would virtually annihilate the biennial salary system, for there were then only about three hundred offices of the first and second classes and more

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than twenty-nine thousand of the other three. The intent to do this can not be presumed. It must be shown by very clear proof.

It is not enough to say, therefore, that the construction proposed is not incompatible with the language of the proviso. It should appear to be the only meaning of which that enactment is susceptible; whereas the fact is that no such meaning can be extracted from its language without interpolating some parts of the text and disregarding others. Thus the phrase "when the quarterly returns" must be changed to "whenever any quarterly returns;" the phrase "the salary allowed" requires the addition of the explanation "for such quarter;" and the direction to "readjust under the provisions of said (second) section" must be ignored.

Such liberties with the phraseology might possibly be tolerated if necessary to carry out the main intent of the act amended, but they cannot be admitted for the purpose of destroying it, so long, at least, as a more favorable construction is possible. With even greater reason must a construction be rejected which gives no effect to the clause directing the matter of readjustment to be under section 2, and therefore biennially.

To overcome these objections an alleged grievance of some postmasters which it is assumed that Congress intended to remedy seems to be relied on; and it amounts in substance to this, that 'in some or in many cases the biennial salary might or did, in a given quarter, fall short of the postmaster's earnings on the old basis of commissions for that quarter; that the old basis was the juster one to the officer, and Congress must be presumed to have intended in the proviso to go back to it in substance in some way which, as it will be seen, is not easily explained.

The fundamental objection to this construction is that it rests on the assumption that Congress, while professedly amending the act of 1864, intended to substantially nullify it; a position which is not only repugnant to settled legal principles, but which, in view of the fact that the system inaugurated in that act has been continued and enforced in all essential particulars, appears to be especially visionary.

Another unfounded assumption is, that such an amend-

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ment was needed to secure to postmasters just compensation in case the salary allowed should turn out to be far below their earnings on the basis of commissions. The act of 1864 makes ample provision for such cases by special readjustment in the Postmaster General's discretion. There is nothing in the amendment to indicate that Congress intended to repeal or in any way limit this discretion. On the contrary, it declares that the conditional readjustments it prescribes (which have no apparent reference to the special cases mentioned in section 2) are to be conducted under the provisions of that section. To be so conducted, they must be readjusted as special cases on satisfactory representation at such times as the Postmaster-General may deem expedient under the exceptional authority given him, or biennially under the general mandatory provisions of the act; and that Congress could not have referred to the exceptional, but must have intended the regular, mode of readjustment is manifest.

As to any suggestion that the amendment may have been framed to protect postmasters by reason of some supposed failure of the Postmaster-General to properly exercise his discretionary authority, there is no evidence of that in the act, where it should be found, and if Congress had any such supposition (a thing which I have no right to presume) and intended to rebuke the administration of that department as indicated, it has taken singular pains to conceal its purpose by the use of language conveying a very different meaning.

Stripped of this special motive, there remains but the claim of a general equity to justify the postmasters' construction, based apparently on the assumption that they are somehow entitled to be compensated on the basis of commissions rather than by salary.

This cannot be so. The right to compensation in such case can rise to no higher level than that of its statutory source. No one is obliged to become or to remain a postmaster against his will, but while such postmaster the existing law is the measure of his compensation in every sense. Congress did not intend, in substituting the salary for the commission system, to give postmasters an exact equivalent of their earnings under the latter plan. It deliberately provided a

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scheme by which the salary should never exceed the commission standard, and would ordinarily be less by a difference extending to the limit of ten per centum. Thus, as before shown, for commission earnings between \$1,000 and \$1,100 the prospective salary assigned would be \$1,000. No postmaster, then, after the act of 1864, could reasonably claim that such a law invaded any of his rights, and the amendment of 1866 extended its scope by making the ten per centum difference impartially applicable in the three classes, as we have seen. When Congress, as to one of the classes, saw fit to change the law, it did so; but that does not affect the present condition.

A fair test of the merit of the proposed construction is to consider the results which would follow from carrying it into effect. We may suppose, for instance, the case of a postmaster with an allowed salary of \$1,000 per annum, whose first quarterly return thereafter shows that on the basis of commissions he would have earned during the quarter \$275. By the construction in question the Postmaster-General must have forthwith ascertained this, and must thereupon proceed to readjust the salary. But in what manner?

One suggestion is that it should be retrospective, raising the salary for the past quarter to equal the commissions; but this would virtually wipe out the salary system, and is prohibited by the act of 1864, as construed in McLean's case (85 U. S., 753) and by the act of 1883.

The readjustment must, therefore, take effect prospectively, and as there is no provision for assigning a salary for less than two years, the Postmaster-General must assign him a salary for that period in advance, but he cannot determine its amount under the act of 1864 from a single return, for it depends on the annual average from eight consecutive quarterly returns. If he can escape that difficulty and can assign a salary of \$1,100 per annum for two years from that return, what is he to do at the end of the next quarter if its return shows commissions of but \$225, except to make a new biennial readjustment on the basis of that return, and so go on, quarter by quarter, maintaining the farce of a biennial system readjusted quarterly. Is it conceivable that Congress intended such anomalous and absurd results as are begotten

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by such a construction of its amendment of the postal law of 1883?

It is needless to further pursue the inquiry. There is no phase of it in which that construction is not destructive of the very essence of the act amended; and that intent can not be admitted unless openly declared or by an inference which has no alternative. There is no such declaration, and that there is no such necessary inference has been shown.

The practical conclusion of this discussion is that in my opinion you are directed by the act of 1883 to make now, on behalf of any applicant thereunder who is found to be entitled under the conditions precedent prescribed in that act, the readjustment or readjustments of salary which he may so claim and be found to have been entitled to at any one or more of the biennial periods since the act of 1864, under that act as amended by the proviso added thereto by the act of 1866 as above construed; crediting the applicant of course with any difference in his favor between the amount (or proportional amount) of the salary so readjusted for the prospective biennial period and the salary paid to him for the time of his service in such period.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. W. Q. GRESHAM,  
*Postmaster-General.*

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DIRECT TAX.

The withholding the amount of the "2 and 3 per cent. funds" due the State of Mississippi, and crediting the State therewith on account of the direct tax, was unwarranted by law, as no liability rests upon the State for the payment of such tax.

DEPARTMENT OF JUSTICE,

*February 15, 1884.*

SIR: I have the honor to return herewith the communication of Senators Lamar and George, of Mississippi, touching the "2 and 3 per cent. funds" alleged to be due that State, which by your direction was referred to me on the 1st instant.

Assuming the facts to be as set forth therein, I concur in their view that no liability rests upon the State for payment

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of the tax referred to, and consequently that the withholding of the amount of said funds and crediting the State therewith on account of said tax were unwarranted by law.

But without more definite and particular information than is afforded by them respecting the *account* as stated at the Treasury, between the United States and the State of Mississippi, I am unable to form, and for that reason do not express, any opinion upon the question whether or not it is competent to the accounting officers now to readjust such account, so as to allow payment to the State of the amount of said funds which shall thus be found to be due thereto.

I am, sir, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

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 CUSTOMS LAWS.

The words "not specially enumerated or provided for in this act," used in schedule N of the act of March 3, 1883, chapter, 121, in the clauses fixing a duty upon "bonnets, hats and hoods for men, women, children, composed of chip, grass," etc., and "upon braids, plaits, flats, laces, etc., used for making or ornamenting hats, bonnets, hoods," etc., apply to articles of the description mentioned, and not to the material out of which such articles are made.

DEPARTMENT OF JUSTICE,

February 15, 1884.

SIR: By your letter of the 19th of November last, my attention is called to certain provisions in the tariff act of March 3, 1883, chapter 121, and an opinion is requested from me as to the proper construction thereof. I have now the honor to submit the following in compliance with your request:

In Schedule N of that act it is provided—

"Bonnets, hats and hoods for men, women and children, composed of chip, grass, palm leaf, willow or straw, or any other vegetable substance, hair, whalebone, or other material, not specially enumerated or provided for in this act, thirty per centum ad valorem."

The question arising upon this provision I understand to be whether the words "not specially enumerated or provided for in this act" apply to the *articles* designated (*i. e.*,

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bonnets, hats, and hoods for men, women, and children), or to the *material* of which they are composed.

Upon consideration, I am of the opinion that the words referred to were meant to apply to articles of the description mentioned, and not to the material out of which such articles are made. The aim of the provision is to classify, for revenue purposes, certain *articles of manufacture* and to subject them to the particular duty thereby imposed, and to signify that it is intended to be a *general* one, covering all such articles, is the object of the words in question. It is meant to comprehend bonnets, hats, etc., of whatever material composed, which are not elsewhere in the act "specially enumerated or provided for." Thus, while hats of wool, being specially provided for in Schedule K, are not within its scope, it must be deemed to embrace hats of silk, these not being elsewhere in the act specially enumerated or provided for.

A similar question is also understood by me to arise upon the following provision in Schedule N of the same act:

"Hats, and so forth, materials for: Braids, plaits, flats, laces, trimmings, tissues, willow sheets and squares, used for making or ornamenting hats, bonnets, and hoods, composed of straw, chip, grass, palm leaf, willow, hair, whalebone, or any other substance or material, not specially enumerated or provided for in this act, twenty per centum ad valorem."

The words "not specially enumerated or provided for in this act," as employed in this provision, apply in my opinion to the *articles* (braids, plaits, laces, trimmings, tissues, etc.) used for making or ornamenting hats, bonnets, etc., and not to the material of which those articles are composed. This view is founded upon the same considerations upon which the construction given by me to the first-mentioned provision rests.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

*Secretary of the Treasury.*

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Passports.

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## PASSPORTS.

Certain papers issued by the mayor of Savannah, Ga., and also by a notary public at Cedar Keys, Fla., containing the essentials of a passport, and intended to be used in traveling in a foreign country, are a violation of section 4078, Revised Statutes.

## DEPARTMENT OF JUSTICE,

*February 15, 1884.*

SIR: Yours of the 12th instant brings to my attention certain action by city mayors, public notaries, etc., at Savannah, Cedar Keys, etc., in regard to papers which are used to answer the purpose of *passports*, and asks whether the statutes now in force providing punishment for issuing passports under certain circumstances apply thereto.

(1) In one of these cases it seems that the mayor of Savannah is in the habit of issuing to persons traveling to Cuba a paper under his hand and the seal of that city, and otherwise in official form, which certifies that the person therein named "is a citizen of the United States," who desires to visit Cuba, and is *prevented by want of time* from obtaining a passport *from the United States authorities*. This is attested by the clerk of the city council, and viséd by the Spanish consul at that port, a fee being paid for each of these services.

(2) In the other case, a notary at Cedar Keys gives a formal certificate, headed "United States of America," with "an eagle" displayed, and making known to all concerned that the notary certifies that the bearer, ———, has produced before the notary in due form full and conclusive proofs of his being a citizen of the United States, and has otherwise complied with the requirements of the Department of State to entitle him to a passport, and also that the notary had forwarded such proofs to the Secretary of State for a passport, which can only reach him after the citizen shall have departed for ———, so that the latter cannot become its bearer, but that the notary will transmit it to the citizen by first opportunity after its receipt.

That sort of passport which is given by a government to its citizens when proposing to pass into the territory of another government is in its essence only a certificate of nationality and identification. The United States for good reasons have reserved to themselves, acting through certain of their

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officers, the right to grant to travelers in foreign countries such certificates. They have also provided severe punishment for the issuing of such by any "persons acting or claiming to act under the United States or any of the States," other than such as are authorized.

Upon consideration thereof, I am of opinion that the papers above described come within the policy and letter of the statutes which forbid persons acting under a State from issuing passports.

Both of these papers, as appears by inspection, contain the essentials of a passport, viz, an identification of the party named therein as a citizen of the United States for the purpose of travel in foreign countries. Both, however, expressly state that they are not passports under the authority of the United States, but are given—one, because time did not allow of obtaining *such passport*; the other, as a preliminary thereto.

The purpose of the legislation of the United States upon this subject is, to forbid all certificates by certain officials, as to the *citizenship*, etc., of travelers into foreign countries, *whether purporting to be in the name of the United States or not*. I conclude therefore, as above, that *notwithstanding what appears therein in addition to such certificate*, the above papers are violations of section 4078 of the Revised Statutes.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF STATE.

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CLAIMS AGAINST THE UNITED STATES.

Payment to a judgment creditor of a claim against the Government in favor of the judgment debtor, if made without the consent of the latter, is unauthorized by law.

DEPARTMENT OF JUSTICE,

February 23, 1884.

SIR: Yours of the 7th instant inclosed a letter from A. Sidney Biddle, esq., of Philadelphia, in which he asks that a certain sum due from the United States to one Charles M. Hilgert, being excess of deposits for unascertained duties on certain sugars imported by the latter, be paid over to Mr. Charles C. Harrison, who is the assignee of a judgment ob-

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tained by Mr. Henry K. Kelly against said Hilgert in satisfaction of such judgment.

It appears that after the importations were made Hilgert absconded and left the country, having (as is alleged) forged commercial paper for a large amount; that there is little or no probability of his return; and that he has left no agent authorized to receive the sum due him as above.

You inquire, "Whether, under these circumstances, the Department can legally authorize payment of the excess of deposits to be made to Mr. Harrison."

Upon mature consideration, I am of opinion that the circumstances stated do not authorize payment to be made as requested. In general, a claim upon the Government can only be discharged by payment to the claimant himself, or to his duly-constituted agent, or to those upon whom the title to the claim or right to receive payment thereof is devolved by operation of law. Payment to a judgment creditor merely of a claim in favor of his judgment debtor, if made voluntarily and without the consent of the latter, would be insufficient. The judgment creditor, simply as such, is invested with no right or title to the claim; he is clothed with no power to discharge it; and therefore payment to him must be deemed to be unauthorized.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,  
*Secretary of the Treasury.*

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CUSTOMS LAWS.

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Distinction between the expression in Schedule M (Rev. Stat., p. 473), "black of bone or ivory drop black," and the expression (Free List, *ibid.*, 433), "bones crude and not manufactured; burned, calcined, ground, or steamed," pointed out; and *held* that burnt bones intended and fitted for other uses in the arts than that of imparting color are duty free, although in fact they are black.

DEPARTMENT OF JUSTICE,  
March 11, 1884.

SIR: I have considered your communication of the 7th instant in relation to the late cases of *De Wardener v. Robertson*, collector, and *Peters v. same*.

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Set-off.

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These cases involve a question as to the proper duty upon bones burned and reduced to a state required in the manufacture of sugar. The result in the former suit differs from that in the latter. In *De Wardener's* case it has in effect been decided that the duty exacted was improperly exacted; in *Peters' case*, however, a verdict has been found for the collector.

In reply to the question which you put, I submit the opinion that the expression in Schedule M ( Rev. Stat., 473 ), "Black of bone or ivory drop black," lays the entire emphasis upon the *color* of the article, and means something used for imparting color; whilst the expression ( Free List, p. 433 ), "Bones crude and not manufactured; burned, calcined, ground or steamed," lays the emphasis upon some state of the article other than color. In the former case the color is the principal matter, and the duty is levied because of the color. In the latter case the color is a mere accident, and the duty imposed upon the article is due to some other consideration.

I am of opinion therefore that burnt bones, like the above, intended and fitted for other uses in the arts than that of imparting color, are free although in fact they be black, and that to render the paragraph in Schedule M applicable the *bone* must in a manner be merged in the black, no original quality of the former remaining ( or at least being regarded ) except such as conduces to the quality of the color.

Very respectfully, your obedient servant,

S. F. PHILLIPS,  
*Acting Attorney-General.*

The SECRETARY OF THE TREASURY.

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SET-OFF.

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Where money was paid by a United States marshal, under a mistake of fact, to a person who subsequently became an officer in the postal service: *Held* that, the latter being in arrears to the United States for the amount so paid, it may be set off against his compensation as such officer.

DEPARTMENT OF JUSTICE,  
*March 31, 1884.*

SIR: I have the honor to acknowledge the receipt of your letter of the 27th inst. relative to withholding a portion of the salary of J. H. Goff, a railroad post-office clerk, as ar-

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Set-off.

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rears due to the United States on account of earnings paid him by Marshal Longstreet. You say "it is not clear that the overpayment is money due the United States from Goff within the meaning of section 1766."

In reply to your letter and suggestion, I have to say that there is no doubt that the sum (\$74.74) referred to in your letter as having been paid to Goff by the marshal as actual expenses, being an excess of the amount due him for witness fees, may and should be withheld under section 1766, Revised Statutes. Mr. Goff is clearly a "person in arrears to the United States" to this extent. He has received \$74.74 more from the United States than he is entitled to under the law. This sum was paid to him by the marshal under a mistake of fact, the latter believing that Goff was a Government officer, and so entitled to actual expenses instead of witness fees.

The principle is well settled that money paid under mistake of fact may be recovered back. This was Goff's case. It is the right of the United States to set off this overpayment independently of the statute. But the prohibition in section 1766 against payment of "compensation" to "any person who is in arrears to the United States" is explicit. It does not admit of construction. But one exception, as I am informed, has been made by the accounting officers to the rule of setting off debts due from officers and employes against their compensation accounts under this section. This was the case of Hon. Thomas P. Ochiltree, member of Congress from Texas. But the reason for not following the general rule in that case was rested upon the constitutional provision requiring members of Congress to be paid a compensation for their services to be ascertained by law. And in cases similar to that of Mr. Ochiltree, where the compensation of delegates from Territories was concerned, the rule of set-off has been maintained, the Constitution not by its terms applying to their salary.

In my opinion the amount of \$74.74 should be deducted and withheld from any amount now due Goff as compensation for his services as postal clerk.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The POSTMASTER-GENERAL.

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Free List.

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## FREE LIST.

A bicycle taken abroad by a citizen for his use, and brought back with him on his return to this country, is not subject to duty, being a "personal effect." (See Free List, Rev. Stat., p. 489).

DEPARTMENT OF JUSTICE,  
April 4, 1884.

SIR: Yours of the 1st instant mentions the case of a citizen who during the past month visited Bermuda, carrying along for use there his *bicycle*; and asks whether upon his return therewith that article is subject to duty.

I agree with you that it is not; being a "personal effect (not merchandise)" within the language of the Free List (Rev. Stat., p. 489, middle).

Allow me to add that upon reading the opinion of Attorney-General Taft, of June 30, 1876 (15 Opin., 125), to which you refer, it seems that he did *not* there hold that a *carriage* used abroad was not a "personal effect" within the above phrase. The only question put to him, as appears, was whether such a carriage was a "*household effect*," within the meaning of another paragraph of that list. (Rev. Stat., p. 484, top).

I mention this in order to save any case in which such an "effect" shall be involved in the present question. I may add that I have not seen the decision of the Treasury Department, No. 2901, July 21, 1876, to which in this connection you refer.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

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Claims under the Treaty with Spain of 1819.

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## CLAIMS UNDER THE TREATY WITH SPAIN OF 1819.

Review of the legislation passed and proceedings had thereunder in execution of the ninth article of the treaty with Spain of 1819 respecting the claims of Spanish subjects growing out of the operations of the American army in Florida.

The Government of the United States has done all that it was bound to do under that article, and has fully executed the same; hence no liability whatever arising under the treaty now rests upon it.

DEPARTMENT OF JUSTICE,

*April 11, 1884.*

SIR: In a letter dated June 26, 1883, you proposed for my consideration the question as to the liability of the United States, under the treaty with Spain of 1819, for interest as allowed by the Florida judges in their decisions upon the claims of Spanish subjects presented under the ninth article of that treaty.

Subsequently, by a resolution of the Senate passed December 6, 1883, the President was requested to inform that body, if not incompatible with the public service: (1) whether or not, in his opinion, the said article has been fully executed by the United States; (2) if not, then "whether the impediment to its execution arises out of unsettled questions of fact or undetermined questions of law, and what, if any, are such unsettled questions of fact, and undetermined questions of law."

These inquiries involve an examination of said article and of the provision made by Congress for executing the same, and also of the result and effect of the proceedings had under such provision.

By the said article it is stipulated: "The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

In execution of the same article the act of March 3, 1823, chapter 35, was enacted. By the first section of that act the judges of the superior courts established at St. Augustine and Pensacola respectively are authorized to receive and adjust all claims arising within their respective jurisdictions,

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Claims under the Treaty with Spain of 1819.

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agreeably to the provisions of said article; and by the second section it is provided: "That, in all cases in which said judges shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be, by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged," etc.

That act was construed by the Secretary of the Treasury to not extend to injuries suffered in 1812 and 1813 from the causes mentioned in the treaty, but to apply only to those of a subsequent period. In consequence of this construction, the act of June 26, 1834, chapter 87, was passed, enlarging the authority of the judge of the superior court at St. Augustine and of the Secretary of the Treasury so as to include claims for injuries suffered in 1812 and 1813, but limiting the time for presenting the claims to one year from the passage of the act.

Such was the provision made by Congress for executing said article; and that the tribunals thereby created (viz, the judges and the Secretary of the Treasury), for adjusting claims for damages, were, in that regard, a sufficient compliance with the treaty, is affirmed in the opinion of the Supreme Court in the case of *The United States v. Ferreira* (13 How., 47, 48). "The tribunals established," remarks the court there, "are substantially the same with those usually created where one nation agrees by treaty to pay debts or damages which may be found to be due to the citizens of another country. This treaty meant nothing more than the tribunal and mode of proceeding ordinarily established on such occasions, and well known and well understood when treaty obligations of this description are undertaken."

Under that provision the judges were authorized to receive and adjust claims which originated within their respective jurisdictions, but a power of revision over awards made by them in favor of claimants was given the Secretary of the Treasury. "No claim, therefore," says the court in the case above cited, "is due from the United States until it is sanctioned by him; and his decision against the claimant for the

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Claims under the Treaty with Spain of 1819.

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whole or a part of the claim as allowed by the judge is final and conclusive." The court further observes in the same case, "all that the judge is required to do is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him or be able himself to obtain. But neither the evidence, nor his award, are to be filed in the court in which he presides, nor recorded there; but he is required to transmit both the decision and the evidence upon which he decided to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge."

Pursuant to the authority thus conferred, the judges received and acted upon claims presented to them; and where they decided in favor of claimants, their decisions, with the evidence upon which the same rested, were reported to the Secretary of the Treasury for his action. In nearly every case in which they so decided they added to the amount of actual damage found to have been sustained by the claimant interest thereon at a certain rate for a certain period; but the interest so added was, on revision of the awards by the Secretary of the Treasury, uniformly rejected by him, and the claimants paid without any allowance for interest being included in the payments.

All claims cognizable by the judges under the provision above referred to have long since been passed upon by them, and the amounts finally allowed thereon, upon revision by the Secretary of the Treasury, have all been paid to the parties entitled.

Thus, as matter of fact, it appears—

(1) That adequate tribunals (composed of the judges and the Secretary of the Treasury) for adjusting the claims were created by Congress, and that, in this respect, all that is contemplated or required by the treaty has been performed.

(2) That, in the adjustment of the claims, the mode of proceeding prescribed by the law creating such tribunals, (viz, examination and decision in the first instance by the judge, revision and final decision thereupon by the Secretary), has been followed throughout.

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Entry of Imported Merchandise.

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(3) That the amounts thereby ascertained to be due from the United States to claimants have all been paid, and that there remain unadjudicated no claims cognizable by such tribunals.

From the foregoing I deduce the following conclusion: That the Government of the United States has already done all that it was bound to do under the article of the treaty hereinbefore mentioned—in other words, has fully executed the said article; and consequently that no liability whatever arising under the treaty now rests upon it.

In regard to the interest allowed by the judges in the first instance, and afterwards, on revision, disallowed by the Secretary of the Treasury, *that* stands rejected by the *ultimate decision* of the tribunal created in conformity with the requirements of the treaty for the purpose of adjusting claims preferred thereunder. And as no appeal from such decision is provided for, it must be deemed to be conclusive upon the claimants with respect to the subject-matter thereof. No obligation on the part of the United States exists, by virtue of the treaty, to “cause satisfaction to be made” to them for any damage over and above that which, *according to the final decision of said tribunal*, they have sustained.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. F. T. FRELINGHUYSEN,  
*Secretary of State.*

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ENTRY OF IMPORTED MERCHANDISE.

*Semble* that section 2859, Revised Statutes, is not repealed by section 9 of the act of June 22, 1874, chapter 391, or by the act of May 1, 1876, chapter 89.

DEPARTMENT OF JUSTICE,  
April 14, 1884.

SIR: In reply to yours of the 10th instant, asking whether the act of 1874, chapter 391, section 9, or that of 1876, chapter 89, repeals section 2859, Revised Statutes, I have to say that after much consideration I am unable to satisfy myself that the latter is repealed by either of the acts before named. There is no express repeal; and I am unable to find such

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 Compensation of Officers.
 

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inconsistency between the respective provisions as in the absence of an express repeal might argue a repeal by implication. It seems to me that for *regulation of details of importation of goods worth one hundred dollars or less* the act of 1874 means to refer to what is to be found in previous legislation. Nor do I find it otherwise by the act of 1876, except as to the particular provision therein expressly made.

I may add that upon its face the act of 1874, section 9, only excepts goods worth \$100 or less from the provisions as to all other goods *therein contained*. And I do not find that these new provisions make such a revolution in previous regulations touching such other goods as carries with it an inference that previous regulations as to the excepted goods also must be thereby repealed.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

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## COMPENSATION OF OFFICERS.

Where an inspector of customs, while holding that office, rendered service as a special deputy marshal under section 2031, Revised Statutes: *Held* that he is prohibited by the third section of the act of June 20, 1874, chapter 328, from receiving any compensation for such service beyond his salary as inspector of customs.

DEPARTMENT OF JUSTICE,

April 19, 1884.

SIR: I have the honor to acknowledge the receipt of your letter of the 28th ultimo, transmitting papers in relation to the retention by the collector of customs at New Orleans of \$50 from the salary of E. J. Sherman, an inspector of customs, on the ground that he has received that amount from the United States for service as a special deputy marshal under section 2031 of the Revised Statutes, and requesting my opinion whether the inspector was prohibited by law from receiving such compensation.

Section 3 of the act of June 20, 1874, chapter 328, contains the following provision:

“That no civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly,

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Compensation of Officers.

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from the Treasury or property of the United States beyond his salary or compensation allowed by law."

By section 2621 of the Revised Statutes a collector may employ, with the approval of the Secretary of the Treasury, proper persons as inspectors at the several ports within his district.

In the case of *Hartwell* (6 Wall., 385) the Supreme Court held, with regard to a substantially similar provision under which a clerk in the office of an assistant treasurer was appointed, that he was a public officer. The only difference in the statute there considered from that last before mentioned is, that in section 2621 the word "employ" is used instead of "appoint," which I do not think a material difference, especially as in sections 2576, 2583, 2605, 2606, 2607 the latter term is used as to inspectors.

In sections 2637, 2737, and in many others of the Revised Statutes, inspectors are styled officers, and they are in practice required to take the oath of office.

There can be no doubt that they have always been considered and treated as public officers, and they have a salary or compensation allowed by law. (Rev. Stat., 2733, 2737; 20 Stat., 173, 414.)

As such inspector, Sherman was therefore a civil officer, and within the restriction of the act of 1874 above cited, and was prohibited by it from receiving from the Treasury the \$50 for service as special deputy marshal. (*Hedrick's Case*, 16 U. Cls. R., 102.)

He was not, as such special deputy marshal, a public officer within the constitutional limitation as to appointment (Const., Art. II, sec. 2), and so can claim nothing by reason of section 1763 of the Revised Statutes.

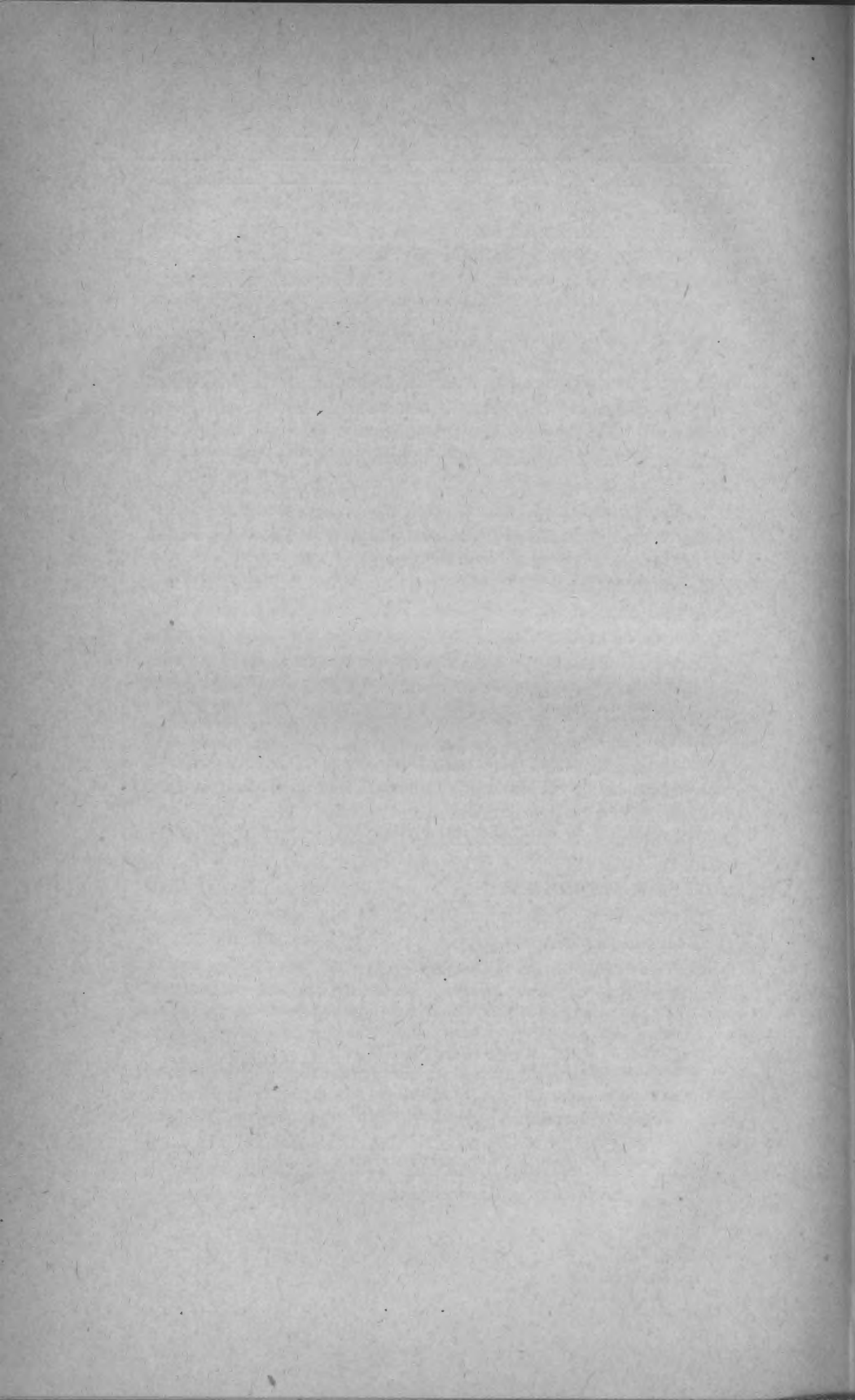
Section 1765 of the Revised Statutes might be considered also as applicable to his case, but in view of the broader language of the act of 1874 I have not deemed it necessary to consider that provision. I return the papers inclosed, as requested.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,

Secretary of the Treasury.



# INDEX.

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## ACCOUNTS AND ACCOUNTING OFFICERS.

1. The First Comptroller has no revisory power over the decisions of the Secretary of the Treasury respecting the issue of warrants; such decisions are binding upon the former officer. 233.
2. It is not within the province of the accounting officers of the Treasury to construe the pension laws and give instructions to pension agents as to the payment of pensions. This properly belongs to the Commissioner of Pensions, whose duty it is, under the direction of the Secretary of the Interior, to administer these laws. 339.
3. The Commissioner of Pensions is not invested with power to audit and adjust accounts for the last sickness and burial of deceased pensioners arising under section 4718 Rev. Stat. This power belongs solely to the proper accounting officer of the Treasury by virtue of section 236 Rev. Stat. 440.
4. S., while a major-general of volunteers, was, in July, 1866, appointed colonel of the Forty-fifth United States Infantry, and on September 10, 1866, accepted the appointment and took the oath of office. From that time until August 31, 1867, when he was mustered out of service as a major-general of volunteers, he continued to draw the pay of a major-general: *Held* that the settlements made by the accounting officers in the matter of his pay as major-general are conclusive upon the executive department of the Government, and can not be re-opened. 448.

See DISTRICT OF COLUMBIA, 6, 7; PAY ACCOUNTS OF ARMY OFFICERS, 1, 2.

## AD INTERIM APPOINTMENT.

See APPOINTMENT, 6, 9, 11.

## ADMINISTRATIVE PRACTICE.

1. No rule of administrative practice is better settled than that when a matter has once been passed upon and finally disposed of by the head of a Department, it should not be disturbed or re-opened by his successors, excepting under extraordinary circumstances, such as the discovery of new facts, and the like. 315.
2. The fact that an application for re-examination had been made to and had not been acted upon by the head of Department by whom the decision was rendered, does not withdraw the case from the operation of the rule. *Ibid.*

See LANDS, PUBLIC, 9; RES ADJUDICATA.

## ADVERTISEMENT.

See CONTRACT, 2, 3.

## AGRICULTURAL COLLEGE LANDS.

See LANDS, PUBLIC, 2.

## AMENDMENT OF ARTICLES.

See NATIONAL BANKING ASSOCIATIONS, 4, 5, 6, 7.

## APPOINTMENT.

1. K. was elected and qualified as Senator from Iowa for a term which would expire in March, 1883. He resigned in March, 1881, to accept the position of Secretary of the Interior, which office he also resigned in the latter part of the same year. Since then, by act of May 15, 1882, chap. 145, the office of tariff commissioner was created: *Advised* that the second clause of section 6 of the first article of the Constitution disqualifies K. for appointment to such office. 365.
2. Doubt suggested whether the provision in section 3 of the act "to regulate and improve the civil service," etc. (22 Stat., 403), for the employment of a "chief examiner," does not come in conflict with the constitutional rule on the subject of appointments. 504.
3. The word "employ" is sometimes used in our legislation in a sense equivalent to "appoint." *Ibid.*
4. An office which has become vacant during a session of the Senate may be filled during the next ensuing recess of the Senate by a temporary appointment by the President; but by section 1761 Rev. Stat. payment of the salary of the appointee, in such case, is postponed until he has been confirmed by the Senate. 521.
5. *Seem* that the nomination and confirmation of a person who at the time is ineligible for the office by force of section 6, article 1 of the Constitution, can not be made the basis of his appointment to such office after his ineligibility ceases. 522.
6. Sections 177, 178, 179, and 180 Rev. Stat., considered with reference to the power of the President to make *ad interim* appointments, and opinion of Attorney-General Devens (16 Opin., 596-7) concurred in. 530.
7. Under the law at present in force, assistant engineers in the revenue-cutter service should be appointed by the President with the concurrence of the Senate. 532.
8. It is a general rule that, where there is no express enactment to the contrary, the appointment of any officer of the United States belongs to the President by and with the advice and consent of the Senate. *Ibid.*
9. Section 180 Rev. Stat. applies to vacancies in office occasioned by death or resignation, as well where they are filled (under sections 177 or 178 Rev. Stat.) without action by the President, as where they are filled (under section 179 Revised Statutes) by his authority and direction. 535.
10. The discretionary power given the President by section 179 Rev. Stat. may be exercised after the vacancy has already been sup-

## APPOINTMENT—Continued.

plied under the operation of either of the two preceding sections: and in that case the ten days' limitation is to be computed from the date of the President's action. *Ibid.*

See DISTRICT OF COLUMBIA, 1, 3; PRESIDENT, 5.

## APPRAISERS.

See CUSTOMS LAWS, 19.

## ARMY.

1. The act of December 12, 1878, chap. 2, limits the nomination of brigadier-general in the Inspector-General's Department to the senior officer thereof. Provisions of that act compared with those of section 1193 Rev. Stat., and distinction between them indicated. 2.
2. Where a judge-advocate, appointed in the volunteer service under the act of July 17, 1862, chap. 201, with the rank of major, was afterwards and prior to the act of July 28, 1866, chap. 299, as amended by the act of February 25, 1867, chap. 79 (by operation of which acts he became transferred from the volunteer to the regular service), brevetted a lieutenant-colonel and also a colonel of volunteers: *Held* that the said acts of 1866 and 1867 produced no effect upon the brevet commissions in the volunteer service previously conferred, and that such brevets can not be treated as brevets in the regular service. 3.
3. Upon consideration of the facts in the case of the retirement of Col. George Stoneman, U. S. Army: *Held*, that that officer was not entitled to be retired as a major-general on account of disability occasioned by wounds received in battle, under the provisions of section 32 of the act of July 28, 1866, chap. 299 (it not appearing that his disability was so occasioned), but that he was properly retired on his rank of colonel. 7.
4. Opinion of November 28, 1874 (14 Opin., 506), upon the claim of General Schuyler Hamilton to be borne on the retired list of the Army, re-affirmed. 9.
5. Relative rank in the Paymaster's Department of the Army, as between officers having the same grade and date of appointment and commission, was regulated by the act of March 2, 1867, chap. 159 (Rev. Stat., secs. 1219 and 1292), and was determined by length of service as a commissioned officer, computed according to the provisions of that act. 10.
6. Except as between such officers as have the same date of appointment and commission, the matter of relative rank was left by that act to be governed by the dates of the commissions under which the officers are at the time serving. *Ibid.*
7. Y., B., and S. were second lieutenants in different infantry regiments, ranking in the order named according to dates of their respective appointments and commissions. They were all promoted to be first lieutenants in their respective regiments as of the same date, June 28, 1878. S., who was the junior second lieutenant, claimed to be the senior first lieutenant under section 1219 Rev. Stat.,

## ARMY—Continued.

because of the greater length of service as a commissioned officer prior to date of promotion: *Held* that the rule prescribed by that section for determining relative rank as between officers of the same grade and date of appointment and commission applies to appointments on promotion as well as to original appointments; and, consequently, that S. ranked the other first lieutenants referred to. 34.

8. Where an Army officer is placed on duty according to his brevet rank by special assignment of the President, he is, while thus assigned, entitled to precedence and command according to his brevet commission, even over an officer holding a full commission of the same rank as the brevet, but of junior date. Thus a colonel who holds a brevet commission as major-general of the date of March 2, 1867, and who is by the President specially assigned to duty according to his brevet rank, takes precedence over an officer who holds a full commission of major-general dated November 25, 1872. 39.
9. On reconsideration, the opinion of January 13, 1881 (*ante*, p. 3), holding that the brevets of Major Winthrop, judge-advocate, in the volunteer force, could not be treated as brevets in the regular Army, re-affirmed. 46.
10. Sections 1104 and 1108 Rev. Stat. prohibit, by implication, the enlistment of white men in the colored regiments therein mentioned and provided for. 47.
11. In fixing the relative rank of officers of the same grade and date of commission, under the act of March 2, 1867, chap. 159 (sec. 1219 Rev. Stat.), constructive service as a commissioned officer is not to be considered. 52.
12. The terms of the statute, "actually served," are used *ex industria*, and are intended to prevent any service purely constructive in its character from affecting the relation between officers of the same date. *Ibid*.
13. The rule prescribed in paragraph 20, Army Regulations of 1863, by which "promotions to the rank of captain shall be made regimentally," is not in conflict with the provisions of section 1204 Rev. Stat., and remains in full force. 65.
14. The regulations and legislation concerning the promotion of subaltern company officers, from the year 1801 to the present time, reviewed, and the practice thereunder stated. *Ibid*.
15. Officers and enlisted men of the Signal Corps (other than those who are *detailed* for service therein) are a part of the Army only in this sense, namely, that in general they are liable to such duties and entitled to such privileges, appertaining to the Army, as can be performed and enjoyed without severance from the Signal Service. 146.
16. They belong to a special service in the Army, and are subject to military government; but they are not by law transferable to ordinary military duty, and are organically separate and distinct from the Army proper. *Ibid*.

## ARMY—Continued.

17. The word "appointment," as used in section 1219 Rev. Stat. comprehends only the appointment of an officer on his original entry into the regular service, and does not include his appointment on promotion thereafter made. Opinion of Attorney-General Devens, of February 21, 1881 (*ante*, p. 34), dissented from. 196.
18. Previous to the act of March 2, 1867, chap. 159, rank in any grade in the Army was determined by date of commission or appointment; and where commissions were of the same date, then, as between officers of the same regiment or corps, by the order of appointment. 362.
19. That act (sec. 1219 Rev. Stat.,) introduced a new rule, cumulative in its character, for determining relative rank as between officers "having the same grade and date of appointment and commission," which, as regards officers of the same regiment or corps, operates only where such officers, being of the same grade and date of appointment and commission, have (one or more) "actually served, whether continuously or at different periods, as a commissioned officer of the United States," etc. Where none of them, when appointed, had thus actually served, the former rule (*i. e.*, order of appointment) would still be applicable in fixing their relative rank in the corps. *Ibid.*
20. Opinion of May 18, 1882, viz, that where certain assistant surgeons had attained the rank of captain on the same day, but whose appointments and commissions were not of the same date, their relative rank as between themselves was not determined by the provisions of section 1 of the act of March 2, 1867, chap. 159 (sec. 1219, Rev. Stat.), but by the date and order of their appointment—reaffirmed. 402.
21. Under section 17 of the act of July 28, 1866, chap. 299, an assistant surgeon who served as such less than three years in the regular Army, or less than three years in the volunteer forces, did not become immediately entitled to the rank of captain, although his volunteer and regular service, when combined, may have amounted to three years. *Ibid.*
22. But by the second section of the act of March 2, 1867, the officer would have a right to have his volunteer service computed, and if at the date of that act this service, united with his service in the regular Army, made three years, he would *then* be entitled to the rank of captain. This provision, however, did not operate retrospectively, so as to affect or alter the previous relations of the officer in the service. *Ibid.*
23. In determining whether the limit of four hundred, prescribed by the act of June 18, 1878, chap. 263, has been reached or not, the number retired under the act of June 30, 1882, chap. 254, must always enter into the computation. 421.
24. No retirement can lawfully be made under the laws existing prior to the act of June 30, 1882, when the number already on the retired list

**ARMY—Continued.**

amounts to four hundred; although, by retirements *under that act*, the list is subject to temporary augmentation beyond the limit of four hundred. *Ibid.*

25. The vacancy existing in the office of assistant surgeon-general may be filled by appointing thereto any one of the surgeons with the rank of colonel or the chief medical purveyor (all of whom hold offices of the same *grade* in the medical corps as that of the vacant office), or by promoting thereto the senior officer in the medical corps having the rank of lieutenant-colonel, which is the next grade below. 465.
26. Where there are two or more offices of the *same grade* in a corps, each requiring a separate commission, on a vacancy occurring in such grade the rules of promotion do not preclude the appointing power from determining to which of these offices the senior in the next grade below shall be appointed. An incumbent of one of them may be transferred by appointment to another which is vacant without prejudicing the rights of such senior, whose claim to promotion would be fully met by appointing him to either. *Ibid.*
27. An officer who has unsuccessfully undergone examination for promotion under section 1206 Rev. Stat., and in consequence has been suspended from promotion for one year, as provided by that section, is not, during the period of such suspension, qualified for promotion on account of continuous service under section 1207 Rev. Stat. 571.
28. Lieutenant-Colonel G., though his commission is junior in date to that of Lieutenant-Colonel B., claims that he is entitled to the next colonelcy over the latter, by reason of errors committed in his promotion in 1847 and 1867: *Advised* that such errors, if any, can not now be rectified by disregarding the fact that B., in virtue of his present commission, is senior to G. in the line of promotion, and that the claim of the latter is therefore inadmissible. 611.

See PAY ACCOUNTS OF ARMY OFFICERS, 1, 2; PRESIDENT, 1, 2, 3, 4; QUARTERS, COMMUTATION FOR, 1, 2; ARMY REGULATIONS, 1, 2.

**ARMY REGULATIONS.**

1. Section 37 of the act of July 28, 1886 chap. 299 (if not already repealed by force of section 5596 Rev. Stat.), was superseded by the act of March 1, 1875, chap. 115, which in effect conferred authority to modify existing Army Regulations as well as to create new ones. 461.
2. The codification of "The Regulations of the Army and General Orders," under section 2 of the act of June 23, 1879, chap. 35, which was approved and published February 17, 1881, superseded the body of Army Regulations promulgated in 1863. Hence paragraph 1304, 1305, and 1306 of the latter regulations are not now in force. *Ibid.*

See PAY ACCOUNTS OF ARMY OFFICERS, 7, 8.

**ARTIFICIAL LIMBS.**

The appropriation of \$175,000 for artificial limbs, etc., made by the act of March 3, 1881, chap. 133, should be expended under the direction of the War Department. 233.

**ASSIGNMENT OF CLAIMS.**

See **CLAIMS**, 10.

**ATLANTIC AND PACIFIC RAILROAD.**

The recommendations of the Secretary of the Interior as to the acceptance of certain sections of the railroad and telegraph lines of the Atlantic and Pacific Railroad Company should be approved by the President. 251.

**ATTORNEY-GENERAL.**

1. In response to a resolution of the Senate directing the Attorney-General to investigate and report to that body who are the owners of the land and water-power at the Great Falls of the Potomac River: *Advised* that any information on the subject found in the records of the Department would be gladly furnished the Senate, but that beyond this, it was submitted, such investigation is not within the duties of the Attorney-General as prescribed by law. 324.
2. The Attorney-General has no control over the action of the head of Department at whose request and to whom an opinion is given, nor could he with propriety express any judgment concerning the disposition of the matter to which the opinion relates, that being something wholly within the administrative sphere of such head of Department. 332.
3. Where a Senate bill was, at the request of a Senator, submitted to the Attorney-General by the head of a Department for an opinion thereon, in order that such opinion might be laid before the committee of the Senate in charge of the bill: *Held* that the Attorney-General is not authorized to give an official opinion in this case, it involving no question of Departmental administration. 347.

**BANKS AND BANKERS.**

See **INTERNAL REVENUE**, 8, 9, 10; **NATIONAL BANKING ASSOCIATIONS**.

**BIDS AND BIDDERS.**

See **CONTRACT**, 1; **POSTAL SERVICE**, 8, 10, 11.

**BOARD OF FIRE COMMISSIONERS.**

See **DISTRICT OF COLUMBIA**, 5.

**BOND.**

See **INDIAN INSPECTOR**, 2; **PATENTED ARTICLES, PURCHASE OF**.

**BONDED WAREHOUSE.**

See **CUSTOMS LAWS**, 31, 33.

**BONDS OF THE UNITED STATES.**

In calling for redemption the new bonds issued by the Secretary of the Treasury, known as "continued fives," those which have the highest number, *i. e.* "the bonds of each class last dated and numbered," as provided by the third section of the act of July 14, 1870, chap. 256, should be called first. 349.

**BOND-SUBSIDIZED RAILROADS.**

See TRANSPORTATION.

**BOUNTY LAND WARRANTS.**

See SOLDIERS' HOME, 1.

**BREVET COMMISSION.**

See ARMY, 2, 8.

**BREVET RANK, ASSIGNMENT ACCORDING TO.**

See ARMY, 8.

**BRIG "GENERAL ARMSTRONG."**

See CLAIMS, 12, 15, 16.

**CADET.**

See MILITARY ACADEMY.

**CADET ENGINEER.**

See COMPENSATION, 9, 10.

**CERTIFICATION OF CHECK.**

See NATIONAL BANKING ASSOCIATIONS, 12, 13.

**CHARGES.**

See CUSTOMS LAWS, 11, 12, 13, 23.

**CHINESE EXCLUSION ACT.**

See CHINESE LABORERS.

**CHINESE LABORERS.**

1. Chinese laborers coming from foreign lands can not be transported across the territory of the United States without violating the act of May 6, 1882, chap. 126, unless such laborers were in the United States on the 17th day of November, 1880, or came here within ninety days after the passage of said act. 416.
2. The provisions of section 1 of the act of May 6, 1882, entitled "An act to execute certain treaty stipulations relating to Chinese," are to be construed with the provisions of the treaty referred to, wherein it is as immigrants into this country that Chinese laborers are dealt with; and thus construed, a Chinese laborer who comes to this country merely to pass through it is not within the prohibition of the statute. 483.

**CHOCTAWS AND CHICKASAWS.**

See INDIANS AND INDIAN LANDS.

**CIVIL ENGINEERS IN THE NAVY.**

See NAVY, 7, 8.

**CIVIL SERVICE.**

1. The joint resolution of March 3, 1865 (section 1754 Rev. Stat.), considered in connection with the act of March 3, 1871, chap. 114, and held that honorably discharged soldiers and sailors are not ex-

## CIVIL SERVICE—Continued.

- empt from liability to examination for admission into the civil service, but that they are entitled to a preference for appointment as against other persons of equal qualifications for the place. 194.
2. Whether there are already two or more members of a family in the public service, etc., as provided in section 9 of the civil service act of January 16, 1883, chap. 27, is not a question to be considered the Civil Service Commission, but by the appointing power. 554.
  3. Departmental clerks whose salaries are \$900 or \$1,000 per annum, although not belonging to either of the classes in section 163 Rev. Stat., come within the scope of the act of January 16, 1883, chap. 27, and may be classified thereunder, for the purpose of examination, into one or more classes, as may be deemed expedient. 621.
  4. Under section 1753 Rev. Stat., the President may prescribe regulations for admission into the civil service, and thereby restrict original entry therein to one or more of the classes that may exist, or permit such entry to all of them as in his judgment will best promote the efficiency of the service. *Ibid.*
  5. If the \$900 or \$1,000 clerkships are constituted a distinct class, a promotion from such class to another class without examination, excepting where, in conformity to the act, the person to be promoted is specially exempted, would be forbidden by the act of January 16, 1883. To be eligible for appointment to any class (whether by promotion or otherwise) the applicant must have passed an examination to test his fitness for the place. *Ibid.*

## CLAIMS.

1. Upon consideration of the facts submitted in the case, in connection with section 3483 Rev. Stat.: *Held* that the steamer *Joseph Pierce*, at the time of her destruction by fire, July 31, 1865, was not in the military service of the United States either by contract or impressment, and accordingly that the accounting officers of the Treasury have no jurisdiction under that section to allow the value thereof to the owners. 90.
2. An order may be made by the Secretary of the Interior directing payment of the certificates given by the Superintendent of the Census in cases where such certificates are assigned in strict conformity to section 3477 Rev. Stat. 266.
3. The decision of the Secretary of the Interior of July 27, 1877, upon the claim of Redick McKee, made under the act for the relief of the latter approved March 3, 1877, viz, that the claimant was entitled to be re-imbursed the money paid out by him as interest on money borrowed for the Government, is as far as the Secretary was authorized to go, and an allowance of interest on the amount so paid out would have been unwarranted. 315.
4. It is a general rule that interest is not allowable on claims against the Government. The exceptions to this rule are found only in cases where the demands are made under special contracts, or special laws, expressly or by very clear implication providing for the payment of interest. *Ibid.*

## CLAIMS—Continued.

5. In view of the decision referred to, the claim should now be treated as *res judicata*. *Ibid.*
6. The award made by the Third Auditor on the 10th of May, 1861, under the law of March 3, 1849, chap. 129, in favor of James and Richard H. Porter, was binding upon all officers of the Government. 352.
7. The act of July 28, 1866, chap. 297, modifying the said act of 1849, did not affect claims adjudicated by the Auditor before its passage. *Ibid.*
8. Under the joint resolution of April 12, 1870, granting to General Gabriel R. Paul (retired) "the full pay and allowance of a brigadier-general in the Army of the United States," that officer is not entitled to an allowance of forage. 390.
9. Upon the facts stated: *Advised* that Charles Ewing, esq., is entitled to the compensation charged in his account for services rendered the Osage Nation of Indians under a contract therewith, executed in compliance with the law respecting contracts with Indians dated February 14, 1877. 445.
10. The provisions of section 3477 Rev. Stat., touching transfers and assignments of claims against the United States, and powers of attorney, etc., for receiving payment thereof, do not apply to undisputed claims, or any claim about which no question is made as to its validity or extent. 545.
11. Where a contract was made for roofing a court-house at a fixed price, and a power of attorney given to receive a part of such price as security for material purchased by the contractor: *Advised* that the power was not affected by section 3477, as no doubt existed concerning the right of the contractor to receive the amount so secured. *Ibid.*
12. Upon the case stated: *Advised* that Samuel C. Reid, jr., is not entitled to receive the unpaid balance lying in the Treasury for the benefit of the owners and crew of the brig *General Armstrong*. 590.
13. The claim of the State of New York for re-imbursement of the interest paid by that State on money borrowed and expended in enrolling, subsisting, clothing, etc., its troops employed to aid in the suppression of the rebellion is not allowable under the provisions of the act of July 27, 1861, chap. 21. 595.
14. To construe the provisions of that act so as to include a claim for interest thus paid would be giving them a meaning much broader than that which has in practice been given other legislation of like character, or than seems to be warranted by any sound rule of interpretation. *Ibid.*
15. Reconsideration of opinion of July 7, 1883 (*ante*, p. 590), and conclusion there reached, respecting the claim of Mr. S. C. Reid, jr., reaffirmed. 600.
16. Under the power conferred by the the act of May 1, 1882, chap. 115, the Secretary of State had no authority to pass upon the claim of Mr. Reid to be re-imbursed expenses incurred by him as agent in the prosecution of the claims of the "captain, owners, officers, and crew" of the brig *General Armstrong*. 626.

## CLAIMS—Continued.

17. The United States are under no obligation to allow interest on the awards made by the Florida judges in cases of claims of Spanish subjects under the ninth article of the treaty with Spain of 1819. 644.
18. Review of the legislation passed and proceedings had thereunder in execution of the ninth article of the treaty with Spain of 1819, respecting the claims of Spanish subjects growing out of the operations of the American Army in Florida. 680.
19. The Government of the United States has done all that it was bound to do under that article, and has fully executed the same; hence no liability whatever arising under the treaty now rests upon it. *Ibid.*

## CLAIMS OF THE UNITED STATES.

1. *Advised* that the amount claimed to be due from the State of Kansas to the United States on account of the direct tax be retained out of the amount appropriated for payment to that State by the act of March 3, 1881, chapter 132. 228.
2. Where it was proposed to submit to arbitration claims of the United States against certain mail contractors: *Advised* that the right to submit in the cases mentioned is doubtful; in view of which a different course is suggested. 486.

See DIRECT TAX.

## CLEARANCE OF VESSELS.

See CUSTOMS LAWS, 1.

## COLLECTION OF DUTIES.

See CUSTOMS LAWS.

## COLONEL STONEMAN'S CASE.

See ARMY, 3.

## COLORED REGIMENTS, ENLISTMENT IN.

See ARMY, 10.

## COMMISSIONER OF PENSIONS.

See ACCOUNTS AND ACCOUNTING OFFICERS, 2, 3.

## COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

See DISTRICT OF COLUMBIA, 1, 2, 3, 4, 5, 6, 7; STATUTES, INTERPRETATIONS OF, 4.

## COMMUNICATIONS TO CONGRESS.

1. Requests made on heads of Departments by Congressional committees, or by either House of Congress, for information on matters relating to ordinary and current legislation, may with propriety be answered directly, without passing through the executive office; otherwise as to communications which concern radical changes in existing laws affecting public policy. 254.
2. Subordinate officers of the several Departments should communicate with Congress through the heads of their Departments respectively. *Ibid.*

## COMPENSATION.

1. Where an officer in the ordnance department, in addition to his regular duties as ordnance store-keeper, acted as assistant commissary at the Watervliet Arsenal by virtue of post orders: *Held* that under section 1261 Rev. Stat. he was entitled to receive \$100 per year in addition to the pay of his rank during the time he performed services as assistant commissary. 43.
2. In computing the longevity pay of officers of the Army, under the provision in the act of February 24, 1881, chap. 79, declaring that "the actual time of service in the Army or Navy, or both, shall be allowed all officers," etc.: *Held*—(1) That the actual time of an officer's service as a cadet at the Military Academy should not be allowed. (2) That where an officer served in the Medical Corps of the Navy the actual time of his service in that corps should be allowed. (3) That where an officer served as a captain's clerk in the Navy, the actual time of his service as such clerk should be allowed. (4) That where the officer served as an assistant civil engineer in the employ of the War Department on the Florida coast and elsewhere, the actual time of his service in that capacity should not be allowed. 93.
3. The amount drawn by Charles M. Blake for pay as chaplain in the Army from May 14, 1878, to the date of his acceptance of appointment as post chaplain with advice and consent of the Senate (May 23, 1881), may be charged against him and withheld from his pay thereafter accruing. 152.
4. *Seem*, however, that he may be allowed the benefit of his actual service from June 21, 1878, to March 4, 1879, for longevity. *Ibid*.
5. In March, 1873, J., a postmaster, was appointed by the Secretary of the Treasury an agent to disburse money appropriated for the erection of a public building. The compensation for such service was then regulated by the act of March 3, 1869, chap. 123, which limited it to not exceeding one-eighth of 1 per centum, and by the terms of his appointment J. was to receive the maximum compensation allowed by law. Subsequently, by the act of March 3, 1875, chap. 131, it was declared that the provision in the act of March 3, 1869, above referred to, should be held to limit the compensation to be allowed for such services to three-eighths of 1 per centum. Thereupon the Secretary of the Treasury increased J.'s compensation to one-fourth of 1 per centum; but the latter claims that he is entitled, under the terms of his appointment, to three-eighths of 1 per centum from the date of the act of 1875: *Held*, that one-fourth of one per centum, as allowed by the Secretary under the provision of the act of 1875, is all that J. is entitled to for his services. 219.
6. The fees of witnesses subpoenaed under section 184 Rev. Stat., on application of the Pension Bureau, to testify before a United States commissioner, and also the fees of the commissioner by whom their testimony is taken, may properly be allowed out of the judiciary fund. The former should be paid by the United States marshal of the district on the certificate or order of the commissioner; the latter, as in ordinary course, on settlement of the commissioner's accounts at the Treasury. 247.

## COMPENSATION—Continued.

7. Y. was advanced twenty-five numbers on the Navy list, under section 1506 Rev. Stat., whereby he was promoted from the grade of ensign to that of master, to which latter grade he was confirmed March 3, 1879, to take rank from November 24, 1877: *Held* that his increased pay commenced, not at the date from which he took rank as master, but at the date of his appointment as master (March 3, 1879). 319.
8. Under a provision in the act of June 16, 1880, enabling the Secretary of War "to cause to be constructed a fire-proof roof for the building at the corner of Seventeenth and F. streets," in Washington, D. C., Mr. James Eveleth, a clerk in the office of the Chief of Engineers, was designated by the Secretary as his agent to take charge of and superintend the work, and was allowed a compensation of \$300 per month from the date of such designation until the completion of the work. For the same period the salary of E. as clerk was suspended, and in effect his duties as such also, these being performed by another person who received the pay therefor: *Held* that it was competent to the Secretary to employ E. as above, and compensate him out of the fund appropriated for the service, and that this case is not within section 1765 Rev. Stat., there being no "additional pay, extra allowance, or compensation" received by E. 321.
9. McF., a cadet engineer, having completed the prescribed course of instruction at the Naval Academy and at sea June 10, 1881, and successfully passed an examination, was confirmed by the Senate as an assistant engineer December 20, 1881, to take rank from the former date: *Held* that he become entitled to the pay of assistant engineer from the date he took rank as such, if that date is subsequent to the vacancy he was appointed to fill. 329.
10. Section 1, of the act of June 22, 1874, chap. 392, comprehends cadet engineers, and fixes the commencement of their pay in the grade of assistant engineer when promoted thereto. *Ibid*.
11. As a general rule, a contract surgeon is entitled to pay only from the time he enters upon duty under his contract. 461.
12. *Semble* that the maximum fixed by paragraph 1305 of the Regulations of 1863 for the compensation of contract surgeons continued up to February 17, 1881; but that thereafter compensation at a rate exceeding such maximum was allowable. *Ibid*.
13. The provisions of the Navy appropriation acts of August 5, 1882, chap. 391, and March 3, 1883, chap. 97, requiring all officers of the Navy to be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Navy, etc., do not entitle such officers to any increased pay for services rendered by them prior to March 3, 1883. 555.
44. To entitle a postmaster to receive compensation for issuing and paying money orders, under the provisions of section 4047 Rev. Stat., he must earn it by performing the service himself or having it performed by a clerk or agent employed and paid by him for that purpose. 627.

## COMPENSATION—Continued.

15. The act of March 3, 1883, chap. 119, merely directs the readjustment of the salaries of postmasters to be made in accordance with the pre-existing law, leaving the meaning of the latter to be determined in the usual and proper methods. 658.
16. By that act the Postmaster-General is required to make, on behalf of an applicant thereunder, the adjustment or readjustment of salary which he may claim and be found to have been entitled to, at any one or more of the biennial periods since the act of July 1, 1864, chap. 197, under the latter act as amended by the proviso added thereto by the act of June 12, 1866, chap. 114, crediting the applicant with any difference in his favor between the amount of the salary so readjusted for the prospective biennial period and the salary paid to him for the time of his service in such period. *Ibid.*
17. Where an inspector of customs, while holding that office, rendered service as a special deputy marshal under section 2031 Rev. Stat.: *Held* that he is prohibited by the third section of the act of June 20, 1874, chap. 328, from receiving any compensation for such service beyond his salary as inspector of customs. 684.

## COMPROMISE.

In passing upon cases submitted to him for compromise, under sections 3229 and 3469 Rev. Stat., the Secretary of the Treasury while he is not at liberty to act from motives merely of compassion or charity, may consider not only the pecuniary interests of the Government, but take into view general considerations of justice and equity and of public policy. 213.

## CONDEMNATION OF LAND FOR PUBLIC USES.

See STATUTES, INTERPRETATION OF, 6.

## CONSTRUCTION OF STATUTES.

See REVISED STATUTES, ETC.; STATUTES, INTERPRETATION OF.

## CONTINUING PUNISHMENT.

See PARDON, 2, 3.

## CONTRACT.

1. A proposal made by M. to carry the mail over a certain route during the fiscal year ending June 30, 1882, for \$1,140, that being the lowest bid received, was accepted; but he subsequently asked to be released therefrom, on the ground that the bid which he intended to make was \$2,140: *Held* that the proposal and its acceptance constitute one agreement, of the same force and effect as if a formal contract had been written out and signed by the parties; that it is the duty of the Postmaster-General to require the execution of such agreement according to its terms; and that he is not at liberty to allow the contractor to withdraw from it upon the allegation that a mistake was made in the proposal submitted. 70.

## CONTRACT—Continued.

2. A contract for furnishing the Post-Office Department with copies of the Postal Guide, under the act of March 3, 1881, chap. 130, making an appropriation for "publication of copies" thereof, does not come within the provisions of section 3709 Rev. Stat., and the Postmaster-General is not required to advertise for proposals previously to making such a contract. 84.
3. The object of that section, in requiring advertisement for proposals before making purchases and contracts for supplies, is to invite competition among bidders, and it contemplates only those purchases and contracts where competition as to the article needed is possible, which is not the case with the Postal Guide. *Ibid.*
4. A. and B. had each a separate contract for transporting the mails, and the latter was also a surety for the former. A. incurred indebtedness to the Government by reason of fines, penalties, and forfeitures beyond the amount due him; and the pay of B., his surety, was withheld for the protection of the Government against loss. Prior to the performance of the service by B., for which his pay was withheld, he gave a pay draft to C., which was placed on file in the Auditor's office "subject to fines, etc., in accordance with the act of Congress approved May 17, 1878, and any claim or demand the Post-Office Department may have against the contractor." *Held*, that the payment of an amount due B. under his contract, sufficient to meet his liability as surety on the contract of A., might lawfully be withheld; and that the draft given by the former on his pay conferred upon the holder thereof no right which prevents such pay being thus withheld. 244.
5. It is competent to the Secretary of the Navy, under the circumstances stated, to release a certain mortgage given by Robert L. Stevens on the 9th of September, 1848, as security for the performance of a certain contract theretofore entered into by him for the construction of a war vessel since known as the "Stevens Battery." 281.
6. The facts in the case held not to constitute sufficient grounds to justify the Secretary of War in releasing the Eastern Dredging Company from the performance of its contract with the United States to do dredging in Charles River, Massachusetts, to the extent of 100,000 cubic yards at the price per cubic yard specified in the contract. 368.
7. Where a contract for the delivery of certain supplies at an Indian agency provided for the acceptance of goods inferior in quality to the sample where the emergency demanded it, *held* that the time and place of delivery before the goods were distributed were eminently the time and place to determine their relative value. 384.
8. The first proviso in the act of May 4, 1882, chap. 116, empowering the Postmaster-General to annul the contract of any contractor or subcontractor who shall sublet his contract for a less sum than that for which he contracted to perform the service, is prospective in its operation. 514.

## CONTRACT—Continued.

9. All subletting of contracts after the date of that act is governed thereby, whether such contracts were made before that date or not. *Ibid.*
10. The fourth proviso in the same act, giving any person employed by a contractor or subcontractor a lien for his compensation on any money due such contractor or subcontractor, properly extends to contracts and subcontracts existing at the date of the act. *Ibid.*
11. The fifth proviso applies to contracts thereafter made, and has no effect upon those existing prior to the passage of the act. *Ibid.*

## CONTRACT SURGEON.

See COMPENSATION, 11, 12; QUARTERS, COMMUTATION FOR, 5; TRAVELING ALLOWANCES.

## COURT-MARTIAL.

1. It is not the official duty of the Secretary of War to give to the judge-advocate, and thus to the court-martial, an opinion as to the admissibility of certain evidence in the trial of a case before the court, nor as to the construction of a statute. Such questions should be left to the decision of the court-martial itself. 54.
2. P., a commissioned officer of the Army, was tried by a general court-martial and sentenced "to be cashiered and to be forever disqualified from holding any office of trust or profit under the Government of the United States." The proceedings and sentence of the court having been approved and confirmed by the President, the officer, in execution of the sentence, was cashiered and dismissed the service: *Held*, that it is not competent to the President now to set aside and annul the finding and sentence of the court, and to nominate the officer to the Senate for restoration to his former rank in the Army. 297.
3. 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 revised and annulled. *Ibid.*
4. In general, courts-martial are governed by the same rules of evidence which govern the ordinary courts of criminal jurisdiction. These rules (where not provided by statute) are supplied by the common law. 310.
5. Evidence of handwriting, by comparison of hands, is inadmissible on a trial by court-martial, excepting where the writing, acknowledged to be genuine, is already in evidence in the case, or the disputed writing is an ancient document. *Ibid.*
6. The admission of such evidence is error, for which, if it was material to the finding of the court, the sentence of the latter should be set aside. *Ibid.*
7. The fact that one of the officers composing a court-martial is junior in rank and another inferior in grade to the accused, does not of itself render either of them incompetent to sit. 397.

## COURT-MARTIAL—Continued.

8. Where the approval of the proceedings, findings, and sentence of a court-martial by the President is attested by an entry on the record signed by the Secretary of War, this is sufficient evidence of such approval. (But see NOTE on page 399.) *Ibid.*
9. The order of the President in the case of Charles D. Coleman, of March 3, 1869, which was rescinded March 13, 1869, being executory and in its nature revocable, and having remained unexecuted at the time of its rescission, was completely annulled thereby. 436.
10. A general officer, commanding a military department in July, 1865, had no power to appoint a court-martial for the trial of an officer under his command where he was himself the "accuser or prosecutor;" nor could such power be imparted to him otherwise than by a legislative act. *Ibid.*
11. H. was tried by a court-martial and found guilty of the offense charged. At the trial a witness objected to answering a question on the ground of self-crimination; but the court required him to answer, the judge-advocate reading in support of this requirement section 860 Rev. Stat.: *Held* that if the court committed an error in compelling the witness to answer, the error is not such as to require a disapproval of the proceedings. 616.
12. Whether the effect of that section is to take away from a witness the common-law privilege of declining to answer a question which tends to criminate him, when it is manifest that he could only be tried in the courts of the United States, *quære*. *Ibid.*

## COURT OF RECORD.

PENSION, 11, 12.

## CRIMES COMMITTED BY INDIANS.

See JURISDICTION, 1, 2.

## CUSTOMS LAWS.

1. A collector of customs may lawfully refuse a clearance to a vessel whose master is alleged to be amenable to the penalty provided by section 2809 Rev. Stat., for bringing into the United States merchandise not included in the manifest required and described in the preceding sections. Such refusal is not a seizure, and the act of February 8, 1881, chap. 34, is inapplicable. 82.
2. Shellac varnish, composed of a mixture, made in a Canadian bonded warehouse, of the gum with alcohol distilled in this country and exported without payment of any internal-revenue tax here and no exaction of duty upon it in Canada because in bond there, is dutiable under Schedule D, of section 2504 Rev. Stat., which declares that "on all compounds or preparations of which distilled spirits is a component part of chief value there shall be levied a duty not less than that imposed upon distilled spirits," namely, \$2 per proof gallon. In determining which is the component of chief value, the value of each ingredient in the domestic markets of the United States should be the guide. 105.

## CUSTOMS LAWS—Continued.

3. The remedy by suit against a collector, provided by section 3011 Rev. Stat., is given to an importer only who has paid the duties to the collector whom he proposes to make defendant in the suit; it does not apply to cases in which, by reason of the failure of the importer to pay the collector, the payment is sought to be enforced by suit against the former. 142.
4. There is no statute giving the Secretary of the Treasury any direct control over suits instituted for the collection of unpaid duties. *Ibid.*
5. Foreign magazines and newspapers transported by mail from Canada into the United States, addressed to dealers, for the purpose of sale by them, or of being by them distributed among subscribers, are dutiable. 159.
6. The postal convention with Canada and the act of March 3, 1879, chap. 180, sec. 15, were not intended to affect existing tariff laws. *Ibid.*
7. In the light of the information presented, Apollinaris mineral water is regarded as an artificial mineral water, and dutiable as such. 176.
8. By section 17 of the act of March 3, 1879, chap. 180, printed matter, other than books, received by mail from foreign countries, under the provisions of postal treaties or conventions, is declared free of duty; and no distinction is there made between such as is mailed to subscribers for their own use and such as is mailed to dealers for sale. 187.
9. Books which are admitted to the international mails, exchanged under the provisions of the Universal Postal Union Convention, may be delivered to addressees upon the payment of the duty thereon. *Ibid.*
10. The terms "quantity" and "whole quantity," as employed in Schedule M (Rev. Stat., 2d ed., p. 476), are not to be understood as covering all the fruit imported in any one vessel shipped to one consignee, if coming from different consignors. Each consignment, not only from one party, but of each separate kind of fruit specified in the statute, is to be considered as the "quantity," and as the "whole quantity," therein specified. 203.
11. The additional duty of 20 per cent. ad valorem in section 2900 Rev. Stat. can not be legally exacted on costs, charges, and commissions, but should be levied only on the "appraised value" of the merchandise imported, exclusive of such charges. 268.
12. The additional duty of 20 per centum in section 2908 Rev. Stat. is a separate and distinct penalty, which can legally be exacted on the charges as entered, and only on this element of the dutiable value of the merchandise. *Ibid.*
13. The legislation on the subject reviewed, and those sections construed. *Ibid.*
14. Where certain importers of sugar, having made due protest and appeal but failing to bring suit afterwards, applied to the Secretary of the Treasury for a refund of duties illegally exacted, as indicated in the decision of the Supreme Court in the case of *Merritt v. Welsh* (104 U. S., 694): *Advised* that the Secretary can not grant the application under section 3012½ Rev. Stat. 336.

## CUSTOMS LAWS—Continued.

15. The word "chief," as used in the provision of the act of February 8, 1875, chapter 36, imposing a duty of 60 per cent. ad valorem on all goods, wares and merchandise made of silk or of which silk is a component material, of chief value, etc., means greater than either of the other materials; not greater than their aggregate. 337.
16. Where a quantity of wool was imported at Boston from Liverpool, and two days later was withdrawn for exportation to St. John, New Brunswick, whence (having been carried thither) it was immediately brought back to Boston: *Held* that if the purpose of the above withdrawal, etc., was to create a second port of importation with the object of reducing the duty, the transaction was fictitious, and that Liverpool remains the last port or place of exportation within the meaning of the statute. 528.
17. The term "examiner," as used in sections 2, 3, and 4 of the act of March 2, 1883, chap. 64, signifies any officer authorized by the fifth section to act in that capacity, and nothing more. 585.
18. It was not the intention of the act to create a new officer to meet its requirements regarding the examination of imported teas. *Ibid.*
19. The term "appraisers" in the act does not embrace "assistant appraisers." *Ibid.*
20. The effect of the proviso in the act of March 3, 1883, chap. 121, declaring "that there shall be no allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits," was to repeal all the provisions previously in force which authorized such allowance; but it nevertheless permits the duties to be assessed on the actual quantity of merchandise imported, whether in casks or bottles. 613.
21. Where the quantity which actually arrives is found by the customs officers to be less than the invoiced quantity, a deduction of the excess of the latter over the former, in adjusting the duties, is not an allowance within the meaning of the proviso mentioned. *Ibid.*
22. Review of legislation fixing the basis for estimating ad valorem duties, passed prior to the act of March 3, 1883, chapter 121. 633.
23. The only change effected by section 7 of that act is to exclude from such basis all costs and charges which, under the law as it previously stood, were required to be *added* to the current or actual market value or wholesale price of the merchandise in the principal markets of the country whence the same was imported, or of the country of production or manufacture, as the case might be, thus making such current or actual market value, etc., the *sole basis* for estimating such duties. *Ibid.*
24. By current or actual market value or wholesale price, as used in the statute, is to be understood the amount of money the article commanded in the foreign market in the condition in which it is there customarily sold and purchased. *Ibid.*
25. The cost of boxes or coverings with which goods are ordinarily prepared for sale in the foreign market, and in which they are usually sold and purchased there, is an element of the actual market value of the goods. *Ibid.*

## CUSTOMS LAWS—Continued.

26. What becomes of the box or covering, in the course of trade, after the importation, does not affect the question of dutiable value. *Ibid.*
27. Opinion of April 20, 1882 (*ante* p. 326), on the power of the Secretary of the Treasury to refund duties erroneously exacted, reaffirmed. 642.
28. Section 3012½ Rev. Stat. confers upon him power to refund *sub modo* only; *i. e.*, upon appeals heard by him under section 2931 Rev. Stat., when made in the form and within the time therein specified. *Ibid.*
29. Imported scrap tobacco is dutiable as manufactured tobacco under the act of March 3, 1883, chap. 121. 646.
30. Iron turnings are not dutiable as manufactured iron. 647.
31. Section 10 of the act of March 3, 1883, chapter 121, extends only to goods which had not been in bonded warehouse more than three years at the date that act took effect. 650.
32. Sections 2971 and 2977 Rev. Stat. place a limitation upon the privilege of exportation with refund of duties, and require that it shall be exercised within three years from the date of importation; otherwise the privilege is lost. *Ibid.*
33. The provision in section 2971 Rev. Stat., requiring merchandise to be sold, is applicable to goods remaining in public store or bonded warehouse beyond three years, as well where the duties thereon have been paid as where they have not been paid. At the end of that period they are to be regarded as abandoned to the Government and sold. *Ibid.*
34. The object and requirement of that provision are, however, sufficiently met by the practice of the Department, whereby, in lieu of a formal sale of the goods, the owner, consignee, or agent is permitted to pay the duties, charges, etc., that have accrued thereon and take them away. *Ibid.*
35. The Secretary of the Treasury has power to refund excess of duties exacted in certain cases referred to. 657.
36. The words "not specially enumerated or provided for in this act," used in Schedule N of the act of March 3, 1883, chap. 121, in the clauses fixing a duty upon "bonnets, hats and hoods for men, women, children, composed of chip, grass," etc., and "upon braids, plaits, flats, laces, etc., used for making or ornamenting hats, bonnets, hoods," etc., apply to articles of the description mentioned, and not to the material out of which such articles are made. 672.
37. Distinction between the expression in Schedule M (Rev. Stat., p. 473), "black of bone or ivory drop black," and the expression (Free List, *ibid.*, 433), "bones crude and not manufactured; burned, calcined, ground, or steamed," pointed out; and held that burnt bones intended and fitted for other uses in the arts than that of imparting color are duty free, although in fact they are black. 676.
38. A bicycle taken abroad by a citizen for his use, and brought back with him on his return to this country, is not subject to duty, being a "personal effect." (See Free List, Rev. Stat., p. 489.) 679.

## CUSTOMS LAWS—Continued.

39. *Seem* that section 2859 Rev. Stat., relating to entry of imported merchandise, is not repealed by section 9 of the act of June 22, 1874, chap. 391, or by the act of May 1, 1876, chap. 89. 683.
- See TONNAGE DUES.

## DIPLOMATIC AND CONSULAR OFFICERS.

1. The issuance of a writ of execution against the person or chattels of a foreign minister is a "suing out" within the meaning of section 4064 Rev. Stat., and renders the party obtaining such writ liable to the penalty prescribed. 563.
2. Cases within that section should be prosecuted by the United States attorney of the proper district, as other misdemeanors are prosecuted. *Ibid.*

## DIRECT TAX.

The withholding the amount of the "2 and 3 per cent. funds" due the State of Mississippi, and crediting the State therewith on account of the direct tax, was unwarranted by law, as no liability rests upon the State for the payment of such tax. 671.

See CLAIMS OF THE UNITED STATES, 1.

## DISBURSEMENT OF PUBLIC MONEY.

1. Where B., not holding any office under the United States requiring him to give bond, was appointed an agent to disburse funds appropriated to build the custom-house and post-office building in the city of Philadelphia, Pa.: *Held* that, in view of the provisions of sections 3657, 3658, and 255 Rev. Stat., the appointment of B. was improvidently made; that he was not lawfully empowered to receive or disburse the public funds placed in his hands; and that, under existing legislation, he is not entitled to any compensation for his services as such disbursing agent. 124.
  2. As between two conflicting claims to a credit for a disbursement made on the same day, which might then have been lawfully made by either one of the claimants, but not by both, regard may be had to the actual time of day when the payment by each was made in order to determine which had priority. 425.
- See COMPENSATION, 5.

## DISCHARGE FROM MILITARY ACADEMY.

See MILITARY ACADEMY, 1.

## DISMISSAL OF OFFICER.

See NAVY, 3; PRESIDENT, 1, 2.

## DISTRICT ATTORNEY.

Opinion of Attorney-General Devens, of May 18, 1877 (15 Opin., 277), upon the subject of allowances to district attorneys under section 827 Rev. Stat., concurred in. 479.

## DISTRICT OF COLUMBIA.

1. Under the act of June 11, 1878, chap. 180, with the exception of the first two, *all* appointments to the office of Commissioner of the District of Columbia are to be for the term of three years. 158.
2. No power is expressly conferred by statute upon any two of the Commissioners of the District of Columbia to act without the third, and it seems that the three Commissioners should be present and acting when any business of importance pertaining to their office is to be transacted. 354.
3. The official term of each of the Commissioners of the District of Columbia, appointed from civil life (excepting the first two appointments), is three years; and in case of the death, resignation, or removal of the incumbent during such term, his successor should be appointed, not for the full term of three years, but for the unexpired term of such incumbent, if any remains. 476.
4. Under the provisions of the act of July 11, 1878, chapter 180, the Commissioners of the District of Columbia have power, in their discretion, to remove members of the police force of the District of Columbia without such trial as is contemplated by section 356 of the Revised Statutes of said District. 489.
5. The Commissioners of the District of Columbia have power, under the act of June 11, 1878, chap. 180, to abolish a part or the whole of the board of fire commissioners of said District. 494.
6. Section 4 of the act of June 11, 1878, chap. 180, requires the Commissioners of the District of Columbia to render accounts for their disbursements thereunder to the accounting officers of the Treasury for adjustment and settlement, which, by implication, may be in accordance with the laws and regulations and usages by which these officers are governed so far as the same are applicable to such accounts. 574.
7. The provisions of sections 3623 and 3678 Rev. Stat., are applicable to the Commissioners, and they and their bondsmen are liable to suit on their bond for the recovery of balances found due from them on settlement of their accounts. *Ibid.*

## DOUBLE PAYMENTS.

See PAY ACCOUNTS OF ARMY OFFICERS.

## DRAWBACK.

See CUSTOMS LAWS, 32.

## DUTIES ON IMPORTS.

See CUSTOMS LAWS.

## EIGHT-HOUR LAW.

1. The opinions of former Attorneys-General construing the provisions of the act of June 25, 1868, chap. 72, known as the eight-hour law (sec. 3738 Rev. Stat.), reviewed, and the following conclusions deduced therefrom:

## EIGHT-HOUR LAW—Continued.

- (1) That the act 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.
  - (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.
  - (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. 341.
2. This exposition of the act is in harmony with the opinion of the Supreme Court in the case of *United States v. Martin* (94 U. S., 400). *Ibid.*

## ELIGIBILITY FOR APPOINTMENT.

See APPOINTMENT, 1, 5.

## EVIDENCE.

See COURT-MARTIAL, 4, 5, 6.

## EXAMINER.

See CUSTOMS LAWS, 17.

## EXTRADITION.

Under section 5272 Rev. Stat. the Secretary of State has power to review the proceedings in an extradition case certified to him, and his power extends to the review of every question therein presented. 184.

## EXTRA PAY.

See COMPENSATION, 1, 8, 17.

## FINES, PENALTIES, AND FORFEITURES.

1. Under section 4751 Rev. Stat. the Secretary of the Navy has power to mitigate, before trial and conviction of the offender, any fine, penalty, or forfeiture incurred under the provisions therein referred to. 282.
2. Where proceedings are already commenced, it is the duty of the prosecuting officer, upon receipt of the order of mitigation, and on the terms and conditions thereof being complied with, to carry it into effect by discontinuing the proceedings. *Ibid.*

## FIRST COMPTROLLER.

See ACCOUNTS AND ACCOUNTING OFFICERS, 1.

## FOREIGN MAGAZINES AND NEWSPAPERS.

See CUSTOMS LAWS, 5, 6.

## FOREIGN MINISTER.

See DIPLOMATIC AND CONSULAR OFFICERS.

**FORFEITURE.**

See FINES, PENALTIES, AND FORFEITURES.

**FORT TAYLOR, FLA.**

In the case of certain martello towers, outworks of Fort Taylor, Fla., which were erected during the rebellion on land then in the military occupation of the United States: *Advised* that if the title to such land has not been acquired by the Government, but is held by individuals, and it is deemed expedient to permanently retain possession thereof for military purposes, application be made to Congress by the War Department for authority to acquire the same, instead of forcing the owners to go there for relief. 6.

**FREE LIST.**

See CUSTOMS LAWS, 8.

**GENERAL SCHUYLER HAMILTON'S CASE.**

See ARMY, 4.

**HALF-PAY PENSIONS.**

See PENSIONS, 3.

**HOLDING OVER.**

See OFFICER, 3, 4.

**HOSPITAL FOR THE INSANE.**

The provision in section 4851 Rev. Stat., that "if any person charged with crime be found in the court before which he is charged to be an insane person, such court shall certify the same to the Secretary of the Interior, who may order such person to be confined in the hospital for the insane," etc., applies only to persons charged with crime before the courts in the District of Columbia; it does not extend to persons indicted in United States courts elsewhere. 211.

**HUNTER-BROOKS CIGAR STAMP.**

See INTERNAL REVENUE, 1, 2.

**IMPROVEMENT OF NAVIGABLE WATERS.**

1. Under the authority of an act of Congress (river and harbor act of March 3, 1881) making an appropriation for "improving James River, Virginia," it was proposed to place wing-dams in the river near Varina, Va., at which point the river is a tidal water. The riparian owner forbade the construction of the dams in front of his land above the line of low water: *Advised* that the United States, with a view to the improvement of navigation, have a right to place a wing-dam in the river in front of the land referred to without the owner's consent, and that such right extends even to the limit of high water—i.e., the line of the water at ordinary high tide. 109.
2. Upon consideration of the statutes relating to the improvement of the South Pass of the Mississippi: *Held* (1) that a navigable depth of 26 feet is hereby required to be maintained through the shoal

## IMPROVEMENT OF NAVIGABLE WATERS—Continued.

- at the head of the Pass ; (2) that a navigable depth of 26 feet is required to be maintained through the Pass itself ; (3) that, in view of the facts set forth by the engineer officer charged with the duty of ascertaining the depth of the channel at these points from time to time, Captain Eads is lawfully entitled to payment for maintenance of the required depth there during the quarter ending May 9, 1881. 137.
3. The United States may avail itself of the remedy by injunction to protect from injury improvements in navigable waters made under authority of Congress. 279.
  4. The provision in the act of August 2, 1882, chap. 375, making it "the duty of the Attorney-General to examine all claims of the title to the premises to be improved under this appropriation," *i. e.*, the appropriation "for improving the Potomac River in the vicinity of Washington," etc., does not forbid the commencement of the work until the Attorney-General shall have performed the said duty. 453.
  5. The \$1,000 authorized by the act of March 3, 1881, chap. 136, to be expended from the appropriation for improving Savannah River, Georgia, in the payment of damages for land taken for widening the channel opposite Savannah, may be so expended without a transfer of the title to the land, the purpose of the provision being to indemnify for the loss of the land, not to acquire ownership thereof. 455.

## INDIAN INSPECTOR.

1. Although the general functions and duties of Indian inspectors do not include specifically the disbursement of public money, and these officers are not required by statute to give bond, yet the Secretary of the Interior may lawfully assign to them other duties relating to business concerning the Indians in addition to those prescribed whenever the exigencies of the public service require it. 391.
2. Where the particular duty thus assigned to an inspector involves the receipt or disbursement of public money, it is competent to the Secretary to take a bond for the protection of the Government against loss, although such bond may not be required by statute ; and the bond would be valid and binding upon both principal and sureties if voluntarily given by the officer. *Ibid.*

## INDIANS AND INDIAN LANDS.

1. The Interior Department has power to remove intruders from lands of the Choctaws and Chickasaws in the Indian Territory, and it is its duty to do so under the provisions of the treaty of June 22, 1855 (11 Stats., 612, 613). 134.
2. All persons (other than Choctaws or Chickasaws by birth or adoption) not comprised within some one of the excepted classes described in article 7 of that treaty, or article 43 of the treaty of April 28, 1866 (14 Stats., 779), are intruders. *Ibid.*
3. The permit laws of the Choctaws and Chickasaws are valid ; and those persons who are permitted thereunder to reside within their

## INDIANS AND INDIAN LANDS—Continued.

- territory, or to be employed by their citizens as teachers, mechanics, or skilled agriculturists, may enter and remain on the lands of these tribes; but the right to remain there ceases when the permit expires. *Ibid.*
4. Teachers, mechanics, and skilled agriculturists, not in the employ of the Government, and who are on such lands without permits from the Indian authorities, are intruders, and should be removed therefrom. *Ibid.*
  5. Authority to issue certificates of indebtedness under the treaty with the Kansas Indians is to be considered as conferred upon the date of the proclamation of the treaty, March 16, 1863, and not before. 200.
  6. Such certificates were of two classes, viz: First, those issued to persons who had settled and improved lands within the reservation to an amount not exceeding \$29,421 in the aggregate; second, those issued to persons having claims against the Indians to an amount not exceeding in the aggregate \$36,394.47. *Ibid.*
  7. The Secretary of the Interior is not at liberty to accept in payment of lands any certificates of the first class issued after the limitation upon the amount of such certificates prescribed in the treaty had been reached, nor any certificates of the second class issued in advance of the ratification and proclamation of the treaty. *Ibid.*
  8. The lands of the Ute Indian Reservation in Utah Territory can not be declared open for settlement and disposal, under the act of June 15, 1890, chap. 223, before allotments provided for in that act are made. 262.
  9. If, previous to such allotments, it is thought advisable that any land within the reservation should be opened to settlement and disposal, additional legislation will be necessary to enable this to be done. *Ibid.*
  10. Opinion of Attorney-General Williams, of May 3, 1875 (14 Opin., 569), as to the rights of William G. Langford in 640 acres of land within the Nez Perces Indian Reservation in Idaho Territory, re-affirmed; and *advised* that he has no such possessory interest in such land as would warrant the Interior Department in accepting the compromise proposed. 306.
  11. Upon the facts presented: *Advised* that additional legislation is required to enable the Secretary of the Interior to treat the Uncompahgre Ute Indian Reservation as public lands. 366.
  12. The children of Thomas F. Richardville, a Miami Indian of Indiana, are entitled to share with other persons upon the roll of the Eastern Miamis equally, and without deduction, in the distribution of the fund (\$221,257.86) appropriated by the act of March 3, 1881, chap. 132, for the payment of the Miami Indians of Indiana. 381.
  13. The lands which have been or are to be sold and the proceeds distributed by the act of May 15, 1882, chap. 144, were set apart for the sole benefit of the Miami tribe of Indians, meaning thereby those who at the time of the survey of the reservation had emigrated and settled on the lands. 410.

## INDIANS AND INDIAN LANDS—Continued.

14. This class of Miamis only are entitled to the proceeds of the sales of the residue mentioned in the second article of the treaty of June 5, 1854, being the same lands referred to in section 3 of the act of May 15, 1882. *Ibid.*
15. Those individual Miamis or persons of Miami blood who are named in the corrected list referred to in the Senate amendment to the fourth article of the treaty of June 5, 1854, and their descendants, have no right to or interest in the said residue or the proceeds of the sales thereof. *Ibid.*

## INDIAN SCHOOLS.

1. The proceeds of sales of articles manufactured in Indian manual and training schools should not be turned into the Treasury, but be received by the Indian Bureau and used for the benefit of the Indian children in the schools. 531.
2. The appropriation made by the act of May 17, 1882, chap. 163, "for the purpose of further instructing and civilizing Indian children west of the Mississippi River," etc., is not applicable to the establishment of an industrial school and the erection of buildings therefor. 647.

## INDIAN TRUST FUNDS.

The Secretary of the Interior, as trustee for certain Indian tribes, has authority, under the act of April 1, 1880, chap. 41, to sell United States 5 per cent. called bonds, held in trust for such tribes, in order that the fund may receive the benefit of the premium. 104.

## INELIGIBILITY FOR APPOINTMENT.

See APPOINTMENT, 1, 5.

## INJUNCTION.

See IMPROVEMENT OF NAVIGABLE WATERS, 3.

## INSPECTION OF STEAM-VESSELS.

1. The inconvenience contemplated by section 4409, Rev. Stat. is such as grows out of the situation of the boat, or of the parties, viewed with reference to the location of the local board, whereby access to the latter is rendered difficult or expensive. 628.
2. Where such inconvenience exists, the authority of the supervising inspector is, by virtue of that section, concurrent with that of the local board; and in cases acted upon by him under that authority there is no appeal. *Ibid.*
3. But where the supervising inspector resides in the same city with the members of the local board, and they are not unable to act, and access to them is as easy and unimpeded as to any like board in the same locality, such inconvenience does not exist, and the supervising inspector would not be warranted in discharging the duties of the local board. *Ibid.*

## INSPECTOR-GENERAL'S DEPARTMENT.

See ARMY, 1.

## INTEREST.

See CLAIMS, 4, 13, 14.

## INTERNAL REVENUE.

1. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may adopt the device known as the Hunter-Brooks cigar stamp, and prescribe regulations for its use, cancellation, and destruction, in accordance with the design of its inventor, if deemed expedient. 111.
2. Any failure to use, cancel, and destroy such stamp, as directed by such regulations, would make the party chargeable with the failure amenable to the penalties existing March 1, 1879, as to the stamps then in use. *Ibid.*
3. The 50 per centum required by section 3176 Rev. Stat. to be added to the tax upon taxable property owned by any person who neglects or refuses to make a list or return of such property, and to verify the same as provided by law, is a *penalty*, not a *tax*. 433.
4. In the case stated, the facts bring it within the discretion of the Secretary of the Treasury, given by section 5293 Rev. Stat., to remit fines, penalties, etc. *Ibid.*
5. Section 3120 Rev. Stat. affords no relief to the party, the addition to his tax having been legally made. *Ibid.*
6. The net profits of a railroad company earned in 1871, and which during that year were used for construction, or were appropriated to the payment of money borrowed for construction and actually used therefor during that year, or in a subsequent year were appropriated to the payment of money so borrowed and used, are liable to taxation under section 15 of the act of July 14, 1870, chap. 255. 469.
7. Where an application was made to the Commissioner of Internal Revenue for a refund of taxes paid in December, 1864, upon spirits lost by leakage or evaporation while stored in a bonded warehouse between July 1 and December 31, 1864: *Advised*, that the act of June 30, 1864, chap. 173, then in force, did not authorize any allowance for leakage in such case. 500.
8. By operation of the repeal provision in the act of March 3, 1883, chap. 121, the taxes on capital and deposits of banks, bankers, and national banking associations, imposed by the internal-revenue law in force at the time of the passage of that act, are not assessable and collectible on the capital and deposits of banks and bankers for the interval between December 1, 1882, and March 3, 1883, nor on the capital and deposits of national banking associations for the interval between January 1 and March 3, 1883. 539.
9. The words "any right accruing," etc., used in section 13 of the said act, do not include such taxes accruing at the date of the repeal, there being, as to them, no right *in esse*. It is the accruing right, not the accruing tax, that is saved. *Ibid.*

## INTERNAL REVENUE—Continued.

10. The provisions of section 13 Rev. Stat., saving "any penalty, forfeiture, or liability incurred" under the statute repealed, do not extend to the taxes referred to; since, as to them, there are no "liabilities incurred" at the date of the act of March 3, 1883. *Ibid.*
11. Where it was proposed to withdraw a quantity of whisky from bonded warehouse, under section 3330 Rev. Stat., and acts of June 9, 1874, chap. 259, and March 1, 1879, chap. 125, in order to ship it to Bermuda, with the purpose, after landing it there, of transporting it back to this country and entering it either for warehousing or for consumption under section 2500 Rev. Stat.: *Advised* that such shipment, with the purpose mentioned, would not be an exportation within the meaning of section 3330 Rev. Stat., and the act of 1874; nor would such shipment and the landing abroad fulfill the condition of the exportation bond, and discharge the whisky from the internal-revenue tax thereon; nor would such whisky, upon return to this country, be entitled to the rights and privileges of imported merchandise under the warehouse laws. 579.

## JUDICIARY FUND.

See COMPENSATION, 6.

## JURISDICTION.

1. The State of Oregon has jurisdiction over the case of a murder of one Indian by another, committed upon an Indian reservation within the limits of the State, unless the reservation was excepted out of the State at the time of its admission, or unless its jurisdiction is restricted by the provisions of some treaty with the Indians still in force. 460.
2. Where an Indian belonging to one tribe murdered an Indian belonging to another tribe within the reservation of a third tribe which has no law covering the case, *semble* that the "bad men" clause in a treaty with the tribe to which the murdered Indian belonged does not operate to bring the case within section 2145 Rev. Stat., and so give the United States courts jurisdiction over the offense. 566.

## KANSAS.

See CLAIMS OF THE UNITED STATES; LANDS, PUBLIC, 2.

## KANSAS INDIANS.

See INDIANS AND INDIAN LANDS.

## LAKE CHAMPLAIN, RIGHT OF FISHERY IN.

The waters of Lake Champlain, within the limits of the United States, being partly in New York and partly in Vermont, the right to take fish from these waters depends solely upon the laws of the one or of the other of those States, according as the *locus* is within the boundaries of the one or of the other. The General Government has nothing to do therewith. 74.

## LAND-GRANT RAILROADS.

1. *Seem* that the last section of the Union Pacific Railroad Company, Eastern Division (formerly the Leavenworth, Pawnee and Western Railroad Company), was in fact completed prior to the time fixed by statute, but not accepted by the President until about four months after that time. 295.
2. There is no legal objection to the issue of patents to the company for lands lying along such section; but delay in this matter suggested in view of circumstances stated. *Ibid.*
3. The assent of Congress to the transfer made by the New Orleans, Baton Rouge and Vicksburg Railroad Company to the New Orleans Pacific Railway Company of all the interest of the former company in the land grant contained in section 22 of the act of March 3, 1870, chap. 122, was not necessary to entitle the latter company to the benefit of such grant in aid of the construction of the road projected by it. The grant, by its terms, is *in presenti*; the interest of the New Orleans, Baton Rouge and Vicksburg Railroad Company therein, at the time of the transfer, was assignable; and the New Orleans Pacific Railway Company was such a successor or assignee as is contemplated by said act. 370.
4. For the 68 miles of the New Orleans, Mobile and Texas Railroad, if constructed prior to said act, no benefit can be claimed by the New Orleans Pacific Railway Company under said transfer from the grant; nor, in case of such prior construction and the non-construction of any portion of the New Orleans, Baton Rouge and Vicksburg road, has the purpose of the grant failed and the grant lapsed. *Ibid.*
5. If the New Orleans, Mobile and Texas road was constructed subsequently to the date of said act, so much of its road as is now owned by the New Orleans Pacific Railway Company is such a road as is contemplated for acceptance by the President, and patents may issue to the latter company for lands opposite to and conterminous with such constructed portion of the road. 371.
6. Certain lands within the 10-mile limits of the Central Pacific Railroad, being parts of odd-numbered sections granted thereto by the act of July 1, 1862, chap. 120, were, under section 7 of that act, ordered to be withdrawn, and this order was received at the land office at San Francisco on the 30th of January, 1865. The map showing definite location of line of said road was filed in General Land Office February 13, 1873, and on May 12, 1874, said lands were selected by the railroad company as inuring to it under said grant. But the same lands were selected by the State of California June 13, 1865, as indemnity for deficiency of school lands granted by acts of March 3, 1853, and February 26, 1859, and a list thereof was certified and approved to the State September 8, 1870. The railroad company applies for patents for these lands: *Advised* that the Secretary of the Interior is not authorized by the general law or the provisions of the act of July 1, 1862, to issue such patents to the company. 406.

## LAND GRANT, TRANSFER OF.

See LAND-GRANT RAILROADS, 3.

## LANDS, PUBLIC.

1. The decision of the Secretary of the Interior, in November, 1855, that those lands which had been reserved by the President under the act of September 20, 1850, chap. 61, granting lands to the State of Illinois to aid in the construction of a railroad, did not pass to the State by virtue of the swamp-land grant of September 28, 1850, chap. 84, is to be treated as *res adjudicata* as to all the lands embraced within the belt of territory to which it specifically relates and refers. 27.
2. Under the act of June 2, 1862, chap. 130 (donating public lands to establish agricultural colleges), the State of Kansas became entitled to a certain quantity (90,000 acres) of public lands lying within her borders subject to private entry at the minimum price of \$1.25 an acre; and by the same act it was declared that if such lands are selected from those which have been raised to double minimum in consequence of railroad grants, they shall be computed at the maximum price and the number of acres diminished proportionately. Subsequently the Secretary of the Interior, pursuant to the provisions of the railroad land-grant act of July 1, 1862, chap. 120, made a withdrawal of lands for 15 miles on each side of the general route (as designated) of a certain railroad within the scope of the act, part of which lands (the even-numbered sections) were afterwards restored to market and raised to double-minimum lands, in accordance with the act of March 3, 1853, chap. 143. Thereafter, in September, 1865, 7,682.92 acres of these double-minimum lands at \$2.50 an acre were certified to and accepted by the State of Kansas, in lieu of 15,365.84 acres at the minimum price of \$1.25 an acre, which last completed the quantity to which the State was originally entitled: *Held* that the claim of the State under the said act of July 2, 1862, is fully satisfied, and that it is not entitled to a further allowance thereunder (as claimed) of 7,682.92 acres. 129.
3. Where public land subject to homestead settlement has been duly entered under the homestead law, it thenceforth ceases to be at the disposal of the Government so long as the entry of the settler subsists. Hence it can not, whilst such entry stands, be set apart by the President for a military reservation. 160.
4. Where, however, a pre-emption filing has been made of public lands, the land covered thereby may be set apart by the President for such reservation at any time previous to payment and entry by the settler under the pre-emption law. *Ibid.*
5. Where a part of the public domain has been reserved by the President for military or other public purposes, and subsequently the land so reserved becomes unnecessary for such purposes, it can not be restored to the public domain without authority from Congress. 168.
6. Mineral lands belonging to the public domain, which are reserved from sale under section 2318 Rev. Stat., may be reserved for military or other public purposes by the President. 230.

**LANDS, PUBLIC—Continued.**

7. Where such lands are included in a military reservation, they are not open to exploration and purchase under section 2319 Rev. Stat. *Ibid.*
8. It is otherwise where a right has once attached to mineral land, under the laws relating thereto, in favor of the locator of a mining claim. Here the land, during the existence of such right, is not subject to reservation by the President; and if it be subsequently reserved, the locator may nevertheless perfect his title. *Ibid.*
9. No legal objection exists to the practice of the Land Department, in issuing patents for mining claims upon veins or lodes, to insert in the patent a clause excepting from the grant all town-site rights in the premises, where it appears that the surface ground of any such claim lies wholly or partly within the limits of a previously located, entered, or patented town site. 248.
10. *Seem* that the President has power to make a reservation for occupation by Indians from public domain lying within the limits of a State. 258.
11. The provisions in section 2 of the act of April 30, 1878, chap. 76, requiring moneys collected for depredations upon the public lands to be covered into the Treasury, in effect modifies section 4751 Rev. Stat. only as to that part of the penalties, etc., recovered which was payable under the latter section to the Secretary of the Navy; it does not affect the part payable thereunder to informers. 592.
12. Section 5 of the act of June 3, 1878, chapter 151, applies to the Pacific States and Washington Territory, and repeals section 4751 Rev. Stat., only so far as concerns such States and Territory. *Ibid.*

**LAST SICKNESS, EXPENSES OF.**

See ACCOUNTS AND ACCOUNTING OFFICERS, 3.

**LEAKAGE.**

See CUSTOMS LAWS, 20, 21; INTERNAL REVENUE, 7.

**LEASE OF BUILDING FOR GEOLOGICAL SURVEY.**

See STATUTES, INTERPRETATION OF, 2, 3.

**LONGEVITY PAY.**

See COMPENSATION, 2, 4.

**LOTTERIES.**

See POSTAL SERVICE, 1.

**MAIL CONTRACTS.**

See CONTRACT, 1, 4.

**MAIL TRANSPORTATION.**

See CONTRACT, 1, 8, 9, 10, 11; POSTAL SERVICE, 3, 4, 5.

**MAJ. RODNEY SMITH'S CASE.**

This case is controlled by the opinion in Major Terrell's case (*ante*, p. 10). 12.

**MAJOR TERRELL'S CASE.**

See ARMY, 5, 6.

**MARINE CORPS.**

1. There is no law requiring an officer of the Marine Corps, before promotion, to be examined as to his physical qualification for duty at sea. 117.
2. A board of naval surgeons, constituted under section 1493 Rev. Stat., is not by law invested with authority to examine and pronounce upon any other cases than those of officers on the active list of the Navy. *Ibid.*
3. *Semble* that the examination, physical or other, of a retiring board, constituted under section 1623 Rev. Stat., is the only one to which an officer of the Marine Corps is by law subjected in order to determine his fitness for active duty; and unless the officer is by *this* board found incapacitated for active service, and the finding is approved by the President, he remains in the line of promotion on the active list as he previously was, and is entitled to all the rights which belong to his position. *Ibid.*

**MEDICAL CORPS OF THE ARMY.**

See ARMY, 18, 19, 20, 21, 22, 25, 26.

**MEDICAL CORPS OF THE NAVY.**

See NAVY, 4, 10.

**MEMBER OF CONGRESS.**

See OFFICER, 1, 2.

**MIAMI INDIANS.**

See INDIANS AND INDIAN LANDS, 12, 13, 14, 15.

**MILITARY ACADEMY.**

1. Where a cadet was, by order of the Secretary of War, on the recommendation of the Academic Board, discharged from the Military Academy for deficiency in studies: *Held*, (1) that the order, having been completely executed, is beyond the power of revocation; (2) that section 1325 Rev. Stat. prohibits the returning or reappointing of the cadet to the Academy, excepting upon the recommendation of said Board; (3) that Congress may thus limit or restrict the authority of the President to appoint cadets; (4) that accordingly it is not competent to the President to revoke the said order or to restore the cadet to the Academy, irrespective of the recommendation of said Board. 67.
2. The professors of the Military Academy at West Point are commissioned officers of the Army, whose pay and allowances are assimilated to those of a lieutenant-colonel and a colonel; and in case of such disability as is described in section 4693 Rev. Stat. they are entitled to pensions at the same rate with officers of the rank of lieutenant-colonel. 359.

## MILITARY FORCES, EMPLOYMENT OF.

Upon consideration of the facts stated: *Advised* that the military forces of the United States may be employed under section 5298 Rev. Stat., after proclamation as required by section 5300 Rev. Stat., to aid in the execution of the laws and for the suppression of combinations of outlaws and criminals in the Territory of Arizona, without the need of further legislation. 333.

See POSSE COMITATUS.

## MINERAL LANDS.

See LANDS, PUBLIC, 6, 7, 8, 9.

## MINING CLAIMS, PATENTS FOR.

See LANDS, PUBLIC, 9.

## MONEY ORDER.

See COMPENSATION, 14.

## MISFEASANCE IN OFFICE, LIABILITY FOR.

Where a person placed money in the hands of an assistant postmaster for the purchase of "special-request envelopes," but the latter gave no receipt therefor, did not order the envelopes, and appropriated the money to his own use—the postmaster having no knowledge of the receipt of the money at the time, and not being chargeable with any negligence in the matter: *Held* that the person who paid the money to the assistant postmaster has no claim upon the Government for the envelopes, and that the postmaster is under no liability for the money so paid to his assistant. 526.

## MITIGATION OF FINES, PENALTIES, AND FORFEITURES.

See FINES, PENALTIES, AND FORFEITURES, 1, 2.

## NATIONAL BANKING ASSOCIATIONS.

1. Under section 4 of the act of June 20, 1874, chap. 343, a national banking association, desiring to withdraw its circulating notes and take up the bonds deposited with the United States Treasury as security therefor, may do so by depositing with the Treasurer the required amount in *lawful money*, whether this consists of coin or of legal-tender notes. 121.
2. A national banking association may, under section 3 of the act of June 20, 1874, chap. 343, deposit coin in the Treasury for the redemption of its circulation. 144.
3. The Treasury, while privileged under sections 3 and 4 of that act to redeem such circulation in United States notes, has also the right to redeem the same circulation in coin. *Ibid.*
4. National banking associations organized under the act of February 25, 1863, may amend their articles of association where this would not be in conflict with the provisions of the statute. 288.
5. Where such associations are so organized for a period of less than twenty years from the date of the act they can not, by amending their articles, extend the period to twenty years from such date. *Ibid.*

## NATIONAL BANKING ASSOCIATIONS—Continued.

6. Where the articles provide for an increase of capital, and the maximum of such increase is once fixed by the determination of the Comptroller of the Currency, both his power and that of the association over the subject are exhausted. A further increase and a new maximum can not be effected by an amendment of the articles. *Ibid.*
7. An amendment of the articles providing for an increase of the number of directors would not be inconsistent with the provision of section 5139 Rev. Stat. declaring that "No change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired." *Ibid.*
8. The stockholders of an expiring association may organize a new one, and adopt for the latter the name of the former. *Ibid.*
9. An association may, upon the expiration of the period limited for its duration, convert itself into a State bank under the laws of the State, provided it has liquidated its affairs agreeably to the laws of Congress; and after it has thus become a State bank it may reconvert itself into a national banking association, under section 5154 Rev. Stat. and adopt the name of the expired corporation with the approval of the Comptroller of the Currency. *Ibid.*
10. Consideration of the facts, as gathered from the papers submitted, concerning the indebtedness of the First National Bank of New Orleans (an insolvent bank) to the United States, and of certain questions propounded with reference thereto. 360.
11. A national bank whose charter is about to expire, but which has taken no steps toward going into liquidation under sections 5220 to 5224 Rev. Stat., can not withdraw all of the bonds deposited to secure its circulation, upon depositing lawful money equal to the amount of its outstanding circulation, notwithstanding the provisions of sections 5159 and 5160 Rev. Stat., and section 4 of the act of June 20, 1874, chap. 343. 409.
12. By section 5203 Rev. Stat., and section 13 of the act of July 12, 1882, chap. 290, the certification of a check drawn upon a national bank, where at the time of certification the drawer has not on deposit with the bank, and regularly entered to his credit on its books, an amount of money equal to the amount of the check, is prohibited. 471.
13. Whether the check be marked by the bank "accepted," or simply "good," can make no difference; either constitutes a certification within the meaning of the statute. *Ibid.*
14. The acceptance of a check, where the drawer has no funds on deposit, is a loan of the credit of the bank rather than a loan of money, and, if otherwise unobjectionable, is not within the restriction provided by section 5200 Rev. Stat. *Ibid.*
15. Liabilities so incurred by a bank are within the limit imposed by section 5202 Rev. Stat. *Ibid.*

## NAVAL ACADEMY.

1. The heads of the departments of ethics and English studies, of Spanish and other modern languages, and of drawing, should be commissioned as "professors of mathematics" (sec. 1528 Rev. Stat.), after passing the examinations required by the act of January 20, 1881, chap. 24. 108.
2. Opinions of August 7, 1877 (15 Opin., 637), and March 31, 1879 (16 Opin., 296), referred to, and suggested that copies thereof be sent by the Secretary of the Navy to the Senate in response to a resolution of that body in regard to the subject of relative rank of graduates of the Naval Academy. 193.

## NAVIGABLE WATERS, LAND UNDER.

*Semble* that the proprietors of land adjacent to Lake Huron, Michigan, have no legal right to stone taken from the bed of that lake, in front of their property, by other persons, and delivered by the latter on the Government works—the ownership of such bed being apparently in the State. Under the circumstances presented, the claim of such proprietors for the stone so taken and delivered may properly be resisted by the United States officer in charge of the works. 59.

## NAVIGATION.

See IMPROVEMENT OF NAVIGABLE WATERS.

## NAVY.

1. Upon the facts of this case, as set forth in the opinion, it is held that Paymaster Thomas T. Caswell is entitled to a position on the list of paymasters in the Navy next above that of Paymaster John H. Stevenson; the position of the latter officer, as borne on the Navy Register, being affected by the restoration of the name of Paymaster Edward Bellows to said list, from which it had been illegally dropped. 21.
2. Section 1461 Rev. Stat. gives to naval officers on the retired list a right to promotion on that list as their several dates on the active list are promoted. 36.
3. Where a paymaster in the Navy was sentenced to dismissal by court-martial, and it appeared by the order of the Secretary of the Navy that the President approved the finding of the court and directed the sentence to be carried into effect: *Held* that the officer was legally dismissed from the naval service. 43.
4. The custom and practice of the Navy Department requiring competitive examinations of assistant surgeons, and assigning them positions on the Navy Register in the order of relative merit as ascertained and reported by the board of examiners authorized by existing law and regulations, is not under the present law (sec. 1480 Rev. Stat., act of February 27, 1877) correct; the effect of such law being to adopt the rule of seniority in regard to promotions from one grade to another in the Medical Corps of the Navy. 48.

## NAVY—Continued.

5. Under the act of July 25, 1866, chap. 231, R., who had entered the naval service October 5, 1850, and stood No. 77 on the list of lieutenant-commanders, was promoted to the grade of commander; while L., who had entered the service February 17, 1841, and stood at the date of said promotion No. 7 on the said list, was not among those advanced under that act, and after the promotions thereunder were completed stood No. 2 in his grade (lieutenant-commander). Subsequently, by promotion in due course, both R. and L. attained the rank of captain, the former being senior by date of commission. In estimating length of service for the purpose of determining their precedence with officers of the staff corps holding the relative rank of captain: *Held*, that (under sec. 1496, Rev. Stat.) R. should be considered as having gained length of service according to his promotion, but that L. should not be considered as having lost anything in length of service—the effect of the promotion of the former officer upon the latter being purely an incidental one. 56.
6. Where, under the provisions of section 1506, Revised Statutes, an officer was advanced by the President in numbers, with the advice and consent of the Senate, for eminent and conspicuous conduct in battle or extraordinary heroism: *Held* that such action of the President and Senate is conclusive upon the executive department of the Government, and that the grounds thereof are not subject to re-examination. 76.
7. Civil engineers in the naval service are officers in the Navy, possessing defined relative rank with other naval officers. 126.
8. They may be retired from active service and placed on the retired list under the statutory provisions (see secs. 1443 *et seq.*, Rev. Stat.) regulating the retirement of officers in the Navy. *Ibid.*
9. Where W., while holding a commission as captain in the Navy, was appointed to the office of Chief of the Bureau of Navigation, with the relative rank of commodore: *Held* that in case of his retirement by reason of a disability incident to the service, or on his application, during his incumbency of that office, and whilst he is borne on the Navy Register as a captain, he should be placed on the retired list with the rank of captain, and that, on being thus retired, he would be entitled to 75 per centum of the sea-pay of officers of that rank. 154
10. Surgeon T., having been examined by a board of medical officers, and found totally disqualified for the performance of his duties, was retired under section 3 of the act of February 21, 1861, chapter 49. Subsequently, in November, 1878, a board of medical officers was convened, by order of the Secretary of the Navy, to examine and report whether, in their opinion, Surgeon T.'s disability did or did not originate in the line of duty; and the finding of this board was that his disability had its origin in the line of duty. Such finding was approved by the Secretary of the Navy January 1, 1879, who directed that thereafter Surgeon T. be regarded on the records of the Department as retired on account of disability occasioned while in the line of duty: *Held* that the Secretary of the Navy was not

## NAVY—Continued.

- authorized by law to submit the case of Surgeon T. to a medical board for re-examination as to the origin of the disability for which he was retired, and that the Secretary's action, based on the report of such board, is without any legal effect as regards the cause for retirement in the case of that officer or his right to pay. 178.
11. Construction of section 1412, Revised Statutes, as given in 14 Opin., 192, 358, and 15 Opin., 45, namely, that it gives to transferred officers the full benefit of their former sea-service only in so far as this may go to complete the period of such service required in their respective grades previous to examination for promotion, and in so far as it ought properly to be taken into account in the matter of assignment to duty—reaffirmed. 189.
  12. W. was appointed an acting third assistant engineer in the volunteer Navy February 8, 1862, and performed sea service continuously until May 20, 1864, when he was made a third assistant engineer in the regular Navy, and completed two years of sea service as such January 1, 1867. He was promoted to the grade of second assistant engineer October 6, 1869, to take rank from January 1, 1868. On July 1, 1870, he completed two years' sea service in the latter grade and on March 12, 1875, was promoted to the grade of passed assistant engineer, to take rank from October 29, 1874: *Held* that the credit of his volunteer service, under section 1412, Revised Statutes, does not entitle him to the benefits claimed therefor as regards promotion to or pay in his present grade. 399.
  13. An officer who was retired as a commodore, and has since been promoted to the grade of rear-admiral on the retired list, under the act of August 15, 1876 (sec. 1460, Rev. Stat., as amended), is not entitled to any increase of pay by reason of his promotion. 495.
  14. The first section of the act of June 22, 1874, chapter 392, is *in pari materia* with the provision touching the pay of promoted officers contained in section 7 of the act of June 15, 1870, chapter 295, the act of June 5, 1872, chapter 296, and section 1516, Revised Statutes, and was designed to fix the commencement of the increased pay of promoted officers in active service only. *Ibid.*
  15. Section 1591, Revised Statutes, which declares that an officer promoted on the retired list shall not, in consequence of such promotion, be entitled to increase of pay, is applicable alike to officers promoted under section 1461, Revised Statutes, and to those promoted under section 1460, as amended. *Ibid.*

## NAVY DEPARTMENT.

1. The chief of a bureau in the Navy Department can not lawfully hold over after the expiration of the term for which he was appointed. 648.
2. The general rule is that where Congress has not authorized the officer to hold over, his incumbency must be deemed to cease at the end of his term, though no appointment of a successor may then be made. *Ibid.*

See SUPPLIES FOR THE PUBLIC SERVICE, 1.

## NEW ORLEANS, BATON ROUGE AND VICKSBURG R. R. CO.

See LAND GRANT RAILROADS, 3.

## NEWTON'S CASE.

See PRESIDENT, 1, 2.

## NORTH CAROLINA CHEROKEES, REMOVAL OF.

In the case of certain Cherokee Indians of North Carolina, who left their homes in that State on the supposition that they would be furnished by the United States with transportation to the lands owned by their tribe in the Indian Territory: *Advised* that there is no authority under existing legislation to effect the removal of these Indians in the manner supposed, as above. 72.

## OFFICER.

1. A member of Congress is not an "officer of the Government" within the meaning of the provision in section 6 of the act of August 15, 1876, chapter 287, whereby "all executive officers or employes of the United States, not appointed by the President with the advice and consent of the Senate, are prohibited from requesting, giving to, or receiving from any other officer or employé of the Government any money or property or other thing of value for political purposes." 419.
2. That provision is intended to regulate the conduct of the inferior officers, etc., of the Government with respect to these and other officers, etc., in its service, as ordinarily understood. To place a construction thereon which would embrace among the latter those who are not "officers" in the common acceptance of the word, and thus enlarge the penal effect of the provision, would not be warranted by any sound rule of interpretation. *Ibid.*
3. The chief of a bureau in the Navy Department can not lawfully hold over after the expiration of the term for which he was appointed. 648.
4. The general rule is that where Congress has not authorized the officer to hold over, his incumbency must be deemed to cease at the end of his term, though no appointment of a successor may then be made. *Ibid.*

## OFFICIAL ENVELOPE.

1. United States commissioners are "officers of the United States," within the meaning of section 29 of the act of March 3, 1879, chapter 180, and as such are entitled to use the penalty-envelope provided for by sections 5 and 6 of the act of March 3, 1877, chapter 103, in the transmission to the Departments at Washington of mail matter relating to their accounts for fees payable by the Government and other official business. 183.
2. Indian agents and registers and receivers of land offices are (by virtue of section 29 of the act of March 3, 1879, chapter 180) entitled to use the penalty-envelope for the transmission of official mail matter between themselves and other officers of the United States or between themselves and the Executive Departments, but not for the transmission of such matter to private persons. 255.

## OFFICIAL ENVELOPE—Continued.

3. These officers are not "departmental in their character" within the meaning of sections 5 and 6 of the act of March 3, 1877, chapter 108. *Ibid.*
4. When supplied with official postage-stamps by the Departments, they may use them for the transmission of official mail matter as well to private persons as to other officers of the Government. *Ibid.*
5. Opinion of May 25, 1880 (16 Opin., 501), as to the use of the penalty-envelope, reaffirmed. 264.
6. A marshal, upon the expiration of his term, ceases to be an officer of the United States, and is not entitled to use the "penalty-envelope" in executing process (under section 790, Rev. Stat.) then in his hands. 529.
7. Section 29 of the act of March 31, 1879, chapter 180, so far as it relates to the indorsement to be placed on the penalty-envelope, is a substitute for the corresponding provision in the fifth section of the act of March 3, 1877, chapter 103. Such envelope must be indorsed with a proper designation of the office from which the same is transmitted, and a statement of the penalty provided by the fifth section of the latter act. 631.

## OFFICIAL POSTAGE-STAMPS.

See OFFICIAL ENVELOPE, 4.

## PACIFIC RAILROADS.

See LAND-GRANT RAILROADS, 1.

## PARDON.

1. C., a lieutenant-commander in the Navy, was sentenced by a court-martial to suspension for one year, and to retain his then present number on the list of lieutenant-commanders for that time. The sentence having been executed, he applied to be restored to the number on said list which he thereby lost: *Held*, that the restoration could not be effected by the President otherwise than by a pardon. 31.
2. The punishment imposed (loss of numbers), being a continuing one, is still subject to the pardoning power, which, when exercised, would have the effect to restore the officer to his former rank according to the date of his commission: *Ibid.*
3. In September, 1882, Lieutenant N. was sentenced by a court-martial to reduction of rank in his grade, and the sentence was carried into effect. In September, 1883, the department commander remitted the sentence under the power to pardon conferred by article 112 of the Articles of War: *Held* that, the punishment imposed by the sentence being a continuing one, the sentence could be remitted by the pardoning power, and that the authority exercised by the department commander was in conformity to law. 656.

## PASSENGER VESSEL.

See SHIPPING, 3.

## PASSPORT.

Certain papers issued by the mayor of Savannah, Ga., and also by a notary public at Cedar Keys, Fla., containing the essentials of a passport, and intended to be used in traveling in a foreign country, are a violation of section 4078, Revised Statutes. 674.

## PATENTED ARTICLES, PURCHASE OF.

When articles are to be bought for the Government, and it is doubtful whether officers of the United States in using them will or will not be exposed to suits for the infringement of a patent: *Advised* that a bond of indemnity to the Government be taken from parties who offer to furnish such articles, for the protection of the officers. 33.

## PATENT, LAND,

See LANDS, PUBLIC, 9.

## PATENTS FOR INVENTIONS.

By virtue of the supervisory power conferred on him by section 441 Rev. Stat. over the public business relating to patents for inventions (see also section 481 Rev. Stat.), it is within the competency of the Secretary of the Interior to review a decision of the Commissioner of Patents made in an interference case under Rule 110, Rules and Practice of the Patent Office, upon a motion to amend a preliminary statement. 205.

## PAY ACCOUNTS OF ARMY OFFICERS.

1. Where an Army officer assigned his pay accounts in payment of certain indebtedness, which accounts the Paymaster-General declined to pay, for the reason that on the maturity thereof the officer was in arrears to the United States: *Held* that the refusal of the Paymaster-General was in accordance with section 1766 Rev. Stat. 30.
2. The statute does not require that, before payment is withheld, the officer shall be adjudged in arrears in a suit brought against him. *Ibid.*
3. Where an officer's account for the same month was paid twice by different paymasters—one payment being made in November and the other in December: *Held* that the paymaster who made the last payment is chargeable with the overpayment. 425.
4. In such case the Government may hold liable for the overpayment both the officer who made and the officer who received the payment. *Ibid.*
5. When the amount of overpayments to an officer are charged to the paymasters making them, and the Government afterwards recovers a part of the loss sustained by such overpayments, the balance of the loss should be apportioned to all of these paymasters *pro rata*. 426.
6. Opinion of July 27, 1882 (*ante*, p. 426), on certain questions concerning paymasters' accounts, reconsidered. 603.
7. A pay account for Lieutenant M., for the month of August, 1877 (he being on duty within the limits of the New York pay district), was paid by the chief paymaster at New York, and soon afterwards a

## PAY ACCOUNTS OF ARMY OFFICERS—Continued.

second pay account of Lieutenant M. for the same month was paid by another paymaster there, who had no knowledge of the previous payment, nor was it practicable for him to obtain such knowledge: *Held* that the last-mentioned paymaster is not chargeable with the amount so paid by him, but that, by virtue of the Army Regulations (paragraph 1006, Regulations of 1863; paragraph 1652, Regulations of 1881) he is entitled to have the same passed to his credit. *Ibid.*

8. A third account of Lieutenant M. for the same month was paid to an assignee by a paymaster at Charleston, S. C., the latter knowing that Lieutenant M. was not then serving within the Charleston pay district. Viewing this case in connection with paragraph 1348, Regulations of 1863, and certain circulars from the Paymaster-General's Office mentioned: *Held* that the payment of this account was wholly unauthorized, and that the paymaster is properly chargeable therewith. *Ibid.*

## PAYMASTER CASWELL'S CASE.

See NAVY, 1.

## PAYMASTER GENERAL'S DEPARTMENT.

See ARMY, 5.

## PAYMENT.

1. Where an award was made to M., as surviving partner of the firm of M. & G., and on the subsequent death of M. the representatives of G. demanded to share in the distribution of the award: *Advised* that the administrators of M., the surviving partner in whose name the claim was presented and to whom the award thereon was made, should alone receive payment. 537.
  2. Payment to a judgment creditor of a claim against the Government in favor of the judgment debtor, if made without the consent of the latter, is unauthorized by law. 675.
- See PAY ACCOUNTS OF ARMY OFFICERS.

## PENALTY.

See FINES, PENALTIES AND FORFEITURES.

## PENALTY-ENVELOPE.

See OFFICIAL ENVELOPE.

## PENSION.

1. Consideration of legal principles applicable to the case of a claim for pension, where the injury followed the use of abusive language of the claimant towards his assailant. 172.
2. T. died while his application for pension was pending, leaving a widow and a daughter under sixteen years of age; the mother died after the daughter attained the age of sixteen years; and subsequently the pension was allowed and a certificate therefor issued: *Held* that under section 4718 Rev. Stat. the daughter is entitled to the pension which had accrued up to the death of the father. 190.

## PENSION—Continued.

3. The provision in section 4713 Rev. Stat., declaring that where an application for pension should not have been filed "within three years of the termination of a pension previously granted on account of the service and death of the same person, the pension shall commence from the date of filing, by the party prosecuting the claim, the last paper requisite to establish the same," is applicable to half-pay pensions allowable under section 4725 Rev. Stat. 221.
4. In the case of General Burnett it is held that he is entitled to, and should be allowed, the increase of pension granted by the act of June 16, 1880, chapter 236, to a certain class of pensioners. 327.
5. Under section 4702 Rev. Stat., the surviving child (the widow and other children being dead) is entitled to the whole of the pension to which the father would be entitled were he living. 339.
6. The *proviso* in section 4714 Rev. Stat. is to be construed as applicable to the new limitation prescribed by section 2 of the act of March 3, 1879, chapter 187, as to date of filing pension claims; and a declaration made in accordance therewith may be accepted, to exempt a claim from such limitation. 355.
7. Rates of pension which should be allowed General Burnett under the general laws of March 3, 1873, June 18, 1879, and June 16, 1880, and under the special act of March 3, 1879, stated; and *advised* that two pension certificates be issued—one under the general law of June 16, 1880, the other under the special act of March 3, 1879. 401.
8. Where a pensioner was entitled to, though not actually receiving, a pension of \$50 a month under a general law, and while so entitled a special act was passed giving him another pension: *Held* that his right under the general law did not cease or become merged in that granted by the special act. 415.
9. A contract surgeon, on entering the service, was ordered to duty in a post hospital at a distant place, and in obedience to the order went aboard a steamer to proceed thither, but before the departure of the boat became too sick to go on, and was removed to a hospital, where he died in a few days of typhoid fever, leaving a dependent mother, but no widow or child: *Held* that, under the provisions of sections 4692, 4693, and 4707, Revised Statutes, the dependent mother is entitled to be enrolled as a pensioner, on the ground that the deceased, when taken down with sickness, was "*in transitu*" under orders. 457.
10. When an officer is ordered to go to a given point for duty and has set about his preparations to do so, his transitus has begun. *Ibid.*
11. Declarations of pension claimants must be made before a court of record, or before some officer thereof having custody of its seal. 510.
12. The power to fine and imprison is not in this country a distinguishing mark of a court record, but the enrolling or recording of their acts and proceedings is; and such court must have a seal by which its acts and proceedings are authenticated and proved. *Ibid.*

## PERMIT LAWS.

See INDIANS AND INDIAN LANDS.

## POLICE FORCE OF THE DISTRICT OF COLUMBIA.

See DISTRICT OF COLUMBIA, 4.

## POSSE COMITATUS.

1. Troops of the United States can not, without violating the provisions of section 15 of the act June 18, 1878, chapter 263, be employed as a posse comitatus, to aid the United States marshal or his deputies in arresting certain persons in the State of Kentucky charged with robbing an officer of the Government. 71.
2. Section 15 of the act of June 18, 1878, chapter 263, renders unavailable the aid of the military forces of the United States for the suppression of unlawful organizations, unless the state of facts be such as to enable these forces to be used under the provisions of section 5287 or of sections 5298 and 5300, Revised Statutes. 242.

## POSTAL GUIDE.

See CONTRACT, 2, 3.

## POSTAL NOTES.

See POSTAL SERVICE, 15.

## POSTAL SERVICE.

1. Where the Postmaster-General finds, upon evidence satisfactory to himself, that a person is engaged in conducting a fraudulent lottery, he may and should forbid the delivery of registered letters and the payment of money-orders to such person. It is not in terms all fraudulent lotteries, etc., that are excluded from the use of the registry and money-order systems; those only are denied such use which are found to be fraudulent by the Postmaster-General. 77.
2. Where there is a letter-carrier office at the place of publication of a newspaper or periodical, and at another place, within another postal district, a news-dealer is employed by the publisher to mail at the latter place copies of the newspaper or periodical intended for distribution to subscribers at the former place, such copies are not entitled to transmission through the mails at pound rates. 164.
3. The *proviso* in the second section of the act of April 7, 1880, chap. 78, limits the power of the Postmaster-General to allow increased pay for expedited service to fifty per centum of the compensation expressed in the original contract. The *original letting*, and not any subsequent increase of service and pay, under section 3960 Rev. Stats., is made the standard of limitation. 166.
4. The case submitted being one in which it is proposed not to expedite the service, but to reduce the speed thereof as fixed by the now existing contract: *Advised* that the act of April 7, 1880, chap. 48, has no application thereto, and imposes no restriction upon the Postmaster-General in dealing therewith. 240.

## POSTAL SERVICE—Continued.

5. When a reduction of speed is proposed, he is left at liberty to act as in his judgement the good of the service and the interests of the public may demand, without any limitation upon the exercise of his authority. *Ibid.*
6. Section 3962, Revised Statutes, makes it imperative upon the Postmaster-General to deduct from the pay of mail contractors the price of the trip where, without fault on their part, the trip is not performed. 276.
7. And *semble* that the section has the same effect as regards the pay of companies performing "recognized service" in the case of trips not performed by such companies. *Ibid.*
8. The Postmaster-General may require from the bidder for a mail contract conformity to all proper and reasonable administrative regulations of the Post-Office Department; and if the bidder neglects to conform thereto, his bid may be rejected. 285.
9. Case of a material change by erasure and interlineation in the bidder's bond, where no attestation by a witness appears thereon that such change was made before execution of the bond, considered. *Ibid.*
10. The statutory requirements relative to bids for mail contracts (by which, *inter alia*, every proposal must be accompanied by bond with sureties) are intended to protect the Government against imposition through worthless bids. 293.
11. Where such requirements are conformed to in point of *form*, but the Postmaster-General is satisfied, from reliable information, that the bond is worthless and therefore unacceptable, he may and should treat the bid as though it were unaccompanied by a bond. *Ibid.*
12. Removal of an assistant postmaster. 475.
13. Suspension of a postmaster. *Ibid.*
14. The top or outside of a letter-box, attached to a lamp-post, is not an authorized depository for mail-matter, the taking of which therefrom is punishable under section 5469, Revised Statutes. 524.
15. Postal notes, under the act of March 3, 1883, chapter 123, are required to be drawn payable only at the office selected by the remitter. 620.
16. A circular of the World's Dispensary Medical Association, contemplating the sale of 100,000 copies of a certain book at \$1.50 per copy, and proposing to distribute among the purchasers a large amount out of the proceeds of such sale in sums ranging from 25 cents to \$6,000 per each purchaser: *Held* to be unmailable matter, it being manifestly a device to deceive and defraud the public. 624.

## POSTMASTER.

See COMPENSATION, 14, 15, 16.

## POSTMASTER-GENERAL.

See POSTAL SERVICE, 1, 3, 4, 5, 6, 8, 11.

## POST-TRADER.

1. Where one person had been appointed post-trader for a certain military post, and subsequently, on a change in the location of the post, another person was appointed post-trader for the same post: *Held* that as the law allows but one post-trader to be appointed for a military post, the second appointment must be deemed to work a revocation of the first, and accordingly that the last appointee is entitled to the place. 424.
2. Under section 3 of the act of July 24, 1876, chapter 226, a post-trader can not be appointed by the Secretary of War excepting on the recommendation of a council of administration appointed by the commanding officer of the post, yet he may be removed by the Secretary without the concurrence of the council of administration and commanding officer. 517.

## POTOMAC RIVER IMPROVEMENT.

See IMPROVEMENT OF NAVIGABLE WATERS, 4.

## POWER OF ATTORNEY.

See CLAIMS, 10, 11.

## PRESIDENT.

1. Power of the President under the act of July 15, 1870, chapter 294, to drop an officer from the rolls of the Army, considered. 13.
2. Neither the act of March 3, 1865, chapter 79, nor that of July 13, 1866, chapter 176, applies to cases expressly and specifically provided for by the act of July 15, 1870, section 17. *Ibid.*
3. The President has no power to retire Lieutenant-Colonel Freudenberg with the rank and pay of colonel of infantry from the date of his first retirement, December 15, 1870. 60.
4. Mistakes, if any, made in the execution of an act which is subsequently repealed, can not be rectified by executive action after such repeal. *Ibid.*
5. It is not competent to the President, with the concurrence of the Senate, now (in May, 1881) to reappoint Rev. Charles M. Blake a post chaplain in the Army as of the 28th day of September, 1878, so as to entitle him to pay from that date. 97.
6. The President has power to direct, by an executive order, the manner in which shall be ascertained and determined the compensation for property taken or destroyed in the construction of the Missouri, Kansas and Texas Railway through the reservation of the Chickasaw and Choctaw tribes of Indians. 265.
7. The President has power to designate one of his executive clerks to sign for him, and in his name, all patents for land, etc.; and should an exigency of the public service require it, he is authorized to appoint an assistant to aid in performing that duty, so long as the exigency exists. 305.
8. In the absence of any act of Congress or constitutional provision conferring upon him authority so to do, the President can not officially consent to and approve the erection of the proposed bridge across the Niagara River. 523.

## PRESIDENT—Continued.

9. The President has no power, in the absence of a treaty provision, to extend to a foreign government the privilege of taking the testimony of prisoners, excepting when they are confined in prisons of such of the Territories as are not invested with authority to regulate the prisons within their limit, and in the prisons of the District of Columbia; and then only, as to the former prisons, with the concurrence of the Attorney-General, and as to the latter prisons, with the concurrence of the supreme court of the District. 565.

See LANDS, PUBLIC, 3, 4, 5, 6, 8, 10; PARDON, 1, 2.

## PROCESS.

Writs issued by the courts of Minnesota run into and upon the military reservation of Fort Snelling, in that State. 1.

## PROMOTION.

See ARMY, 13, 14, 25, 26, 27, 28; MARINE CORPS, 1, 2, 3; NAVY, 4, 6, 13, 14, 15.

## PROPERTY LOST IN THE MILITARY SERVICE.

See CLAIMS, 1, 6, 7.

## PUBLIC LANDS.

See LANDS, PUBLIC.

## QUARTERS, COMMUTATION FOR.

1. An officer in the enjoyment of quarters in kind at the commencement of leave (cumulative) taken under the act of July 29, 1876, chapter 239, does not become entitled to commutation upon the commencement of the leave. 41.
2. Nor does he become entitled to commutation if, during such leave, he voluntarily abandons the use of the quarters in kind; nor if he vacates his quarters in kind at the command of his superior; nor if there are unoccupied quarters at the post or station that might properly have been assigned to him had no leave been granted. *Ibid.*
3. An officer of the Army placed on waiting orders is not entitled to commutation for quarters under the *proviso* in section 9 of the act of June 18, 1878, chapter 263. 169.
4. The word "places," as used in that *proviso*, comprehends only military posts and stations. *Ibid.*
5. B. was in the military service as a surgeon, under contract dated January 1, 1881, and on duty at the Washington Arsenal, District of Columbia, from January 1 to April 30, 1881: *Held* that he was entitled, for that period, to the commutation for quarters allowed by law to an assistant surgeon of the rank of first lieutenant, if no public quarters were available for his accommodation. 461.

## RAILROAD TRANSPORTATION.

See TRANSPORTATION.

## REDEMPTION OF CIRCULATION.

See NATIONAL BANKING ASSOCIATIONS, 2, 3, 11.

## REFUND OF DUTY.

See CUSTOMS LAWS, 14, 27, 28, 35; INTERNAL REVENUE, 7.

## REGISTRY OF VESSELS.

1. A vessel built in the United States, and owned wholly by citizens thereof, is entitled to be registered under the laws of the United States, although she may have formerly belonged to citizens of a foreign country. 286.
2. A registered vessel of the United States, wholly and continuously owned by a citizen of the United States, does not forfeit her privileges as such by having been employed under a foreign flag since the rebellion. 443.
3. An American-built vessel, wholly and continuously owned by a citizen of the United States, but as yet unregistered, may be admitted to registry, although she has sailed under a foreign flag since the rebellion. *Ibid.*

## REGULATIONS. .

See ARMY, 13, 14; ARMY REGULATIONS; CIVIL SERVICE, 4.

## RELATIVE RANK.

See ARMY, 5, 6, 7, 11, 12, 18, 19, 20, 21, 22; NAVAL ACADEMY, 2; NAVY, 5.

## REPRIEVE.

Upon examination of the papers accompanying an application made to the President asking for the appointment of a commission to examine and consider the mental condition of Charles J. Guiteau, and praying for his reprieve pending the investigation: *Advised*, for reasons stated, that the application be not granted. 394.

## RES ADJUDICATA.

See CLAIMS, 5; LANDS, PUBLIC, 1.

## RESERVATION.

See LANDS, PUBLIC, 3, 4, 5, 6, 7, 8, 10.

## RETIRED LIST.

See ARMY, 2, 3, 24; NAVY, 2, 8, 9, 10, 15.

## RETIRED OFFICERS OF THE ARMY.

See ARMY, 3, 4, 23, 24.

## RETIRED OFFICERS OF THE NAVY.

See NAVY, 2, 9, 10, 13, 14, 15.

## REVENUE-CUTTER SERVICE.

See APPOINTMENT, 7, 8.

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## SAVANNAH RIVER IMPROVEMENT.

See IMPROVEMENT OF NAVIGABLE WATERS, 5.

## SCHOOL-FARM LANDS, PROCEEDS OF.

See TRUST FUNDS.

## SEAMEN.

See SHIPPING, 1.

## SEA SERVICE.

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## SECRETARY OF THE INTERIOR.

See INDIAN INSPECTOR; INDIANS AND INDIAN LANDS, 1, 7, '11; INDIAN TRUST FUNDS; PATENTS FOR INVENTIONS.

## SECRETARY OF THE TREASURY.

See COMPROMISE; CUSTOMS LAWS, 4, 14, 27, 28, 35; INTERNAL REVENUE, 4; TRUST FUNDS.

## SECRETARY OF WAR.

See COURT-MARTIAL, 1; POST TRADER, 2; SOLDIERS' HOME, 2.

## SENTENCE OF COURT-MARTIAL.

See COURT-MARTIAL, 2, 3; NAVY, 3; PARDON, 1, 2.

## SET-OFF.

Where money was paid by a United States marshal, under a mistake of fact, to a person who subsequently became an officer in the postal service: *Held* that, the latter being in arrears to the United States for the amount so paid, it may be set off against his compensation as such officer. 677.

## SETTLEMENT OF ACCOUNT.

See ACCOUNTS AND ACCOUNTING OFFICERS, 4.

## SHIPPING.

1. An alien seaman, though he has declared his intention to become a citizen of the United States, and has served three years on vessels of the United States, is ineligible to the position of an officer of an American vessel. For that, full citizenship is required. 534.
2. On application of the master, the American brig *Mary C. Comery*, while lying at a Colombian port, was surveyed and condemned as unseaworthy by the port officers. Meanwhile the United States consul summoned a committee, which also surveyed the vessel, and, finding her unseaworthy, recommended a sale for the benefit of all concerned. But prior to the last survey the master notified the consul that he abandoned the vessel, and thereupon left the port: *Advised* that, in the case stated, the consul is without authority to sell the vessel, but should notify the owners of the condition of their property, and in the mean time take care of it. 552.
3. A tug-boat, used for the purpose and in the manner stated in the opinion, can not be called a "passenger vessel" or "vessel carrying passengers," within the provisions of section 4464 to 4469 Rev. Stat. 599.

## SIGNAL CORPS.

See ARMY, 15, 16

## SOLDIERS' HOME.

1. The Soldiers' Home is not entitled to bounty land-warrants belonging to the estates of deceased soldiers which remain unclaimed for the period of three years after their decease. 157.
2. In passing upon recommendations made by the Board of Commissioners of the Soldiers' Home under section 4816 Rev. Stat., the Secretary of War is invested with a discretionary power to approve or disapprove the same. 449.

## SOUTH PASS OF THE MISSISSIPPI.

See IMPROVEMENT OF NAVIGABLE WATERS, 2.

## SPANISH CLAIMS UNDER TREATY OF 1819.

See CLAIMS, 17, 18, 19.

## STATE PROCESS.

See PROCESS.

## STATE TAX.

See TAX LIEN.

## STATUTES, INTERPRETATION OF.

1. The appropriation made by the act of March 3, 1881, chap. 133, "for the purchase of a suitable site in the city of Washington for the erection of a brick building to be used and occupied by the Pension Bureau," etc., is to be construed as applying solely to the purchase of a site. The language of the clause contains no ambiguity necessarily giving rise to the inference that Congress intended it to embrace more than its terms express. 63.
2. The appropriation made by the act of June 16, 1880, chap. 235, "for the expenses of the Geological Survey, and the classification of the public lands, and examination of the geological structures, mineral resources, and products of the national domain, to be expended under the direction of the Secretary of the Interior," is not applicable to the payment of rent of the building in Washington, D. C., leased from Dr. J. W. Bulkley, July 9, 1880, and used as offices for the Geological Survey. 87.
3. That appropriation not being "in terms" made for the rent of any building or part of any building in the District of Columbia to be used by the Geological Survey, and no provision therefor being made elsewhere, the lease of July 9, 1880, was forbidden by the act of March 3, 1877, chap. 106, and is void. *Ibid.*
4. The power given the Commissioners of the District of Columbia by the sixth section of the act of March 3, 1881, chap. 134, "to sell to the highest bidder at public auction" all the right, title, and interest of the United States in and to a certain lot of ground situated in the city of Washington, carries with it authority to make a conveyance to such bidder, as an incident to the execution of the power. 100.

## STATUTES, INTERPRETATION OF—Continued.

5. The appropriation made by the act of March 3, 1881, chap. 135, in the provision authorizing the creation of a board of Army officers to make examinations of improvements of heavy ordnance and projectiles, is applicable to expenses necessarily incurred by the board in performing the duties devolved thereon, among which the actual and necessary expenses of its members for board and lodging and for traveling while so engaged can be fairly included. 252.
  6. The authority given by the act of April 11, 1882, chap. 75, "to purchase a site" for a public building to be erected at Minneapolis, Minn., does not include authority to acquire such site by condemnation under the eminent domain power of the United States. 509.
  7. Construction of the act of July 15, 1882, chap. 294, "to increase the water supply of the city of Washington," etc. 587.
- See APPOINTMENT; ARMY; ARMY REGULATIONS; CHINESE LABORERS; CIVIL SERVICE; CLAIMS; COMPENSATION; CONTRACT; CUSTOMS LAWS; DISTRICT OF COLUMBIA; EIGHT-HOUR LAW; IMPROVEMENT OF NAVIGABLE WATERS; INDIANS AND INDIAN LANDS; INDIAN SCHOOLS; INDIAN TRUST FUNDS; INTERNAL REVENUE; LAND-GRANT RAILROADS; LANDS, PUBLIC; NATIONAL BANKING ASSOCIATIONS; NAVY; OFFICER; OFFICIAL ENVELOPE; PENSION; POSSE COMITATUS; POSTAL SERVICE; POST TRADERS; PRESIDENT; QUARTERS, COMMUTATION FOR; REVISED STATUTES, ETC.; TERRITORIES; TRUST FUNDS.

## SUBLETTING CONTRACT.

See CONTRACT, 8, 9.

## SUITS IN REVENUE CASES.

See CUSTOMS LAWS, 3, 4.

## SUPERVISING INSPECTOR.

See INSPECTION OF STEAM-VESSELS.

## SUPPLIES FOR THE PUBLIC SERVICE.

1. No legal obstacle exists to re-imbursing the appropriation for the Navy Department from the appropriation for the Revenue Marine Service with the cost of such heavy ordnance and ordnance stores as may be furnished by that Department to be used in said service. 480.
2. Where one Department receives from another Department supplies which are within the scope of appropriations belonging to each a re-imbusement of the appropriation of the one from the appropriation of the other, of the cost of such supplies, is not a violation of section 3678 Rev. Stat.; nor do the provisions of section 3618 Rev. Stat. apply to such case. *Ibid.*

## SWAMP-LAND GRANT.

See LANDS, PUBLIC, 1.

## TAX LIEN.

Where the title to land in Cincinnati, Ohio, was acquired by the United States by condemnation, and jurisdiction over the land so acquired was ceded to the United States by the State: *Held* that taxes theretofore assessed upon the land by the city authorities, and remaining unpaid, ceased thereafter to be a lien upon the land, and did not become a proper charge against the United States. 44.

## TEMPORARY APPOINTMENT.

See APPOINTMENT, 4.

## TERRITORIES.

Persons appointed under the bigamy act of March 22, 1882, chap. 47, section 9, to perform the duties of the registration and election offices, thereby declared vacant, have authority to administer all oaths which the former incumbents of these offices were authorized to administer in the performance of the duties thereof. 314.

## TESTIMONY OF PRISONERS.

See PRESIDENT, 9.

## TIMBER DEPREDACTIONS.

See LANDS, PUBLIC, 11, 12, 15.

## TIME, CHANGE OF.

A change of time at Washington, D. C., by adopting the seventy-fifth meridian in lieu of the true meridian at that place (being a change of eight minutes and twelve seconds), can not be effected by mere executive authority. It can only be done by appropriate legislation. 619.

## TONNAGE DUES.

1. The "tax of fifty cents per ton" imposed by section 4219 Rev. Stat., as amended by the act of February 27, 1877, chap. 69, is not a *penalty* capable of being remitted by the Secretary of the Treasury under sections 5292 and 5293 Rev. Stat. 120.
2. A foreign vessel, *i. e.*, one belonging wholly or in part to a subject of a foreign power, is not liable to the penal tax prescribed in section 4371 Rev. Stat. This tax applies exclusively to vessels belonging to citizens of the United States which are capable of being and should be enrolled and licensed. 388.

## TRANSPORTATION.

Under sections 5260 and 5261 Rev. Stat., it is sufficient if, previous to the payment of claims for freight and transportation over the railroads of companies to which the United States have issued bonds, the law applicable thereto has been ascertained by a judgment of the Court of Claims, or, upon appeal, of the Supreme Court. Where the law is thus ascertained in one case, it may be acted upon in all similar cases without further litigation. 512.

## TRANSPORTATION OF THE MAIL.

See CONTRACT, 1, 8, 9, 10, 11; POSTAL SERVICE, 3, 4, 5.

## TRAVELING ALLOWANCES.

Traveling allowances, as authorized by paragraph 2280, Regulations of 1881, can be lawfully paid a contract surgeon where they constitute part of the contract. 461.

## TREASURY WARRANT.

See ACCOUNTS AND ACCOUNTING OFFICERS, 1.

## TREATIES WITH FOREIGN GOVERNMENTS.

1. The tariff on statuary and other works of art considered in connection with the treaty of 1871 between the United States and Italy. 223.
2. The treaty makes no provision, in letter or spirit, as regards the importation, exportation, or prohibition of articles, the produce or manufacture of Italy, where dealt in by Italian citizens residing in Italy, excepting that such importations, etc., shall be upon as favorable a footing as like commerce by English, French, German, or other *foreign* citizens whatsoever. *Ibid.*
3. In the administration of the tariff there has been due observance of the legal rights of Italian citizens, arising either under said treaty or under statute provisions of Congress. *Ibid.*

## TREATIES WITH INDIAN TRIBES.

• See INDIANS AND INDIAN LANDS, 1, 2, 5, 7, 14, 15.

## TRUST FUNDS.

The investment of trust funds (money derived from the sale of school-farm lands) made by the Secretary of the Treasury, under the provisions of the act of March 3, 1873, chap. 260, and section 3 of the act of May 7, 1878, chap. 96, in 5 per cent. bonds of the United States, which have since been called for payment, may be continued by him in the same bonds at 3½ per centum, in accordance with the circular of the Treasury Department of May 12, 1881, or he is at liberty to pay off such bonds and invest the proceeds in any other bonds of the United States for the benefit of the trusts mentioned in the provisions aforesaid. 217.

See INDIAN TRUST FUNDS.

## UNION PACIFIC RAILWAY COMPANY.

The allowance made to the Union Pacific Railway Company for special service, to be paid out of the so-called "special-facilities" appropriation, can not lawfully be paid to the company in cash, but must be retained and applied as directed by section 2 of the act of May 7, 1878, chap. 90. 393.

## UNION PACIFIC RAILROAD COMPANY, EASTERN DIVISION.

See LAND-GRANT RAILROADS, 1, 2.

## U. S. ATTORNEY.

See DISTRICT ATTORNEY.

## U. S. COMMISSIONER.

See COMPENSATION, 6 ; OFFICIAL ENVELOPE, 1.

## UNMAILABLE MATTER.

See POSTAL SERVICE, 16.

## UTAH.

See TERRITORIES.

## UTE INDIANS.

See INDIANS AND INDIAN LANDS, 8, 9, 11.

## VACANCY IN OFFICE.

See APPOINTMENT, 4, 9, 10.

## VESSEL.

See REGISTRY OF VESSELS ; SHIPPING.

## VESSEL OF THE UNITED STATES.

See SHIPPING.

## WASHINGTON, D. C.

See DISTRICT OF COLUMBIA ; STATUTES, INTERPRETATION OF, 7,  
TIME, CHANGE OF.

## WITHDRAWAL FOR EXPORTATION.

See CUSTOMS LAWS, 16 ; INTERNAL REVENUE, 11.

## WITHDRAWAL OF CIRCULATION.

See NATIONAL BANKING ASSOCIATIONS, 1.

## WITHHOLDING PAY.

See COMPENSATION, 3 ; CONTRACT, 4.

## WITNESS.

See COMPENSATION, 6 ; COURT-MARTIAL, 11, 12.

## WORKS OF ART.

See TREATIES WITH FOREIGN GOVERNMENTS, 1, 2.