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53D CONGRESS, 3d Session. | HOUSE OF REPRESENTATIVES. | MIS. DOC. No. 44.

OFFICIAL OPINIONS

OF

THE ATTORNEYS-GENERAL

OF

THE UNITED STATES,

ADVISING THE

PRESIDENT AND HEADS OF DEPARTMENTS

IN RELATION TO THEIR OFFICIAL DUTIES,

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

EDITED BY

EDWARD A. HIBBARD, ESQ.

VOLUME XX.

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1895.

VOLUME XX.

CONTAINING

THE OPINIONS OF ATTORNEYS-GENERAL

HON. WILLIAM H. H. MILLER, of Indiana,

AND

HON. RICHARD OLNEY, of Massachusetts.

ALSO CONTAINING OPINIONS BY SOLICITORS-GENERAL

HON. WILLIAM H. TAFT, of Ohio,

HON. CHARLES H. ALDRICH, of Illinois.

HON. LAWRENCE MAXWELL, JR., of Ohio,

AND

ACTING ATTORNEYS-GENERAL

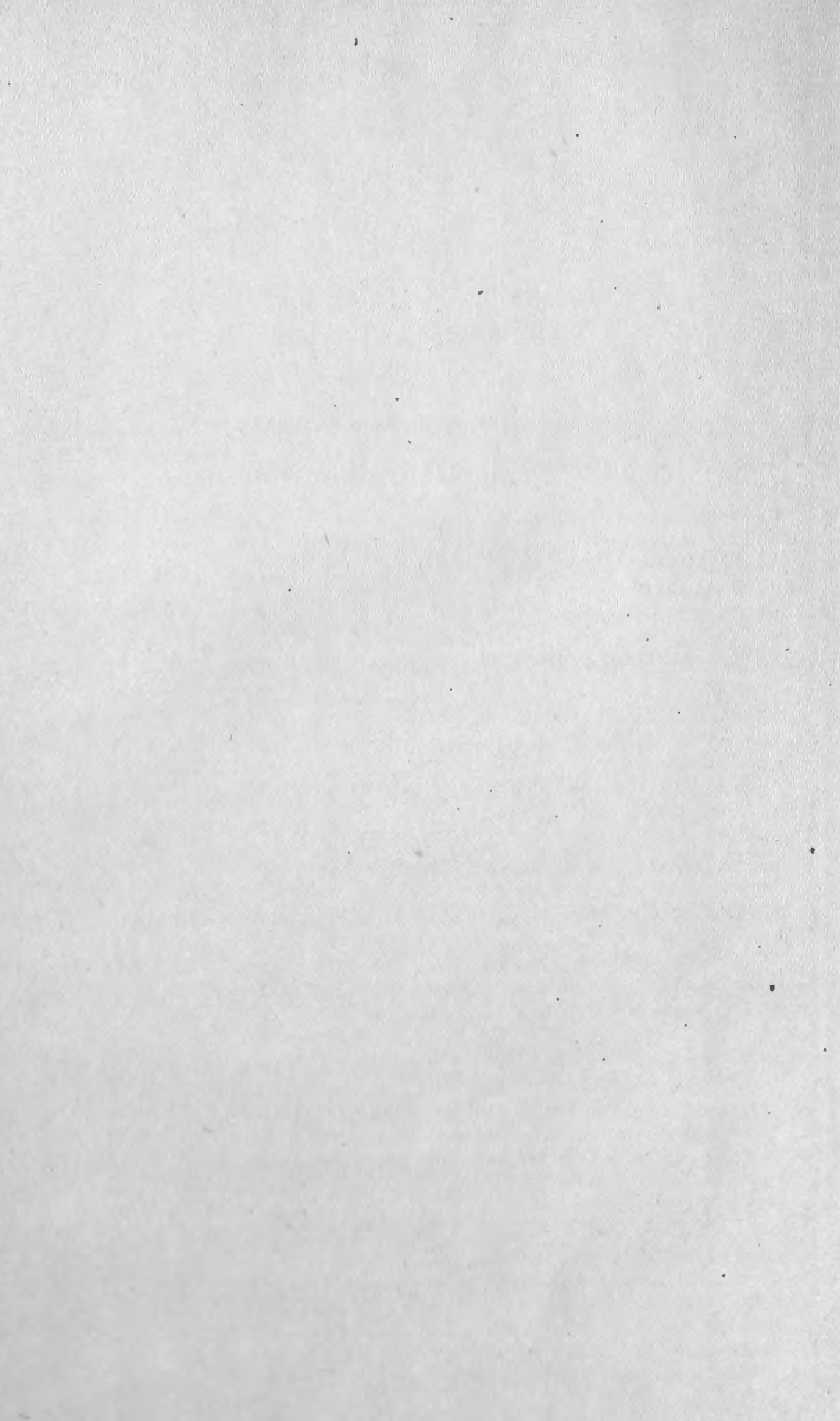
HON. WILLIAM A. MAURY, of the District of Columbia.

HON. EDWARD B. WHITNEY, of New York,

AND

HON. JOHN B. COTTON, of Maine.

ALSO CONTAINING A TABLE OF CITATIONS OF ACTS OF CONGRESS AND OF THE REVISED STATUTES IN VOLUMES XVII TO XX OF THE OPINIONS OF THE ATTORNEYS-GENERAL.



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OPINIONS

OF

HON. WILLIAM H. H. MILLER, OF INDIANA.

APPOINTED MARCH 5, 1889.

BID MADE UNDER MISTAKE OF FACT.

Where an advertisement is made for propositions for installing an electric-light plant, and one of the bids is in the sum of $4,350, but the bidder subsequently asks to recall the bid, claiming it had been made erroneously instead of $9,350, the real bid: *Held*, that if it were the fact that the bid was made under a mistake of fact it is no bid at all, and ought not to be considered.

DEPARTMENT OF JUSTICE,
January 14, 1891.

SIR: Your communication of January 6 instant, asking an opinion as to your power to allow a recall of the bid of the Western Electric Company of Chicago, Ill., made under an advertisement inviting proposals for installing an electric-light plant at the navy-yard, Brooklyn, N. Y., has received my consideration.

The bids under this advertisement were opened on December 16, 1890, and on the following day a telegram was received from the Western Electric Company to the effect that its bid of $4,350, which appears to be the lowest bid, was erroneously made, and an affidavit was subsequently laid before you detailing the circumstances under which the alleged real bid of $9,350 was mistakenly made as above.

I do not understand that the bid has been accepted; but if it had been, it would not be binding on the Western Electric Company, being made under a mistake of fact. If, therefore, the fact be that the bid was made under a mistake of fact, it is no bid at all, and ought not to be considered.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE NAVY.

BOUNTIES ON SUGAR UNDER THE TARIFF ACT OF 1890.

By the tariff act of October 1, 1890, chapter 1244, section 233, the Commissioner of Internal Revenue is not authorized to issue the licenses provided for by the section for the engaging in the production of sugar prior to April 1, 1891.

Sugar produced between March 31, 1891, and July 1, 1891, is not entitled to the bounty given by said act to producers of domestic sugar.

DEPARTMENT OF JUSTICE,
January 14, 1891.

SIR: Your communication of December 18, 1890, asking an opinion on the question whether the tariff act of October 1, 1890, authorizes the Commissioner of Internal Revenue to issue the licenses therein provided for prior to April 1, 1891, and pay to manufacturers the bounty on sugar produced between March 31 and July 1, 1891, has received my consideration.

As that part of the act "providing terms for the admission of imported sugars and molasses and for the payment of bounty on sugars of domestic production" does not take effect until the 1st day of April, 1891 (T. I., 241), I do not see how the provision authorizing the Commissioner of Internal Revenue to issue licenses to producers of sugar (T. I., 233) can be said to become operative before April 1, 1891, when the part of the law of which the provision for licenses is a component goes into effect. Certainly the provision for licenses is one of the "terms" for the payment of bounty, and, therefore, comes within the express declaration of the law that it shall not be enforced until April 1, 1891.

This brings me to the question whether sugar produced between March 31 and July 1, 1891, is entitled to the bounty given by the law to producers of domestic sugar.

The act provides (T. I., 231) that "*on* and after" July 1, 1891, and until July 1, 1905, a bounty of 2 cents per pound shall be paid to the producer of sugar of a certain standard from beets, sorghum, or sugar cane grown within the United States, or from maple sap produced within the United States, and a bounty of 1¾ cents per pound on such sugar of a certain other standard, "under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe."

It further provides (T. I., 232) that "The producer of said sugar to be entitled to said bounty shall have first filed prior to July first of each year with the Commissioner of Internal Revenue a notice of the place of production, with a general description of the machinery and methods to be employed by him, with an estimate of the amount of sugar proposed to be produced in the current or next ensuing year, including the number of maple trees to be tapped, and an application for a license to so produce, to be accompanied by a bond in a penalty, and with sureties to be approved by the Commissioner of Internal Revenue, conditioned that he will faithfully observe all rules and regulations that shall be prescribed for such manufacture and production of sugar."

It is next provided (T. I., 233) that "the Commissioner of Internal Revenue, upon receiving the application and bond hereinbefore provided for, shall issue to the applicant a license to produce sugar from sorghum, beets, or sugar cane grown within the United States, or from maple sap produced within the United States, at the place and with the machinery and by the methods described in the application; but said license shall not extend beyond one year from the date thereof."

The requirement that the sugar producer, intending to claim the bounty, shall file with the Commissioner of Internal Revenue, "prior to July first of each year," a notice of the place of production, with a general description of the machinery and methods to be employed by him, with an estimate of the amount of sugar proposed to be produced, including the number of maple trees to be tapped, was to enable the Commissioner of Internal Revenue to make all necessary arrangements and preparations for the protection of the Treasury against fraudulent claims for bounty, and I think it was intended by Congress that he should have that information each year well in advance of the times when the several species of sugar mentioned in the act are manufactured or produced.

To say, then, that Congress intended that the statements of sugar producers should be received and considered and the necessary arrangements and preparations based on them, for the administration of the act and the prevention of

frauds by unscrupulous sugar producers, should all be made and the licenses applied for granted after April 1, 1891, and in time for the production of sugar between that date and the 1st of July next ensuing, is, to my mind, unreasonable and incompatible with the manifest purpose of Congress to give the Commissioner of Internal Revenue ample time to make every needed preparation for an intelligent and effective execution of this important law. I can not believe that Congress intended to require that these novel and untried provisions of law should be set in operation in this precipitate way and under such circumstances of disadvantage to the Government.

It seems to me that the contention that the producers of maple sugar are entitled to bounty on sugar produced prior to July 1, 1891, is erroneous in giving too literal a construction to the language of T. I., 231—that is, in supposing that the language of that paragraph was intended to limit the time for the payment of the bounty instead of the time of the production of the sugar. The meaning of the paragraph seems to me to be the same as it would be if the provision were that "there shall be paid to the producer of the various classes of sugar on and after July 1, 1891." In other words, if the language of the paragraph were so transposed as to read as follows:

"To the producer of sugar testing," etc., "on and after July 1, 1891, and until July 1, 1905, there shall be paid," etc.

This construction seems to be strongly reinforced by the consideration that any other construction would make this law give a bounty upon maple sugar for fifteen years, whereas upon other sugars it would be given for only fourteen years, since it appears from the papers submitted that no sugar, except maple, is produced between April and July. It is not credible that it was the purpose of Congress to thus discriminate between maple and other sugars, or to fix any particular day for the payment of bounty. The time when the payments were to be made was not of great significance, and was left to be regulated by the Commissioner of Internal Revenue under T. I., 231, but it was the evident purpose of Congress to limit the period during which the bounty might be earned. Taking all of the different paragraphs together,

it seems clear that it was not intended that bounties should be demandable on sugars produced prior to the first day of July next.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

SEPARATE ENTRY FOR PACKAGES CONTAINED IN ONE IMPORTATION.

The act of May 1, 1876, chapter 89, providing for the separate entry of packages contained in one importation was not repealed by section 29 the customs administrative act of June 10, 1890. The repeal of section 2841, Revised Statutes by that act has no effect upon the act of 1876, because the latter forms no part of section 2841. The act of 1876 is of a limited and special character and it is not to be presumed that Congress had it in contemplation when the statute of June 10, 1890, was passed. The form of oath prescribed by the act of 1876, referring to section 2841, Revised Statutes, is not affected by the subsequent legislation modifying and afterwards repealing that section and substituting a declaration by the importer, consignee, or agent in the place of the former oath.

DEPARTMENT OF JUSTICE,
January 20, 1891.

SIR: Your communication of January 3 instant asks an opinion upon the question "whether the act of May 1, 1876, entitled 'an act to provide for the separate entry of packages contained in one importation' (19 Stat., p. 49), is or is not repealed by section 29 of the act of June 10, 1890 (the so-called customs administrative act), which section, among other things, repeals section 2841 of the Revised Statutes of the United States."

The act of May 1, 1876 (*supra*), provides as follows:

"That a separate entry may be made of one or more packages contained in an importation of packed packages consigned to one importer or consignee, and concerning which packed packages, no invoice, or statement of contents or values, has been received."

Every such entry shall contain a declaration of the whole number of parcels contained in such original packed package, and shall embrace all the goods, wares, and merchan-

dise imported in one vessel at one time for one and the same actual owner or ultimate consignee.

"SEC. 2. That the importer, consignee, or agent's oath prescribed by section twenty-eight hundred and forty-one of the Revised Statutes is hereby modified for the purposes of this act, so as to require the importer, consignee, or agent to declare therein that the entry contains an account of all the goods —— imported in the —— whereof —— —— is master, from —— for account of ——; which oath, so modified, shall, in each case, be taken on the entry of one or more packages contained in an original package. But nothing in this act contained shall be construed to relieve the importer, consignee, or agent from producing the oath of the owner or ultimate consignee in every case now required by law; or to provide that an importation may consist of less than the whole number of parcels contained in any packed package, or packed packages, consigned in one vessel at one time, to one importer, consignee, or agent.

"SEC. 3. That all provisions of law inconsistent herewith are hereby repealed."

It appears that at the time the act of 1876 was passed, a large express business, in the way of bringing small parcels from other countries to this country, had grown up, but, owing to the fact that such small parcels were usually brought packed together in large packages, such as trunks or boxes, there was no way, under the existing law, by which any one of the several parcels belonging to different persons contained in a packed package could be admitted to separate entry at the custom-house, nor was there any way by which the packed package could be entered by the express carrier, until the owners of all the parcels contained in the package, generally living more or less remotely from the port of entry, had sent in their invoices. This produced vexatious delays to those owners of parcels who were ready with their invoices and desirous to get their property, but were compelled to wait for the arrival of the invoices covering all the other parcels packed in the same packages with theirs.

It was this inconvenience of the old law, requiring the packed package to be entered as an entirety, that was remedied by the act of 1876, which, as we have seen, expressly

authorizes the owner of one or more parcels contained in a packed package to make separate entry thereof.

Section 2785, Revised Statutes, which is the provision that caused the inconvenience remedied by the act of 1876, is still in force, there being no express or implied repeal thereof by the act of June 10, 1890; and I discover nothing in the latter act which is inconsistent with the act of 1876, for the act of 1890 relates to the entries of entire packages covered by one invoice, while the act of 1876 relates to separate entries of several parcels contained in one package and belonging to several owners.

It is to be observed, furthermore, that as the act of 1876 relates only to the manner of making entry, all the other regulations of a general character, touching the collection of the revenue by customs, apply to merchandise entered under that act.

The repeal of section 2841, Revised Statutes, by the act of June 10, 1890, had no effect on the act of 1876, because the latter formed no part of section 2841. It is true the act of 1876 adopted, with a modification, the form of oath prescribed by section 2841 to be taken on entering merchandise by an importer, consignee, or agent, but that did not make the act a part of the section.

When section 2841 was amended and reenacted by the act of March 3, 1883, no notice was taken of the act of 1876 in the section as reenacted, but the act of 1876 was treated as in force and unaffected by the act of 1883.

The act of 1876 is not incorporated into section 2841 in the revised edition of 1878 of the Revised Statutes, but is printed therein in brackets, as a separate law between that section and section 2842.

Moreover, the act of 1876 is legislation of a very limited and special character, and, according to a well-settled rule of statutory interpretation, it is not to be presumed from any general expressions used that Congress had that act in contemplation when the statute of June 10, 1890, was passed. (*Ex parte* Crow Dog, 109 U. S., 556, 570; *State* v. *Stoll*, 17 Wall., 425, 436; *Movins* v. *Arthur*, 95 U. S., 144, 146; *Rounds* v. *Waymart Borough*, 81 Pa. St., 395; Endl. Stat., 223.)

The view above taken is much strengthened by the consideration that it is hardly reasonable to infer that Congress intended to produce such an inconvenience to the importing business of the country as would have been involved in the repeal of the act of 1876.

The act of 1876 being still in force, your attention is called to the point that the form of oath prescribed by that act, by reference to section 2841, Rev. Stats., is not affected by the subsequent legislation modifying and afterward repealing that section, and substituting a *declaration* by the importer, consignee, or agent in the place of the former *oath*. (Endl. Stat., 233; Sedgw. Stat., p. 229, ed. 1874; *Turney* v. *Wilton*, 36 Ill., 385; *Spring, etc., Works* v. *San Francisco*, 22 Cal., 434; *Sika* v. *Chicago, etc., R. R.*, 21 Wis., 270.)

This, I believe, disposes of the question submitted.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

VACANCY IN HEAD OF DEPARTMENTS.

Where there is a vacancy in the head of a Department, it can not be temporarily filled for a longer period than ten days, either by operation of law or by designation of the President. 17 Opin., 535, in so far as it holds that twenty days may be taken by the President, by allowing the statutory occupation of the office for ten days without designation and then making a designation for an additional ten days not accepted.

DEPARTMENT OF JUSTICE,
January 31, 1891.

SIR: In obedience to your request that I submit to you an opinion as to whether the vacancy caused by the death of the Hon. William Windom, late Secretary of the Treasury, can be temporarily filled for more than ten days, either by statutory succession, or by designation of the President, or both. I have the honor to submit the following:

Provisions for temporarily filling such a vacancy are found in sections 177, 179, 180, and 181 of the Revised Statutes.

Section 177 is as follows:

"In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof

shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease."

Section 178 makes a similar provision for chiefs of bureaus.

Sections 179, 180, and 181 are as follows:

"SEC. 179. In any of the cases mentioned in the two preceding sections, except the death, resignation, absence, or sickness of the Attorney-General, the President may, in his discretion, 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 vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease."

"SEC. 180. A vacancy occasioned by death or resignation must not be temporarily filled under the three preceding sections for a longer period than ten days."

"SEC. 181. No temporary appointment, designation, or assignment of one officer to perform the duties of another, in the cases covered by sections one hundred and seventy-seven and one hundred and seventy-eight, shall be made otherwise than as provided by those sections, except to fill a vacancy happening during a recess of the Senate."

Section 182 provides that any officer performing the duties of another officer under the foregoing sections is not to receive any extra compensation.

It seems to me impossible to escape the effect of section 180 in limiting to a period of ten days the time during which the vacant office may be filled, either by the statutory succession provided in section 177, or the designation by the President provided in section 179, or by both. The temporary filling of the vacancy is that provided under the three sections preceding section 180. The first of those sections is section 177, which provides only for succession by operation of law, while section 179 refers to succession by designation of the President.

This construction is fully borne out by opinions of my predecessors. On September 11, 1884, Mr. Attorney-General Brewster (18 Opin. of Attys. Gen., 58) advised the President upon the occasion of the death of Secretary Folger "that

under sections 177, 179, 180, and 181 of the Revised Statutes no statutory succession or assignment of some other officer to the vacancy is valid for a longer period in all than ten days." An opinion to the same effect was rendered by Mr. Acting Attorney-General Phillips (18 Opin., 50) on August 27, 1884, in construing sections 178 and 180 of the Revised Statutes. See also opinions of Mr. Attorney-General Brewster (17 Opin., 530); of Mr. Attorney-General Devens (16 Opin., 596; of Mr. Attorney-General Hoar (13 Opin., 7).

The sections under discussion are a mere revision of the act of July 23, 1863 (15 Stats. at Large, 168), a reading of which supports the view here taken.

It has been urged that the ten-day limitation applies only to the designation by the President and not to the temporary supplying of the vacancy by operation of law.

The reasons of much cogency against such a construction are:

First, that it would place no limitation upon the time in which the "first or sole assistant" might fill the vacancy, which does not seem consistent with the expressed legislative purpose; and,

Second, it makes the reference in section 180 to the three preceding sections mean exactly the same as if the language had been the two preceding sections. In other words, it makes the reference to section 177 meaningless; for the use in section 177 of the words "unless otherwise directed by the President" is an exception out of that section and not an affirmative provision to which reference could properly be made under section 180.

In an opinion by Mr. Attorney-General Brewster (17 Opin., 535) it seems to be held that twenty days may be taken by the President under section 178 by allowing the statutory occupation of the office, without designation for ten days, and then making a designation for an additional ten days. To this construction I can not assent. If the ten days' limitation applies to a statutory occupation by an assistant or deputy at all, then it seems to me the period of temporary occupancy can not be lengthened by tacking the ten days by designation upon the ten days by succession.

It is proper to say that this last opinion of Attorney-General Brewster is directly in conflict with the opinion of Act-

ing Attorney-General Phillips, above referred to, and is also seemingly in conflict with his own later opinion in 18th Opinions, p. 58 (*supra*).

Upon the whole, therefore, I am of the opinion that the natural and proper construction of these sections discovers a legislative purpose that a vacancy caused by death or resignation in the office of Secretary of the Treasury shall be permanently filled by constitutional appointment within ten days. It may be that the action of an assistant secretary, after the expiration of ten days, would not be invalid, being the action of an officer *de facto*, but the statute, even if directory, is no less obligatory upon those called upon to act under it than if mandatory, although the legal effect of action or non-action under such statute may be very different.

Very respectfully,

W. H. H. MILLER.

The PRESIDENT.

TRANSPORTATION OF ENLISTED MEN OF THE NAVY.—BOND-AIDED RAILROAD.

Section 6 of the act of July 1, 1862, chapter 120, interpreted to include seamen as well as land troops. The Government having contracted with the West Shore Railroad, a corporation of the State of New York, for the immediate transportation to San Francisco of certain enlisted seamen then in the city of New York, and a portion of the route being over railroads aided by the United States in pursuance of the act of July 1, 1862, and a question having arisen as to whether payment of said contract price should be made to the West Shore Railroad, held that the question was essentially a judicial one; that a construction should not be put on the law by the Executive Department that would enable the bond-aided railroad to receive payment from the Treasury for services that are in effect services rendered to the Government; and that all compensation to the bond-aided railroad in so far as such service was performed by the said aided railroad should be witheld until the rights of such railroad are adjusted by an agreement in compliance with the terms of the law or are judicially determined.

DEPARTMENT OF JUSTICE,
February 4, 1891.

SIR: Your communication bearing date January 3, 1891, with four inclosures, and relating to the claim of the West Shore Railroad Company for payment for the transportation

of 157 enlisted men of the Navy from New York, N. Y., to Vallejo Junction, Cal., is received.

You request my opinion upon two questions, as follows:

"Whether the transportation of enlisted men of the Navy is included among the services to be performed for the Government as required by the acts of Congress relating to railroads that have been aided in whole or in part by the United States; and

"Whether, if the transportation of enlisted men of the Navy be not included among such services, it is required by law that the amount of the compensation for which said railroads agree to transport enlisted men of the Navy be charged against the appropriation for such transportation and retained by the United States under the provisions of the second section of the act approved May 7, 1878 (Stat. at L., vol. 20, p. 58)."

Section 6 of the "Act to aid in the construction," etc., passed July 1, 1862 (12 Stats., 489), makes the grants upon condition that the company, among other things, shall "transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government whenever required to do so by any department thereof;" and provides that "all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid."

Section 10 of the act to amend the act above cited, passed July 2, 1864 (13 Stats., 356), modifies and amends as therein set forth, and also subordinates the lien of the United States bonds to that of the authorized bonds of the companies, but adds that this shall be so, "except as to the provisions of the sixth section of the act to which this is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the Government of the United States."

Section 5 of said act provides that one-half of the compensation earned by the companies in performing services for the United States shall be paid over to the companies; but by a later enactment this concession to the companies is withdrawn.

These acts are commented upon and construed in the case

of the *United States* v. *Central Pacific R. R. Co.*, 118 U. S., 235, as follows:

"By the act of July 1, 1862, 'all compensation for services rendered for the Government' was to be applied to the payment of the bonds issued by the United States to aid in building the road. By the act of July 2, 1864, only 'one-half of the compensation for services rendered for the Government' by said company was required to be applied to the payment of the bonds. The act of May 7, 1878, merely restored the provisions of the act of July 1, 1862, and again required all compensation for services rendered the Government to be applied to the payment of the bonds. This compensation, as we have seen, has been limited by the decisions of this court to compensation for services rendered by the aided roads."

It appears that in October, 1890, the Navy Department was in urgent need of the immediate transportation to San Francisco of 157 men who were enlisted seamen then in the city of New York.

Not being able to obtain satisfactory rates and methods of transportation otherwise, bids and offers for the same were sought from such common carriers as it was thought might furnish the desired facilities.

On the 27th of said month Mr. C. E. Lambert, general passenger agent of the West Shore Railroad (a corporation of the State of New York), in response to a request for a bid to perform the service sought by the Department, submitted to Commodore F. M. Ramsay, chief of Bureau of Navigation of said Department, an offer to transport the party, on the basis of $49.51 per capita, from New York to San Francisco, in manner specified.

It was understood that the route would be over the West Shore Railroad, New York, Chicago and St. Louis Railroad, Chicago and Northwestern Railway, Union Pacific Railway, and Southern Pacific Company's Railroad.

It is understood that the price stated was reasonable and was the lowest rate obtainable. The offer was accepted on the part of the Government, the service was performed, and the compensation due therefor and remaining unpaid under the contract so made is $7,773.07.

The practical question presented is, whether the United States shall pay the West Shore Railroad the above amount, or whether the disbursing and accounting officers of the Government should, under the laws, withhold from the West Shore Railroad the portion of said amount earned by bond-aided railroads and apply the same to the indebtedness of such roads to the Government as their proportionate interests shall be ascertained.

The conditions set forth in said section 6 of the act of 1862, and continued under section 10 of the act of 1864, are that the railroad shall transport mails, troops, and munitions of war, supplies, and public stores for the Government whenever required to do so by any Department thereof.

It is manifest that this transportation of munitions, supplies, and stores can not be properly limited to those for the use of land forces only.

The title of the act of 1862 is "An act to aid in the construction of a railroad * * * and to secure to the Government the use of the same for postal, military, and other purposes."

It can not be said that there is anything in either act or in any amendment to indicate an intent to exclude the Government from a right to transport its sea forces as well as its land forces, under the provisions of these acts.

It is suggested that the word *troops* as used in said sections does not include seamen, and that it does not cover the "157 enlisted men of the Navy" transported from New York to Vallejo Junction.

While military use employs the term troop to designate a body of cavalry, and common usage applies the word troops to soldiers in general, yet the word troop, in its broad and original sense, is stated to mean a collection of people, a company, a number, a multitude.

In view of the well-known objects and purposes of Congress in relation to this railroad legislation, it is improbable that it was intended to leave out the transportation of marines or seamen over those roads under the provisions of said acts.

It is more probable that Congress intended the general term troops to include enlisted men of the Navy when transported across the country as the exigencies of the public service might require.

Subsequent legislation has not extended the privileges of these railroads in the direction now in view, but has, on the contrary, asserted the duty of the Government to protect the financial interests of the public in dealing with them.

Section 2 of the act of March 3, 1873 (17 Stat., 485), as incorporated into section 5260, Revised Statutes, enacts as follows:

"The Secretary of the Treasury is directed to withhold all payments to any railroad company and its assigns on account of freights or transportation over their respective roads of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with the 5 percentum of net earnings due and unapplied, as provided by law."

Section 2 of the act to alter and amend, etc., passed March 7, 1878 (20 Stat., 56), enacts:

"That the whole amount of compensation which may, from time to time, be due to said several railroad companies respectively for services rendered for the Government shall be retained by the United States, one-half thereof to be presently applied to the liquidation of the interest paid and to be paid by the United States upon the bonds so issued by it as aforesaid, to each of said corporations severally, and the other half thereof to be turned into the sinking fund hereinafter provided for the uses therein mentioned."

Under the exacting requirements of these statutes it does not appear to be justifiable to pay out of the Treasury moneys that are to go to an aided railroad on account of the transportation of these enlisted seamen without a judicial determination of the questions involved.

The questions arising out of the transactions under consideration are essentially judicial in their nature, and such a construction of the laws as may enable the bond-aided railroads to receive payment from the Treasury for services that are in effect "services rendered for the Government," should not receive Executive sanction.

I advise the withholding of all compensation earned by any bond-aided railroad in performing the service under consideration, in so far as such service was performed upon such aided railroad, until the questions of the rights of such rail-

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roads in the premises are adjusted by an agreement that shall be in compliance with the terms of the law, or until such questions shall be judicially determined.

The inclosures submitted by you are herewith returned.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE NAVY.

BONDS OF U. S. CONSULAR OFFICERS.

It is competent for the Secretary of State, under section 1697 of the Revised Statutes, to accept as sureties upon official bonds of U. S. consular officers, corporations organized under State or United States laws as surety or guaranty companies authorized by their charter to undertake such obligations.

DEPARTMENT OF JUSTICE,
February 11, 1891.

SIR: By your letter of February 4, inclosing correspondence with the Secretary and Comptroller of the Treasury, you ask my opinion whether you may lawfully accept as sureties upon official bonds of U. S. consular officers corporations organized under State or United States laws known as surety companies, or whether in approving such bonds you must require natural persons as sureties. Section 1697, Revised Statutes, provides that—

"Every consul-general, consul, and commercial agent, before he receives his commission or enters upon the duties of his office, shall give a bond to the United States, with such sureties, who shall be permanent residents of the United States, as the Secretary of State shall approve, in a penal sum," etc.

This section was enacted in 1856, at which time, perhaps, no corporations for the purpose of furnishing security upon official bonds had any existence in this country, and such corporations were, therefore, not at that time within the contemplation of Congress. In recent years, however, numerous corporations of this kind have been created by State and Federal statutes, and their use has become frequent, not to say general. In construing a statute it is a cardinal rule to try to arrive at the legislative purpose; but, at the same time, this purpose is not always limited by the legislative

thought at the time of its enactment. The effect of statutes is frequently modified by circumstances. For instance the provision in the judiciary act of 1789, for reasonable notice of the time and place of taking depositions, often meant, then, a notice of weeks or months, where now a notice of as many days would be sufficient. It is not difficult to suggest other cases in which the developments in steam, electricity, and generally in the arts would affect the construction of statutes. Without further discussion, however, it is sufficient to say that, upon questions quite similar to the one now under consideration, two opinions were given by my immediate predecessor.

Where a statute required the Secretary of the Navy, before making contracts for the construction of vessels, to invite proposals for the work "which shall be subject among other regulations to such provisions as to bonds and securities for the quality and due completion of the work as the Secretary of the Navy shall prescribe," Mr. Attorney-General Garland held that it was competent for the Secretary to accept a guaranty corporation as surety on such bond. (See Opinion July 15, 1887.)

Section 1383, Revised Statutes, enacted in 1812, requires that a pay officer of the Navy "shall, before entering upon the duties of his office, give a bond, with two or more sufficient sureties, to be approved by the Secretary of the Navy, for the faithful performance thereof." By an opinion bearing date August 2, 1888, Mr. Attorney-General Garland held that it was lawful for the Secretary of the Navy to approve a pay officer's bond secured by such corporations solely, or in combination with natural persons, as sureties under this statute.

The only language in section 1697 which could be claimed to distinguish that case from one arising under section 1383 is the requirement that the sureties shall be permanent residents of the United States; but there is nothing in this distinction, because it is uniformly held that a corporation is a resident and citizen of the sovereignty by which it is created.

I am therefore of opinion that it is competent for the Secretary of State, under section 1697, to accept as surety, either in connection with a natural person or with another

like company authorized by its charter to undertake such obligations, a surety or guaranty company.

Of course, in this, as in every other case, the duty of careful investigation as to the solvency of the sureties is with the Secretary.

Respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF STATE.

COMPENSATION OF SOLDIERS—EXTRA DUTY.

Section 35 of the act of March 3, 1863, chapter 75, prohibits allowance of extra pay to soldiers for special services rendered between September 1, 1863, and October 20, 1863.

The question is not affected by the fact that in the act of February 9, 1863, chapter 25, an appropriation was made for such services rendered during the fiscal year, July 1, 1863, to June 30, 1864, for section 35 of the draft act passed three weeks later, above considered, took away any authority impliedly conferred by this appropriation. (10 Opin., 472, overruled; 15 Opin., 362, followed.)

DEPARTMENT OF JUSTICE,
February 11, 1891.

SIR: By letter of the 19th of December, the late Secretary of the Treasury submitted to the Attorney-General a statement of the claim of Ira D. Bronson, late private Company K, Second Kansas Cavalry, for compensation for extra duty performed in September and October, 1863, now pending in the office of the Second Comptroller, and requested an opinion as to whether the 35th section of the act of March 3, 1863 (12 Stat. L., 736), prohibits payment of the extra pay allowed by the act of March 2, 1819 (3 Stat. L., 488), as amended by the act of August 4, 1854, section 6 (10 Stat. L., 576).

The statement of the claim submitted shows that Bronson was detailed on extra duty as a clerk and messenger at the Department Headquarters of the District of Southwestern Missouri by order of Brig. Gen. McNeil, commanding that district, dated September 7, 1863. The accompanying voucher shows the services rendered under this order by Bronson to have been continuous for fifty days from September 1, 1863, to October 20, 1863, and is approved for $12.50, at the rate of 25 cents per day.

The question presented involves the construction of section 35 of the act of March 3, 1863 (12 Stat. L., 736), which is as follows:

"SEC. 35. *And be it further enacted*, That hereafter details to special service shall only be made with the consent of the commanding officer of forces in the field; and enlisted men, now or hereafter detailed to special service, shall not receive any extra pay for such services beyond that allowed to other enlisted men."

Does this section prohibit the allowance of extra pay to soldiers for special service? Two Attorneys-General have answered the question, one in the affirmative and the other in the negative. Attorney-General Bates, on April 3, 1863 (10 Opin., 472), held that the section did not prohibit the allowance of extra pay for special services, while Attorney-General Devens, on September 4, 1877 (15 Opin., 362), without referring to the opinion of Attorney-General Bates, held that it did. The opinion of Attorney-General Bates was invoked on a claim for extra pay by enlisted men detailed for special services as clerks of the staff officers of the War Department. It appears from the statement of the Second Comptroller that the accounting officers of the Treasury followed this opinion in its application to that particular special service, but refused to allow extra pay for any other.

The Attorney-General is asked to review these conflicting opinions and to decide which shall be followed.

By the act of March 2, 1819 (3 Stat. L., 1819, chapter 45), entitled "An act to regulate the pay of the Army when employed on fatigue duty," it was provided:

"That whenever it shall be found expedient to employ the Army at work on fortifications, in surveys, in cutting roads, and other constant labor, of not less than ten days, the non-commissioned officers, musicians, and privates so employed shall be allowed fifteen cents and an extra gill of whisky or spirits each per day while so employed."

By the sixth section of "An act to increase the pay of the rank and file of the Army and to encourage enlistments," passed August 4, 1854 (10 Stat., 576), the act of 1819 was amended as follows:

"That the allowance to soldiers employed at work on fortifications, in surveys, in cutting roads, and other constant

labor, of not less than ten days, authorized by the act approved March second, eighteen hundred and nineteen, entitled 'An act to regulate the pay of the Army when employed on fatigue duty,' be increased to twenty-five cents per day for men employed as laborers and teamsters, and forty cents per day when employed as mechanics, at all stations east of the Rocky Mountains, and to thirty-five cents and fifty cents per day, respectively, when the men are employed at stations west of those mountains."

Under the two provisions of law just quoted, soldiers detailed to special service continued to receive the extra pay therein allowed until 1863, as will appear from the appropriations for incidental expenses of the Quartermaster's Department in each annual Army appropriation bill.

On March 3, 1863, the provision which is the subject of discussion was enacted as the thirty-fifth section of "An act for enrolling and calling out the national forces and for other purposes." This was generally known as the draft act. It was made necessary by the failure of the Government to secure through volunteer enlistments a sufficient number of soldiers to put down the rebellion. It was enacted at the darkest hour of the civil war, when the fate of the nation seemed trembling in the balance. The Army in the field had been reduced by death, disease, desertion, and absence. It was intended to remedy the evil and increase the forces in the field. The principal plan provided therein was by conscription. The other very important means adopted was to reduce to a minimum the enlisted men who were not engaged in the active service in the field. Nearly all the sections of the act which do not provide the procedure in the conscription are directed to bringing enlisted men back to their regiments "at the front." The new and stringent provisions against deserters and their accomplices, the offer of immunity for their return on the passage of the act, the reduction of the pay of officers on leave by one-half, and the limitation upon the power of granting furloughs therein contained, leave no doubt of this purpose of Congress. Section 35 is to be construed as *in pari materia* with these provisions. For the sake of clearness the language of the section is repeated:

"That hereafter details to special service shall only be made with the consent of the commanding officer of forces in the

field; and enlisted men, now or hereafter detailed to special service, shall not receive extra pay for such services beyond that allowed to other enlisted men."

By the first clause it was taken out of the power of anyone to withdraw for special services men at the front, without the consent of the commanding officers in the field. In this way those who were held responsible for the success of the Army were given the power to prevent the reduction of their forces through special details made by those in authority who were not in the field. The second clause was intended to take away from the soldier the inducement to seek such detail for extra pay. The freedom from danger enjoyed by those specially detailed was ample compensation for the difference in amount of labor. In my opinion the intention of Congress in the last clause of the section was to abolish extra pay entirely.

Senator Wilson, of Massachusetts, who reported the bill from the committee in which it had been prepared, made a short statement of its provisions, to be found on pages 976, 977, and 978 of the Congressional Globe for the third session of the Thirty-seventh Congress, 1862–'63, part 2. Section 35 in the act as it passed was section 34 in the bill as reported. On page 978 he states section 34 as follows:

"Section 34. Details to special service are to be made only with consent of the commanding officer in the field, and *no extra pay for special service to be allowed.*"

Attorney-General Bates' opinion is based on what must be regarded as a very narrow construction of the language used, and fails wholly to give effect to the intention of Congress, standing out in every line of the whole act, to increase the fighting force. His reasoning is that the prohibition is not against extra pay, but against extra pay beyond that allowed to other enlisted men, which he says was provided by the act of 1819 and of 1854. This is based on the words taken literally, without regard either to the rest of the act or the existing state of the law. And even in this narrow view the construction can not be supported. The words "other enlisted men" mean, of course, enlisted men other than those to whom reference has previously been made. The only enlisted men previously referred to are those "now or hereafter detailed for special service." The clause may

be correctly paraphrased, therefore, as follows: "And enlisted men, now or hereafter detailed to special service, shall not receive extra pay beyond that allowed to enlisted men not so detailed." Enlisted men, not detailed to special service, received no extra pay. And, therefore, men detailed to special service were to receive none.

Another objection to the construction of Attorney-General Bates is that it renders the clause nugatory and useless; for, thus construed, it worked no change in existing law. Before the section was enacted, there was no authority to give enlisted men extra pay except that contained in the acts of 1819 and 1854, and the extra pay thus authorized was, of course, limited by the terms of those acts. The effect of Attorney-General Bates' opinion, therefore, was to give the clause in question the effect of forbidding that which there was no authority or power to do before it was passed. While this is often done in penal statutes, and sometimes may be done where the question of authority is doubtful, it is certainly not usual in a case like that under consideration, where there was not the slightest ground for claiming the previous existence of such authority, and where, so far as appears, no claim of the kind had ever been made.

The act of March 1, 1864 (13 Stat., 38, 39), is a legislative construction of section 35, opposed to that of Attorney-General Bates. Section 2 provides that "the thirty-fifth section of the act entitled 'An act for enrolling and calling out the national forces and for other purposes,' approved March three, eighteen hundred and sixty-three, shall not be deemed hereafter to prohibit the payment to enlisted men employed at the Military Academy of the extra-duty pay heretofore allowed by law to enlisted men when employed at constant labor for not less than ten days continuously." This plainly implies that before the passage of this act, the thirty-fifth section of the act of March 3, 1863, had properly been deemed to prohibit the payment of any extra-duty pay to enlisted men.

Nor is the question affected by the fact that in the act of February 9, 1863 (12 Stat., 643), an appropriation was made for the fiscal year beginning July 1, 1863, and ending June 30, 1864, for extra pay to soldiers employed on constant labor under the acts of 1819 and 1854. Section 35 of the

draft act was passed some three weeks later and took away any authority impliedly conferred by this appropriation act to give soldiers extra-duty pay.

A similar appropriation in the Army appropriation act for the year ending June 30, 1865, passed June 15, 1864 (14 Stat., 126), must be satisfied by a reference to section 2 of the act of April 1, 1864 (13 Stat., 39), above referred to, which in effect repealed section 35 of the draft act so far as it applied to enlisted men on duty at the Military Academy. Moreover, the services upon which the claim under consideration is based were rendered in September and October, 1863, that is to say, in the fiscal year ending June 30, 1864, while the appropriation act of June 15, 1864, applied only to services rendered during the fiscal year ending June 30, 1865.

The difficulty in the construction of section 35 arises from the use of the word "extra" before pay and of the clause beginning "beyond that," etc. Either might have been omitted and the section would have been much clearer. But the unnecessary and confusing attempt at emphasis, by the use of both, can not change the meaning, which, for the reasons given, plainly is that extra pay for enlisted men should be abolished.

The result is that the opinion of Attorney-General Devens must be followed and that the opinion of Attorney-General Bates must be overruled. The claim of Bronson should be rejected as for extra pay not authorized by law.

The excuse for the length of this opinion is in the fact that two former Attorneys-General have disagreed as to the proper construction of this statute.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The ACTING SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

LIABILITY OF DISBURSING AGENTS FOR MONEY DEPOSITED IN BANKS.

A special disbursing agent of the Board of Town-site Trustees of Oklahoma Territory who deposited moneys received by him as such agent in two banks that suspended payment, with his sureties, is liable for any loss that may arise from the failure of these banks, and he is not relieved from liability by the fact that these banks were designated by the board of trustees as places of deposit. The regulations of the Secretary of the Interior, providing for the designation by the town-site board of a bank for the depositing of money in the hands of the disbursing agent, must be construed in the light of sections 3639 and 3620 of the Revised Statutes to limit power of designation by the board to banks which are lawful depositories of public money within the statutes, which these banks were not.

The fact that some of the money so deposited was collected from assessments, and never in the Treasury, is immaterial, inasmuch as it was public money, and his bond expressly bound him to account for all public moneys coming into his hands.

DEPARTMENT OF JUSTICE,
February 13, 1891.

SIR: By letter of the 3d ultimo you submitted to the Attorney-General an opinion of the Assistant Attorney-General assigned to your Department, together with the correspondence on which the opinion had been rendered, with the request that the same be considered, and that you be advised whether the Attorney-General concurs therein.

The question to be considered is whether one Hay and the sureties on his official bond as special disbursing agent are liable to the United States for moneys received by him as such disbursing agent and deposited by him with private banking firms in Norman and Guthrie, Okla. Hay was a member and secretary of Board No. 4 of Town-site Trustees of Oklahoma Territory, appointed by the Secretary of the Interior under the act of May 14, 1890 (26 Stat. L., 809), and was designated by the Secretary as special disbursing agent for the board. As such he gave bond conditioned that he should "at all times, during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully disburse all public moneys, and honestly account, without fraud or delay, for the same, and for all public funds and property which shall or may come into his hands."

The first section of the act under which this board of trustees was appointed, required that after the entry of the town-site had been made by them, as therein directed, the Secretary of the Interior should provide regulations for the proper execution of the trust. Number 19 of the regulations (10 Land Decisions, 666 *et seq.*), made and promulgated in accordance with the act, defined the duties of the disbursing agent, and, among other things, provided that he should "deposit all the sums received by him at least once a week, and when practicable, daily, in some bank designated by the board," and should "pay the same out only on his checks countersigned by the chairman of the board of which he is secretary, which checks, after they are honored, shall be filed with his account as vouchers."

The town-site board of which Hay was secretary and disbursing agent designated the Commercial Bank of Norman as a place for the daily deposits of moneys in his hands as such agent, and the Commercial Bank of Guthrie as the bank to which he should transfer his weekly balances. Hay had on deposit with the former some $1,615, and with the latter $3,262.83, when both banks suspended payment. The question is whether Hay and his sureties are liable for any loss which may arise from the failure of these banks.

A preliminary objection is made to his liability for the loss of a part of the sums on the ground that it was collected from assessments made and never in the treasury. It was, however, money properly paid into his hands as a special disbursing agent, and was public money, while there, because the United States was responsible for its proper disposition, whatever that might ultimately be. His bond expressly bound him to account for all public moneys coming into his hands.

The main question is whether the designation of the banks by the board of trustees as places of deposit relieved Hay from the loss. This must be answered in the negative. Hay was a disbursing officer of the United States, and was forbidden by sections 3639 and 3620, Revised Statutes to deposit the public money in his possession in any other place than with assistant treasurers of the United States, or in some place designated as a depository by the Secretary of the Treas-

ury. The regulation of the Secretary of the Interior providing for the designation by the town site board of a bank for the deposit of moneys in the hands of their secretary and disbursing agent, must be construed in the light of the foregoing sections. The power of designation by the board is limited, therefore, to banks which are lawful depositories of public moneys within the statute. It is not claimed that either the Norman bank or the Guthrie bank was such a depository. The result is that Hay is not exonerated from liability on his bond for the loss arising from the failure of these banks.

The Supreme Court of the United States has frequently decided that the contract in an official bond for the accounting of moneys is not a contract of bailment in which liability depends on the question of reasonable and ordinary care, but that it is an absolute contract to pay the money in any event. The conceded fact that these deposits were made in good faith and in the belief that they were lawful and proper has, therefore, no bearing upon the question of Hay's liability or that of his bondsmen.

The opinion of Assistant Attorney-General Shields, in which he reaches the same conclusion after a more extended examination, is fully concurred in.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved:

W. H. H. MILLER.

SEALED CARS.

An act to prevent smuggling construed.

Section 2 of the act of June 27, 1864, chapter 164, applies as well to merchandise imported into a contiguous country and then imported into the United States as to merchandise produced in that foreign country and then imported into the United States.

While the Secretary of the Treasury can not require a formal entry of goods sealed in a foreign county at a frontier port, he is not concluded by the seals from requiring an examination of the contents of the cars so secured on arrival at the frontier ports, and he may direct such an examination notwithstanding the seals as may seem to him best adapted to prevent fraud.

The authority of the Secretary of the Treasury to make regulations which should have the obligation of a treaty between Great Britain and this country, given by articles 29 and 30 of the Treaty of Washington, was limited by the terms thereof. Those articles related only to the examination, inspection, and exemption from duty of goods, wares, and merchandise in one country through which they were to be carried continuously in unbroken cars and envelopes for distribution in the other country. The treaty had no reference whatever to the manner of the inspection and examination in the country of the distribution of the goods and merchandise; that matter was wholly within the control of the country where the goods were to be consumed and used, and there is no obligation by force of the Treaty of Washington which prevents a modification of the regulations referred to in so far as they affect goods and merchandise imported into this country for our consumption.

Sections 2 and 3 of the act of 1864 probably contemplated that the sealing of cars should be performed by consular officers. The Secretary of the Treasury has no authority by law and therefore is not required to appoint new officers especially charged with the duty.

DEPARTMENT OF JUSTICE,
February 13, 1891.

SIR: By letter of the 24th ultimo the Secretary of the Treasury requested the opinion of the Atterney-General upon certain questions therein stated. The questions relate to the construction of section 2 of the act approved June 27, 1864, entitled "An act to prevent smuggling, and for other purposes" (13 Stat., 197), which is now embodied in the Revised Statutes as section 3102. The Secretary stated that from "the date of the passage of the act referred to it has been the practice to permit cars laden in Canada, and secured in the manner described in the section, to pass the frontier of the United States if the seals found thereon have been intact;" that "since the completion of the Canadian Transcontinental a practice has grown up by which consular officers in British Columbia seal cars into which merchandise imported direct from Asiatic countries has been placed, and such cars upon arrival at the frontier of the United States have been and are now permitted to pass without inspection of their contents;" that "a similar practice obtains as to goods imported at Montreal, and consigned to points in the United States;" and that "recent investigations by the officers of the Treasury Department have shown that European and Asiatic merchandise, as well as goods, the products of the

Dominion of Canada, and dutiable under our laws, have been imported in cars secured by consular officers without being accounted for to customs officers at ports of destination." The Secretary requested that he be advised,

"First, whether or not the law referred to is applicable to goods imported from beyond the sea into contiguous foreign countries, or only to goods, wares, or merchandise the products of such contiguous countries; second, whether under the provision for the prevention of fraud upon the revenue, the Secretary has authority, in view of the results of recent investigation, to ignore the seals placed upon the cars by consular officers, and to require the entry and examination of the contents of cars so secured upon arrival at frontier ports; third, whether or not the law in question, or any other law, requires that officers of the United States shall be stationed on contiguous foreign territory for the purpose of sealing cars into which may be placed merchandise destined for ports within our territory."

The proper construction of section 2 of the act to prevent smuggling, of June 27, 1864, required in answering the foregoing questions, will be aided by a consideration of the other provisions of that act. The first section requires that from and after the passage of the act all goods, wares, and merchandise, and all baggage and effects of passengers, and all other articles imported into the United States from any contiguous foreign country or countries, except as thereafter provided, as well as the vessels, cars, and other vehicles and envelopes in which the same were imported, should be unladen in the presence of and be inspected by an inspector or other officer of the customs at the first port of entry or custom-house in the United States where the same should arrive. The rest of the section enforces this provision by forfeiture and otherwise.

Section 2 provides—

"That to avoid the inspection at the first port of arrival, required by the first section of this act, the owner, agent, master, or conductor of any such vessel, car, or other vehicle, or owner, agent, or other person having charge of any such goods, wares, merchandise, baggage, effects, or other articles, may apply to any officer of the United States duly authorized to act in the premises, to seal or close the same,

under and according to the regulations hereinafter authorized, previous to their importation into the United States; which officer shall seal or close the same accordingly; whereupon the same may proceed to their port of destination without further inspection: *Provided*, That nothing contained in this section shall be construed to exempt such vessel, car, or vehicle, or its contents, from such examination as may be necessary and proper to prevent frauds upon the revenue and violations of this act: *And provided further*, That every such vessel, car, or other vehicle shall proceed, without unnecessary delay, to the port or place of its destination, as named in the manifest of its cargo, freight, or contents, and be there inspected, as provided in section one."

Section 3 provides—

"That the Secretary of the Treasury be, and he is hereby, authorized and required to make such regulations, and from time to time so to change the same as to him shall seem necessary and proper, for sealing such vessels, cars, and other vehicles, when practicable, and for sealing, marking, and identifying such goods, wares, merchandise, baggage, effects, trunks, traveling-bags or sacks, valises, and other envelopes and articles; and also in regard to invoices, manifests, and other pertinent papers, and their authentication."

The other sections are not material to the discussion.

1. The first question is whether section 2 of the foregoing act applies as well to merchandise imported into Canada and thence imported into the United States, as to merchandise produced in Canada and thence imported into the United States. No distinction is made in the first section of the act as to the origin of the merchandise. The second section is as wide in its application as the first. The first question must be, therefore, answered in the affirmative.

2. The second question is whether the Secretary has authority to ignore the seals placed upon imported cars by consular officers, and to require the entry and examination of the contents of cars so secured upon arrival at frontier ports. In connection with this question, the attention of the Attorney-General is called to the regulations governing the transportation of merchandise to and from the British possessions in North America under the laws and treaty of Washington promulgated March 30, 1875. (Synopsis of Decisions of Treasury

Department, No. 2171.) Articles 4, 5, 6, and 7 of the regulations provide for the sealing of cars by consular officers of the United States in Canada, and the transportation of these cars through frontier ports of the United States when the seals are unbroken without any examination until the port of destination is reached. It is evident from the language used in these regulations that they apply not only to goods carried through this country to and from Canada for exportation out of the United States, but also to goods which are imported into the United States and are subject to duty here.

The authority of the Secretary of the Treasury to make regulations which should have the obligation of a treaty or a convention between Great Britain and this country was given by articles 29 and 30 of the treaty of Washington, and was therefore limited by the terms thereof. (Revised Statutes of 1873–1875, p. 365.) Those articles related only to the examination, inspection, and exemption from duty of goods, wares, and merchandise in one country, through which they were to be carried continuously in unbroken cars or envelopes, for destination in the other. The treaty had no reference whatever to the manner of inspection and examination in the country of the destination of the goods and merchandise. That was a matter in its nature wholly within the control of the country wherein the goods were to be consumed and used. There is no obligation, by force of the treaty of Washington, which prevents a modification of the regulations referred to, in so far as they affect goods and merchandise imported into this country for our consumption here. The second question to be answered, therefore, is not embarrassed by the provision of the treaty of Washington or the regulations in accordance therewith, and depends only on the construction of the second section of the smuggling act of 1864 quoted above, now embodied in section 3102 of the Revised Statutes. This renders it unnecessary to discuss the question whether article 29 of the treaty of Washington has been abrogated.

The purpose of the second section of the smuggling act was to enable importers into the United States to save the trouble and expense of an examination at the frontier ports. The necessity for a formal entry at the first port of arrival of goods in sealed cars is dispensed with by the section, and can not be required by the Secretary of the Treasury in view

of its language. An examination of the goods at the frontier port may be required, however, and the manifest accompanying the car will serve all the practical purposes of a formal entry. The proviso of the second section is, that nothing contained therein shall be construed to exempt the car or its contents from such examination as may be necessary to prevent fraud upon the revenues and violations of the act. This places a large discretion in the Secretary to direct such an examination as he may think necessary for the purpose stated. If the working of the section under the present regulations has resulted in fraud upon the revenue, it is clearly within both the power and the duty of the Secretary to prevent a recurrence of such frauds by a regulation requiring such an examination as he may deem necessary to that end. If it be said that this is vesting in the Secretary a power to defeat the very object of the section, it is a sufficient answer to say that such was clearly the intention of Congress. It is not to be presumed that Congress gave this privilege to importers with the idea that it should be enforced in their interest at the expense of the revenue. The object of the proviso was to enable the Secretary to so modify the effect of the section as to prevent the frauds which his investigations now disclose. It is, of course, the duty of the Secretary to make such regulations for the examination of goods at the frontier ports as may least interfere with the object of Congress in the passage of the section. But the fraud must be stopped in any event. The answer to the second question, therefore, is that the Secretary of the Treasury can not require a formal entry of the goods sealed in a foreign contiguous country at a frontier port, but that he is not concluded by the seals from requiring an examination of the contents of the cars so secured on arrival at the frontier ports, and he may direct such an examination, notwithstanding the seals, as may seem to him best adapted to prevent fraud.

3. The third question is whether or not the law referred to, or any other, requires that officers of the United States shall be stationed on contiguous foreign territory for the purpose of sealing cars into which may be placed merchandise destined for ports within our territory. Section 2 of the act of 1864 evidently contemplates the presence in the contigu-

ous country of some officers authorized to seal cars. By the third section the Secretary is required to make regulations for the sealing of cars by such officers. The sealing of a car is not very different from other duties of a commercial character which have been imposed upon consular officers of the United States from the foundation of the Government. It is reasonable, therefore, to suppose that Congress intended that the duty here referred to should be performed by consular officers. Such has been the construction of the act since its passage. There is therefore an implied obligation upon the Secretary to authorize such officers to seal cars and vessels under the act in question. There is no provision of law, however, requiring the Secretary of the Treasury to appoint inspectors for the sole purpose of sealing cars and vessels in the contiguous countries, and there is no appropriation out of which such inspectors could be paid. The seventh section of the smuggling act empowers the Secretary to appoint additional inspectors in certain revenue districts of the United States, but nothing is said of inspectors stationed in foreign countries. Section 2999 authorizes the appointment of special agents of the Treasury to reside in foreign countries through which bonded goods are carried from the warehouse of one collection district of the United States on the Atlantic coast to that of another on the Pacific coast, and *vice versa*, for the purpose of supervising the transportation of such goods through the foreign country and preventing fraud upon the Government. This section was enacted in 1854, and was evidently directed to the carriage of goods over the Isthmus of Panama. It can not in any view apply to the case in hand.

Section 2 was an exception to the operation of section 1 of the smuggling act of 1864. It was doubtless supposed by Congress that the bulk of importations would be made under section 1 of the act, and that the exceptional cases under section 2 could be properly attended to by the consular officers, and the Government thereby protected from fraud. If it now turns out that the importations in the manner provided in section 2 are so great that consular officers are not fitted, or have not the opportunity by reason of their other duties, to so examine the goods and seal the cars as to prevent fraud, the Secretary of the Treasury has no authority by

law, and therefore is not required, to appoint new officers especially charged with the duty. This result may be a reason for Congressional action granting such authority, but until it is granted consular officers must continue to do the sealing.

The only way now open to the Secretary of preventing the evils which have proved necessarily incident to the system of sealing cars in accordance with section 2 of the act of 1864, under the present regulations, is to modify the regulations, by directing that an examination of some kind be had upon the frontier.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The ACTING SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

STEAM PLATE-PRINTING PRESSES—BUREAU OF ENGRAVING AND PRINTING.

The sundry civil act for the fiscal year ending June 30, 1890, not having been modified by subsequent acts, prohibits the use of the steam plate-printing presses in the Bureau of Engraving and Printing for the purpose of supplying stamps needed for immediate use under the laws for the collection of internal revenue, unless the requirements specified in said act be complied with.

DEPARTMENT OF JUSTICE,
February 19, 1891.

SIR: Your inquiry of the 14th instant, as to whether you are authorized by law to employ the steam plate-printing presses, now in charge of the Bureau of Engraving and Printing for the purposes of supplying stamps needed for immediate use under the laws for collecting the internal revenue, is at hand.

An act entitled "An act making appropriations for sundry civil expenses," etc., passed August 4, 1886 (24 Stat., 222, 227), contains the following provisions:

"For wages of not more than one hundred and eighty plate printers, at piece rates to be fixed by the Secretary of the Treasury, not to exceed the rates usually paid for such work,

including the wages of not more than two hundred printers' assistants, at one dollar and twenty-five cents a day each when employed, and for royalty for use of steam plate-printing machines, three hundred and seven thousand three hundred and eighty dollars, to be expended under the direction of the Secretary of the Treasury: *Provided*, That any part of this sum may be used for purchasing and operating new and improved plate-printing presses."

The act similarly entitled, passed March 3, 1887 (24 Stat., 509, *515*), contains the following provisions:

"For wages of not more than one hundred and eighty-seven plate printers, at piece rates to be fixed by the Secretary of the Treasury, not to exceed the rates usually paid for such work, including the wages of not more than one hundred and eighty-eight printers' assistants, at one dollar and twenty-five cents a day each, when employed, and for wages of not more than twenty-six printers' assistants at steam presses, at one dollar and fifty cents a day each, when employed, and for royalty for use of steam plate-printing machines, three hundred and sixty-six thousand five hundred dollars, to be expended under the direction of the Secretary of the Treasury: *Provided*, That any part of this sum may be used for purchasing and operating new and improved plate-printing presses."

The corresponding paragraph of the similarly entitled act of October 2, 1888 (25 Stat., 505, *511*), reads as follows:

"For wages of plate printers, at piece rates to be fixed by the Secretary of the Treasury, not to exceed the rates usually paid for such work, including the wages of printers' assistants, at one dollar and twenty-five cents a day each, when employed, and for wages of printers' assistants at steam presses, at one dollar and fifty cents a day each, when employed, and for royalty for use of steam plate-printing machines, three hundred and ninety-eight thousand dollars, to be expended under the direction of the Secretary of the Treasury: *Provided*, That there shall not be an increase of the number of steam plate-printing machines in the Engraving and Printing Bureau."

And the corresponding paragraph of the similarly entitled act of March 2, 1889 (25 Stat., 939, *945*), contains the following provisions:

"For wages of plate printers, at piece rates to be fixed by the Secretary of the Treasury, not to exceed the rates usually paid for such work, including the wages of printers' assistants, at one dollar and twenty-five cents a day each, when employed, and for wages of printers' assistants at steam presses, at one dollar and fifty cents a day each, when employed, and for royalty at not exceeding one cent per thousand impressions for use of steam plate-printing machines, four hundred and fifty-six thousand dollars, to be expended under the direction of the Secretary of the Treasury: *Provided*, * * * That no part of this appropriation shall be used for the repair or reconstruction of steam plate-printing presses: *Provided further*, That there shall not be an increase of the number of steam plate-printing machines in the Engraving and Printing Bureau: * * * *Provided*, That unless the patentees of said steam presses shall accept the five hundred dollars already paid as royalty on each press and the rate per thousand sheets herein provided the said presses shall not be used by the Government after the close of the present fiscal year."

No legislation is found in the "sundry civil bill" enacted August 30, 1890, or elsewhere, to change the law as Congress saw fit to establish it by the act of March 2, 1889.

Under that statute, considered in connection with the related antecedent enactments, the conclusion seems to be a necessary one that the use of the steam plate-printing machines is prohibited except upon a compliance with the requirements specified in said act of 1889.

Very respectfully,

W. H. H. MILLER.

The ACTING SECRETARY OF THE TREASURY.

PUBLIC CARTAGE OF MERCHANDISE.

Section 25 of the act of June 22, 1874, chapter 91, regarding the letting out of public cartage of merchandise in the custody of the Government to the lowest bidder, applies only to such cartage as is paid for by the Government and not to cartage the expense of which is paid by the individual importer.

DEPARTMENT OF JUSTICE,
February 24, 1891.

SIR: By letter of January 17, 1891, you request my opinion upon the proper construction of section 25 of the act of June 22, 1874 (chap. 91, U. S. Stat. L., vol. 18, p. 186). The section reads as follows:

"That public cartage of merchandise in the custody of the Government shall be let after not less than thirty days' notice of such letting to the lowest responsible bidder giving sufficient security, and shall be subject to regulations approved by the Secretary of the Treasury."

It appears that there are, with respect to cartage, two classes of merchandise. The cartage of the first class is paid by the Government as part of the expense of collecting the revenue, and is not charged to the importer. The cartage of the second class is charged against and paid by the importer before the goods are delivered to him. The first class comprises those packages, not less than one in ten of an importation, designated by the collector for examination and appraisement, which are taken from the steamer's wharf to the appraisers' stores under section 2901. The expense of the cartage of these packages is properly chargeable to the United States. The second class includes all goods unclaimed or entered in bond transferred from the steamers' wharves to bonded warehouses; examined packages entered in bond, transferred after examination and appraisement from appraisers' stores to bonded warehouses; overflow goods, including samples and personal and household effects, transferred from one warehouse to another to make room, and goods transferred from public stores to bonded warehouses for sale by the Government. Every expense attending the cartage and storage of such goods is properly chargeable to the importer under chapter 7 of Title XXXIV of the Revised Statutes, and particularly sections 2960, 2961, 2962, 2963, 2964, 2965, 2970, 2972, 2973, 2977, and 2980.

The theory upon which cartage charges are paid by the United States on the first class of goods, and by the importer on the second, is that cartage from the wharf to the appraisers' stores is for the convenience of the Government in examination. After that, if the importer wishes to pay the duties,

the goods are delivered into his custody, and the Government has no more to do with them. If he prefers to delay payment of duties, and to take advantage of the system of bonded warehouses, he must pay all the extra expense to which the Government is subject over and above that which would have been incurred had he paid the duties immediately after examination and appraisement. This extra expense, of course, includes cartage, under sufficient inspection of the Government, to bonded warehouses.

The section in question was passed in 1874, during Secretary Boutwell's administration of the Treasury. It was then held to apply only to the cartage of merchandise, payment for which was made out of the public treasury; i. e., to the first class of goods above mentioned. The cartage of goods of the second class was let by private contract without competition. Such continued to be the practice under Secretaries Richardson, Bristow, Morrill, Sherman, Windom, Folger, McCulloch, and Manning. In 1887 Secretary Fairchild advertised for bids on cartage of the second-class and contracts have since been thus let. A difficulty is encountered in letting bids under the second-class, by competition, which will be understood by a statement of how contracts are let for cartage of the first class. Bids are invited on cartage at so many cents per package, whatever the size of the package. The distances from steamers' wharves to the public stores is easy of ascertainment and makes a fair basis for one element of the expense. The size of the packages generally imported may be averaged, and when the same person is charged with the carriage of all goods a fixed price per package is measurably fair. These are the conditions existing in bidding on cartage of the first class.

When we come to cartage of the second class, however, a very different state of affairs presents itself.

There are numerous bonded warehouses, public (sections 2954 to 2959) and private (section 2960, etc.), and these warehouses are at greatly varying distances from the wharves. Of course the packages to be carted are of all sizes, varying from tons to ounces. An importer may have a single large or small package, or he may have a variety embracing all sizes. Manifestly it would be unfair that an importer bringing in only a steam engine or locomotive should be charged

for cartage only a sum which might be a fair average for all packages, great and small; and it is difficult to see how this inequality is to be avoided, under a system of letting for an average price, where the payments are to be made by each importer for himself. Of course there is no difficulty where all payments for packages, great and small, and for distances long and short, are to be made by one person, as by the Government under the first class. For the same reason, contracts for municipal work by a unit of quantity are frequent and feasible; but where, as here, with reference to all goods in the second class, it is essential not merely that there shall be a fair average, but that each individual shall pay what is just for himself; the public letting of contracts, as for an average price, seems to be impossible. This view harmonizes with the use of the word "public" in the Revised Statutes and is greatly reenforced by that word. A different construction ignores that word entirely, and thereby violates a cardinal rule in the construction of statutes, which requires every word to be given due significance.

For one class of this cartage the Government pays; it is therefore public. For the other class each individual owner pays; it is therefore private.

In view of the foregoing considerations, I can not doubt that the contemporaneous and continued construction by the statesmen and lawyers who administered the office of Secretary of the Treasury for thirteen years after this statute was enacted was right.

I have the honor, therefore, to state that in my opinion section No. 25 of the anti-moiety act of 1874 (18 Stat., 186), in the words "public cartage of merchandise in the custody of the Government," has application only to such cartage as is paid for by the Government, and not to cartage the expense of which is paid by the individual importer.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

REAPPRAISAL BY GENERAL APPRAISERS.

A general appraiser, acting under a collector's direction for the reappraisement, must confine himself to the particular items of the importation on account of which a reappraisement was ordered. (Section 13 of the customs administrative act, June 10, 1890, chapter 407, construed.)

DEPARTMENT OF JUSTICE,
March 17, 1891.

SIR: I understand your communication of December 19, 1890, to submit for opinion the question, whether when a reappraisement by a general appraiser is directed, his jurisdiction embraces all the merchandise included in the invoice or importation which was the subject of the original appraisement or is limited to the particular merchandise whose appraisement has caused dissatisfaction.

In an opinion dated September 27, 1890 (19 Opin., 666), this Department passed upon the question whether the Board of three General Appraisers established by the customs administration act of June 10, 1890 (Pamph. Laws, 1889–'90, p. 131), could properly reappraise items of merchandise not brought before them specially by appeal, and the conclusion reached was that in all cases of appeal the action of the Board of General Appraisers should be confined to the particular items on account of which the appeal in each case was taken.

I am now asked to say whether a general appraiser, acting under a collector's direction for a reappraisement, must confine himself to the particular items of an importation on account of which a reappraisement was ordered, or may proceed to make a new appraisement of the whole importation where the items complained of are less than said importation.

It seems to me that the language of section 13 of the act of June 10, 1890, requires that the general appraiser should limit his reappraisement to the particular items of merchandise whose appraisement is the cause of dissatisfaction. That language is, "If the collector shall deem the appraisement *of any imported merchandise* too low, he may order a reappraisement which shall be made by one of the general appraisers; or, if the importer, owner, agent or consignee of *such merchandise* shall be *dissatisfied with the appraisement thereof*, and shall have complied with the requirements of

law with respect to the entry and appraisement of merchandise, he may within two days thereafter give notice to the collector in writing of such dissatisfaction, on the receipt of which the collector shall at once direct a reappraisement of *such merchandise* by one of the general appraisers."

It thus appears that when the collector or the importer shall be dissatisfied with the appraisement "of any imported merchandise," the collector is authorized to "direct a reappraisement of *such merchandise* by one of the general appraisers;" that is to say, the collector is authorized to direct a reappraisement of the particular merchandise the original appraisal of which has given dissatisfaction. This is the necessary sense of the words "*such merchandise*," which can have reference to nothing but the previously supposed case of "imported merchandise" whose appraisement has dissatisfied the collector or the importer. It is such merchandise and such only that is to be reappraised, and I am, therefore, of opinion that the general appraiser can not reappraise an invoice *de novo* unless the dissatisfaction of the party complaining of the appraisement extends to the whole invoice, and not merely to certain items thereof.

It is true that section 12 authorizes the general appraisers "to exercise the powers and duties devolved upon them by this act and to exercise, under the general direction of the Secretary of the Treasury, *such other supervision over appraisements* and classifications for duty of imported merchandise *as may be needful to secure lawful and uniform appraisements and classifications at the several ports*," but the operation of this language must, I think, be subordinated to the express terms of section 13 limiting reappraisements by general appraisers to the particular merchandise whose appraisal had given dissatisfaction, for it can hardly be supposed from the general words quoted from section 12 that Congress intended that the restriction imposed by section 13 should be respected or not, at the option of the general appraisers, which is as much as to say that the restriction imposed by section 13 is no restriction at all.

Very respectfully, yours,

WM. H. TAFT,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

SECRETARY OF AGRICULTURE'S AUTHORITY.

The appropriation act for the Agricultural Department for the year ending June 30, 1892, contains specific appropriations for illustrations, maps and charts, and photographic illustrations: *Held*, that section 3706 of the Revised Statutes does not include illustrations and engravings, and inasmuch as there is no other provision of law requiring the Secretary of Agriculture to procure them from or through the Public Printer, the presumption is that the money necessary to purchase such illustrations is to be expended under the direction of the head of the Department of Agriculture.

DEPARTMENT OF JUSTICE,
March 19, 1891.

SIR: By letter of the 13th instant you request the opinion of the Attorney-General upon the question whether you have the authority to procure the illustrations, engravings, maps, and charts to accompany bulletins and special reports prepared by the several divisions of your Department, or whether you must look to the Public Printer to prepare or procure them.

There are in the appropriation act for the Agricultural Department for the year ending June 30, 1892, specific appropriations for illustrations, maps and charts, and photographic illustrations. Such appropriations have occured in previous acts. You state that it has always been the practice for the head of your Department to procure the illustrations and to furnish them to the Public Printer to be bound with the printed matter which they properly accompany, and that this practice has been uniformly concurred in by the accounting officers of the Treasury Department.

The question has now arisen whether the practice is not a violation of section 3706, which reads as follows:

"All printing, binding, and blank books for the Senate or House of Representatives and the executive or judicial departments shall be done at the Government Printing Office, except in cases otherwise provided by law."

Does the word "printing" mean and include the preparation of maps, charts, and illustrations?

It should be noted that the section requires the printing to be done *at the Government Printing Office.* If it appears that there are not now and never have been facilities for the preparation of maps, charts, and illustrations at that office,

and that Congress never had intended that there should be, it would seem to be clear that section 3706 does not apply to them.

In this connection you call attention to sections 3779 and 3780, Revised Statutes, which provide that whenever charts, maps, diagrams, views, or other engravings are required to illustrate any documents ordered printed by either House of Congress, they shall be procured by the Public Printer, and that the contract for the same shall be let to the lowest bidder. Here is clear evidence that Congress does not intend maps, charts, and illustrations to be made at the Government Printing Office. This accords with the fact, as stated by you, that they never are made there. It follows that the printing referred to in section 3706 does not include illustrations and engravings, maps, or charts.

There being no other provision of law requiring the Secretary of Agriculture to procure from or through the Public Printer the illustrations, maps, and charts for which appropriation has been made in the Agricultural Department appropriation act, the presumption is that the money necessary to purchase such illustrations is to be expended under the direction of the head of that Department. I am of the opinion, and therefore advise you that the practice in this regard, which, as you state, has up to the present time prevailed in your Department, is fully warranted by law, and should be continued.

Very respectfully,

WM. H. TAFT,
Acting Attorney-General.

The SECRETARY OF AGRICULTURE.

ALLOTMENT OF LAND TO INDIVIDUAL INDIANS.

Certain land has always been occupied by the Nez Perce tribe of Indians, save that in 1836 to 1847 a mission building was established and occupied on the tract. The act of March 3, 1853, chapter 90, established the territorial government of Washington and confirmed title in the missionary boards to lands hitherto occupied as missionary stations. By various treaties with said tribe of Indians this land was reserved for the exclusive use of the tribe and provision was made for the allotment of 20-acre lots to individual Indians. One Langford claimed title by virtue of a deed from the missionary society that

formerly occupied a station on the tract. *Held,* that even if the grant to the Mission Board passed title, as to which quære, yet it was subject to the Indian right of occupancy and nothing but a naked title even after allotment of the land to the individual Indians under the act of February 8, 1887, chapter 119. Whether conferring upon the allottee the power of unlimited alienation after twenty-five years' occupation in severalty would be an infringement of the rights of the holder of the ultimate fee not decided, as not now arising.

DEPARTMENT OF JUSTICE,
March 21, 1891.

SIR: On January 20 last you requested the opinion of the Attorney-General upon the question whether an allotment to individual members of the Nez Perce tribe of Indians, under the allotment act of 1887 (24 Stat., 388), of 640 acres of land at the mouth of the Lapwai, in Idaho, now included in the reservation of that tribe and occupied by it, would terminate the Indian right of occupancy, so as to vest the right of immediate possession in one William G. Langford, who claims title through a congressional grant. You accompanied the request for an opinion with an elaborate opinion of Assistant Attorney-General Shields upon the same question, which has been of much assistance to me in the consideration of the subject.

The following statement of facts, statutes, and treaties, taken from the papers submitted, will suffice for an understanding of the precise point to be here decided: The land in question has always been occupied by the Nez Perce tribe of Indians, with the exception that in 1836, under the auspices of the American Board of Commissioners for Foreign Missions, a mission building was established and occupied on the tract and was continued there until 1847, when, in fear of an Indian uprising, the mission agent left the country, and since that time the Indians have been, with a slight interruption to be hereafter noted, in undisturbed occupancy. Twenty-six Indian families now have their homes on the tract in question, and the period of their occupation ranges from five to fifty years. August 14, 1848, the organic act of the Territory of Oregon was passed, which contained the following proviso:

"*Provided*, That nothing in this act contained shall be construed to impair the rights of person or property now per-

taining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the Government to make if this act had never passed: *And provided also*, That the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in said Territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong." (9 Stat., 323.)

At this time, as has been said, the land in question was not occupied as a missionary station, for it had been deserted the year before, so that it did not come within the terms of the grant and confirmation in the section just cited.

March 3, 1853, there was passed and approved "An act to establish the Territorial government of Washington" (10 Stat., 172), which act contained the following proviso:

"*Provided*, That nothing in this act contained shall be construed to affect the authority of the Government of the United States to make any regulations respecting the Indians of said Territory, their lands, property, or other rights by treaty, law or otherwise, which it would have been competent to the Government to make if this act had never been passed: *Provided further*, That the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations, among the Indian tribes in said Territory, or that may have been so occupied as missionary stations prior to the passage of the act establishing the Territorial government of Oregon, together with the improvements thereon, be, and is hereby, confirmed and established to the several religious societies to which said missionary stations respectively belong."

The latter proviso undoubtedly includes the land now in question.

March 3, 1863, there was passed and approved "An act to provide a temporary government for the Territory of Idaho." (12 Stat., 808.)

This act saves all rights as between the United States

and the Indian tribes, and makes no reference to mission lands. Each of these three several acts had reference to territory which included within its exterior limits the Nez Perce lands now under consideration.

By a treaty between the United States and the Nez Perce Indians concluded June 11, 1855, and ratified by the Senate March 8, 1859, and proclaimed by the President April 29, 1859 (12 Stat., 957), large amounts are ceded, relinquished, and conveyed by said Nez Perce tribe to the United States; but there is reserved from the lands so ceded, for the use and occupation of said tribe, and as a general reservation for other friendly tribes and bands of Indians, a tract of land which includes the lands at the mouth of the Lapwai, under consideration.

And it is provided therein that no white man, excepting those employed in the Indian Department, shall be permitted to reside upon said reservation without the permission of the tribe and the superintendent and agent.

The President is authorized to cause the whole or such portions of such reservation as he may think proper to be surveyed into lots, and assign the same to such individual Indians as will locate on the same as permanent homes.

No reference is made in the treaty to any mission lands, but a tract occupied by William Craig is saved to him from the reservation.

June 9, 1863, another treaty was concluded between said parties, which was ratified April 17, 1867, and proclaimed by the President April 20, 1867, whereby the tribes relinquished a large portion of the lands before reserved, and whereby—

"The United States agree to reserve for a home and for the sole use and occupation of said tribe the tract of land included within the following boundaries, to wit, etc.," setting forth a description which includes in the reservation the lands under consideration.

White men are excluded from the reservation, as under the former treaty. Under article 3, lots of 20 acres each may be allotted to certain members of the tribe for permanent homes, and the residue is to be held in common for the sole use and benefit of the Indians.

No reference is made in this treaty to any mission lands, but it is agreed that a piece of land theretofore given to Robert Newell by the chiefs of the tribe, and included within the reservation boundaries, shall be confirmed and patented to him.

By the amendatory treaty concluded August 13, 1868, and proclaimed February 24, 1869 (15 Stat., 693), further provisions for allotment are agreed upon and set forth, but no mention is made of any mission lands.

The American Board of Commissioners of Foreign Missions sought to acquire possession of the property by action at law, in 1868, against the United States Indian agent. Langford, attorney for the board, acquired title by deed from the board in the same year, and was put in possession by order of court, but was soon after ousted by advice of Attorney-General Williams.

Langford's title has been under consideration by two Attorneys-General—by Mr. Williams in 1875 (14 Opin., 588), and by Mr. Brewster in 1882 (17 Opin., 306).

Mr. Williams's conclusion was stated as follows (14 Opin., 572):

"Thus it would seem that the title imparted by the acts 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."

Mr. Brewster's opinion is summarized in his own words, as follows:

"I am clearly of the opinion that Langford has no such possessory interest in the land in question as would warrant the Interior Department in accepting the proposed compromise. * * * When the Nez Perce tribe cedes the land in question to the United States, it would seem that they would take it for the benefit of Langford and his heirs."

Forcible argument might be made against the view of the confirmation and grant in the act of 1853 to the Board of Missions which gives to it the effect of a grant in fee simple.

Surrounding circumstances would support strongly the contention that by the statute it was only intended to make lawful, as far as the United States was concerned, the occupation of this land as a mission for civilizing purposes. Such purposes could only exist while the Indians occupied the same country, and upon the abandonment of this land by them it might well be presumed to have been the congressional intention that the title of the mission should end. However, it is not necessary to consider this question at length, because even on the theory that a fee passed by the grant to the Board of Missions, it was subject to the Indian right of occupancy, and that right, for reasons presently to be stated, is quite sufficient to render the fee nothing but a naked title, even after allotment of the land to the members of the Indian tribes under the act of 1887. (24 Stat., 388.) That act authorizes the President to allot in severalty to the individuals of any tribe or band of Indians, which has been or shall hereafter be located upon any reservation created for their use by treaty, act of Congress, or executive order, the reservation or any part thereof. Section 5 of the act provides that upon approval of the allotments, the Secretary of the Interior shall cause patents to issue therefor in the name of the allottees "which patents shall be of legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of such period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever." The section further avoids all conveyances or contracts to convey in respect to such allotted lands made prior to the expiration of the twenty-five years during which the allotments are held in trust by the United States.

The exact question presented is whether allotments can be made to individual Nez Perces of the land in question without giving Langford the right of possession and ownership under his deed from the Board of Missions. His title is that of the United States subject to the Indian right of occu-

pancy. What is the Indian right of occupancy? It is the right to enjoy the land forever with the right of alienation limited to one alience, the United States, or to such persons as the United States, in its capacity of guardian over the Indians, may permit.

The guardianship which the United States exercises over the Indian is an attribute of its sovereignty over the territory within its limits. Congress will not be presumed, by a mere grant of land, to have conveyed away such sovereignty. By the confirmation of title in the act of 1853 nothing but the proprietary interest of the Government in the mission land passed, and that interest was entirely subject to the Indian right of occupancy as it might develop under the sovereign guardianship of the nation. This would be true in the absence of any express reservation of such sovereign guardianship, but in the present case, as we have seen, in the very statute under which Langford's claim arises, the organic act of Washington (10 Stat., 172) there is an express provision that nothing in the act shall be construed to affect the authority of the United States to make any regulation respecting the Indians of said Territory, their lands, property, or other rights by treaty, law, or otherwise, which it would have been competent for the Government to make if the act had never been passed. The whole policy of the Government has been directed to civilizing the Indians under its pupilage. No greater step can be taken toward their civilization than the allotment of the soil to them in severalty, whereby the independence, the sense of responsibility, and the thrift incident to the right of private property are all developed with abiding results. Allotments in severalty of Indian land are, therefore, naturally evolved from the Indian right of occupancy, a fact which is made apparent from the provisions for allotments in the treaties of 1855, 1863, and 1869, referred to above, with these very Indians. A right to land which is subject to the Indian right of occupancy is subject, therefore, to the possibility and probability of the Indians reaching such a state of civilization as to make necessary an allotment of that right.

The mere partition of the Indian right of occupancy among the members of the tribe is no more an injury to Langford's title to the ultimate fee, if he in fact has any such title, than

the partition of a life estate among cotenants would be an injury to the sole reversioner. Whether the conferring upon the allottee the power of unlimited alienation after twenty-five years of occupation in severalty would be an infringement of the rights of the holder of the ultimate fee, is a question which is not decided, because it does not now arise. Suffice it to say, that a mere allotment under the allotment act of 1887 will not in any way strengthen Langford's claim to immediate possession.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved:

W. H. H. MILLER.

COSTS OF SUITS.

The words "costs of suits" in the appropriation act of the Navy Department passed June 30, 1890, chapter 640, relate to the ordinary taxed costs of suits and not to fees of counsel. Accordingly the fee of the United States attorney for services in defending suits brought against certain naval officers for acts done by them in obedience to the orders of the Navy Department can not be paid out of that appropriation, but must be fixed by the Attorney-General and paid out of the appropriations for the payment of such special compensation as may be fixed by the Attorney-General for services not covered by salaries or fees.

DEPARTMENT OF JUSTICE,
March 26, 1891.

SIR: In reply to your request, through Judge-Advocate-General Remey, for an opinion as to whether Mr. John T. Carey, late United States attorney for the Northern District of California, may be lawfully paid out of the appropriation for "costs of suits" in the act of June 30, 1890 (Pamphlet Laws, 1889-'90, p. 189), making appropriations for the naval service for the fiscal year ending June 30, 1891, and for other purposes, for services rendered by direction of the Attorney-General as counsel in defending suits brought against certain naval officers for acts done by them in obedience to the orders of the Navy Department, I beg to say

that in my opinion the appropriation referred to relates to the ordinary taxed costs of suits and not to fees of counsel.

These must be fixed by the Attorney-General and paid out of the appropriation for the payment of such special compensation as may be fixed by the Attorney-General for services not covered by salary or fees. (Pamphlet Laws, 1889–'90, p. 409.)

The authority of the Attorney-General or Department of Justice to employ and pay United States attorneys for services not covered by their salaries and fees is expressly recognized by Congress in section 3 of the act of June 30, 1874 (18 Stat., 109), and section 299 Revised Statutes, and the annual appropriation made by Congress for that purpose.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE NAVY.

ATTORNEY-GENERAL.

The Attorney-General is not authorized by law to respond by an official opinion as to a question of law not arising in the Department from which the inquiry is sent or as to one not shown to be pending and of present executive consequence.

DEPARTMENT OF JUSTICE,
March 27, 1891.

SIR: I have received your communication of the 4th instant, calling for my opinion as to the proper construction of that clause of the pension appropriation act of March 1, 1889 (25 Stat., 782), which reads as follows:

"And the amount which may have accrued on the pension of any pensioner subsequent to the last quarterly payment on account thereof, and prior to the death of such pensioner, shall, in the case of a husband, be paid to his widow, or if there be no widow, to his surviving children or the guardian thereof, and in case of a widow to her minor children."

The precise question submitted is, whether the words "minor children," as used, may include minor children who are above 16 years of age.

It is shown by an inclosure transmitted by you that March 29, 1889, the Commissioner of Pensions ruled that "Minor

children as contemplated by this act are minors recognized as such by the *lex loci*," which ruling was approved by the Secretary of the Interior.

By another inclosure it appears that the Assistant Secretary of the Interior, in the case of the appeal of Lewis Brooks, minor, held, October 2, 1890, that the said words "minor children" are used in the act of March 1, 1889, to designate children under 16 years of age and no others.

It thus appears that the question you submit arose in and has been acted upon by the officers of the Department of the Interior.

It becomes necessary for me to say that the law does not authorize me to render an opinion in such a case; the controlling enactment of the Revised Statutes is as follows:

SEC. 356. "The head of any Executive Department may require the opinion of the Attorney-General on any questions of law arising in the administration of his Department."

It is manifest that the question to which you call my attention arose in the Department of the Interior.

While the concluding portion of the letter from the Second Comptroller which you inclose suggests that a decision of the question raised may be of service to the accounting officers of your Department, no actual case is stated to exist that awaits action, or concerning which my opinion is desired.

I am not authorized by statute or precedent to respond by an official opinion as to a question of law not arising in the Department from which the inquiry is sent, or as to one not shown to be pending and of present executive consequence.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

SEAL FISHERIES—RENTAL.

It is within the power of the Secretary of the Treasury under the existing lease by the United States to the North America Commercial Company of the right of taking fur-seal skins on the islands of St. Paul and St. George, Alaska, to make a reduction of the yearly rental for the year ending May 1, 1891, proportionate to the reduction made by him below the limit named in the lease of the number of seals which said company has been permitted to kill on these islands.

DEPARTMENT OF JUSTICE,
March 27, 1891.

SIR: By letter of March 20 you ask the opinion of the Attorney-General upon the question whether it is within the power of the Secretary of the Treasury, under the present existing lease by the United States to the North American Commercial Company, of the right of taking fur-seal skins on the islands of St. Paul and St. George, Alaska, to make a reduction of the yearly rent for the year ending May 1, 1891, proportionate to the reduction made by him, below the limit named in the lease, of the number of seals which said company has been permitted to kill on those islands.

The power of the Secretary of the Treasury with reference to the seal fisheries and the leasing of the same is conferred by sections 1960 to 1971 inclusive, and by an act dated March 24, 1874 (18 Stats., 24), in which he is authorized to designate the months in which fur seals may be taken for their skins on the islands of St. Paul and St. George, in Alaska, and in the waters adjacent thereto, and the number to be taken on or about each island respectively. Section 1962 of the Revised Statutes provides that for the period of twenty years from July 1, 1870, the number of fur seals to be killed on the two islands leased shall be limited to 100,000, and then continues:

"But the Secretary of the Treasury may limit the right of killing, if it becomes necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as may be proper."

No question can be made but that this exception was written into the first lease made by the Alaska Commercial Company for the twenty years from July 1, 1870, and that the Secretary of the Treasury was given power under that lease in reducing the number of seals killed to make such proportionate reduction of rent as might seem to him just and proper. It was, though not expressed, a binding term of the lease. The sections of the Revised Statutes to which reference is made above are merely a revision of the act of July 1, 1870 (16 Stats., 180). The change in the Revised Statutes in the language and order of the sections was made necessary by the fact that the Revised Statutes were enacted after

the first lease had been executed, while the act of 1870 was passed to authorize the first lease, and before it was executed. Looking at the Revised Statutes alone, section 1963 leaves it somewhat doubtful whether the Secretary of the Treasury is authorized to make a lease similar in all respects to the one which expired on the 1st of July, 1890. The language is:

"When the lease heretofore made by the Secretary of the Treasury to the Alaska Commercial Company of the right to engage in taking fur seals in the islands of St. Paul and St. George, pursuant to the act of July first, eighteen hundred and seventy, chapter one hundred and eighty-nine, or when any future similar lease expires, or is surrendered, forfeited, or terminated, the Secretary of the Treasury shall lease to proper and responsible parties to the best advantage of the United States," etc.

The section then goes on to state the interests which the Secretary shall subserve and protect in the making of the lease, and fixes an annual rent of not less than $50,000, to be secured by deposit of United States bonds. It will be found, upon a comparison of the act of July 1, 1870, with section 1963, Revised Statutes *et seq.*, that the requirements for the lease of 1870, under the act of that year, are in all respects similar to those expressed in the Revised Statutes for the lease of 1890. Section 5 of the act of 1870 provides that—

"At the expiration of said term of twenty years (that is, July 1, 1890), or on surrender or forfeiture of any lease, other leases may be made *in manner as aforesaid* for other terms of twenty years,"

showing conclusively that it was the intention of Congress in the act of 1870—an intention presumably not departed from in the reenactment of that law in the Revised Statutes—that the Secretary of the Treasury should have power to make a lease similar in all respects to that made on the 1st of July, 1870. As has been said, the authority of the Secretary of the Treasury to restrict and limit the right of killing under section 1962, with the power of making a proportionate reduction of the rents reserved to the Government, was in effect a provision as to what the lease of date July 1, 1870, should contain. The provision of section 1963, as explained by reference to section 5 of the act of 1870,

empowers the Secretary of the Treasury to enter into a similar lease July 1, 1890, and therefore implies that the term contained in section 1962 as to the proportionate reduction of the rents should be likewise in the same manner, either expressly or by implication, a term in every succeeding lease.

It follows, therefore, that the question put by you to the Attorney-General should be answered in the affirmative.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

APPROPRIATION FOR PUBLIC BUILDINGS.

The clause in the sundry civil act of 1882, chapter 433, providing that no act passed authorizing the Secretary of the Treasury to purchase a site and erect a public building thereon shall be held and construed to appropriate money unless the act in express language makes such appropriation, although a proviso in an appropriation law is so general in its language as to affect all future legislation.

The act of March 3, 1891, chapter 527, providing for the erection of a public building at Philadelphia, in the State of Pennsylvania, construed in the light of the above statute and of its own parliamentary history not to carry an appropriation, although its language taken alone would probably carry an appropriation by implication.

DEPARTMENT OF JUSTICE,
March 28, 1891.

SIR: By letter of the 7th instant you invited the attention of the Attorney-General to an act of Congress, approved March 3, 1891, entitled "An act to provide for the purchase of a site and the erection of a public building thereon at Philadelphia, in the State of Pennsylvania," and requested his opinion "whether or not the said bill carries the appropriation of $2,000,000 mentioned therein for the purchase of the site named in the bill and the erection of a building thereon." You inclosed a copy of the act, the important part of which, for this discussion, is as follows:

"That the Secretary of the Treasury be, and he is hereby, authorized and directed to acquire, by purchase, condemna-

tion, or otherwise, a site and cause to be erected thereon a suitable building, including fireproof vaults, heating and ventilating apparatus, elevators and approaches, for the use and accommodation of the United States Mint, in the city of Philadelphia and State of Pennsylvania, the cost of said site and building, including said vaults, heating and ventilating apparatus, elevators, and approaches, complete, not to exceed the sum of two million dollars.

"So much of the appropriation as may be necessary to defray traveling expenses and other expenses incident to the selection of the site, and for necessary survey thereof, shall be immediately available.

"So much of said appropriation as may be necessary for the preparations of sketch-plans, drawings, specifications, and detailed estimates for the building by the Supervising Architect of the Treasury Department shall be available immediately upon the selection of the site by the Secretary of the Treasury.

"No money appropriated shall be available, except as hereinbefore provided, until a valid title to the site for said building shall be vested in the United States, nor until the State of Pennsylvania shall have ceded to the United States exclusive jurisdiction over the same, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of said State and the service of civil process therein.

"After the said site shall have been paid for, and the sketch-plans and detailed drawings for the building shall have been prepared by the Supervising Architect, and approved by the Secretary of the Treasury and Director of the Mint, the balance of appropriation shall be available for the erection and completion of the building, including fireproof vaults, heating and ventilating apparatus, elevators, and approaches, and such balance of the appropriation as may remain available after the building shall have been completed shall be applied to and used in the purchase of apparatus for the purposes of the mint."

In my opinion no money is appropriated by this act for the purposes therein mentioned. Its language, just quoted, if taken alone, would probably by implication carry an appropriation; but when we consider it in connection with the rule

of construction laid down in the section of the sundry civil act of August 7, 1882 (22 Stat., 305), referred to by you, together with the parliamentary history of this act, and others of the same character passed by the same Congress, it is impossible to escape the conclusion that Congress did not intend, by the language above quoted, to take the sum of money therein mentioned out of the Treasury. The section in the sundry civil act of 1882 is as follows:

"*Provided*, That no act passed authorizing the Secretary of the Treasury to purchase a site and erect a public building thereon, shall be held and construed to appropriate money, unless the act in express language makes such appropriation."

Though this is a proviso in an appropriation bill, its language is so general as to affect all future legislation. The act under consideration, therefore, must contain an express appropriation of money. There certainly is no express appropriation of $2,000,000. There is a reference in the second paragraph of the act to an appropriation. In the third paragraph the reference is repeated, with the words "said appropriation." The word "appropriated" occurs in the fourth paragraph, and "balance of the appropriation" twice in the fifth. It would be natural to refer these words to the express authority conferred on the Secretary of the Treasury in the first paragraph, to acquire by purchase, condemnation, or otherwise a site, and to cause to be erected thereon a suitable building not to exceed the sum of $2,000,000, and to give to that authority the effect of an appropriation. Such a construction, however, would be an appropriation by implication, forbidden by the section of the sundry civil act of 1882, quoted above.

The parliamentary history of the act will show that the words "appropriation" and "appropriated," wherever they occur in the act, must have reference to a future appropriation to be made in another act, and must be construed to limit the expenditure under such appropriation. It appears that on May 2, 1890 (Congressional Record, vol. 21, part 5, p. 4172), a bill (H. R. 9957) to provide for the purchase of a site and the erection of a public building thereon, at Philadelphia, in the State of Pennsylvania, was introduced by

Mr. Bingham, was read twice, and referred to the Committee on Public Buildings and Grounds. On June 5, 1890 (Congressional Record, vol. 21, part 6, p. 5670), Mr. Darlington, from the Committee on Public Buildings and Grounds, reported this bill with amendments, and it was committed to the Committee of the Whole House on the state of the Union, and ordered to be printed. The bill as originally introduced by Mr. Bingham was exactly like the act under consideration, except that at the end of the first paragraph were the following words: "Which said sum of two million dollars is hereby appropriated for said purpose out of any moneys in the United States Treasury not otherwise appropriated," and that in the fourth paragraph, after the words "no money appropriated," were the words "by this act," and in the fifth paragraph, before the word "appropriation," as it occurs twice therein, was the word "said." The bill as reported back by the committee was accompanied by a report (Report No. 2326), which recommended the passage of the bill with the following amendments: "In line twelve, strike out all after the word 'dollars' down to and including line fifteen, *which is the appropriating clause.* In line twenty-six, strike out the words 'by this act.' In line thirty-eight strike out the word 'said.' In line forty-one, strike out the word 'said.'" Nothing else was done with the bill in the first session. On February 19, 1891, Mr. Spooner, for Mr. Cameron, introduced in the Senate a bill exactly in the words of the bill which we have followed in the House, as amended by the Committee on Public Buildings. The bill was referred in the Senate to the Committee on Public Buildings and Grounds, and on February 26, 1891, was reported back and passed. February 28, 1891, in the House the Senate bill was read twice and referred to the Committee on Public Buildings and Grounds, by whom, on the same day, it was reported with the recommendation that, as it was identical with the House bill, it be taken as a substitute for the same and passed (H. R. 4025). It was passed in this form, and was approved on March 3, 1891. The Senate bill is the same bill as the amended House bill, and was introduced as an original bill in the Senate merely to facilitate its passage. The history of the House bill must, therefore, affect the construc-

tion of the Senate bill which finally became the law. The amendments to the original House bill conclusively establish the intention on the part of Congress to eliminate the appropriation.

A reference to the Congressional Record, volume 21, part 5, pages 2040 to 2049, will disclose an extended debate as to the policy to be pursued by the House of Representatives on bills for the erection of public buildings, and will throw light on the purpose of the House Committee on Public Buildings and Grounds in striking out the appropriating clause in the bill under discussion. It will there be found that the conclusion reached was that no public-building bill should be allowed to pass containing an appropriation; that the matter of appropriations for the buildings whose construction was authorized should be left to the Appropriations Committee, to be included in the sundry civil bill. The Senate concurred in that plan, as will be found by reference to the Congressional Record, volume 21, part 5, pages 4188 and 4189, where, in discussion over the passage of a bill authorizing the erection of a public building at Lima, Ohio, Mr. Payne, in support of his amendment to the bill striking out the appropriating clause, in answer to Mr. Sherman's remark that "the words of appropriation ought to be left in," said: "No; the committee of conference have ageed, on the demand of the other House, to strike out all the appropriations in public-building bills, and all the bills that go to the House are amended in that way." Mr. Sherman: "And providing for the appropriations in a separate general bill?"

Many of the public-building bills passed by the Fifty-first Congress were prepared with an appropriating clause, and when this was stricken out, in accordance with the policy just adverted to, care was not always taken to strike out also, in subsequent clauses of the same bills, references to the eliminated appropriation. These clauses usually fixed the time at which parts of the appropriation should become available. The only effect which can be properly given to such references in public-building acts is to make them apply to appropriations for the purpose of carrying out the act *to be thereafter made.*

A consideration of other bills passed by this same Congress for the erection of public buildings, in connection with

the appropriations therefor in the sundry civil bill, leaves no doubt of the correctness of this construction. On page 66 of the Pamphlet Laws of the first session Fifty-first Congress is an act authorizing the construction of a public building at Baton Rouge, La. The third clause of that bill is:

"So much of the appropriation herein made as may be necessary to defray the expenses of advertising for proposals, etc., shall be immediately available."

The third clause is:

"So much of said appropriation as may be necessary for the preparation, etc., shall be available immediately upon the report of the commissioners selecting the site."

Other clauses of a similar character follow. Nevertheless, we find on page 371 of the sundry civil act for the same year an appropriation "for post-office at Baton Rouge, Louisiana; for purchase of site and commencement of building under present limit, thirty thousand dollars." It would be absurd to contend that the bill authorizing the construction and fixing the limit of $100,000 contained an appropriation of that amount, and that this appropriation of $30,000 in the sundry civil bill was in addition thereto. The two acts are only to be reconciled, therefore, on the theory that the first was not intended to carry an appropriation, as its parliamentary history will show, and that the reference to the appropriation made in the original act must be given effect by applying it to the appropriation under the sundry civil bill. The same thing is true of the acts authorizing the construction of public buildings at Martinsburg (Pamphlet Laws, Fifty-first Congress, first session, 127), at Lafayette, Ind., and at Burlington, Iowa, by the same Congress (Pamphlet Laws, pp. 111 and 107), appropriations for which will be found in the sundry civil act in the same volume (p. 371 *et seq.*) of the Pamphlet Laws.

The conclusion necessarily is, then, that there is no appropriation in the act now in question. The fact that Congress failed in the sundry civil appropriation act of 1891 to make any appropriation to which the language in this act can apply is not material.

The presumption arising therefrom must be that the Fifty-first Congress deemed it wise to delay the time for carrying out the act until a future Congress should make an appropriation therefor.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

ACTUAL BONA FIDE RESIDENCE.

A general rule applicable to all cases can not be formulated as to what constitutes bona fide residence under the act making, among other things, appropriation for expenses of Civil Service Commission, passed July 11, 1890, chapter 667. The purpose of the proviso of that paragraph of that act was to discriminate against persons who claim the benefit of such citizenship, and disclaim and fail to discharge any of the obligations of such State residence and citizenship.

DEPARTMENT OF JUSTICE,
April 1, 1891.

SIR: My opinion is asked as to the meaning of the words "*An actual and bona fide resident*" as used in the proviso of the paragraph of the act of Congress of July 11, 1890 (Pamphlet Laws, 1889–'90, p. 235), making an appropriation for the expenses of the Civil Service Commission. The proviso is in the following words:

"*Provided,* That hereafter every application for examination before the Civil Service Commission for appointment in the departmental service in the District of Columbia shall be accompanied by a certificate of an officer, with his official seal attached, of the county and State of which the applicant claims to be a citizen, that such applicant was, at the time of making such application, an actual and bona fide resident of said county, and had been such resident for a period of not less than six months next preceding; but this provision shall not apply to persons who may be in the service and seek promotion or appointment in other branches of the Government."

Just what constitues an actual bona fide residence is not

always easy of determination. That a man may have an actual bona fide residence in one place, and be bodily absent therefrom for months and even years together, is certainly true. That a Senator or Representative in Congress, or other Government official, who leaves his home in one of the States to live in the District of Columbia, or in a foreign country, during his official term, and with the purpose, whenever his public employment ceases, of returning to his original home, is continuously an actual bona fide resident at that home is not doubted. Such a person is liable to all the burdens of residence and citizenship at home. There he is liable to a poll tax; there his personal property is assessed for taxation; there he should be enrolled in the census; there in case of war he would be liable to military duty, and there in case of death would be the administration of his estate.

On the other hand, a person who leaves his home in one of the States, and, with his family, makes a home and engages in business, public or private, in the District of Columbia, or elsewhere, denies his liability to enrollment for any purpose at his former State home, is not there listed for taxation, and recognizes no obligations of domicile there, is certainly not an actual bona fide resident at that place within the meaning of the statute under consideration. The fact that such a person might still claim (a claim of very doubtful validity) the right to vote in the State from which he came would not make him a proper applicant for the examination provided for in this section.

In my opinion it was the purpose of this act to discriminate against persons of the latter class—persons who claim the benefit of State citizenship, and disclaim or fail to discharge any of the obligations of such State residence and citizenship.

In brief, what constitutes actual bona fide residence under this statute, as in other cases, is a mixed question of law and fact to be determined in each instance upon its own peculiar facts. A general rule applicable to all cases can not be formulated. The foregoing suggestions indicate the principle to be applied.

Respectfully yours,

W. H. H. MILLER.

The PRESIDENT.

SEAL FISHERIES—RENTAL—INTERPRETATION OF LEASE.

Where a lease to a company of the privilege of taking fur seals on certain islands contains an unconditional promise to pay $60,000 a year rent and an express stipulation that the limit for the first year shall be 60,000 seals, but the intention of both parties to the lease was that 100,000 seals should remain the standard catch, and that 60,000 named for the first year was merely a reduction below the standard catch, and it was mutually understood that the rental of $60,000 was to be but sixth-tenths of $60,000 for the first year, the Secretary of the Treasury is authorized, without the intervention of the courts, to put this construction upon the lease even if at variance with its strict legal interpretation, and to regulate the payment of rent accordingly.

DEPARTMENT OF JUSTICE,
April, 1, 1891.

SIR: Your letter of the 28th ultimo referring to the opinion heretofore rendered by this Department as to the proper construction of certain portions of the law governing the right to take fur seals on the islands of St. Paul and St. George, in Alaska, is received. You state that, in one respect, the question submitted by your Department was misapprehended; that you desire the opinion of the Attorney-General whether or not it would be in violation of law to reduce the yearly rent agreed to be paid by the North American Commercial Company in proportion to the reduction of the catch in any year below 100,000 seals, in view of the fact that 100,000 has been from the beginning regarded as the standard catch upon which all calculations have been based; that your Department considers such reduction required by the equities of the case and the understanding which prevailed when the lease was made; and that the naming of 60,000 skins in the lease was intended only to make it clear that, in accordance with the published call for proposals, a full catch of 100,000 would not be permitted the first year.

The question submitted involves the construction of the lease with the North American Company made July 1, 1890, a copy of which accompanied your first request for an opinion. In answer to that request, the opinion was expressed that the feature of section 1962 under which the Secretary of the Treasury was given power to reduce the rents reserved under the lease, dated July 1, 1870, in pro-

portion to the reduction made by him in the limit of seals to be killed below 100,000, was, by implication, a term of that lease; and that, because under the law the subsequent lease, dated July 1, 1890, was to be similar in its terms, the same term was implied therein with respect to any reduction below the limit of 60,000 seals which was named in the lease. It was thought that as there was an unconditional promise in the lease to pay $60,000 a year rent, and an express stipulation that the limit for the first year should be 60,000 seals, the two provisions could only be reconciled on the theory that 60,000 was the standard catch on the basis of which the lease was negotiated.

If, however, as you state, the intention of both parties to the lease was that 100,000 seals should remain the standard catch, and the 60,000 seals named for the first year's catch was merely a reduction by the Secretary below the standard catch, which was then mutually understood to have the effect of reducing the rent for the first year to six-tenths of $60,000, a court of equity would reform the lease to clearly express these terms. You are authorized as the representative of the United States, without the intervention of a court, to put such construction upon the lease, even if at variance with its strict legal interpretation, as will give effect to the common intention of the lessor and lessee in executing the same. You may, therefore, treat the standard catch as 100,000 seals and regulate the payment of rent accordingly.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

REVOCATION OF ORDER REVOKING A SELECTION FOR APPOINTMENT.

Where the head of a Department revokes a selection for appointment and advises the Civil Service Commission of such revocation, it is not permissible under civil service legislation and rules for him to revoke his order revoking the selection for appointment, withdraw his notice to the Commission of the revocation, and appoint the party previously certified by the Commission and selected for appointment without further certification. This is so, although through a misrepresentation a wrong has been done to the party selected for appointment. *Semble:* There might be a remedy to the parties by the President, who made the rules waiving them, to avoid injustice in the particular case.

DEPARTMENT OF JUSTICE,
April 8, 1891.

SIR: You submit for an opinion the following statement of facts with the question of law arising thereupon, sent to you by the Civil Service Commission, namely:

"The name of Mrs. Lucie A. Brown, of North Carolina, having, on August 30, 1889, been entered upon the copyist eligible register of that State as the result of an examination taken by her, was duly certified on the 23d August, 1890, with two other names from the same register, to the Secretary of the Treasury, in accordance with the provisions of Departmental Rule VII, to enable him to make an appointment as a substitute clerk in Class A, at $600 per annum, in the office of the Light-House Board. Mrs. Brown was selected for appointment, and a notice to this effect, requesting her to report for duty not later than August 30, 1890, was sent August 25 to 'Miss' Lucie A. Brown, Greenville, N. C. No response being received to this notice, the Department on September 4 notified Mrs. Brown, by a communication addressed in the same manner, that, having failed to report for duty as directed, her selection for appointment was revoked, and on the same day advised this Commission to that effect, stating that Miss A. S. Rhodes, then serving as a substitute, had been transferred to the place intended for 'Miss' Brown, as the principal for whom she, Miss Rhodes, was serving would return to duty. In the meantime, namely, on August 30, Mrs. Brown's period of eligibility expired, and after that date she was not eligible to be certified for any place.

"The communication of the Secretary of the Treasury of August 25, to 'Miss' Brown was remailed from Greenville,

N. C., to her at '227 Indiana avenue, Washington City, D. C., and was received in this city, according to the postmark on the envelope, on November 30, 1890. The letter of September 4 was also forwarded to the same address in this city, and probably reached here at the same time, although there is no postmark to show the date of its arrival in Washington.

"On the 8th of December Mrs. Brown notified the Treasury Department by letter that she had received the notice of selection for appointment of August 25, and the notice of revocation of September 4, stating that it was through no fault of hers that she did not report for duty, as these papers did not reach her until November 30, 1890, having been detained somewhere, she was unable to say where, and asking for early consideration of the matter.

"On December 9 the Secretary of the Treasury, in making requisition for a certification to enable him to appoint a substitute clerk in the office of Internal Revenue, transmitted the letter of Mrs. Brown of December 8 and the notices referred to therein, and requested that if it could properly be done Mrs. Brown's name be included among those to be certified. Her name was not certified because, first, North Carolina was not then in the order of apportionment entitled to an appointment; and, second, her period of eligibility had expired.

"Since these occurrences took place the question has been raised whether or not the Secretary of the Treasury may now lawfully revoke his order of September 4 revoking Mrs. Brown's selection for appointment, withdraw his notice to the Commission of this revocation, and appoint Mrs. Brown to a place in the Treasury Department without further certification. On this question the Commission is divided in opinion, and desires to have it submitted to the Attorney-General for his opinion therein, the facts being as stated, and it being conceded that Mrs. Brown's failure to receive the notice of her selection for appointment was not through any fault or neglect on her part, but probably resulted from the error of the Treasury Department in addressing the notice to "Miss" instead of Mrs. Lucie A. Brown, and the failure of the postmaster at Greenville to forward the letter to Mrs. Brown at her address in this city, which had been left with him."

After the revocation by the Secretary of the Treasury of his order selecting Mrs. Brown for the position to which Miss. Rhodes was appointed, it seems clear that Mrs. Brown stood in the same position as the other eligibles whose names were certified with hers; like them she had been certified, but not appointed.

The case of Mrs. Brown is a hard one, and strongly appeals to the sympathy of the appointing power, and I must acknowledge that I regret I can not say that, in my opinion, the Secretary of the Treasury could repair the unintentional wrong done this lady by revoking his past action to her prejudice, and appointing her to a position in the classified departmental service.

But, in my judgment, there are weighty reasons why such a course would be inadmissible under the civil-service legislation and rules.

First, it might result in the appointment of a person whose term of eligibility, under clause 10 of Departmental Rule VI, had expired, as in fact is the case with Mrs. Brown; secondly, it might result in giving the State to which the appointee belonged more than its lawful quota of appointments, and such, we are informed, would be the result of Mrs. Brown's appointment at this time; and, thirdly, it might result in the appointment of a person over the heads of others of higher standing on the same register, whose names had been added since the appointee's name was certified and who would have been certified to the appointing power, if the Commissioners of the Civil Service had been applied to for the usual certificate.

These reasons are sufficient, in my judgment, to show that Mrs. Brown is not strictly eligible for appointment to the classified departmental service without a new certification of her name made on the application of the appointing power.

This lady has suffered through what seems to have been the fault of the Government. It would seem that a remedy might be furnished by the President, who made the rules, waiving them to avoid injustice in the particular case.

Very respectfully yours,

W. H. H. MILLER.

The PRESIDENT.

ROCK CREEK PARK—DUTY OF COMMISSION.

Where an act provides for the acquisition of land for a public park not to exceed 2,000 acres, at a total cost not to exceed $1,200,000, and the park commission appointed by the act has assessed the value of the land proposed to be taken at $830,000, but fears that it will be unable to agree with all property-owners to accept its estimate of value, and that if forced to institute condemnation proceedings the judicial assessment upon the lots not purchased by agreement may be so large as to make the cost exceed the limit of the appropriation, it is still the duty of the commission to perform its duty under the statute; and should the judicial award and expenses of obtaining the land exceed the limit of the appropriation, it will be in its power, exercising its discretion, to pay for the land most to be desired, in view of the impossibility of acquiring all included in its map.

DEPARTMENT OF JUSTICE,
April 10, 1891.

SIR: In obedience to your direction I beg to submit the following views upon the letter of Gen. Casey, chairman of the commission, for the purpose of establishing a public park on Rock Creek, in the District of Columbia, under an act of Congress passed September 17, 1890 (Pamphlet Laws, p. 492), in which he presents for your consideration a dilemma that the commission anticipate as possible in the execution of the act. Stated in brief, the difficulty is this:

The first section of the act directs the establishment of the park, with the following proviso:

"*Provided*, That the whole tract so to be selected and condemned under the provisions of this act shall not exceed two thousand acres, nor the total cost thereof exceed the amount of money herein appropriated."

The amount appropriated in the act for the payment of all expenses, including the cost of the land, was $1,200,000.

The subsequent sections of the act provide that the commission shall select the land for the park, and shall make an accurate map of the same, with the names of the owners; shall fix a just compensation for the various lots, to be approved by the President; and that upon the filing of the map in the public records of the District, the land so selected shall be taken as condemned for public purposes and the title thereto vested in the United States, if the owners of the land accept the compensation fixed. In the event that in thirty

days after the filing of the map an agreement is not reached with the owners for any of the lots in the map, it then becomes the duty of the Commissioners to institute proceedings in the supreme court of the District of Columbia for an assessment of the land selected and not purchased by agreement. The land has been selected, the map prepared and filed, and the compensation aggregates $830,000 as fixed by the Commissioners, being $350,000 below the limit fixed for the cost in the act. The Commissioners fear that only part of the owners of the land will agree to accept the compensation fixed by them, with your approval; and that in order to acquire title to the remainder they will be obliged to go into court, as in the act provided, and that the judicial assessment upon the lots not purchased by agreement may be so large as to bring the entire cost of the land above the limit of the appropriation fixed in the act, and so violate the proviso of the first section.

I do not see that the difficulty thus anticipated, which may or may not be a real one when the assessment in court is had, should prevent the commission from executing their plain duty under the statute. So far as they are concerned, and as far as their responsibility extends, the limit of cost for the park by them selected is very considerably under the amount appropriated in the act. The third section contemplates that they shall fix a price to be approved by you on each lot, and that if this shall be accepted by the lot owners the purchase shall be made. There is no suggestion in the language of the act that the purchase by agreement enjoined upon the commission is to be conditional. The terms used exclude any other idea than that of absolute purchase. The proviso in the first section as to the acres to be purchased is of course absolute. As to the payment of money it is also absolute, because no more than that appropriated in the act can be paid. But it would be going too far to say that the proviso is such a condition precedent as to nullify all the work of the commission, if it should turn out that by the uncertain assessment in the judicial proceedings the cost of the land selected should exceed $1,200,000. If it does, it will require further Congressional action. I am of the opinion that if the assessed value of the land in the court proceedings exceeds the limit, the commission may exercise its

discretion to pay for that land which in their opinion is most to be desired, in view of the impossibility of acquiring all that they have included in their map. Whether the failure to acquire all included in the map by reason of the limit of the appropriation would invalidate the local assessments upon adjoining lot owners, provided for in the subsequent sections of the act, is not a question mooted, and could not, I think, affect the plain duty of the Commissioners in the premises.

Very respectfully,

WM. H. TAFT,
Acting Attorney-General.

The PRESIDENT.

SUPERINTENDENT OF IMMIGRATION AND HIS ASSISTANTS—SALARIES.

The salaries of the Superintendent of Immigration and of his clerical assistants authorized by section 7 of the act of March 3, 1891, chapter 551, may be paid by the Secretary of the Treasury out of the immigration fund created under section 1 of the act of August 3, 1882, chapter 376.

The salaries of the inspectors of immigration appointed under the second paragraph of section 8 of said act of 1891, may be paid in the discretion of the Secretary of the Treasury out of the immigrant fund or out of the immigration appropriation of the sundry civil act of 1891.

The power vested in the Secretary of the Treasury by section 2 of the act of August 3, 1882, chapter 376, to contract with commissions, boards, or other legal officers of immigration designated by the governor of any State, is withdrawn by the provisions of said act of March 3, 1891.

In so far as the later act is an amendment of the former the two acts are to be construed together as one act, and one part is to be interpreted by the other.

DEPARTMENT OF JUSTICE,
April 15, 1891.

SIR: Your communications dated respectively March 28 and April 8, calling for my opinion upon specified questions arising under the immigration and contract-labor laws, have been received and considered.

The first question presented is, whether the salaries of the Superintendent of Immigration, his chief clerk, and the two clerks of class 1, authorized by section 7 of the act of March 3, 1891 (an act in amendment of the various acts, etc.), may

be paid out of the "immigration fund" created under section 1 of the act of August 3, 1882 (22 Stat., 214), entitled "An act to regulate immigration."

The second question is, as to what moneys or fund such inspectors as may be appointed under the second paragraph of section 8 of said act of 1891 shall be paid.

The third question is, whether the power to contract with State commissions, boards, or officers given by section 2 of said act of August 3, 1882, is repealed by the provisions of said act of 1891.

The act of August 3, 1882, provides as follows:

"There shall be levied, collected, and paid a duty of fifty cents for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States."

It is then enacted that—

"The money thus collected shall be paid into the United States Treasury, and shall constitute a fund to be called the immigrant fund, and shall be used, under the direction of the Secretary of the Treasury, to defray the expense of regulating immigration under this act, and for the care of immigrants arriving in the United States, for the relief of such as are in distress, and for the general purposes and expenses of carrying this act into effect."

The duty imposed is made a lien, and a debt, and payment thereof may be enforced.

Section 1 concludes with the following proviso:

"*Provided*, That no greater sum shall be expended for the purposes hereinbefore mentioned, at any port, than shall have been collected at such port."

By section 2 the Secretary of the Treasury is charged with the duty of executing the provisions of the act and with supervision over the business of immigration to the United States:

"And for that purpose he shall have power to enter into contracts with such State commission, board, or officers as may be designated for that purpose by the governor of any State to take charge of the local affairs of immigration in the ports within said State, and to provide for the support and relief of such immigrants therein landing as may fall into distress or need public aid, under the rules and regula-

tions to be prescribed by said Secretary," and such commission, board, or officers are authorized to board vessels and examine passengers and to report any convict, lunatic, idiot, or any person unable to take care of himself or herself, to the collector, and such person shall not be permitted to land.

By section 3 the Secretary of the Treasury is authorized to establish regulations and rules and issue instructions "calculated to protect the United States and immigrants coming into the United States from fraud and loss, and for carrying out the provisions of this act and the immigration laws of the United States."

Section 4 provides for the sending back of foreign convicts, convicted of other than political offenses, at the expense of the vessel owners.

The act of February 26, 1885 (23 Stat., 332), known as the "Alien contract-labor act," applies to one class of immigrants, to wit, to aliens who came under a contract made to perform labor in the United States.

Section 1 prohibits the assistance or encouragement of the importation or immigration of aliens under any preexisting contract or agreement, parol or special, express or implied, to perform labor or service in this country.

Section 2 declares all such agreements with aliens hereafter made previous to their migration or importation to be void.

Section 3 provides penalties to which those violating section 1 shall become liable.

Section 4 enacts the penalties that the master of a vessel shall be subject to for knowingly bringing in any immigrant who comes under contract to perform labor.

Section 5 provides saving clauses applicable in specified cases.

The act of February 23, 1887 (24 Stat., 414), is an amendment to the last-mentioned act and adds several sections thereto. By added section 6 the Secretary of the Treasury is charged with the duty of executing the provisions of the act, "and for that purpose he shall have power to enter into contracts with such State commission, board, or officers as may be designated," etc.; and such contractee shall examine passengers arriving at any port in any vessel and report any

passenger included in the prohibition in this act "to the collector of such port, and such persons shall not be permitted to land."

By section 7 the Secretary of the Treasury is directed to establish regulations and rules, and issue instructions to carry out the provisions of the act.

Section 8 provides for the return of prohibited persons to the nations whence they came, which shall be done under regulations to be prescribed by the Secretary of the Treasury.

The act of March 3, 1891 (Public—No. 152), manifestly amends and supplements the above-mentioned laws.

The title is—

"An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor."

Section 1 excludes the following classes from admission as immigrants into the United States, viz:

"All idiots, insane persons, paupers, or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another or who is assisted by others to come, unless it is affirmatively and satisfactorily shown on special inquiry that such person does not belong to one of the foregoing excluded classes, or to the class of contract laborers excluded by the act of February twenty-sixth, eighteen hundred and eighty-five."

This exclusion is to be in accordance with the existing acts regulating immigration, and is in addition to the Chinese exclusion, but is so limited as not to prevent a person living in the United States from sending for a relative or friend who is not of the excluded classes; and it does not apply to those who are merely political offenders.

Section 3 provides, in substance—

"That it shall be deemed a violation of said act of February twenty-sixth, eighteen hundred and eighty-five, to assist or encourage the importation or migration of any alien by promise of employment through advertisements printed and published in any foreign country; and any alien coming to

this country in consequence of such an advertisement shall be treated as coming under a contract as contemplated by such act."

Section 4 restricts the solicitation and encouragement of immigration by transportation companies and applies penalties therefor.

The seventh section of the act of 1891 is as follows:

"SEC. 7. That the office of Superintendent of Immigration is hereby created and established, and the President, by and with the advice and consent of the Senate, is authorized and directed to appoint such officer, whose salary shall be four thousand dollars per annum, payable monthly. The Superintendent of Immigration shall be an officer in the Treasury Department, under the control and supervision of the Secretary of the Treasury, to whom he shall make annual reports in writing of the transactions of his office, together with such special reports, in writing, as the Secretary of the Treasury shall require. The Secretary shall provide the Superintendent with a suitably furnished office in the city of Washington, and with such books of record and facilities for the discharge of the duties of his office as may be necessary. He shall have a chief clerk, at a salary of two thousand dollars per annum, and two first-class clerks."

Section 8 provides for the reporting and examination of all immigrants coming by water, before they are landed; during inspection they may be cared for by the Superintendent and an adverse report by the inspection officers, as to the right to land, "shall be final unless appeal be taken to the Superintendent of Immigration, whose action shall be subject to review by the Secretary of the Treasury."

It is further enacted:

"That the Secretary of the Treasury may prescribe rules for inspection along the borders of Canada, British Columbia, and Mexico, so as not to obstruct or unnecessarily delay, impede, or annoy passengers in ordinary travel between said countries: *Provided*, That not exceeding one inspector shall be appointed for each customs district, and whose salary shall not exceed twelve hundred dollars per year."

And said section concludes with the following paragraph:

"All duties imposed and powers conferred by the second section of the act of August third, eighteen hundred and

eighty-two, upon State commissioners, boards, or officers acting under contract with the Secretary of the Treasury shall be performed and exercised, as occasion may arise, by the inspection officers of the United States."

Sections 10 and 11 provide for the return of aliens unlawfully coming to the United States, at the expense of those who brought them, if that can be done; and if it can not be so done, then at the expense of the United States.

It is established law that the United States has, in common with all independent nations, the right to exclude from all territory within the national boundaries such aliens and foreigners as the law-making power sees fit, by proper enactment, to exclude.

An examination of the foregoing epitomes of the laws under consideration leads to the conclusion that Congress intended to exclude from this country certain specified classes of immigrants, and has enacted a system of laws prescribing a procedure of exclusion.

These acts are to be considered together and, unless some fatal defect be found, they are to be so construed as to secure the result intended by their enactment and in the manner that Congress intended.

In response to a communication received from your predecessor in office I had the honor of expressing my views upon certain sections of the act of August 3, 1882 (19 Opin., 486), and then held that the Secretary of the Treasury is not confined to the agencies mentioned in sections 2 and 4 of that act, and that he might adopt other appropriate means for carrying out the objects of the statute.

It is also held in that opinion that the act places the primary responsibility for the execution of its provisions upon the Secretary of the Treasury, and that the propriety of the use or employment of State commissions or boards is to be determined by the Secretary as a matter of discretion only; and, in conclusion, it is determined "that the Secretary is not restricted in the carrying out of the provisions of this act to the agencies mentioned in the second and fourth sections; that it is within his discretion whether he will use them or not."

By the act of February 23, 1887 (which amends the act of 1885), the Secretary of the Treasury is charged with a similar

duty as to the enforcement of the "alien contract-labor" law, and is given similar authority to contract with State commissions, boards, and officers, as appears in the act of 1882, in relation to the immigrants there designated; and the same primary responsibility and discretionary power must be held to be his.

The capitation tax directed by the act of 1882 provides the immigrant fund which goes into the Treasury and is to be used under the direction of the Secretary. One use specified is to defray the expense of regulating immigration under the act; another use is for the general purposes and expenses of carrying the act into effect. One of the specified purposes of the act is to exclude every convict, lunatic, idiot, or person unable to take care of himself or herself. The act of 1885 excludes an additional class of immigrants. The act of 1887 amplifies the powers of the Secretary of the Treasury and assimilates them to those given him under the act of 1882. The act of October 19, 1888 (25 Stat., 567), gives him still further powers.

The sundry civil appropriation act of 1889 (25 Stat., 957) indicates a Congressional construction which links the immigration acts together, appropriating as follows:

"For the purpose of carrying into effect the provisions of the alien contract-labor law approved February 26, 1885, as amended by the acts approved February 23, 1887, and October 19, 1888, and to defray the expenses which the Secretary of the Treasury is authorized to incur by the provisions of the last-named act, fifty thousand dollars, or so much thereof as may be necessary, to be paid out of the 'immigrant fund' provided for in the act of August second, 1882, entitled 'An act to regulate immigration.'"

Then follows the act of March 3, 1891, amending and extending the acts which preceded it. In determining the present state of the law it is necessary to consider the acts together.

In so far as the later act is an amendment of the former, they are to be construed together as one act, and one part is to be interpreted by another. (*United States* v. *Central Pacific R. R. Co.*, 118 U. S., 239, and cases cited.)

The enactment of 1882 provides the fund, subsequent legislation and executive application have recognized its gen-

eral uses; the amending act of 1891 creates the office of Superintendent of Immigration, authorizes an appointment of the officer, fixes his salary, and provides three clerical assistants.

The duties of the superintendent are not very clearly defined, but he is constituted an officer of the Treasury Department and is placed under the control and supervision of the Secretary of the Treasury. The inference is not only fair but necessary that he is to aid and assist, under the direction of the Secretary, in carrying the act of August 3, 1882, and the connected laws into effect.

The proviso in the act of 1882 "that no greater sum shall be expended for the purposes hereinbefore mentioned, at any port, than shall have been collected at such port," is a limitation upon the amount that may be expended at any port, but does not constitute the fund a mere aggregation of local funds or prohibit the expenditure of its moneys for other or general purposes of carrying the act into effect. While the act of 1891 (as well as the provision under which the present immigrant inspectors have been appointed) lacks definiteness as to the appointment, yet, as the Secretary of the Treasury is charged with the execution of the immigration laws, and is required to enforce them, he is authorized to employ the requisite means provided by Congress for so doing, and it does not appear that he is restrained from using either the moneys of the "immigration fund" or those of the $90,000 appropriated for immigration purposes by the sundry civil act of 1891.

In my opinion the Superintendent of Immigration and his clerical assistants may be paid out of the "immigrant fund" created under section 1 of the act of August 3, 1882.

It is my opinion, also, that such inspectors as you may find it necessary to appoint to carry these laws into effect may be paid, in your discretion, out of the immigrant fund, or out of the immigration appropriation of the sundry civil act of 1891.

I answer your third question by saying that, in my opinion, the power to enter into new contracts with State commissions, boards, or officers is withdrawn. It is evident that Congress intended to provide for the employment of immigration officials who will be under the direct control of the Secretary of the Treasury, but their immediate employment is not required.

It does not appear that the necessary inspection officers are directly provided for by law, excepting in districts adjacent to foreign contiguous territory, and I am advised that in those districts no State contracts have been made.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

DUTY ON REFINED SUGAR IMPORTED SINCE APRIL 1, 1891.

Where refined sugar manufactured in this country from raw sugar imported under the tariff act of 1883 was exported before April 1, 1891, with a drawback of the duties collected on the importation, and was imported after April 1, 1891, the importation is subject to duty to the full amount of the drawback allowed on the sugar on its exportation.

DEPARTMENT OF JUSTICE,
April 17, 1891.

SIR: I have considered your request for an opinion as to the rate of duty leviable on a certain importation since April 1, instant, of refined sugar manufactured in this country from raw sugar imported under the tariff of 1883, and exported before April 1, 1891, with a drawback of the duties assessed and collected on the importation.

It seems to me that there is no way of avoiding the conclusion that the said importation of sugar must pay duty to the full amount of the drawback allowed on this sugar on its exportation.

The first proviso of paragraph 493 (T. I.) of the act of October 1, 1890, declares "that this paragraph shall not apply to any article upon which an allowance of drawback has been made, the reimportation of which is hereby prohibited, except upon payment of duties equal to the drawbacks allowed, or to any article manufactured in bonded warehouse and exported under any provision of law."

I do not see how it is possible, on any known rule of interpretation, to say that the drawback referred to in this proviso means duties levied under the act of October 1, 1890, only, and has no reference to duties levied under the tariff act of March 3, 1883. In my view, the language of the proviso is

as applicable to duties levied under the one act as under the other.

To restrict the proviso to duties levied under the act of October 1, 1890, upon a supposed ground of inconvenience or hardship, and thus deny the language of the proviso its natural sense, would be, in my judgment, to introduce a principle which would require the courts, in interpreting tariff laws, to consider questions of expediency and political economy that are proper to be considered by Congress alone.

Because Congress has, by the present tariff, admitted refined sugar manufactured *abroad* at a half a cent per pound, the inference is by no means a *necessary* one that it was intended that refined sugar made *in this country* from raw material *imported* under the tariff of 1883 and exported with drawback and imported since April 1, 1891, should be admitted at the same rate of duty. The conditions are not the same in the two cases, and how can it be said, with certainty, that Congress must have intended to apply the same rule to both cases? The only safe course seems to be to refrain from speculation as to possible legislative intent and give the words of the law their ordinary meaning.

It is, furthermore, hardly reasonable to suppose that it would have been left for the courts to restrict the meaning of the proviso if Congress had intended that the language used should not be taken as applicable to all exportations with drawback. On the other hand, as several months were to intervene between the enactment of this statute and the date of its full effect, on the 1st of April, it may well have seemed to Congress proper, by this proviso, to prevent the manipulation of the market by exportations for drawback with the purpose of reimportation after April 1. At any rate, it is sufficient to say *ita lex scripta est.*

Respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

INSANE ALIEN IMMIGRANT.

The Secretary of the Treasury is authorized to permit an insane alien immigrant to land in this country upon receiving a satisfactory bond that the immigrant will not become a public charge and that the country shall be protected against loss by reason of her coming here. (18 Opinions, 500, followed.)

DEPARTMENT OF JUSTICE,
April 29, 1891.

SIR: Your inquiry of yesterday calls for my opinion as to whether Fannie Schinkin, an insane alien immigrant, aged 17 years, who arrived from a European port the 27th instant, accompanied by her parents and brothers and sisters, may be permitted to land.

You state that the relatives of the lunatic claim to be able and willing to furnish a satisfactory bond as security that the said lunatic shall never become a public charge.

You ask whether you are authorized by law to accept such a bond and permit the insane person to land.

By section 2 of "An act to regulate immigration," passed August 3, 1882 (22 Stat., 214), it is provided that alien passengers arriving at ports of the United States shall be examined.

"And if, on such examination, there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge, they shall report the same in writing to the collector of the port, and such persons shall not be permitted to land."

Section 3 of said act is as follows:

"SEC. 3. That the Secretary of the Treasury shall establish such regulations and rules and issue from time to time such instructions, not inconsistent with law, as he shall deem best calculated to protect the United States and immigrants into the United States from fraud and loss, and for carrying out the provisions of this act and the immigration laws of the United States; and he shall prescribe all forms of bonds, entries, and other papers to be used under and in the enforcement of the various provisions of this act."

The act of March 3, 1891, adds additional classes to the excluded list, but provides that the exclusion shall be "in

accordance with the existing acts regulating immigration, other than those concerning Chinese immigration." It therefore follows that section 3 of the act of 1882 remains in force.

Under date of November 6, 1886, Mr. Attorney-General Garland communicated to the Secretary of the Treasury his opinion upon a case substantially similar to the one now under consideration (18 Opin., 500). He there decides that an alien residing in Brooklyn, N. Y., can be permitted to bring his lunatic son from a foreign country upon engaging in a satisfactory manner that the lunatic shall not become a public charge. It must be held that Congress was aware of this construction put upon the law of 1882 when it enacted that of 1891, and that it assented to that construction.

As the case submitted to me is presented, Fannie Schinkin is an insane person of tender years, who comes to this country with her family, who come in good faith as immigrants.

I infer that all of the members of the family except this unfortunate child are unobjectionable under the laws.

Under the existing circumstances, and until further Congressional legislation, I do not think that this person is absolutely excluded from coming into the country.

Upon receiving a satisfactory bond that this person shall not become a public charge, and that the country shall be protected against loss by reason of her coming here, and upon a compliance with such rules and regulations as you may make in the premises, you will, in my opinion, be authorized to permit her to land.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

DUTIES BASED UPON WEIGHT.

The second proviso in section 50 of the tariff act of October 1, 1890, providing that when duties are based upon the weight of merchandise deposited in any public or bonded warehouse, said duties shall be levied and collected upon the weight of said merchandise at the time of its withdrawal, applies to importations under the act generally upon which duties are levied by law, and not merely to importations made prior to the taking effect of the act.

Duties based upon Weight.

While there is a general rule of construction to the effect that a proviso is to be construed as limiting legislation to the subject-matter with which it is immediately connected, this rule is by no means of universal application.

DEPARTMENT OF JUSTICE,
May 4, 1891.

SIR: I have the honor to acknowledge the receipt of your letter of the 28th ultimo, asking a construction of the second proviso in section 50 of the tariff act of October 1, 1890. That section reads as follows:

"That, on and after the day when this act shall go into effect, all goods, wares, and merchandise previously imported for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty, and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty upon the entry or the withdrawal thereof than if the same were imported respectively after that day: *Provided*, That any imported merchandise deposited in bond in any public or private bonded warehouse having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-one, upon the payment of duties at the rates in force prior to the passage of this act: *Provided, further*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal."

The question submitted is whether the second proviso is confined in its application to the subject-matter of the section in which it is found, namely, importations made prior to the taking effect of this act, or whether it applies to importations under the act generally, upon which duties are levied according to weight. In my opinion the latter is the correct construction. The language of the proviso is general, and, independently of the fact that it is found in section 50, a construction limiting it to the subject-matter of that section would have no support. It is true there is a general rule of construction to the effect that a proviso is to be construed as limiting legislation to the subject matter with which it is

immediately connected; but this rule is by no means of universal application. The enactment of general legislation by Congress in provisos to acts relating to particular subjects is not uncommon.

Thus, in the sundry civil act of August 7, 1882 (22 Stat. L., 305), after a number of appropriations for the purchase of sites for public buildings, we find the following:

"*Provided*, That no act passed authorizing the Secretary of the Treasury to purchase a site and erect a public building thereon shall be held and construed to appropriate money, unless the act in express language makes such appropriation."

It is clear that this proviso is general, and not limited to the appropriations in the act in which it is found. Other provisos with similar effect might be cited. I am aware that under former tariff acts the rule has been to levy duties upon weighable merchandise according to the weight at the date of importation, but this proviso seems to be intended to change that rule, and there seems to be sufficient reason for such change. To limit the effect of this proviso to the subject matter of section 50 would be to discriminate in favor of importations made prior to the taking effect of this act as against importations under the act. Such construction would not only put prior importations upon an equality with importations under the act as to rate, but would give them an advantage in the matter of weight. Such intention is not to be presumed.

Moreover, there seems to be no reason why the duty should not be levied according to the weight when the importation is actually consummated by taking the goods out of bond for consumption. During all the time the goods are held in bond they are at the expense of the importer; the interest on the investment, the charges for warehousing and insurance are all paid by him, and no reason is apparent why he should not have the corresponding benefit, if there be a benefit, resulting from the delay within the limits prescribed by law in the final act of importation. At least legislation to that end seems reasonable, and such appears to me to be the effect of this proviso.

Respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ARTIFICIAL LIMBS—COMMUTATION INTO MONEY.

An amendment of March 3, 1891, to section 4787 of the Revised Statutes having provided that soldiers and seamen wounded in the rebellion, who had been entitled to receive artificial limbs every five years, shall now receive the same every three years, and a question having arisen as to whether sections 4788 and 4790 of the Revised Statutes providing for a money commutation in place of said limb stood in the same relation to the amended section 4787 as to the original section and whether now such money commutation can be had every three years, it is decided that it can be had.

The word "thereafter," now appearing in section 4787 of the Revised Statutes refers not to July 17, 1870, but to the time when the artificial limb shall have been furnished after that date; consequently the periods of three years run from the time when such limb was furnished, and not from July 17, 1870.

DEPARTMENT OF JUSTICE,
May 4, 1891.

SIR: Section 4787 of the Revised Statutes provides as follows:

"Every officer, soldier, seaman, and marine who was disabled during the war for the suppression of the rebellion, in the military or naval service, and in the line of duty, or in consequence of wounds received or disease contracted therein, and who was furnished by the War Department, since the seventeenth day of June, eighteen hundred and seventy, with an artificial limb or apparatus for resection, or who was entitled to receive such limb or apparatus since said date, shall be entitled to receive a new limb or apparatus at the expiration of every five years thereafter, under such regulations as have been or may be prescribed by the Surgeon-General of the Army. (The provisions of this section shall apply to all officers, noncommissioned officers, enlisted and hired men of the land and naval forces of the United States who, in the line of their duty as such, shall have lost limbs or sustained bodily injuries depriving them of the use of any of their limbs, to be determined by the Surgeon-General of the Army; and the term of five years herein specified shall be held to commence in each case with the filing of the application for the benefits of this section.)"

On March 3, 1891, Congress passed the following act, amending section 4787, to wit:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That

section forty-seven hundred and eighty-seven of the Revised Statutes of the United States be amended by striking out the word 'five' where it occurs therein, and inserting in lieu thereof the word 'three,' so that when amended said section will read as follows: Every officer, soldier, seaman, and marine who was disabled during the war for the suppression of the rebellion in the military or naval service, and in the line of duty, or in consequence of wounds received or disease contracted therein, and who was furnished by the War Department since the seventeenth day of June, eighteen hundred and seventy, with an artificial limb or apparatus for resection, who was entitled to receive such limb or apparatus since that date, shall be entitled to receive a new limb or apparatus at the expiration of every three years thereafter, under such regulations as have been or may be prescribed by the Surgeon-General of the Army."

Section 4788 of the Revised Statutes provides as follows:

"Every person entitled to the benefits of the preceding section may, if he so elects, receive, instead of such limb or apparatus, the money value thereof, at the following rates, namely: For artificial legs, seventy-five dollars; for arms, fifty dollars; for feet, fifty dollars; for apparatus for resection, fifty dollars."

Section 4790 of the Revised Statutes provides as follows:

"Every person in the military or naval service who lost a limb during the war of the rebellion (or is entitled to the benefits of section forty-seven hundred and eighty-seven), but from the nature of his injury is not able to use an artificial limb, shall be entitled to the benefits of section forty-seven hundred and eighty-eight, and shall receive money commutation as therein provided."

The following questions, arising upon this legislation, have been submitted by you for an opinion, namely:

First. Whether sections 4788 and 4790 stand in the same relation to section 4787, *as amended*, as they stood to that section before the amendment. In other words, the question is, whether the commutation in money for an artificial limb or apparatus can be claimed now every *three* years instead of every *five?*

It seems to me quite clear that sections 4788 and 4790 give the right to the commutation for artificial limbs or apparatus

upon the same terms as the right to artificial limbs or apparatus themselves is given by section 4787, *as that section may stand*, at the time any application for commutation money is made.

If this view be sound, it follows that, as an artificial limb or apparatus is demandable under section 4787, as amended, every three years, instead of every five, the money commutation for such limb or apparatus is also demandable every *three* years.

The language of section 4788 compels this interpretation. It declares that "every person entitled to the benefits of the preceding section may, if he so elects, receive, *instead of such limb or apparatus*, the money value thereof, at the following rates," etc., by which it clearly appears that the money value of the limb is demandable at *whatever* time the limb itself is demandable. It can not be that Congress intended that the limb should be demandable every three years, but "the money value thereof" every *five* years only. The words of the law will bear no such construction.

Second. The next question is, whether the said act of March 3, 1891, is retrospective in its operation. In other words, whether persons who have been drawing money commutation under section 4787 every five years are entitled, under the section as amended, to have their commutation computed for every *three* years since June 17, 1870, and to demand the difference between the result of the calculation on a basis of five years and that on a basis of three years.

This question grows out of a doubt as to the meaning of the word "thereafter" in section 4787. The context in which this word is found is as follows: "Every officer, soldier, seaman, and marine who was disabled * * * and *who was furnished* by the War Department since the seventeenth day of June, eighteen hundred and seventy, with an artificial limb or apparatus for resection, * * * shall be entitled to receive a *new* limb or apparatus *at the expiration of every three years thereafter*, under such regulations," etc.

To my mind the word "thereafter" has no reference to June 17, 1870, but refers to the time since that date when any artificial limb or apparatus should have been furnished, which time is to be the point from which are to be reckoned the periods of three years. There is no ground in the law

for the pretension that June 17, 1870, is the point from which the periods of three years are to be reckoned. The law was not intended to have a retrospective operation, for it says that a new limb or apparatus shall be given "*at the expiration* of every three years thereafter," which shows the legislative purpose to have been to provide for periods of three years, in the *future*, and *not in the past.*

In my opinion every person who received an artificial limb or apparatus three years ago is entitled to receive another one *now.* Such is the necessary effect of substituting "three" for "five" in the law amending section 4787.

This, I believe, disposes of the questions submitted.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

SEALED CARS—REGULATIONS.

Section 3102 of the Revised Statutes gives to the Secretary of the Treasury power to impose similar regulations as to invoices for cars sealed in a contiguous foreign country as are imposed by the immediate-transportation act of 1880, and an entry such as is required under the immediate-transportation act may be required by regulation under the anti-smuggling act.

DEPARTMENT OF JUSTICE,
May 4, 1891.

SIR: Upon the 9th of March, 1891, Acting Secretary Nettleton acknowledged receipt of an opinion of this Department of the 13th of February, concerning the treatment of merchandise imported from contiguous countries under consular seals, wherein it was held that the formal entry of such goods could not be required by the Secretary of the Treasury, in view of the provisions of the law relating to consular sealing. It was suggested in that opinion that an examination of the goods at the frontier port might be required, however, and regulations to that end might be made and enforced by the Secretary.

You now submit to the Attorney-General a statement of the regulations which you deem necessary to prevent a recurrence of the frauds arising under the present regulations

governing the importation of goods from Canada under consular seals. You say:

"The danger to the revenue under the consular-sealing system as at present enforced lies not only in the loose and irresponsible manner of sealing cars and the preparation of the manifests on foreign territory, but also in the mode of transportation from ports on the frontier to points of destination in the United States by transportation companies who are not required to give bonds by which proper responsibility to the United States can be secured. The immediate-transportation act of 1880, under which merchandise arriving from foreign countries is transported by bonded common carriers from the port of first arrival to the port of destination without examination or appraisement, provides that an entry, to which an oath is not required, shall be made at the port of first arrival, with which shall be filed the invoice and the bill of lading, which entry must show the marks, numbers, description of the packages and contents, dutiable value of each package and the estimated duty, upon the filing of which the merchandise is allowed to be transferred from the importing vessel to the cars without examination or appraisement of the contents, each package being marked with a label specially provided for the purpose and which shows the port of arrival, the importing vessel, the date of arrival, the carrier, the date of shipment, and the name of the inspector who supervises the transfer. The value of the merchandise thus shipped is charged against the bond of the common carrier. Separate manifests in triplicate fully describing the goods are required for each car or other vehicle, one copy to be sent by mail to the collector at port of destination, one copy to accompany the car, and the third copy to be retained on file in the custom-house at port of departure. The cars must be locked with customs locks. On arrival at the port of destination the conductor of the car reports the fact that the goods have arrived to the chief customs officer and delivers the manifest to him. The collector is required to compare this manifest with the entry and manifest received by mail and directs an inspector to take charge of the car or vehicle, who reports the condition of the fastening, etc. Regular entry of the goods for warehouse or consumption, as in ordinary importations, may then be made by

the consignee at the port of destination. Collectors are required to report to the accounting officers of the Treasury the goods shipped and received by them under the immediate-transportation act, and a comparison of these reports insures proper accountability for the merchandise.

"These formalities are deemed necessary for the safety of the revenue with regard to merchandise shipped without appraisement between ports in the United States, and proceedings of a similar character should, in my judgment, be enforced as to merchandise arriving at frontier ports under consular seal, if the Secretary of the Treasury has authority under the proviso to section 3102, Revised Statutes, to prescribe such regulations.

"Your opinion on this point is respectfuliy requested."

I think that the regulations which you propose in the foregoing will be within your power, under the proviso in the second section of the act to prevent smuggling. (Sec. 3102, R. S.)

As was stated in the opinion of the Department on this subject, of February 13, 1891, already referred to, the proviso of the second section "That nothing contained in this section shall be construed to exempt such vessel, car, or vehicle, or its contents, from such examination as may be necessary and proper to prevent frauds upon the revenue and violations of this act," together with the third section, which provides—

"That the Secretary of the Treasury be, and he is hereby, authorized and required to make such regulations, and from time to time so to change the same as to him shall seem necessary and proper, for sealing such vessels, cars, and other vehicles, when practicable, and for sealing, marking, and identifying such goods, wares, * * * and also in regard to invoices, manifests, and other pertinent papers, and their authentication," gives to the Secretary of the Treasury plenary power to make regulations to prevent frauds under the sealing system, having in view always, of course, the intention of Congress that cars and vehicles, sealed as provided in the act, shall be subject to as little detention as is consistent with reasonable security from frauds.

The statement in the former opinion, that no formal entry can be required under the act, had application only to such

entry as is made at the place of final importation for consumption or warehouse, and it was not thereby intended to express the opinion that an entry such as is required under the immediate transportation law might not be required by regulation under the anti-smuggling act.

In my opinion, therefore, the regulations suggested by the Acting Secretary in the letter to which this is an answer are within your power to make and enforce.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

WORLD'S COLUMBIAN EXPOSITION—CONTRACT-LABOR LAWS—SKILLED FOREIGN EXPERTS.

Skilled employés of foreign exhibitors at the World's Columbian Exposition, who come in good faith for the purpose of setting up and operating the machinery of such exhibitors, are outside of and not subject to the contract-labor laws of the United States.

A statute must not be construed so as to lead to an absurd conclusion.

DEPARTMENT OF JUSTICE,
May 5, 1891.

SIR: In your communication of March 27 I am asked for an official opinion as to the application of the contract-labor laws to skilled experts who may come from foreign countries to aid foreign exhibitors in setting up and operating machinery to be brought to the United States and exhibited at the World's Columbian Exposition.

The question to be considered is whether the act of February 26, 1885 (23 Stat., 332), or the acts of February 23, 1887 (24 Stat., 414), and October 19, 1889 (25 Stat., 566), amending the same, prohibit foreign exhibitors from bringing their experienced employés to set up and operate such machinery for the purposes of such exhibition.

The intent of the contract-labor legislation is to protect the laborers, mechanics, and artisans of the United States against the competition of aliens brought or induced to come into this country under contracts to perform labor or service.

It is sought to exclude hired alien competitors of American workmen, and to protect in their natural rights those

who are, or who in the nature of things will become, citizens of the United States.

The purpose plainly is to prevent a stimulated and unnatural rivalry against our own citizens in the fields of American labor.

There is no wish to harm or discommode the immigrant or the foreigner, but there is a purpose to save to citizens of the United States that which belongs to them.

Thus viewing the law, I am at liberty to say that a construction of it which carries annoyance and injury to the foreigner and accomplishes nothing in checking the rivalry aimed at, while it subjects our own people to inconveniences and losses, is not a necessary or proper construction.

The saving clauses of section 5 of the act of 1885, which except from the rule of exclusion private secretaries, servants, or domestics of a foreigner temporarily residing here, and also skilled alien workmen coming under contract to perform labor upon any new industry as therein set forth, suggest the extent and the limitations of the enactment.

In order to render the law effectual, and also, it is believed, to avoid consequences that might be both harsh and unreasonable, it is provided by section 7 of the amendatory act of 1887 that the Secretary of the Treasury shall establish regulations and rules and issue instructions for carrying out the provisions of the act, and shall prescribe all forms of bonds, etc., to be used under and in the enforcement thereof.

Under this section there is, undoubtedly, ample provision to guard the interests covered by the contract-labor laws should occasion require.

The enactment providing for the exposition is the act of April 25, 1890 (26 Stat., 62).

The title speaks of the exhibition as being international, and the preamble declares that it should be of a national and international character, so that people of all nations can participate therein.

By section 5 the exhibition is designated the "World's Columbian Exposition."

By section 10 the President is authorized to make proclamation, through the Department of State, of the establishment and organization of the exposition, setting forth the

time at which it will open and close and the place at which it will be held; and it is further provided that—

"He shall communicate to the diplomatic representatives of foreign nations copies of the same, together with such regulations as may be adopted by the commission, for publication in their respective countries, and he shall, in behalf of the Government and people, invite foreign nations to take part in the said exposition and appoint representatives thereto."

Considering the acts of Congress relating to contract labor in a just and liberal spirit, and in connection with the exposition enactment, it would, in my judgment, be an extravagant and an unauthorized conclusion to hold that foreign workmen coming in good faith to take their places in the exposition may be excluded from the country under the authority of said contract-labor laws.

The court (10 Saw., 225) says that the rule that "a statute must not be so construed as to lead to an absurd conclusion" is one of the most venerable canons of statutory construction.

The Supreme Court, in *United States* v. *Kirby* (7 Wall., 486), says: "All laws should receive a sensible construction; general terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

It is another venerable canon of construction, frequently applied, that "The intent of the lawmaker is the law."

To hold that the skilled assistants, the trained experts of foreign exhibitors who come here upon the invitation of the nation, bringing their complicated and expensive machinery to illustrate the manufacture of valuable products, and to aid us in showing the world's progress in the creation of things useful and desirable—are barred and excluded by our contract-labor laws—would be to carry those laws beyond the purpose or intent of those who made them, and would lead to an unreasonable and an absurd conclusion.

I am, therefore, of the opinion that skilled employés of foreign exhibitors at the World's Columbian Exposition, who

come, in good faith, for the purpose of setting up and operating the machinery of such exhibitors, are outside of and not subject to the contract-labor laws of the United States.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF STATE.

PERSONS IN CHARGE OF CONSULAR OFFICES.

A person placed in charge of a consular office by the incumbent of the consulate, but without appointment and qualification as prescribed by the Constitution and laws of the United States, can not lawfully perform the regular official duties of the post, nor should he be permitted to perform those other unofficial services, such as notarial services, which a consul is not required by law to perform, but the chief value of which depends entirely on the fact that the person rendering them is a consular officer.

DEPARTMENT OF JUSTICE,
May 7, 1891.

SIR: Your communication of January 15, ultimo, earlier attention to which has been unavoidably delayed, requests an opinion upon the question whether a person placed in charge of a consular office by the incumbent of the consulate to which the office belongs, but "without appointment and qualification as prescribed by the Constitution and laws of the United States" can perform (1) the regular official duties of the post, and (2) notarial and other unofficial services."

I am unable to see how a person can lawfully execute the duties of a public office of the United States who has not been clothed with authority to do so by the appointing power of the United States. Such a person can not possibly have any virtue in him as a public officer. This disposes of the first branch of your question.

The second branch refers to that class of functions which are performed customarily by consuls, but which are entirely unofficial, being neither required to be done by law nor by executive regulation. (*United States* v. *Mosby*, 133 U.S., 273.)

The value of *such* services depends entirely on the fact that the person rendering them is a consular officer. It may be that the laws of a State of the United States give validity to certain services of that kind, as, for example, taking

acknowledgments abroad of conveyances of land in such State, or it may be that the efficacy of the act is due to the faith generally reposed in consular officers. However that may be, the United States would seem to be in duty bound to protect the public, as far as it may be reasonably expected to do so, against the exercise of even merely voluntary consular functions by persons not regularly appointed consuls. It, therefore, clearly concerns the United States that no person shall be permitted to exercise the office of consul of the United States in any way who has not been authorized by Congress to do so. This disposes of the second branch.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF STATE.

GOVERNMENT PROPERTY.

A proposed recommendation of the Chief of Engineers considered, permitting a railroad to be built by the United States to be turned over to the State of Oregon for operation, on certain conditions, and decided to give that State a vested right to operate the railway and derive revenue therefrom, and consequently to be beyond the power of the Secretary of War to grant, not having been authorized by act of Congress.

The arrangements hitherto made by the Secretary of War and President, allowing private individuals to enter military reservations and prosecute undertakings for the common benefit of themselves and the United States distinguished from this proposed recommendation as having no contractual feature and being revocable at the pleasure of the Government.

DEPARTMENT OF JUSTICE,
May 8, 1891.

SIR: For the purpose of facilitating trade on the Columbia River the legislature of Oregon passed an act, approved February 16, 1891, which established a board of portage commissioners with power "to build, construct, equip, and maintain" portage railways at the Cascades and between The Dalles and Celilo on the said river. Among other powers vested in this board is the power to fix and collect freights and fares on said roads, and apply the same to the expenses of operating the roads, and, in case of a surplus after paying such expenses, the board is required to pay it into the State treasury.

To carry out the purposes of the act the sum of $60,000 is appropriated.

It is to be remarked that, at each of the above-mentioned points where these portage railways are to be constructed, the United States is building a canal at great expense. When these canals are completed there will be no use at these points for land carriage of any kind, so that the projected railways are merely to serve a temporary purpose.

On March 3, 1891, Congress passed a joint resolution "authorizing the State of Oregon to construct, maintain, and operate a portage railroad on the property of the United States at the Cascades of the Columbia River, Oregon," which is as follows:

"*Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled*, That the State of Oregon is hereby authorized to construct, maintain, and operate a portage railroad over the lands belonging to the United States at the Cascades of the Columbia River, in the State of Oregon, and to use in the construction of the same and in the operation thereof the Government roads upon said lands: *Provided*, That such occupation and use shall not interfere with the Government works at said Cascades, and shall be under such restrictions and regulations as the Secretary of War shall prescribe." (Laws 2d session 51st Congress, p. 1116.)

It seemed advisable, however, to the Chief of Engineers that the projected portage railway should be built by the United States as a means for carrying on the work of constructing the canal at the Cascades, and then turned over to the authorities of the State of Oregon to be operated for the benefit of the United States and the public generally. In return for which the State was to construct certain works necessary to the operation of the portage railway, and do the transportation required by the United States in connection with the construction of the canal, free of cost to that government.

Accordingly the Chief of Engineers submitted to the Secretary of War on March 13, 1891, the following recommendation, namely:

"That Maj. Handbury, the officer in charge of the work at the Cascades, be authorized to construct a 3-foot gauge rail-

road from the easterly limit of Government grounds at the Cascades locks, Oregon, to the lower bulkhead of the canal on these grounds, at such time as it may be made evident that this railroad will be needed by the State of Oregon for portage purposes across these grounds, and that the application of the board of portage commissioners of the State of Oregon be granted under the following conditions:

1. "That the State of Oregon, through its board of portage commissioners, be permitted to enter these grounds below the lower bulkhead and erect thereon such temporary structures as may be necessary to facilitate these portage operations.

2. "That said board be permitted to operate this railroad with such engines, cars, and other rolling stock as may be found necessary, on condition that the passage of the cars or trains over the road be so arranged as not to interfere with the Government work in hand, and that the State transport over this road free of charge such material, supplies, etc., as may be necessary for the public improvements being made at that point under control of the War Department."

The question submitted for opinion is whether this recommendation of the Chief of Engineers may be lawfully carried out.

It will be observed that the proposition is not to give the board of portage commissioners a license to use the contemplated railway which shall be revocable at the pleasure of the United States. The State is to render a valuable consideration for the use of the railway, and it is not reasonable to suppose that it was intended that the State should hold its rights at the mere sufferance of the United States. The effect, then, of the arrangement would be to give the State a *vested right* to operate the railway, and with it the right to derive revenue by taking fees and tolls for the transportation of persons and merchandise.

Looking at the proposed arrangement from the standpoint of the State of Oregon, it seems to me extremely doubtful, to say the least, whether the board of portage commissioners would have the power, under the State statute (*supra*), to make such an agreement with the United States. Their authority is *to build* and operate a portage railway, not to contract for the *use* of one *already built*, and to enable them

to execute the work the State legislature has, as we have seen, appropriated a considerable sum of money.

The State law requires the board to charge tolls and fares for transportation over the railway, and it may be doubted whether the board could lawfully authorize free transportation for the Government, however reasonable and proper it might be to do so. The question is one of power and not of expediency. The State law provides that "all property, or prisoners, or troops belonging to or under the control of the State of Oregon, shall be transported over said road free of charge," and that is all that is said about free transportation, and it would seem to be the extent of the board's power in that particular.

But, however that may be, I am very clearly of opinion that you have no power to turn over Government property to States or individuals, to be used for any purpose not authorized by some act of Congress, any more than you have power to give such property away absolutely. The property, real and personal, of the United States is dedicated by law to the uses and purposes of the United States, and nothing short of an act of Congress can authorize its application to any other uses and purposes.

I do not mean to say whether you have authority or not to build a portage railway as a proper means for the construction of the canal, because that question is not before me, but assuming that you have such power I do not think you have any right to allow a railway, built for that purpose, to be used by the State of Oregon as a highway of commerce, whether the State pays a consideration for the use of it or not. The question is one of *power*, and that must come from Congress, and is not to be inferred from the fact that what is recommended would be highly beneficial to the United States. Whether the proposed application of Government property to State purposes is advisable or not is a question for the legislative, and not the executive, department of the Government. This conclusion is, I think, supported by the case of *Steele* v. *United States* (113 U. S., 128). In that case it was held that the disposition of a lot of scrap material by an officer of the Navy Department otherwise than by *sale*, as directed by section 1541 of the Revised Statutes, could have

no validity. In the same way it may be said that if the law in virtue of which the canal at the Cascades is being constructed authorizes the building of a portage railway, it authorizes it as a proper means and appliance for constructing that improvement, and for no other purpose whatever, and it could be used for no other purpose without a violation of law. This must be the case so long as it remains true that "we have no officers in this Government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." (The Floyd Acceptances, 7 Wall., 676.)

I am aware that it has been for many years usual for the Secretary of War, and occasionally the President, to allow private individuals to enter military reservations and prosecute undertakings for the common benefit of themselves and the United States. But arrangements of this character have had no contractual feature, and, so far as I am informed, have been always made revocable at the pleasure of the United States (16 Opin., 206; 19 Id., 628), and are essentially different from the arrangement which it is proposed to you to make with the State of Oregon.

These anomalies, however, so far from encouraging departures from the principle that this is a government of law and not of men, serve to emphasize that principle, because they are sustained on the ground that, like other instances of public authority, they rest on the consent of Congress, tacit though that consent be.

It seems impossible, therefore, to find any warrant of law for carrying out the arrangement with the board of portage commissioners which has been recommended to you for adoption.

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

W. H. H. MILLER.

The SECRETARY OF WAR.

MILE.

The word "mile," as used in section 5 of the act to provide for ocean mail service between the United States and foreign ports, and to promote commerce, approved March 3, 1891, chapter 519, means mile of 5,280 feet, and not a geographical mile.

DEPARTMENT OF JUSTICE,
May 9, 1891.

SIR: By your letter of April 13 you ask my opinion as to the meaning of the word "mile," as used in section 5 of "An act to provide for ocean mail service between the United States and foreign ports, and to promote commerce," approved March 3, 1891 (26 Stat. L., 830). The purpose of the act is to promote the carriage of the ocean mails in ships of American register, and thereby to promote ocean commerce in American bottoms. By its first section this act authorizes the Postmaster-General to make "contracts, for a term not less than five nor more than ten years in duration, with American citizens," for the carrying of the ocean mails in American steamships. Section 2 provides for the manner of advertising and letting of said contracts. Section 3 requires that the steamships shall be of American build, and officered by American citizens, and manned in certain proportions by American crews. Section 3 also divides such steamships into four classes, and specifies the manner and material of their build, their tonnage, and rate of speed. The language as to these items is as follows:

"They shall be divided into four classes. The first class shall be iron or steel screw steamships, capable of maintaining a speed of twenty knots an hour at sea in ordinary weather, and of a gross registered tonnage of not less than eight thousand tons. * * * The second class shall be iron or steel steamships, capable of maintaining a speed of sixteen knots an hour at sea in ordinary weather, and of a gross registered tonnage of not less than five thousand tons. The third class shall be iron or steel steamships, capable of maintaining a speed of fourteen knots an hour at sea in ordinary weather, and of a gross registered tonnage of not less than two thousand five hundred tons. The fourth class shall be iron or steel or wooden steamships, capable of maintaining a

speed of twelve knots an hour at sea in ordinary weather, and of a gross registered tonnage of not less than fifteen hundred tons."

Section 4 provides that these ships shall be constructed according to plans and specifications approved by the Secretary of the Navy, and of sufficient strength to be readily convertible into cruisers. Section 5 provides for a compensation for such ocean mail service by way of bounty or subsidy, said provision being as follows:

"That the rate of compensation to be paid for such ocean mail service of the said first class ships shall not exceed the sum of four dollars a mile, and for the second-class ships two dollars a mile, by the shortest practicable route, for each outward voyage; for the third-class ships shall not exceed one dollar a mile, and for the fourth-class ships two-thirds of a dollar a mile for the actual number of miles required by the Post-Office Department to be traveled on each outward bound voyage."

The remaining provisions of the statute are immaterial to the question under consideration. That question is whether the word "mile," as used in section 5, means a geographical or a statute mile. It will be observed that in section 3, where provision is being made for the rate of speed, the nautical word "knot" is used, which is practically synonymous with "geographical mile;" but in section 5, where provision is made for compensation, the word "mile" is used.

It is a general rule that in construing statutes words are to be taken in their ordinary, usual meaning, unless the language indicates a different intent. Webster defines "mile" as "a certain measure of distance, being equivalent in England and the United States to 320 poles or rods, or 5,280 feet." Worcester gives substantially the same definition, and this in each case is the first definition given. Each afterwards gives the "geographical or nautical mile." In other words, each treats the statute mile as *the* mile, and then gives the definition of the other mile with the accompanying adjective.

The fact that in section 3 the word "knot" is used, and that in section 5 the word "mile" is used, seems to me to indicate a different legislative meaning in one case than in the other. If it had been the purpose of Congress that the

subsidy should be paid by geographical mile, it would have been natural, following the language of the third section, to have also used the word "knot" in the fifth section.

Moreover, in so far as any statute of the United States touches the definition of the word "mile" it indicates the statute mile. Section 3570, Revised Statutes, defining the relation between the French metric system and our system of weights and measures, provides:

"The tables in the schedule hereto annexed shall be recognized in the construction of contracts, and in all legal proceedings, as establishing, in terms of the weights and measures now in use in the United States, the equivalents of the weights and measures expressed therein in terms of the metric system; and the tables may lawfully be used for computing, determining, and expressing in customary weights and measures the weights and measures of the metric system."

In this table the statute and not the geographical mile is used.

Again, I am advised that in construing all Federal statutes allowing mileage for travel, as well upon the ocean as upon the land, the uniform practice of the accounting officers has been to estimate and allow such mileage upon the basis of the statute mile of 5,280 feet. This rule has been applied to officers of the Navy, to members of Congress, and in short to all persons traveling upon duty upon the ocean under statutes providing for mileage.

Another thing, not perhaps entirely unworthy of consideration, is the fact that geographical miles are not of uniform length, but vary in different latitudes to such an extent as would make an item of some significance where large amounts are involved.

In two cases in which the question of allowance of mileage to naval officers was under consideration, although the difference between statute and geographical miles was not mooted, the Supreme Court, in determining whether mileage or actual expense is to be allowed, has held that no distinction is to be taken between travel upon the ocean and travel upon the land. (See *United States* v. *Temple*, 105 U. S., 97, and *United States* v. *Graham*, 110 U. S., 219.)

It may not be inproper, in conclusion, to say that this statute, designed to promote foreign commerce, is entitled to a liberal construction, with a view to carrying out the purpose of its enactment.

My conclusion is that the term "mile," as used in the fifth section of the statute, means a mile of 5,280 feet.

Very respectfully,

W. H. H. MILLER.

The POSTMASTER-GENERAL.

NAVIGABLE WATERS—POWER OF A STATE AND OF THE UNITED STATES—BRIDGES.

All waters are navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States where they form in their ordinary condition by themselves, or by uniting with other waters, a continuous highway, over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which the commercial power of Congress may be exercised to the extent necessary to protect their free navigation, and it is immaterial that the stream was originally non-navigable or artificially constructed, or wholly within one State, or practically controlled by one State or city.

The power of the State to legislate in regard to navigable waters is subject to the paramount power in Congress to regulate commerce among the several States. Until Congress acts directly in the matter the power of the State is plenary, but when Congress has acted with reference to bridges in the State its will must control so far as may be necessary to secure free navigation. In section 4 of the river and harbor act of September 19, 1890, chapter 907, Congress has acted, and under that act it is the duty of the Secretary of War to ascertain whether the Canal street bridge across the South Branch of the Chicago River is an unreasonable obstruction to the free navigation of said river, and if he comes to the conclusion that it is such an obstruction, it is his duty to proceed as required by that statute.

Inasmuch as the plans for the proposed excavation in said river have not as yet been submitted to the Secretary of War for his approval and authorization, he is not now required by law to give the proceedings consideration.

The cases illustrating the extension of the doctrine of navigable waters of the United States and the extension of the authority of the United States over said waters reviewed and discussed.

DEPARTMENT OF JUSTICE,
May 11, 1891.

SIR: Your communication of March 10 in relation to the bridge now in process of construction across the south branch of the Chicago River at Canal street, and that of May 1 relative to certain excavations and alterations proposed to be made in said river under the direction of the board of trustees of the sanitary district of Chicago, have received that careful consideration which the importance of the interests that may be affected rightfully demands.

The first question submitted for my opinion is, whether, under section 4 of the river and harbor act of September 19, 1890 (Stat., 453), it is incumbent upon you to consider whether said bridge, as constructed, is "an unreasonable obstruction to the free navigation" of said river; and whether you are required, under said enactment, to take official action in relation to such bridge.

This inquiry seems to be, whether the enactment referred to is one that may lawfully require your action in relation to an obstructive bridge built across the south branch of this waterway under the authority of the State of Illinois, and by the direction of the local government.

The second question I understand to be, in substance, whether any action is required on the part of the Secretary of War relative to the contemplated proceedings of the board of trustees of the sanitary district of Chicago whereby said board proposes to enter upon, use, widen, deepen, and improve the Chicago River and its south branch and the forks thereof, to form a supply channel for the main channel heretofore surveyed from Chicago to Joliet, as indicated in the resolution of said board passed April 21, 1891.

These questions are so related that I will, as you request, answer as to both in this communication.

It is shown that the South Branch of the Chicago River was originally only navigable for small craft of light draft; that it was so narrow, crooked, and shallow as to be valueless for commerce; that large amounts of money have been expended by the city and by owners of abutting lands to create the existing navigability, which is mainly artificial in its nature.

The stream lies wholly within the State of Illinois, and the portion under consideration within the city of Chicago, and expensive docks, wharves, and slips have been constructed. It is shown that a vast and valuable commerce passes along this waterway, and an immense passenger and freight movement goes over it.

The Canal street bridge site is stated to be more than 3 miles from the lake, and more than 2 miles from the junction of the branches.

This south branch extends through the heart of the city, and is now spanned by 22 bridges for street travel, which are lighted, policed, and controlled by the city, and is also crossed by 5 railroad bridges.

The National Government removed the bar originally existing at the river's mouth, in Lake Michigan, and deepened the channel there, but it has neither performed any act nor expended any money above the mouth or within this stream to develop or aid its navigation. The city and the riparian owners have expended in improving the navigation, and in docking, over $1,250,000, and the annual expense of keeping this branch navigable amounts to about $80,000.

No public docks, slips, or landing places exist there, but the contiguous property belongs to private parties and is used for business purposes. The waterway is, however, practically dedicated to public use.

While the waterway remains navigably connected with the lake, its current has been reversed by artificial means, and, from being an affluent to Lake Michigan, it has been made to flow away from it. This channel as it exists, it is stated, is a navigable sewer and an interior harbor of the city of Chicago.

At the same time, it is a channel navigated, in part, by vessels which bring from, and carry to, other States and foreign territory the commodities of commerce.

Beyond this bridge-site are located nine "regular" elevators possessing a capacity of 14,000,000 bushels of grain, 12 great coal yards, distributing largely outside of Illinois, lumber yards that handle 1,000,000 feet per year, and the stock yards and packing houses of Chicago.

It is stated that of the 22,000 vessels entering at and departing from the port during the season of navigation,

about 7,000 pass the site of this bridge, many of them being large craft which navigate the Great Lakes.

The first question is whether this south branch of the Chicago River is to be classed among the navigable waters of the United States.

If it may be held that this channel is a private water, or exclusively under the control of the city or the State, little further consideration is necessary.

But if this waterway is, in its condition and uses, a portion of what has been denominated in decisions and statutes "navigable waters of the United States," then it will remain to be determined whether the Secretary of War may interfere as to the construction of a bridge which unreasonably obstructs the navigation.

The States granted to Congress the power "to regulate commerce with foreign nations and among the several States." It was long since determined that the power to regulate commerce includes that of establishing rules for navigation in the navigable waters of the United States. It follows that Congress may supervise the channels of this navigation, so as to keep them reasonably free from obstruction.

The documents which accompany your communication of March 10 show a wide difference in views as to this commercial channel. In one view this south branch is a local sewer and sludge basin; in another, it is a crowded waterway thronged with interstate commerce. It must be said, however, that whatever view is taken by parties diversely interested, the navigable status of the river can not now be fairly questioned.

A short review of the course of the General Government as to the waters of the country may not be unprofitable in this connection.

The development of the jurisdiction of the National Government over the waters of the country has been markedly along the line of the admiralty jurisdiction of the United States courts.

In 1824 it was decided in the case of the steamboat *Thomas Jefferson* (10 Wheat., 428) that the district court of the United States had no jurisdiction in a case of seaman's wages, except

where the service was performed upon the sea, or upon waters within the ebb and flow of the tide.

In 1833 it was held in *Peyroux* v. *Howard* (7 Pet., 324) that the court of admiralty had jurisdiction because the tide ebbed and flowed at New Orleans, where the cause of action arose, and that the jurisdiction depended upon that fact.

In *United States* v. *Coombs* (1838) (12 Pet., 77) it is held that this jurisdiction so far as it depends upon locality is limited to the sea and to tide waters as far as the tide flows.

By the act of February 26, 1845 (5 Stat., 726), the admiralty jurisdiction of the district courts was extended to matters of tort and contract arising as to vessels of 20 tons burden navigating the lakes and waters connecting them.

Warring v. *Clarke* (5 How., 441), decided in 1848, illustrated the unreasonableness of adhering in America to the tide-water rule.

In 1851 the decision of the case of the propeller *Genesee* (12 How., 443), arising out of a collision on Lake Ontario, overruled the previous decisions and abolished the tide-water rule as applicable to American waters, and held that the lakes and the navigable rivers connecting them were within the scope of admiralty jurisdiction as understood in the United States when the Constitution was adopted.

This case practically holds that the admiralty jurisdiction of the United States is coextensive with its public navigable waters.

Although this decision is rested upon the admiralty and maritime clause of the Constitution, an equally comprehensive construction of the clause authorizing the regulation of commerce was developed, and the conclusion is now reached that all our waters are navigable waters of the United States, within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, where they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. The *Daniel Ball* (10 Wall., 557); the *Montello* (11 Wall., 411 and 20, *id.*, 430); *Cardwell* v. *American Bridge Company* (113 U. S., 205).

In *Ex parte* Boyer (109 U. S., 629) the same rule is extended over canals and waterways that are wholly artificial, but which connect navigably with waters of other States.

In the direct line of the development of national authority in relation to our waters navigable in fact and not State locked, we reach the decision in *Escanaba Co.* v. *Chicago* (107 U. S., 678), where the court of last resort declares that—

"The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress, under its commercial power, may exercise control to the extent necessary to protect, preserve, and improve their free navigation."

It is not of consequence that the stream was originally non-navigable, or that it was artificially constructed, or that it is wholly within one State, or that it has always been practically controlled by the State or city. The use now actually made of the waterway, its practical dedication to the public, the importance, amount, and nature of its commerce, and the source and destination of the commodities borne upon it, establish the character of the navigation.

Therefore it must necessarily be held under the Constitution, the statutes, and the decisions that the Chicago River is as unquestionably a portion of the navigable waters of the United States as is the Strait of Mackinac.

The second question is, when does a stream which is wholly within a State, and which is a part of the navigable waters of the United States, remain under State control, and when does it become subject to national requirements?

It is true that the power to authorize the construction of a bridge over the river in question, as well as the enactment of the great mass of legislation which may affect its commerce, remains in the State; but it is also true that the power vested in Congress to regulate commerce authorizes national legislation which will render void conflicting State laws. As Congress has, in the judgment of many, by its recent enactments made important and radical changes in the relations between the nation and the States as to navigable waters, a review of decisions made upon cases previously arising will better than in any other way present the character and suggest the effect of this recent legislation.

In the case of *Gibbons* v. *Ogden* (9 Wheat.), Chief Justice Marshall, in announcing the opinion of the court, says that all experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from the distinct powers of the State and of the General Government; but that this does not prove that the powers themselves are identical.

He also says that the States may sometimes enact laws the validity of which depends on their interfering with and being contrary to an act ot Congress passed in pursuance of the Constitution, and points out that if this act came into collision with an act of Congress, the act of the State must yield to the law of Congress.

He also speaks of acts of the State legislatures which do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with or are contrary to the laws of Congress made in pursuance of the Constitution of the United States.

He declares the subjection of such a State law to the act of Congress.

In the Cuyahoga Bridge Case (3 McLean's Reports, 226) the court says of the respective powers of the State and of Congress in relation to legislation in regard to navigable waters that "a State, by virtue of its sovereignty, may exercise certain rights over its navigable waters, subject, however, to the paramount power in Congress to regulate commerce among the several States. These powers are not concurrent, but are separate and independent of each other. And in regard to the exercise of this power by a State, there is no other limit than the boundaries of the Federal power."

In *Gilman* v. *Philadelphia* (3 Wall., 713) the court holds that the States may exercise concurrent or independent power in relation to bridges across streams which lie wholly within the State. In relation to these powers the court says: "It is not possible to fix definitely their respective boundaries. In some instances their action becomes blended; in some the action of the State limits or displaces the action of the nation; in others the action of the State is void because it seeks to reach objects beyond the limits of State authority."

In this case the court also says: "Until the dormant power

of the Constitution is awakened and made effective by appropriate legislation, the reserved power of the States is plenary, and its exercise in good faith can not be made the subject of review by this court."

In the Blackbird Creek Case (2 Pet., 105) it is held that a small navigable stream lying wholly within a State, and in which the tide ebbs and flows, may be closed to navigation by an enactment of the State, and that any injury arising from said act is an affair between the government of the State and its citizens, of which the Supreme Court can take no cognizance. But it is stated: "If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control State legislation over these small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States,—we should feel not much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act."

The act of the State of Delaware in closing the creek was allowed to stand, because it was not in "conflict with any law passed on the subject."

In *Kellogg* v. *The Union Company* (12 Conn., 24) the Blackbird Creek Case is referred to, and the court says that the decision strongly intimates the opinion that in order that the power vested in Congress should be so exercised as to affect the question, some act must have been passed, the object of which was to control State legislation.

The court refers to several decisions involving State powers and navigation rights, and adds: "These cases all proceed upon the ground that there is reserved to the State a power to adopt their own municipal regulations in regard to navigable waters within their territorial limits; and in every case the question will be, whether the act of the State does in fact conflict with the laws of Congress, within the meaning of the Constitution." A State law in order to be affected by a law of Congress must come into conflict with such law.

In *Thames Bank* v. *Lovell* (18 Conn., 500) the court says (p. 511): "In speaking here of navigable rivers, we speak

of them as public highways only, without reference to the flow of the tides; for to all rivers navigable in fact, the power of Congress to regulate commerce may extend without distinction. And we suppose, therefore, that the several States' legislatures have the same power to improve the navigation of the tide-water rivers as any other." And the court quotes with approval, "That a grant of power by Congress probably does not prevent the States from continuing to act on subjects within the grant, till Congress *legislate fully* concerning it, and so as to *conflict* with the doings of the State unless there is an express prohibition on the States to act further in the matter, or it is strongly implied from the nature of the case."

In *Pound* v. *Turck* (95 U. S., 459) Mr. Justice Miller, in stating the opinion of the court, says (p. 462) that the principle established by the decisions is, that some powers conferred by the commerce clause of the Constitution are exclusive in Congress, while there are others which from their nature may be exercised by the States until Congress shall see proper to cover the same ground by such legislation as that body may deem appropriate to the subject.

In the case of *Escanaba Co.* v. *Chicago* (107 U. S., 678) the court declares (p. 683) that "The Chicago River and its branches must therefore be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation."

But the court recognizes the propriety of leaving the control of the bridges crossing said river to the municipal authorities, and says (p. 690): "To render the action of the State invalid in constructing or authorizing the construction of bridges over one of its navigable streams, the General Government must directly interfere so as to supersede its authority and annul what has been done in the matter."

In *Cardwell* v. *The American Bridge Co.* (113 U. S., 205) the court says (p. 209) that, as to authorizing the construction of bridges over navigable streams, the power of the State is subordinate to that of Congress, and adds: "That until Congress acts on the subject the power of the State is plenary. When Congress acts directly with reference to the

bridges authorized by the State, its will must control so far as may be necessary to secure the free navigation of the streams."

In *Huse* v. *Clover* (119 U. S.) the court says of the State action (p. 548), that "it is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce that that body may interfere and control or supersede it."

In reference to the bridge authorized by the State of Oregon to be built across the Willamette River, it is said (125 U. S., 8) that "there must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States."

In 1885 Mr. Attorney-General Garland construes the laws upon this point as follows (18 Opin., 164):

"As the Mississippi River above, at, and for some distance below the city of St. Paul is wholly within the State of Minnesota, the principle enunciated by the Supreme Court of the United States in *Wilson* v. *The Blackbird Creek Marsh Company* (2 Pet., 250); *Gilman* v. *Philadelphia* (3 Wall., 713); *Pound* v. *Turck* (95 U. S., 459), and *Escanaba Company* v. *Chicago* (107 U. S., 678), applies to this case, namely; that until Congress acts, and by appropriate legislation assumes control of the subject, *the power of a State over bridges across navigable streams within its limits is plenary;* but that when this power is exercised so as to unnecessarily obstruct navigation, Congress may interfere and remove the obstruction. The power of Congress to regulate bridges over navigable waters is paramount, and where it comes in conflict with that of the State, the latter necessarily becomes ineffective."

It is established beyond question that previous to 1884 no national legislation existed which interfered with the general authority of the States, acting within the limits of law as administered by the courts, to control within their respective boundaries the navigable waters of the United States.

We now reach the third question to be considered, which is, whether, since the cases cited arose, the dormant power of the Constitution has been awakened by Congressional enactment, so as to bring into conflict with existing para-

mount law all State or local authority to build or to continue bridges over navigable waters of the United States which are, or which shall become, unreasonable obstructions to free navigation.

And incidentally, under your inquiry of May 1, the question is raised whether, under the enactment of 1890, States and local authorities are not only prohibited from hereafter commencing the construction of any bridge or other works not heretofore authorized by law over navigable waters of the United States without the approval of the Secretary of War, but are also forbidden hereafter to excavate or fill or alter the course, condition, or capacity of the channel of any such navigable waters except upon the approval and authorization of the Secretary of War.

The legislation to be considered consists of the following enactments:

In the general legislation enacted by the river and harbor act of 1884 (23 Stat., 147) the Secretary of War is directed to—

"Report whether any bridges, causeways, or structures now erected or in process of erection do or will interfere with free and safe navigation; and if they do or will so interfere, to report the best mode of altering or constructing such bridges or causeways so as to prevent any such obstructions."

By section 8 of the same act (p. 148) it is provided—

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now or hereafter to be constructed over any of the navigable waters of the United States, under authority of the United States or of any State or Territory, is an obstruction to the free navigation of such waters, by reason of difficulty in passing the draw opening or the raft span of said bridge," * * * it shall be his duty to require the owners of the bridge, by booms, piers, or otherwise, to guide water craft safely through the opening; and if the owner fails so to do, the Secretary shall make the change at the expense of the United States, and the owner is made liable to pay therefor.

By section 4 of the river and harbor act of 1886 (24 Stat., 330) the Secretary of War is directed to report as to the use

or injury of public works by private parties; and it is also directed that—

"He shall report, at the same time, whether any bridges, causeways, or structures now erected or in process of erection do or will interfere with free and safe navigation."

By section 9 of the river and harbor act of 1888 (25 Stat., 424) it is provided, "That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States, is an obstruction to the free navigation of such waters, by reason of insufficient height, width of span, or otherwise," the Secretary shall require the owners to "so alter the same as to render navigation through or under it free, easy, and unobstructed."

Provision is made for enforcing the requirements.

By section 4 of the river and harbor act of 1890 (Stat., 454) said section 9 is amended so as to enact:

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise," * * * it shall be the duty of the Secretary to give notice to those owning or controlling the bridge "so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed;" and he is required to specify the changes to be made and the time in which to make them.

By section 10, if those owning or controlling the bridge shall willfully fail or refuse to comply, they shall be deemed guilty of a misdemeanor, and shall be subject to punishment.

By section 7 of this act (p. 454), it is provided that "It shall not be lawful hereafter to commence the construction of any bridge * * * or other works over or in any port, * * * harbor, navigable river, or navigable waters of the United States, under the act of any legislative assembly of any State, until the locations and plan of such bridge or other works have been submitted to and approved by the

Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, condition, or capacity of the channel of said navigable waters of the United States, unless approved and authorized by the Secretary of War."

It is provided that this section shall not apply to a bridge heretofore duly authorized by law; "or be so construed as to authorize the construction of any bridge, * * * or other works, under an act of the legislature of any State, over or in any stream, * * * or harbor, or other navigable water not wholly within the limits of such State."

The scope of this new development of national supervision and control will be readily apprehended.

Some may question whether Congress has by a general law directly placed the obstructive bridges in conflict with its requirement; but it is said in *Gilman* v. *Philadelphia* (3 Wall., 731) that "Congress may interpose, whenever it shall be deemed necessary, by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority both the legislative and judicial power of the nation are supreme. A different doctrine finds no warrant in the Constitution, and is abnormal and revolutionary."

It has been objected that authorizing the head of a Department to require the alteration or removal of a construction made by State authority is arbitrary and unjustifiable; that property rights are involved, and that the parties interested have a right to a judicial determination whether their obstructions are "unreasonable."

The rendering of an enactment effectual upon the ascertainment of a fact or contingency by the head of a Department is not uncommon. As it is stated in *Miller* v. *Mayor* (109 U. S., 394):

"The execution of a vast number of measures authorized by Congress and carried out under the direction of heads of Departments would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must of course come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate. (*South Carolina* v. *Georgia*, 93 U. S., 13.)"

The doctrine as announced by Chief Justice Marshall in *McCulloch* v. *Maryland* (4 Wheat., 409) that "the Government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means," has never been seriously questioned.

Some of the communications received by you and inclosed to me suggest that supervision by the Secretary of War, if effected by the statute, will obligate the General Government to assume the management, control, and expense of the waterway, but this does not follow.

The statute is revisory and defensive in its nature; it clears the way for interstate and foreign commerce, but does not assume police powers or local control.

Some objections to the application of the law appear to be based upon an inference that the Secretary of War is called upon to consider only the needs of water transportation and obstruction thereto; but it should be recognized that in deciding whether any given bridge is an "unreasonable" obstruction, he must necessarily take into account not only the interests of navigation, but also those of intersecting locomotion and transportation.

In an opinion submitted by me to you on the 23d of October last (19 Opin. A. G., 676) attention is called to the significant insertion of the word "unreasonable" before the word "obstruction" as used in the amended act, thereby "clearly presenting a question of fact which can not be determined by this Department, which can and must be determined in the first instance by you, but in regard to which your determination is probably subject to review in the courts."

It is further said in that opinion that to determine the question of "unreasonable obstruction" involves an examination of all the facts, circumstances, and equities surrounding the case, which are by no means all on the side of the Government."

The right to cross the river is as unquestionable as the right to navigate it; the use of bridges is as necessary and as rightful as the use of the stream.

The numberless and interwoven interests of a great city can not be cut off from each other, nor can the movements of a million people be unnecessarily impeded, by an intersecting stream.

The rights of intersecting lines of freight and of travel, the needs and the convenience of residents, and the business movements of all who come and all who go are elements which help to constitute the reasonableness or the unreasonableness of an interfering structure built for their use, but to some extent obstructive to the waterway.

In conclusion, permit me to say that it is my opinion that the statute of 1890 under consideration is one that may not properly be disregarded, and is an enactment that renders it necessary for you under the representations made to consider whether the Canal Street bridge is an unreasonable obstruction to the free navigation of the south branch of the Chicago River, and in case you decide that the same is such an obstruction it will be incumbent upon you to proceed in relation thereto in accordance with the requirements of that statute.

In relation to your inquiry of May 1, it is my opinion that as the board of trustees of the sanitary district of Chicago have not as yet submitted the plans of their proposed works for your approval and authorization, but have merely given notice in general terms of what they contemplate doing at some future time, you are not now required by law to give their proceedings consideration.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

PAYMENT OF CLAIMS.

A proper construction of the last clause of an act for the allowance of certain claims for stores and supplies taken and used by the United States Army as reported by the Court of Claims under the provision of the act of March 3, 1883, known as the Bowman Act, does not warrant the making of a Treasury draft payable or deliverable to any other parties than those named in the act or to their executors or administrators.

DEPARTMENT OF JUSTICE,
May 15, 1891.

SIR: Your letter of May 13, in which you ask my opinion as to the proper construction of the last clause of an act "for the allowance of certain claims for stores and supplies taken and used by the United States Army as reported by the

Court of Claims under provision of the act of March 3, 1883, known as the Bowman Act," is received.

The clause in question is as follows:

"All Treasury drafts in payment of claims appropriated for in this act shall be made payable to and delivered to the parties named respectively; or, in case of death of the party, to his or her executor or administrator."

The first section of the act authorizes the payment to the several persons in the act named the several sums of money therein mentioned for each, but provides that before such payments shall be made certain steps for the verification of the correctness of the claim shall be taken by the Attorney-General and the Court of Claims. Then follows a list of names, with amounts appropriated for each, covering about eleven pages. The form in which these names and amounts are given is as follows:

"To Thomas N. Allison, administrator of James L. Allison, deceased, of Jackson County, Ala., nine hundred and twenty dollars.

"To Saint Cecelia's Academy of Nashville, Tenn., nine hundred and thirty dollars.

"To William W. Anderson, of Harrison County, Ky., four hundred and twenty-five dollars."

These claims are nearly three hundred in number.

After the enacting clause, the act commences as follows:

"That the Secretary of the Treasury be, and is hereby, authorized and required to pay, out of any money in the Treasury not otherwise appropriated, except as hereinafter provided, to the several persons in this act named the several sums mentioned herein, the same being in full accord, and the receipt of the same to be taken and accepted in each case as a full and final discharge of, the several claims examined, investigated, and reported favorably by the Court of Claims of the United States under the provisions of the act of March 3, 1883, entitled 'An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government: *Provided, however*,'" etc.

Then follow the requirements for the investigation by the Attorney-General and Court of Claims, as above stated.

The language thus quoted from the first section would

have indicated a legislative purpose that these claims should be paid, as ordinary claims against the Government are paid, to the party or his attorney, under the restrictions theretofore existing in section 3477, and perhaps in other sections.

But this provision was not permitted to stand by itself. As the last expression of Congress in the act, the provision above quoted and of which you ask a construction was enacted. This provision adds something to the meaning of the act, or it is useless. If the act is to be construed as authorizing a payment to assigns or attorneys, then this last provision is given no effect. It is evident to my mind that, for a reason deemed sufficient, Congress meant that these claims should be paid to the parties themselves, or, in case of death, to their several personal representatives; that it did not mean that they should be paid to anyone else, or that the officers of the Treasury should be required to investigate the validity of assignments or powers of attorney as preliminary to such payment. If required to suggest the reason which moved the enactment of this last clause of the statute, I should say that it was probably the same which caused the enactment of the statute of 1853, now known as section 3477, R. S., as expounded by Mr. Attorney-General Black in Ninth Opinions, 188.

Whatever the reason, the language seems to me too specific to leave room for doubt or construction. First, it requires that the draft shall be made *payable* to the party named; second, that the draft be *delivered* to the party named; and third, in case of the death of the party, the draft is to be delivered to his or her executor or administrator. The intent seems to me to be no less plain than that manifested in sections 4764, 4765, 4766, requiring the payment of a pension to the pensioner himself, and not to any third party.

Answering your question, then, I say:

In my opinions, a proper construction of the act does not warrant the making of the Treasury draft payable or deliverable to any other parties than those named in the act or to their executors or administrators.

The second question is covered by the answer to the first.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

PINKERTON LAND CLAIM—EXPATRIATION—TREATY OF GUADALUPE HIDALGO.

A citizen of the United States in 1889 who expatriates himself in that year and becomes a citizen of Mexico can not invoke Article XXI of the treaty of Guadalupe Hidalgo for an arbitration as against an act of this Government done while he was a citizen thereof.

A claim of one Pinkerton to certain lands in the Territory of New Mexico considered, and his remedy, if he has any, decided to be under the act of March 3, 1891, chapter 539, establishing a court of private land claims in certain States and Territories.

DEPARTMENT OF JUSTICE,
May 16, 1891.

SIR: Your communication of March 26 requesting an investigation of the subject-matter of an inclosed letter and statement made by William Pinkerton and dated March 23, 1891, was duly received.

It appears that said Pinkerton makes claim to a large tract of land lying in the Territory of New Mexico, and asks that such claim and the question of his right to said land be made the subject of an arbitration with the Government of Mexico under article 21 of the treaty of Guadalupe Hidalgo.

Passing by the question whether said article was intended to cover the case of a claim of this character, I beg to present a brief history of the Pinkerton claim.

In 1843 the Mexican authorities granted certain lands now in Colorado to a man, Canadian born, named Gervacio Nolan. In November, 1845, they granted other lands lying in New Mexico to Nolan, Aragon, and Lucero. Neither grant was limited as to quantity. No boundaries were set up, and no segregation was made. Under the Mexican colonization law of 1824 grants to individuals were limited to eleven square leagues.

After the acquisition by the United States of the territory which included these lands, and July 22, 1854, an act was passed (10 Stat., 308) providing (among other things) for an investigation of claims made to lands under Spanish and Mexican grants, and it was made the duty of the surveyor-general to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico, and to report thereon; and it was by section 8 further enacted as follows:

"Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm bona fide grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the Government, and shall not be subject to the donations granted by the previous provisions of this act."

Nolan died about 1857, and in 1860 his widow and heirs-at-law filed with the surveyor-general of the Territory of New Mexico a claim covering the tract claimed under said grant of 1845, claiming that Nolan died intestate, and that he had purchased all interests of Aragon and Lucero. This claim became known as No. 39.

During said year 1860 said widow and heirs also filed with the surveyor-general a claim to the lands claimed under the grant of 1843. This land is situated in the State of Colorado, and the claim became known as No. 48.

The claims were both investigated by the surveyor-general and were approved by him, and he recommended their confirmation by Congress.

In 1868 these claims, with others, were referred by Congress to the Committee on Private Land Claims of the House, with direction to report by bill or otherwise. In July of that year the committee recommended that certain of the claims be confirmed; but as claims Nos. 39 and 48 were subsequent to the Mexican limiting law of 1824, and were understood to cover much more than eleven square leagues, these two claims were "withheld for further investigation."

In April, 1870, the Private Land Claims Committee of the House reported in favor of the confirmation of claim No. 48 to the extent of eleven square leagues. After further legislative proceedings in the premises, the act of July 1, 1870 (16 Stat., 646), was passed confirming to the heirs of Gervacio Nolan, under claim No. 48, lands in Colorado to the extent of eleven square leagues. The act provides for the locating of the lands, and for adjusting with actual settlers, and for the costs of surveys. Section 4 enacts that the surveyor-general shall furnish properly approved plats to said

heirs of Gervacio Nolan, or their legal representatives, which shall be evidence of title; and the following proviso is appended: "*Provided, however,* That when said lands are so confirmed, surveyed and patented, *they shall be held and taken to be in full satisfaction of all further claims or demands against the United States.*" The lands were surveyed and patented to the heirs of said Nolan, who received the same. No action was ever taken by Congress in relation to claim No. 39 after it was "withheld" in 1868.

It will be noticed that the claim of Nolan's widow and heirs, filed in February, 1860, alleges that Nolan had purchased all the interest of Aragon and Lucero in the lands covered by claim No. 39.

In a letter dated in 1885 and filed in the Interior Department, Mr. Pinkerton alleges that he holds the interest of Lucero. In the statement before me, submitted by you, Mr. Pinkerton says (p. 2), "When Gervacio Nolan (one of the original grantees in the Nolan grant) died in 1857, it became necessary to sell his property for the purpose of dividing it amongst a large family. I paid a fair price for it, receiving in exchange a conveyance of all his right, title, and interest in the same; as his legal assignee I claimed to own a clear Mexican title to his share in the Nolan grant, made to him and two associates, one Antonio Aragon, and Antonio Maria Lucero." On page 4 of this statement Mr. Pinkerton describes himself "as legal assignee of all the rights, title, and interest of Gervacio Nolan to a one-third interest in the Nolan grant."

The origin of Mr. Pinkerton's connection with this claim No. 39, the date of that origin, and the amount of consideration paid are all left very obscure.

It appears that a survey of the land covered by claim No. 39 was made upon a deposit of the cost thereof, and plats of the land were filed in the local office at Santa Fe; but in October, 1881, the plats were withdrawn in consideration of the act of 1854 and of the action of the surveyor-general thereunder.

The land remained, therefore, in reservation until January 9, 1886, when Mr. Secretary Lamar restored the land to the public domain. (4 Land Decisions, 311.)

This restoration of the land covered by claim No. 39 is the act that Mr. Pinkerton complains of in this communication of March 23, 1891. This decision of the Secretary of the Interior is upon the ground that Congress in making the confirmation to the heirs of Nolan by the act of 1870, took final action as to claim No. 39, and that the condition attached to section 4 by the proviso quoted, upon acceptance by the heirs of Nolan, determined all further rights under claims Nos. 39 and 48 outside of the lands confirmed by the act of 1870. Mr. Attorney-General Garland, under date of April 23, 1887 (19 Opin., 8), reviews the question and holds, in effect, that as the surveyor-general reported in favor of the confirmation of claim No. 39, therefore section 8 of the act of 1854 requires that the land be held in reservation until final action by Congress on the claim; and holds that the confirmation of a portion of the claim No. 48 was not final action upon claim No. 39.

It is stated in Mr. Secretary Lamar's decision (p. 313) that Mr. District Attorney Mills, of New Mexico, states that hundreds of suits have been instituted against settlers located upon lands within claim No. 39, and that one of them (*Pinkerton* v. *Ledoux*) has been appealed to the Supreme Court. It is found that said case was decided in 1889 and is reported (129 U. S., 346). It appears that the action is ejectment, whereby Pinkerton seeks possession of a quarter section within the Nolan grant (No. 39). The case as a whole is not of much consequence in this investigation, but certain outcroppings are of interest. It appears that no plat is shown to have been annexed to the act of juridical possession; that under the claim of plaintiff the whole tract would embrace nearly 1,000 square miles, "whilst if it is confined to one league west of the Red River, as would seem to be the meaning of the original petition and grant, the quantity would still be over 100 square miles." The proof of title seems to have been remarkably simple.

The plaintiff gave in evidence the original Nolan grant, consisting of petition, grant, and juridical possession; the report of the surveyor-general was received without objection, and "the defendant's counsel admitted that the plaintiff had acquired all the title of the original grantees in and

heirs of Gervacio Nolan, or their legal representatives, which shall be evidence of title; and the following proviso is appended: "*Provided, however*, That when said lands are so confirmed, surveyed and patented, *they shall be held and taken to be in full satisfaction of all further claims or demands against the United States.*" The lands were surveyed and patented to the heirs of said Nolan, who received the same. No action was ever taken by Congress in relation to claim No. 39 after it was "withheld" in 1868.

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The plaintiff gave in evidence the original Nolan grant, consisting of petition, grant, and juridical possession; the report of the surveyor-general was received without objection, and "the defendant's counsel admitted that the plaintiff had acquired all the title of the original grantees in and

to the western half of the grant to the north of the Santa Clara hills," covering, as plaintiff claimed, the land then in controversy.

The jury rendered a verdict for defendant.

The opinion upon the review is by Mr. Justice Bradley, and concludes as follows:

"We see nothing in the charge of which the plaintiff can properly complain.

"This case seems to have been very perfunctorily tried and discussed. There is a question which may be entitled to much consideration, whether the Nolan title has any validity at all without confirmation by Congress. The act of July 22, 1854, before referred to, seems to imply that this was necessary. There is also another act of Congress which may have a bearing on the case. We refer to the act of July 1, 1870 (16 Stat., 646, c. 202), by which another grant to Nolan was confirmed to the extent of 11 leagues. After various provisions with regard to the exterior lines of those 11 leagues, the fourth section declares 'that upon the adjustment of said claim of the heirs of Gervacio Nolan, according to the provisions of this act, it shall be the duty of the surveyor-general of the district to furnish properly approved plats to said claimants, etc.: *Provided*, That when said lands are so confirmed, surveyed and patented, they shall be held and taken to be in full satisfaction of all further claims or demands against the United States.'

"Whether this provision was not intended to affect the entire claim of Nolan for any grant of lands in New Mexico may be a serious question. Without expressing any opinion on the subject, it suffices to say that we see no error in the judgment of the supreme court of New Mexico, and it is therefore affirmed."

Mr. Pinkerton states his age to be 80 years, and that he had been a citizen of the United States for twenty-three years previous to the decision made by Mr. Secretary Lamar in 1886.

It appears that at some time within or since 1889 he became a citizen of the Republic of Mexico, and then, through the representative of that Government, sought to have his claim under claim No. 39 confirmed or secured to him as a Mexican citizen.

Thus Mr. Pinkerton's claim became the subject of an international correspondence. In connection with that correspondence the Secretary of the Interior transmitted to the Secretary of State an elaborate history of the Pinkerton case, accompanied with many documents. This letter of Mr. Secretary Noble bears date November 26, 1890. It is understood that the Secretary of State declined to accede to the request presented in Mr. Pinkerton's behalf, holding that as Pinkerton expatriated himself subsequently to the decision of Mr. Secretary Lamar, made in 1886, he is not in position to invoke the aid of Mexico as against an act of this Goverment done while Pinkerton was a subject thereof.

And, in effect, that Mr. Pinkerton has no standing as a Mexican to demand from this Government an arbitration under the treaty of Guadalupe Hidalgo as to an act, or as to the effect of an act, performed by this Government while he was a citizen of the United States.

Of the correctness of this position there can be no question.

Therefore, in any view of the case, Mr. Pinkerton is not entitled to the arbitration which he solicits. If, however, he believes that he is entitled to further consideration in relation to his claims under No. 39, he is undoubtedly entitled to seek a remedy under the act of March 3, 1891 (Public, 140), being "An act to establish a court of private land claims in certain States and Territories." This act is especially provided for a just and final determination of Spanish and Mexican grants.

In conclusion, I beg to say: That if the action of the Secretary of the Interior, taken January 9, 1886, is approved, Mr. Pinkerton is without ground of complaint.

If that action is not approved, and the opinion announced by the Attorney-General April 23, 1887, that "final action of Congress on such claim" had not then been had is sustained, then the subsequent enactment of March 3, 1891, provides such final action, and Mr. Pinkerton has no continuing cause for complaint.

It is my opinion that Mr. Pinkerton's communication is not entitled to further Executive consideration.

Very respectfully,

W. H. H. MILLER.

The PRESIDENT.

SILVER-BULLION ACT—TREASURY NOTES—SEIGNIORAGE.

Under the act of July 14, 1890, chapter 708, directing the purchase of silver bullion and the issue of Treasury notes, other Treasury notes can not be issued on the gain or seigniorage arising from the coinage provided for in the act and paid into the Treasury.

The Secretary of the Treasury has power to issue silver certificates in exchange for all standard silver dollars which have been properly coined and put into circulation and are offered at the Treasury for exchange in sums not less than $10; whether such silver represents profit or seigniorage is immaterial.

The law must be construed in connection with the act of February 28, 1878, chapter 20.

DEPARTMENT OF JUSTICE,
May 21, 1891.

SIR: I have the honor to acknowledge the receipt of your letter of the 14th instant, in which you ask three questions with relation to the construction of the act of July 14, 1890 (26 Stat., 289), directing the purchase of silver bullion and the issue of Treasury notes thereon.

The questions are as follows:

First. Whether Treasury notes of the character authorized by the act may be issued on the gain or seigniorage arising from the coinage provided for in the act and paid into the Treasury.

Second. Whether silver certificates may be issued against silver dollars paid into the Treasury as such gain or seigniorage.

Third. Whether silver certificates may be issued upon the deposit of silver dollars coined under the provisions of this act, and paid out in redemption of Treasury notes, or upon other obligations of the Government.

Touching the first question, I have to say that section 1 of the act directs the Secretary of the Treasury to purchase silver bullion to the aggregate amount of four million five hundred thousand ounces per month, if so much be offered, at the market price, not exceeding a certain rate, "and to issue in payment of such purchase of silver bullion Treasury notes of the United States, to be prepared by the Secretary of the Treasury," etc. This is the only direct authority in the act for the issue of such Treasury notes, and they are to be issued only for the purchase of the bullion. They are not to be issued upon money in the Treasury, but only for the

purpose of purchasing bullion and bringing it into the Treasury, and, of course, must be limited by the amount necessary for such purchase. This view is confirmed, if confirmation be necessary, by the provision in the second section that "no greater or less amount of such notes shall be outstanding at any time than the cost of the silver bullion, and (of) the standard silver dollars coined therefrom then held in the Treasury purchased by such notes."

The Treasury notes must always just equal the cost of the silver bullion purchased.

Your first question, therefore, is answered in the negative.

Touching the second question—whether silver certificates may be issued against silver dollars paid into the Treasury as such gain or seigniorage—the act under consideration makes no provision in reference to silver certificates. The law as to the issue and use of such certificates must be found by construing this act in connection with the act of February 28, 1878, (20 Stat. L., p. 25.) The only provision in the latter act touching silver certificates is in the third section, which reads as follows:

"That any holder of the coin authorized by this act may deposit the same with the Treasurer or any assistant treasurer of the United States, in sums not less than ten dollars, and receive therefor certificates of not less than ten dollars each, corresponding with the denominations of the United States notes. The coin deposited for or representing the certificates shall be retained in the Treasury for the payment of the same on demand. Said certificates shall be receivable for customs, taxes, and all public dues, and, when so received, may be reissued."

This section provides for the issue of silver certificates to the "holder" of the silver standard dollars when presented in sums not less than $10. It does not authorize the issue of certificates against dollars in the Treasury, but in exchange for dollars offered at the Treasury. The act of 1878 required the Secretary to purchase and coin not less than $2,000,000 or more than $4,000,000 worth of silver bullion per month, and provided that "any gain or seigniorage arising from this coinage shall be accounted for and paid into the Treasury as provided under existing laws relative to the subsidiary coinage."

The law as to the disposition of the profit on subsidiary coinage is found in section 3526, Revised Statutes, and is substantially that the balance to the credit of this profit fund shall, at least twice a year, be paid into the Treasury of the United States. Section 3 of the act of 1890 in like manner requires that "any gain or seigniorage arising from such coinage shall be accounted for and paid into the Treasury."

This profit becomes a part of the general fund in the Treasury, and is subject to the same uses as the balance of such funds.

It will be noticed that section 3 of the act of 1878 provides for the issuing of silver certificates to any "holder" of the coin authorized by the act. The act of 1890, being *in pari materia* with the act of 1878, the same provision would be applicable to the issue of certificates for dollars coined under the later act. It is entirely clear to my mind that the word "holder," as used in the third section of the act of 1878, does not include the Director of the Mint, or any other officer of the United States who brings the coin to the Treasury, and is credited therewith on the charge against him for the bullion, but the word "holder" means a person, other than an officer of the United States, who has come into the possession of the silver dollars. In other words, as stated with reference to the Treasury notes issued under the first section of the act of 1890, the silver certificates are not issued upon coin in the Treasury, but, theoretically at least, in exchange for standard silver dollars offered at the Treasury; and I have no doubt as to your authority to issue silver certificates in exchange for all standard silver dollars which have been properly coined and put into circulation, and are offered at the Treasury for such exchange, in sums not less than $10. Whether such silver represents profit or seigniorage I think is wholly immaterial. The only limitation seems to be that, for every $10 of silver certificates issued, a like amount of coined standard silver dollars shall go into the Treasury.

The foregoing answers your third question as well as the second.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

NOTICE OF PAYMENT OF BONDS.

In answer to a question by the Secretary of the Treasury, whether in the event of the public unconditional announcement that interest on the 4½ per cent bonds issued under the act of July 14, 1870, chapter 256, would cease after a certain specified day, the Secretary of the Treasury would be precluded from negotiating with the holders of bonds for a continuance thereof at a lower rate of interest, a reply was given that the language of section 3 of the act required the Secretary to pay all the bonds designated for payment in any notice. A suggestion was given that a similar course be taken to that pursued in the case of the 5 per cent bonds, and that to the notice be appended a statement that if within defined limits some holders of the bonds requested to have them continued during the pleasure of the Government at 3½ per cent interest, such request would be granted provided they were deposited before a certain day. It was stated that that arrangement, although criticised, stood as a precedent for the guidance of the Secretary of the Treasury.

DEPARTMENT OF JUSTICE,
May 29, 1891.

SIR: Your letter of even date herewith submits for opinion the question "whether in the event of the publication by this Department of an unconditional announcement that interest on the bonds of the 4½ per cent loan will cease on a certain specified day after September 1, 1891, and that the bonds will be paid on that day, the Department would, by such publication, be cut off from the right it now has of negotiating with the holders of the bonds for a continuance thereof at a lower rate of interest."

The bonds in question were issued by authority of the act of July 14, 1870, entitled "An act to authorize the refunding of the national debt" (16 Stat., 272), which authorizes (sec. 1) the Secretary of the Treasury to issue 5 per cent bonds to an amount not to exceed $200,000,000, and 4½ per cent bonds to an amount not to exceed $300,000,000, and 4 per cent bonds to an amount not to exceed $1,000,000,000, the 5 per cents to be payable ten years from the date of issue "*at the pleasure of the United States*," the 4½ per cents fifteen years from the date of issue "at the pleasure of the United States," and the 4 per cents thirty years from the date of issue "at the pleasure of the United States."

The provision of this act which bears on the question before me is section 3, which is in the following words:

"*And be it further enacted*, That the payment of any of the bonds hereby authorized after the expiration of the said several terms of ten, fifteen, and thirty 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 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."

This language, by taking away all authority to pay interest three months "after the date of such notice," would seem to make it imperative on the Secretary of the Treasury to pay all the bonds designated for payment in any notice to be given.

If less than the bonds designated in such notice should be paid, those left unpaid would cease to bear interest, a result which is, of course, to be avoided.

It would seem, however, that some such course might be taken with reference to these 4½ per cents as was taken with reference to the 5 per cent bonds issued under the act of July 14, 1870, which were redeemable at the pleasure of the United States after ten years from the date of their issue.

On May 12, 1881, the Secretary of the Treasury called for certain of these bonds and to the call was appended a clause that in any case any of the 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 3½ 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."

Certain bondholders availed themselves of the privilege of continuing their bonds at the reduced interest rate of 3½ per cent (see 17 Opin., 349).

It is true the arrangement thus made somewhat outside the letter of the law was criticised in Congress, but it stood,

and may be referred to as a precedent for your guidance in the case of the 4½ per cents should you be willing to continue any of them at a reduced rate of interest beyond the time named for redemption in the contemplated call.

I am, sir, your most obedient servant,

WM. A. MAURY,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

ROCK CREEK PARK—PURCHASE OF LAND.

The mere fact that the law authorizing the acquisition of land for Rock Creek Park, of date September 27, 1890, chapter 1001, requires the commission, if unable to agree with the owner of the land selected within thirty days' time, to apply for an assessment of the value of such land as it has been unable to purchase at its assessed price, does not preclude the commission from later purchasing by agreement the land of certain property-owners, although judicial proceedings have been commenced for the assessment of the value of the land.

DEPARTMENT OF JUSTICE,
June 5, 1891.

SIR: By the act of Congress of September 27, 1890, entitled "An act authorizing the establishing of a public park in the District of Columbia" (Laws 1889–1890, p. 492), it is directed (section 1) that a tract of land, not exceeding 2,000 acres, shall be set aside for the purpose stated in the title, and shall be known by the name of "Rock Creek Park;" and, to carry out the purposes of the act, it is provided (section 2) that a commission shall be appointed.

Section 3 of the act then declares as follows:

"That the said commission shall cause to be made an accurate map of said Rock Creek Park, showing the location, quantity, and character of each parcel of private property to be taken for such purpose, with the names of the respective owners inscribed thereon, which map shall be filed and recorded in the public records of the District of Columbia, and from and after the date of filing said map the several tracts and parcels of land embraced in said Rock Creek Park shall be held as condemned for public uses, and the title thereof vested in the United States, subject to the payment of just

compensation, to be determined by said commission, and approved by the President of the United States: *Provided*, That such compensation be accepted by the owner or owners of the several parcels of land.

"That if the said commission shall be unable by agreement with the respective owners to purchase all of the land so selected and condemned within thirty days after such condemnation, at the price approved by the President of the United States, it shall, at the expiration of such period of thirty days, make application to the supreme court of the District of Columbia, by petition at a general or special term, for an assessment of the value of such land as it has been unable to purchase.

"Said petition shall contain a particular description of the property selected and condemned, with the name of the owner or owners thereof, if known, and their residences, as far as the same may be ascertained, together with a copy of the recorded map of the park, and the said court is hereby authorized and required, upon such application, without delay, to notify the owners and occupants of the land, if known, by personal service, and if unknown, by service by publication, and to ascertain and assess the value of the land so selected and condemned, by appointing three competent and disinterested commissioners to appraise the value and values thereof, and to return the appraisement to the court; and when the value or values of such land are thus ascertained, and the President of the United States shall decide the same to be reasonable, said value or values shall be paid to the owner or owners, and the United States shall be deemed to have a valid title to said land; and if in any case the owner or owners of any portion of said land shall refuse or neglect, after the appraisement of the cash value of said lands and improvements, to demand or receive the same from said court, upon depositing the appraised value in said court to the credit of such owner or owners, respectively, the fee-simple, shall in like manner be vested in the United States."

The commission, thus constituted, selected the land necessary for the park, and prepared, filed, and recorded a map of the same as required by the law.

The commission having been unable, within thirty days after the date of condemnation, to agree as to compensation

with the owners of the larger part of the land condemned applied to the supreme court of the District to assess the value of the said land.

But since the application to the court was made, the commission and the owners of some of the land embraced in the application have agreed on what would be just compensation for their land, but a doubt has been started as to whether the commission has authority to make such an agreement, now that judicial proceedings have been commenced for the purpose of assessing the value of the said land. Upon this question an opinion is requested.

It is true that the law requires (section 3) the commission to apply to the supreme court of the District at the expiration of thirty days after condemnation "for an assessment of the value of such land as it has been unable to purchase," and that the words just quoted refer to land remaining unpurchased at the expiration of the period mentioned and at the commencement of the judicial proceedings required to be then taken.

But I am unable to bring myself to the conclusion that the commencement of judicial proceedings, after the expiration of the thirty days, puts an end to the power of the commission and the landowners to come to an agreement of purchase, subject to the approval of the President, at any time before such proceedings are complete. The right of eminent domain is, at best, a harsh one, and it would require very explicit language to authorize me to hold that Congress intended that the mere pendency of proceedings for the enforcement of that right should supersede the power of the commission to acquire by purchase. Certainly the direction of the statute that the commission shall apply to the court to assess the value of all land not purchased within thirty days after condemnation is, in my judgment, not sufficient to warrant such a conclusion.

I think that the opinion in favor of a continuing power in the commission is strengthened by the consideration that Congress has not given the quality of finality to valuations made by the court any more than to those made by the commission. In both instances a valuation, to have validity, must be approved by the President, and it is fair to say that Congress does not seem to indicate any preference between these two modes of proceeding.

Again, as the appropriation made by the act is to cover the expenses of "inquiry, survey, assessment, cost of lands taken, and all other necessary expenses incidental thereto," it is hardly supposable that Congress contemplated that the amount of the appropriation applicable to the main object of the act should be reduced by the costs of continuing the proceedings in court after a landowner has agreed to accept the compensation offered by the commission and approved by the President.

The fact that the commission has, with the approval of the President, heretofore valued the particular land now in question is, in my opinion, no obstacle whatever to its making a new valuation.

It results, therefore, that, in my opinion, the commission may, with the approval of the President, carry out the said agreement with certain of the landowners.

Very respectfully, yours,

W. H. H. MILLER.

The PRESIDENT.

BUREAU OF ENGRAVING AND PRINTING.

Section 2 of the act of March 3, 1883, chapter 123, requiring the Chief of the Bureau of Engraving and Printing to submit estimates of the cost of executing certain work for the Post-Office Department and to perform the work if his estimates be lower than the proposals of the other bidders, is mandatory in its provisions; if, however, by reason of subsequent legislation or inadequate facilities, the statute has become impossible of execution, such facts may properly be considered in submitting the bids and also may properly be considered by the Postmaster-General in making the awards.

DEPARTMENT OF JUSTICE,
June 8, 1891.

SIR: Under date of June 5 instant the Acting Secretary of the Treasury writes me as follows:

"I have the honor to transmit herewith a copy of a letter from the Chief of the Bureau of Engraving and Printing, dated the 4th instant, recommending that your opinion be requested as to the effect of section 2 of the act of March 3, 1883 (Stat., vol 22, p. 526), which provides that the Chief of the Bureau shall submit estimates of the cost of executing certain work for the Post-Office Department and shall per-

form such work if his estimate be lower than the proposals of other reasonable bidders. The act referred to provides that the supplies desired shall be obtained under advertisements calling for proposals to furnish the same for 'a period of four years.'

"In pursuance of the statute the Chief of the Bureau submitted estimates in 1883 and in 1887 for certain classes of printed and engraved matter, but the contracts were awarded to other establishments whose proposals were lower. At the time those estimates were submitted certain steam presses owned by the Government were in operation, and others might lawfully have been obtained and employed; but legislation since enacted has imposed conditions which have compelled the Bureau to discontinue the use of the presses, and its facilities have thereby been so hampered that it is unable promptly to execute the orders of this Department, and would of course find it impossible to accomplish the additional task of fulfilling a contract with the Post-Office Department.

"Please advise me whether, in view of these facts, the statute is still mandatory upon the Chief of the Bureau of Engraving and Printing."

In answer I have to say that there is nothing in the form or substance of the statute referred to to indicate that it was not intended by Congress to be mandatory. If by reason of subsequent legislation the statute has become impossible of execution, the facts which make it so may be very properly stated in connection with the bid submitted. Or, if the force or facilities at command in the Bureau of Engraving and Printing are inadequate to the work, or to make them adequate thereto would involve a large outlay, such facts may well be considered in submitting the bid, and all of these facts may very properly be considered by the Postmaster-General in making the award of the contract.

I have the honor to be, respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

DIRECT TAX—PAYMENT TO STATES.

The amount of the direct tax coming to the State of Vermont as repayment under the act of March 2, 1891, chapter 496, is $179,407.80; but the question arises as to whether the Secretary of the Treasury should withhold any or all of this money from the State of Vermont in pursuance of the requirements of the act of March 3, 1875, chapter 149, inasmuch as the State of Vermont is charged on the books of the Department in the sum of $543,780.23, the amount alleged to have been overdrawn by that State for arms under section 1661, Revised Statutes.

It appears that these arms consisted entirely of ordnance and ordnance stores and did not include any clothing or quartermasters' stores, and were delivered within the State in December, 1864, for the purpose of repelling a threatened invasion from Canada. The facts of the invasion reviewed historically and shown to have been really an invasion of the United States by the Confederates, and that the defense of Vermont against incursion from Canada was a defense of the United States against Confederate insurgents: *Held* that the act of March 3, 1875, does not apply to an unliquidated claim in favor of a State, arising out of a particular charge which is subject to equitable recoupments in an unadjusted transaction, and that statute has no application in this case, and the Secretary of the Treasury is justified in paying to the State of Vermont the amount of its share of the refund of the direct tax, leaving the other accounts in controversy between the United States and that State to be adjusted by an accounting afterwards by the Treasury Department and the legal officers of the Government.

DEPARTMENT OF JUSTICE,
June 11, 1891.

SIR: I am in receipt of your letter of the 5th ultimo, submitting inquiries in relation to payments to be made under the act of March 2, 1891, entitled "An act to credit and pay to the several States" moneys collected under the direct tax act of August 5, 1861, with inclosures.

As these inquiries relate mainly to the case of the State of Vermont, I will answer especially as to that case.

The said act of March 2, 1891 (Stat., 822) is intended to return to the States the money taken from them under section 8 of the act of August 5, 1861 (12 Stat., 292).

It requires the Secretary of the Treasury to credit to each State a sum equal to all collections made under that act, and appropriates all sums necessary to reimburse the State for the money found due to such State under this act, and

directs the Treasurer of the United States to pay the same to the governors of the States.

The amount of the direct tax going to the State of Vermont under this act of 1891 is stated to be $179,407.80.

Unless it shall appear that some debt exists on behalf of the United States against the State of Vermont which ought, legally and properly, to be set off against the moneys of the direct tax, then unquestionably there should be paid to the said State under said act of 1891 the sum of $179,407.80.

This case comes to me for my opinion under the following circumstances:

It appears that while preparing for the refund required by said act of March 2, and under date of March 28, 1891, the First Comptroller made inquiry of the War Department whether any State stands indebted in any bureau of such Department, and if so, the amount and on what account.

Under date of March 31, answer is made from the Ordnance Office that—

"The following States and Territories are charged on the books of this office with the following amounts, being for arms, etc., overdrawn by them under section 1661, Revised Statutes, prior to February 12, 1887, viz: * * * Vermont, $543,780.23."

Thereupon it was, upon the suggestion of the First Comptroller, submitted to the Second Comptroller of the Treasury for his opinion as to whether the amounts charged against the States named constitute such claims as may be withheld by the Secretary of the Treasury under act of March 3, 1875 (18 Stat., 481).

The Second Comptroller makes answer April 9, and therein states with reference to the State of Vermont that, "It appears that the indebtedness arose from the fact that the U. S. Government loaned to the State in October, 1864, ordnance stores for the purpose of enabling it to arm its militia in order to be in readiness to defend the State against any invasion across the Canada border in aid of the rebellion. It is alleged that the State sold a large portion of these stores, and that the money received from the sales was paid into the State Treasury, and has ever since been retained by the State.

"It also appears that the State has an unadjusted claim against the United States amounting to $66,890.16, for money expended under the act of July 27, 1861, in equipping troops for the Federal service in the war of the rebellion. * * * The State also claims that it is entitled to be allowed the expenses incurred by it in arming and equipping the State militia in 1864 to prevent the threatened raid from Canada, amounting to about $200,000."

The Second Comptroller further says that negotiations for settlement were had, but without effect; and he suggests that, as the accounts between the United States and the States and Territories have not been audited and settled under the Revised Statutes, the Secretary might not be justified in deducting them, yet he thinks that a sufficient sum to cover the alleged indebtedness should be withheld until the determination of the question.

Under date of April 27, the Second Comptroller addresses a further communication to the Secretary of the Treasury, in which he refers to that of April 9, and says that, upon further consideration of the subject in connection with the charge against Vermont, "I feel by no means satisfied of the legality of the charge reported by the War Department, but think there is a reasonable doubt as to whether the advance to said State of the large quantities of arms and ordnance stores did, under the then existing circumstances, constitute such an indebtedness on the part of the State to the General Government as to bring it within the operation of the act of March 3, 1875."

He then recommends "that the whole matter be referred to the Attorney-General * * * with the request for * * * his opinion," etc. He then proceeds to give important historical statements bearing upon the question under consideration.

Your letter of May 5 transmits these communications with other inclosures, and calls for my opinion upon the questions involved.

It becomes necessary, in relation to the case of Vermont, to now consider the facts and circumstances connected with the transfer, by the United States to that State, of the "arms," etc., charged against the State and mentioned in the letter from the Ordnance Office, dated March 31, 1891.

These arms and stores consisted of field batteries of artillery, with their carriages and ammunition; infantry muskets and rifles, with their accouterments and ammunition; cavalry equipments, and so forth, and consisted wholly of ordnance and ordnance stores, and did not include any clothing or quartermaster stores.

The stores charged were ordered to be delivered in December, 1864, and were delivered within the State in said month, or soon thereafter, at the cost of the General Government.

It has been said that there is no precedent for the case now under consideration. Granting the truth of this, it may be added that no similar question exists between the United States and any other State; therefore the decision made relates exclusively to the case of Vermont.

The Confederate attack on St. Albans, a Vermont village located about twelve miles from the Canadian line, occurred October 19, 1864.

Lieut. Bennett H. Young, with twenty or more Confederates, appeared in that village and made an attack upon it in the nature of a raid. The attacking party robbed three banks of about $200,000, killed one man, wounded others, seized and took away horses, took armed possession of a portion of the village, held many of the citizens prisoners for awhile, and shot at groups of people and individuals wherever seen.

They claimed to be Confederate soldiers; that they came to retaliate for acts done in the South, and that they represented the Confederate States. In some instances they administered what they called a Confederate oath; and their leader produced "a proclamation" to the people declaring their purpose to be retaliation, but circumstances prevented the reading thereof. The band were excellently armed, and acted under the orders of their commanding officer as a military organization.

After seizing horses they were well mounted, and they then moved off toward Canada with their captures in military array, discharging their navy revolvers at citizens indiscriminately. They threatened and attempted to burn the town, applying "Greek fire," which could only be extinguished by being hewed out of the wood.

It must be remembered that at this time there were from 15,000 to 20,000 or more rebellious citizens of the United

States domiciled or commorant in Canada, including distinguished accredited agents of the Confederate organization.

It will also be noted that only one month previous to the St. Albans raid a party of Confederate soldiers organized an expedition with intent to liberate the Confederate prisoners confined on Johnsons Island, seized the *Philo Parsons* on Lake Erie, and by her aid seized, scuttled, and grounded the *Island Queen*, and then, raising the Confederate flag, sailed to Canada, where the captors scuttled and cast off the *Parsons*, and escaped with their booty to the sheltering Dominion.

It was also well known that during the year 1864 there were parties of insurgents drilling at Marysburg, and that concentrations were made at Windsor and at other places in Canada.

A project for sending into the Northern States clothing infected with malignant diseases was generally believed to exist, and a purpose to burn Northern cities was well established.

Under date of November 3, 1864, Mr. Seward wrote to Lord Lyons: "While the Government has been engaged in considering Earl Monk's request, our requisitions for the offenders whose crimes were committed on Lake Erie and for the burglars and murderers who invaded Vermont remain unanswered. We hear of a new border assault at Castine, in the State of Maine, and we are warned that plots are formed at Montreal to fire the principal cities of the Union."

It is familiar history that during this period the whole energy and power of the national administration and Government were employed in sustaining and strengthening the armies then active in the Southern States against the rebellion.

Under these circumstances, and in view of the history of the times, it is a correct conclusion that the attacks, made and threatened, upon the Northern border were a carrying on of the war waged by the insurgent organization, and that the defense of Vermont against incursions from Canada was a defense of the United States against Confederate insurgents.

It seems now to be beyond question that the "St. Albans raid" was a belligerent act of the forces then at war with the Union. It appears that Young was appointed a second

lieutenant June 16, 1864, and ordered to report to Messrs. Thompson and Clay in the British Provinces for instructions; and October 6 his suggestion "for a raid upon accessible towns in Vermont, commencing with St. Albans," was approved.

The attack was known to and authorized by those in high Confederate standing.

The letters captured by Gen. Augur and reported November 12, 1864 (P. I, Dip. Cor., 1865, p. 13), supply the connecting details.

The military management of the affair on the part of the United States was at once assumed by Maj. Gen. Dix, commanding the Department of the East, and his somewhat hasty order directing pursuit of the attacking party into Canada was modified by the President, who thus recognized the national relations of the transaction.

The final judicial act of the proceeding against the raiders in the courts of Canada, as reported by Mr. Robert S. Hale, agent and counsel for the United States before the American-British Claims Commission, was upon warrants issued by Judge Smith, one of Her Majesty's justices for the superior court for the province of Canada East, and five of the persons charged were brought before him upon an application of the United States for their extradition.

After much delay Justice Smith decided that the persons were not the subject of extradition under the treaty, but were belligerents against the United States in committing the acts complained of. He said: "I am therefore constrained to hold that the attack on St. Albans was a hostile expedition authorized both expressly and impliedly by the Confederate States, and carried out by a commissioned officer of their army in command of a party of their soldiers. And, therefore, that no act committed in the course of or as incident to that attack can be made the ground of extradition under the Ashburton treaty."

The diplomatic correspondence between this country and Great Britain from the date of the St. Albans raid until the close of the war abounds in references to this raid and to the attacks made and threatened by insurgents then in Canada.

Mr. Secretary Seward, under date of October 21, 1864, writes to Mr. Burnley concerning this raid: "It is not to be

doubted that the object of these depredations is the same with that of the piratical operations which recently occurred on Lake Erie, namely, to embroil the governments of the United States and Great Britain in a border war."

Under date of November 23, 1864, Mr. Adams writes to Earl Russell, complaining of "the manner in which the territories in America under the authority of Great Britain, both continental and insular, are systematically used by the insurgents against the United States as bases for hostile proceedings of every description."

He refers to their use of Nova Scotia, New Brunswick, and Bermuda, and to the cases of the *Philo Parsons* and *Island Queen* and to the foray upon St. Albans, and says: "Inroads by marauding ruffians upon the population of the United States on that border can not be tolerated."

He refers to insurgents domiciled in Canada, and gives notice of the purpose of the United States to increase its naval armament upon the lakes. He adds: "In taking this step I am advised to assure your lordship that it is resorted to only as an indispensable measure to the national defense."

Under these proceedings and declarations it must be admitted that the assaults from Canada were attacks upon the United States, and that the defense of Vermont was an act of the National Government in preservation of the Union.

That the State aided in carrying out this national defense was a natural procedure under our system of government.

At the date of the attack at St. Albans the legislature of Vermont was in session. In his message, delivered October 14, Governor Smith commented upon the threats of attack and the lack of means of defense, and stated that the Secretary of War had signified his willingness to furnish arms, accouterments, and ordnance stores, and he added: "I also received personal assurances from the Secretary that camp equipments, such as might be required for drill and instruction in camp, would be freely furnished by the Department to the extent needed on proper requisition."

November 22, public act No. 1 was passed, practically providing for the enrollment of the arms-bearing men of the State and dividing the State into twelve military districts, with duly constituted and officered military organizations in each.

Under this act twelve regiments of infantry, one regiment of cavalry, and three batteries of artillery were organized. All were uniformed, armed, and equipped, and made ready for efficient service.

Small amounts of arms were furnished by the Secretary of War immediately after the attack of October 19, 1864, but these do not appear to be of consequence in this investigation.

After the legislative action above specified, and in December, 1864, the governor and quartermaster-general of the State came to Washington, and consulted with the President and Secretary of War about supplying the authorized military organizations.

Governor Ormsbee, in his message of November 5, 1886, refers to these negotiations, and states that Governor Smith "went to Washington to confer with the President and Secretary of War as to measures and means of national defense against anticipated raids and invasions," and further states that:

"A conference was had, and President Lincoln and Secretary Stanton were very solicitous that the State of Vermont should organize a force of militia sufficient to meet the emergency, so that the national forces at the front might not be weakened by calling from that source. It will be remembered that this was a period of great importance and solicitude as to national affairs, and I have the authority of Governor Smith for saying that both President Lincoln and Secretary Stanton personally besought him to make every proper effort to have such a force of militia organized, at the same time giving most unqualified assurance that the General Government would furnish the necessary arms and ammunition to put such a force on war footing."

It does not appear that this statement, or that one previously quoted from Governor Smith's message, has ever been questioned.

State Quartermaster Pitkin, in his report to Governor Smith, dated October 1, 1865, says:

"On the 11th day of December last I accompanied you to Washington, D. C., for the purpose of procuring from the War Department arms, accouterments, clothing, camp equipage, etc., for the use of the militia. I succeeded in

obtaining from the Ordnance Department, upon requisitions approved by you, all ordnance stores required. Camp equipage and, clothing could not then be procured from the United States, and, in compliance with your order, I purchased such quantities as were considered necessary for immediate use."

December 7, 1864, Governor Smith requested the War Department to furnish the State arms, accouterments, ordnance stores, ammunition, equipments, camp and garrison equipage, complete, and also "uniforms, consisting of caps, coats, and pants" sufficient for arming, equipping, and uniforming 12 regiments of infantry, 1 of cavalry, and 3 batteries of artillery.

The records of the War Department show the following action upon this request:

Referred to Chief of Ordnance to report whether the ordnance supplies can be furnished.

E. M. STANTON.

ORDNANCE OFFICE, *December* 12, 1864.

Respectfully returned. All the ordnance stores asked for can be furnished.

A. B. DYER,
Brigadier-General, Chief of Ordnance.

Returned to the Chicf of Ordnance with directions to furnish the stores required. By order of the Secretary of War.

C. A. DANA,
Assistant Secretary of War.

WAR DEPARTMENT,
January 30, 1865. (Received O. O. December 12, 1864.)

Under date of December 12, the Secretary of War writes:

SIR: In reply to your communication of the 7th instant, requesting the War Department to furnish the State of Vermont with arms, accouterments, ordnance stores, etc., I have the honor to say that this Department will be able to furnish you with the ordnance and ordnance stores, and also with the arms specified in your letter, upon requisition made by you upon the Chief of Ordnance.

Uniforms and camp and garrison equipage can not be furnished in the present state of the supplies of the Quartermaster's Department.

Yours truly,

EDWIN M. STANTON,
Secretary of War.

To his Excellency J. GREGORY SMITH,
Governor of Vermont.

December 14, Secretary Stanton sent to Governor Smith: "Your telegram received. I regret not having an opportunity to see you again before your departure. The military supplies will be forwarded without delay. Instructions to meet emergencies as they arrive will be given to Gen. Dix, with whom you will please communicate."

Under the proceedings detailed, the militia of the State were organized pursuant to legislative enactment, were furnished with arms, ordnance, and ordnance stores by the General Government, and were supplied with clothing, rubber blankets, etc., at the expense of the State, as the Secretary of War had then stated the War Department to be unable to furnish them "in the present state of the supplies of the Quartermaster's Department."

The item of $543,780.23 charged upon the books of the Ordnance Office against the State of Vermont, as stated in the aforesaid report of March 31, 1891, is a portion of the property delivered to the State under the foregoing negotiations and orders.

The property which was delivered in 1864–'65 was valued at about $640,000 and was charged on the books of the Ordnance Office to the State in the account of arms, etc., furnished to the militia of the United States under the act of April 23, 1808.

In the State quartermaster's report before cited he says: "In compliance with the orders of the commander-in-chief, I have furnished the militia with uniforms, arms, accouterments and ammunition."

It appears that the State expended, in connection with the arming and equipment of the men of said organizations, for uniforms, clothing, rubber ponchos and tent blankets, knap-

sacks, canteens, and other supplies of like nature, the sum of $162,831, no part of which has been repaid to the State.

Said State also expended in connection with said troops other considerable sums of money, which remain unadjusted.

It also appears that in the year 1870 the State sold a portion of said arms and ammunition for the sum of $143,469.66, which was turned into the State treasury, and soon after exchanged another portion for other equipments, at a valuation of $4,099.

It is claimed on behalf of the State that these arms, etc., had remained on hand for about five years after the close of the war; that no national law existed authorizing the return of the arms to the General Government; that the arms were charged to the State upon a continuing account; that the annual allotment of arms, etc., under the statute of 1808 was withheld from the State and was charged against the property so charged to the State; that the property required expense in care and protection, and was deteriorating in value, and that, being offered a liberal price for a portion of the property, the State properly and justifiably disposed of the same.

It is not my duty to determine the correctness or validity of these claims; but the question submitted to me is, in substance, whether the law requires that the proceeds of the sales of those arms (to wit, the $147,568.66, or the $143,469.66,) should be set off against or deducted from the $179,407.80 to which Vermont is stated to be entitled under the "direct tax act" of March 2, 1891.

The questions arising as to the remaining $400,000, or thereabouts, are left in such obscurity from complications of fact, and, perhaps, from deficiences of legislation, that they can only be reached by the accounting or the law-making departments of the Government.

It is understood that the property was charged against the State when the same was delivered, and that the balance has been carried along from year to year, under the account of the act of 1808, until the law of February 12, 1887, was enacted changing the policy of the issuance of arms for the militia, and, consequently, the Government has had continuing knowledge of the existence and condition of the transaction.

The law of 1808 required an annual issue of arms to each State, with the view of keeping up a constant supply. No State had any interest in the arms supplied to any other State, nor was there any provision for national control or State responsibility to the General Government after the arms were delivered. Here were delivered to one State, under one order, more arms than the law allowed to be issued to the whole United States in three years.

It is plain that the arms were delivered to Vermont to meet, or to prevent threatened attacks, in such a manner as should avoid withdrawing men from the armies then active in the South; and the charges were placed under the account of the act of 1808 as a matter of bookkeeping and without the direction of any law.

By act of July 27, 1861 (12 Stat., 276), the Secretary of the Treasury is directed to pay to the governor of any State the expenses properly incurred by such State, for enrolling, subsisting, paying, clothing, equipping, and so forth, its troops employed in aiding to suppress the "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."

Vermont makes claim for about $66,890 under this statute.

By the act of March 3, 1875 (18 Stat., 455), it is provided that all issues of arms and other ordnance stores made by the War Department to States between January 1, 1861, and April 9, 1865, under the aforesaid act of 1808, and charged to the States, having been made for the maintenance and preservation of the Union, and properly chargeable to the United States, the Secretary of War is authorized, upon a proper showing by such States of the faithful disposition of such arms and stores, to credit to the States the sums so charged to them.

Provided, that if he shall find that any of such arms or stores have been sold or otherwise misapplied, he shall refuse credit for such portion thereof, and the amount thereof shall remain a charge against the State, the same as if this act had not been passed.

If it be held that the arms charged, which were sold and disposed of, were improperly sold and were misapplied, then

this act has no application as to those, and no adjustment can be made under it.

It is true that the expression of Congress implies that the selling of arms without the authority of the Government is a misapplication, but the act declares that the issue was made for the maintenance and preservation of the Union, and was properly chargeable to the United States.

A reasonable deduction is that the act of 1875 is without effect as to the question now under consideration.

It may properly be said, also, that the act of March 3, 1875 (18 Stat., 481), does not apply to an unliquidated claim in favor of a State arising out of a property charge which is subject to equitable recoupments, in an unadjusted transaction; and that statute has no application in this case.

It is manifest that if the action which placed Vermont in condition for defense should be treated as a movement intended to defeat or ward off attacks made upon the United States by a belligerent enemy, then the claim that the General Government should furnish, and that it expected to pay for the war supplies for such defense, is not an unreasonable one.

The auditor of the State says: "It was agreed by and between the President and Secretary of War of the one part, and the governor and quartermaster of the State of the other part, that the State should raise a divison of militia, and that the United States should provide arms, ordnance stores, camp and garrison equipage, and other supplies to put such force in condition for service, if required for the defense of the frontier."

The official utterances of Governors Smith and Ormsbee, as hereinbefore quoted, are practically to the same effect. Governor Smith's requisition of December 7 calls for "camp and garrison equipage complete, and also uniforms consisting of caps, coats, and pants sufficient," etc.

Secretary Stanton answers, December 12: "Uniforms and camp and garrison equipage can not be furnished in the present state of the supplies of the Quartermaster's Department."

It seems plain that if the Department could have furnished those supplies it would have done so with the same promptness that it furnished ordnance and ordnance stores. And

the phraseology used by the Secretary is strongly corroborative of the terms of the agreement as understood by the representatives of the State.

At the date of the issue of the arms the State was entitled, upon the books of the War Department, under the act of 1808, to $3,541.28; its quota in the field was then considerably in excess of all calls previously made; it neither sought nor needed assistance in its State affairs or in furnishing its proportionate force for the suppression of the rebellion. At the same time the General Government was exerting its whole physical power to break up the opposing armies, and was exercising its diplomatic skill in preventing attacks from Canada and a collision with Great Britain.

Under these circumstances the National Government, as a war measure, in the performance of its duty to preserve the Union, and under the pressure of a necessity for which it was nowise responsible, made the State of Vermont its instrument in the general service of the national defense, and attempted to furnish it with arms and supplies.

The State, as such, was not recognized as the party at war with the rebellion, nor with the insurgents commorant in Canada. The purpose of those who created and controlled the Northern disturbances was, as stated by Mr. Seward, "to embroil the governments of the United States and Great Britain in a border war."

Therefore, while Vermont occupied an exposed position, and from local interest was prompt to prepare to repel an invasion, yet the aggression was against the nation, and the defense was that "common defense" for which the people provided in establishing the Constitution.

In this view of the case it does not appear that there exists such a debt against the State and in favor of the United States arising out of the occurrences and circumstances detailed, as either law or equity requires should be set off against or deducted from the sum standing in the State's favor under the direct tax acts of August 5, 1861, and March 2, 1891.

If the cost of supplying the extraordinary organizations of the State with uniforms, garrison and camp equipage and like supplies, amounting to the $162,831, specified, or over, is to be paid by the General Government, the claim

for arms sold disappears, and the balance claimed by the State together with its claim made under the act of July 27, 1861, and such accounting by the State as the law may authorize for all arms and stores received, will remain for adjustment.

It does not seem to be equitable, or to be required by any law, that the transaction of furnishing the arms, stores, etc., charged, the use and disposition thereof, and such legal or equitable rights of counterclaim, or of recoupment as may exist, should be forcibly severed and separately settled.

It is shown that, November 17, 1886, the State, after referring by preamble to the condition of affairs during the closing period of the war, and alleging the expenditure of moneys for which "the State is justly entitled to be reimbursed by the United States," enacted a statute empowering the governor and the auditor of accounts of the State to adjust and settle all accounts and claims between the United States and the State.

It is further enacted that any sums found due the State may be received and paid into its treasury by said officers; and they are, by said law, authorized to draw upon the treasury of the State for any sum that may be found due to the United States.

Therefore it appears that the State is not wanting in preparation in the premises, but awaits the action of the General Government.

In conclusion, permit me to say that the specified sum of $179,407.80, proceeds of the "direct tax", is not shown to be anywise connected with, or affected by, the arms and ordnance issue of December, 1864, and, in my opinion, you are authorized to pay the same to the State under the act of March 2, 1891.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

APPOINTMENTS TO CAVALRY OR INFANTRY.

The words "such arm or corps" in the act of May 17, 1886, chapter 338, refer to the arm the duties of which the graduate has been adjudged competent to perform, and the word "vacancy" used in the act contemplates a vacancy in the arm of the service in which the additional second lieutenant is then commissioned. A cadet found competent at graduation to serve in one branch of the service, and commissioned to serve there, is while he remains there out of the way to seek appointments authorized by statute in other branches of the service; consequently the Secretary of War is authorized to assign recent graduates, non-commissioned officers, and civilians to the cavalry or infantry, although "additional" second lieutenants remain in the engineers and artillery, and no vacancies exist in the last-named branches.

DEPARTMENT OF JUSTICE,
June 15, 1891.

SIR: I am in receipt of your communication bearing date this day, requesting my opinion whether under the acts of June 11, 1878 (20 Stat., 108), June 18, 1878 (20 Stat., 145), and May 17, 1886 (24 Stat., 50), you are authorized to assign recent graduates, non-commissioned officers, and civilians to the cavalry or infantry, while "additional" second lieutenants remain in the engineers and in the artillery, and no vacancies exist in the two last-named branches, while many vacancies exist in the cavalry and infantry branches.

From your communication it appears that there are now 9 additional second lieutenants commissioned in the engineer and artillery branches of the service.

The act of June 11, 1878, prohibits in time of peace the appointment of civilians not graduated at the Military Academy to be second lieutenants unless more vacancies exist in the Army than will be required by the then next graduating class. It limits the appointees after July, 1882, to the number of vacancies existing on the 1st day of July of each year; and prohibits the future attaching of supernumerary officers to any company or corps of the Army, and directs that all graduates of the Military Academy, not appointed under this act, be discharged upon graduation.

The act of June 18, 1878, enacts that "all vacancies in the grade of second lieutenant shall be filled by appointment from the graduates of the Military Academy so long as any such remain in service unassigned; and any vacancies there-

after remaining shall be filled," first, by promotion of meritorious non-commissioned officers, and in the absence of these by appointment of persons in civil life.

Under the act of 1886, the graduate may be promoted and commissioned as "second lieutenant in any arm or corps of the Army in which there may be a vacancy, and the duties of which he may have been judged competent to perform," and in case there be no vacancy "in such arm or corps" he may be commissioned "as an additional second lieutenant," "until a vacancy shall happen."

The words "such arm or corps," although somewhat obscure in their relation, manifestly refer to the arm, the duties of which the graduate has been judged competent to perform.

It must be understood that the vacancy, the happening of which is contemplated, is a vacancy in the arm of the service in which the additional second lieutenant is then commissioned.

A cadet having been found competent upon graduation to perform the duties of a designated arm of the service, upon being promoted and commissioned as an additional second lieutenant therein, is entitled to remain in that branch unless transferred by order of the President or at his own request; therefore, while an "additional" second lieutenant, he is not in such a position as to interfere with the assignment of subsequent graduates to other arms of the service.

Being assigned to and commissioned to serve in a specified arm, he must be held while he so remains to be out of the way of appointments authorized by statute to be made in other branches of the service.

In my opinion you are authorized to assign recent graduates, non-commissioned officers, and civilians to the cavalry or infantry to fill vacancies existing in such branches, while the "additionals" referred to remain attached to the arm of service in which they are commissioned to serve.

Very respectfully,

WM. A. MAURY,
Acting Attorney-General.

The SECRETARY OF WAR.

CONTRACT-LABOR LAWS—WORLD'S COLUMBIAN EXPOSITION.

Clerks, storekeepers, and other persons coming to this country for the sole purpose of aiding the exhibitor to take part in the exposition are outside of and not subject to contract-labor laws of the United States.

DEPARTMENT OF JUSTICE,
June 17, 1891.

SIR: Your communication of the 6th instant, inclosing a copy of a note received from the British minister bearing date June 1, and calling for a further construction of the contract-labor law of the United States as applicable to certain classes of persons whose services may be required by foreign exhibitors at the World's Columbian Exposition, was duly received.

The question submitted is, whether "clerks, stall keepers, and other persons employed by exhibitors" are within the excluding provisions of the law.

In the official opinion transmitted to you under date of May 5, 1891, the conclusion is stated "that the skilled employés of foreign exhibitors at the World's Columbian Exposition, who come in good faith for the purpose of setting up and operating the machinery of such exhibitors, are outside of and not subject to the contract-labor laws of the United States."

The laws providing for the Exposition were enacted after the passage of those relating to the importation of aliens under contract to perform labor.

The invitation extended by the United States to other nations in the exposition law implies a consent to the bringing of necessary assistants by foreigners intending to make exhibitions.

I deem it to be in accordance with the intent of Congress that our contract-labor laws shall be construed in their application to exhibitors and their necessary assistants in harmony with the purposes and spirit of the World's Exposition legislation.

It will be understood, of course, that none of those classes or persons that are excluded from the country upon grounds other than the ground that they come under a contract to

perform labor, will be admitted as expert assistants of foreign exhibitors.

The question, then, comes to this: May foreign exhibitors, coming under the invitation of American legislation enacted for the creation and management of the World's Exposition, bring with them such of their trusted and skilled assistants as are persons who might themselves come at will, as immigrants, to this country and be entitled to land under the laws of the United States?

Incorporating herein the opinion of May 5, so far as the same is applicable, I add, in response to your further inquiry, that clerks and stall keepers and other persons coming to this country for the sole purpose of aiding the exhibitor to take part in the Exposition, are, in my opinion, persons outside of, and not subject to, the contract-labor laws of the United States.

Very respectfully,

WM. A. MAURY,
Acting Attorney-General.

The SECRETARY OF STATE.

LOST HORSES.

The act of March 2, 1861, entitled "An act to provide for the payment of expenses incurred by the Territories of Washington and Oregon in the suppression of Indian hostilities therein in the year 1856" is not an amendment of the act of March 3, 1849, but special, independent legislation, and none the less so because it adopts by reference certain provisions of the act of 1849.

During the year 1890 three claims for horses lost in the Indian war of 1855 and 1856 were filed in the office of the Third Auditor of the Treasury and allowed as meritorious. *Held,* that they were barred by the broad language of the provision of the appropriation act of March 3, 1873, not having been presented by the end of the fiscal year 1874.

DEPARTMENT OF JUSTICE,
June 19, 1891.

SIR: By an act of Congress approved March 2, 1861, entitled "An act to provide for the payment of expenses incurred by the Territories of Washington and Oregon in the suppression of Indian hostilities therein in the years eighteen hundred and fifty-five and eighteen hundred and

fifty-six," provision is made (section 1) for compensating certain Oregon and Washington regiments and companies of volunteers which had been engaged in suppressing the said Indian hostilities, under specified conditions and restrictions. It also provides for the payment of claims "for services, supplies, transportation, and so forth, incurred in the maintenance of said volunteers," also under specified conditions and restrictions.

Section 2 of this act provides: "That all claims *for horses or other property* lost or destroyed in said service shall be settled *according to the act approved the third of March, eighteen hundred and forty-nine*, providing for payment for horses or other property lost or destroyed in the military service of the United States."

During the year 1890 six claims under this act for the value of horses lost in the Indian war of 1855 and 1856 in the military service of the Territory of Oregon were filed in the office of the Third Auditor of the Treasury, and have been allowed by him as meritorious under the act, and that action of the Auditor is now before the Second Comptroller of the Treasury for revision.

The questions arising in these cases and submitted for opinion are as follows:

1. "Whether the act of March 3, 1873, bars the said claims."

2. "Whether, in case it is decided that these claims are not affected by the act of March 3, 1873 (or in case of other like claims filed prior to June 30, 1874), they must be required to come strictly within the terms of the act of 1849."

As there are acts of limitation which affect the claims in question if they are to be treated as arising under the act of 1849, but which do not play any part in this discussion if the act of 1861 is to be taken as an independent law, it is important to consider in the first place how these two statutes stand toward each other; in other words, whether the latter is amendatory of the former, as has been claimed.

The act of 1849 (9 Stat., 414) entitled "An act to provide for the payment of horses and other property lost or destroyed in the military service of the United States" declares (sec. 1) that compensation shall be made, under certain conditions, for horses lost by persons engaged in the service

of the United States in battle, or wounded in battle and afterwards dying, or being wounded are abandoned by orders and lost, and so forth, and with the same particularity (sec. 2) declares in what cases compensation shall be made for certain kinds of property captured or destroyed by the enemy.

The act then goes on to provide (sec. 3) that the claims provided for shall be adjusted by the Third Auditor "under such rules as shall be prescribed by the Secretary of War, under the direction or with the assent of the President of the United States, as well in regard to the receipt of applications of claimants as the species and degree of evidence, the manner in which such evidence shall be taken and authenticated, which rules shall be such as in the opinion of the President shall be best calculated to obtain the object of this act, paying a due regard as well to the claims of individual justice as to the interest of the United States; which rules and regulations shall be published," etc. The next section (sec. 4) provides that the Auditor shall keep a record of his adjudications and for the payment of the same when favorable to the claimants.

Other provisions (secs. 5. and 6) declare that parents, guardians, and other persons furnishing horses, equipments, and accouterments may have compensation in certain cases, and (sec. 7) that condemned horses and their equipage may be paid for in particular instances.

But the act of 1861 dispenses with the particularity of the act of 1849 touching property lost or destroyed, by simply providing (sec. 2) "That all claims for horses or other property lost or destroyed in the said service shall be settled according to the act approved the third of March, eighteen hundred and forty-nine, providing for payment for horses or other property lost or destroyed in the military service of the United States."

The effect of this reference to the act of 1849 was to make its provisions and the regulations made thereunder by the Secretary of War and the President, so far as applicable, as much a part of the act of 1861 as though they had been specially stated therein. This is a shorthand and very common method of legislating, frequent examples of which are

to be met with in the statute books of the United States and the several States.

There are several considerations from which the true relation between these two statutes may be inferred, namely: the act of 1849 is complete in itself, but the act of 1861, so far as claims for horses and other property lost or destroyed are concerned, is entirely dependent on the provisions of the act of 1849, which it adopts. The act of 1849 is *general* and *permanent* in character; while the act of 1861 is *temporary*, applying only to property lost or destroyed during a specified period—in suppressing an Indian outbreak in two of the Territories. It does not seem probable that Congress amended the general and permanent statute of 1849 by grafting on it the transitory statute of 1861; whereas it was far from unusual to provide in the act of 1861 that claims for horses and other property lost or destroyed should be settled according to the provisions of the act of 1849 relating to claims of the same description. There is no express declaration in the act of 1861 that it is amendatory of the act of 1849, as would probably have been the case if that act had been intended to have that effect, according to the long-established practice of Congress, examples of which are furnished by the acts of March 3, 1863 (12 Stat., 743); June 25, 1864 (13 Stat., 182); July 28, 1866 (14 Stat., 327), and June 22, 1874 (18 Stat., 193), each of which is expressly declared to be amendatory of the said act of 1849.

For these reasons I have reached the conclusion that the act of 1861 is not an amendment of the act of 1849, but that it is special, independent legislation, and none the less so because, as we have seen, it adopts by reference certain provisions of the act of 1849. These provisions must be considered to be written in the act adopting them, and to be operative, as thus written, by virtue of that act alone.

Having now established the relation which it seems to me the acts of 1849 and 1861 hold to each other, I am brought to the immediate consideration of the first question submitted for an opinion, namely, whether the said claims arising under the act of 1861 and filed at some date or dates not given during the year 1890 in the office of the Third Auditor, are barred by the following provision in the legis-

lative, executive, and judicial appropriation act of March 3, 1873 (17 Stat., 500), namely: "and all claims for horses lost prior to January first, eighteen hundred and seventy-two, shall be presented by the end of said fiscal year" 1874. This provision occurs in the following context:

"To enable the Secretary of War to have the rebel archives examined, and copies furnished from time to time for the use of the Government, six thousand dollars: *Provided*, That no claims against the United States for collecting, drilling, or organizing volunteers for the war of the rebellion shall be audited or paid unless presented before the end of the fiscal year ending June thirtieth, eighteen hundred and seventy-four; and all claims for horses lost prior to January first, eighteen hundred and seventy-two, shall be presented by the end of said fiscal year."

The limitation prescribed by this proviso is as comprehensive as language could make it, and I am at a loss to see how I can refuse to give to its words their full natural sense by applying them to horse claims of every description which had arisen prior to January 1, 1872.

I do not incline to the theory that because the limitation of the act of 1873 as to horse claims is associated in the same proviso with a limitation for the presentation of claims "for collecting, drilling, or organizing volunteers for the war of the rebellion," it must be inferred that Congress intended the former limitation to apply only to claims for horses lost or destroyed during that particular war. That theory, however, can not stand against the fact that the limitation in question applies to all horse claims prior to January 1,1872, thus covering claims that originated *between the close of the rebellion and the date above mentioned*, Congress having in mind, no doubt, claims for horses lost in the service by unavoidable accident in time of peace, which Attorney General Black had held were proper claims under the act of 1849. This opinion Congress afterwards placed beyond doubt by an amendment of that statute (18 Stat., 193).

When the legislative, executive, and judicial appropriation bill for the year ending June 30, 1874, was under consideration by the House, in committee, a colloquy took place between Mr. Garfield, chairman of the Appropriations Committee, and in charge of the bill, and Mr. Ritchie, which

throws so much light on the subject under consideration that I give it entire as reported:

"Mr. Ritchie. The last part of that paragraph is as follows:

"'And all claims for horses lost prior to January 1, 1872, shall be presented by the end of said fiscal year.'

"I am at a loss to understand exactly in what connection claims of that description are contemplated, whether it means horses lost in collecting, drilling, or organizing volunteers or not, or whether loss of horses occurring generally during the period of our late war.

"Mr. Garfield, of Ohio. The gentleman is correct, with this exception: The committee wanted to have a limit beyond which these old claims should not be filed. And the law, as it stood, applied to all horses lost in the regular Army since the rebellion as well as those lost during it. We therefore fixed the 1st of January last as the limit, and have said that all claims for horses in the regular Army or the volunteer army prior to January last, in order to be paid, must be presented by the end of the present fiscal year; *so that we may not have any more of these old horse claims coming, as some of them do, from the Mexican war.*

"Mr. Ritchie. You refer to the property of the soldiers only?

"Mr. Garfield, of Ohio. That only." (Cong. Globe, 3d sess., 42d Congress, Part I, p. 416.)

The remarks of the eminent chairman of the Appropriations Committee seem to leave no room for doubt that the intention was to cover horse claims of every kind and description existing prior to January 1, 1872.

If ever there existed a description of claims that called for a statute of limitations or the liberal interpretation of one already existing, it is these Oregon and Washington horse claims, which are easily fabricated, and against which the Government is in most cases powerless to defend itself after the lapse of so many years and in the absence of that documentary evidence which is provided in the regular service, but which I suppose was hardly thought of by the Territorial authorities, suddenly thrown on their own resources to repress an Indian uprising.

The right to present horse claims under the act of 1849

and the acts amendatory thereof has been several times enlarged to a greater or less extent by Congress (see Acts June 22, 1874, 18 Stat., 193; January 9, 1883, 22 Stat., 401; August 13, 1888, 25 Stat., 437), but no such liberality has been shown toward horse claims under the act of 1861. All such claims, therefore, as were not filed "before the end of the fiscal year ending June thirtieth, eighteen hundred and seventy-four," are in my opinion barred. As a consequence, the claims in question, which were not filed until some time during the year 1890, can not be allowed under the law.

This answer to the first question makes it unnecessary to answer the second, as I apprehend.

I have the honor to be, your most obedient servant,

WM. A. MAURY,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—CIVIL SERVICE COMMISSION.

Where the Civil Service Commission has decided that a person is not entitled to reinstatement for a clerkship in the Pension Office, and it does not appear that any action in the matter is pending in the Interior Department, the Attorney-General declines to give an opinion as to the question whether or not the Commission interpreted the law correctly, on the ground that no statute exists which authorizes the Secretary of the Interior, or the Attorney-General at his suggestion, to reverse or review the action of the Commission.

DEPARTMENT OF JUSTICE,
June 25, 1891.

SIR: Your communication dated the 13th instant concerning the application of William H. Evans for reinstatement to a clerkship in the Pension Office has been duly received, and also the papers relating to the same matter referred to me under date of the 22d of April.

You request my "opinion as to whether Mr. Evans is eligible for reinstatement under departmental civil-service Rule X as modified;" and state that he "was considered by the Commissioner of Pensions to be eligible;" and that "the Civil Service Commission expressed an adverse opinion."

It appears that said Evans on the 15th of January, 1884, resigned his clerkship in the Pension Office, and early in the year 1891 made application to the Civil Service Commission for certification for reinstatement under said Rule X.

In July, 1863, Mr. Evans served sixteen days in Company C of the One hundred and fourteenth Regiment of Indiana "Minute Men," at the time of the insurgent foray known as "Morgan's raid," and at the end of such service was discharged. He claims that he is entitled to the certification asked for upon the ground that the service and discharge specified constitute him a "person who served in the military or naval service of the United States in the late war of the rebellion and was honorably discharged therefrom" under said Rule X.

Rule X is as follows:

"Upon requisition of the head of a Department the Commission shall certify for reinstatement in said Department, in a grade requiring no higher examination than the one in which he was formerly employed, any person who within one year next preceding the date of the requisition has, through no delinquency or misconduct, been separated from the classified service of that Department: *Provided*, That certification may be made, subject to the other conditions of this rule, for the reinstatement of any person who served in the military or naval service of the United States in the late war of the rebellion, and was honorably discharged therefrom, without regard to the length of time he has been separated from the service."

The requisition of the head of the Department is not before me, but notice of the "adverse opinion" of the Commission is given as follows:

"UNITED STATES CIVIL SERVICE COMMISSION,
"*Washington, D. C., April* 3, 1891.

SIR: In response to request No. 1087 for the reinstatement of William H. Evans in the Bureau of Pensions, stating that he resigned January 15, 1884, and that he served in Company C, One hundred and fourteenth Indiana Minute Men, you are respectfully informed that in a report from the War Department it is stated that the records do not show that such an organization as One hundred and fourteenth Indi-

ana Minute Men was in the service of the United States, and therefore Mr. Evans does not seem to be entitled to the benefit of the proviso of departmental Rule X.

"Very respectfully,

(Signed) "CHAS. LYMAN,

"*President.*

"The SECRETARY OF THE INTERIOR."

While the service performed by Mr. Evans may have been important and valuable, the Commission, upon investigation and deliberation, has decided that it does not constitute him one who served in the military service of the United States under Rule X, and the Secretary of the Interior was duly informed of this decision. As, under the rule, the certification rests with the Commission, it is not apparent that any question connected with the matter is now pending in the Interior Department.

If the Commission determined the question in accordance with law, no further proceedings in the premises are authorized.

Even if the Commission erred in its judgment of the law, it does not appear that the question is pending in the Interior Department.

No statute is found which authorizes the Secretary of the Interior, or the Attorney-General upon the suggestion of the Secretary, to reverse or review this action of the Commission.

It is provided by statute that "the head of any Executive Department may require the opinion of the Attorney-General on any questions of law arising in the administration of his Department." (R. S., sec. 356.)

It is properly held by Mr. Attorney-General Bates (10 Opin., 220) that "when the solution of the question is not necessary to the discharge of any duty properly belonging to any Department, it is not the duty of the Attorney-General to give an opinion thereon, and such opinion would consequently be extra-official and unauthorized."

This decision is approved by Mr. Attorney-General Garland (19 Opin., 8); and the principle that there must be a case of present executive consequence pending in the Department from which the request comes in order to authorize an official opinion has been affirmed many times.

As the Civil Service Commission is not included in the Interior Department, and as the rule formulated pursuant to the law vests the Commission with author.ty to give or to withhold certification, in accordance with its judgment, and as it has exercised that authority, it is not apparent that any question in the premises remains with the Interior Department upon which the statute permits me to act.

I am compelled, therefore, to say, without considering the position occupied by Mr. Evans, or such opinions as may be entertained as to his eligibility for reappointment by those not authorized to determine the question—that the limitations of the statutes and the precedents established by learned predecessors preclude me from now reviewing the decision made by the Civil Service Commission.

All inclosures received are returned herewith.

Very respectfully,

WM. A. MAURY,

Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

OCEAN MAIL-SERVICE ACT CONSTRUED—MODIFICATION OF CONTRACT—CORPORATION.

The act of March 3, 1891, chapter 519, is to be so construed as to lead to certainty and definiteness in the contracts provided for in the act, and it should be interpreted strictly and differently from the statutes providing for an inland mail service. There is no authority in the act for insertion in the contracts of a condition by which the Postmaster-General and the contractor may subsequently vary the terms of the contract, both as to the class of ships and rate of compensation, without submitting the rate to the effect of competition, nor are its provisions sufficient to authorize the Postmaster-General at any time after the commencement of service on any ocean mail route to increase the number of trips thereof and make proportionate payment for the same.

A corporation organized under the laws of any State in the United Sates is an American citizen within the meaning of the act.

Whenever the service begins under the contract, no matter what its character, the term has begun, and no power exists to make that term longer than ten years. The mere fact that a change is to be made in the character of the service before the end of the term is not material if that change is defined and fixed when bids are made. No vessels except of the first class can be accepted for said mail service, under

the provisions of the act, between the United States and Great Britain; consequently it is not permissible to insert in a contract for service to the Continent of Europe a proviso for the delivery of mails on the way at Southampton, England.

DEPARTMENT OF JUSTICE,
June 27, 1891.

SIR: In a letter of the 6th instant the assistant attorney-general for the Post-Office Department, by your direction and on your behalf, submitted to the Attorney-General a request for his construction of the act of Congress entitled "An act to provide for ocean mail service between the United States and foreign ports, and to promote commerce," approved March 3, 1891, by answering certain questions now arising in the inauguration of the service therein provided for.

Before answering the questions it may be well to run through the act and to state shortly the provisions of it. It is entitled "An act to provide for ocean mail service between the United States and foreign ports, and to promote commerce." The first section empowers the Postmaster-General "to enter into contracts, for a term not less than five nor more than ten years in duration, with American citizens, for the carrying of mail on American steamships" between the United States and such ports of foreign countries (Canada excepted) as in his judgment will best subserve and promote the postal and commercial interests of the United States, these contracts to be made with the lowest responsible bidder for the performance of the service on each route. The second section directs that before a contract is made weekly advertisements shall be inserted for three months in a newspaper in each of a number of named cities, describing the route, the time when such contract will be made, the duration of the same, the size of the steamers to be used, the number of trips a year, the times of sailing, and the time when the service shall commence, which is not to be more than three years after the contract is let. The details of the mode of advertising and letting such contracts are to be conducted in the manner prescribed in chapter 8 of Title XLVI, Revised Statutes, for the letting of inland mail contracts, so far as applicable to ocean mail service. Section 3 provides that the vessels to be employed in this service shall be American-built steamships, owned and officered by American citizens;

directs how the crew shall be made up and how the vessels shall be constructed, and divides them into four classes, according to tonnage and speed. The first class must have a tonnage of not less than 8,000 tons and a speed of not less than 20 knots an hour, and only vessels of this class are to be accepted for service between this country and Great Britain. The second, third, and fourth classes are to have a tonnage of not less than 5,000, 2,500, and 1,500 tons, respectively, and a speed of not less than 16, 14, and 12 knots an hour, respectively. It is to be stipulated in the contracts that the vessels may carry passengers and their baggage in addition to the mails, and may do all ordinary business done by steamships. Section 4 provides that steamships of the first three classes employed under the act and thereafter built shall be constructed so as to permit their conversion into naval cruisers under supervision of the naval authorities. Section 5 fixes the maximum limit of compensation for first-class vessels at $4, of the second class at $2, of the third class at $1, and of the fourth class at 66⅔ cents per mile for the number of miles in the outward-bound voyage. On failure from any cause to perform voyages stipulated for in the contract a pro rata reduction is to be made from the agreed compensation, and power is given the Postmaster-General to impose suitable fines for delays and irregularities in the service. Section 6 provides for free carriage of a mail messenger of the United States. Section 7 authorizes employment of United States officers in this merchant service. Section 8 requires employment of a certain number of American-born boys as cadets or apprentices in the service; and the ninth and last section gives to the United States the right to take the steamers employed under the act on payment of a fair price, to be fixed, in the absence of agreement, by appraisers.

The ultimate purposes of the act are to provide an ocean mail service, to promote commerce, and to secure a permanent naval reserve of ships and men. The means to be used is American-built and American-manned ships of certain classes. It is common knowledge that the number of such ships now in existence is very small. The chief purpose of the act, therefore, is to encourage and induce American citizens to build, equip, man, and navigate vessels of the kinds described in the act for the service therein provided

for. The period, not exceeding three years, which may under the second section elapse between the execution of the contract and the beginning of the service, is, of course, intended to enable contractors to build their ships after the contracts of service are entered into. A similar intent may be gathered from the fourth section. With the purpose clearly defined, the construction of the terms of the act must be made to conform thereto. The greatest inducement which Congress could offer to contractors to make the enormous outlay necessary to build the ships required by the act was certainty in the rate and duration of compensation, and in the other conditions of the service. By requiring the contract to be made with the lowest responsible bidder the act gives, and was intended to give, to every American citizen an equal opportunity to bid and compete for the benefits accruing under the act to contractors, and to enable him in making his bid to know exactly what his liability and reward under the contract he bids for should be. In furtherance of this plan, the advertisement is required to state the route to be traversed, the date of the contract, the duration of it, the size of the steamers to be used, the number of trips a year, the times of sailing, and the time of commencing the service. Everything which makes for certainty of liability and benefit under the contracts to be let aids and serves the chief purpose of the act. That construction of its terms, therefore, which leads to certainty and definiteness in the contracts is to be favored. It follows that no power should be implied in the Postmaster-General to vary at his discretion the operation of the contracts when once entered into, and that any such powers, if any, which are expressly given in the act should be strictly construed. The statute under discussion is to be viewed in this respect very differently from such statutes as provide for inland mail service. The latter are not intended for any purpose but to afford postal facilities. It is not their object to foster the railroads, the steamboats, or the star-route coaches used in the service. It is not within the purview of such laws to induce a permanent outlay of capital in the inland carrying trade of the country. Incidentally, mail contracts may accomplish something in that direction, but such an object plays no part in arriving at the proper construction of those

acts. By express provisions, the largest discretion is generally given the Postmaster-General to vary, increase, and reduce the mail service on any route at any time, and thereby to meet the changing demands for postal facilities in all parts of the country. But in the statute under discussion the purpose of the act which dwarfs all others is to encourage the building and operation of a merchant marine. This accomplished, then postal facilities and commerce will be increased, and a national naval reserve maintained. If it be said that a discretionary power to vary the mail contracts is an aid to efficient ocean mail service, it is enough to answer that the uncertainty of liability and benefit accompanying such discretion would so interfere with the outlay of capital for building the ships as to prevent the attainment of the primary object of the act, without which all the other purposes of the act must fail.

Having said so much of the general purpose of the act and the rule of construction it naturally suggests, we come to the questions propounded. The questions will be discussed in rather a different order from that in which they appear in the letter of your Department. The first to be considered is stated as follows:

"Would a condition in any contract, permitting the Postmaster-General to discontinue, during the contract term, the service performed in a ship of the lower class, and to transfer it to a ship of the higher class, when the contractors offer the latter, and when, in his judgment, the better service was required, be repugnant to the act?"

If by this question it is meant to ask whether a condition may be inserted under which by agreement between the Postmaster-General and the contractor ships of a higher class may be furnished at the rate of compensation fixed in the contract for the lower class, then there could be no objection to such a condition, though it should be added that there would be no significance in it, for such a variation of the contract might be permitted without any condition. It would only result in the contractor rendering a better service than he agreed to render at the contract price. If, however, it is intended to ask whether a condition may be inserted by which the Postmaster-General and the contractor may subsequently vary the terms of the contract, both as to class of ships and

rate of compensation, without submitting the rate to the effect of competition, the answer must be that there is no authority in the act for the insertion in the contract of such a condition. It would indirectly empower the Postmaster-General to make a contract without inviting bids, because it would leave with him and the contractor full power to contract again after the original contract had been entered into.

The second question to be answered is stated as follows:

"Section 2 of the act provides that 'the details of the mode of advertising and letting such contracts shall be conducted in the manner prescribed in chapter 8 of title 46 of the Revised Statutes for the letting of inland mail contracts, so far as the same shall be applicable to the ocean mail service.' Section 3960, Revised Statutes (a part of said chapter and title), provides the method of increasing the service after execution of contract and fixes the standard of payment for the additional service. Under this section the Postmaster-General has always added to the schedule of any route any number of trips required to meet the necessities of the route. Are the provisions of section 2 of the act under consideration, in the requirement that 'the mode of advertising and letting * * * shall be conducted in the manner prescribed by chapter 8,' etc., sufficient to authorize the Postmaster-General, at any time after the commencement of service on any ocean mail route, to increase the number of trips thereon, and make proportionate payment for the same?"

The question must be answered in the negative. The language used shows conclusively that it was not intended by the reference to chapter 8 of title 46 of the Revised Statutes to enlarge the powers of the Postmaster-General, but only to make more definite the procedure in accomplishing what had been provided for. The words are "*the details of the mode of advertising and letting such contracts* shall be conducted in the manner," etc. Certainly the unlimited power to increase or reduce the amount of service under the contract could not be included in *the details* in the mode of *advertising and letting contracts.* Reference is had by this clause only to such sections of chapter 8 as relate to the mode of receiving proposals (section 3944), or the guaranty of proposals (section 3845), or the oath to accompany the bid (section 3946), or to any of the preliminaries required thereby in

the course of selecting the successful bidder and the making of the contract, if they are properly applicable to the ocean mail service. To give it the wider construction suggested by incorporating section 3960 in the act would not only be at variance with the ordinary significance of the language used in the clause of reference, but it would be contrary to the general purposes of the act, to which allusion has already been made.

The next question is as follows:

"Is it competent for the Postmaster-General to insert a condition in any contract for service under this act which forbids the annulment of it except with the mutual consent of the parties during the contract term?"

Such a condition might be inserted, but it is not clear what good it would accomplish. It could hardly be intended thereby to prevent the Government or the contractor from avoiding the contract for a breach of its terms if it or he wished to do so. In the absence of a breach the contract could not be annulled, save by mutual consent, whether the condition proposed was inserted or not.

The next question is as follows:

"The act requires the service to be performed in 'American-built steamships *owned* and officered by American citizens.' Is a corporation organized under the laws of any State in the United States an 'American citizen' within the meaning of the act?"

The answer must be in the affirmative. To hold otherwise would be to practically destroy the operation of the act. The capital required to run a foreign steamship line is so great as to preclude individuals from undertaking such an enterprise. It is not to be supposed that Congress intended to hamper the construction of a new merchant marine by withholding all inducement for the use of aggregated and organized capital in attaining that end. Nor are we without direct authority upon this point. In *McKinley* v. *Wheeler* (130 U. S., 630) it was held that a corporation created under the laws of one of the States of the Union all of whose members were citizens of the United States was a citizen of the United States within the meaning of section 2319, declaring valuable mineral deposits in lands belonging to the United States open to exploration and purchase by citizens of the

United States. A strong English case on the same point, and even more directly applicable, is *The Queen*, on the prosecution of the *Pacific Steam Navigation Company*, v. *Arnaud* (25 Law Journal, N. S., Part II, Com. Law, 50). Section 5 of the statute 8 and 9 Victoria, chapter 89, provided that no vessel should be registered under it unless the vessel wholly belonged to Her Majesty's subjects. It was held by the Court of Queen's Bench, Lord Denman delivering judgment, that a vessel owned by a British corporation some of whose members were foreigners was owned by a British subject within the meaning of the act.

The next question is as follows:

"Can the Postmaster-General advertise for service—say for ten years, to begin in three years from the date of awarding the contract—on any route (as, for instance, from New York to Southampton, England) for a complete service, to be designated as triweekly, on condition that a different service, to be known as a limited service, and specially designated as a weekly service, may be commenced thereunder at any time within three years from the date of awarding the contract? To make the inquiry more specific, suppose a contract be executed on the condition that within one year the weekly service shall be commenced and continued for two years, at which time a triweekly service shall begin and be continued, would the contract term begin with the inauguration of the limited service and extend ten years from that date, or would it begin at the completion of the service and continue ten years thereafter?"

The term of the contract to be let is to be not less than five years, nor more than ten. The term of the contract is the time between the beginning and the end of the service. Whenever the service begins under the contract, no matter what its character, the term has begun, and no power exists to make that term longer than ten years. In the question suggested, the term would begin with the inauguration of the limited service.

The next question is as follows:

"The act does not require the special use of the vessels in cluded in either of the four classifications, except in the performance of service between the United States and Great

Britain. Can the Postmaster-General advertise for a service between New York and the continent of Europe—to Havre, Antwerp, Bremen, or Hamburg—for a full term of ten years, to be conducted in ships of either the first or second class, conditioned for the commencement of the service in ships of the lower grade and the substitution of ships of a higher grade, at any time within a specified date included within the contract term, the compensation at the date of changing the service from the lower to the higher grade to be changed from the scale of price for the lower to that of the higher grade? The question may be otherwise stated thus: Is it competent, under the law, to include in a contract of ten years for service on said route the condition that it may be performed for the first five years in vessels of the second class, at a rate of compensation stated in the bid and accepted, and for the remaining portion of the contract term in vessels of the first class, at a rate of compensation also stated in the bid? This, of course, involves the authority to arrange for two kinds of service to be performed in two classes of vessels at different rates of pay in the same contract."

There is nothing in the act forbidding such a condition. The route is fixed in the bid, the size of the steamers, the rate of compensation, and all the other elements going to make certain the liability and benefit of the contractor. They are known to the competitive bidders when the contract is let. The mere fact that a change is made in the character of the service before the end of the term is not material if that change is defined and fixed when bids are made. There is no inhibition against such a change of service. On the contrary, it would seem to be quite in accordance with the spirit of the act.

The next question is as follows:

"The act provides that the service between the United States and Great Britain shall be performed in steamships of the first class. *Query:* Would an advertisement, inviting proposals for the service between New York and Liverpool, England, via Queenstown, Ireland; also, inviting a separate proposal from New York to Southampton, England (one contract only to be made for the service to Great Britain), be

permissible? If bids were made for both routes, can the Postmaster-General decide which he will accept, and reject the other, in view of the fact that the law provides that the 'notice shall describe the route?'"

If deemed best, there would seem to be no objection to inviting proposals of the kind suggested, in the alternative, providing that each alternative contained every specification required by the second section of the act, and the Postmaster-General might then accept a bid on either alternative and reject the other. We may well assume that Congress did not intend to deprive the Postmaster-General of the very accurate means of information as to cost of service, so useful in the making of contracts and selection of routes, which is afforded by the system of alternative bidding.

The last question is as follows:

"In a contract for service to the continent of Europe in vessels of the second class, can a provision be made for the delivery of mails at Southampton, England, as an intermediate point, in view of the fact that service between the United States and Great Britain is limited to vessels of the first class?"

The question must be answered in the negative. Section 3 of the act provides that, "No vessel, except of said first class, shall be accepted for said mail service under the provisions of this act between the United States and Great Britain." The delivery of mails between the United States and Southampton is mail service between the United States and Great Britain. The fact that the steamer delivering such mails may continue on her voyage to another destination, can not affect the answer to the question.

Very respectfully,

WM. H. TAFT,
Acting Attorney-General.

The POSTMASTER-GENERAL.

CHINESE DEPORTATION.

Chinese persons found to be unlawfully in this country may be removed directly to China unless they show that they are not subjects of China and are the subjects of some other foreign country. If a person of the Chinese race is found unlawfully within this country, and claims to be entitled to be returned to a foreign country other than China, the burden of proof is upon him to establish the conclusion that he is a subject of such foreign country.

DEPARTMENT OF JUSTICE,
June 30, 1891.

SIR: Your letter of the 26th instant is at hand, calling my attention to the enactments of Congress which constitute the legislation relating to the exclusion of Chinese laborers, and requesting my opinion as to whether authority is given to return directly to China Chinese persons who are found to be in this country in violation of said laws, and who may have come into it through foreign contiguous territory.

It is evident that the purpose of the laws referred to is not so much to prevent these persons from coming into the United States by some specified method of transportation, or from some contemplated direction or country, as it is to prevent them from coming into this country in any manner.

I will first consider the law without regarding the related paragraphs of the "sundry civil" acts of 1890 and 1891.

Section 1 of the act of 1882 declared it to be unlawful for the Chinese laborer to come "or, having so come * * * to remain within the United States." The act of 1884 declares that "it shall not be lawful for any Chinese laborer to come from any foreign port or place, having so come * * * to remain within the United States."

Here is a recognition that the persons sought to be excluded came not only from China, but from other foreign ports and places.

By section 15, as amended in 1884, it is enacted that "the provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or of any other power."

Here are two classes designated: First, Chinese who are subjects of China; second, Chinese who have become subjects of some other power.

Section 12 declares "that no Chinese person shall be permitted to enter the United States by land without producing the certificate required by those who come by vessels."

This section further enacts: "And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came," at the cost of the United States.

These statutes must be construed not only in accordance with reason, but with reference to each other.

If a Chinese laborer has become a subject of Great Britain, or is actually, under section 15, a subject of the Dominion of Canada, and thereafter forms the intention of coming and does come into the United States, the law may properly be construed to declare that, upon being discovered, he may be returned to Canada; but if he leaves China, intending to reach San Francisco or New York, and lands north of the national boundary and proceeds to carry out his intent by reaching the United States as best he may, and when he finds himself safely able to do so, it is manifest that China, not Canada, is the "country from whence he came," and therefore China is the country to which he is to be removed.

It would be a strained construction of legislative intent to hold that Congress meant to declare that the country through which one comes shall be deemed the country whence he comes.

It would seem to be trifling to enact, or to judicially declare, that when the obnoxious individual comes by ship, although he sails around the Horn, or breaks the voyage by crossing South America, he may be transported back to Asia; but that if he comes by way of Mexiço, or the British possessions, he may cross at any point of our extended border line and can, upon discovery, only be placed back upon the soil of the contiguous territory to repeat his experiment until it shall be attended by success.

I understand that a construction of section 12 is urged that subjects the second paragraph thereof to the first one, and that implies that the removal of the person "to the country from whence he came," relates especially to those entering the United States by land, or from contiguous territory.

This construction is not a necessary or a natural one.

The context shows that Congress regarded the two classes of Chinamen recognized in section 15, viz, those Chinese who are subjects of China and those Chinese persons who may have become subjects of any other foreign power, and intended to enact that "any Chinese person" (of either class) "found unlawfully within the United States shall be removed therefrom to the country from whence he came;" that is, that those of one class shall be removed to China, and those of the other class may be returned to the country of that foreign power whose subjects they had become.

If three Chinese laborers determine to leave their homes in China and domicile at Washington, and one enters the United States at El Paso, another at Suspension Bridge, while the third comes into the port of San Francisco, and all are "found unlawfully within the United States" at Washington, the law does not require that these persons shall be deported to the different countries through which they made their way, and that one shall be placed in Mexico and another in Canada, and that the third shall be shipped back to China; but, on the contrary, China is the country from which all came, and it is in accordance with law that the three shall be returned there.

Neither is it seen that any different conclusion should be reached, although those coming by way of contiguous foreign countries shall delay from point to point and employ a long time in coming, or shall complicate their movements and obscure their purposes by connivance with those who may be willing to aid them.

It will be seen that Chinese laborers claiming the right to be returned to contiguous territory under the act of 1884 must show that they are subjects of the power governing the country thereof.

It is said in *The Pizarri* (2 Wheat., 245) that the words "subjects," "people," and "inhabitants" are practically synonymous; it is also stated that "a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country." He owes allegiance to the country, while he resides in it, temporary, indeed, if he has not by birth or naturalization contracted a permanent allegiance, but so fixed that as to all other nations he follows the character of that country in war as well as in peace.

Such difficulties as have arisen from the coming from Canada of Chinese persons have not been occasioned by those subject to the sovereign of that country, but by those who have availed themselves of the location and laws of Canada to make their way from China to the United States.

The residence and domicile of the Chinaman remains in China until he acquires a new one with intent to remain in it. Until a domicile by residence and intent is acquired the domicile of origin remains.

The distinction between "the actually domiciled and the merely commorant foreigner" must be kept in mind.

Mr. Justice Swayne, voicing the opinion of the court in *Mitchell* v. *United States* (21 Wall., 350), says:

"When a change of domicile is alleged the burden of proving it rests upon the person making the allegation. To constitute the new domicile two things are indispensable: First, residence in the new locality; and second, the intention to remain there. The change can not be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, can not work the change. There must be the *animus* to change the prior domicile for another.

"Until the new one is acquired the old one remains. These principles are axiomatic in the law upon the subject."

It is manifest that the Chinese person must have terminated the domicile of origin which arises from birth and connections, and must have become domiciled in Canada, according to the law cited, prior to his coming to the United States, and must continue to remain so domiciled, to be in position, when arrested for being unlawfully in this country, to claim the privilege of being returned to Canada. It will be noted that under our legislation the rule as to Chinese persons is exclusion; the exception, admission.

The supplemental act of October 1, 1888 (25 Stat., 504), declares it to be unlawful for any Chinese laborer who shall, subsequent to the passage of the act, be outside of, or who shall thereafter depart from the United States, to return to or remain therein; and all certificates of identity provided for by the fourth and fifth sections of the act of 1884 are declared void.

Therefore, all persons of the class designated are prohibited from entering the United States.

The act of 1884, by section 6, commented upon by the Supreme Court in *Wan Shing* v. *The United States* (decided May 11, 1891), provides for the permission to be obtained from the Chinese Government, or that other foreign government of which at the time the Chinese person shall be a subject, which shall, before he goes on board any vessel to proceed to the United States, be vised by the representative of this country.

After considering the law of 1882 as amended by that of 1884, and as supplemented by that of 1888, the court concludes its opinion in the case of Wan Shing as follows:

"The result of the legislation respecting the Chinese would seem to be this: That no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein and have left with a view of returning; and that all other persons of that race, except those connected with the diplomatic service, must produce a certificate from the authorities of the Chinese Government, or of such other foreign government as they may at the time be subjects of, showing that they are not laborers, and have the permission of that government to enter the United States, which certificate is to be vised by a representative of the Government of the United States."

It is plain that all foreign-born laborers of this race are prohibited from entering this country.

Chinese officials and persons connected with the diplomatic service are admitted upon their credentials, and all other admissible persons of that race must produce the governmental certificate vised by the representative of the United States.

It is manifest that until the Chinaman shall by statutory evidence overcome the prima facie rule of exclusion which exists against him, he can not be permitted to enter the United States. Hence the burden of proof rests upon him and he must establish his right to enter.

Decisions made prior to the suplemental legislation illustrate the application of the rule.

In the case *in re Ho King* (14 Fed. Rep., 724) the court says:

"Indeed, the fact of being compelled to make proof of his condition or character at all is a burden and inconvenience upon the Chinese coming to the United States which is not required by any other immigrant or visitor coming to this country."

And the court also says that in the absence of the certificate of the Chinese Government, "a Chinese claiming the right to enter and reside in the United States must establish the fact that he is not a laborer by evidence, as in ordinary cases of *ex parte* proof of fact."

In this case those Chinese who have the right under the treaty and the laws to come into the country are designated "privileged classes," who are entitled to certificates, and non-production of certificates is considered presumptive evidence of the fact that the person is prohibited.

In *in re Tung Yeong* (19 Fed. Rep., 184) the onus resting upon the Chinese person to establish his right to enter the country is distinctly recognized. Referring to the law as it then existed, the court says:

"The right of laborers who can prove they were in the country at the date of the treaty and had left before the law went into effect, to be allowed to land without the production of a custom-house certificate, being thus recognized, the court held that the burden of proof was on them, and that satisfactory evidence of the facts would be vigorously exacted."

It is also stated that "in no case has a person been allowed to land on the plea of previous residence on unsupported Chinese oral testimony."

When a person of the Chinese race unlawfully enters this country, or is found unlawfully within it, and claims to be entitled to be returned to a foreign country other than China, it must likewise be held that the burden of proof is upon him to establish the conclusion that he is a subject of such foreign country.

I have presented the statutes as they existed prior to and until the passage of the act "making appropriations for sundry civil expenses," etc., passed August 30, 1890 (Stat. S., 371), by which is enacted the following provision (p. 387):

"*Enforcement of the Chinese exclusion act*: To prevent unlawful entry of Chinese into the United States, by the appointment of suitable officers to enforce the laws in relation thereto, and for expenses of returning to China all Chinese persons found to be unlawfully within the United States, fifty thousand dollars."

The same provision is reenacted in the similar act of 1891 (Stat., 968), except the amount appropriated is increased to $60,000.

This legislation is last in the order of time. It recognizes the existing laws by providing for their enforcement, and supplements them by appropriating money "for expense of returning *to China all Chinese persons found to be unlawfully* within the United States."

This last expression of the lawmaker, which may be said to comprise both an appropriation for and an amendment to the Chinese exclusion laws, bears with great force against sending any of the prohibited persons to foreign contiguous countries unless they are in position to be considered as actual "subjects" of those countries.

Further than this I do not deem myself now called upon to express an opinion as to the enactments of 1890 and 1891.

Recognizing the importance of the due and efficient execution of the laws, I deem it my duty to say, in view of the important questions presented by the papers submitted to my examination, that not only is exclusion the rule and admission the exception, and not only is the burden of proof upon the Chinese applicant for admission, but the evidence must be convincing.

It has been officially recognized and set forth in reports of committees of our national legislature and in decisions of our court of last resort that much of the evidence offered on behalf of Chinese laborers seeking admission into this country has been unreliable and untrustworthy in its character and not entitled to credit.

This necessary conclusion has a general application and is distinctly declared and acted upon in *The Chinese Exclusion Case* (130 U. S., 598, 599), and is illustrated further in *Quock Ting* v. *The United States* (May 11, 1891).

In these and many other cases the rule of law that must

be applied is plainly written. It is obligatory upon all concerned.

In conclusion, I have the honor to answer your inquiry by saying that, in my opinion, under our laws Chinese persons found to be unlawfully in this country may be removed directly to China, unless they shall show, in the manner and under the rules hereinbefore indicated, that they are not subjects of China, and that they are the subjects of some other foreign power. Whether under the language of the acts of Congress of 1890 and 1891 natives of China naturalized in a foreign country would be subject to a different rule is not decided.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—COMMISSIONER OF PENSIONS.

The Attorney-General is not authorized to give his opinion to the Secretary of the Treasury as to the proper construction of a pension appropriation act, inasmuch as it appears that the Treasury Department is bound by the rulings of the Department of the Interior in construing that law, and, therefore, no question is pending in the Treasury Department arising in the administration of that Department. 17 Opinions, 339, followed.

DEPARTMENT OF JUSTICE,
July 1, 1891.

SIR: I have the honor to acknowledge the receipt of your communication of the 9th ultimo, inclosing certain papers in reference to the construction of the pension appropriation act, March 1, 1889 (25 Stat. L., 782), and requesting an opinion upon two points:

First. Does the term "minor" children, as used in the pension appropriation act of March 1, 1889, refer to those children only who are under 16 years of age, or does it refer to all minors recognized as such by the *lex loci?*

Second. Is the provision of the act of March 1, 1889, conferring discretionary authority upon the Secretary of the Interior to pay the accrued pension to the legal representatives of a deceased pensioner, applicable to a widow's pension or to a mother's pension, or is it applicable only to the

case of a male pensioner who dies leaving no widow and no surviving children?

So much of the above act as relates to the questions at issue is found in these words:

"That a check or checks drawn by a pension agent, in payment of pension due, and mailed by him to the address of the pensioner, shall constitute payment within the meaning of section 4765, Revised Statutes, in the event of the death of the pensioner subsequent to the mailing and before the receipt of the check; and the amount which may have accrued on the pension of any pensioner subsequent to the last quarterly payment on account thereof, and prior to the death of such pensioner, shall in the case of a husband be paid to his widow, or, if there be no widow, to his surviving minor children or the guardian thereof, and in the case of a widow to her minor children: *Provided*, That hereafter whenever a pension certificate shall have been issued and the pensioner mentioned therein dies before payment shall have been made, leaving no widow and no surviving minor children, the accrued pension due on said certificate to the date of the death of such pensioner may, in the discretion of the Secretary of the Interior, be paid to the legal representative of such pensioner."

Accompanying your communication is a copy of a letter to you from Hon. B. F. Gilkerson, Second Comptroller. From this letter it appears that a difference of opinion exists between the officers of the Interior Department and those of the Treasury Department "as to the proper construction of the several clauses of the pension appropriation act (March 1, 1889, 25 Stat. L., 782), providing for the payment, in certain cases, of the accrued pension to the minor children, or to the legal representatives of pensioners who die without receiving their pensions; also as to the authority of the accounting officers of the Treasury to adjust certain pending claims, or others of a like character involving the same or similar questions of law." The Comptroller suggests the questions specifically stated in your letter and accompanies the communication with a printed copy of the opinion of Hon. James Tanner, late Commissioner of Pensions, under date of March 29, 1889, in which the rule is promulgated to the Bureau of Pensions that "minor children as contem-

plated by this act (March 1, 1889) are minors recognized as such by the *lex loci*."

Also an opinion of the honorable Assistant Secretary Cyrus Bussey, under date of October 2, 1890, overruling the opinion of Commissioner Tanner, *supra*, and holding that "the term 'minor' children, under a proper construction of the pension laws, refers to those children only who *are under 16 years of age*," and that "this construction applies to the act of March 1, 1889;" and that "under the pension laws, minority is held to *cease* at the age of 16."

Also an opinion of Assistant Secretary Cyrus Bussey, December 3, 1890, holding that "the act of March 1, 1889, conferring discretionary authority upon the Secretary to pay '*accrued* pension to a legal pensioner's legal representatives' is not applicable to a widow's pension, nor to a mother's pension, but only to a pensioner who dies leaving no *widow* and no minor children."

The two opinions of the honorable Assistant Secretary must be considered the official rulings of the Department of the Interior upon the matters stated. It is upon these two questions that the difference of opinion has arisen between the officers of the Department of the Interior and the Treasury Department.

Section 356 of the Revised Statutes points out the conditions under which the head of any Executive Department can call for an opinion from the Attorney-General. It is in these words:

"The head of any Executive Department may require the opinion of the Attorney-General on any question of law *arising* in the administration of his Department."

It is upon this ground that the honorable Second Comptroller states that the questions asked arise "in the administration of the business of this Department, the same being of present executive consequence in the adjustment of a class of cases at this time pending before the Department."

The propriety of keeping every branch of the executive government within its legal sphere is clear. The confusion which would unavoidably arise, if one branch was permitted to usurp the functions of another, would be disastrous to the proper working of the whole.

When, therefore, a "difference of opinion" arises between

several Executive Departments as to the construction of the law, the primary question is as to which is vested with the determination and responsibility of the question. That one only can have jurisdiction over the subject-matter is plain.

Before giving an opinion, it is the duty of the Attorney-General to determine whether the question presented by the Treasury Department is one within its power to propound and whether or not that Department is not bound by the rulings of the Interior Department in the premises. If the Treasury Department is so bound, then no question is pending "arising in the administration" of that Department.

Upon this preliminary question, the Department of Justice has already expressed its opinion by the Hon. Benjamin Harris Brewster, Attorney-General, in which I concur. (17 Opin., 339.)

The opinion so far as it relates to the question at issue is as follows:

"The Acting Secretary inquires further, whether pension agents should receive instructions as to the meaning of the 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 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. Stats.) 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.

Whatever opinion, therefore, I may entertain respecting the questions propounded, as abstract questions of law, I am not at liberty to give the same in answer to your request. I, therefore, respectfully decline its further answer.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

CUSTOMS ADMINISTRATIVE ACT—PROTEST.

An entry of goods at the custom-house was liquidated September 8, 1890. A protest against the decision of the collector as to the rate and amount of duties assessed was filed September 17, 1890; but the duties were not fully paid until September 19, 1890, more than ten days after the entry was liquidated: *Held*, that section 14 of the customs administrative act of June 10, 1890, requires the importer, if he desires to make a contest, to protest and pay the duties and charges in full within ten days after liquidation where the merchandise is entered for consumption, or to protest within ten days where the merchandise is entered in bond only.

Statutes, like other writings, containing language admitting of doubt, should be read in the light of the circumstances under which they were made.

DEPARTMENT OF JUSTICE,
July 6, 1891.

SIR: Your letter of the 4th of June, 1891, brings to my attention for an opinion a question which has arisen under section 14 of the customs administrative act of June 10, 1890, in consequence of a recent decision of the Board of General Appraisers at the port of New York of November 26, 1890. (S. S. 10,500, G. A. 150.)

An examination of the decision of the Board of General Appraisers will make the question presented perfectly clear. The merchandise in the case decided by the board was returned as refined glycerine (specific gravity 1.239), and duty was assessed at the rate of 5 cents per pound, under the provisions of paragraph 3 of the act of March 3, 1883.

The entry was liquidated September 8, 1890. The protest was filed September 17, and the duties were paid September 19, 1890, more than ten days after the entry was liquidated.

The protest was against the decision of the collector "as to the rate and amount of duties" assessed, and was filed within ten days after the ascertainment and liquidation of of such duties, but the duties were not fully paid until more than ten days after such ascertainment and liquidation, and the board ruled that the act prescribed no time within which payment of duties and charges should be made, and, consequently, that the importer, in making his protest, had complied with section 14 of the act, and was therefore entitled to have "the collector, in conjunction with the naval officer, if there be one," review his action on the entry

under article 43 of the new Treasury Regulations, and it was so ordered accordingly.

This decision expressly overrules a previous decision of the Board of General Appraisers at New York of September 16, 1890 (S. S. 10, 255 G. A. 33), in which it was laid down that, "in the case of merchandise entered for consumption payment of the duties and charges ascertained to be due thereon is a condition precedent to the right of protest."

In overruling that decision the board say that the passage above quoted was a *dictum* "unnecessary to the determination of that case, and was inadvertently used." But according to the case, *as reported*, the ruling appears to have been made upon a point directly involved in the proceeding, namely, whether the protest, unaccompanied by a payment of the liquidated duties in full, was properly taken under section 14 of the act of June 10, 1890. Indeed, the ruling seems to have been directly on the *only* point of which the board could have properly taken cognizance, the point of jurisdiction, the board having reached the conclusion that it had no jurisdiction over the appeal. Having determined that it had no jurisdiction, the board would not seem to have had authority under the law to look into the merits of the question raised by the protest. It may be, however, that the case is not presented in the report as it appeared to the Board of General Appraisers.

To understand the practice which has grown up under the decision of the Board of General Appraisers of November 26, 1890 (*supra*), and which is considered as a serious obstruction to the collection of the revenue, it is proper to make some general reference to the course of business in collecting customs duties. In the first place, the convenience of the Government, owing to the limited capacity of the public stores and the convenience of the importer, who should have his goods with as little delay as possible, seem to require that all goods, not retained for the purposes of examination and valuation, should be delivered to the importer upon payment of the duties and charges, as roughly estimated on the entry.

The course of business with the collector is not to hold on to the packages retained for examination and valuation after that purpose has been answered as security for the pay-

ment of any additional amount that may be found to be due by the importer, on liquidation, but to deliver such packages to him upon personal security for the payment of any further amount of duties which may have been found to be due on liquidating the entry. This practice, under which the Government loses the security of the retained packages for the payment of such further liability, has arisen from the urgency of importers to get possession of their goods without the delay of waiting for the liquidation of the duties with which they are chargeable.

It thus appears that, according to the course of administration mentioned, the Government is without any custody of the goods imported at the time the duties chargeable on them are duly liquidated and ascertained, so that the effect of the decision of the Board of General Appraisers of November 26, 1890, that it is not necessary for the importer to pay the duties in full with which he is chargeable within ten days after liquidation in order to make his protest valid and operative, and that the statute prescribes no time within which such payment shall be made, is to put it in the power of the importer to delay indefinitely the payment of duties in full for his own convenience and to the detriment of the Government.

The abuses which were to be apprehended and have actually resulted from this interpretation of the law—an interpretation which, I may say, does not seem to have been regarded as possible by the author of article 43 of the new Treasury Regulations—are set forth in the following extract from your letter:

"The practical result of this ruling is an accumulation in the custom-houses of large numbers of protests, which may be made for speculative purposes, and which are not promptly transmitted to the Board of General Appraisers because of the failure of the importers to pay the increased duties against the exaction of which they file their protest. The importers are thus enabled to take the initiatory step in suit for recovery of duties, full payment of which has not been made, and delay indefinitely the decision by the General Appraisers of the question raised by the protest, with a view of taking advantage of decisions which may hereafter be made in other cases, thereby defeating one of the chief

purposes of the administrative act, which was to secure the prompt disposition of questions arising under the tariff laws and discourage the filing of mere speculative protests."

This brings me to the serious and important question for consideration, namely, whether the abuses thus stated can not be corrected by an instruction from the Secretary of the Treasury to the collectors of customs to decline to recognize a protest as valid in any case in which all duties have not been paid by the importer within ten days after liquidation.

The question presented is to be determined by an examination of section 14 of the customs administrative act of June 10, 1890, namely:

"That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall within ten days after 'but not before' such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where

an application shall be filed in the circuit court within the time and in the manner provided for in section fifteen of this act."

It thus appears that the collector's liquidation and ascertainment of duties is conclusive unless within ten days after such liquidation and ascertainment, "as well in cases of merchandise entered in bond as for consumption," the dissatisfied importer shall protest, "and if the merchandise is entered for consumption *shall pay* the full amount of the duties and charges ascertained to be due thereon."

It is upon the words just quoted that the question turns, whether the payment of duties thereby required must, like the protest, be made within ten days after liquidation, or, to state the question differently, whether Congress intended to favor the importer, by permitting him not only to have possession of his goods, but to keep the Government out of its revenue at pleasure, or, certainly, until judgment could be recovered against him in a plenary suit outside the statute of June 10, 1890; for it is precisely this advantage that is given the importer by the decision of the Board of General Appraisers of November 26, 1890, as the obstructive practice complained of shows.

It would be remarkable, indeed, that such a result should flow from a statute that was enacted for the purpose of expediting the collection of the revenue by removing the impediiments of the old law.

What those impediments were is matter of common knowledge, but it may not be out of place to make a quotation on the subject from the report of the Committee of Ways and Means of the House that accompanied the act of June 10, 1890, on its introduction as a bill. The report says with regard to sections 14 and 15 as follows:

"These sections are substituted for sections 2931 and 2932, Revised Statutes, and are in substance the same as were contained in the bill familiarly known as the 'under valuations bill,' which passed the Senate at the first session of the Fiftieth Congress, after a full discussion and practically without division. The Senate committee having the bill in charge reported as follows with respect to these two sections:

"'It will be seen that the proposed sections are a radical departure from the existing law. They substitute for the

decision of the Secretary of the Treasury, in all cases of appeal upon questions of classification and rate of duty, and upon questions as to fees, charges, and exactions, the decision of the board of appraisers provided for in the preceding section, and confer upon said board in the first instance exclusive jurisdiction of all said questions. They confer upon the several circuit courts of the United States appellate jurisdiction upon all questions of law as respects classification and rate of duty, with a final determination by the Supreme Court of the United States in difficult cases, or in cases where the Attorney-General shall be of opinion that the matter in controversy should be appealed thereto.

"'The intent and purpose of these two sections are to afford the importer and the Government a *speedy* decision upon every question of law and fact that can arise as respects the proper classification of merchandise and the rate of duty to be charged thereon. It is believed that these two sections together will render substantial justice to the importer and to the Government.'

* * * * * * *

"The Secretary of the Treasury, in his last annual report, calls especial attention to this condition of affairs, and says:

"'The calendar of customs suits in the southern district of New York has grown so large that there is no reasonable prospect of disposing of them in this generation. A merchant who has suffered an illegal exaction of duties can not hope for a speedy trial of his cause, and justice is practically denied him. The laws which were ostensibly enacted to prevent fraud by undervaluation promote rather than suppress this evil.'

"It should be said that some of these suits were begun as early as 1858. It is impossible to compute the amount involved, so that the Government is menaced with unknown obligations amounting to many millions of dollars and always increasing. In addition to these suits there are more than 30,000 protests and appeals pending in the Treasury Department and in the New York custom-house dependent on this litigation.

"It is believed that the proposed sections will afford claimants a *speedy*, just, and efficacious remedy. The tribunal in the first instance will be composed of officers

selected with a view to their peculiar fitness and qualifications for the duties devolving upon them. Their time and attention will be given exclusively to a study of the tariff laws and to their practical application, and they could readily hear and dispose of the cases as they might arise in an intelligent and satisfactory manner; but if they shall make a mistake as respects the true construction of the statutes relating to classification and rate of duty, a speedy and efficacious remedy is provided for a review of their decision as respects the law of the case, their finding of facts being conclusive upon the Government and the importer."

This extraneous matter, thus authoritatively presented, it is my duty to consider, because statutes, like other writings containing language admitting of doubt, should be read in the light of the circumstances under which they were made, that we may put ourselves in the place of the legislature and view the subject-matter, from its standpoint. Said Mr. Justice Bradley, in delivering the opinion of the court in *Siemens* v. *Sellers* (123 U. S., 276, 285), "no doubt the words of a law are generally to have a controlling effect upon its construction; but the interpretation of those words is often to be sought from the surrounding circumstances and preceding history." The same court said in *Platt* v. *Union Pacific Railroad Company* (99 U. S., 48, 64):

"But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances. Guided by this rule of construction, as well as by others universally recognized, we have been led unhesitatingly to the conclusion that the deed of trust or mortgage executed by this company in 1867 was a disposition of the lands granted by the third section of the act of 1862, within the meaning of that act."

See also, to the same effect, *Smythe* v. *Fisk* (23 Wall., 374, 380).

Guided now by this safe and sensible rule of interpretation, all doubt seems to be removed as to the intention of Congress to require duties to be paid in full within ten days after liquidation, to make the importer's protest available

by entitling him to appeal to the Board of General Appraisers.

Payment of duties in full by the importer protesting being a condition-precedent to the collector's power to transmit the invoice and other papers in the case to the Board of General Appraisers, if the importer has the right to withhold such payment at pleasure, the right to protest may be used for obstructions and speculative purposes, and thus the evil of the old law of a vast and unmanageable accumulation of disputed questions under the customs laws will be continued.

Already, and as a consequence of the decision of the Board of General Appraisers of November 26, 1890, there is a large accumulation of protests which are kept in suspense by the importers witholding payment of duties, and so preventing their transmission by the collector to the Board of General Appraisers, for the mere chance of profiting by the rulings of the board or the courts in other similar cases, prosecuted in good faith.

The contest between these importers and the Government is a very unequal one. Before it begins they have received their goods and sold them, with the duties, as liquidated, included in the price, and they are of course content to wait indefinitely for a possible refund of duties, in which they have really no longer an interest, because the consumer has already paid them. This hoped-for refund, if realized, is, as experience indicates, sometimes liberally divided with third parties, who may be said, with truth, to be more interested in the contest with the Government than the importers themselves, who must often be at a loss to understand on what ground they are entitled to a recovery from the Government. But the real party in interest in such cases, the taxed consumer, the remedy of the law, unfortunately, does not and perhaps could not practically reach.

On the other hand, the Government, if the decision of the Board of General Appraisers in question is sound, is compelled to wait for its revenue until it shall please these importers to bring their obstructive and vexatious inaction to a close, and is, furthermore, compelled to remain indefinitely ignorant of the extent of its liabilities, in this respect, with the possibility of being suddenly called on to refund the large sums represented by these accumulations of unmeritorious and speculative protests.

The danger of embarrassing the National Treasury by sudden demands of this kind is too manifest to require a labored argument, in the light of what has been stated, to prove that one of the primary objects of the act of June 10, 1890, was to provide the machinery for an expeditious disposition of questions growing out of the customs laws.

But it may be said that section 14 does not name any time for the payment of the charges on dutiable merchandise, but only requires the protest against them to be made within ten days after payment, and that payment in full of such charges is as much a condition precedent to the collector's power to transmit protests, etc., to the Board of General Appraisers as payment of the duties themselves, and that, therefore, as the importer may put off indefinitely a hearing before the board by withholding payment of such charges alone, it could not have been the intention of the act to require the prompt payment of duties in full within ten days after liquidation, since, as stated, such payment, without the payment of the charges also, would not expedite the hearing before the board contemplated by the protest.

It must be admitted that there is a difference in the language of the act as to protests against the collector's ascertainment of duties and his decision as to these non-dutiable charges. In the first case, the protest must be made within ten days after *liquidation* of duties, and in the second, within ten days after payment of charges.

But, in reality, the difference is only apparent, because, when we have reference to the established course of business as to the payment of these charges, we find that the importer is required to secure their payment by depositing with the collector beforehand a sum sufficient to cover them. It is plain, therefore, that the real time when payment of charges may be properly said to be made is when the liquidation is completed, for it is not until then that the collector has officially determined precisely how much of the deposit he has retained for their payment. The provision of section 14, therefore, declaring that the protest against non-dutiable charges must be made within ten days after payment of them, is the same as though it had required such payment within ten days after liquidation, for we are bound

to presume that Congress legislated with full knowledge of this well-established course of business. Indeed, this difference of phraseology may, perhaps, be satisfactorily accounted for on the theory that Congress did not consider the term "*liquidation*" as properly applicable to charges ascertained and fixed by law, and therefore requiring no *calculation* or *liquidation* to determine their amount; and it must be conceded that to have employed that term to indicate the process by which the amount of charges was to be arrived at would appear to be unauthorized by any recognized previous use of the term.

But however that may be, there is so essential a difference between non-dutiable charges and duties, the latter being the lifeblood of the Government and the former in no way affecting its vitality, that an argument based on a provision of law relating to such charges can not be safely relied on as a guide to the meaning of another provision of the same law relating to duties. Because a revenue law is indulgent to the taxpayer as to the costs and charges involved in collecting his taxes, it by no means follows that the same indulgence is extended to the taxes themselves. On the contrary, we know that it is the universal policy of governments to require prompt payment of taxes, and to provide also procedure to recover back afterwards any part of the amount so paid that is decided to have been illegally exacted.

The previous law, namely, section 2931, Revised Statutes, provided a limitation of ninety days within which duties were to be paid and suit brought, and nothing is more unreasonable than to say that the act of June 10, 1890, repealing that law intended to substitute for that limitation of ninety days the uncertain period of the importer's pleasure or the almost equally uncertain period within which the Government might collect the tax by a suit at law, supposing the delinquent importer should be solvent when judgment should be recovered.

In view of the foregoing considerations it would seem manifest that section 14 must be understood to mean that the collector's liquidation of duties shall be final and conclusive, unless the importer, consignee, or agent shall, within ten days after such liquidation, as well in cases of merchandise entered in bond as for consumption, make protest in writing and in cases of merchandise entered for consump-

tion, shall, within said ten days, pay the full amount of duties and charges ascertained to be due thereon. In other words, if the dissatisfied importer desires to make a contest as to the action of the collector, he must protest and pay the duties and charges in full within ten days after liquidation, where the merchandise is entered for consumption, or he must protest within said ten days, where the merchandise is entered in bond only. The statute contemplates two classes of cases, namely, entries in bond and entries for consumption, and the language used must be taken distributively, *reddendo singula singulis.* Otherwise, the next provision of section 14, that "upon such notice *and payment* the collector shall transmit the invoice and all the papers," etc., to the Board of General Appraisers, must be interpreted to mean that, where the protest relates to duties on merchandise entered *in bond* only, the duties must be *paid* before the case can be sent to the board, which would plainly make nonsense of the law by confounding two classes of cases which Congress intended to keep distinct from one another.

This view of the statute does no violence whatever to the language of the statute, while that adopted by the Board of General Appraisers has this effect, and makes the statute mean what its history shows could not have been in the contemplation of Congress.

The inconvenience which embarrasses you has arisen from a misinterpretation, as I think, of section 14 by the Board of General Appraisers and the collectors, who are all officers of your Department, and more or less subject to your authority and control by virtue of sections 249 and 251, Revised Statutes of the United States.

Under these sections you have full power to instruct collectors to decline to recognize as valid any protest against an assessment of duties on merchandise entered for consumption where the duties and charges were not paid in full within ten days after their liquidation. I say nothing as to whether you have any power in the premises over the Board of General Appraisers, or as to whether that board has any authority to decide the question under consideration, because that subject is not covered by the question submitted for opinion.

In conclusion, I hope I may be pardoned for going out-

side the question presented for consideration and making the suggestion that perhaps it would go far toward correcting the evil in question if the packages sent to the appraiser's stores for examination and valuation should be held also as security for any additional amount found to be due by the importer on liquidating the entry. You of course are much better able than I to say whether the suggested departure from the present practice of delivering such packages to the importer before liquidation would be too serious an inconvenience to persons engaged in the importing business.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

IMPORTATION—MACHINERY FOR DISABLED FOREIGN VESSEL.

A crank shaft and steamer's shafts brought to this country from a foreign country to repair a vessel of that country lying disabled in our ports are articles imported into the country within the meaning of section 2503 of the Revised Statutes and section 2502 of the tariff act of 1883.

DEPARTMENT OF JUSTICE,
July 7, 1891.

SIR: By letter of May 13, 1891, you submitted for the consideration of the Attorney-General "the claim of the North German Lloyd Steamship Company for a refund of the duty levied on two shafts and other machinery imported by them in 1881 and 1885 to replace broken and disabled shafts in vessels belonging to them." You add that "the claim that such shafts and other machinery were not properly subject to duty was duly considered by this Department on the appeal of the consignees in each case, and decided adversely," but that "in view of the favorable reports thereon of the Committee on Claims of the House of Representatives and of the Senate," which you inclose, you ask the Attorney-General to advise you whether in his opinion articles brought into the United States under such circumstances are importations within the purview of the tariff laws.

The cases presented are two. On April 23, 1881, the steamship *Strassburg*, of the North German Lloyd Company, arrived at the port of Baltimore from Bremerhaven. On the

customary examination of her machinery after arrival in port it was discovered that the crank shaft contained several cracks which prevented the vessel from completing her voyage until the defective shaft could be replaced. By reason of the peculiar construction of the *Strassburg*, the company kept on hand at Bremerhaven, the home port, a duplicate crank shaft for immediate use in case of accident. The duplicate shaft was shipped from Germany by another steamer of the same line, landed and transferred to the *Strassburg* at Baltimore, and there was put in place. The collector of the port of Baltimore assessed the duplicate shaft as imported merchandise, subject to duty at 45 per cent ad valorem, and collected $2,422.55, which the company paid under protest. The decision of the collector was affirmed by the Secretary of the Treasury.

The second case is as follows:

The steamship *Werra*, while on her way from Germany to the United States, in August, 1885, met with an accident to her machinery in midocean, breaking her shaft and losing part of her propeller. In this helpless condition she was found and towed by the British steamship *Venetia* into the port of Boston. The broken parts of her machinery could only be replaced by the original builders in England, who forwarded a new shaft by another vessel of the same line. This was landed at New York and carried to Boston by rail, where it was put in place of the broken shaft. The new shaft was assessed for duty by the collector at New York at 3¼ cents per pound, or $1,006.30, which the company paid to the collector at Boston, having duly protested on the same after the liquidation by the collector at New York. The agents of the company at Boston offered the collector a warehouse and withdrawal entry for immediate exportation, which the latter refused to accept and proceeded to collect the duties.

The shaft brought in for the *Strassburg* in 1881 was assessed under the metal schedule contained in the Revised Statutes as a manufacture of steel at 45 per cent ad valorem. The shaft brought in for the *Werra* in 1885 was assessed at 3¼ cents per pound under the metal schedule (C) in the tariff act of 1883 (par. 177) as a "steamer shaft" valued at more than 10 cents per pound. If these shafts

were "imported" into this country, it is not denied that they were correctly classified under the tariff acts of 1874 and 1883, respectively, and even if they were not, the protests were not so framed as to permit any other classification on a reliquidation.

Section 2503, Revised Statutes (tariff of 1874), provides that "there shall be levied, collected, and paid upon all articles mentioned in the schedules contained in the next section *imported from foreign countries*, the rates of duty which are by the schedules respectively prescribed." The *Strassburg* shaft was assessed under section 2503.

Section 2502 of the tariff act of 1883 (22 Stat., 488) requires that "there shall be levied, collected, and paid upon all articles imported from foreign countries" the rates of duty prescribed by the succeeding schedules, among which is Schedule C imposing a duty on steamer shafts.

The only question for answer here is whether these shafts were "articles imported" within the meaning of the foregoing sections. To import an article into this country is to bring it into the country. The shafts here involved were brought, the one from Germany, the other from England, and were both landed in this country: one at Baltimore, and the other at New York. They were, therefore, "articles imported" from foreign countries. As it is admitted that they were not upon the free list and were not exempted by any express provision of law, they are liable to the duty imposed. This answers the question you have put to the Attorney-General. You have referred in your letter, however, to the reports of two Congressional committees upon the validity of the claim of the steamship company, and have also inclosed a brief of counsel for the company upon the same subject. As it was these documents which induced you to seek a reconsideration of the action of your predecessors in rejecting the claims and refusing a refund, the grounds therein stated require examination.

The Congressional committee which reported upon the first claim, that of the *Strassburg* shaft, admitted that the collector and Secretary were right under the law in assessing the shaft for duty, but thought the circumstances of the case commended it as one entitled to special Congressional relief. That report, therefore, calls for no comment.

The Senate Committee of Claims in the second case, that of the *Werra* shaft, reported that the shaft was not subject to duty under the law. The grounds upon which this report proceeds may be considered in connection with those stated in the brief of counsel for claimant as they are substantially similar.

The first ground upon which it is contended that the shafts were not "articles imported" within the meaning of the customs law is that they were not voluntarily brought into this country. Lord Chief Justice Hale is cited to sustain the proposition that the word import does not include an article brought into the country involuntarily. The citation is taken from Hargrave's Tracts, Part III, "Concerning the custom of goods," cap. 20, and is as follows:

"The goods ought to be imported *by way of merchandize*, for if they come in by reason of foul weather, or to escape pirates, or to take in fresh water; yea, though they unlade part of their lading or all of it upon such an extremity; yea, yet farther, though they sell within the port some of their lading for the defray of their casualties, as the mending their ship and buying of victuals, even by the common law they were to pay no custome or subsidy for any more than what was so actually sold. And this appears by divers precedents, as well before as since the statute of 28 E. 3, cap. 13 * * * And accordingly if they were wrecked upon the English coast, no custome by law is due for more than is sold."

The language shows that Sir Matthew is here speaking of dutiable and nondutiable articles. He is not defining the meaning of the word "imported." He says the articles to pay duty must be *imported* by way of merchandise, which is as much as to say that an article *imported* in any other way or for any other purpose, as to escape storm or pirates, is not to pay duty. But concede that the bringing of an article into the country is not an importation within the purview of the revenue laws unless it be voluntary, which is certainly all that can be claimed from the foregoing passage or the decisions which are cited (*Schooner Mary*, 1 Gall., 206; *Schooner Boston and Cargo*, 1 Gall., 239, 245), the importations of the shafts here were entirely voluntary. The owners of the new shafts and the vessels in which they were brought

intended the vessels to arrive in the United States and the shafts to be landed here. No stress of weather brought them here. The common-law rule as stated by Lord Hale exempts from duty only those articles upon which the forces of the foul weather or the pirates are directly exerted as a necessity for their being brought into port. It certainly can not include such articles as are subsequently and intentionally imported to aid the distressed vessel. The common-law rule has been embodied in the customs laws of this country, and is to be found in sections 2891, 2892, and 2894, Revised Statutes. It appeared as section 60 of the first permanent customs act of March 2, 1799 (1 Stat. L. 672, which provided:

"That if any ship or vessel from any foreign port or place, compelled by distress of weather, or other necessity, should put into any port or place of the United States, not being destined for the same, the master might, by form of oath prescribed, set forth the circumstances of the distress or necessity to the collector, and if there was a necessity for unlading the vessel the collector should grant a permit for that purpose; and if it was necessary either to preserve the cargo or to defray the expenses attending such vessel and cargo to sell part of the cargo, then that part sold was to pay duty; that the rest of the cargo might be reladen upon the vessel under the superintendence of the revenue officers, and the vessel might proceed with the same to her place of destination free from any other charge than for storing and safekeeping of the merchandise and fees to the officers of the customs as in other cases."

This provision must be regarded as an authoritative expression of the common-law exemption, with such additional guaranties against fraud as were deemed necessary by the legislature. Its effect is not to be extended beyond the natural meaning of its language by arguments based on comity, charity, or humanity. It may be observed in passing that strictly speaking, neither articles upon the *Werra* nor those upon the *Strassburg* were entitled to the exemption of the section, because the *Strassburg* was destined for Baltimore, where she arrived, and the *Werra*, though not destined for the port of Boston, was destined for New York, where she was subject to the same revenue law. But waiving that, the section is applicable only to the cargo of the

vessel at the time of the distress and not to articles which the owner or captain of the vessel is obliged subsequently to buy or procure in order to enable her to continue her voyage. The sixteenth article of our treaty with Germany (17 Stat. L., 931) in dealing with the same subject-matter does not differ in this respect from the statute. No rebate is provided on imported articles bought in this country by the shipowner to repair foreign vessels in our ports. Why, then, should an exemption be permitted on articles bought or procured abroad by the owner and by him brought here for that purpose? If Congress had intended any exemption of the kind, it would have made it express. Instead of doing that, however, it has made an express exemption which plainly implies that articles imported to repair foreign ships are dutiable. By section 2514, Revised Statutes, all articles of foreign production needed for the repair of *American* vessels engaged exclusively in foreign trade may be withdrawn from bonded warehouses free of duty under such regulations as the Secretary may prescribe. The privilege here extended to American vessels would seem to exclude the existence of any power in the Secretary of the Treasury to extend a similar privilege to foreign vessels repairing in this country.

Again, by section 2983 the privilege of purchasing supplies from the public warehouses free from duty may be extended under regulations of the Secretary of the Treasury to the *vessels of war* of any country in ports of the United States if such nation reciprocate such regulation to war vessels of the United States in its ports. This only illustrates the general proposition, that when Congress intends the exemption of any articles from duty by reason of comity it makes express provision for it. No such power is given the Secretary of the Treasury in the absence of special statute.

The second ground upon which it is contended that the shafts are not "articles imported" is, that they were not either sold or consumed in this country. The argument is based on Chief Justice Marshall's opinion in *Brown* v. *Maryland* (12 Wheaton, 419). The court there held that the levy by the State of a tax upon the sales of imports as such was a tax upon imports and invalid. This rested on the proposition that the privilege of importing given upon payment of duty by the General Government included and conferred the

right to sell the goods when imported. The Chief Justice said (p. 442):

"The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and reexported in the same vessel, goods landed and carried overland for the purpose of being exported from some other port, goods forced in by stress of weather and landed but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that in the opinion of the legislature the right to sell is connected with the payment of duties."

The exceptions which he mentions in the passage above quoted are exceptions expressly made in the law of 1799. (See section 32 as to reexport of goods brought in; section 33 as to transfer from one port of the United States to another; section 45 as to exemption of sea stores; section 60 as to exemption of cargoes of vessels arriving in distress at ports to which they are not bound, already referred to; section 75 as to a drawback on imported goods exported in the same packages.) These exemptions exist under the present law. Under no one of them, however, are the shafts in the present case included. The Chief Justice is not here defining the meaning of the word "imports," but he is demonstrating that the general policy of the law as shown by its express provisions exempts imports which are not either sold or consumed in this country. He can not be understood as saying that, without express statutory exception, an article brought into this country is not an import because it is neither sold nor consumed here. Among the very exemptions he points out are goods *imported* and reexported in the same vessel, showing that such goods are imported, though they are immediately exported.

But even if it be admitted that an article must be either sold or consumed here to be an import within the purview of the law, the case of the claimant is not aided. The shafts in question went into consumption in this country. The component parts of a machine go into consumption when they are put in the place where they are to discharge the functions for which they were manufactured. The shaft of a vessel

enters into consumption when it is put in place on her, as much as does the nail which is driven into her deck or the paint which is put on her sides. The *Werra* and the *Strassburg* were both in the United States when the shafts were put into their machinery. It is true that by force of a treaty with Germany (17 Stat., 921) a German merchant ship moored in the ports of the United States is, for the purpose of enforcing discipline in her crew and certain sailors' contracts, within the jurisdiction of German judicial tribunals and *pro tanto* out of the jurisdiction of our courts. But in all other respects the vessel is subject to the local law of this country (Wildenhus's Case, 120 U. S., 1). It will hardly be contended that articles sold on the deck of a foreign vessel moored to the dock in Boston or Baltimore are not sold in the United States. What distinction can be made between the place of such a sale and the place of consumption of an article which, in the same vessel and in the same port, ceases to be an independent shaft and becomes a component part of the vessel's machinery. It is said that the shaft might have been taken on board and been put in place when the vessel was towed beyond the limits of the United States. That would make a different case, and does not assist a conclusion here.

It is of significance in this connection that by sections 2795, 2796, and 2797 the sea stores of a vessel brought into port are exempt from duty when the master shall particularly specify the articles by sworn manifest, but if there appears to be an excess, it is liable to duty.

This provision shows, first, that the excess of sea stores, though not landed, is "imported" merchandise; and, second, that it was deemed necessary to especially exempt articles which are neither to be landed nor consumed here.

The same remark may be made with respect to section 2798, which permits a steam vessel arriving at any port in the United States with coal on board to retain the same without landing it, and to proceed to a foreign port without paying duty upon it.

The fact that these shafts were made for these particular vessels is said to constitute them a part of the permanent equipment of the vessel, and it is argued that constructively they were always in the vessels and ought not to be treated

as a separate importation. There is no authority or justification for a fiction of this kind to evade the plain letter of the statute. It might be conceded that if it were possible to carry two shafts on the vessel, the one to be used in case of accident as a substitute for the other, the unused shaft so carried would be part of the equipment of the vessel and exempt from duty, just as her boats or other detached parts of her equipment would be. But the fact that the shaft was not carried is an evidence that such substitute shafts do not make a part of the ordinary equipment of a vessel. And, however this may be, the fact is that this shaft was not part of the equipment of the vessel when she came in, and had to be brought in as a separate importation by another steamer.

Another circumstance referred to by the Senate committee and by counsel for claimant as of significance in this discussion is that the shafts could not be procured in this country. It is not denied that steamer shafts are within the tariff laws and have imposed upon them a specific duty. It does not take a particular shaft out of the law that it is of a manufacture and in a form not procurable here. In case of doubtful construction under the tariff laws it may be that such a motive as the mention of this circumstance suggests for not imposing a duty would control the meaning of an ambiguous statute, but here the duty is plainly laid on steamer shafts, and the question whether a particular steamer shaft can be made in this country is wholly irrelevant in considering its dutiability.

Certain rulings of your predecessors are cited as governing the question. One is the case of the yacht *Madge*, which was brought into this country on the deck of a steamer. It was a pleasure yacht, and it was held that such a yacht was not goods, wares, and merchandise within the meaning of the tariff law. By section 4216, Revised Statutes, yachts belonging to a regularly organized yacht club of any foreign nation which shall extend like privilege of entering or leaving any port of the United States without entering or clearing at the custom-house thereof, or paying tonnage tax. The holding of the Secretary may be supported on the theory that the bringing of the yacht in on deck of the steamer was not different from her condition if she had been brought in in tow of the steamer, or had sailed

in herself, and that therefore she was still a pleasure yacht, entitled to the privileges of the section quoted. The other cases were where the racing rigging of yachts, which could not be used in crossing the ocean, was brought in on a steamer and was admitted duty free. These cases must be conceded to be nearer the one under consideration. But even if they are applicable here, I must decline to yield to them as authority for the reasons heretofore given.

I have the honor to advise you that the action of your predecessors in office in declining to make the refunds which the claimant company seeks should not be disturbed or modified.

Very respectfully,

WM. H. TAFT,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

UNMAILABLE MATTER—LOTTERY NOTICE.

A pamphlet and papers accompanying it considered, and determined to be matter that should be excluded from the mails, as containing an advertisement of a lottery, in violation of section 3894 of the Revised Statutes.

DEPARTMENT OF JUSTICE,
July 9, 1891.

SIR: Your communication of June 22, 1891, submits for opinion the question whether certain matter, next hereinafter described, is unmailable under the act of September 19, 1890 (Pamph. Laws, 1889, 1890, p. 465), amending section 3894 of the Revised Statutes of the United States.

The matter referred to, which you inform me is being introduced into the mails at the New Orleans post-office by thousands, consists of a printed pamphlet, bearing the following title:

"Full and Revised Report of the State Supreme Court on the Lottery Revenue Case.—Concurring and Dissenting Opinions.—Syllabus and Decree."

On the first page of this pamphlet is the following heading:

"The Great Cause—Why and How the People Won—The Able, Learned and Exhaustive Opinions in Favor of the Lottery Revenue Amendment—A Unanimous Court on the Main

points Raised—The Dissenting Views of Justices Fenner and Breaux."

The heading is followed by what is termed "The Syllabus," and the decision of the court and certain concurring opinions and the opinions of the dissenting judges.

Accompanying this pamphlet, and enveloped by one and the same wrapper, is an empty unsealed envelope, on the face of which is printed the following superscription:

"No. 72. Use this envelope only for money remittance by the Southern Express Company. Said to contain $—— For New Orleans National Bank, New Orleans, La., from ——, ——189—."

The back of the envelope contains the following directions, etc., also in print:

"Consignee will please open this package on the end, so as to preserve the seals.

"[SEAL.] (Stitch here.) (Stitch here.) [SEAL.]

"Tie and seal over knot (here).

"Counted and sealed by —— ——, in presence of —— ——. Berlin & Jones Envelope Co., N. Y."

Section 3894, Revised Statutes, as amended by the said act of September 19, 1890 (*supra*), is as follows:

"No letter, postal card, or circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money postal note, or money order for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post-office, or branch thereof, or by any letter-carrier; *nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier.* Any person who shall knowingly deposit or cause to be deposited, or who shall know-

ingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment for each offense. Any person violating any of the provisions of this section may be proceeded against by information or indictment, and tried and punished, either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed."

If the matter above described is unmailable it would seem to be because it falls within the following prohibition of section 3894, as amended, "* * * nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawing of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier."

Looking now at the form in which the opinions of the judges of "the supreme court of the State" are presented, I have no doubt that it is a pamphlet, which is defined by the Century Dictionary to be: "A printed work consisting of a few sheets of paper stitched together but not bound." Nor have I any doubt that this pamphlet, which you inform me is being sent through the mails by thousands, is also a publication, which is defined by the same authority to be: "The act of publishing, or bringing to public notice, notification to people at large, by speech, writing, or printing," etc., "The act of offering a book, map, print, piece of music, or the like to the public by sale or by *gratuitous distribution*." These definitions are, substantially, no doubt, what will be found in other dictionaries, but I deem it unnecessary to quote from them.

I am equally clear that Congress used the terms "pamphlet" and "publication" in the law in the above senses.

Unmailable Matter—Lottery Notice.

Coming now to the envelope, which is the accompaniment of the pamphlet or publication, we are next to inquire whether it, too, is a publication.

The language of the law is very comprehensive, namely, "*any * * * publication of any kind*," and following, as it does, the words "*newspaper, circular, pamphlet*," would seem to indicate that Congress intended that it should be taken in its most comprehensive sense—that is, as embracing things not covered by "newspaper, circular, pamphlet." This we are bound to assume, otherwise the words "any * * * publication of any kind" would be allowed no meaning at all, in violation of the well-known rule that nothing in a statute is to be rejected if it can possibly have any effect.

That the purpose of the envelope is to bring something to public notice or to give notification of something to people at large the matter printed on it does not permit me to doubt, when taken in connection with the fact that thousands of envelopes similar to the one now before me are being mailed at the post-office at New Orleans.

On its face it notifies its recipient to "use this envelope only for money remittance by the Southern Express Company," to send the money inclosed to "the National Bank of New Orleans, La.," to write on its face his name and the date of the remittance; and on the back are directions looking to the safety and security of money remitted in the envelope.

Bearing in mind, now, that thousands of these envelopes are being deposited in the mails, addressed, as I must infer, to many persons and places, I do not comprehend how there is room for doubt that each envelope so sent is a "*publication*," in the sense of the law. If each of these envelopes is not a publication, I am at loss to understand how any circular disseminated through the mails in the same way can be a publication.

It being thus established that the pamphlet and the envelope are both publications, the next inquiry is, whether they, or either of them, contain "any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance," without which neither of them can be excluded from the mails under the law in question.

An advertisement is generally defined by the Century Dictionary to be: "A notice or an announcement made public by handbill, placard, or similar means." Of course the word has two or three special restricted senses that are familiar, and which are also given by that authority. The "Imperial Dictionary" gives this definition of advertisement: "A written or printed notice intended to make something known to the public, especially a printed and paid notice in a newspaper or other public print."

The fact that the pamphlet and envelope are invariably mailed together, in the same wrapper, is a circumstance to show that the sender recognizes some connection or relation between the two, while the directions on the envelope plainly indicate that the sender's purpose is to find *customers* rather than *readers*.

It may be that neither the pamphlet nor the envelope is an advertisement, by itself, but there is nothing to prevent them from being taken together, as it was no doubt intended they should be, and read as *one* publication. This is constantly done where the evidence of ordinary business transactions is to be found in several papers, and I can see no reason whatever why the same principle should not be applied to the documents in question. (*Bailey* v. *Railroad Company*, 17 Wall., 96, 107, 108; *Anderson* v. *Harvey*, 10 Gratt., 386, 396.)

But, in order to get the full meaning of the two documents, when taken together, it is important to advert to certain well-known facts, that the documents may be read in their light.

It may be doubted whether anything is better known to all classes throughout the country than the existence in the city of New Orleans, of the Louisiana Lottery Company, as a company, extensively engaged in selling lottery tickets all over the United States. It is equally well known that the use of the mails, for the purposes of that business, has been forbidden by Congress, and that, to evade the law in this particular, the lottery company has been instructing its correspondents to address mail matter intended for it to a bank at New Orleans. It is also notorious that the charter under which the lottery company is doing business is about to expire, and that the company is making strenuous efforts for

its renewal, and to that end has been engaged in a contest in the courts with the authorities of the State of Louisiana, from which it has recently come off victorious, as the press everywhere has announced with a conspicuousness which is only given to news likely to interest many readers.

These facts, involved as they are with a question of public morals, form part of the history of the times in which we live, and excite no little attention and discussion, in the newspapers and elsewhere, and it would be a strange spectacle, indeed, if those whose duty it is to exclude lottery matter from the mails, should be compelled to perform that duty with their eyes shut to facts known to everybody else.

The law is guilty of no such absurdity. In *Hoare* v. *Silverlock* (12 A. B. Ell., N. S., 624), the question was whether a count in a declaration, in an action for libel, stating that the friends of the plaintiff "had realized the fable of the Frozen Snake" was sufficient without an innuendo or explanatory averment, and the court held that it was, Lord Coleridge remarking, in relation to the necessity for an innuendo, that, "the jury and court in such a case as this are in an odd predicament, if they alone of all persons are not to understand the allusion complained of. Suppose the libel had said the plaintiff acted like a Judas; must the history of Judas have been given, and referred to by innuendo?" This case was cited with approbation, by the Supreme Court of the United States in *Brown et al* v. *Piper* (91 U. S., 37, 42), where it is laid down, that "*Courts will take notice of whatever is generally known within the limits of their jurisdiction.*" * * * To the same effect is the case of *Ohio Life Insurance and Trust Company* v. *Debolt* (16 How., 416, 435), where the court said that it was a matter of public history of which they could not refuse to take notice that almost every bill for the incorporation of banking, insurance, trust, and other like companies is drawn originally by the parties interested in obtaining the charter. In *Bailey* v. *Kalamazoo Publishing Co.* (40 Mich., 251, 257), it is said that "courts have no right to be ignorant of the meaning of current phrases which everybody else understands." In *Lohman* v. *The State* (81 Ind., 15, 17) judicial notice was taken of what is meant by "A gift enterprise," and in *Salomon* v. *The State*, and *Boullemet* v. *The State*

(28 Ala., 83, 88), the court took notice of the peculiar nature of lotteries and the mode in which they are carried on.

In addition to the facts above stated, and in connection with them, I would remark that the pamphlet itself furnishes evidence that it is not printed and mailed in good faith, but with an ulterior purpose. In its title the supreme court of Louisiana is designated "*The State Supreme Court*," which we feel at liberty to say would not have been the case if the apparent object of the pamphlet had been its real one. No doubt it was thought that to place the word Louisiana in immediate connection with the words "*Lottery Revenue Case*" might excite the suspicions of the post-office officials and lead to the rejection of the pamphlet from the mails.

Again, the words of the heading of the first page, "*The Great Cause—Why and How the People Won*," furnish a strong indication of an ulterior object in issuing the pamphlet. Reading this heading, one would suppose that the suit referred to involved the decision of some question vital to popular liberty, instead of one menacing public morality.

On looking into the pamphlet we discover that the State of Louisiana passed a law, directing it to be submitted to the people of the State to determine whether the charter of the Louisiana Lottery Company should be renewed for twenty-five years, from January 1, 1894, for an enormous consideration, and containing a provision renewing the said charter if the vote of the people should be in favor of it, and the "Great Cause" referred to was a suit to compel the Secretary of the State of Louisiana to submit that matter to the vote of the people, he having refused to do so. It thus appears, that the only party benefited by the decision of the "Great Cause" is the Louisiana Lottery Company.

Taking now the pamphlet and the envelope together and reading them in the light of the above facts what do we find? A pamphlet about the Louisiana Lottery Company and nothing else, bringing that company to the public attention in a striking way.

The recipient of the pamphlet is not allowed to remain at a loss to understand why a publication about a matter not interesting him was sent, because on opening it he discovers the envelope, and at a glance almost sees that *it means busi-*

ness of some sort. Familiar as he is with the facts to which we have referred, he is not so simple as to suppose that the bank to which the envelope is directed is inviting him to some enigmatical transaction. He knows well enough that banks do not approach the public in that way, but he intuitively connects the envelope with the Louisiana Lottery Company and completely understands, from what is before him and from what he knows besides, that if he will send money to the bank its worth in lottery tickets will be returned to him by the Louisiana Lottery Company. What are these documents, then, thus read, but publications containing an advertisement of the Louisiana Lottery Company; that is to say, publications bringing that company to the notice of the public and soliciting the public to purchase tickets in its lotteries?

If the statute can be evaded by so transparent a device, it seems to me it was almost a waste of time to pass it, for all the good it will do.

You have no power to try questions of this kind by judicial methods. You can not summon parties or witnesses before you, and can not therefore be expected to have a better foundation for your action in excluding matter from the mails than a magistrate is required to have for issuing a warrant for the arrest of a supposed criminal. You can not, it is true, proceed upon suspicion any more than the magistrate can, but you are safe in acting on reasonable and probable grounds. That such grounds exist in the case before me seems not to admit of doubt.

Very respectfully,

W. H. H. MILLER.

The POSTMASTER-GENERAL.

ATTORNEY-GENERAL—SEIZURE OF PICTURES OF COINS.

The question whether or not certain pictures of coins constitute a violation of section 3 of the act of February 10, 1891, chapter 127, is one for the determination of the courts, not for the Executive Departments; consequently the Attorney-General declines to express an opinion thereon.

The Secretary of the Treasury is not authorized by law to seize the articles described.

DEPARTMENT OF JUSTICE,
July 15, 1891.

SIR: By your letter of June 19, last, you ask my opinion as to the construction to be placed upon section 3 of the act of February 10, 1891 (26 Stat., 742), being "An act further to prevent counterfeiting or manufacture of dies, tools, or other instruments used in counterfeiting and providing penalties therefor, and providing for the issue of search warrants in certain cases."

Section 3 reads as follows:

"That every person who shall make, or who causes or procures to be made, or who brings into the United States from any foreign country, or who shall have in possession with intent to sell, give away, or in any other manner use the same, any business or professional card, notice, placard, token, device, print, or impression, or any other thing whatsoever, whether of metal or its compound, or of any other substance whatsoever, in likeness or similitude, as to design, color, or the inscription thereon, of any of the coins of the United States or of any foreign government, that have been or hereafter may be issued as money, either under the authority of the United States, or under the authority of any foreign government, shall, upon conviction thereof, be punished by a fine not to exceed one hundred dollars."

Your letter asks an answer to two questions:

First, whether pictures of coins, printed or lithographed upon advertising cards and labels, or upon playing-cards, more or less accurately representing one of the faces, the color, and the inscription, on the various coins of the United States, are obnoxious to the provisions of section 3 above quoted.

This is not a question of law, arising in the administration of the Treasury Department, within the meaning of section 356, Revised Statutes, which reads as follows:

"The head of any Executive Department may require the opinion of the Attorney-General on any questions of law arising in the administration of his Department."

Whether any given acts or practices constitute a crime is a question for the determination of the courts, not of the Executive Departments, except where some executive action

is dependent upon that determination. This is not such exceptional case.

You will therefore excuse me from giving an answer to this first question.

The second question is, whether your subordinates in the Secret Service are authorized to seize the articles described and proscribed in section 3, or the instruments by which they are made.

To this the answer must be in the negative, and that entirely independent of the answer to the first question. The power to make such seizure is in derogation of common right, is conferred only by statute, and the statute conferring the same must be strictly construed. There is nothing in this act, or in any other statute within my knowledge, authorizing such seizure.

Section 4 of this act authorizes the seizure of "all counterfeits of any of the obligations or other securities of the United States or of any foreign government, or counterfeits of any of the coins of the United States or of any foreign government, and all material or apparatus fitted or intended to be used, or that shall have been used, in the making of any such counterfeit obligations or other securities or coins hereinbefore mentioned, that shall be found in the possession of any person without authority from the Secretary of the Treasury or other proper officer to have the same."

The articles brought under the ban in section 3 do not fall within the classification of counterfeits, as is evidenced not only by their description but by the trifling penalty imposed, as compared with the penalties imposed for ordinary counterfeiting.

I return herewith the papers.

Respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

MASTER'S LICENSE.

Section 14 of Rule 5 of General Rules and Regulations adopted by the Board of Supervising Engineers, and approved by the Secretary of the Treasury, was within the authority conferred by section 4405, Revised Statutes, and the same now has the force of law.

DEPARTMENT OF JUSTICE,
July 15, 1891.

SIR: Your letter of the 3d instant, relating to the appeal of Robert H. McCoy, is received with inclosures.

It appears that Mr. McCoy applied to the local inspectors at Cincinnati, Ohio, in June last to be licensed as master of steam vessels running on Western rivers; whereupon his case was examined and the application refused on the ground that applicant had "not been licensed and served at least one year as first-class pilot, or chief mate, on lake, bay, or river steamers, as provided by section 14, rule 5, General Rules and Regulations."

Said McCoy then appealed to the supervising inspector of the Seventh district, asking that the decision of the local inspectors be set aside and that a license to act as such master be issued to him.

The supervising inspector only examined the case and sustained the decision of the local inspectors.

Thereupon, said McCoy appealed to the Secretary of the Treasury to set aside the findings or decisions of said inspectors and to direct the issuance of a master's license to McCoy in accordance with his original application.

Representatives and owners of important steamboat and transportation lines also represented the hardship of the rule adopted as applied to Western rivers and requested that the license should be granted to McCoy.

The inquiry submitted to me is whether said section 14 of rule 5 is so far in conflict with section 4439 of the Revised Statutes, or is to such an extent in derogation of the rights of McCoy in the premises that said section 14 should be held to be without effect as applied in the case under consideration.

The statute is as follows:

"SEC. 4439. Whenever any person applies to be licensed as master of a steam vessel, the inspector shall make diligent inquiry as to his character, and shall carefully examine the applicant, as well as the proofs which he presents in support of his claim, and if they are satisfied that his capacity, experience, habits of life, and character are such as to warrant the belief that he can be safely intrusted with the duties and responsibilities of the station for which he

makes application, they shall grant him a license authorizing him to discharge such duties on any such vessel for the term of one year." * * *

Section 14 of rule 5 provides as follows:

"That no original master's license on lake, bay, and river steamers shall be issued hereafter to any person who has not been licensed and served at least one year as first-class pilot or chief mate on such steamers, such service as pilot or chief mate to have been within three years preceding the application for license: *Provided, however*, That the foregoing clause shall not apply to persons who have served at least three years as master, mate, or pilot on sailing vessels on waters for which the applicant desires to obtain a license." * * *

The rule referred to was adopted by the Board of Supervising Inspectors, January 25, 1888, and was approved by the Secretary of the Treasury the 7th of the month following.

Said rule was established under the authority of section 4405, Revised Statutes, which provides that, "The board shall establish all necessary regulations required to carry out in the most effective manner the provisions of this title (LII), and such regulations when approved by the Secretary of the Treasury shall have the force of law."

Upon this case my opinion is as follows:

Section 14 of rule 5 is in compliance with section 4405, Revised Statutes, as a regulation "to carry out in the most effective manner" the provisions of Title LII; and is a carrying out of the requirement of section 4439, Revised Statutes, that the applicant shall have such capacity, experience, and habits of life that he can be safely intrusted with the duties and responsibilities of the position for which he applies.

Therefore the board was authorized to establish and declare said section 14, and the same now has the force of law.

As the decisions of the local inspectors and supervising inspector are in accordance with section 14, they are in accordance with the law, and must stand.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

PUEBLO INDIANS.

Section 5 of the act of August 15, 1876, chapter 289, and the act of July 31, 1882, chapter 360, are not applicable to the Pueblos of New Mexico.

DEPARTMENT OF JUSTICE,
July 28, 1891.

SIR: Your communication of the 25th instant, wherein, by reference to a letter of the Commissioner of Indian Affairs, you request my opinion upon the question "whether section 5 of the act of August 15, 1876 (19 Stat., 200), and the act of July 31, 1882 (22 Stat., 179), are applicable to the Pueblos of New Mexico," is received and has had due consideration.

Section 5, above referred to, reads as follows:

"And hereafter the Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes, and to make such rules and regulations as he may deem just and proper, specifying the kind and quantity of goods, and the prices at which such goods shall be sold to the Indians."

And the act of July 31, 1882, so far as pertinent here, reads as follows:

"Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of five hundred dollars."

It is, of course, well known that the Territory of New Mexico was acquired by the United States from Mexico by the treaty of Guadalupe Hidalgo, in 1848.

The status of the Pueblo Indians has frequently been adjudicated by the courts of New Mexico and the Supreme Court of the United States. In *The United States* v. *Ritchie* (17 How., 531) it was held that, as the result of the plans of government adopted by the Mexicans after throwing off the Spanish yoke, these Indians within the Mexican borders became citizens. The court says:

"But as a race, we think it impossible to deny that under the construction of the laws of the country no distinction

was made as to the rights of citizenship, and the privileges belonging to it between this (Pueblo Indian) and the European or Spanish blood. Equality between them, as we have seen, has been repeatedly affirmed in the most solemn acts of the Government."

In *The United States* v. *Lucero*, decided in 1869 by the supreme court of New Mexico (1 N. M., 422–458), the same conclusion is reached, and it is held that the Pueblos, not being tribal Indians, were not within the provisions of the intercourse act of 1834, and not subject to the jurisdiction of the Indian Department of the United States Government. Other decisions of the supreme court of New Mexico reiterate these conclusions.

In the United States *v.* Joseph (94 U. S. 614), it is announced that the question whether the Pueblo Indians and their lands were subject to the provisions of the intercourse act of 1834, extended to New Mexico by the act of July 27, 1851 (9 Stat., 587), must be determined by the answers to two questions, namely:

1. Are the people who constitute the Pueblo, or village of Taos, an Indian tribe within the meaning of the statute?

2. Do they hold the land on which the settlement mentioned in the petition was made by a tenure which brings them within its terms? that is, by the ordinary Indian title.

Both questions are answered in the negative. The court, after referring to the fact that there were wild, nomadic tribes, such as the Apaches, Navajoes, etc., in New Mexico, to which the statute could apply, says:

"The Pueblo Indians, if indeed they can be called Indians, had nothing in common with this class. The degree of civilization which they had attained centuries before, their willing submission to all the laws of the Mexican Government, the full recognition by that Government of all their rights, including that of voting and holding office, and their absorption into the general mass of the population (except they had their lands in common), all forbid the idea that they should be classed with the Indian tribes for whom the intercourse acts were made, or that in the intent of the act of 1851 its provisions were applicable to them. The tribes for whom the act of 1834 was made were the semi-independent tribes whom our Government has always recognized as exempt from our

laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions; in whom we have recognized the capacity to make treaties, and with whom the Governments, State and National, deal, with few exceptions only, in their national or tribal character and not as individuals.

The court declined to expressly rule that the Pueblos were citizens of the United States and of New Mexico, but did state that "We have no hesitation in saying that their status is not, in the face of the facts we have stated, to be determined solely by the circumstance that some officer of the Government has appointed for them an agent, even if we could take judicial notice of the existence of that fact, suggested to us in argument," and that, "If the defendant is on the lands of the Pueblos without the consent of the inhabitants, he may be ejected, or punished civilly by a suit for trespass, according to the laws regulating such matters in the Territories."

In view of these adjudications, my conclusion is that the sections of the statutes referred to are not applicable to the Pueblos of New Mexico.

The papers are herewith returned.

Respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

IMMIGRANTS—FERRY SERVICE.

The act of August 3, 1882, chapter 376, and sections 7 and 8 of the immigration act of March 3, 1891, chapter 551, fully authorize the Secretary of the Treasury to provide subsistence for Government employés and immigrants on Ellis Island and to procure the transportation facilities necessary and pay such proper expenses as may be necessary to carry the immigration laws into effect. He is authorized to do this in any manner not prohibited by law that he shall deem best and for such reasonable term as shall best subserve the interests of the Government, subject to the rights of the officers and agents of the Government and to such legislation as Congress may see fit to enact, and to such rules as he himself may from time to time adopt, and preserving to him control over the wharves and the power to prevent the coming of improper persons and the departure of those who should be detained. The con-

tract for transportation may lawfully confer to the contractor an exclusive right to carry immigrants to and from the island and the right to collect a reasonable compensation therefor.

DEPARTMENT OF JUSTICE,
July 28, 1891.

SIR: Your letter of the 14th instant, calling for my opinion as to the authority possessed by you to contract for ferry service to and from Ellis Island, and also for the furnishing of subsistence to immigrants and others upon said island, has been duly considered.

The questions involved may be formulated as follows:

1. Is the Secretary authorized to contract for ferry service to and from Ellis Island for a term of more than one year?

2. May the ferriage contract provide for the exercise by the contractor of an exclusive right of carrying immigrants and other persons to and from said island, with permission to collect a reasonable compensation therefor?

3. Is the Secretary authorized to contract for a term of more than one year for subsistence for Government employés on the island and for immigrants there while in charge of the Government?

Under the act of August 3, 1882 (22 Stat., 214), the immigrant fund is placed under the control of the Secretary of the Treasury, to be used for the care of immigrants and for the purposes and expenses of carrying the act into effect; and he is charged with the duty of executing the provisions of the act and with supervision over the business of immigration; and is authorized to establish such regulations and rules and issue such instructions not inconsistent with law as he shall deem best calculated to protect the United States and immigrants from fraud and loss and for carrying out the provisions of the act and the immigration laws of the United States.

By section 7 of the act of March 3, 1891, relative to immigration (26 Stat., 1085), the Superintendent of Immigration is made subject to the control and supervision of said Secretary, and by section 8 the Superintendent must cause the aliens to be properly housed, fed, and cared for during inspection after temporary removal.

Due precautions are directed to prevent the landing of aliens except at a time and place designated.

The due execution of the law requires provision for the subsistence of immigrants and employés. The "sundry civil" act of March 3, 1891 (26 Stat., 949), contains an enactment providing means "for completing the building and other improvements on Ellis Island, and for procuring the necessary transportation facilities to and from said island."

It therefore appears that the Secretary of the Treasury is fully authorized by law to provide subsistence on Ellis Island and to pay such proper expenses as may be required to carry the immigration laws into effect; and is also authorized to procure transportation facilities necessary in the premises.

It is evident that, under the law, all ferriage communication with Ellis Island may be under such regulations as the Secretary shall prescribe; and also, that the subsistence contemplated, of immigrants and employés, is a necessary expenditure in the enforcement of the immigration law.

In my opinion the Secretary of the Treasury is authorized to procure the transportation facilities in question, and to provide for the subsistence under consideration in any manner not prohibited by law that he shall deem best. Sections 3679 and 3732 (R. S.) do not interfere with this freedom of action, because no appropriation will be required to be made by Congress on account of either of the contemplated contracts.

It is my opinion, also, that the inhibition contained in section 3735 (R. S.) is inapplicable to the ferriage and subsistence contracts under consideration.

It is my opinion that you are authorized to contract as to both ferriage and subsistence for such reasonable term as will, in the respective cases, be most for the interest of the Government and for the due, economical, and efficient administration of the immigration laws.

It will be understood that the service under the respective contracts must be subject to the rights of the officers and agents of the Government and to any legislation that Congress may see fit to enact, and to such rules and regulations as the Secretary of the Treasury shall adopt from time to time.

It is essential that the Secretary shall retain full control of the wharves and landings of the island and that he shall be enabled to prevent the coming of improper persons,

and the departure of such as ought, under the law, to be detained; it is also necessary that officers and agents of the United States, and all persons coming or going upon Government vessels, shall be free from restrictions as to ferry transportation; and the continuing right of Congress to legislate in the premises, and of the Secretary to control, by regulations and otherwise, will be understood. Subject to these rights, privileges, and reservations, it is my opinion that the contract providing for procuring transportation facilities may lawfully confer upon the contractor the exclusive right to carry immigrants and other persons to and from said island, and the right to collect from those so carried a reasonable compensation therefor.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

Where a request for an opinion contains no statement of fact and presents no questions of law, the Attorney-General declines to give an opinion.

DEPARTMENT OF JUSTICE,
July 28, 1891.

SIR: The Commissioner of Indian Affairs left at this Department a few days since an opinion, prepared by Mr. Assistant Attorney-General Shields, touching the question of the rule of individual distribution among the Choctaw and Chickasaw Indians of the appropriations made by the last Congress (26 Stat., 1025), with an oral request for an opinion from this Department touching that subject-matter.

The act of Congress, after making the appropriation, provides—

"That three-fourths of this appropriation be paid to such person or persons as are or shall be duly authorized by the laws of said Choctaw Nation to receive the same, at such times and in such sums as directed and required by the legislative authority of said Choctaw Nation, and one-fourth of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Chicka-

saw Nation to receive the same, at such times and in such sums as directed and required by the legislative authority of said Chickasaw Nation."

This language plainly has reference to the payment of these moneys in bulk to the representatives of the Choctaw and Chickasaw nations, and imposes no duty upon the Secretary of the Interior with reference to the individual distribution of the same. The persons entitled to such distribution, the evidence necessary to establish their claims, and the manner of such distribution are all matters to be regulated by the laws of the Choctaw and Chickasaw nations, respectively, subject, doubtless, to the rule that such laws must not be in conflict with the Constitution and laws of the United States.

It is not apparent, therefore, that any question is presented to the honorable Secretary of the Interior for decision requiring an opinion from the Attorney-General under section 356 of the Revised Statutes. Any decision by the Secretary, or opinion by the Attorney-General, as to who are the proper distributees of this fund, would be wholly inconclusive, and, as I conceive, outside of duties imposed by law—scarcely less so than if we should attempt to determine what should be done with the moneys paid to the several States under the act providing for the refunding of direct taxes, or fix the rule for the distribution of decedent's estates in one of the Territories.

At any rate, this request contains no statement of facts, and formulates no question of law for my consideration.

Under the circumstances, therefore, the papers are returned without the opinion asked.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

EXTRA COMPENSATION.

The act of March 3, 1891, chapter 540, appropriating money for a new edition of the Postal Laws and Regulations, does not authorize the Postmaster-General to make an allowance to an officer of his Department whom he may designate for that purpose.

DEPARTMENT OF JUSTICE,
August 3, 1891.

SIR: The act of March 3, 1891 (26 Stat., 880), entitled "An act making appropriations for the fiscal year ending June 30, 1891, and for former years, and for other purposes," contains the following provisions:

"POSTAL LAWS AND REGULATIONS: For printing and publishing a new edition of the Postal Laws and Regulations, consisting of eighty-five thousand copies; such edition to be prepared under the direction of the Postmaster-General, and printed at the Government Printing Office. And the Postmaster-General may authorize the sale of copies of such edition not needed for the use of the Department, to individuals, at the cost thereof, with ten per centum added; the proceeds of such sales to be deposited in the Treasury, as part of the postal revenues, forty thousand three hundred and sixty-five dollars."

On this provision you base the question whether you are "authorized to designate an officer of this Department to prepare the proposed volume of laws and regulations and make an allowance to pay him out of the appropriation," as above provided.

I am of opinion that you have no authority to make an allowance out of the said appropriation for the preparation of a new edition of the Postal Laws and Regulations to any officer of your Department whom you may designate for that work, whether a duty of that kind appertains to his office or not. The law on that subject seems entirely clear.

Section 1765, Revised Statutes, provides as follows:

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

To make this inhibition more explicit it is declared by section 3 of the act of June 20, 1874 (18 Stat., 109), "That no civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the

Treasury or property of the United States beyond his salary or compensation allowed by law."

As I understand this legislation, it prohibits an officer of any branch of the Government from receiving additional or extra compensation for any service rendered by him, if the service so rendered have any affinity or connection with the duties of his office, unless such compensation is "*authorized by law and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.*"

It is true there is an appropriation of $40,365 for defraying the expenses of preparing the new edition of these laws and regulations, but that appropriation does not "explicitly state" that any part of it is for "additional pay, extra allowance, or compensation" to any officer of the Post-Office Department who may be designated for that work, and I need not add that this appropriation is to be treated as in subordination to section 1765 and section 3 of the act of June 20, 1874 (*supra*).

In *Converse* v. *United States* (21 How., 463, 471) the Supreme Court had occasion to interpret the acts of Congress now embodied in section 1765. In that case the collector for the port of Boston had been selected by the Treasury Department as agent to purchase supplies for the light-house service *throughout the United States* and to make the disbursements for that purpose, and it was held that he could receive the compensation allowed by law for that service, because the laws prohibiting additional or extra pay "can by no fair interpretation be held to embrace an employment which *has no affinity or connection*, either in its character or by law or usage, with the line of his official duty, and where the service to be performed is of a different character and for a different place, and the amount of compensation regulated by law." There was, however, a strong dissent from the opinion of the court by Justices Catron, Grier, and Campbell.

On precisely the same ground additional pay was allowed in *United States* v. *Saunders* (120 U. S., 126); in *United States* v. *Brindle* (110 U. S., 688); in *Meigs* v. *United States* (19 Ct. Cls., 497); and in *Pierce's Case* (15 Opin., 608).

But how can it be said in this case that the preparation of the new edition of the Postal Laws and Regulations has no affinity or connection with the duties of any officer in the Post-

Office Department, or that it "is of a different character and for a different place?" If the claim of compensation for the preparation of that work by an officer of that Department would not be covered by section 1765 and the act of 1874, it is not easy to imagine a case that would be.

The act of March 3, 1879 (20 Stat., 356), referred to in your letter, furnishes a good example of the legislation necessary to take a case such as your question supposes out of the operation of section 1765 and the act of 1874, and seems to warrant the inference that Congress did not intend by the act of March 3, 1891, to authorize you to employ an officer of your Department at an additional or extra compensation to prepare the contemplated edition of the postal laws and regulations, or it would have said so, as in the act of 1879.

The act of March 3, 1873 (17 Stat., 542), to which you also call my attention, appropriating additional compensation to Messrs. Ireland and McGrew, officers of the Post-Office Department, for *having previously prepared* an edition of the Postal Laws and Regulations, was a mere gratuity on the part of Congress, it being very clear that no action against the United States for such compensation could have been maintained in the Court of Claims.

Very respectfully, yours,

W. H. H. MILLER.

The POSTMASTER-GENERAL.

CERTIFICATION OF LAND—DUTY OF THE UNITED STATES.

Certification of land already covered by a homestead or preemption entry is erroneous and without authority of law. The act of March 3, 1887, chapter 556, is mandatory, and makes it the duty of the United States to bring a suit to restore title to the United States if the party to whom the land was erroneously certified after a prior certification does not give or procure a relinquishment or reconveyance.

DEPARTMENT OF JUSTICE,
August 4, 1891.

SIR: Your communication of April 29, in relation to procedure under the act of March 3, 1887 (24 Stat., 556), being "An act to provide for the adjustment of land grants," etc., is received.

As my opinion rests upon the case now presented, I will note the controlling circumstances thereof, which are as follows:

About August 1, 1856, Boyd W. Randall settled upon the S. ½ of the NE. ¼ of sec. 29, T. 111 N., R. 25 W., (Tracy), Minnesota.

He filed the proper declaratory statement October 4, 1856, and improved and resided upon the land, and entered the same April 28, 1866, at the land office at St. Peters, and received receiver's and register's certificate No. 6179.

Randall continued to reside upon the tract until March 27, 1882, when he was forcibly ejected upon proceedings instituted by one Washington Boright, who was grantee of the St. Paul and Sioux City Railway Company.

The land was certified to the said railway company before its sale to Boright, and Randall's entry was canceled at the local land office in consequence of such certification. This cancellation was without the consent of Randall, and the fees paid by him were not returned.

The Commissioner of the General Land Office assents to the substantial correctness of these statements, and says (March 12, 1891): "The land was erroneously certified for railroad purposes. This office recommended proceedings under act of March 3, 1887 (24 Stat., 556), for the recovery of the title."

The inference is a necessary one that Randall, in compliance with the laws and in response to the invitation of the United States, settled and resided upon a previously unoccupied portion of the public domain, and duly proceeded by declaratory statement and other prescribed acts to obtain title to the same.

After the initiation of these proceedings and before their completion the Government erroneously certifies this land occupied by him to the railway company under an existing land-grant law. This company conveys its rights to Boright by a quitclaim deed, and this grantee of the company carries the erroneous certification to its practical consequences by forcibly ejecting Randall from the land.

Since this ejectment Boright has conveyed the land to others.

Under these circumstances is the Government called upon to take action?

It may be regarded as settled law that the certification of land already covered by a homestead or preemption entry is erroneous and without authority of law.

The question now arises as to the act of March 3, 1887.

By section 1 the Secretary of the Interior is directed to adjust, in accordance with the decisions of the Supreme Court, existing land grants made to railroads.

By section 2, if it shall appear that lands have been theretofore erroneously certified to any company, the Secretary of the Interior shall demand a relinquishment or reconveyance thereof, and upon failure for ninety days after the demand "it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title to the United States."

By section 3, if the entry of a settler has been erroneously canceled, he shall upon application be reinstated in all his rights and allowed to perfect his entry.

Section 4 covers cases where a homesteader or preemptioner does not take under section 3, and where the company has sold the land to a person described in section 4.

In such case the purchaser becomes entitled to receive the land, and the company is obligated to pay the Government therefor; "and in case of neglect or refusal of the company to make payment, * * * the Attorney-General shall cause suit or suits to be brought against such company for the said amount."

Under the decisions of the courts no special enactment was necessary to authorize the bringing of a suit to recover land certified erroneously or conveyed by mistake.

In *United States* v. *Stone* (2 Wall., 535) Mr. Justice Grier, speaking for the court, says:

"Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judi-

cially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court."

It is true that the United States is not justified in bringing a suit to set aside its own patent or certification, when it has no interest in the subject of litigation, and where the purpose of the action is to transfer the title from one claimant to another; but it must be held that where the Government is under obligation to a party who will be benefited by its action, it may bring its suit for his benefit.

It is the doctrine of the cases that where the United States is under obligation to a party, where the duty rests upon the Government to protect an individual or the public against a certification erroneously made or a patent granted by mistake, the United States has such an interest as justifies its suit under the guidance of its Attorney-General.

(*United States* v. *Stone*, *supra; Id.* v. *Hughes*, 11 How., 552; *Id.*, 4 Wall., 232; *Moore* v. *Robbins*, 96 U. S., 530; *Moffat* v. *United States*, 112 U. S., 24; *United States* v. *Minor*, 114 U. S., 233; *Col. C. and I. Co.* v. *United States*, 123 U. S., 307; *San Jacinto Tin Co.*, 125 U. S., 273; *United States* v. *Beebe*, 127 U. S., 338; *Bell Telephone Co. Case*, 128 U. S., 315; *Williams* v. *United States*, 138 U. S., 517.)

This being the law without special statutory instructions, we may next consider the construction to be placed upon the act of 1887, which contains explicit directions as to designated cases which fall under the general doctrine enunciated in the decisions above cited.

Applying the enactment to Randall's case, it now appears upon the present presentation of facts, it must be said that his land was erroneously certified to the railway company; and that upon demand of relinquishment or reconveyance, it becomes the duty of the company to procure reconveyance, and upon its failure so to do, prosecution should follow therefor and to restore the title to the United States.

This brings us to section 3, and the rights of the settler under that section are very clearly pointed out by Mr. Attorney-General Garland (19 Opin., 69), as follows:

"The question submitted under this section is: 'What

class of purchasers is referred to by the expression bona fide purchasers of said unclaimed lands?'

"Three classes of persons are provided for under this section:

"First. Bona fide settlers whose homestead or preëmption entries have been erroneously canceled on account of a railroad grant or withdrawal.

"Second. Bona fide purchasers of such unclaimed lands.

"Third. Bona fide settlers residing thereon.

"The rights of the several classes to the lands referred to in the section are successive, in the order stated in the section. The first in right is the homestead or preëmption settler whose entry has been wrongfully canceled. If he elects to assert his right, and has not been disqualified by locating another claim, or making another entry in lieu of the entry erroneously canceled, his right is absolute, and the successive rights of the remaining two classes can not attach if he lawfully asserts his claim."

The facts and circumstances being admitted or assumed which place the case within the statute, it is my opinion that the law is mandatory as to subsequent action, and the fact that the land is now held by one who purchased from the grantee of Boright is not to be taken as a sufficient ground for omitting to bring suit.

As to the question which you submit relative to bringing a suit under section 4 against a company for an amount equal to the Government price of similar lands, in the cases stated in said section, permit me to say, that as it does not appear that any such case is now pending, or under consideration, I do not deem myself authorized to answer in relation thereto.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

EXTRA COMPENSATION—DISTRICT ATTORNEYS.

Suits against the United States under section 15 of the customs administrative act of June 10, 1890, are directly in the line of duty of the district attorneys and fall within section 824 of the Revised Statutes, and the compensation of district attorneys for their services in defending suits against the United States in their respective districts, brought by importers under section 15 of the act of 1890, is limited to the fees prescribed by section 824 of the Revised Statutes.

DEPARTMENT OF JUSTICE,
August 7, 1891.

SIR: The questions presented for opinion in your note of June 20, ultimo, are—

"1. Whether a U. S. attorney, appearing in behalf of the Government in proceedings which may be instituted by importers under the provisions of section 15 of the act of June 10, 1890, is entitled to compensation for such services under section 827 of the Revised Statutes, which prescribes a compensation to be certified by the court 'when a district attorney appears by direction of the Secretary or a solicitor of the Treasury, on behalf of any officer of the revenue, in any suit against such officer, for any act done by *him*, or for the recovery of any money received by him, and paid into the Treasury, in the performance of his official duty,' or—

"2. Whether his compensation is restricted to such as is allowed by section 824 of the Revised Statutes."

The provisions of the act of June 10, 1890 (26 Stat., 131), which appear to have any bearing on the first question, are contained in sections 15 and 25, though the act is silent on the subject of compensation of district attorneys for services rendered under section 15. That matter is left to be regulated by preexisting legislation.

Section 15 provides that—

"If the owner, importer, etc., or the *collector* or the *Secretary of the Treasury* shall be dissatisfied with the decision of the Board of General Appraisers they, or *either of them*, may have a review of the questions of law and fact involved in the circuit court; that such review shall be obtained by filing in the office of the clerk a concise statement of the errors complained of, a copy of said statement to be served on *the collector* or on the importer, owner, etc., as the case may be; that thereupon all papers and evidence are to be brought into the court, and on the application of the *Secretary*, the collector, importer, etc., the case may be referred to one of the appraisers to take further evidence offered by the Secretary, collector, importer, etc.; that a hearing shall be had and the liquidation made according to the decision on such hearing, unless an appeal is allowed to the Supreme Court, and such appeal shall be allowed *on the part of the United*

States whenever the *Attorney-General* shall apply, etc.; and on such appeal security for damages and costs shall be given as in *other cases in which the United States is a party;* and all final judgments in favor of the importer *shall be paid by the Secretary of the Treasury,*" etc.

Section 25 provides that—

"After the taking effect of this act no collector or other officer of the customs shall be in any way liable to any owner, importer, etc., for any ruling or decision or for the collection of dues, duties, or charges, or on account of any matter for which an appeal is allowed under this act."

In my opinion, this proceeding is a suit, which, as defined by Chief Justice Marshall, is "any proceeding in a court of justice by which an individual pursues that remedy which the law affords him" (*Weston* v. *City Council of Charleston,* 2 Pet., 449; *ex parte Milligan,* 4 Wall., 2, 112, 113; *Kohl et al.* v. *United States,* 91 U. S., 367, 368); it is a suit between parties as appears by the requirement of section 15, that notice of the institution of the proceeding shall be served on the party adverse in interest. Is the United States or the collector the party defendant? The readiest way to solve that question is to let the statute interpret itself.

If it had been the intention to make the importer's suit one against the collector, it is hard to understand why it was provided (section 15) that an appeal from the decision of the circuit court should be allowed "*on the part of the United States* whenever the Attorney-General shall apply for it within thirty days," etc.; or that in appeals from the judgments of the circuit courts "security for damages and costs shall be given *as in the case of other appeals in cases in which the United States is a party;*" or that the Secretary of the Treasury should pay all final judgments in favor of importers, without any certificate by the court that the collector acted under the directions of the Secretary of the Treasury, or that that there was probable cause for his action.

Looking at these provisions, in connection with section 25 of the same act, exempting the collector from suit by reason of any matter or thing as to which the importer might be entitled to appeal from the collector's decision, or that of any board of appraisers, the conclusion seems irresist-

ible that it is the United States, and not the collector, that is the defendant, and the sole defendant, in suits by importers under section 15.

Upon this theory alone the provision (sec. 15) giving the Secretary of the Treasury *equal authority with the collector* to apply to the court to be allowed to take additional testimony, and to produce such testimony, is intelligible, for it is unlikely that Congress would have given the Secretary of the Treasury such authority over a suit against a collector.

Again, it is not probable that Congress would have authorized a judgment binding on the United States in a proceeding against a collector, thereby preserving, as an empty form, a feature of the old system which was superseded by the act of June 10, 1890.

It may be said, however, that when the importer begins proceedings in the circuit court he is required (sec. 15) to serve notice on the collector alone, and that this makes the collector a defendant in the suit. On the contrary, it is through some one of its officers alone that the United States can receive notice or be served with process of any kind; and there was an obvious appropriateness in requiring that this collector, as being the officer best acquainted with the facts necessary to the defense of the suit. Indeed, it seems to me, there would have been a decided unfitness in making the collector the party defendant in such a proceeding, inasmuch as its sole object is to establish the invalidity of the decision of the Board of General Appraisers, *and not that of the collector*.

But supposing the importer's suit is against the collector, it is against him *in his official character*, for section 25 exempts him in his individual character from the liability to suit to which he was subject under the old law. It follows, then, that a suit against him in his official character is necessarily a suit against the United States. It must be the latter, or nothing at all. There is no middle ground.

That this is the effect of a suit against the collector, *qua* collector, is too well established to be controverted. In *Governor of Georgia* v. *Nadrazo* (1 Pet., 110, 123) it was objected that the suit, which was brought originally in a district court of the United States, was a suit against the

State of Georgia, and therefore could not be maintained. In disposing of the question of jurisdiction, Chief Justice Marshall said:

"The claim upon the governor is as a governor; he is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially.

"The decree is pronounced, not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant, as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the State itself may be considered as a party on the record. If the State is not a party, there is no party against whom a decree can be made. No person, in his natural capacity, is brought before the court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced."

The same doctrine has been repeatedly laid down by the Supreme Court in later cases (*Comm. of Kentucky* v. *Dennison, Governor*, 24 How., 97; *Hagood* v. *Southern*, 117 U. S., 52; *In re Ayres*, 123 U. S., 443, 488, where all the cases are cited. See also the analogous cases of *Brown* v. *Strode*, 5 Cr., 303; *McNutt* v. *Bland*, 2 How., 1; *Irvine* v. *Lowry*, 14 Pet., 293; *Coal Co.* v. *Blatchford*, 11 Wall., 172, 176).

The contrast between the situation of the collector under the old law and the new is instructive and confirmatory of the view taken of section 15.

Under the old law, the collector was personally liable to the aggrieved importer for the illegal exaction of duty, and might be compelled by suit to indemnify the importer out of his own estate. True, he might be protected by showing that he acted under the order of the Secretary of the Treasury (R. S., 989); or by a certificate of probable cause from the court. Says the Supreme Court, in *United States* v. *Sherman* (98 U. S., 565, 567), "When the certificate is given, the claim of the plaintiff in the suit is practically converted into a claim against the Government. *But not until then.*" (See

also *Cox* v. *Barney*, 14 Blatch., 289, and *White et al.* v. *Arthur*, 10 Fed. Rep., 80.)

The collector was necessarily, therefore, the party defendant in such a suit. Under the new law, the Government alone is responsible to the injured importer, whether the collector who assessed and exacted the duty acted with probable cause or under the direction of the Secretary of the Treasury or not. Why, then, should the collector be the party defendant in a suit growing out of a decision not made by him and for which he is not responsible? If this law contemplated individual liability of any sort, it should be that of the members of the Board of General Appraisers.

The answer to the first question, therefore, is, that district attorneys are not entitled to be compensated under section 827 (R. S.) for services in defending suits by importers under section 15 of the act of June 10, 1890.

2. Are district attorneys *restricted* to the fees allowed by section 824 (R. S.) as compensation for such services.

Section 767 (R. S.) provides that "There shall be appointed in each district * * * a person learned in the law, *to act as an attorney for the United States* in such district."

This section, and so much of section 771, Revised Statutes, as makes it the "duty of every district attorney to prosecute in his district all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned," are taken from section 35 of the act of September 24, 1789 (1 Stat., p. 92).

When Congress enacted section 767 did it intend to impose on the officer so appointed the duty to represent the Government in every suit in that district in which it was interested? It is urged that because section 771, Revised Statutes, declares that certain duties shall belong to the office of district attorney, such designation must be taken to exclude all duties not designated.

The maxim *expressio unius est exclusio alterius*, says Mr. Broom, should be applied with "great caution" (Max., 506). Mr. Justice Story says this maxim is often misapplied (*ex parte* Christy, 3 How., 313), and in his dissenting opinion in *Brown* v. *United States* (8 Cranch, 153) he remarks that "it is by no means infrequent in the Constitution to add clauses of a

special nature to general powers which embrace them, and to provide affirmatively for certain powers, without meaning thereby to negative the existence of powers of a more general nature. * * * The affirmative power 'to define and punish piracies and felonies committed on the high seas' has never been supposed to negative the right to punish other offenses on the high seas; and Congress has actually legislated to a more enlarged extent."

The application of the maxim to sections 767 and 771, looking at them as having belonged to one and the same section of the act of 1789, and as still holding the same relation to each other, notwithstanding their new arrangement in the Revised Statutes, would defeat what appears to be the plain intention of Congress.

From the nature of things, Congress could not forecast all the needs for the services of district attorneys that would from time to time exist, and it is not reasonable to infer an intent to confine the official duties of those officers to the cases specifically designated in order to give to them additional or exceptional compensation.

If the construction were otherwise, then, in cases not enumerated in the law, and in which the Government is a party defendant, district attorneys could not be required to represent the Government, no matter what might be the emergency or inadequacy of the Attorney-General's ability to provide for the protection of the public interests under the authority conferred by section 367, Revised Statutes. I should be reluctant to conclude that Congress had left the organization of the Government in so defective a condition.

By section 15 of the act of 1890 Congress has for the first time authorized a direct suit against the United States, as we have seen, by an importer claiming a refund of money as having been illegally exacted by a collector of customs, and it would be remarkable, indeed, if the state of the law were such that it was not the official duty of the proper district attorney to defend the interests of the Government in such a suit. Certainly, Congress supposed that such a duty existed, or it would have cured the defect by a provision in the act of 1890.

But if there was any doubt originally on this subject, I feel quite sure that it is removed by section 299, enacted in

1856, which may be regarded as a legislative interpretation of the antecedent law. That section is as follows:

"All accounts of the United States district attorneys for services rendered in cases instituted in the courts of the United States, or of any State, when the United States is interested but is not a party of record, or in cases instituted against the officers of the United States or their deputies, or duly appointed agents, for acts committed or omitted or suffered by them in the lawful discharge of their duties shall be audited and allowed as in other cases, assimilating the fees, as near as may be, to those provided by law for similar services in cases in which the United States is a party."

This provision does not profess to add to the duties of district attorneys, but presupposes an already existing authority to require them to attend to litigation in which the Government is concerned, although not a party, but which is not covered by section 771, Revised Statutes, or any other, unless it be section 767, Revised Statutes, which authorizes the appointment of district attorneys to act as attorneys for the United States.

It is true that section 827, Revised Statutes (see also sec. 771, Rev. Stat.) makes it the duty of district attorneys to defend suits against revenue officers when requested to do so by the Secretary or the Solicitor of the Treasury, but that section does not cover suits against officers unconnected with the revenue. As to this latter class of suits, the law is silent, and yet it is every day's practice for district attorneys to defend them; and the same may be said in reference to cases in which the United States is interested but not a party to the record.

If such cases do not fall within the authority conferred by section 767, Revised Statutes, there is no law applicable to them, unless, as has been several times ruled in the First Comptroller's office (5 Lawrence's Decisions, p. 38, Bliss's Case; 6 *ib.*, p. 36, McCulloch's Case; *ib.*, p. 55, Emolument Case), the *proviso* of section 3 of the act of June 20, 1874 (18 Stat., 109), that is to say, "*Provided*, That this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees," can be said to extend the authority of the Department of Justice over them, a point upon which I am

not now called to express an opinion, although I will remark in passing that the Court of Claims, in a very recent case, denied the soundness of the First Comptroller's interpretation of that *proviso.* (*Thomas Smith* v. *United States*, decided June 8, 1891.)

Section 823, Revised Statutes, referring to section 824, Revised Statutes, declares that "the following and *no other compensation* shall be taxed and allowed to * * * district attorneys * * * except in cases otherwise expressly provided by law," and section 1765 provides as follows:

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law and regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation." (See *United States* v. *Saunders*, 120 U. S., 126.)

Section 3 of the act of June 20, 1874 (18 Stat., 109), declares: "That no civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States *beyond his salary or compensation allowed by law.*"

Section 834 makes it the duty of district attorneys to include in their annual returns all fees and emoluments to which they may be entitled "in any case in which the United States will be bound by the judgment rendered therein," and which are not included in sections 825 and 827, Revised Statutes.

It is my opinion, therefore, that suits against the United States under said section 15 are directly in the line of duty of the district attorneys and fall within section 824, Revised Statutes; and that the compensation of district attorneys for their services in defending suits against the United States, in their respective districts, brought by importers under section 15 of the act of 1890, is limited to the fees prescribed by section 824, Revised Statutes.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

SECRETARY OF BOARD OF LADY MANAGERS OF WORLD'S COLUMBIAN EXPOSITION.

It is competent for the Secretary of the Treasury to make payment to Mrs. Susan Gale Cooke for her services as secretary *pro tempore* of the Ladies' Bureau of Managers of the World's Columbian Exposition.

DEPARTMENT OF JUSTICE,
August 7, 1891.

SIR: Your letter of July 30, in relation to making payment to Mrs. Susan Gale Cooke for her services as secretary *pro tempore* of the Board of Lady Managers of the World's Columbian Commission, with accompanying voucher and other papers, is at hand.

By section 6 of the act of April 25, 1890 (26 Stat., 62), the Board of Lady Managers may appoint one or more members of all committees authorized to award prizes for exhibits which may be produced in whole or in part by woman's labor, and, beyond this, the board is to perform such duties as may be prescribed by the Commission.

The sundry civil act of March 3, 1891 (26 Stat., 965), gives recognition to the Board of Lady Managers and directs that $36,000 of the appropriation there made shall be used for said board.

On or about November 20, 1890, the Board of Lady Managers, after meeting and organizing, selected a president and a secretary.

It appears that the Commission, April 3, 1891, by its "fifth" resolution then unanimously adopted, prescribed that the executive committee of the Board of Lady Managers, or a subcommittee of said executive committee, "is hereby authorized and empowered, in the absence of the board, to exercise any and all powers which said board might exercise in session."

It further appears that on the 15th of said April the executive committee of the Board of Lady Managers removed the then secretary of said board, and thereafter appointed Mrs. Susan Gale Cooke to act as secretary *pro tempore;* and that thereupon Mrs. Cooke assumed the duties of such secretary, and has since duly performed them. It also appears that the validity of the removal of the former secretary has been affirmed in the circuit court of the United States for the northern district of Illinois.

Since this decision by the court the World's Columbian Commission has, by its Board of Reference and Control, directed the secretary of the commission to certify a voucher to procure payment to Mrs. Cooke for her services rendered as secretary *pro tempore*, as aforesaid, which voucher is presented duly certified.

It is my opinion, in view of the legislation referred to, the several acts performed, and the circumstances shown to exist, that there is no law, or regulation having the force of law, that prohibits you from making payment to Mrs. Cooke for the performance of the services designated in the voucher submitted.

Very respectfully,

W. H. H. MILLER,
Attorney-General.

The SECRETARY OF THE TREASURY.

INTEREST—REFUNDS.

No authority exists for the payment of interest upon refunds made in conformity with judgments contained in cases of appeal under section 15 of the customs administrative act of June 10, 1890.

DEPARTMENT OF JUSTICE,
August 7, 1891.

SIR: By your letter of July 31 you submit for opinion: "Whether or not any authority now exists in law for the payment of interest upon refunds made in conformity with judgments obtained in cases of appeal under section 15 of the act of June 10, 1890 (26 Stat., 131), from decisions of the Board of United States General Appraisers."

Section 15 provides that if the owner, importer, assignee, or agent of imported merchandise is dissatisfied with the decision of the Board of General Appraisers he may, by complying with certain conditions in the section prescribed, have a review of such decision, in the nature of an appeal, in the circuit court, "said court to hear and determine the questions of law and fact involved in such decision respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification, and the decision of such court shall be final, and the proper collector

or person acting as such shall liquidate the entry accordingly," unless a further appeal and trial shall be had in the Supreme Court as therein provided. It further provides that "all final judgments, when in favor of the importer, shall be satisfied and paid by the Secretary of the Treasury from the permanent indefinite appropriation provided for in section 23 (24) of this act."

It will be seen from the foregoing that the statute is silent in relation to interest. The proceeding is in the nature of a suit against the United States. (See opinion of this date to the Secretary of the Treasury in reference to fees of district attorneys, under this section.)

"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.'" (17 Opin., 318.)

This proposition finds abundant support in the decisions of the Supreme Court. In *Tillson* v. *The United States* (100 U. S., 43) it is said:

"Interest, however, would have been recoverable against a citizen if the payments were unreasonably delayed, but with the Government the rule is different, for in addition to the practice which has long prevailed in the Departments of not allowing interest on claims presented, except it is in some way specially provided for, the statute under which the Court of Claims is organized expressly declares that no interest shall be allowed upon any claim up to the time of rendition of judgment therein in the Court of Claims, unless upon a contract expressly stipulating for interest."

So, in *United States* v. *Sherman* (98 U. S., 565), it is said:

"Before that time (certificate of probable cause) the Government is under no obligation, and the Secretary of the Treasury is not at liberty to pay. When the obligation arises, it is an obligation to pay the amount recovered; that

is, the amount for which judgment has been given. The act of Congress says not a word about interest. Judgments, it is true, are by the law of South Carolina, as well as by Federal legislation, declared to bear interest. Such legislation, however, has no application to the Government. And the interest is no part of the amount recovered. It accrues only after the recovery has been had. Moreover, whenever interest is allowed, either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default can not be attributed to the Government. It is presumed to be always ready to pay what it owes." (See *Harvey* v. *The United States*, 243.)

So, in *Angarica* v. *Bayard*, (127 U. S., 251), this doctrine is forcibly reiterated. The court says:

"The case, therefore, falls within the well-settled principle that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect. It has been established, as a general rule, in the practice of the Government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, or whether they arise in the ordinary business of administration, or under private acts of relief, passed by Congress on special application. The only recognized exceptions are where the Government stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages."

Your question is, therefore, answered in the negative.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

REFUND OF DIRECT TAXES—SET-OFF OF INDEBTEDNESS OF STATES.

Section 3481 of the Revised Statutes makes it the duty of the Secretary of the Treasury to insist upon the right of set-off against the demands of the State of West Virginia for refund of the direct tax to the extent of the equitable proportion of the debt of Virginia to the United States for which West Virginia is liable.

DEPARTMENT OF JUSTICE,
August 12, 1891.

SIR: By your letter of April 13 last you ask whether under the law the Secretary of the Treasury is authorized and required to retain the whole or any part of the amount due to the State of West Virginia on account of the refund of direct taxes under the act approved March 2, 1891, by reason of the alleged liability of the State of West Virginia for a part of the indebtedness of Virginia prior to the separation and erection of West Virginia into a new State.

The constitution of West Virginia, which went into effect in 1863, declared that "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, eighteen hundred and sixty-one, shall be assumed by this State; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within the period of thirty-four years." (Art. 8, sec. 8.)

Upon this constitution the State of West Virginia was admitted into the Union.

The indebtedness of the Commonwealth of Virginia prior to the 1st day of January, 1861, was, as I am advised, something over $30,000,000. I am informed by your letter that of this indebtedness nearly $1,600,000 was due to the United States, and that the same, with interest, remains mainly unpaid.

Section 3481 of the Revised Statutes of the United States reads as follows:

"Whenever any State is in default in the payment of interest or principal on investments in stocks or bonds issued or guaranteed by such State and held by the United States in trust, the Secretary of the Treasury shall retain the whole, or so much thereof as may be necessary, of any moneys due on any account from the United States to such State, and apply the same to the payment of such principal and interest, or either, or to the reimbursement, with interest thereon, of moneys advanced by the United States on account of interest due on such stocks or bonds."

In my opinion, under this statute, it is your duty to insist upon the right of set-off against the demand of the State for

a refund of the direct tax to the extent of the "equitable proportion" of the debt of Virginia for which West Virginia is liable. What this "equitable proportion" may be is not a question of law, but of fact, or of mixed law and fact, and is not for my determination.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

PUBLIC BUILDINGS—EXCLUSIVE JURISDICTION OF THE UNITED STATES.

Statutes of Kansas and Illinois, providing that the United States "shall have the right of exclusive legislation and concurrent jurisdiction," do not comply with the requirements of the acts of Congress providing for the construction of public buildings at Atchison and Galesburg, in those States.

DEPARTMENT OF JUSTICE,
August 13, 1891.

SIR: The note of the Acting Secretary of August 11, wherein my attention is called to the language of the statutes of Kansas and Illinois purporting to cede jurisdiction to the United States over the ground to be purchased for public buildings at Atchison, Kans., and Galesburg, Ill., is received.

You state that the language of the act of the legislature in each State is that the United States "shall have the right of exclusive legislation and concurrent jurisdiction."

The act of Congress providing for the construction of the public building at Atchison provides that "no money shall be used or applied for the purposes mentioned until a valid title to the site for such building shall be vested in the United States, nor until the State of Kansas shall have ceded to the United States exclusive jurisdiction over the same, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of said State and the service of civil process therein." (26 Stat., p. 115.)

The act providing for the public building at Galesburg, Ill., contains the same provision. In other words, in each

act of Congress a cession from the State of exclusive jurisdiction, with certain specific exceptions, is required.

The State grants the right of exclusive legislation and concurrent jurisdiction.

In my opinion the State legislation does not comply with the requirements of the act of Congress.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

REMISSION ORDER—NUMBER IN GRADE.

An order remitting the unexecuted portion of the sentence of a lieutenant-commander of the U. S. Navy who had been suspended for two years, and was to retain his number and grade, does not have the effect of advancing him two numbers in grade, although during the time of his suspension from duty two officers with commissions dated subsequently to his had been advanced above him in the grade of lieutenant-commander.

DEPARTMENT OF JUSTICE,
August 27, 1891.

SIR: Your letter of the 12th instant, requesting my opinion as to the effect of the remission order given in the case of Lieut. Commander George M. Book, U. S. Navy, under date of December 14, 1889, is received.

It appears that Lieut. Commander Book was tried before a general court-martial in April, 1889, upon the charge of "Absenting himself from his command without leave," and was found guilty of the charge, whereupon, May 3, 1889, the court sentenced said officer "to be suspended for two years from rank and duty, on furlough pay, and to retain his present number on the list of lieutenant-commanders during that time."

The proceedings, finding, and sentence of the general court-martial were duly approved on said May 3 by the Secretary of the Navy, whose order then made declares that said Lieut. Commander Book "is accordingly suspended from rank and duty, on furlough pay, for two years from this date, and will during that period retain his present number in his grade."

Between May 3 and December 14, 1889, Lieut. Commander

Book lost two numbers in his grade by promotions required to be made in accordance with the rules established by law to fill vacancies which then occurred in the next higher grade, that of commander, and by the consequent advancement of a corresponding number of officers in the grade of lieutenant-commander above him.

As a consequence, although the commissions of Lieut. Commanders Longnecker and Ide were dated respectively August 30 and October 12, 1881, while that of Lieut. Commander Book was dated May 28, 1881, yet by reason of the sentence which held the latter to his number which he held May 3 on the list, said Lieut. Commanders Longnecker and Ide passed to higher numbers on the list. On said 14th of December the active list, as it would appear upon the register of the officers of the Navy, stood thus:

Lieutenant-commanders: No. 5, Edwin Longnecker; No. 6, George E. Ide; No. 7, George M. Book.

On said December 14 the Secretary of the Navy issued the following:

"NAVY DEPARTMENT,
"*Washington, D. C., December* 14, 1889.

"Lieut. Commander GEORGE M. BOOK, U. S. N.,
"*159 Washington Park, Brooklyn, N. Y.:*

"SIR: The unexecuted portion of the sentence of the general court-martial before which you were tried at the navy-yard, Washington, D. C., April 15, 1889, is hereby remitted.

"Very respectfully,

"B. F. TRACY,
"*Secretary of the Navy.*"

The question submitted to me is, whether this remission of sentence has the effect of advancing Lieut. Commander Book to No. 5 upon the list and register and of moving back Lieut. Commanders Longnecker and Ide, respectively, to Nos. 6 and 7 on the list?

The sentence rendered by authority of law gives the law in this case, and section 1467 (Rev. Stat.) must, in its application, accord with the sentence.

It will be noted that the form of the remitting order is not a nullification of the original sentence, neither is it an absolute pardon for the offense committed. The sentence is

neither declared void nor vacated: "*The unexecuted portion* * * * *is* * * * *remitted.*"

While an absolute pardon might, under the rule indicated in 12 Opin. 547, and 17 *id.*, 31 and 656, reinstate the officer sentenced, an order by the Secretary remitting the unexecuted portion of the sentence can not, in my opinion, produce that result.

That portion of the sentence which before December 14 operated to place the two officers referred to above the officer sentenced upon the list was executed at the date of the order of remission, and was therefore by the terms of the order not affected by it.

It is my opinion that the question submitted should be answered in the negative.

Very respectfully,

WM. H. TAFT,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

COMMISSIONER OF INDIAN AFFAIRS—INJUNCTION OF STATE COURT.

The Commissioner of Indian Affairs and his subordinate, the Indian agent, have full discretion to remove from the Indian reservation any person not of the tribe of Indians entitled to remain thereon, and can not be interfered with by mandamus or injunction of any court. An order of a State court restraining the Indian agent from so doing should be disregarded.

DEPARTMENT OF JUSTICE,
August 29, 1891.

SIR: By letter of the 10th instant from Acting Secretary Chandler, with which was transmitted a copy of a communication of the 8th instant from the Commissioner of Indian Affairs, with inclosures, the opinion of the Attorney-General was requested upon the question whether, under the circumstances, the Indian agent in charge of the Puyallup Indian Reservation, Wash., might, with the aid of a military force, oust from the school lands of that reservation certain trespassers thereon. The facts upon which the question is predicated are as follows: White men have settled upon the school lands belonging to the Puyallup Indian Reserva-

tion in the State of Washington. The Indian agent has attempted to oust them. A local State court, on application of the trespassers, issued a temporary order restraining the Indian agent from making any further attempt, and then directed the removal of the case to the United States court. A detachment of United States troops was sent to the Indian agent to aid him in ousting the trespassers. Gen. Kautz, the commanding officer, visited the Indian agent, and stated that, in view of the fact that the matter was in the courts, he was not authorized to interfere. The question now is whether the Indian agent has authority, in spite of the restraining order of the local court, with the aid of the detatchment of United States troops, to oust the trespassers.

Section 2118 of the Revised Statutes provides that "every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees or otherwise, is liable to a penalty of one thousand dollars. The President may, moreover, take such measures and employ such military force as he may judge necessary to remove any such person from the lands."

Section 2149, Revised Statutes, provides "that the Commissioner of Indian Affairs is authorized and required, with the approval of the Secretary of the Interior, to remove from any tribal reservation any person being therein without authority of law, or whose presence within the limits of the reservation may, in the judgment of the Commissioner, be detrimental to the peace and welfare of the Indians; and may employ for the purpose such force as may be necessary to enable the agent to effect the removal of such person."

Section 2147 provides: "The superintendent of Indian Affairs and the Indian agents and subagents shall have authority to remove from the Indian country all persons found therein contrary to law; and the President is authorized to direct the military force to be employed in such removal."

The Indian reservation in question is, I assume, covered by the provision in the organic act of the State of Washington to be found on page 677 of 25 Statutes at Large, wherein it is provided:

"*That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title* to the unappropriated public lands lying within the boundaries thereof *and to all lands lying within said limits owned or held by any Indian or Indian tribes;* and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, *and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.*"

It would seem that the *locus* of the trespass and of the attempted ouster was not within the territorial jurisdiction of the State court. But, however this may be, the Commissioner of Indian Affairs and his subordinate, the Indian agent, have full discretion under sections 2118, 2147, and 2149, above quoted, to remove from the Indian reservation any person not of the tribe of Indians entitled to remain thereon. (*United States* v. *Crook*, 5 Dillon, 453.) No court can interfere with the exercise of such discretion by mandamus or injunction. (*Marquez* v. *Frisbie*, 101 U. S., 473; *Litchfield* v. *Register and Receiver*, 9 Wall., 575). I am therefore of the opinion that the order of the State court is beyond its jurisdiction and void, and that it may be and should be entirely disregarded. The Indian agent may lawfully eject the white settlers from the Indian reservation, and may use, in so doing, by direction of the President, any military force necessary for the purpose.

Very respectfully,

WM. H. TAFT,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

DRAWBACK—ADDITIONAL DUTY.

The additional duty imposed by section 7 of the customs administrative act of June 10, 1890, is not subject to drawback upon the exportation of the article.

DEPARTMENT OF JUSTICE,
September 8, 1891.

SIR: Your communication of July 14, 1891, requests an opinion upon the question whether the additional duty imposed by section 7 of the act of June 10, 1890, entitled

"An act to simplify the laws in relation to the collection of the revenues" (25 Stat., 131), in cases where the appraised value of any article of imported merchandise shall exceed by more than 10 per cent the value declared in the entry, is subject to rebate or drawback upon the exportation of such article.

Section 7 of the act in question declares that * * * "if the appraised value of any article of imported merchandise shall exceed by more than 10 per centum the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to 2 per centum of the total appraised value for each 1 per centum that such appraised value exceeds the value declared in the entry." * * *

The question propounded is answered, it seems to me, by the opinion of the Supreme Court of the United States in the case of *Bartlett* v. *Kane* (16 How., 263). That case arose under the tariff act of August 30, 1842 (5 Stat., 548), which contained a provision (section 17) that if the appraised value of any imported merchandise exceeded by 10 per centum the invoice value, there should be levied and collected on such merchandise 50 per centum of the duty imposed on the same, when fairly invoiced, and the question in the case was whether upon reexportation of the merchandise involved the plaintiff was entitled to a return of the additional duty which had been assessed on said merchandise.

In denying this claim to drawback, the court used the following language:

"An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the acts this additional duty has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, and in reference to the subject of drawback and debenture, it must still be regarded in the light of a penal duty.

"The provision for the return of the duty upon a reexportation formed a part of the system of regulations for impor-

tation and revenue from the earliest period of the Government, and has always been understood to establish relations between the regular and honest importer and the Government.

"It does not include, in its purview, any return of the forfeitures or amercements resulting from illegal or fraudulent dealings on the part of the importer or his agents. Those do not fall within the regular administration of the revenue system, nor does the Government comprehend them within its regular estimates of supply. They are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud and injustice. A construction which would give to the fraudulent importer all the chances of gain from success, and exonerate him from the contingencies of loss, would be a great discouragement to rectitude and fair dealing. We are satisfied that the existing laws relating to exportations, with the benefit of drawback, do not apply to relieve the person who has incurred, by an undervaluation of his import, this additional duty from the payment of any portion of it."

It seems unnecessary for me to do more than say that, upon the grounds taken by the Supreme Court in this case of *Bartlett* v. *Kane*, I am of opinion that it was not the intention of Congress that the additional duty imposed for undervaluation by section 7 of the act of June 10, 1890, should be the subject of drawback.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

The Attorney-General will not give an opinion where the subject-matter submitted shows no question of law in the Department submitting it arising in the administration of that Department.

DEPARTMENT OF JUSTICE,
September 8, 1891.

SIR: Your letter of July 3, 1891, submits for opinion generally the papers transmitted to you by the Secretary of State with reference to the claim of the Ahillar brothers,

which is being urged against this Government by Señor Romero, the Mexican minister.

Your letter propounds no specific question of law based upon a case stated, nor does the subject-matter submitted appear to relate to a business which, in its present aspect, belongs to the administration of your Department, but, on the contrary, it appears to relate to a business belonging exclusively to the administration of the Department of State.

My predecessors have frequently held that the opinion of the Attorney-General can not be given upon a general subject, but only on one or more specific questions of law based on a case stated. They have also as often held that the opinion of the Attorney-General can not be given upon a matter referred to him by the head of a Department who is not authorized to act on such matter. (6 Opin., 24; 9 Opin., 421; 10 Opin., 50.)

Section 356, Revised Statutes, provides that "the head of any Executive Department may require the opinion of the Attorney-General *on any questions of law arising in the administration of his Department*."

In my opinion, the reference of the Ahillar claim to you by the Secretary of State for the purpose of getting your views upon it did not make any questions of law involved in that claim "*questions of law arising in the administration*" of your Department. The whole subject belonged, and still belongs, to the Department of State, which did not intend to relinquish its control over it by asking your opinion on the claim, which, it seems, grew out of the claimants' arrest and imprisonment for smuggling.

For these reasons, I am compelled to return the papers without any expression of opinion.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

The Attorney-General is not required to give an opinion except on such questions as are necessary to guide the heads of departments in their actions. 11 Opinions, 4, followed, that he has no power to give an official opinion upon questions referred to him by the Secretary of the Treasury for the guidance not of the Secretary but of the Third Auditor.

DEPARTMENT OF JUSTICE,
September 8, 1891.

SIR: On the 8th of July last you inclosed two communications from the Auditor of the Treasury for the Post-Office Department, one dated June 13, 1891, with eight inclosures, and the other dated July 3, 1891, with one inclosure, in relation to the claim of Luke Voorhees, late mail contractor on route No. 35040, Dakota, in which the Auditor asks that you transmit the same to the Attorney-General with the request that he give his opinion upon the question of law arising on the case presented. In compliance with the Auditor's wishes, you have requested the Attorney-General's opinion thereon.

The case, as it is to be gathered from the inclosures and the statements of the Auditor, is as follows:

Voorhees was a mail contractor whose mail contract was expedited on representations made by him to the Treasury Department. On the recommendation of a special agent, after he had been paid some $20,000 for expedited service, a suit was brought to recover that amount, on the ground that the action of the Department in expediting the service had been induced by his misrepresentation. The decision of the lower court was against the Government on demurrer to the declaration. The case was carried to the Supreme Court of the United States, where the judgment of the lower court was affirmed. There remained due the contractor on the books of the Sixth Auditor, for services rendered by him under the expedited contract, a balance of $9,356.37 duly certified to the Auditor by the Postmaster-General, under section 405 of the Revised Statutes. Pending the suit against Voorhees, the Postmaster-General made an order suspending the pay on this balance, the reason being stated as follows:

"On account of frauds in the oath of contractor as to extra stock required for expedition, it not having been required,

or he having employed extra stock therefor, and thus not having incurred any extra expense by reason thereof."

The Postmaster-General, since the decision of the Supreme Court upon the suit by the United States to recover the amount already paid on the expedited service, has been requested to revoke his order suspending the pay on the balance still shown to be due on the books of the Department, the claim being that the question decided by the Supreme Court in favor of the contractor was exactly the same as that arising on the claim of the contractor for the unpaid balance. The Postmaster-General refuses to revoke this order. The Auditor states the question which he desires to be transmitted to the Attorney-General for decision, as follows:

"In view of the decision of the Supreme Court of the United States, the provisions of sections 191 of the Revised Statutes, and the assumed state of facts as above given, am I now authorized to report the amount due Voorhees to the Secretary of the Treasury, notwithstanding the order for suspension still being unrecalled?"

As the present question is put, it is not one which the Attorney-General can answer.

By section 356 of the Revised Statutes the head of any Executive Department may require the opinion of the Attorney-General on any question of law arising in the administration of his Department. This section has been construed to require from the Attorney-General opinions only on such questions of law as are necessary to guide the head of the Department in his action. It has been expressly decided by Attorney-General Bates (11 Opin., 4) that the Attorney-General has no power to give an official opinion on questions referred to him by the Secretary of the Treasury at the request of the Third Auditor for the guidance not of the Secretary, but of the Third Auditor. (See also A. G. XIX Opin., 674.)

It is possible that it may be necessary for your own guidance at some future time that the question shall be answered. By the deficiency bill of July 7, 1884 (23 Stat., 254), it is provided "That the Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant whose claim has been allowed in

whole or in part to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective Houses for consideration." Should the Auditor submit to you for transmittal to Congress a certified balance on this account it would then become your duty to decide whether the Auditor, in view of the order of the Postmaster-General, had any jurisdiction to consider and certify the account at all, and in such case you might properly ask the advice of the Attorney-General in the premises. But if the Auditor declines to certify the account to you, you will never be called to take action upon the matter. The opinion you ask, therefore, considered with reference to guiding your own action, if given now, would be an answer to an hypothetical question. Such a question the Attorney-General, for obvious reasons, is constrained to decline to answer. (19 Opin., 414.)

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

REGISTRY OF FOREIGN-BUILT VESSEL—ATTORNEY-GENERAL.

If a foreign-built vessel wrecked in American waters is repaired in an American shipyard, the repairs exceeding three-fourths of the cost of the vessel when repaired, some years after her restoration and after sailing under a foreign flag be sold by her foreign owner to a citizen of the United States, she may properly be registered under section 4136 of the Revised Statutes.

Section 4136 of the Revised Statutes must be construed in connection with section 4132 and in the light of the purpose of Congress in passing both sections.

The Attorney-General is required only to answer questions of law and can not consider questions of fact on evidence submitted.

DEPARTMENT OF JUSTICE,
September 29, 1891.

SIR: On the 22d instant you transmitted to the Attorney-General the application of Benjamin F. Clyde for the registry of the foreign-built schooner *Croatan*, formerly called

the *Joaquin Ancona*, and requested his opinion whether such registry should be granted. The facts are that the vessel was built by a foreigner in a foreign country; was wrecked in American waters, and the wreck was towed by direction of her foreign owner to an American shipyard, where she was repaired. The repairs made upon her before she was ready for service again exceeded three-fourths of the cost of the vessel when repaired. Some years after her restoration, and after sailing under a foreign flag, she was sold by her foreign owner to a citizen of the United States.

Section 4136 of the Revised Statutes provides that the Secretary of the Treasury may issue a register or enrollment for any vessel built in a foreign country whenever such vessel shall be wrecked in the United States and shall be purchased and repaired by a citizen of the United States, if it shall be proved to the satisfaction of the Secretary that the repairs put upon such vessel are equal to three-fourths of the cost of the vessel when so repaired.

The question is, do the facts above stated bring the *Croatan* within the benefit of the section? If the section is to be literally and strictly construed, they do not. The natural meaning of the language would limit the privilege of registry therein conferred to a vessel which had first been purchased and then repaired by a citizen of the United States. Such a construction, however, is too narrow. By section 4132, vessels built within the United States and belonging wholly to citizens thereof may be registered as vessels of the United States. It is clear that under this section if a foreigner should build a vessel in the United States, sail it under a foreign flag, and then sell it to a citizen of the United States, such citizen might obtain registry for the vessel as an American vessel. The plain intention of section 4136 was to give to wrecked vessels, which were practically rebuilt in the United States, the same privilege that vessels would have if wholly built within the United States. Its ultimate purpose was to aid American shipbuilding, and it was evidently considered by Congress that the rebuilding of three-fourths of a vessel was to be encouraged as well as the building of a vessel entire. The section must be construed in connection with section 4132 and in the light of the general purpose of Congress in the passage

of both sections. Otherwise, and following the letter of the section, a foreign-built vessel wrecked in the United States and purchased and repaired by a citizen of the United States in a foreign port would be entitled to American registry. A result so plainly contrary to the spirit of the section and the intention of Congress shows the necessity of not following too closely the letter of the statute, and warrants even a slight variation therefrom to carry out the plain purpose of the enactment.

By transposing the words "purchased and repaired," so that the section shall read "repaired and purchased" by a citizen of the United States, the section would be made literally to include within its benefit the vessel here in question, and I do not think it is doing violence to the language of the section to hold that it may be so construed, considering the evident intention of Congress in its enactment. Your own Department, by Treasury decision No. 8688, granted registry to a British vessel which was wrecked in the waters of the United States, transferred to a British subject as the agent of the British underwriters who made a contract to raise her, subsequently sold her to an American citizen, the consideration being a sum of money in addition to an assumption by the latter of bills incurred by the British subject in raising her before the sale. Repairs were then made upon her which, together with the amount expended in raising her, exceeded three-fourths of the cost of the vessel when so repaired. It is obvious that there a very considerable part of that which was counted as repairs, namely, the expense of raising the vessel, was expended by a British subject, and that the case did not come literally within section 4136 any more than the one under discussion. But an authority which is more directly in point is a decision by Attorney-General Black, to be found in 9 Opin., 424. The question was there asked by the Secretary of the Treasury whether a vessel built in the United States, but transferred to a foreign owner, and afterwards wrecked in the waters of the United States and purchased and repaired by an American citizen, was entitled to registry under what has since become section 4136. Judge Black, after stating the case, uses the following language:

"Does this case come within the act of 1852, so as to entitle the vessel so purchased and repaired to a registry? Liter-

ally it does not, for the words of the act require the vessel to have been built in a foreign country, whereas this vessel was built here, and became a foreign vessel by the transfer of it to a foreign owner. But though the case be not within the strict letter of the law, it is within its spirit and general intent, which manifestly was to let all foreign vessels wrecked and repaired in the United States, and purchased by American citizens, have the benefit of American registry. I am, therefore, of opinion that the party who has made this application is entitled to what he asks for."

The statement of the intention of Congress made by Judge Black in this opinion would include the vessel with respect to whose registry you ask the question, and the departure from the letter of the section by him in the case there decided was even greater than is required in the present case to grant the registry. You are therefore advised that the application of Mr. Clyde should be granted.

You accompanied your request for an opinion with papers containing evidence upon which, under section 4136, you are called upon to decide, first, whether the vessel was wrecked; second, whether the wreck took place in the United States; third, whether the repairs made upon her in the United States before she was ready for service again after the wreck were equal to three-fourths of the cost of the vessel when repaired. This opinion has been rendered on the assumption that all the foregoing facts have been found in favor ot the applicant The Attorney-General, in discharging the duty imposed upon him by section 356, Revised Statutes, is required only to answer questions of law and can not consider questions of fact upon evidence submitted. (19 Opin., 672.)

The papers inclosed with the letter requesting an opinion are herewith returned.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

IMPORTATION—MACHINERY FOR DISABLED FOREIGN VESSEL.

The Attorney-General adheres to the views expressed by him in his opinion of date July 7, 1891. 20 Opinions, 194.

DEPARTMENT OF JUSTICE,
September 30, 1891.

SIR: I have your letter of the 26th instant, in which you refer to my opinion of the 7th of July last on the application of the North German-Lloyd Steamship Company for a refund of the duty levied on certain shafts and other machinery imported by said company in their own vessels to replace broken and disabled shafts in other vessels of that company lying in the ports of this country. You inclose for further consideration a letter from Dr. George O. Glavis, attorney for the steamship company, of the 16th instant, in which he cites the case of *The United States* v. *A Chain Cable*, reported in 2 Sumner, 362, and suggests that it was overlooked in the preparation of the opinion already rendered.

It was held, in the opinion referred to, that where a crank shaft was imported into this country in one vessel, was landed, and then put in place upon another as part of the latter's equipment, that the shaft was an article imported and subject to the duty imposed thereon by the tariff laws. The case of *The United States* v. *A Chain Cable*, cited by Dr. Glavis, is not in point against this view. There the question was whether a chain cable which had been purchased in Liverpool by the ship *Marathon* to replace an unseaworthy hempen cable, and which immediately became part of her equipment, could be assessed as dutiable when the ship reached this country and the cable was loaned to another ship for temporary use only. It was left to the jury to say whether it was a mere temporary loan, and the jury found that it was. Justice Story supported a judgment against the Government on the ground that the cable had become a part of the *Marathon* equipment in Liverpool, and, coming in as part of the ship in which it was imported, was not goods, wares, and merchandise. He said, on page 365:

"Until Congress shall declare that the new rigging or equipments of the ship procured abroad are dutiable, or not to be landed without a permit, it seems to be difficult to conceive how courts of justice can treat them as 'goods,

wares, or merchandise,' within the meaning of the general revenue laws. The 'goods, wares and merchandises,' within the meaning of the fiftieth section of the revenue collection act of 1797, chapter 128, are such only as are designed for sale, *or to be applied to some use or object distinct from their bona fide appropriation to the use of the ship in which they are imported.*"

As the crank shafts in question were to be applied to some use distinct from the use of the ship in which they were imported, it is not apparent how the decision of Mr. Justice Story does other than make against the claim of the steamship company herein. It certainly does not conflict with the views expressed by this Department in the opinion already rendered.

The inclosure is herewith returned.

Very respectfully,

WM. H. TAFT,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

It is against the practice of the Department of Justice to give an opinion upon a question so general as not to show what the question that has arisen in any Department is.

DEPARTMENT OF JUSTICE,
October 6, 1891.

SIR: A communication from you, dated March 7, 1891, requested my opinion upon the general question whether the patents for the Courtenay Automatic Signal Buoy had expired.

Your letter contains the following statements:

"It appears from the report of Mr. Prindle that the United States and British patents for this invention expired upon the 26th of April, 1890, and that the invention shown and described in these patents has become and is public property.

"At the instance of the Light-House Board, I have the honor to ask if, in view of the facts developed by the investigation made by Mr. Prindle, and stated in his report, the

board can now go on and manufacture buoys of the kind described in the Courtenay patent without infringing upon the rights of the patentee."

This Department, some months ago, called the attention of the Light-House Board, informally, to the fact that your communication presented no definite question of law for opinion, but merely the general question, whether the patents in question had come to an end, and suggested that the precise question or questions disturbing the mind of the Board should be stated.

Having heard nothing more from the Board, I beg leave to say that it would be against the settled practice of this Department to give an opinion upon so general a question as that submitted in your letter.

If the Light-House Board has no doubt of the expiration of the said patents they do not need my opinion. If, on the other hand, the Board has a doubt on the subject it will give me pleasure to try to resolve that doubt when it is communicated to me.

I need only add, that it is apparent from the foregoing why the delay has occurred in replying to your letter.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

IMMIGRATION—SUPERVISING INSPECTOR—APPROPRIATION.

The Secretary of the Treasury has power to appoint or designate a supervising inspector or special inspector to perform such duties as he shall direct and to serve at such places as will, in the judgment of the Secretary, best promote the administration of the Immigrant-Inspection Service. The appointee may properly be paid from the immigrant fund.

DEPARTMENT OF JUSTICE,
October 19, 1891.

SIR: I have received your letter of the 10th instant, together with other information in relation to the question submitted.

Under the "Act to regulate immigration," passed August 3, 1882 (22 Stat., 214), the immigrant fund is, as you are well

aware, to be used under the direction of the Secretary of the Treasury for the purpose specified in section 1 of the act; and the Secretary is charged with the duty of executing the provisions of the act.

It is not apparent that Congress, by the provisions of section 4 of the act making appropriations for legislative, executive, and judicial expenses (*id.*, 219), passed three days later than the immigration act, intended to change or to restrict the broad powers given in said act of August 3.

It may properly be noted that section 8, of the act of March 3, 1891 (26 Stat., 1084), to which you refer, recognizes the official existence and the service of "inspection officers" and of "inspectors."

The general scope of the immigration laws and the powers of the Secretary of the Treasury thereunder are considered at some length in the opinion which I had the honor of submitting to you under date of April 15, 1891, and to that, and to 19 Opin., 486, I beg to refer you. The pending question does not render it necessary to discuss further these laws or powers.

In response to the inquiry now under consideration, I beg to say: That if in your judgment it is necessary so to do in order to properly regulate immigration or to carry the acts relating thereto into full and effective execution, you are, in my opinion, authorized to appoint or designate a supervising inspector, or a special inspector, to perform such duties in connection with the service as you shall direct, and to serve at such place or places as will in your judgment best promote the efficient administration of the Immigrant-Inspection Service. The appointee may properly be paid from the immigrant fund.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

BOOKS AND RECORDS OF POSTAL SERVICE OF THE CONFEDERATE GOVERNMENT.

Certain books and records proposed to be purchased discussed, and several ways suggested in which they might be of value to the United States, and the Postmaster-General advised that he may act favorably toward their acquisition.

DEPARTMENT OF JUSTICE,
October 20, 1891.

SIR: I have made such investigation as I was able touching certain records of the late Confederate States mentioned in the act entitled "An act making appropriation for the services of the Post-Office Department for the fiscal year ending June 30, 1892." The part of said act relating to this matter is as follows: "To enable the Postmaster-General, if in his judgment, after a careful investigation, it shall be deemed advisable, and they shall by him be deemed valuable as aids in facilitating and protecting the Government in the settlement of the accounts now in the office of the Sixth Auditor of the Treasury Department and in protecting the Government against overpayments and frauds, to purchase certain books and records of the post-office department of the late so-called Confederate Government, and referred to in Senate Executive Document No. 7, second session Fifty-first Congress, $10,000, or so much thereof as may be necessary."

The books in question and their condition and contents are briefly described as follows:

I. A book entitled "Record of letters and other communications from the post-office department of the Confederate States, John H. Reagan, postmaster-general." This title is found on page 53. The preceding pages contain an index, in a mutilated condition. The book bears evidence that it has been used as a copy book by some child. The book contains copies of letters of the postmaster-general beginning October 12, 1863. There are none earlier than that date. It also contains copies of auditor's reports of the post-office department, and other matters relating to the post-office department of the Confederate States. From page 53 to page 348, the book is substantially intact. The last communication is under date of April 1, 1865. The evidences of the book having been used as a copy book appear scattered through the entire book. From 378 forward the leaves have been cut out, but the margins show that they were used as a copy book. The book bears evidence of being a genuine record, but there is no other evidence authenticating it as such.

A memorandum on pages 85 and 86, shows that the amount paid out to contractors with the United States for mail service prior to June 1, 1861, is $502,017.19. Other interesting matter upon the same subject is found under the heading of "Revenue accounts," pages 86 and following.

II. This book is apparently in a good state of preservation, a portion of it having been used for memoranda purposes by the holder. This shows the mail contract routes, the name of the contractor, and the compensation for the services. It relates to South Carolina alone. The entries in this book commence in 1863. There is no special evidence identifying the genuineness of the book, save that derived from its appearance, which is satisfactory.

III. This is a blank book for postage stamp and envelope accounts, in part completed but largely containing the names of the offices, the county, and the postmaster, without any entry thereunder.

IV. This is a mutilated book containing a record of dead letters. It is not in a good state of preservation, but contains a large number of entries under the subject-matter. There is no special evidence showing the authenticity of this book, but its appearance carries out the idea of its being genuine.

V. This book is a register of postage stamps sent. This, like the others, is mutilated, and out of the 417 pages has few left.

VI. This is the most important record of the list. It is a register of reports of payments to mail transportation contractors and corresponds to that kept in the office of the Sixth Auditor of the Treasury Department of the United States. The front part of the book is mutilated and some pages are out. The first account commences in October, 1861, and continues down to April 1, 1865, inclusive.

The authenticity of this book is vouched for by one Henry St. George Offutt, now of New York City, who appears by a printed copy of the post-office records of the Confederacy, to have been chief of its contract bureau. The affidavit establishes beyond doubt the genuineness of the volume.

It seems to have been modeled after the record kept in the Sixth Auditor's Office of the United States. I have examined briefly the items in relation to the payments. I find

numerous payments marked "U. S.," under the head of "Transportation." Whoever kept the book seems to have made the distinction betweed accounts for Confederate States contractors, and those of the United States, who had sums due them prior to May 31, 1861, by marking the letters "U. S." after such latter accounts. These accounts give the number of the route, the clerk, the contractor, agent, etc., the appropriation and the amount paid. I have not personally verified the amounts appearing by this book to have been paid to contractors of the class mentioned. But I am informed by Messrs. McGrew & Small that they aggregate $479,000.

It is not necessary for me to state in detail the history of these books. From an affidavit attached to one of the most important of these volumes it appears that the records of the Confederate States Post-Office Department were modeled, so far as applicable, after the forms then in use in the Post-Office Department of the United States. These volumes, at the collapse of the rebellion, were taken by an employé of the Confederate States Post-Office Department to Chester court-house, S. C., there abandoned, and subsequently came into the possession of the present holder, but whether at once, or through prior possessors, does not appear. Although the affidavit above mentioned relates to but one of the books, I think there is no doubt of the genuineness of all six of the volumes. An inspection of these several volumes shows that they were regularly kept in accordance with their different uses in the postal department of the Confederate States. They are thus authentic public records of a *de facto* government.

It is a historical fact that in the year 1861, from January 1 to May 31, the postal affairs in the States in rebellion were nominally under the control of the United States. May 27, 1861, the Postmaster-General of the United States, by proclamation, suspended all postal services in the States in rebellion on and after the 31st day of May, 1861. Out of these circumstances it happened that there were a large number of unsettled accounts for mail transportation due the contractors, nominally, from the United States.

August 30, 1861, the Confederate States Government passed an act to collect for distribution the moneys remain-

ing in the several post-offices of the Confederate States, at the time the postal services were taken in charge by said Government, that is, June 1, 1861. By this act the Confederate States took possession of all the moneys then due the United States from postmasters and others, and provided a fund for the pro rata payment of claims for postal services, which accrued before its Postmaster-General took charge of the postal service in the States composing the Confederacy.

September 27, 1862, the Confederate States passed another act directing the Postmaster-General to pay "to the several persons, or their lawful authorized agents or representatives, the sums respectively found due and owing to them for postal services rendered in any States of this Confederacy under contracts or payments made by the United States Government before the Confederate States Government took charge of such service, as the said sums have been credited and ascertained by him under the provisions of the act entitled 'An act to collect for distribution the moneys remaining in the several post-offices of the Confederate States at the time the postal service was taken in charge by said Government,' approved the 30th of August, 1861; but the sums authorized by this act to be paid are only the balances found due after all proper deductions shall have been made on account of previous payments made by the United States or any States, or of available provision made in whole or in part for such payment by said Government, or any of the States, and after making all proper deductions for failures or partial failures to perform the services according to their several contracts or appointments during the time for which they claim pay; provided, that the provisions of this act shall extend only to *loyal citizens of the Confederate States.*"

In accordance with the provisions of this last act, the Postmaster-General of the Confederate States paid out to the parties entitled to its provisions about $502,000. The evidence of such payment on the part of the Confederacy, up to and including the issuing of the warrant for such payments, is found extended in volume numbered 6 in this letter. I am informed that the amount found due such contractors, and appearing upon the books of the Sixth Auditor of the United States, corresponds substantially with the

amount so paid by the Confederate Government. Notwithstanding the payments by the Confederate States, the Congress of the United States has been and still is besieged by claimants demanding a settlement of the accounts for transporting mails credited to them upon the books of the Sixth Auditor of the United States. The Congress of the United States in 1877 passed an act making an appropriation of $375,000 for the payment of such claims, but provided that no payments should be made where the claimant had already received pay for the same services for the Confederate States Government. Claiming under this last act, a large number of suits were commenced in the Court of Claims. Some have been prosecuted to judgment favorably, and others have been dismissed for want of proof. A large number have been dismissed in consequence of the decision in the Selma, Rome and Dalton case hereinafter mentioned. Very few are now pending.

No part of the $375,000, appropriated as above, was paid out, because the Secretary of the Treasury conceived it his duty to pay no part of said sum until all claimants had proffered their accounts to that Department. None so doing, that amount lapsed into the Treasury, in accordance with law.

I am informed that parties making claims for these services have continued to demand of Congress a recognition and payment of their claims; that in some instances such demand has been successful, while in others, by some happy chance, the bills very narrowly escaped becoming law. It is asserted that all such claims are accompanied with statements that no payment *was* made by the Confederate States.

At this date the condition of affairs may briefly be summarized, thus: The books of the Sixth Auditor of the Treasury of the United States show open accounts due parties for transporting mails between the 1st day of January, 1861, and the 31st day of May, 1861. The dockets of the Court of Claims show a number of suits pending for similar services brought under the act of Congress, 1877, *supra*.

The files of Congress show many bills providing for the payment of these claims.

Under these circumstances, the Postmaster-General is directed to investigate, if he deems it advisable, and determine if the books in question are valuable as aids in facil-

itating and protecting the Government in the settlement of the accounts now pending in the office of the Sixth Auditor of the Treasury Department, and in protecting the Government against overpayments and frauds.

The important question then is, what use or benefit will accrue to the United States from the possession of these books?

First. They will enable the Sixth Auditor of the Treasury, by the comparison of parties, routes, and amounts due, to determine what sums were paid by the Confederate Government to the persons who have sums credited to them on the books of the United States for the same service. The Sixth Auditor being practically Comptroller and Auditor with respect to these accounts, in the absence of direction from Congress, will be enabled to close all such accounts, and against such decision there can be no successful appeal. In the event that claimants whose names are found in these volumes attempt by aid of Congress to obtain from the United States the amounts shown to have been due them on the books of the Sixth Auditor, the Treasury Department of the United States will inform Congress of such fact, and thus prevent the passage of a bill for such relief. It is assumed that no committee of Congress would report favorably a bill for the relief of any party who appears to have had his pay.

Second. Are these records legal evidence which may be used in defense of suits pending in the Court of Claims?

The question of the competency of the records as evidence is entirely separate from the force to be attached to the same if admissible. It is apparent that the principal book in question does not purport to be a record of the complete payment, but of facts leading up to the issuing of the warrant upon which the payment is completed. The warrants themselves are not produced. The evidence, therefore, is a link only in the chain of events necessary to show payment. I am inclined to the opinion that, being public records of a *de facto* political government, and showing transactions between such government and the claimant, the custody of the record being fairly traced from the possession of such government to the present date, they are admissible.

The identity of the parties would be left still to be traced and the ultimate payment to be proved. There is evidence, however, *dehors* the record, that it was the part of the method of keeping these accounts that when warrants were issued upon the statements therein found, and such warrants were unpaid, that fact was noted in the margin of the record; hence a reasonable presumption, unless such annotation is found, that the payment was in fact made. So far as the cases now pending in the Court of Claims is concerned this evidence can be perpetuated.

It has been suggested that the possession of these books would enable the United States to recoup from present contractors money paid by the United States heretofore on claims found to have been paid in these books by the Confederate Government. Many railroad companies are now employed in carrying the mails which carried them during the period from January 1, 1861, to May 31, 1861; that payments have in many cases been made such railroad companies for these antebellum services, and that the United States may recoup from amounts presently due such companies the amounts so paid. The circumstances under which such payments were made by the United States would necessarily largely determine the right of the United States to recover. Under ordinary conditions such payment would be made by the United States under and by virtue of a right on the part of the contractor as a creditor, and it would make no difference to the United States that the same contractor had received pay for the same services from others, there being no privity between the three parties. I can conceive, however, that if the payment made by the United States, was made under a fraudulent statement as to the facts of the same services having been paid by the Confederate States, and under the condition imposed by the law of 1877, *supra*, that the United States might recoup from the moneys presently due the same contractor such sums.

As I have, however, no sufficient data upon which to determine this matter, I can give no opinion as to the usefulness of this evidence for that purpose.

I have attempted a verification of the usefulness of these books by reference to a suit lately pending in the Court of

Claims. The Selma, Rome and Dalton Railroad Company, successors of the Alabama and Tennessee Rivers Railroad Company (which latter company transported the mails of the United States between January 1, 1861, and May 31, 1861), brought suit for the sum of $5,000 in the Court of Claims, claiming under the act of 1877, above mentioned. The claimant offering no proof as to whether payment for the same services had been made by the Confederate States, the Court of Claims ruled that the action could not be maintained and dismissed the petition. This ruling was affirmed by an equal division of the justices of the Supreme Court of the United States, to which the claimant took the case by appeal. The importance of the legal question involved caused the then Attorney-General, Hon. A. H. Garland, to join with the claimant's counsel to set aside the judgment and reopen the case for further argument upon this point. This was done and the case was reargued at the December term, 1890, and the judgment of the Court of Claims affirmed by the unanimous decision of the justices.

An examination of book number six shows the amount thus claimed by the Selma, Rome and Dalton Company, paid by the Confederate States.

I have not examined the books as to other claims pending in the Court of Claims.

While primarily the act in question has relation to the settlement of these accounts in the office of the Sixth Auditor of the Treasury Department alone, I think that the data found in these volumes may be of use to the Government in another direction, namely, in the investigation of loyalty of claimants under the Bowman Act for stores and supplies taken and used by the United States Army. These books contain a large array of names of contractors, of postmasters, and other agents of the Confederacy, and the facts *therein* set forth would be valuable in enabling the Department of Justice to trace evidence with respect to loyalty of such claimants.

If the books shall come into the possession of the Government, I should desire that they be at once accessible, either in the original or by copy, at the Confederate archives division of the War Department.

From this brief review of the history and legal aspect of the case, whatever opinion I may hold as to the custody and ownership of these books by the present claimant thereof, I feel warranted in the opinion that the Postmaster-General may act favorably toward their acquisition.

Very respectfully,

W. H. H. MILLER.

The POSTMASTER-GENERAL.

COMPTROLLER OF THE CURRENCY—DIVIDEND—CREDITORS OF BANK.

It is not within the province of the Comptroller of the Currency to inquire what use the creditors of a national bank propose to make of the dividend paid them.

If the receiver of the bank has authority of the proper district court and the consent of every one of the creditors of the bank to a private sale of any of its assets, then this dividend money could be used to purchase such assets; the money thus used would again become assets of the bank for distribution.

DEPARTMENT OF JUSTICE,
November 2, 1891.

SIR: I have considered your communication of October 29, 1891, with reference to the 10 per cent dividend now payable to the creditors of the Middletown National Bank, and am of opinion that when the Comptroller of the Currency shall have paid this dividend to the creditors or their duly authorized attorney or attorneys, it is not within his province to inquire what use *the creditors* propose to make of the money so paid. Consequently, if they should use it in buying an asset of the bank from the receiver, the money thus used will again become assets of the bank for distribution.

In my consideration of this question, I have, of course, assumed that the receiver has the authority of the proper district court for disposing of the particular asset at private sale, and that his plan for disposing of this asset has been freely acquiesced in by *every one of the creditors.*

Very respectfully yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

The Attorney-General can not investigate the papers and records for the purpose of ascertaining the facts upon which the question arises.

DEPARTMENT OF JUSTICE,
November 6, 1891.

SIR: Your note, dated October 5, in which you transmit to me a bundle of papers in connection with the case of Luke Voorhees, is received. In your note you say:

"The material facts in this case will be disclosed by the papers and records herewith submitted. The opinion of your Department is respectfully requested as to whether, in view of all the facts and circumstances of the case, the order of this Department suspending the pay of Luke Voorhees on route No. 34040, Fargo to Pembina, Dakota, contract term 1878 to 1882, under date of June 19, 1883, is so far modified or affected by the decision of the Supreme Court, in the case of the *United States* v. *Luke Voorhees*, decided in the defendant's favor at its October term, 1889 (135 U. S. Reports, p. 550), as to impose upon me the obligation of rescinding said order of suspension; i. e., whether said decision affects or ought to affect the order of suspension in question."

The papers were returned to you before because when requesting an opinion you made no statement of facts. They are returned again for the same reason. It has been uniformly held by my predecessors, as well as by myself, that when an opinion is desired by the head of a Department, a statement of the facts upon which the question arises must be submitted. The Attorney-General can not investigate "the papers and records" for the purpose of ascertaining these facts. (12 Opin., p. 206; 14 Opin., p. 367; 19 Opin., pp. 396–467, 696.)

Respectfully, yours,

W. H. H. MILLER.

The POSTMASTER-GENERAL.

CIVIL SERVICE COMMISSION—ATTORNEY-GENERAL.

It is not within the authority of the Attorney-General to reverse a decision of the Civil Service Commission, or to require it to issue a certificate of reinstatement.

DEPARTMENT OF JUSTICE,
November 13, 1891.

SIR: Your communication of the 7th instant, relating to the case of William H. Wykoff, applicant for reinstatement as a clerk in your Department, under amended Civil Service Rule X, has been duly considered.

It appears that Mr. Wykoff was, August 25, 1885, serving as a clerk of class 2, and on that day resigned the position and left such service through no fault or delinquency on his part.

He now claims the right to reinstatement.

It appears from the report received from the War Department that Mr. Wykoff was hired by Capt. C. H. Irvin, assistant quartermaster, at Nashville, during 1864, and "was employed under his direction as a clerk at $75 per month from May 1, 1864, to August 6, 1864, when he was discharged, no cause being assigned."

The report concludes as follows:

"The records of this office also show that during the years 1863 and 1864 the civilian employés of the Quartermaster's Department on duty at the most important quartermaster depots, viz, Washington, D. C., Alexandria, Va., Nashville, Tenn., etc., were, by direction of the Secretary of War, organized into regiments, uniformed, officered, armed, and drilled to make a force for the protection of the Government property and to be available for service in case of emergency to relieve the regular troops.

"There having been no regular muster rolls prepared of the quartermaster's employés at Nashville, who belonged to the quartermaster's volunteers, except the rolls upon which they were reported and paid as civilian employés, the Quartermaster-General is unable to give a positive certificate as to Mr. Wykoff's connection and service with the organization referred to, but inasmuch as the records show that Mr. Wykoff was employed as clerk in the quartermaster's department at Nashville, from May to August, 1864, it is presumed that he was a member of the quartermaster's volunteers, organized at that depot, during the time he was employed, and performed the same military service as the other civilian employés of the quartermaster's department on duty there for the same period."

The Civil Service Commission declines to issue a certificate for the reinstatement of the applicant, and concludes its letter relating thereto as follows:

"It does not appear from the statement of the Quartermaster-General that Mr. Wykoff served in the military service of the United States and was honorably discharged therefrom within the meaning of the rule, but merely that it is presumed that he, with other civilian employés, was held available for service for the protection of Government property in case of emergency to relieve the regular troops. In the absence of positive evidence of the performance of such service the Commission thinks that it is without authority to issue the certificate for reinstatement."

It will be remembered that Rule X, so far as it is now in question, provides that:

"Upon requisition of the head of a Department the Commission shall certify for reinstatement in said Department * * * any person who served in the military or naval service of the United States in the late war of the rebellion and was honorably discharged therefrom."

It is plain that the Commission decided that the evidence presented does not bring the applicant within the rule.

This determination has been communicated to the head of the Treasury Department. It is not within the scope of my authority to reverse this decision of the Commission or to require it to issue the certificate of reinstatement.

If the Commission determined the question in accordance with law no further proceedings in the premises are authorized.

If it should be considered that the Commission erred in making its decision it does not appear that the question is now pending in the Treasury Department.

No statute is found which authorizes the Attorney General to reverse or review this action of the Commission upon the suggestion of the Secretary of the Treasury.

It is provided by statute that "the head of any Executive Department may require the opinion of the Attorney-General on any questions of law arising in the administration of his Department." (R. S., sec. 356.)

It is properly held by Mr. Attorney-General Bates (10 Opin., 220) that "when the solution of the question is not

necessary to the discharge of any duty properly belonging to any Department it is not the duty of the Attorney-General to give an opinion thereon, and such opinion would consequently be extra-official and unauthorized."

This decision is approved by Mr. Attorney-General Garland (19 Opin., 8); and the principle that there must be a case of present executive consequence pending in the Department from which the request comes in order to authorize an official opinion has been affirmed many times.

As the Civil Service Commission is not included within the Treasury Department, and as the rule formulated pursuant to law vests the Commission with authority in the matter of certification, and as it has exercised that authority, it is not apparent that any question in the premises remains with the Treasury Department upon which the statute permits me to act. I am therefore compelled to say, without considering whether the applicant is or is not shown to come within the terms of Rule X, that under the statutes, and the precedents established by learned predecessors, I am without authority to render to you an official opinion upon Mr. Wykoff's eligibility.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

COSTS—REFUND OF DUTIES.

In cases of judgments against the United States by circuit courts on appeal by importers from illegal assessment of duties by the collector of customs, the refund adjudged to be made by the United States does not include costs.

DEPARTMENT OF JUSTICE,
December 10, 1891.

SIR: Your letter of November 12, 1891, submitting the question whether in cases of judgments against the United States by circuit courts on appeals by importers from illegal assessments of duties by collectors of customs the refund adjudged to be made by the United States includes costs, is received.

In my opinion, costs are not and can not be included in such judgments without some declaration of Congress to that

effect. As Chief Justice Marshall said in *United States* v. *Barker* (2 Ph., 395), in response to a motion for costs against the United States, "The United States never pay costs."

In *United States* v. *Boyd* (5 How., 29, 51), the court said: "Another ground upon which the judgment must be reversed is that a judgment for costs was rendered against the plaintiffs. The United States are not liable for costs."

In the case of *The Antelope* (12 Wh., 546–549) the court say: "It is a general rule that no court can make a direct judgment or decree against the United States for costs and expenses in a suit to which the United States is a party, either on behalf of any suitor or any officer of the Government. As to the officers of the Government the law expressly provides a different mode." See also *United States* v. *McLemore* (4 How., 286).

The proceedings instituted by importers by way of appeal to the courts under section 15 of the act of June 10, 1890, are suits against the United States, as was held by this Department, after much consideration, in an opinion dated August 7, 1891, and, therefore, such proceedings as to costs against the United States fall directly within the rulings of the above cases.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

APPOINTMENT—RESIDENCE.

Where a resident of Wisconsin is examined for the departmental service and passes at an eligible average and is subsequently appointed upon certification from the Wisconsin elegible list and his appointment charged to the apportionment of that State, and it is later ascertained that subsequently to passing his examination he changed his residence to Idaho and neglected, but not with any desire of concealing the fact, to notify the Civil Service Commission of such change of residence and had he so notified it he would have been transferred to the Idaho eligible register, and in consequence thereof Idaho has received an appointment to which it was not then and has not been since entitled: *Held*, that subsection 3 of section 2 of the civil service act of January 16, 1883, chapter 27, is directory only, and that the appointment is not invalid.

DEPARTMENT OF JUSTICE,
December 10, 1891.

SIR: In reply to the question propounded to you by the Civil Service Commission and submitted for my consideration by you in the case of Cyrus L. Hall, I beg to submit the following opinion:

It appears by the statement of facts that on October 24, 1889, Mr. Hall sent in an application for the clerk examination for the departmental service, alleging an actual bona fide residence in the State of Wisconsin, and on November 29, 1889, he was examined at St. Paul, Minn., and passed at an eligible average.

On January 3, 1891, he was appointed to a $1,000 clerkship in the Pension Office, Interior Department, *upon certification from the Wisconsin eligible register*, and his appointment was charged to the apportionment of that State.

On receipt of the notice of Hall's absolute appointment at the end of probation it was observed that his actual bona fide residence was given as *Idaho*, instead of Wisconsin, and on inquiry it was learned that subsequent to his examination he had removed from Wisconsin to Idaho and had become a resident and citizen of the latter State.

It is stated, furthermore, that under the regulations of the Commission it was Hall's duty to advise the Commission of his change of residence when it took place, but that he failed to do so, and that had he done so his name would have been transferred from the Wisconsin to the Idaho eligible register, and would not have been certified when it was, but that the name of an actual bona fide resident of Wisconsin would have been certified, and that Hall would not have been appointed, but that a resident of Wisconsin would have been.

As a consequence of this failure of Hall to give timely notice of his removal to Idaho, Wisconsin was charged with an appointment which it did not receive and failed to receive an appointment it was entitled to, and Idaho received an appointment with which it was not charged and to which it was not then, nor has it been since, entitled under the law and the rules in relation to appointment as understood by the Commission.

It also appears that Hall's omission to give due notice of his change of residence was not with any purpose to suppress that fact, and that Hall is "a most excellent clerk," and that the Commissioner of Pensions and the Secretary of the Interior are desirous that he should be permitted to remain in the public service upon his present footing.

Upon this state of facts an opinion is asked on the validity of the appointment of Hall as a citizen of Wisconsin after his change of residence from that State to Idaho.

Subsection 3 of section 2 of the act approved January 16, 1883, entitled "An act to regulate and improve the civil service of the United States," provides as follows:

"Third. Appointments to public service aforesaid in the Departments at Washington shall be apportioned among the several States and Territories and the District of Columbia upon the basis of population as ascertained at the last preceding census. Every application for an examination shall contain, among other things, a statement, under oath, setting forth his or her actual bona fide residence at the time of making the application, as well as how long he or she has been a resident of such place."

And section 2 of departmental Rule VII provides as follows:

"Certification hereunder shall be made in such manner as to maintain, as nearly as possible, the apportionment of appointments among the several States and Territories and the District of Columbia, as required by law."

The apportionment by the act of the appointments to the public service in the Departments at Washington among the several States and Territories and the District of Columbia is somewhat fundamental in its character, and was no doubt intended to be faithfully observed by those charged with the duty of enforcing the law under which the people of the several States and Territories and the District of Columbia have certain rights which it is the duty of the Civil Service Commission, acting under your supervision, to protect.

But while it is the undoubted duty of the executive branch of the Government to give proper effect to this requirement of Congress, it is a very different thing to say that an appointment made in disregard of this rule of apportionment, *through*

a mere inadvertence, is to fail entirely and be treated as a nullity.

Is it reasonable to suppose that Congress was so distrustful of the executive department as to legislate with such an intention?

It is true that a failure to obey the statute with regard to apportionment may produce inconvenience and, perhaps, hardship, but these may and will be repaired by a return to the rule of the statute in making subsequent appointments, and the presumption is not to be tolerated that any officer having the appointing power would fail to do this so soon as practicable.

It seems to me, therefore, more reasonable to conclude that Congress did not intend that, in such a case as the one before me, where everything was done in good faith, an inadvertent disregard of the rule of apportionment in making an appointment should annul that appointment. I am of opinion, therefore, that the statute is directory only in the above particular, and, consequently, that the appointment of Mr. Hall was not invalid.

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

W. H. H. MILLER.

The PRESIDENT.

ATTORNEY-GENERAL.

The question as to the right of a State to tax lands in an Indian reservation is judicial and not administrative; the Attorney-General ought not to express an opinion upon it. 19 Opinions, 56, followed.

DEPARTMENT OF JUSTICE,
December 11, 1891.

SIR: In reply to your letter of November 7, 1891, inclosing a communication to you from the Commissioner of Indian Affairs and requesting my opinion upon the question of the right of the State of Michigan to tax lands in the Isabella Reservation held by the Indians under patents denominated "not so competent" and issued under the provisions of the 3d article of the treaty of October 18, 1864, I have the honor to state that matters have gone so far in the direction of assessing and enforcing taxes against the said lands by the

State of Michigan that it seems to me the better course would be to make a test case with a view to the determination of the Federal question by the Supreme Court of the United States. The question involved seems to be judicial and not administrative in character.

In the case of the *Klamath Indians* (19 Opin., 56), my predecessor, Attorney-General Garland, upon the same ground, declined to give an opinion upon a matter of controverted right between those Indians and the State of California.

The following observations in that opinion seem to be pertinent to this case, namely—

"The matters covered by these questions are clearly justiciable in the appropriate courts at the suit of the Indians themselves who are interested in them. They are essentially judicial in their character, and as each is readily resolvable into a case at law or in equity, I do not see how it can be said to be a question arising in a course of executive administration.

"There is nothing in the nature of the protectorate or guardianship exercised by the United States over the Indian tribes that warrants the Executive Department of the Government in assuming to determine a controversy properly cognizable by the Judicial Department of the Government because the well being of an Indian tribe requires, that such controversy should be decided. The organic distinctions between the three great divisions of Government established by the Constitution must be respected, or collisions and discords inimical to good government will inevitably take place.

"When the questions arose between the State of Kansas and the Shawnee and Miami and Wea Indian tribes as to the power of the State to tax certain lands held in severalty by individuals of these tribes, the three tribes filed bills in equity against the State officials seeking to enforce the right to tax, and the suits thus brought were finally determined in favor of the Indians by the Supreme Court of the United States. (*The Kansas Indians*, 5 Wall., 737; see also the case of *The New York Indians*, *ib.*, 761.)

"My predecessor, Mr. Butler, declined to pass upon claims arising under a treaty with the Cherokee Indians, on the

ground that a board of commissioners had been established by the treaty for the purpose of determining cases of that kind, saying that the Attorney-General had 'no power to give an official opinion, on the request of a head of a department, *except on matters that concern the official powers* and duties of such department' (3 Opin., 369; see also section 356 Rev. Stat., and 13 Opin., 160, and 11 Opin., 407).

"It seems to me, therefore, that, as the only way to settle the questions submitted is by judicial proceedings, it would be hardly proper for me to express an opinion on them, while my doing so might, at the same time, be regarded as an attempt of the Executive branch of the Government to forestall such proceedings."

I shall be glad to cooperate with you in the proper measures to get a judicial determination of the important question to which you refer.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

ATTORNEY-GENERAL.

Unless the head of a Department has to pass upon a matter, it is not one calling for an opinion of the Attorney-General.

DEPARTMENT OF JUSTICE,
December 14, 1891.

SIR: I have received the letter of the First Comptroller of the Treasury referred to me by you, and also the letter of the Hon. T. W. Ferry, inclosed with said letter, presenting the question whether the clerk of the court of the third judicial district of Utah is accountable for certain fees.

It would appear from the Comptroller's letter that the question presented is one which he considers to be within his exclusive jurisdiction. Unless, therefore, you have to pass upon the matter, I do not see that it belongs to the class of questions which may properly come before me. If, however, it is a matter upon which your action will be necessary, I shall be pleased to render an opinion on it.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

REVOCATION OF ORDER SUSPENDING PAY—*RES ADJUDICATA*.

Where an order suspending pay of a mail contractor is made by the Postmaster-General, the order should not be vacated on unsupported application for that purpose, or where no substantial ground is shown for the application.

The principle of *res adjudicata* applies to departmental action of a final nature.

DEPARTMENT OF JUSTICE,
December 18, 1891.

SIR: Your communication of November 19, 1891, and the accompanying statement of facts, bring to my attention the following case:

Luke Voorhees entered into a contract with the Government to carry the mail from Fargo to Pembina, Dak., being route numbered 35040, for the term of four years, beginning July 1, 1878, and ending June 30, 1882.

As the contract stood originally, the service was to be rendered six times a week, the schedule of running time, each way, was 62 hours, and the annual compensation was $17,000. Prior to July 1, 1878, no mail service had been performed on this route.

On July 30, 1878, an order was made by the Postmaster-General, to take effect August 1, 1878, expediting the schedule and reducing the running time on said route from sixty-two hours to forty-three hours in summer and fifty hours in winter, and allowing an additional sum of $8,500 per annum.

This order of expedition was revoked by requests, and a petition, all moving, however, from Voorhees himself, through his agents and employés, and so much of the order as allowed Voorhees the additional sum of $8,500 per annum was based on the following statement, made and sworn to by Voorhees, namely—

"I hereby certify that it will take 50 per cent more men and horses to perform mail service on route 35040, from Fargo to Pembina, on a reduced schedule from sixty-two hours to forty-three hours in summer and fifty hours in winter."

This statement was also signed by Voorhees.

It further appears that service on said route was performed by Voorhees from July 1, 1878, to July 31, 1881, and that it was so certified to the Auditor.

On July 9, 1881, the Postmaster-General made the following order:

"On account of fraud in the oath of contractor as to extra stock required for expedition, it not having been required, or he not having employed extra stock therefor, and thus not having incurred any extra expense by reason thereof, discontinue service July 31, 1881, and allow one month's extra pay on $17,162.94, the cost of the trip service."

This last order was followed up by another on July 19, 1883, in which the Postmaster-General directed a suspension of pay on said route, and, as a consequence, the amount certified as due to Voorhees for the period from April 1, 1881, to July 31, 1881, together with the one month's allowance for discontinuance of service, remain unpaid to this day.

The record does not state on what grounds the order of July 19, 1883, was made, nor do I suppose that you intend me to treat as a fact in the case the surmise, in paragraph 8 of your statement, that the order of July 19, 1883, was based "on the charges against Mr. Voorhees referred to in the order of July 9, 1881," and was intended "to await the determination of the suit which had been or was to be instituted against Voorhees for the recovery of $14,342.52, alleged to have been overpaid him on said route."

However that may be, suit was brought by the United States against Voorhees to recover back the said amount as so much money improperly and unlawfully obtained by him through the expedition order above given; the theory on which the said suit was ordered to be brought being, that Voorhees, "for his own advantage and for the convenience of the public, had all along, from the commencement of service by him on said route, performed it on a schedule of time as fast as that required by the order of expedition, and that, as no greater number of men and horses were required to perform the service on the expedited time, his affidavit was necessarily false and made for the purpose of defrauding the Government."

Voorhees demurred to the petition or complaint in the said suit, and the demurrer was sustained, and upon error this judgment was affirmed by the Supreme Court of the United States (135 U. S., 550).

Since the result of that case, application has been made to you to revoke the order of suspension made by one of your predecessors on July 19, 1883.

The question submitted for opinion, upon this state of facts, is whether a proper case is presented for a revocation of the said order of suspension.

There can be no doubt of the correctness of the theory on which the Postmaster-General ordered suit to be brought against Voorhees, namely, that he actually employed no more men or horses in performing the expedited service than he had been theretofore employing. If such was the fact, he was defrauding the Government by receiving compensation for the increased number of men and horses authorized by the order of expedition.

Congress has spoken plainly on this subject in section 3961 of the Revised Statutes, which is as follows:

"No extra allowance shall be made for any increase of expedition for 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 employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution."

In *United States* v. *Barlow* (132 U. S., 271), the defendant, Barlow, was held bound to refund to the United States, under section 3961, money received under an expedited schedule as payment for additional horses and men which he had never used, although they had been allowed in the order of expedition.

If the same condition of facts had been presented in the record in the case of Voorhees as in that of Barlow, the demurrer would, no doubt, have been overruled, but unfortunately the petition or complaint in the case of Voorhees contained no averment of fraud. It is true, that at the very time an expedition of his schedule was being applied for Voorhees was giving the public the increased speed under the original contract. But this he was not bound to do. He was at liberty to return to the contract at any time, and the court say that there was no allegation that Voorhees did not use the additional men and horses under the expedited schedule, or that the cost of the expedited service was excessive.

It thus appears that the charge of fraud which was, as you

assume and as was probably the case, the basis of the order of suspension, was not passed upon by the Supreme Court, and so far as the judgment on the demurrer is concerned is still undisposed of. Indeed, if the United States were to sue Voorhees again for money had and received under a fraudulent claim for service never rendered, the judgment on the demurrer would not be a bar to such a suit. As the Supreme Court say in *Gould* v. *Evansville, etc., R. R. Co.* (91 U. S., 526, 534), "if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right, for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action," citing *Aurora City* v. *West* (7 Wall., 90); *Gilman* v. *Rives* (10 Pet., 298); *Richardson* v. *Barton* (24 How., 188).

So far then from the judgment in the case of Voorhees having settled the question of fraud in his favor, that question stands now precisely as it did when the order of suspension was made.

In view of the charge of fraud in the order of July 9, 1881, it is fair to presume that the order of suspension was based, wholly or in part, on the finding of fraud in the preceding order.

But however that may be, the order of suspension was made by competent authority, and is entitled to every reasonable presumption to support it. Such an order, although of an interlocutory character, should not be vacated on an unsupported application for that purpose.

That the principle of *res judicata* does apply to departmental action of a final nature is well settled. Said Attorney-General Hoar (13 Opin., 35):

"Under these circumstances, I am of opinion that the deliberate decision of a former administration of a question involving private rights and interests, can not with propriety be reconsidered by its successors. No new facts are shown to exist which were not known when that decision was made. Ample opportunity has occurred for Congress, by a new provision of law, or by a declaratory act, to establish authoritatively the construction of the statute.

"It was said by Mr. Wirt '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.' (1 Opin., 9.)

"An adherence to this rule, which has been often restated by this Department, I consider as of great importance. Without it there would seem to be no end to the number of times in which a question might be presented for reconsideration." (See also 9 Opin., 34; and 13 Opin., 388.)

I am of opinion that the principle of *res judicata* should also protect the order of suspension, to the extent, at least, of requiring some substantial ground to be shown for setting it aside.

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

W. H. H. MILLER.

The POSTMASTER-GENERAL.

OWNERSHIP OF IMPROVEMENTS ON LAND—GOVERNMENT PROPERTY.

A large expenditure of money was laid out by the Government in building on a military post which afterwards was ascertained to be on land covered by a Mexican land grant, and a patent was issued by the Government to the owner: *Held,* That the United States had the right to remove or sell the improvements on the land so far as the right of the owner of the land was concerned: *held further,* that no authority exists in the President or Secretary of War to sell or dispose of the property, and that application therefor should be made to Congress.

DEPARTMENT OF JUSTICE,
December 22, 1891.

SIR: Your communication of December 15, 1891, submits for an opinion several questions, which will be stated further on, and which arise upon the following state of facts:

In October 1868, the President of the United States reserved from what he supposed to be a part of the public domain, a considerable area of land to be used in the Territory of New Mexico as a military reservation, and, accordingly, the military post known as Fort Union was established there. A large amount of money was expended on this land in buildings and other improvements necessary for a military post.

After these things had been done, it came to light that this supposed military reservation lay within the boundaries of a grant of land made by the Government of Mexico to one of its citizens prior to the treaty of Guadalupe Hidalgo, and embracing a district about 50 miles square.

After the conquest and the cession of New Mexico by the treaty of Guadalupe Hidalgo the said grant by Mexico was recommended to Congress for confirmation by the Secretary of the Interior, in pursuance of a report of the surveyor-general of New Mexico, under the provisions of the act of July 22, 1854 (10 Stat., 308); and, accordingly, Congress confirmed the said grant by an act approved June 21, 1860 (12 Stat., 71).

On March 16, 1876, the Secretary of the Interior notified the Secretary of War that the claimants of the Mora grant, as it is called, were entitled to a patent. It is said that at the time that notice was given the improvements which had been put upon the land by the Government were valued at $290,000.

On June 22, 1876, a patent for the whole Mora tract was issued by the General Land Office to the parties shown to be entitled to it under the grant from Mexico, confirmed by Congress.

In consequence of representations by the Secretary of War to the Secretary of the Interior with regard to the importance of Fort Union to the Government as a military post, and the value of the improvements there, the Secretary of the Interior reconsidered the case, and recalled and canceled the patent before it reached the parties for whom it was intended.

On August 15, 1876, another patent was issued which contained the following clause:

"The United States herein expressly reserves to itself the buildings and improvements situated on the Fort Union military and timber reservations as at present established, together with the possession and use of the same, and the right to remove said buildings and improvements upon the discontinuance or abandonment of said reservation by the United States."

In other respects the second patent was the same as the first.

On August 19, 1876, the second patent was delivered by

the surveyor-general of New Mexico to Thomas B. Catron as part owner of the claim and attorney for his co-owners with full powers.

In the letter of the Commissioner of the General Land Office, dated July 14, 1891, which is an inclosure of your communication, it is stated that "Hon. S. B. Elkins, as part owner in the grant and attorney with Mr. Catron for co-owners, represented the case before this office in person; and not only made no objections to the cancellation of the first, and issuance of the *second* patent, containing said stipulation as to the Fort Union property, but held that the maintenance of said military post, for a time, upon said grant, would be a benefit to the inhabitants."

It is true, as the Commissioner informs us in the same letter, that Mr. Catron protested, for himself and his co-owners, when he received the patent, that the United States had no right to reserve any part of the said grant for its own uses and that it had no right or title to any part of the land covered by the grant. But no allusion whatever was made in the said protest to the buildings and improvements at Fort Union, or to the right claimed by the Government to remove them.

It appears, furthermore, that since the patent was issued a military post has been maintained at Fort Union, and that the United States is still in possession and control of it. But the public interests now require that this military post should be broken up and the reservation abandoned and the rights of the Government in said buildings and improvements disposed of, and my opinion is requested on several questions which I will consider in their order.

1. The first question is, "Whether the above-mentioned buildings and other improvements belong to the United States, and whether they are real estate or personal property."

It is clear that the executive order establishing the reservation, so called, and the subsequent improvements, made at large expense to the United States, took place under the mistake of fact that the land covered by the executive order formed part of the public domain, but I do not think that in such a case as this the Government should be held subject to the legal or equitable principles that would control in the

case of an individual who has entered and erected buildings on the land of another, believing himself to be the owner of it. In my judgment it would be a dangerous limitation on the rights of the United States to hold that any relief it may be entitled to in this case must be worked out through the law of fixtures or the equitable principle with reference to compensation for improvements made, in good faith, by one person on the land of another.

It seems to me safer to place the rights of the Government in this case on the well-settled principle that it should not be made to suffer by the laches of its officers. As it must operate through agents in the performance of its manifold functions, this principle is essential to its protection. In *United States* v. *Beebe* (127 U. S., 344) the court say "that the United States are not * * * barred by any laches of its officers, however gross, in a suit brought by them as a sovereign Government to enforce a public right or to assert a public interest." This passage was quoted with approbation in the subsequent case of *United States* v. *Insley* (130 U. S., 266). Indeed, a surety in an obligation to the Government can not claim a discharge from the obligation in consequence of the laches of a public officer, although a surety is said "to possess an interest in the letter of his contract," an example which is, alone, sufficient to show that this case must be governed by the principle invoked. (*United States* v. *Kirkpatrick*, 9 Wh., 720; *United States* v. *Van Zandt*, 11 *id.*, 184; *United States* v. *Nicholl*, 12 *id.*, 505; *Gibbons* v. *United States*, 8 Wall., 269; *Jones* v. *United States*, 18 *id.*, 662; *Minturn* v. *United States*, 106 U. S., 444; *Dox* v. *Postmaster-General*, 1 Pet., 318.)

I am of opinion, therefore, that, under this principle, the United States had a perfect right to remove or sell the buildings or improvements in question, and that the owners of the Mora grant have no right whatever to those buildings or improvements, the mistake or laches of the Government officers who failed to ascertain the ownership of the so-called reservation being no obstacle in the way of the assertion of the Government's right in the premises.

It is unnecessary to inquire as to the effect of the recall and cancellation of the first patent and the issuing of the second with the reservation for the protection of the United

States, because such reservation was, in my view, unnecessary. Nor is it necessary to inquire whether either patent operated to convey title, seeing that the land covered by it had been already granted at the time of the cession and conquest.

2. The next question is, whether, if the buildings, etc., belong to the United States, the Secretary of War may sell them.

I am not able to say that section 3618, Revised Statutes, is a source of authority or anything more than a law regulating the disposition of the proceeds of "old material, condemned stores, supplies, or other public property," nor do I find any provision of law either in the statutes proper or in the Army Regulations in force in 1863 and adopted by Congress by the act of July 28, 1866 (14 Stat., 332), which seems to authorize the President or the Secretary of War to dispose of property such as that in question. This is not remarkable, because it did not occur to Congress as possible that a case like the one before me could occur. It seems to me, therefore, that application should be made to Congress to authorize some disposition of the public property at Fort Union.

3. The next question is based on the contingency of an affirmative answer to the second inquiry, whether the property at Fort Union can be sold by the Secretary of War, and requires no answer, the second question having been answered in the negative.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

DESERTER—ATTORNEY-GENERAL.

A soldier enlisted for three years August 27, 1862, who deserts between September 27 and October 16, 1862, and enrolls October 16, 1862, for nine months, and serves faithfully and is honorably discharged August 16, 1863, is then arrested as a deserter, admitted to a United States hospital January 5, 1864, and deserts February 8, 1864, his second enrollment not having been made for the purpose of bounty or gratuity other than what he would have received under the original term of his enlistment, is barred by his desertion after his arrest in January, 1864, from deriving advantage under the act of March 2, 1889, chapter 390.

The Attorney-General will not answer a purely hypothetical question.

DEPARTMENT OF JUSTICE,
December 29, 1891.

SIR: Your communication of September 19, 1891, brings to my attention the following state of facts:

On August 27, 1862, Adam Zarn enlisted for three years in Company B, One hundred and seventh Pennsylvania Volunteers, and deserted somewhere between September 27 and October 16, 1862.

On October 16, 1862, Zarn enrolled for nine months in Company B, One hundred and fifty-eighth Pennsylvania Drafted Militia Volunteers, and served faithfully with the regiment last mentioned, and was mustered out and honorably discharged from the same August 12, 1863.

It also appears that Zarn was afterwards arrested as a deserter January 5, 1864, and admitted to a United States hospital February 8, 1864, and that he deserted March 12, 1864. There is no record of his further arrest or return, and the regiment in which he owed service has long been mustered out.

Zarn's second enrollment was not effected for the purpose of securing "bounty or other gratuity that he would not have been entitled to had he remained under his original term of enlistment," except the time he was absent from the service.

Upon this state of facts have arisen the two questions following:

1. Is Zarn entitled to relief under the act of March 2, 1889 (25 Stat., 869)?

2. Is he entitled to relief from the first desertion by reason of his service in the One hundred and fifty-eighth Pennsylvania Drafted Militia?

These questions may be considered together.

In my opinion, Zarn's desertion after his arrest in January, 1864, is a bar to his deriving any advantage from the act of March 2, 1889, entitled "An act for the relief of certain volunteers and regular soldiers of the late war and the war with Mexico" (25 Stat., 869), which authorizes the removal from the records of a charge of desertion standing against a soldier in any one of the several cases enumerated in the statute, and restores to such soldier his lost rights to pay and bounty.

That Zarn, when arrested in 1864, owed service as a soldier under his first enlistment for three years on August 27, 1862, does not admit of doubt. It was, therefore, *desertion* in him to leave the service in March, 1864, after his arrest.

This final abandonment of the service by Zarn is not condoned by anything I can discover in the act of March 2, 1889 (*supra*).

This answer to the first question makes the second purely abstract and hypothetical in so far as Zarn is concerned, and, therefore, is not such a question as I may answer under the law, which restricts me to questions of law arising in the administration of any Department (see sec. 356, Rev. Stat.). I am unable to regard the second question as arising in Zarn's case, and therefore as properly arising in your Department,

If you shall deem it proper to refer to me for opinion a case presenting the second question now propounded, it will be my pleasure to give it prompt attention.

I have the honor to be, yours very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

McKINLEY ACT—PRESIDENT'S PROCLAMATION.

The President has not the power to issue the proclamation provided for in section 3 of the act of October 1, 1890, chapter 1244, to take effect *in futuro*, nor has he the power to reimpose duties on one or more of five articles enumerated in said section but not on the others. . In the proclamation the particular country on whose products the duties are to be reimposed should be named.

DEPARTMENT OF JUSTICE,
January 5, 1892.

SIR: Yours of January 2, in which you ask three questions in reference to the construction of section 3 of the act of Congress of October 1, 1890, known as the McKinley Act (26 Stat., 612), is received.

Section 3, in so far as important to this inquiry, reads as follows:

"That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever, and so often as the President shall be

satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which, in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides the production of such country for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides the product of or exported from such designated country."

Your first question is:

"If I should find that our trade with a particular nation is reciprocally unequal and unreasonable and should so declare by proclamation, have I the power to make the proclamation take effect at a future indicated day, or does the law, of its own force, reimpose the duties from the date of my declaration of the fact?"

The constitutional objection made to legislation of this character is that it is practically an attempt, by statute, to authorize the Executive to exercise the legislative function. The answer to this objection is that the Executive is, by the statute, required to ascertain, and by his proclamation declare, the facts, and that then the law authorizing the reimposition of the duties becomes operative as the expression of the legislative will. If it were to be held that the Executive could find the facts to exist at one time, but, by his own will, could declare that the duties should not be reimposed until some future date, to be determined by him, the constitutional objection would not seem to be clearly met. Moreover, upon the language of the statute, the meaning seems not doubtful. That language is, that "whenever and so often as the President shall be satisfied" that the state of facts calling for such action exists he shall have the power and it shall be his duty, to suspend by proclamation, etc. That is, it shall be his duty *then, at that time*, to make such suspension. The answer to this question, therefore, I think,

must be that you have not the power to make the proclamation to take effect at a future indicated date.

Your second question is as follows:

"As all of the articles enumerated in section 3 are to be taken into account in considering concessions which the United States has made to secure reciprocal trade, is it competent for me, if I find the existing conditions of trade with a particular nation to be reciprocally unequal and unreasonable, to suspend by proclamation the free introduction of one or more of these articles?" * * *

It seems to me quite clear that this statute groups sugar, molasses, coffee, tea, and hides in such a way as to be conclusive upon the President, so that when he shall be satisfied that the government of any country producing these five articles imposes duties or other exactions upon the products of the United States which we deem reciprocally unequal and unreasonable he is in duty bound to suspend, by proclamation to that effect, the statute providing for the free introduction of all of those articles from that country into the United States. I am unable to find in the Statute any warrant for a selection of one or more articles as subject to reimposition of duty. The second question is therefore answered in the negative.

Thirdly, you ask, in substance, whether in the proclamation the countries with which this Government has satisfactory trade arrangements may be named, and the proclamation reimposing the duties made general as to all others, or whether the countries imposing duties or other exactions deemed reciprocally unequal and unreasonable shall be specifically named in the proclamation, and the duties imposed accordingly. This is, perhaps, a question of form rather than substance, but I can not doubt that the latter is the mode contemplated by the statute. This is the direct and natural course. Moreover, the last line of the portion of the statute above quoted seems to leave no room for doubt that the particular country on whose products the duties are to be reimposed is to be named. The language used is "such designated country."

Very respectfully,

W. H. H. MILLER.

The PRESIDENT.

REMOVAL OF DEPOSIT OF BALLAST.

There is no power in the Secretary of War or in the supervisor of the harbor of New York to prevent the deposit of ballast in New York Harbor at a distance of more than 3 miles from the shore at low-water mark.

DEPARTMENT OF JUSTICE,
January 6, 1892.

SIR: I have, by reference, the letter of December 23, written by H. B. Robeson, supervisor of the harbor of New York, to Gen. Casey, Chief of Engineers, with the indorsements, touching the matter of the deposit of ballast outside of New York Harbor, and at a distance of more than 3 miles from the shore at low-water mark.

You ask my opinion as to whether or not the supervisor of the harbor or the War Department can interfere to prevent these deposits.

In answer I have to say: I know of no statute authorizing such interference, nor of any power to so interfere in the absence of statute. The indorsement of Col. Lieber, Acting Judge Advocate-General, seems to cover the subject-matter.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

OCEAN MAIL SERVICE—CONDITIONAL BIDS—DISCONTINUANCE OF SERVICE—CONTRACT.

Where the Government formally accepted the proposition of one party for carrying ocean mails over route No. 11, and the offer of another party for carrying ocean mails over routes Nos. 31 and 32, pursuant to the act of March 3, 1891, chapter 519: *Held*, that the position of the Post-Office Department that contracts for routes 31 and 32 would not be executed until the contract for route No. 11 had been executed and the claim of the successful bidder for route No. 11 that he would not execute the contract as to route 11 because another party had been awarded the contract as to a route known as No. 35, claiming it had verbally agreed that his bid as to route No. 11 was contingent on his obtaining the contract as to route No. 35, were equally untenable.

Section 817, Postal Laws and Regulations, can not be applied to contracts for ocean mail service under this act. The bidder to whom the contract for route No. 11 was awarded, if he really understood that his

bid was contingent on his obtaining the contract for route No. 35, cannot be prosecuted under section 3954, Revised Statutes, as amended August 11, 1876. Action can be brought against him and his sureties on his bid under section 3945, Revised Statutes, as amended January 23, 1874. The acceptances of the Government of the bids on routes Nos. 31 and 32 constituted a contract.

DEPARTMENT OF JUSTICE,
January 18, 1892.

SIR: It appears by your communication of January 12, instant, and the inclosures thereof, that, in obedience to the act of Congress of March 3, 1891 (26 Stat., 830), entitled "An act to provide for ocean mail service between the United States and foreign ports and to promote commerce," the Postmaster-General, by advertisement, invited proposals for carrying the mails between the United States and various other countries, and that William H. T. Hughes, of New York, sent in proposals for carrying the mail from New York to Buenos Ayres, Argentine Republic, being route No. 11, and that the New York and Cuba Mail Steamship Company, a corporation existing under the laws of the State of New York, sent in proposals for carrying the mail from New York to Tuxpan, Mexico, by Havana, Progreso, and Tampico, etc., being route No. 31, and that this same company sent in proposals for carrying the mail from New York to Havana, etc., being route 32.

These proposals have been formally accepted by the Postmaster-General.

You say, however, that "the Postmaster-General has declined to execute the contracts for routes 31 and 32 until that for route 11 has been executed, it having all along been stated by Hughes and the company he represents that they proposed operating the three routes together and as one interest, notwithstanding the contract for 11 was awarded to Hughes under his own bid."

On the other hand, Hughes declines to execute a contract for route 11 because the bid of the New York and Cuba Mail Steamship Company for route 35 has not been accepted, stating that he had fully explained to you that his ability to perform mail service on route 11 was dependent on the acceptance of the bids for routes 31, 32, and 35.

But I see no authority of law for introducing into the writ-

ten contracts resulting from the proposals made by Hughes and the company, and their acceptance by you, verbal understandings and conversations which took place before said contracts were formed. Each of the said proposals was separately accepted, and stands upon an independent footing, and the execution of the contract under any one of the said proposals can not be made a condition to the execution of the contract under another. Indeed, it was one of the terms of advertisement inviting proposals that "consolidated or combined bids proposing one sum for two or more routes, *or offering to perform one service on one route conditioned on the acceptance of any other bid will not be considered.*"

It follows, therefore, that the position taken by the Post-Office Department, that the contracts for routes 31 and 32 will not be executed until the contract for route 11 shall have been executed, and that the position taken by Mr. Hughes that he will not execute the contract for route 11 because the bid of the New York and Cuba Mail Steamship Company for route 35 has not been accepted can not be sustained. Indeed, to sustain either of these positions would be to hold that one kind of contract might be advertised for and another kind actually executed, at the option of the parties, thus depriving the service of the main advantages of advertising for proposals.

The next inquiry is whether section 817, Postal Laws and Regulations 1887, respecting the discontinuance of mail service and the allowance as full indemnity to the contractor of one month's extra pay, can be applied to ocean mail service under the act of March 3, 1891, which regulation reads as follows:

"The Postmaster-General may discontinue or curtail the service on any route, in whole or in part, in order to place on the route superior service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor one month's extra pay on the amount of services dispensed with and a *pro rata* compensation for the amount of services retained and continued."

In my opinion, to hold that contracts for ocean mail service under the act of March 3, 1891, were subject to regulation 817 would introduce an element of instability into such con-

tracts which would tend to impair seriously the usefulness of the act.

The act requires (section 3) that contractors for mail service under it shall construct ships of several classes "after the latest and most approved types, with all the modern improvements and appliances for ocean steamers," the vessels of each class to be capable of maintaining a certain speed in ordinary weather.

It also provides (section 4) that vessels of the first, second, and third classes shall be constructed "with particular reference to prompt and economical conversion into auxiliary naval cruisers, and according to plans and specifications to be agreed upon by and between the owners and the Secretary of the Navy, and they shall be of sufficient strength and stability to carry and sustain the working and operation of at least four effective rifled cannon of a caliber of not less than 6 inches, and shall be of the highest rating known to maritime commerce."

It is further provided (section 9) that such steamers may be taken and used by the United States as transports or cruisers upon paying their actual value at the time of taking.

Having regard now to the large amount of capital necessary to enable a contractor under this law to furnish the plant requisite for executing his contract, and to the fact that all vessels to be built must be of a particular construction and have a certain speed, it seems to me only reasonable to say that Congress intended that a contract under this law should not be discontinued or modified, as indicated in regulation 817, unless authorized by the terms of the contract itself.

In other words, Congress intended that the law governing these contracts, in the particulars stated, should be given by the contracts themselves and not by the will of one of the contracting parties.

Your next inquiry is in the following words: "The Department is also desirous of ascertaining if, in the event of Hughes's failure to execute his contract for route 11, he can be proceeded against under Revised Statutes 3954, as amended by act of Congress of August 11, 1876 (19 Stat., 130); penalty for making straw bids."

The provision of law referred to declares "that any" per-

son bidding for the transportation of the mails upon any route which may be advertised to be let, and receiving an award of the contract for such service, who shall "*wrongfully refuse or fail*" to enter into a contract with the Postmaster-General shall be deemed guilty of a misdemeanor and be punished by a fine of not more than $5,000, and by imprisonment for not more than twelve months.

It appears by the correspondence accompanying your communication that Mr. Hughes bases his refusal to execute a contract for route No. 11 upon what he claims to be a verbal understanding between him and the Postmaster-General. It is true, that officer denies the existence of any such understanding, but if Mr. Hughes has been acting on the belief that such an understanding was to be collected from conversations between him and the Postmaster-General that occurred before the proposals were accepted, I do not see how Mr. Hughes can be said to have "wrongfully" refused or failed to execute the contract in question. Congress evidently meant to make a distinction between a refusal or failure on some honest ground or reason, however bad in point of law, and a "wrongful" refusal or failure proceeding from intentional disregard of the contract rights of the United States.

I am next asked "if action can be brought under Revised Statutes 3945, as amended by act of June 23, 1874, section 12 (18 Stat., 235), against the accepted bidder and his sureties," by which I understand you to ask whether an action will lie against Mr. Hughes and his sureties on the bond that accompanied his bid, and which the above legislation requires shall accompany every bid. From the facts before me it seems that Mr. Hughes has been guilty of a breach of the condition of his bond.

I am asked to say whether "the fact that notice was given of the award of routes 31 and 32 binds the Department, notwithstanding the Postmaster-General has not yet affixed his signature to the contracts."

In my judgment, a contract between the successful bidders for routes 31 and 32 and the United States resulted from notice to them of the acceptance of their bids by the Postmaster-General, although he had not signed the contracts for said routes.

In *Garfielde* v. *United States* (93 U. S., 242, 244) this court said "the Court of Claims holds that the proposal on the part of Garfielde and the acceptance of the proposal by the [Post-Office] Department created a contract of the same force and effect as if a formal contract had been written out and signed by the parties. Many authorities are cited to sustain the proposition. We believe it to be sound, and that it should be so held in the present case." (See also *Taylor* v. *Merchants' Fire Insurance Company*, 9 How., 390.)

This I believe disposes of all the questions submitted for opinion.

Very respectfully,

W. H. H. MILLER.

The POSTMASTER-GENERAL.

PUBLIC BUILDING—JURISDICTION.

A State statute that the United States shall have over land to be taken for a public building "the right of exclusive legislation and concurrent jurisdiction together with the State of Louisiana" is not a compliance with the act of April 26, 1890, chapter 160, requiring a cession to the United States of jurisdiction over the site selected.

DEPARTMENT OF JUSTICE,
January 25, 1892.

SIR: On the 19th instant you invited the attention of the Attorney-General to the act of Congress approved April 26, 1890 (26 Stat., 67), authorizing the Secretary of the Treasury to erect a public building at Baton Rouge, La., and to procure a suitable site therefor. You request him to advise you whether the State of Louisiana has complied with the requirement of that statute in its cession of jurisdiction to the United States over the site about to be purchased. The act provides that payment for the property selected for the site shall not be made until the receipt of the written opinion of the Attorney-General in favor of the validity of the title to the site selected, and when the State of Louisiana shall have ceded to the United States jurisdiction over the site selected, during the time that the United States shall be or remain the owner thereof, for all purposes excepting the administration of the criminal laws of said State and the service of

civil process therein. The State of Louisiana, by the act of its legislature, volume 118, page 166, approved July 6, 1882, has provided that the United States shall have over all property selected for the purposes of the Federal Government "the right of exclusive legislation and concurrent jurisdiction together with the State of Louisiana" and "shall hold the same free from all State, parochial, municipal, or other taxation."

Is this cession of jurisdiction within the requirements of the act of April 26, 1890, above referred to?

Section 355 of the Revised Statutes provides that no public money shall be expended upon any site or land purchased by the United States for the purpose of erecting thereon a public building until the written opinion of the Attorney-General shall be had in favor of the validity of the title, or until the consent of the legislature of the State in which the land or site may be to such purchase has been given. The act of the legislature of Louisiana would seem to be a compliance with section 355, but of course the special act controls the section in the general statutes in so far as it is more restrictive. Section 355, therefore, does not aid the discussion. By an opinion rendered August 13, 1891, the Attorney-General decided that acts of the legislatures of Kansas and Illinois, providing that the United States should have "the right of exclusive legislation and concurrent jurisdiction" over sites selected for Federal public buildings did not comply with a requirement of the statute that these States shall cede to the United States "exclusive jurisdiction over the same during the time the United States shall be or remain the owner thereof for all purposes except the administration of the criminal laws of said State and the service of civil process therein." The only difference between the case now presented and that upon which the Attorney-General passed, in the opinion referred to, is the omission in the Baton Rouge act of the word "exclusive." The difference does not change the construction.

The cession required is of jurisdiction for all purposes except the administration of the criminal laws of the State and the service of civil process therein. The exception is of jurisdiction, which could only, under any circumstances, be exercised by the State. If the requirements were satisfied

by a cession of concurrent jurisdiction, no such exception would be necessary. Jurisdiction in the United States Government for all purposes, except a jurisdiction which only the State can exercise, must mean exclusive jurisdiction in the United States with the exception named. For these reasons the cession by the State of Louisiana of jurisdiction to the United States by the act of the legislature in 1882 is not a compliance with the requirements of the act of Congress authorizing the construction of the public building at Baton Rouge.

Very respectfully, yours,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

APPROPRIATION—TRANSFER.

The appropriations in the act of June 14, 1880, chapter 211, and in the act of March 3, 1881, chapter 136, were general and available for payment of damages sustained by the improvements contemplated to be made by those acts as well as for the actual work of construction. Consequently the transfer made of a portion of this appropriation to the Interior Department, to be used in payment to Indians, was proper, but the act of August 19, 1890, chapter 807, relieved the amount so transferred from the use to which by such transfer it had been assigned, and, unless the money has now been covered back into the Treasury, the unexpended balance of the portion so transferred can properly go back into the original fund.

DEPARTMENT OF JUSTICE,
January 26, 1892.

SIR: By your letter of January 21 you submit for opinion the construction of the language of certain statutes:

First, in the act of June 14, 1880 (21 Stat., p. 193), is an appropriation in these words:

"For the reservoirs at the head waters of the Mississippi River, to be used in the construction of a dam at Lake Winnibigoshish, seventy-five thousand dollars: *Provided*, That all injuries occasioned to individuals by overflow of their lands shall be ascertained and determined by agreement or

in accordance with the laws of Minnesota, and shall not exceed in the aggregate five thousand dollars." * * *

The act of March 3, 1881 (21 Stat., p. 481), reads as follows:

"For reservoirs upon the head waters of the Mississippi River and its tributaries, one hundred and fifty thousand dollars; and this sum, together with the sum of seventy-five thousand dollars heretofore appropriated for the construction of a dam at Lake Winnibigoshish, shall be expended at such places on said head waters of the Mississippi River and its tributaries as the Secretary of War shall determine: *And it is provided*, That compensation for any private property taken or appropriated for any of said improvements, and all damages to private property caused by the construction of any of said dams, by flowage or otherwise, shall be ascertained and determined under and in accordance with the laws of the State in which such private property is situated. And the Secretary of the Interior is hereby authorized and directed to ascertain what, if any, injury is occasioned to the rights of any friendly Indians occupying any Indian reservation by the construction of any of said dams, or the cutting or the removing of trees or other materials from any such reservation for the construction or erection of any of said dams, and to determine the amount of damages payable to such Indians therefor; and all such damages to private property and to friendly Indians, when ascertained and determined in the manner herein directed and provided, shall be paid by the United States: *Provided, however*, That such damages shall not exceed ten per centum of the sums hereby and heretofore appropriated for the construction of said reservoirs." * * *

Upon these statutes the question arose whether the damages to private property resulting from any of said improvements were to be paid out of the funds so appropriated. Assuming that they were to be so paid, you state that in 1882 the Secretary of the Treasury transferred $15,966.90 of these appropriations from the books of the War Department to those of the Interior Department, for the payment of damages of the character above described sustained by the Chippewa Indians; that the Indians refused to accept this sum in settlement of such damages, and by act of August 19, 1890 (26

Stat., p. 357), Congress made a further appropriation, in the following words:

"To enable the Secretary of the Interior to pay the Chippewa Indians of the State of Minnesota the amount of the several sums, not hitherto paid, awarded them by commission appointed December second, eighteen hundred and eighty-two, for damages sustained on account of the building of dams and reservoirs on Lake Winnibigoshish, Cass Lake, and Leech Lake, one hundred and fifty thousand dollars, to be in full payment for all damages and claims of whatever nature on account of the construction and maintenance of such dams and reservoirs." * * *

Only $333.73 of the $15,966.90 transferred as above having been expended, the question now arises whether the unexpended balance of the sum so transferred may be retransferred to the War Department, and thus again become a part of the original appropriation for the construction of the reservoirs.

In my opinion, the appropriations of $75,000 and $150,000, first above recited, were general and were available for the payment as well for the property taken and damages sustained by reason of the improvements, as for the actual work of such construction. Hence the transfer of the $15,966.90 to the Interior Department for the payment of such compensation and damages was, I think, authorized by law. I think the appropriation of $150,000 in full for such claims by the act of 1890, operated to relieve the amount transferred from the War to the Interior Department books from the use to which, by such transfer, it had been assigned, and to make it proper that such fund should be retransferred and become a part of the original appropriation from which it was taken as if the transfer had never been made. The transfer of the money from the books kept in the Treasury for the War Department to those kept for the Interior Department was a matter of bookkeeping and convenience only, upon the theory that money to be paid to the Indians should be paid through the Interior Department, rather than through the War Department. The necessity for holding the fund in the Interior Department being at an end, there would seem to be no reason why the unexpended balance should not go

back to the original fund. This is, of course, upon the supposition that the money has not been covered back into the Treasury.

I return herewith the papers inclosed.

Respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ABSENCE ON PAY.

Section 4 of the act of March 3, 1883, chapter 128, inhibits heads of Departments and the Executive from granting leave of absence to Department clerks with pay and without charging the time against the period of absence allowed annually by law, in every case except that of the sickness of the clerk concerned.

DEPARTMENT OF JUSTICE,
January 26, 1892.

SIR: Your letter of the 14th ultimo relating to the question of authority to direct or authorize leaves of absence for Department clerks with pay and without charging the time against the annual leave of absence, has, with the letters inclosed therewith, received careful consideration.

Section 4 of the act of March 3, 1883, has reference to the service of clerks and other employés of the several Departments of the Government, and the concluding paragraph thereof (22 Stat., 564) is as follows:

"All absence from the Departments on the part of said clerks or other employés in excess of such leave of absence as may be granted by the heads thereof, which shall not exceed thirty days in any one year, except in case of sickness, shall be without pay."

This enactment, which is obligatory upon all who are vested with authority in the premises, appears to prohibit the Executive from authorizing leaves of absence beyond thirty days in any one year except in case of the sickness of the clerk or employé concerned.

In *Chisholm* v. *The United States*, decided January 11, 1892, the Court of Claims considered section 4 of said act of March 3, 1883.

It is stated in the opinion of the court, that—

"Prior to this legislation the 'principal officer' in each of the Executive Departments had full discretion in the man-

agement of this and kindred minor matters in the Department which he administered, and leaves of absence depended entirely upon his discretion, exercised through the appropriate subordinates."

It is stated that the statute is "one of limitation upon a power necessarily implied as an incident to Executive responsibility;" and that it "recognizes a privilege to a certain leave of absence during the year."

Upon the question presented by your letter the court declares that—

"The act authorizes leaves of absence to be granted for thirty days in any one year with pay; it prohibits pay for a longer absence than thirty days in any one year (even if leave be properly given), but with this exception, that pay may be given for an absence exceeding the said thirty days in any one year when sickness is the cause of that extended absence."

Although the patriotic service which has occasioned this inquiry is one that is rightfully entitled to such favorable consideration as can be given under the laws, yet, in view of the phraseology of the statute, and of such constructions thereof as have been made, it is my opinion that heads of Departments, and the Executive of the United States, are, alike, inhibited by the enactment from granting leaves of absence to Department clerks with pay and without charging the time against the period of absence allowed annually by law, in every case except that of the sickness of the clerk concerned.

Very respectfully,

W. H. H. MILLER.

The PRESIDENT.

OCEAN MAIL SERVICE—CONTRACT.

The Postmaster-General may accept a proposal from the Pacific Mail Steamship Company, the holder of a contract with the Government for performing second-class mail service, to perform first-class mail service under the subsidy act of March 3, 1891, chapter 519, on the condition that if the proposal be accepted, the existing contract shall be rescinded, but the company should be required to stipulate for the safety of the Government that, in consideration of the above, the existing contract shall, at the option of the Government, be void in case some other party than the company shall be the successful bidder for first-class service.

DEPARTMENT OF JUSTICE,
January 30, 1892.

SIR: Your communication of January 21, 1892, lays before me for an opinion the following case and question:

"A contract has been entered into with the Pacific Mail Steamship Company, of New York, to carry the mails of the United States from San Francisco to Hongkong, via Yokohama, under the provisions of an act entitled 'An act to provide for ocean mail service between the United States and foreign ports, and to promote commerce,' approved March 3, 1891, for a term of ten years begun November 1, 1891, in vessels of the third class for the first two years of the term, and in vessels of the second class for the remaining eight years of the term, being in accordance with the proposal of the said company which was rendered in response to the Postmaster-General's advertisement of July 15, 1891.

"The company is now desirous of performing the service between the ports named in vessels of the first class in lieu of those of the second class covered by the contract; and the better service would, in my judgment, be advantageous to the public interest. A contract for the improved service could not, of course, be let except to the lowest bidder in response to an advertisement to be hereafter issued. If such an advertisement were published and the Pacific Mail Steamship Company should be the lowest bidder, and a contract awarded to it in vessels of the highest class, the company would insist that the contract for the same should include a provision for the annulment of the contract now in existence for vessels of the lower grade. Without an understanding that a stipulation of this kind would be included in the contract the company would not care to bid in response to an advertisement. It therefore becomes important to determine whether the Postmaster-General is authorized in law to accept a proposal, and to execute a contract thereunder, which contained a provision for the annulment of the former contract and the substitution of the other in its stead. I will thank you to inform me if, in your judgment, an acceptance of this kind and the execution of a contract accordingly are authorized by the law."

To answer your communication in the negative would be to place a restriction on the powers of the Postmaster-

General under the act of March 3, 1891, which the act does not expressly impose, and which, if imposed by implication, might, as the case submitted shows, stand sometimes in the way of the main purposes of the act.

It has not been usual to treat powers to make contracts for services and materials for the use of the Government as belonging to the class of powers which, when once exercised upon a matter, cease to have further existence as to such matter. Instances will be found where Government officers authorized to make contracts and contractors have rescinded or modified contracts, or substituted other contracts for those rescinded, and where such officers have waived technical breaches of conditions by contractors (*Mason* v. *United States*, 17 Wall., 68; *United States* v. *Corliss Steam Engine Co.*, 91 U. S., 321; *United States* v. *Martin*, 94 U. S., 400; *United States* v. *Justice*, 14 Wall., 535; *United States* v. *Adams* 7 Wall., 464). The effect of these cases is to establish the general proposition that, within varying limits, officials invested with authority to bind the Government by contract have more or less power, after making a contract, to rescind or affect it in some way by supplemental agreement with the contractor.

Congress must be supposed to have been acquainted with the cases and the well-established practice in which this principle has been recognized, and, it may be presumed, would have imposed some express restriction on the Postmaster-General as to the rescission of contracts if it had intended that that officer should be governed by some stricter principle.

I think, therefore, that the Postmaster-General may accept a proposal from the Pacific Mail Steamship Company to perform first-class ocean mail service on the route above mentioned under the subsidy act of March 3, 1891, depending on the condition that, if the proposal should be accepted, the existing contract between that company and the Postmaster-General for ocean mail service under the same act shall be rescinded, and that the Postmaster-General may execute a formal contract in furtherance of such accepted proposal.

But before such an arrangement can be carried out with safety to the Government it will be necessary that the

Pacific Mail Steamship Company should stipulate with the Postmaster-General that in consideration of the premises the existing contract between them for ocean mail service shall be null and void, at the option of the Postmaster-General, in case some other person or corporation than the Pacific Mail Steamship Company should be the successful bidder for first-class service on the said route under the subsidy act.

Very respectfully, your obedient servant,

W. H. H. MILLER.

The POSTMASTER-GENERAL.

LAND GRANT—FORFEITURE.

In the absence of any action on the part of Congress declaring forfeiture or directing suit, the Attorney-General is not warranted in instituting proceedings to recover to the United States the title and possession of the land granted by section 19 of the act of March 3, 1877, chapter 108.

DEPARTMENT OF JUSTICE,
February 2, 1892.

SIR: I have the honor to acknowledge the receipt of your communication, bearing date October 2, 1891, calling my attention to the grant made by the United States to the county of Garland in the State of Arkansas by section 19 of the act of March 3, 1877 (19 Stat., 380), and to the acts performed and proceedings had in relation to such grant and the lands set apart in pursuance thereof. You refer to the opinion given by Mr. Attorney-General Garland, October 7, 1885 (18 Opin., 264), and to the decision in *State* v. *Baxter et al.* (38 Ark., 462), and request an examination with a view to a reconsideration, etc., and suggest that proceedings be instituted to recover to the United States the title and possession of the lands designated under said section 19.

The section cited is as follows:

"SEC. 19. That a suitable tract of land, not exceeding five acres, shall be laid off by said commissioners, and the same is hereby granted to the county of Garland in the State of Arkansas as a site for the public building of said county: *Provided*, That the tract of land hereby granted shall not be taken from the land reserved herein for the use of the United States."

It appears that June 23, 1879, the Hot Springs commission set apart $3\frac{62}{100}$ acres, the same being block No. 114 of the city of Hot Springs, and ordered that such tract should be "dedicated as the land granted by the United States to the county of Garland * * * as the site for a public building."

The county never has occupied any of said land, but has located its court-house and jail at a considerable distance therefrom.

It appears that in January, 1880, the county judge of Garland County assumed to lease said land from said county to Baxter and Moore for a term of ninety-nine years for a total rental of $1,025, and these lessees entered into possession and subdivided the lot and sublet considerable portions thereof to innocent parties, who expended considerable sums of money in building upon and improving the same.

January 15, 1881, suit was brought in the name of the State of Arkansas for the use of Garland County against Baxter and Moore and their sublessees and the said county judge, to obtain to the county the exclusive title to and possession of said land. The circuit court of Garland County sustained a demurrer to the amended bill filed, "for want of proper parties plaintiff," but the supreme court of the State (38 Ark., 462) at its May term, 1882, reversed this ruling and remanded the case for further proceedings.

It is stated that said court, since making the above decision, has declared said lease to be a fraud upon Garland County and has set the same aside.

Following this decision, January 2, 1890, a final decree was entered in the circuit court of the State declaring the county to be the owner of block 114 and adjudging the lease void, and carrying a judgment against said county and in favor of owners of improvements for $6,144.89, and giving these occupants the right to hold the land until they are repaid by rents or otherwise.

Said county is given judgments against other parties for rents aggregating $2,385.74.

Taking into consideration the phraseology of the granting act, the action taken thereunder, the proceedings had in the State courts, and the complications existing between the county and the occupants, and giving due attention to the suggestions contained in the opinion of Mr. Attorney-Gen-

eral Garland (*supra*), it is my opinion that in the absence of any action on the part of Congress declaring forfeiture or directing suit I am not warranted in instituting proceedings to recover to the United States the title and possession of the lands granted by section 19 of the act of 1877.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

REWAREHOUSING.

The act of March 28, 1854, section 3000, Revised Statutes, strictly construed, does not authorize repeated warehousing, but where merchandise has been rewarehoused in conformity with the regulations and practice of the Department the action of the owner can not be declared unauthorized.

DEPARTMENT OF JUSTICE,
February 6, 1892.

SIR: I have received your letter of the 18th of December, requesting an opinion as to the construction of section 5 of the act of March 28, 1854 (10 Stat., 272), as in part set forth in section 3000 of the Revised Statutes.

The case stated arises upon certain casks of domestic whisky exported to Europe, imported therefrom, entered for warehousing at New York, withdrawn for transportation to Louisville and rewarehoused there, and sometime subsequently returned to New York and rewarehoused at that port.

The question involved is whether the law authorizes imported merchandise to be rewarehoused repeatedly in different districts, or whether the force of the statute is spent by one withdrawal from a bonded warehouse and transportation to a warehouse in another district and a rewarehousing thereat.

It is understood that the general regulations of the Treasury Department have always conceded to importers the privilege of repeated rewarehousing under the law, and that the common practice has been in accord with the regulations.

The act of March 2, 1799 (1 Stat., 627), which is "An act to regulate the collection of duties," etc., provides that imported merchandise may be transported from one collection

district to another to be exported, with the benefits of drawback; and safeguards are prescribed to protect the United States in the proceeding.

Section 2 of "An act to establish a warehousing system," etc., passed August 6, 1846 (9 Stat., 54), provides: "That any goods when deposited in the public stores in the manner provided * * * may be withdrawn therefrom and transported to any other port of entry under the restrictions provided for in the act of the 2d of March, 1799, in respect to the transportation of goods * * * from one collection district to another to be exported;" * * * and the owner is required to give his bond for the deposit of the goods "in store in the port of entry to which they shall be destined."

The act of 1854 (*supra*) is "An act to extend the warehousing system," etc., and provides in section 1 for the storage of merchandise "which shall have been duly entered and bonded for warehousing," and the "place of storage [is] to be designated on the warehouse entry at the time of entering such merchandise at the custom-house."

By section 5 the merchandise "may be withdrawn under bond without payment of duties" and transported to a bonded warehouse in any other collection district "and rewarehoused thereat," and provision is made for a designation by the Secretary of the Treasury of the routes over which "such goods, wares, or merchandise, may be so transported to their destination."

This enactment, so far as applicable, is codified as follows:

SEC. 3000. Any merchandise, duly entered for warehousing, may be withdrawn under bond, without payment of the duties, from a bonded warehouse in any collection district, and be transported to a bonded warehouse in any other collection district, and rewarehoused thereat; and any such merchandise may be so transported to its destination wholly by land, or wholly by water, * * * over such routes as the Secretary of the Treasury may prescribe." * * *

Nothing is found in either enactment which, in terms or by necessary implication, authorizes a third or a second rewarehousing or a second or further destination of the merchandise upon which the duties may remain unpaid.

The case submitted is one in which the owner of the merchandise followed the regulations and practice of the Depart-

ment, therefore he was justified in rewarehousing a second time. The fact should be noted also, although it is not necessary to determine its consequence, that in this instance the merchandise was not sent to a new district; it was returned for warehousing where it was originally entered.

It is my opinion that as the merchandise designated in your inquiry was rewarehoused in conformity with the regulations and practice of the Department, the action of the owner can not now be declared unauthorized.

It is my opinion that the statute, strictly construed, does not authorize repeated rewarehousing. A continuance of the practice as new cases may arise must depend upon executive direction, and the legal effect of a change in the procedure, should one be made after this long period of practical construction, is a judicial question which can only be determined by the courts.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

BONDS—PARTNERS—POWER OF ATTORNEY.

If a power of attorney signed by the individual members of a firm as well as in the firm name confers explicit authority upon one of its members to use the partnership name in signing entries and executing certain customs bonds, acts performed in compliance with such authorization are obligatory upon the firm.

DEPARTMENT OF JUSTICE,
February 9, 1892.

SIR: Your letter of the 21st ultimo, relating to the execution of certain custom-house bonds, is received.

You state that complaint is made that at the port of Baltimore the attorney of a firm is compelled to sign the individual name of each partner to the entry and to each of the several bonds required, while at the port of New York the attorney of a firm is permitted to use the "partnership name in signing entries and executing bonds, the power of attorney filed with the collector being signed by each member of the firm individually as well as for the firm."

You call my attention to the act of June 20, 1876 (19 Stat., 60), and to Synopsis No. 9238.

The act of June 20, 1876, is in effect a reenactment of the first clause of section 25 of the act of March 1, 1823. (3 Stat., 737.)

It does not in terms extend beyond bonds given for the payment of duties and can not be rested upon as authorizing a partner or attorney to bind the partnership by signing the firm name to documents other than those specified in the statute.

The rule referred to in said synopsis, that one partner has no implied authority to bind his copartners by executing a bond in the firm name, is well established.

It can not be said, however, that the partners constituting a firm are powerless to authorize one of their number, or another proper person, to bind the partnership by executing a bond to be used in the transaction of its business.

The inhibition of the common law rule referred to is against an implied power in one partner to execute the instrument without specific authority.

I have not a copy of the power of attorney in use in New York before me, but if full and explicit authority to make the entries and to sign the bonds in question in the firm name is specified, and the instrument is duly executed "by each member of the firm individually as well as for the firm," and filed with the collector, it must, in my opinion, be held that acts performed in compliance with such authorization are obligatory upon the firm.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—CIVIL SERVICE COMMISSION.

The question whether the Civil Service Commission shall issue a certificate for reinstatement of an officer of the Treasury Department is not a question arising in the administration of the Treasury Department, and not, therefore, a question upon which it would be proper for the Attorney-General to express an opinion at the request of the Secretary of the Treasury.

DEPARTMENT OF JUSTICE,

February 9, 1892.

SIR: By letter of the 22d ultimo you asked the opinion of the Attorney-General upon the question whether the Civil Service Commission should issue a certificate for the

reinstatement of one J. H. Wilkinson, formerly a clerk in your Department, under amended civil service rule 10. The Commission have declined to issue such a certificate on the ground that he is not eligible under the rule mentioned. The rules of the Civil Service Commission are established by the Commission, with the approval of the President. It is their duty under the law to execute those rules, and in the execution of them necessarily to construe them. The Civil Service Commission is not included within any of the great Departments of Government—it is an independent bureau. The question whether the Commission shall issue a certificate for the reinstatement of an officer of your Department is not a question arising in the administration of your Department, and is not, therefore, a question upon which it would be proper for the Attorney-General to express an opinion at your request. The question is one which perhaps affects the administration of your Department, but it is not one which you, as the head of the Department, are called upon to decide in its administration. The Civil Service Commission is independent of your Department. Many of your appointments are made by law to depend upon its decision, which you can not control or review. Until the Commission shall request the President, to whom they are directly responsible, to present the question of law arising in the discharge of their duties to the Attorney-General, he is not called upon to give, and should not under the law give, his opinion. It is true that questions of this kind, with reference to the action of the Civil Service Commission, have been answered by the Attorney-General when the questions were submitted by the heads of Departments (19 Opin., 434, 533), but the question of the right of the head of the Departments to have an opinion from the Attorney-General was not raised or considered in those cases.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

COAL FOR USE OF GOVERNMENT—IMPORTATION.

Bituminous coal imported for the use of the Government is dutiable under paragraph 432 of the tariff act of October 1, 1890, chapter 1244.

DEPARTMENT OF JUSTICE,
February 9, 1892.

SIR: Replying to your letter of the 30th ultimo, requesting an expression of the opinion of the Attorney-General on the question whether coal, if bituminous, imported for the use of the United States marshal's office at Sitka, Alaska, is dutiable under the act of October 1, 1890, paragraph 432, I have the honor to state that in my opinion such coal is dutiable. In the tariff act of 1874, Revised Statutes, section 5, page 483, there was a provision that all articles imported for the use of the Government should come in free. This was part of the free list of the tariff act of 1874. In the tariff act of March 3, 1883, under paragraph 645, in the free list of that act, a similar provision was made. No such provision is contained in the free list of the act of October 1, 1890. The omission of such a provision, in view of the previous legislation, would seem to show necessarily the intention of Congress not to exclude from the operation of the act articles imported for the benefit of the United States.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

ATTORNEY-GENERAL.

The Attorney-General is not authorized to give an opinion on a question judicial in character.

DEPARTMENT OF JUSTICE,
February 11, 1892.

SIR: Your communication of February 9, instant, and the accompanying papers bring to my attention for an opinion the important question of the right of the Northern Pacific, Yekiwa and Kettitas Irrigation Company to construct a dam across the Yakima River for the purposes of irrigation.

The Yakima River is one of the boundary streams of the Yakima Reservation, and you desire to know whether, in my opinion, the construction of the dam in question, which is now in course of being built, will be an invasion of the rights of the Indians residing on said reservation, as the same are guaranteed by the treaty of June 9, 1885. (12 Stat., 951.)

I do not perceive that the question presented is one that arises in a matter before the Department of the Interior which you must pass upon, for I apprehend that the Secretary of the Interior has no authority to settle the question which has arisen between the Indians and the irrigation company. That question is essentially judicial in character, and must be determined by the courts.

It has been repeatedly held by my predecessors that the Attorney-General has no authority to give an opinion in such a case. (1 Opin., 575; 3 *ib.*, 368; 9 *ib.*, 421; 10 *ib.*, 50, 122, 220; 13 *ib.*, 160.)

I regret, therefore, to say that I have no power to give the opinion requested.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

CREDIT.—POSTAL FUNDS.

The act of September 30, 1890, chapter 1126, is mandatory, and compels the Postmaster-General to credit the sum named in the act on the accounts of the postmaster named therein.

DEPARTMENT OF JUSTICE,
February 15, 1892.

SIR: By letter of the 27th ultimo you requested the Attorney-General to advise you what action you should take under the following provision in the deficiency appropriation act of September 30, 1890 (26 Stat., 525):

"That the proper officers of the Post-Office Department are hereby authorized and directed to credit in the account of O. M. Laraway, late postmaster at Minneapolis, Minn., the sum of $11,115.38, being the value of certain *postal funds* which were stolen from the safe in said post-office on the 8th day of July, 1886, without the fault of said postmaster."

The facts upon which this action of Congress was founded are as follows:

On the night of July 8, 1886, the post-office at Minneapolis was entered by burglars, who stole therefrom postage stamps amounting in value to $15,330. The loss was not due to any fault or negligence on the part of the postmaster. On January 6, 1887, the claim for a credit by the postmaster was transmitted to Congress by the Postmaster-General, as required by the acts of March 7, 1882, and May 9, 1888, with the recommendation that the credit for the amount above mentioned be authorized. Pending the consideration of the claim by Congress, postage stamps of the value of $4,115.62 were recovered from the burglars and returned to the Department and credit therefor allowed to the postmaster. This fact was communicated by the Postmaster-General to the House of Representatives December 18, 1889, with a recommendation that a credit should be authorized in the postmaster's account for the difference between the amount stolen and the amount recovered, which was $11,214.38. The provision in the deficiency appropriation act, quoted above, was made in view of this recommendation.

You state that your Department has held that there was a manifest misapprehension of the facts on the part of Congress in authorizing an allowance for property which had not been stolen, namely, postal funds, and that it would be improper and illegal to allow credit for such property; and that on the other hand the language of Congress above quoted confers no authority to allow credit for the postage stamps which were stolen.

I can not concur in this view. The only theft which occurred on the day mentioned from the post-office at Minneapolis was of postage stamps. It was this theft, unquestionably, from which Congress intended to save the postmaster harmless. There is no doubt as to the identity of the transaction. The term "postal funds," under the circumstances, is wide enough to include postage stamps.

But whether this be true or not, the language of the statute is mandatory. No discretion is left to you or the officers of your Department to grant or withhold the credit therein provided for. In obeying the express command of Congress, you and your subordinates are entirely protected. It is not

for you to find the fact under this act. Congress has found the facts, and reciting them lays down your duty. The Government also is entirely protected. No doubt exists that Congress intended to relieve Mr. Laraway from the loss occasioned by the burglary on the night of the day mentioned. The identity of the loss referred to is not doubtful, nor is the amount in dispute. One payment of it secures the Government.

Whether, when Congress, acting on a palpable mistake of fact, has directed an officer to allow credits or pay money to persons not in any way entitled to the same, such officer may delay obedience to the mandatory language of the statute until he can submit the evidence of the mistake to that body for its correction is not here decided, because the facts of the case do not require it. Mr. Laraway is entitled in equity to this credit. Congress has ordered that it shall be allowed to him. A mere misdescription in a recital is no ground for delay in obeying the command of Congress.

The fact that the credit allowed by Congress lacks about $100 of the actual loss is ground for an appeal by Mr. Laraway to Congress for an additional allowance, but certainly constitutes no ground for refusing to accord the partial relief given him under this act.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The POSTMASTER-GENERAL.

Approved:

W. H. H. MILLER.

TREASURY NOTES—UNITED STATES NOTES.

The Treasury notes authorized to be issued in payment for silver bullion by the act of July 14, 1890, chapter 708, are not receivable on deposit in exchange for the currency certificates authorized by the act of June 8, 1872, chapter 346.

DEPARTMENT OF JUSTICE,
February 15, 1892.

SIR: Your letter of February 10, 1892, asks an opinion upon the point whether the Treasury notes authorized to be issued in payment for silver bullion by the act of July 14,

1890 (26 Stat., 289), are receivable on deposit in exchange for the currency certificates authorized by the act of June 8, 1872 (17 Stat., 336). In other words, I am asked whether Treasury notes issued under the act of 1890 are "*United States notes*" within the meaning and for the purposes of the act of June 8, 1872.

At the time the act of June 8, 1872, was passed that part of the currency of the country called United States notes consisted of notes issued on the credit of the United States under the acts of February 25, 1862 (12 Stat., 345), July 11, 1862 (*ib.*, 532), and March 3, 1863 (*ib.*, 709), and, as you inform me, these notes are still outstanding to the amount of about $346,000,000.

The first section of the act of June 8, 1872, now section 5193, Revised Statutes, provides as follows:

"That the Secretary of the Treasury is hereby authorized to receive *United States notes* on deposit, without interest, from national banking associations, in sums not less than ten thousand dollars, and to issue certificates therefor in such form as the Secretary may prescribe, in denominations of not less than five thousand dollars, which certificates shall be payable on demand in United States notes, at the place where the deposits were made."

The act of July 14, 1890 (section 1), authorizes the Secretary of the Treasury to purchase a certain amount of silver bullion in each month, and to issue in payment therefor "Treasury notes of the United States to be prepared by the Secretary of the Treasury, in such form and of such denomination, not less than one dollar nor more than one thousand dollars, as he may prescribe." * * *

Section 2 provides that the notes issued under section 1 shall be redeemable on demand in gold or silver coin, as the Secretary shall determine by regulations to be prescribed by him; that the notes so redeemed shall be reissued, "but no greater or less amount of such notes shall be outstanding at any time than the cost of the silver bullion and the standard silver dollar coined therefrom then held in the Treasury purchased by such notes; and such Treasury notes shall be a legal tender in payment of all debts, public and private, except where otherwise expressly stipulated in the contract, and shall be receivable for customs, taxes, and all public dues,

and when so received may be reissued; and such notes, when held by any national banking association, may be counted as a part of its lawful reserve."

The fact that the act of July 14, 1890, has, as you suggest, placed the "Treasury notes" issued under it substantially on the same footing as "United States notes," but has not called them such, seems to be a strong circumstance to show that Congress did not use these well-known terms synonymously.

The term "Treasury notes" has been generally employed by Congress from an early period to designate interest-bearing notes of the United States, something intermediate between the currency and the funded debt of the United States, and it does not appear probable that Congress would have designated the notes issued under the act of 1890 as "Treasury notes" if it had intended them to be the same, in all particulars, as "United States notes." Such an indiscriminate use of terms which had been theretofore kept distinct, for the most part, can hardly be attributed to Congress.

I am confirmed in this view by the fact that in section 2 of the act of 1890 Congress provides, as we have seen, that the "Treasury notes" authorized to be issued by it *may be counted as a part of the lawful reserve of any national banking association;* for if it had been intended that the "Treasury notes" should be identical with the "lawful money of the United States," that is to say, coin or United States notes, of which alone national-bank reserves can be composed under section 5191, Revised Statutes, there would have been no more necessity for the provision in question than if the act of 1890 had authorized an additional issue of United States notes.

But to my mind, the strongest reason for denying to national banking associations the right to exchange these "Treasury notes" for certificates of deposit, under the act of 1872, is that the power of the Secretary of the Treasury, under that act, is to issue such certificates in exchange for "*United States notes*," no other kind of notes being mentioned.

It may have been that Congress refrained from extending to national banking associations the privilege of exchanging those "Treasury notes" for certificates of deposit, by enlarging the scope of the act of 1872, under the apprehen-

sion that to do so would tend to defeat the purpose of the act of 1890, to increase the volume of the circulating medium of the country. To receive $10,000 in small Treasury notes and issue therefor a single certificate would tend to a contraction, rather than an enlargement of the ordinary circulation of currency.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

LOCATION OF PUBLIC BUILDING.

While the Secretary of the Treasury has the power to erect the public building to be built in the city of Portland, Oreg., at any point within the present limits of that city, yet it is more in accord with the intent of the act of January 24, 1891, chapter 91, to select the location in the limits of said city as they existed at the time that statute was passed.

DEPARTMENT OF JUSTICE,
February 19, 1892.

SIR: I have the honor to acknowledge the receipt of the letter of Acting Secretary Spaulding of February 16, in which it is stated that: "By act of Congress, approved January 24, 1891, the Secretary of the Treasury was authorized to 'acquire a site and cause to be erected thereon a suitable building for the use and accommodation of the custom-house and other Government offices, in the city of Portland and State of Oregon.'"

The letter further states that: "At the date of the enactment of this statute the city of Portland was located on the west bank of the Willamette River, and at the same date there was the city of East Portland and the city of Albina, on the opposite side of the river. Each of these cities had its own city government, post-office, etc. East Portland had a population in excess of 10,000, and Albina a population in excess of 5,000. Since January 24, 1891, these latter-named cities have, by proper legal process, become parts of the city of Portland."

You ask my opinion upon the question whether, "In the selection of the site authorized by the above statute is the Secretary of the Treasury limited to a selection within the

boundaries of the city of Portland as they existed at the time of the passage of the act, or as they now exist or may exist at the time when the authority conferred by said act is exercised."

In answer, I have to say, as a matter of strict law, I think that the Secretary has the power to locate the public building at any point within the present limits of the city of Portland. Congress, in enacting the statute making the appropriation, must be held in law to have contemplated that the boundaries of the city might be changed before the location should be made, and that thereby the location of the building might be affected.

In my opinion, therefore, the location of the building in what was formerly Albina, or East Portland, or, for that matter, in the remotest corner of the remotest addition within the city limits, would not as a matter of strict law be objectionable. At the same time, it is clear that Congress, in enacting this statute and making the appropriation, had in contemplation the location of the building in the city of Portland proper, having then a population of nearly 50,000 people, rather than in one of these suburbs. To so locate the building would be not only within the law but within the plain intent—as matter of fact, not merely as matter of law—of Congress at the time the statute was enacted.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

P. S.—The two inclosures accompanying your letter are returned herewith.

OCEAN MAIL SERVICE—CONTRACT—SURETIES.

Where a contract has been entered into with a party for foreign mail service for a term of ten years under the act of March 3, 1891, chapter 519, it would not be competent to make a new contract with that same party for five years in lieu of the ten years unless the party procured the same by new bidding after due advertisement, and any change in the terms of the contract between the parties releases the sureties on said contract from subsequent liability.

DEPARTMENT OF JUSTICE,
February 20, 1892.

SIR: By letter of the 16th instant the Acting Postmaster-General requested the opinion of the Attorney-General upon the question whether it is competent for you, having entered into a contract for service with the New York and Cuba Mail Steamship Company under "the act to provide for ocean mail service between the United States and foreign ports and to promote commerce," approved March 3, 1891, by which the company has agreed for ten years to carry the mail on certain designated routes at certain prices, to change the contract by agreement with the company so that the term thereof shall be five years instead of ten, and secondly whether, if such change is made, it would release the sureties upon the original contract.

The first question is not free from doubt; but, in view of the strictly competitive letting enjoined by the act, the safer opinion is that the change in the term is such a material change in the contract as to require new advertisements and a new letting.

It would therefore not be competent for you to make a new contract with the New York and Cuba Mail Steamship Company for five years, unless the company procured the same by new bidding after due advertisement.

The second question is freer from doubt. Any change of the contract between the parties releases the sureties from subsequent liability.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The POSTMASTER-GENERAL.

Approved:

W. H. H. MILLER.

PENSION—ENLISTED MAN.

A person who enlisted in the Forty-seventh Regiment of the Pennsylvania Militia pursuant to the President's proclamation for volunteers to serve for six months, even if the regiment was not actually mustered into service of the United States, but was engaged in the service of the United States under the command of an officer of the U. S. Army, has a pensionable status within the first subdivision of section 4693, Revised Statutes.

DEPARTMENT OF JUSTICE,
March 1, 1892.

SIR: In your letter, received by me on the 16th of February last, you make, in substance, the following statement of facts:

June 15, 1863, the President of the United States, by proclamation, called upon the executive of the State of Pennsylvania for 50,000 volunteers, to serve for six months, unless sooner discharged; and on the same day the governor promulgated said call to the people of the State by General Order No. 43. In response to this call those persons who afterwards constituted the Forty-seventh Regiment of Pennsylvania Militia did volunteer. They enlisted; the regiment was duly organized, and its members were, as they supposed, regularly mustered into the service of the United States. As a matter of fact they were not so mustered into the United States service. The regiment was, however, actually engaged in the service of the United States, under the command of a general officer of the U. S. Army, acting under direct orders from the War Department at Washington. This service was mainly rendered outside the State of Pennsylvania, and continued for the period of three months. Randolph M. Manley was a member of Company I of such regiment, and while so in the service with his regiment, in the line of his duty outside the State of Pennsylvania, he incurred the disability (sunstroke) on account of which he was granted a pension. The payment of this pension having been suspended, the question presented is whether he was in the military service of the United States in such a sense as to give him a pensionable status under section 4693 of the Revised Statutes.

The first three subdivisions of that section describing the persons entitled to pensions—being the only portions pertaining to this question—read as follows:

"First. Any officer of the Army, including regulars, volunteers, and militia, or any officer in the Navy or Marine Corps, or any enlisted man, however employed, in the military or naval service of the United States or in its Marine Corps, 'whether regularly' mustered or not, disabled by reason of any wound or injury received, or disease con-

tracted, while in the service of the United States and in the line of duty.

"Second. Any master serving on a gunboat, or any pilot, engineer, sailor, or other person not regularly mustered, serving on any gunboat or war vessel of the United States, disabled by any wound or injury received, or otherwise incapacitated, while in the line of duty, for procuring his subsistence by mutual labor.

"Third. Any person not an enlisted soldier in the Army, serving for the time being as a member of the militia of any State, under orders of an officer of the United States, or who volunteered for the time being to serve with any regularly organized military or naval force of the United States, or who otherwise volunteered and rendered service in any engagement with rebels or Indians, disabled in consequence of wounds or injury received in the line of duty in such temporary service. But no claim of a State militiaman, or nonenlisted person, on account of disability from wounds, or injury received in battle with the rebels or Indians, while temporarily rendering service, shall be valid unless prosecuted to a successful issue prior to the fourth day of July, eighteen hundred and seventy-four."

In the first line of the first of these subdivisions the word "army," as used in relation to the word "officer," is defined to include "regulars, volunteers, and militia." In my opinion the words "military service" are equally broad in their relation to the term "enlisted man," as used in the third line. In other words, the first subdivision includes an enlisted man in the "military service," whether he be in the regulars, volunteers, or militia, "however employed." But the word "militia" is very comprehensive. It includes the entire reserve forces of the State or nation subject to military duty. Ordinarily it covers all able-bodied male citizens between the ages of 18 and 45, and of course includes the enlisted as well as the nonenlisted militia.

In my opinion the distinction between the classes covered by the first and the third subdivisions of this section is found in the fact that those referred to in the first subdivision are the enlisted militia—those who have been regularly organized into companies and regiments, and as such organizations received into the service of the General Government upon

some definite status; while the third subdivision covers the unenlisted militia or other persons; that is, those who may never have been enlisted or in any manner regularly organized for or received into such service, but who nevertheless, as need requires, do volunteer and as "minutemen" render to the Government acceptable "temporary service." To illustrate: In my opinion Mr. Manley, a regularly enlisted member of Company I, of the organized Forty-seventh Regiment of Pennsylvania Militia, is of the class covered by the first subdivision; and "Old John Burns of Gettysburg," who left his home and served through the battle without any legal connection with any company or regiment of the Army, except that he obeyed orders and fought for his country like a soldier, is an extreme illustration of the class covered by the third subdivision. This view is, to my mind, confirmed by a number of considerations:

First. It is incredible that Congress should, by this first subdivision, have intended that an officer of the militia should be pensionable, while an enlisted man, incurring a disability under the same circumstances, should not.

Second. The first subdivision covers militia, "whether regularly mustered or not." The third subdivision says nothing about "muster." The use of the word "muster" at all ordinarily implies an antecedent enlistment. The fact that the word is used in the first subdivision, and not in the third, therefore indicates that the first subdivision has reference to the enlisted or organized militia, and the third to the unorganized militia or other persons.

Third. It is unreasonable to suppose that Congress would have been less liberal in the matter of pensions to enlisted militiamen than to "other persons not regularly mustered" serving upon gunboats, covered by the second division.

Fourth. With reference to persons volunteering simply as minutemen for temporary service, without organic connection with the Army, it is reasonable to suppose that Congress would be more exacting as to the origin of the disability giving a party a pensionable status; and, accordingly we find that as to such persons, covered by the third subdivision, the disability must be "in consequence of wounds or injury received in the line of duty of such temporary service." In other words, it does not cover incapacity

resulting from "disease" contracted in such service. Moreover, the same restrictive policy is further carried out by the last clause of the third subdivision, providing that no claim for disability from "wounds or injury received *in battle*" by one of such unorganized volunteers shall be valid unless prosecuted to successful issue before July four, eighteen seventy-four.

For these reasons, in my opinion, Mr. Manley was an enlisted man within the meaning of the first subdivision of section 4693.

All papers are herewith returned.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

ROCK CREEK PARK—PRICE OF LAND—POWER OF THE PRESIDENT.

Where an appropriation for acquiring title to land for a public park is limited to $1,200,000, and the law requires the President to decide that the prices to be paid for various parcels of land are reasonable, and the commission appointed by the act has presented for his decision a report of appraisers in condemnation that would make the cost of the park considerably exceed that amount, it would not be lawful for the President to decide that the prices as submitted are reasonable.

DEPARTMENT OF JUSTICE,
March 3, 1892.

SIR: The commissioners appointed by you under an act entitled "An act authorizing the establishing of a public park in the District of Columbia," approved September 27, 1890, (26 Stat., 492), have presented to you a report of the proceedings had under that act and now invite action by you thereon. You have transmitted the report to the Attorney-General, asking his views upon your power to act in the premises.

The report shows that, in accordance with the third section of the park act, a map was filed by the commission in the public records of the District of Columbia, showing the location, quantity, and character of each parcel of private prop-

erty to be taken for the purpose mentioned, and that the prices for the different parcels thereof were determined by said commission, with your approval, and submitted to the owners thereof for acceptance, the aggregate of these prices being about $830,000. A few owners accepted the sums thus offered, but the larger number declined to do so. Thereupon the commission, in accordance with the provision of the act contained in the second clause of the third section, made application to the supreme court of the District of Columbia, by petition, for an assessment of the value of such lands as it had been unable to purchase. The court, in accordance with the next clause, appointed three competent and disinterested appraisers to assess the values of the lands selected. The appraisement was had, and was returned to the supreme court of the District of Columbia, which has approved the same. The law, after directing the return of the appraisement to the court, provides as follows:

"And when the value or values of such land are thus ascertained, and the President of the United States shall decide the same to be reasonable, said value or values shall be paid to the owner or owners, and the United States shall be deemed to have a valid title to said land."

The commission have presented to you, for your decision that the same are reasonable, the prices for the parcels condemned as assessed by the appraisers appointed by the supreme court of the District of Columbia, and now invoke your action and ask you to make such decision.

It is conceded that the prices of the lands already purchased by the commission, and those now submitted to you for your decision that they are reasonable, together with the expenses of the condemnation, aggregate something more than $1,430,000.

The first section of the act reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That a tract of land lying on both sides of Rock Creek, beginning at Klingle Ford bridge, and running northwardly, following the course of said creek, of a width not less at any point than six hundred feet nor more than twelve hundred feet, including the bed of the creek, of which not less than two

hundred feet shall be on either side of said creek, south of Broad Branch road and Blagden Mill road and of such greater width north of said roads as the commissioners designated in this act may select, shall be secured, as hereinafter set out, and be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known by the name of Rock Creek Park: *Provided, however*, That the whole tract so to be selected and condemned under the provisions of this act shall not exceed two thousand acres nor the total cost thereof exceed the amount of the money herein appropriated."

The appropriation to which reference is made in the first section is contained in the last clause of section 6 in the words following:

"To pay the expenses of inquiry, survey, assessment, cost of lands taken, and all other necessary expenses incidental thereto, the sum of one million two hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated."

It is now definitely ascertained what the parcels selected by the commission under the first three sections of the act will cost. Their cost exceeds the amount provided in the proviso of the first section. Upon the decision of the President that the prices are reasonable, the law contemplates that the money therefor shall become immediately payable to the owners of the property. There is no discretion vested in anyone, after your action with reference to the payment of the money for the prices which you shall decide to be reasonable. Your decision is the last act necessary to show a determination on the part of the Government to take the property. In my opinion, if the aggregate of these expenses and assessments were within the requirement of the act, your decision would vest in each property-owner a right of action for the value of his property taken. But the right to take the property at all is dependent upon two conditions precedent, one that the park shall not exceed 2,000 acres in extent, and the other that the aggregate cost shall not exceed $1,200,000. In violation of either of these con-

ditions you have no right to act at all. It therefore follows that it is not within your power to decide the prices as submitted in the present report of the commission to be reasonable.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The PRESIDENT.

Approved:

W. H. H. MILLER.

ENSIGN OF NAVY—PATENT RIGHTS.

The Secretary of the Navy may lawfully contract with an ensign of the Navy for the purchase of patent rights and improvements in "B. L. R. ordnance" for use in the Navy, when the ensign was not employed to make experiments, paid himself the expenses of obtaining letters patent, and when no expense was authorized or facility furnished by the Bureau of Ordnance to aid him in making or perfecting his invention.

Section 3721, Revised Statutes, not section 3718, applies to the case.

DEPARTMENT OF JUSTICE,
March 8, 1892.

SIR: It appears by your communication of February 25, 1892, that Ensign Dashiell of the U. S. Navy has made certain improvements in "B. L. R. ordnance" for use in the Navy, for which he has obtained letters patent from the United States, and that he offers to sell the improvements or the right to use them to the United States.

It further appears that the improvements in question do not relate to a matter as to which Ensign Dashiell was employed to make experiments, with a view to suggesting improvements, and that he was not assigned to any such duty; and that the fees and expenses of obtaining the letters patent were paid by him, and that no expense was authorized or facility furnished by the Bureau of Ordnance to aid him in making or perfecting his invention.

The question submitted for opinion, on this state of facts, is whether the Secretary of the Navy can, under existing laws, purchase Ensign Dashiell's rights under the patent, or

contract with him for the use of the patent in consideration of the payment of a royalty by the United States.

This case, unlike that of Lieut. Dunn (19 Opin., 407), to which you call my attention, does not fall within section 3718 (Rev. Stat.), requiring that provisions, etc., for the use of the Navy shall be furnished, when time will permit, by contract by the lowest bidder, but falls within section 3721, Revised Statutes, which expressly exempts from the operation of section 3718, purchases of "*ordnance*, gunpowder, or medicines." Your power of contracting for supplies of the excepted classes being uncontrolled by legislative regulation, I see no reason why you may not lawfully contract with Ensign Dashiell for the purchase or the use of his patent rights.

In 1858 the Secretary of War made a contract with Maj. Henry B. Sibley, of the U. S. Army, to pay him a royalty for the use of his patent conical tent, which, together with the fact that section 1673 (Rev. Stat.) prohibits the paying of a royalty to any officer or employé of the United States for the use of any patent for "the Springfield breechloading system" or any part thereof, or for any such patent in which such officers or employés may be directly or indirectly interested, shows that to make contracts of that character, in proper cases, has not been foreign to the practice of the Government.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE NAVY.

AMNESTY.—POWER OF THE PRESIDENT.

The President has the constitutional power, without Congressional authority, to issue a general pardon or amnesty to classes of foreigners.

The question of the President's pardoning power reviewed and the authorities collated. Various proclamations of general amnesty appended.

DEPARTMENT OF JUSTICE,
March 9, 1892.

SIR: A petition has been presented to you, praying you to issue a pardon or amnesty to all persons residing in Utah Territory, who have been guilty of polygamy, unlawful

cohabitation or adultery as denounced by the acts of March 22, 1882 (22 Stat., 30), and March 3, 1887 (24 Stat., 635). You have asked the opinion of the Attorney-General upon the question whether you have the constitutional power, without Congressional authority, to issue such a general pardon or amnesty. Upon this question the following is respectfully submitted:

Section 2 of Article II of the Constitution, in defining the powers of the President, provides that "he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

It has been decided by the Supreme Court that the power herein conferred upon the President is unlimited (*ex parte* Garland, 4 Wall., 333). The pardon may be granted before or after conviction, and absolutely or upon conditions. The ground for the exercise of the power is wholly within the discretion of the Executive. He may, therefore, if he thinks fit, pardon an offender because his offense is one of many like offenses, arising from a widespread, popular feeling and without regard to the character or the particular circumstances of the individual. He may, for the same reason, grant, by separate acts of pardon, immunity from punishment to each of a thousand such offenders. If he may do so, it is difficult to see why he does not exercise the same power, when by public proclamation he extends a pardon to ten thousand offenders, without naming them, but describing them as persons committing, or participating in, the same kind of offenses.

It is said that the power to grant pardons is a power to examine the circumstances of each case and then confer immunity on the offender. If the right to pardon were dependent on the existence of any particular grounds in the case of each offender, the argument, it seems to me, would be of more force. There is, however, no such restriction on its exercise. The ground may be as properly one which has equally and the same application to ten thousand or a hundred thousand cases, as one which is peculiar to the case under consideration. If so, does not the contention in favor of the narrower view become an argument in favor of a formality rather than a substantial and logical distinction? No one will deny that the President, without Congressional

authority, may issue separate pardons to every individual of the thousands of Mormons who have lived in polygamy in Utah. Only those would have to be omitted whose position is so obscure, or humble, that the President can not learn their names. Does not the power of amnesty, therefore, depend only on the question whether pardons can be made sufficiently definite in respect to the beneficiaries by a description other than by name? If the grantor is certain, the extent of the grant is certain, and the grantees are so described that they can be made certain, what is the inherent difference between the power involved in the grant of an individual pardon, and that in an amnesty to a class of persons to each one of whom the power to grant separate pardon, for a reason applicable to all, is conceded?

It is suggested that offenders can not be pardoned as a class any more than they can be tried and convicted as a class. This argument is not of force unless there is an analogy between a sentence of conviction and a pardon. The sentence is a judgment supported by a verdict rendered by a jury, on lawful evidence and full hearing, with the issue of the accused's guilt or innocence clearly defined. A pardon is a gracious act of mercy resting on any ground which the Executive may regard as sufficient to call for its exercise. There is no hearing of evidence; there is no issue made. The recital in the act of pardon may show a ground which in law and logic would be wholly irrelevant to the guilt or character of the offender, and not in the slightest degree affect the validity of the pardon. State policy may require the Executive to grant it. Such considerations show the absence of any parallel between the trial of an offender and the exercise of Executive clemency in his case, and wholly destroys an analogy which would require the same procedure in both.

But it is urged against this view that it intrusts too great a power to the Executive. In what way? It only enables him to do that in one act which he might do by a thousand. The power which the Executive exercises is still the pardoning power, and that the Constitution gives him. It is no argument against its exercise that it may be abused. That is true of every power intrusted to the Executive.

On principle, it seems to me, therefore, the unlimited

power to grant pardons for all offenses against the United States, except in cases of impeachment, includes power to issue a general pardon or amnesty to any class of offenders.

Practice and authority confirm this view. Alexander Hamilton, in the seventy-third number of the Federalist, referring to this clause of the Constitution, said:

"But the principal argument for reposing the power of pardoning in this case in the Chief Magistrate is this: In seasons of insurrection or rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the Legislature or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity."

Such language leaves no doubt that in the mind of this, one of the greatest of the framers and expounders of the Constitution, the pardoning power included the authority to offer and grant pardon and amnesty to a whole body of insurgents or rebels, i. e., to a class of offenders. This language was quoted and used by Mr. Justice Story in his work on the Constitution. (Sec. 1500 *et seq.*)

The practice, contemporaneous with the adoption of the Constitution, supports the existence of the power of the President to grant amnesty without legislative sanction. In 1794 President Washington issued a proclamation extending pardon to the whisky insurrectionists, and Gen. Lee, as Commander-in-Chief of the United States forces, issued a similar proclamation in the name of the President, and by his authority. Copies of these proclamations are appended. Governor Mifflin, of Pennsylvania, acting under a constitutional authority conferred in the same words as that of the President, issued a similar proclamation of pardon (also appended) to the insurgents for their offenses against the State of Pennsylvania. President Adams issued a proclamation of pardon to the same insurgents in 1800, a copy of which is appended. President Madison granted pardon by proclamation to a class of offenders known as the "Barataria" pirates, who were a large band of men engaged in smug-

gling and violations of the revenue and navigation laws of the United States. I have appended a copy of this proclamation. By the thirteenth section of the act of July 17, 1862 (12 Stat., 592), the President was authorized, at any time thereafter, by proclamation, to extend to persons participating in the then existing rebellion pardon and amnesty, with such exceptions and conditions as he should deem expedient. On December 8, 1863 (12 Stat., 737), President Lincoln issued a proclamation offering pardon and amnesty to the rebels. The recitals of this proclamation show that he did not admit that he had not the power to issue such a proclamation, without Congressional authority, but that he distinctly asserted the contrary. The two recitals on this subject are as follows: "Whereas, in and by the Constitution of the United States, it is provided that the President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment and * * *

"Whereas * * * laws have been enacted by Congress * * * declaring that the President was thereby authorized at any time thereafter, by proclamation, to extend to persons who may have participated in the existing rebellion in any State or part thereof, pardon and amnesty, with such exceptions, and at such times and on such conditions as he may deem expedient for the public welfare, *and whereas the Congressional declarations for limited and conditional pardon accords with well-established judicial exposition of the pardoning power*," etc.

President Johnson issued several limited pardon proclamations of this character, and then in January, 1867 (14 Stat., 377), Congress repealed the amnesty section of the act of 1862. Thereafter, on September 7, 1867 (15 Stat., 699), he issued another limited and conditional pardon proclamation. On July 4, 1868 (15 Stat., 702), he issued a full and absolute pardon by proclamation to all rebels, except those who were under an indictment for treason, and by a proclamation of December 25, 1868 (15 Stat., 711), he extended full, absolute, and unconditional pardon to all who had taken part in the rebellion. President Johnson on July 3, 1866, issued a proclamation extending pardon to all deserters who should return to their colors. A copy of this order is appended. Again, on October 10, 1873, President Grant

issued a proclamation pardoning all deserters who should return to the Army, which is also in the appendix.

We thus see that the contemporaneous exposition of the Constitution and the contemporaneous practice under it by the early Presidents, continued down to the period after the war, support the view that the power to grant pardons includes the power to grant pardons to a class by proclamations describing the class by the offense committed. The practice has been fully sustained by the Supreme Court of the United States.

In *ex parte* William Wells (18 How., 307) the question was whether the Constitution gave the President the power to commute a sentence of death to imprisonment for life. This is held to be a conditional pardon and within the power of the Executive. Referring to the significance of the word "pardon," Justice Wayne says, on page 310:

"In the law it has different meanings, which were as well understood when the Constitution was made as any other legal word in the Constitution now is. Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are *general*, special, or particular, conditional or absolute, not necessary in some cases, and in some grantable, of course."

And, again, referring to the power under the Constitution, the same justice says:

"The real language of the Constitution is general, that is, common to the class of pardons, or extending the power to pardon to all kinds of pardons known to the law as such, whatever may be their denomination."

The necessary effect of this language would seem to be that the power to pardon given the President includes the authority to issue general pardons.

In *ex parte* Garland (4 Wall., 333) the question was whether a statute which excluded from practice in the courts attorneys who had participated in the rebellion would operate to exclude one who had received full pardon for his offenses before trial. It was held that it could not. Mr. Justice Field delivered the opinion of the court and said, referring to the pardon clause of the Constitution:

"The power thus conferred is unlimited, with the exception

stated—i. e., in cases of impeachment. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction or judgment. This power of the President is not subject to legislative control; Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him can not be fettered by any legislative restrictions."

In *United States* v. *Padelford* (9 Wall., 531) the effect of President Lincoln's proclamation of December 8, 1863, was under consideration, with respect to which the court say:

"This proclamation, *if it needed legislative sanction*, was fully warranted by the act of July 17, 1862, which authorized the President at any time thereafter to extend pardon and amnesty to persons who had participated in the rebellion, with such exceptions as he might see fit to make. That the President had power, *if not otherwise, yet with the sanction of Congress*, to grant a general conditional pardon has not been seriously questioned. And this pardon, by its terms, included restoration of all rights of property, except as to slaves and as against the intervening rights of third persons."

Here is an intimation that in the mind of the court there was good ground for the contention that no legislative sanction was needed for the issuance by the Executive of a general conditional pardon.

In the case of the *United States* v. *Klein* (13 Wall., 128) the Chief Justice referred to the amnesty clause of the act of July 17, 1862, as follows:

"*The suggestion of pardon by Congress, for such it was, rather than authority*, remained unacted on for more than a year."

Again, after referring to the proclamation of general conditional pardon issued while the amnesty clause of the act of July 17, 1862, was in force, the Chief Justice described the three proclamations issued by President Johnson after its repeal, the last one of which, as we have seen, conferred full pardon, unconditionally, on all participating in the rebellion, and then said:

"It is true that the section of the act of Congress which purported to authorize the proclamation of pardon and

amnesty by the President was repealed on January 21, 1867; but this was after the close of the war, when the act had ceased to be important as an expression of the legislative disposition to carry into effect the clemency of the Executive, and after the decision of this court that the President's power of pardon 'is not subject to legislation;' that Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders."

Again, on page 147:

"It is the intention of the Constitution that each of the great coordinate departments of the Government—the legislative, executive and the judicial—shall be, in its sphere, independent of the others. To the Executive alone is intrusted the power of pardon, and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned, and removes all its penal consequences."

It is perfectly clear from these extracts that in the opinion of the court the proclamation of absolute pardon, December 25, 1868, was entirely within the constitutional power of the President, though it may be admitted that it was not necessary to the conclusion in the Klein case, that it should be so decided.

In the case of *Armstrong* v. *The United States* (13 Wall., 154), however, the rights of the claimant against the United States rested solely on the proclamation of December 25, 1868, and the absolute and unconditional pardon thereby conferred and those rights were sustained.

Said the Chief Justice:

"The proclamation of the 25th of December granted pardon unconditionally and without reservation. This was a public act of which all courts of the United States are bound to take notice and to which all courts are bound to give effect. The claim of the petitioner was preferred within two years. The Court of Claims, therefore, erred in not giving the petitioner the benefit of the proclamation."

This is an express holding that the proclamation of absolute and general pardon and amnesty is within the power of the President without legislative authority or sanction. This ruling has been followed in *Pargoud* v. *The United States* (13 Wall., 156); *Carlisle* v. *The United States* (16 Wall., 147); *Knote* v. *The United States* (95 U. S., 149).

The only authority which can be cited against this view is the report of the Judiciary Committee of the Senate on the right of the President to issue the proclamation of December 25, 1868. This will be found in the bound volume of Senate Reports of the Fortieth Congress, third session, No. 239. They reported for adoption by the Senate the following resolution:

"*Resolved*, That in the opinion of the Senate the proclamation of the President of the United States of the 25th of December, 1868, purporting to grant general pardon and amnesty to all persons guilty of treason and acts of hostility to the United States during the late rebellion, with restoration of rights, etc., was not authorized by the Constitution or laws."

And accompanied their recommendation with an argument in support thereof. Arguments on the subject by Senator Ferry and Senator Conkling will be found in Congressional Globe, third session Fortieth Congress, Part I., pp. 168, 438. I can not find that the resolution which was reported February 17, 1869 (Cong. Globe, 3d session 40th Cong., 1381), was ever adopted by the Senate. As the validity of the proclamation here condemned has been since four times sustained by the Supreme Court, the committee report can not now be considered an authority of weight.

A very full discussion of the power of the President to grant a general pardon or amnesty to a class of offenders will be found in the American Cyclopædia, 1873, under the head of "Amnesty." There will be found a reference to the prerogative of the English Crown in granting pardons and an explanation of the statutes of amnesty passed by Parliament which clearly shows that the power existing in the Crown included power to issue general pardons. I have already taken too much space, and I forbear to discuss this aspect of the subject.

The same view has been taken in some of the State courts where acts of general amnesty passed by the State legislatures have been held invalid on the ground that such acts are an invasion of the pardoning power, which is exclusively vested in the Executive, by language in the State constitution similar to that of the Federal Constitution. See *State* v. *Sloss* (25 Mo., 291); *The State* v. *Fleming* (7 Humphreys,

Tenn., 152); *Haley* v. *Clark* (26 Ala., 439); see also *People* v. *Moore*, (62 Mich., 496).

It is submitted that reason, practice, and authority established the constitutional power of the Executive, without legislative sanction, to issue proclamations extending pardon or amnesty to classes of offenders.

There are appended copies of the proclamations of general pardon and amnesty to which reference has been made in the foregoing opinion, for the reason that they are not found in the regular publications of the Statutes at Large, and some of them are not recorded in the State Department.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The PRESIDENT.

I concur in this opinion.

W. H. H. MILLER.

PROCLAMATION GRANTING PARDON TO THE WESTERN INSURGENTS.

[Sparks' Life of Washington, vol. 12, p. 134, 135.]

Whereas the commissioners, appointed by the President of the United States to confer with the citizens in the western counties of Pennsylvania, during the late insurrection which prevailed therein, by their act and agreement, bearing date the 2d day of September last, in pursuance of the powers in them vested, did promise and engage, that, if assurances of submission to the laws of the United States should be bona fide given by the citizens resident in the fourth survey of Pennsylvania, in the manner and within the time in the said act and agreement specified, a general pardon should be granted, on the 10th day of July then next ensuing, of all treasons and other indictable offences against the United States, committed within the said survey before the 22d day of August last, excluding therefrom, nevertheless, every person who should refuse or neglect to subscribe such assurance and engagement in manner aforesaid, or who should after such subscription violate the same, or wilfully obstruct, or attempt to obstruct, the execution of the acts for raising a revenue on distilled spirits and stills, or be aiding or abetting therein;

And whereas, I have since thought proper to extend the said pardon to all persons guilty of the said treasons, misprisions of treason, or otherwise concerned in the late insurrection within the survey aforesaid, who have not since been indicted or convicted thereof, or of any other offense against the United States;

Therefore be it known, that I, George Washington, President of the United States, have granted, and by these presents do grant, a full, free, and entire pardon to all persons (excepting as is hereinafter excepted, of all treasons, misprisions of treason, and other indictable offenses against the United States, committed within the fourth survey of Pennsylvania before the 22nd day of August last past, excepting and excluding therefrom, nevertheless, every person who refused or neglected to give and subscribe the said assurances in the manner aforesaid (or having subscribed, hath violated the same), and now standeth indicted or convicted of any treason, misprision of treason, or other offense against the said United States; hereby remitting and releasing unto all persons, except as before excepted, all penalties incurred, or supposed to be incurred, for, or on account of, the premises.

In testimony whereof I have hereunto set my hand, and caused the seal of the United States to be affixed, this tenth day of July, in the year of our Lord one thousand seven hundred and ninety-five, and the twentieth year of the independence of the said United States.

GEORGE WASHINGTON.

GENERAL LEE'S PROCLAMATION OF PARDON.

[Pennsylvania Archives, Vol. IV, pp. 479–80].

By Henry Lee, Governor of the Commonwealth of Virginia, Major-General therein, and Commander in Chief of the Militia Army, in the service of the United States.

A Proclamation.

By virtue of the powers and authority in me vested by the President of the United States, and in obedience to his benign intentions therewith communicated, I do, by this, my proclamation, declare and make known to all concerned, that a full, free, and entire pardon (excepting and providing as hereafter mentioned) is hereby granted to all persons residing within the counties of Washington, Allegheny, Westmoreland, and Fayette, in the State of Pennsylvania, and in the county of Ohio, in the State of Virginia, guilty of treason, misprision of treason against the United States, or otherwise directly or indirectly engaged in the wicked and unhappy tumults and disturbances lately existing in those counties, excepting, nevertheless, from the benefit and effect of this pardon, all persons charged with the commision of offenses against the United States, and now actually in custody or held by recognizance to appear and answer for such offenses at any judicial court or courts, excepting also, all persons avoiding fair trial by abandonment of their homes; and excepting, moreover, the following persons, the atrocity of whose conduct renders it proper to mark them by name for the purpose of subjecting them, with all possible certainty, to the regular course of judicial proceedings, and whom all officers, civil and military, are required to endeavor to apprehend and brought to justice, to-wit: Benjamin Parkinson, Arthur Gardner, John Holcraft, Daniel Hamilton, Tho. Lapsley, William Miller, Edward Cook, Edward Wright, Richard

Holcraft, David Bradford, John Mitchell, Alexander Fulton, Thomas Spiers, William Bradford, Geo. Parker, Wm. Hanna, Edward Magner, jr., Thos. Hughes, David Lock, Ebenezer Gallagher, Peter Lyle, John Shields, William Hay, William McElhenny, Tho. Patten, Stephenson Jack, Patrick Jack, and Andrew Highlands, in the State of Pennsylvania; and William Sutherland, Robert Stephenson, William McKinley, John Moore, and John McCormick, of Ohio county, in the State of Virginia.

Provided, That no person who shall hereafter willfully obstruct or attempt to obstruct the execution of any of the laws of the United States, or be in any wise aiding or abetting therein, shall be entitled to any benefit or advantage of the pardon hereinafter granted: *And provided also*, That nothing herein contained shall extend, or be construed to extend, to the remission or mitigation of any forfeiture of any penalty incurred by reason of infractions of, or obstructions to, the laws of the United States for collecting a revenue upon distilled spirits and stills.

Given under my hand, at headquarters, in Elizabeth Town, this twenty-ninth day of November, seventeen hundred and ninety-four.

HENRY LEE.

By order of the commander in chief.

G. K. TAYLOR, *Aid-de-Camp*.

GOVERNOR MIFFLIN'S PROCLAMATION OF PARDON

[Pennsylvania Archives, Vol. IV, pp. 536–39.]

WEDNESDAY, *August* 26, 1795.

The President of the United States having by his proclamation, dated the   day of August, instant, thought proper to extend the pardon of the Government of the United States to all persons who have been guilty of the treasons or misprisions of treason in his said proclamation mentioned, or who have been otherwise concerned in the late insurrection within the four western counties of this State, who have not since been indicted or convicted thereof, the Governor this day took the same into consideration, and being desirous on his part to pursue a like policy, as well on account of its humanity as for the sake of preserving uniformity in the proceedings of the General and State Governments in relation to the same important object, accordingly issued his proclamation in the words following, to wit:

Pennsylvania, ss:

In the name and by the authority of the Commonwealth of Pennsylvania, by Thomas Mifflin, Governor of the said Commonwealth:

A Proclamation.

Whereas at the commencement of the late insurrection in the western part of this State, constituting the fourth survey thereof, I deemed it expedient to attempt a vindication of the violated authority of the laws and the restoration of peace, harmony, and order by the influence of reason and lenity upon the minds of the deluded and refractory insurgents;

And whereas the better to promote so desirable an object I appointed, authorized, and employed the Hon. Thomas McKean, Chief Justice of this Commonwealth, and Maj. Gen. William Irvine (with full confidence in their wisdom, prudence, and patriotism), as commissioners, to confer with the said insurgents, and on behalf of the Government of Pennsylvania to promise to them and every of them an act of pardon and oblivion for all past transgressions upon receiving a satisfactory assurance of a future submission to the laws;

And whereas the said commissioners in pursuance of the trust thus reposed in them did, by an instrument under their hands bearing date the twenty-fourth day of August, in the year one thousand seven hundred and ninety-four, promise upon certain terms and conditions of submission to the laws of this State and of the United States, to be made in the manner and within the time in the said instrument specified, that if the people of the said western counties should keep peace and be of good behavior until the first day of June, now last past, an act of free and general pardon and oblivion of all treasons, insurrections, arson, riots, and other offenses inferior to riots, committed, perpetrated, counseled, or suffered by any person or persons complying with the terms and conditions aforesaid, within the counties by the said commissioners specified, since the fourteenth day of July, in the year one thousand seven hundred and ninety-four, should be granted so far as the said offenses concerned the State of Pennsylvania or the government thereof.

And whereas it appears by a proclamation heretofore issued by the President of the United States that he has thought proper to extend the pardon of the Government of the United States to all persons who have been guilty of treasons or misprisions of treason in his said proclamation specified, or have been otherwise concerned in the said insurrection within the said survey, but who have not since been indicted or convicted thereof, and I am desirous, on my part, to pursue a like policy, as well on account of its humanity as for the sake of preserving uniformity in the proceedings of the General and State Governments, in relation to the same important object: Therefore, I, Thomas Mifflin, governor of the Commonwealth of Pennsylvania, have granted and by these presents do grant a full, free, and entire pardon to all persons (not included in the exception hereinafter declared) of all treasons, insurrections, arsons, riots, and other offenses inferior to riots, committed within the said fourth survey, between the said fourteenth day of July and the twenty-second day of August, in the year one thousand seven hundred and ninety-four, and which may have been and are indictable offenses against the said State of Pennsylvania, together with a free and entire remission and release of all fines, forfeitures, and penalties consequent thereon, excepting and excluding always, nevertheless, from all the benefit and advantage or any claim to the benefit and advantage of the pardon hereby granted every person who has either refused to give the assurance of submission stipulated and required as aforesaid, or who, having given the same, shall afterwards have deviated therefrom, and now actually stands indicted or convicted of any offense against the State of Pennsylvania.

Given under my hand and the great seal of the State, at Philadelphia, the twenty-sixth day of August, in the year of our Lord one thousand seven hundred and ninety-five and of the Commonwealth the twentieth.

THOMAS MIFFLIN.

By the Governor.

A. J. DALLAS,

Secretary of the Commonwealth.

PROCLAMATION GRANTING PARDON TO THE PENNSYLVANIA INSURGENTS, MAY 21, 1800.

[From the Life and Works of John Adams, Vol. IX, pp. 178, 179.]

Whereas the late wicked and treasonable insurrection against the just authority of the United States of sundry persons in the counties of Northampton, Montgomery, and Bucks, in the State of Pennsylvania, in the year 1799, having been speedily suppressed, without any of the calamities usually attending rebellion, whereupon peace, order, and submission to the laws of the United States were restored in the aforesaid counties, and the ignorant, misguided, and misinformed in the counties have returned to a proper sense of their duty, whereby it is become unnecessary for the public good that any future prosecutions should be commenced or carried on against any person or persons by reason of their being connected in the said insurrection:

Wherefore be it known that I, John Adams, President of the United States of America, have granted, and by these presents do grant, a full, free, and absolute pardon to all and every person or persons concerned in the said insurrection, excepting as hereinafter excepted, of all treasons, misprisions of treason, felonies, misdemeanors, and other crimes by them respectively done or committed against the United States in either of the said counties before the twelfth day of March, in the year one thousand seven hundred and ninety-nine, excepting and excluding therefrom every person who now standeth indicted or convicted of any treason, misprision of treason, or other offense against the United States, whereby remedying and releasing unto all persons, except as before excepted, all pains and penalties incurred or supposed to be incurred for or on account of the premises.

Given, etc.

JOHN ADAMS.

[From the Archives of the State Department.]

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Among the many evils produced by the wars, which, with little intermission, have afflicted Europe, and extended their ravages into other quarters of the globe, for a period exceeding twenty years, the dispertion of a considerable portion of the inhabitants of different counties, in sorrow and in want, has not been the least injurious to human happiness, nor the least severe in the trial of human virtue.

It had been long ascertained that many foreigners flying from the

dangers of their own home, and that some citizens forgetful of their duty, had cooperated in forming an establishment on the Island of Barrataria, near the mouth of the river Mississippi, for the purposes of a clandestine and lawless trade.

The Government of the United States caused the establishment to be broken up and destroyed; and having obtained the means of designating the offenders of every description, it only remained to answer the demands of justice by inflicting an exemplary punishment.

But it has since been represented that the offenders have manifested a sincere penitence; that they have abandoned the prosecution of the worse cause for the support of the best, and particularly that they have exhibited in the defense of New Orleans unequivocal traits of courage and fidelity. Offenders who have refused to become associates of the enemy in the war upon the most seducing terms of invitation, and who have aided to repel his hostile invasion of the territory of the United States, can no longer be considered as objects of punishment, but as objects of a generous forgiveness.

It has therefore been seen with great satisfaction that the general assembly of the State of Louisiana earnestly recommend those offenders to the benefit of a full pardon; and in compliance with that recommendation, as well as in consideration of all the other extraordinary circumstances of the case, I, James Madison, President of the United States of America, do issue this proclamation, hereby granting, publishing, and declaring a free and full pardon of all offenses committed in violation of any act or acts of the Congress of the said United States touching the revenue, trade, and navigation thereof, or touching the intercourse and commerce of the United States with foreign nations, at any time before the eighth day of January, in the present year one thousand eight hundred and fifteen, by any person or persons whomsoever, being inhabitants of New Orleans and the adjacent country, or being inhabitants of the said Island of Barataria and the places adjacent: Provided that every person claiming the benefit of this full pardon, in order to entitle himself thereto, shall produce a certificate in writing from the governor of the State of Louisiana stating that such person has aided in the defense of New Orleans and the adjacent country during the invasion thereof as aforesaid.

And I do hereby further authorize and direct all suits, indictments, and prosecutions for fines, penalties, and forfeitures against any person or persons who shall be entitled to the benefit of this full pardon forthwith to be stayed, discontinued, and released. And all civil officers are hereby required, according to the duties of their respective stations, to carry this proclamation into immediate and faithful execution.

Done at the city of Washington the sixth day of February, in the year one thousand eight hundred and fifteen, and of the Independence of the United States the thirty-ninth.

(Signed) JAMES MADISON.

By the President:

(Signed) JAMES MONROE,
Acting as Secretary of State.

General Orders, No. 43.]

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
Washington, July 3, 1866.

OFFER OF PARDON TO DESERTERS FROM THE REGULAR ARMY WHO SURRENDER.

By direction of the President, all deserters from the regular Army who voluntarily join their regiments or surrender themselves at any military post or recruiting rendezvous before the 15th of August, 1866, will be returned to duty without trial or punishment, on condition that they make good the time lost by desertion, and forfeit all pay and allowance for the time of their absence.

Such deserters as, under this order, surrender themselves at any other place than the stations of their regiment will be subject to assignment to other regiments, as if they were unattached recruits.

By order of the Secretary of War:

E. D. TOWNSEND,
Assistant Adjutant-General.

Official:

ASSISTANT ADJUTANT-GENERAL.

General Orders, No. 102.]

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
Washington, October 10, 1873.

The President of the United States commands it to be made known that all soldiers who have deserted their colors, and who shall, on or before the 1st day of January, 1874, surrender themselves at any military station, shall receive a full pardon, only forfeiting the pay and allowances due them at the time of desertion; and shall be restored to duty without trial or punishment on condition that they faithfully serve through the term of their enlistment.

By order of the Secretary of War.

E. D. TOWNSEND,
Adjutant-General.

Official.

ASSISTANT ADJUTANT-GENERAL.

CLASSIFIED CIVIL SERVICE—WEATHER BUREAU EMPLOYÉS

The employés of the Weather Bureau of the Department of Agriculture, on duty away from and outside of the city of Washington, are not members of the classified Civil Service.

DEPARTMENT OF JUSTICE,
March 12, 1892.

SIR: Your communication of March 9 instant, submits for an opinion the question, whether the employés of the Weather Bureau of the Department of Agriculture, who are

on duty outside and away from the city of Washington, are members of the classified Civil Service by the mere operation of sections 5 and 6 of the act of Congress of October 1, 1890, entitled "An act to increase the efficiency and reduce the expenses of the Signal Corps of the Army, and to transfer the Weather Service to the Department of Agriculture." (26 Stat., 653.)

By general rule 2 of the Revised Civil-Service Rules the President of the United States has declared that "There shall be five branches of the classified Civil Service, as follows:

1. The classified Department service.
2. The classified customs service.
3. The classified postal service.
4. The classified railway mail service.
5. The classified Indian service.

The employés in question fall within no one of these classifications. There is no room for holding that they belong to the classified Departmental service, because rule 1, of the Departmental rules, says that that service "shall include the several officers, clerks, and other persons in any department, commission, or bureau at Washington," etc.

I am, sir, your obedient servant,

W. H. H. MILLER.

The SECRETARY OF AGRICULTURE.

SUMMARY COURT ACT—MITIGATION OF SENTENCE.

The act of October 1, 1890, chapter 1259, does not give the reviewing officer power to mitigate or approve a part and disapprove a part of a sentence of a summary court, where the sentence was within the power of the court-martial to impose.

DEPARTMENT OF JUSTICE,
March 14, 1892.

SIR: By letter of December 9, 1891, the then Acting Secretary of War requested the answer of the Attorney-General to the following question:

"Does the act entitled an 'Act to promote the administration of justice in the Army,' approved October 1, 1890 (26 Stat., 648), give the reviewing officer power to mitigate or to approve a part and disapprove a part of a sentence of a summary court?"

The act referred to provides that hereafter, in time of peace, all offenses cognizable before a garrison or regimental court-martial shall, within twenty-four hours from the time of the arrest of the offender, be submitted to a summary court, consisting of the line officers second in command at the post or station of the accused, which court is to have power, after hearing the case, to adjudge the punishment to be inflicted. No sentence adjudged by said summary court is to be executed until it shall have been approved by the post or other commander. It is provided that any enlisted man brought before such court may have a trial by court-martial on request, as a matter of right. It will be observed that this section does not repeal articles 81, 82, 83, *et seq.*, providing for regimental and garrison courts-martial, or article 104, providing that no sentence of a court-martial shall be carried into execution until the whole proceeding be approved by the officer ordering the court, or by the officer commanding for the time being; or that part of article 112, providing that every officer commanding a regiment or garrison in which a regimental or garrison court-martial may be held, shall have power to pardon or mitigate any punishment which such court may adjudge. The summary court provided in the act of October 1, 1890, is merely a substitute for the garrison or regimental court-martial. The accused may still, as a matter of right, have his trial by court-martial, in which case he will enjoy the benefit of article 104 and article 112. There is, however, no provision in the new act approved October 1, 1890, by which the power of pardon or mitigation is given to the commanding officer of the post, nor is there anything in the act which extends article 112 so that it shall apply to convictions by the summary court. The power of pardon is vested by the Constitution in the President, and, in the absence of special provision to the contrary, it must there remain. It is a power the existence of which can not rest on mere implication, but must be expressly conferred.

But it is said that the power to approve includes power to partially approve and partially disapprove, and so to mitigate sentences. The language of the act as to approval is as follows:

"There shall be a summary court-record book or docket

kept at each military post, and in the field at the headquarters of the command, in which shall be entered a record of all cases heard and determined and the action had thereon, and no sentence adjudged by said summary court shall be executed until it shall have been approved by the post or other commander."

What is the nature of this power and duty of approval in the commanding officer? An examination into its derivation will be of assistance.

We derived both our common law and our military law from England, and to that country's history we may properly look for the origin of the principles and procedure in both. From Clode's Military Law (Eng.), Chapter VII, paragraph 6, p. 145, we learn that—

"The original intention of interposing the authority of the Crown, as confirming officer before a court-martial sentence was carried into execution, was assuredly one of mercy. Military tribunals were (then, at any rate, if not now) prone to severity, and hence the attribute of mercy was secured to the criminal."

And in support of this view the high authority of Lord Chancellors Hardwicke and Talbot is cited. In their reports to King George II (Reports of the Law Officers to George II, Vol. I, pp. 510–520) they say (p. 510):

"Though it is provided that the sentence of any general court-martial shall not be put in execution until report be made of the whole proceedings to His Majesty, or the general commanding in chief, and his directions are signified thereupon, yet we conceive that was only to give His Majesty an opportunity of extending His Royal Mercy by pardon or reprieve."

And again (p. 514):

"According to the principles of the law of England, the King personally never gives judgment, especially of punishment; for mercy is his proper act."

No revisory power over the trial and sentence of criminals by common-law courts in England exists, except that which is exercised by the Crown, through the home office, by way of pardon. The power of pardoning military offenders was used for the same purpose and led to distinctions between its exercise as a revisory power, and as an act of pure mercy

and grace. The confirming or approving of the sentence of the court-martial became a revision of the proceedings like that of an appellate court. The pardoning and mitigating power remained to be exercised on different grounds, resting wholly in the arbitrary discretion of the pardoning power. If this is the true derivation of our present system of military procedure, then certain conclusions must follow which make easy the answer to the question here under discussion. The fact that the power of the Crown over sentences of courts-martial is divided into approving, pardoning, or mitigating, is strong evidence that neither includes the other. The power of approval is strictly a revisory power. In the consideration of the validity of a sentence, therefore, the approving authority would be limited to an examination of the power of the court to impose the sentence and the legality of the proceedings upon which it was founded. It would seem to be contrary to generally accepted ideas of a legal review of the proceedings of a lower court that the revising authority should be enabled to pass upon and modify a simple exercise of discretion in the lower tribunal. Within the limits of the punishment provided by law the discretion of the sentencing court is complete to affix such penalties as it sees fit; at least, a revisory jurisdiction could not do more than to set aside the sentence altogether for an abuse of discretion. It could not make a new sentence. Whether the approving officer might disapprove an illegal and separate part of the sentence, and order the enforcement of the remainder, is a question not before us, but it would seem clear on principle that where there is no invalidity in the sentence any modification of it by the confirming authority, by lessening its severity, is an exercise of the pardoning or mitigating power, and not, properly speaking, an approval or disapproval.

The conclusion reached is supported by the decision of the present Acting Judge-Advocate-General, and would seem to follow from a decision of Gen. Hancock in 1874, approved by the then Judge-Advocate-General, upon the right of the approving authority to so modify an illegal sentence as to bring it within the power of the court-martial. (Ive's Military Law, p. 184.)

The summary court act is a substitute for post and regimental courts-martial, and offenders may or may not submit

themselves to its jurisdiction. The articles of war, as we have seen, expressly give to the officer convening the courts-martial not only the approving, but also the pardoning and the mitigating power. The summary court act gives to the commanding officer only the approving power. This may have been a mere *casus omissus*, but there is nothing which entitles us to so regard it. On the contrary, it must be taken as strong evidence of the purpose of Congress to withhold from the commanding officer, in case of summary court convictions, the pardoning and mitigating power. Following the distinctions heretofore pointed out, it must be concluded that the act entitled "An act to promote the administration of justice in the Army," approved October 1, 1890 (26 Stat., 648), does not "give the reviewing officer power to mitigate or to approve and disapprove a part of a sentence of a summary court" where the sentence was within the power of the court-martial to impose.

Respectfully, yours,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF WAR.

Approved:

W. H. H. MILLER.

COMMISSIONER OF SOLDIERS' HOME—RETIRED OFFICERS OF THE ARMY.

The board of commissioners of the Soldiers' Home are authorized to permit the governor, deputy governor, and treasurer, who are retired officers of the Army, and reside at the Home and have its affairs in charge, to make use of ordinary supplies of fuel, light, forage, milk, ice, or vegetables, produced at and obtained for use at the Home, and are also authorized to pay to the treasurer, out of the funds of the Home, a salary for his services.

DEPARTMENT OF JUSTICE,
March 14, 1892.

SIR: Your communication bearing date the 3d instant, and relating to allowances by the Board of Commissioners of the Soldiers' Home, located at Washington, to retired officers of the Army holding official positions under the statute establishing this Home, has been duly considered.

The inquiry involved in the question submitted to me is: Whether the board of commissioners possesses authority to permit the governor, deputy governor, and treasurer, who are retired officers of the Army, and who reside at the Home and have its affairs in charge, to make use of ordinary supplies of fuel, light, forage, milk, ice, or vegetables, produced at or obtained for the uses of the Home; and also, whether the board is prohibited from paying to the treasurer, out of the funds of the Home, a salary for his services.

There were issued to the three officers named during the year ending October 31, 1891, vegetables, milk, garden products, ice and gas, including governor's and treasurer's offices, as follows: To the governor, $308.38; to the deputy-governor, $305.97; to the treasurer, $303.73, making a total of $918.08. These issues were approved by the board of commissioners and the allowances were in accordance with usages of the Home which have existed since the establishment of the institution.

It is not understood that the articles designated are gratuitously furnished, or that they are sold and delivered at agreed prices upon measurement, but they are supplied as convenience and economy may require, an account thereof being duly kept; and the same are considered as a recognition of, and in the nature of compensation for, services performed by these officers.

The governor, deputy-governor, and treasurer now serving are retired officers of the Army, and if they can receive no compensation from the property or funds of the institution they become subject to an exacting service for which they receive no additional recompense.

But it has been contended that these retired officers are prohibited by law from receiving the allowances in question.

It has been suggested from sources entitled to the highest consideration that the articles specified are "pay or emoluments" received "from the Government" and that their allowance and receipt are in violation of an inhibiting statute.

Is the allowance by the board of the articles designated prohibited by statute?

Are the articles pay or emoluments received from the Government of the United States?

To answer these inquiries requires an investigation as to the origin of the Soldiers' Home and the property and funds thereof, and as to the statutory limitations to which the board of commissioners and the officers of the Home are subject.

Following the war with Mexico came the enactment of the statute of March 2, 1847 (9 Stat., 149), which, for providing for the comfort of discharged soldiers so disabled by disease or by wounds received in the service as to be unable to proceed to their homes and for forwarding destitute soldiers to their homes, appropriated $500,000.

The act of March 3, 1851 (9 Stat., 595), is, as declared by its title, "An act to found a military asylum for the relief and support of invalid and disabled soldiers of the Army of the United States."

By section 7 it is enacted "that for the support of the said institution the following funds shall be set apart, and the same are hereby appropriated: 'First, the unexpended balance of the $500,000 above referred to; second, the sum of $118,791.19 levied by the commanding general of the Army of the United States in Mexico during the war with that Republic, for the benefit of the soldiers of the United States Army, regulars and volunteers, engaged in that war, but taken possession of as funds of the United States and placed in the Treasury; also, all stoppages and fines adjudged against soldiers; all forfeitures on account of desertion; all moneys, not exceeding two-thirds, of the hospital fund; the post funds of military stations; unclaimed moneys belonging to the estates of deceased soldiers; and also 25 cents per month to be deducted from the pay of every non-commissioned officer, musician, artificer, and private of the Army of the United States, the same to be deducted by the pay department of the Army, and passed to the credit of the commissioners of the asylum."

By section 7 of the act of March 3, 1859 (11 Stat., 434), the above pay deduction is reduced to 12½ cents per month, and the name of the institution is changed to that of "Soldiers' Home."

It is stated that the amount turned over to the Home from the appropriation of the act of 1847 was $54,391.23.

The moneys provided as above shown and some other

very inconsiderable items coming from the soldiers have furnished the property and funds of the Home.

By section 12 of the act of March 3, 1883 (22 Stat., 565), the sum of $10,000 is appropriated for the "employment of additional clerical force to be used in adjusting accounts in the Treasury Department of those funds which under the law belong to the Soldiers' Home."

By section 8 of said act all funds of the Home not needed for current use are directed to be "deposited in the Treasury of the United States to the credit of the Home as a permanent fund," and interest at the rate of 3 per cent is directed to be paid thereon.

The act of March 3, 1851, directed that the officers of the institution should consist of a governor, a deputy governor, and a secretary (who should also act as treasurer), and that they should be appointed from the Army by the Secretary of War on the recommendation of the board of commissioners. The act of March 3, 1883, vests the selection of these officers in the President, and directs that the treasurer shall give a bond in the penal sum of $20,000.

The act of January 21, 1870 (16 Stat., 62), declares that no retired officer of the Army shall be assigned to duty, or be entitled to receive more than the pay and allowances provided by law for retired officers of his grade; but on April 6 of the same year Congress, by a joint resolution (16 Stat., 372), directed that the act cited above shall not apply to officers selected for this Soldiers' Home: "*Provided*, That they receive from the Government only the pay and emoluments allowed by law to retired officers." In the revision of the Statutes the act and resolution of 1870 were incorporated into section 1259, Revised Statutes. The proviso was omitted in the original revision, but came into the second edition by virtue of the act of February 27, 1877 (19 Stat., 243); so that as the law now stands the retired officer may be assigned to this Home as one of the officers required by statute to serve there, but he can receive from the Government only the pay and emoluments allowed by law to retired officers. As it is manifest that the articles specified as having been received by the officers now serving were not pay or emoluments allowed by law to retired officers as such, the question arises whether these articles were received "from the Govern-

ment." If a retired officer is employed by a private person or by a corporation, public or private, he may properly receive payment for his services. He may give military instruction in a college and accept compensation from the college therefor.

He may, except in cases of statutory prohibition, hold a civil office and receive its emoluments without yielding his right to those that belong to him as a retired officer, and it must be held that the officers in question may receive the articles specified in addition to their pay and emoluments as retired officers, unless it shall appear that these articles are pay or emoluments received by them from the Government.

It is not shown that any original appropriation from the undistinguishable moneys of the United States gathered in its Treasury, has ever been made to the asylum or Home.

The nucleus of the fund was provided by Gen. Scott, to whom is credited the inception of the purpose of establishing the institution.

Congress approved the project by creating a board of commissioners to carry it into effect, and by turning over the moneys levied in Mexico and the remainder of those previously appropriated for the use of our disabled soldiers returning from that country.

The appropriation of $10,000, by the act of 1883, was not to the Home, but was to provide clerical aid to transfer to the institution "those funds which under the law belong to the Soldiers' Home."

While some portions of the remainder of the funds coming to the Home may in one view appear to have been moneys of the United States, they came to the Home under the laws by way of the soldiers.

The reports show that prior to May, 1882, the contributions to the Home from pay of soldiers, fines, and stoppages against enlisted men, and pay forfeited by deserters, amounted to $3,096,396.96.

The extent of the contributions is suggested when we remember that the property now consists of over 500 acres of valuable land supplied with necessary and expensive buildings for the use of the inmates, officers, and assistants of the

Home, and, in addition thereto, a "permanent fund" which, on the 30th of September last, amounted to $2,427,986.34.

This permanent fund is not public money, but is held by the Treasurer of the United States as the banker for the Home, and 3 per cent interest is paid to the Home for the use thereof.

The equities existing between the Government, representing the public, and the Home as now existing, appear quite suggestively when we see that an institution, the needs of which 200 acres will supply, practically gives to the public the free use of a beautiful and finely kept park of 500 acres, and that nearly 10 miles of charming driveways are kept open to the people of the whole country at a cost, to those who never drive over them, of $10,000 per year; and these equities appear even more distinctly when we remember that the Government still holds in its Treasury moneys that have belonged to this Home from ten to thirty years which now aggregate more than $1,500,000, upon which no interest is paid, and which are withheld because of the cost and trouble which will attend the settlement of the accounts involved and the ascertainment of the balance due to the Home.

The allowance of supplies of the nature of those now under consideration to the officers of the Home residing upon the premises has been the rule ever since the Home was founded. A custom like this, just and reasonable in its results, and not shown to be in violation of a statute, and which has been acquiesced in for a long period, acquires the force of law; it is a practical construction which courts and executive officers accept and follow.

In the case before us great additional consequence must be given to the fact that the Committee on Military Affairs of the Senate, in 1882, made a thorough and important investigation of the affairs of the Home and submitted an elaborate report, accompanied with the evidence taken (Sen. Rep. No 531, 47th Cong., 1st sess., May 3, 1882), and that the act of March 3, 1883, proceeded therefrom.

From that investigation it appears that quarters for these resident officers were constructed in 1870 under the direction of the commissioners and from the moneys of the Home.

It also appears that quarters, fuel, forage, vegetables,

fruit, light, and some other supplies were furnished to these officers by the Home when they were not otherwise supplied by law.

Although the report criticises with some severity certain acts of some of the commissioners in permitting unjustifiable uses of moneys and products of the Home, there is nothing therein nor in the law enacted in consequence of that report to indicate a prohibition or even a disapproval of the use or consumption by resident officers of the Home of the articles now being considered.

It must therefore be held that practice, acquiescence, and Congressional approval have established the construction of the law that permits the allowances in question.

The use of the articles in question as shown is merely an indirect application of a small fraction of the trust funds to the benefit of the *cestuis que trust.*

These articles when received by a retired officer of the Army acting as governor, deputy-governor, or treasurer of the Home residing thereat are not pay or emoluments received from the Government.

Here, as in most cases of trusteeship, some things must be left to the discretion and judgment of those who are empowered to administer the trust.

In this case the articles received must be issued by the allowance of the board; they must not be excessive in amount or value; they should be such as, in the nature of things, may be readily supplied at the time and place, and such as may be properly issued with due regard to convenience and economy.

Subject to these conditions, it is my opinion that these articles may be received by these officers without any violation of existing statutes.

In response to your inquiry, so far as it relates to the salary granted to the treasurer by the board, permit me to answer that it is shown that the duties of this officer are quite exacting and his service involves a large pecuniary responsibility; he is required to serve as secretary, as well as treasurer, and to make all of the purchases for the Home.

The investigation made by the Senate committee in 1882, before referred to, disclosed the fact that additional compen-

sation had been paid to the treasurer from the funds of the Home.

The act of 1883, which was the outgrowth of this investigation, not only fails to prohibit or restrict such payment, but it recognizes the importance of the services of this officer by requiring him to give a bond in the penal sum of $20,000, for the faithful performance of his duty.

As the compensation received by the treasurer through the board of commissioners is not pay or emoluments received from the Government, it is my opinion that he is not prohibited by any statute from receiving such salary, reasonable in amount, as the board in its discretion shall grant.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

COMMENCEMENT OF DUTIES.

The President having proclaimed March 15 as the date at which the suspension of free importation of enumerated articles from countries designated in the proclamation is to take effect, goods shipped prior to the date when such change takes effect are admitted at the old rate of duty.

DEPARTMENT OF JUSTICE,
March 17, 1892.

SIR: Touching the time when duties are to be imposed under the tariff bill of 1890, about which inquiry was made from your Department of me yesterday evening, I beg to say:

The language of the statute, after providing for the proclamation by the President, is as follows:

"In such cases and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country, as follows." (26 Stat., 612.)

By his proclamation, the President has fixed March 15 instant as the date on which the suspension of free importation of the above-named articles from the countries designated is to take effect. My understanding is that under the rulings of the Treasury Department it has been customary, when the law has been changed, to admit goods shipped prior

to the date when such change takes effect at the old rates, and this being so, I see no reason for applying a different rule under this section. Indeed, upon that point I think the judicial mind would lean to a liberal rather than a rigorous construction.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

CHIEF ENGINEERS—GRADES—PROMOTIONS.

The relative rank among the chief engineers changes with their seniority in that grade, but such change may be indicated by a notification from the Secretary of the Navy. No examination or appointment or confirmation by the Senate is necessary.

DEPARTMENT OF JUSTICE,
March 18, 1892.

SIR: On the 13th ultimo you requested the opinion of the Attorney-General on the question—

"Whether in the division of the seventy chief engineers into three grades, by relative rank, as provided for in sections 1390 and 1476 of the Revised Statutes, three *grades* of *chief engineers* were created, within the meaning of the word *grade* as used in sections 1493 and 1496 of the Revised Statutes, which provide that no line officer and no officer not of the line, shall be promoted to a higher *grade* on the active list until his physical, mental, moral, and professional fitness therefor has been established to the satisfaction of the board of examining officers appointed by the President; also whether upon the advancement of a chief engineer from the third to the second, or from the second to the first or highest grade of *relative rank*, such officer should be subjected to examination before a board of officers, as required in the case of officers promoted to a higher *grade*, and given a new commission after confirmation by the Senate, as is done in the cases of all officers of the line, and of all of those of the several staff corps except naval constructors, civil engineers, chaplains, and professors of mathematics." (Secs. 1477, 1478, 1479, and 1480, R. S.)

Section 1390 of the Revised Statutes is as follows:

"The active list of the Engineer Corps of the Navy shall consist of seventy chief engineers, who shall be divided into three grades, by relative rank, as provided in chapter four of this title;

"Ten chief engineers;

"Fifteen chief engineers; and

"Forty-five chief engineers who shall have the relative rank of lieutenant-commander or lieutenant.

"And each and all of the above-named officers of the Engineer Corps shall have the pay of chief engineers of the Navy as now provided.

"One hundred first assistant engineers who shall have the relative rank of lieutenant or master; and

"One hundred second assistant engineers who shall have the relative rank of master or ensign; and the said assistant engineers shall have the pay of first and second assistant engineers of the Navy, respectively, as now provided."

Section 1476 provides as follows:

"Officers of the Engineer Corps on the active list shall have relative rank as follows:

"Of the chief engineers, ten shall have the relative rank of captain, fifteen that of commander, and forty-five that of lieutenant-commander or lieutenant.

"First assistant engineers shall have the relative rank of lieutenant or master, and second assistant engineers that of master or ensign."

The concluding part of section 1480 is as follows:

"The grades established in the six preceding sections for 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 section 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: *Provided*, That the issuing of a new appointment and commission to any officer of the Pay Corps under the provisions of this section shall not affect or annul any existing bond,

but the same shall remain in force and apply to such new appointment and commission."

These three sections were derived from sections 7 and 10 of the act of March 3, 1871. (16 Stat., 538.) Section 7 of that act was as follows:

"That the officers of the Engineer Corps on the active list of the Navy shall be as follows:

"Ten chief engineers who shall have the relative rank of captain;

"Fifteen chief engineers who shall have the relative rank of commander; and

"Forty-five chief engineers who shall have the relative rank of lieutenant-commander or lieutenant.

"And each and all of the above-named officers of the Engineer Corps shall have the pay of chief engineers of the Navy, as now provided.

"One hundred first assistant engineers, who shall have the relative rank of lieutenant or master; and

"One hundred second assistant engineers, who shall have the relative rank of master or ensign; and the said assistant engineers shall have the pay of first and second assistant engineers of the Navy, respectively, as now provided."

It will be observed that the word "grades" used in section 1390 did not occur in the original act, and was the result of the revision.

Section 1493 and section 1496 of the Revised Statutes, which require physical and other examinations before promotions may be made from one grade to another in the active list of the Navy, first appeared in the act of April 21, 1864 (13 Stat., 53). At the time this act was passed, the grades of engineers in the Navy had been established by the act of August 31, 1842 (5 Stat., 577), in which the Secretary of the Navy was authorized to appoint a requisite number of chief engineers and assistant engineers, not to exceed one chief engineer, two first assistant, two second assistant, and three third assistant engineers for each steamship of war in the actual service of the United States. The chief engineer was given the right to share in prize money as a lieutenant, the first assistant engineer as a lieutenant of marines, the second assistant engineer as a midshipman, and the third assistant engineer as the forward officers; but none of the engineers should hold any other rank than as an engineer.

By act of March 3, 1859 (11 Stat., 407), chief engineers of more than twelve years rank with commanders; chief engineers of less than twelve years, with lieutenants; first assistant engineers next after lieutenants; second assistant engineers next after masters; third assistant engineers with midshipmen; but the rank conferred no authority to exercise military command, and no additional right to quarters.

It is perfectly evident from this history of the grades among engineers that when the sections 1493 and 1496 were enacted in 1864, such grades were not regulated by the relative rank with the line incident to them, but that the relative rank was assigned merely for the purpose of establishing precedence between the staff officers and officers of the line and also for the distribution of prize money. By the act of 1864 already referred to a new grade among engineers was created, that of fleet engineers. When the act of 1864 went into effect, therefore, the examinations required for promotion from one grade to another applied in the Engineer Corps to promotions from third assistant engineer to second assistant engineer, from second assistant engineer to first assistant engineer, from first assistant engineer to chief engineer, and from chief engineer to engineer of the fleet. The act of 1871 in effect abolished the grade of third assistant engineer and the grade of fleet engineer, and the question now presented is whether that act, by providing different relative ranks for the three divisions of the chief engineers, thereby created three different grades of chief engineers, promotion from one of which to another was enjoined by the act of 1864 now embodied in sections 1493 and 1496. Were this a new question and one which your Department had not already decided by a practice of twenty years, strong grounds might be urged for the view that it was the intention of Congress by the act of 1871 to create three grades among the chief engineers and to make new appointments and new commissions essential in promotions from one to another. The practice of twenty years, however, can not be lightly overturned, and when there is grave doubt as to the proper construction, the practice is controlling. The use of the word "grades" in section 1390, in referring to the three different relative ranks of chief engineers, lends weight to the contention that "grades" as

used in sections 1480, 1493, and 1496 should be held to apply to the three classes of chief engineers. But the fact already alluded to that the word "grades" appeared first in section 1390 in the revision of the statutes, and did not appear in section 7 of the act of 1871, which was the parent section, weakens that argument very much. It is clear that the mere fact that different relative rank is assigned to officers whose office is designated by the same title does not necessarily put such officers in different grades. Take the case, for instance, of a passed assistant surgeon to whom a different relative rank is given from that given to an assistant surgeon. It was decided by Acting Attorney-General Jenks (19 Opin., 169) that a passed assistant surgeon and an assistant surgeon are officers of one and the same grade, but belong to different classes in such grade. And this conclusion was based on the reasoning of the Supreme Court in the case of *The United States* v. *Moore* (95 U. S., 760).

There is language in the opinion of Attorney-General Devens (16 Opin., 414) which may support the view that chief engineers are of three different grades, but the question was not before him and his intimations were in the nature of illustrations rather than well-considered conclusions. He did not have before him what, as I have said, is all-controlling in the construction of a doubtful statute—the practice of the Department for more than twenty years. Were it now to be decided that the chief engineers are by law divided into three grades, in promotion from one of which to another, examination, appointment by the President, confirmation by the Senate, and a new commission are essential, it would require that nearly every chief engineer in the first two classes now acting should be examined, and appointed, and confirmed by the Senate, though they have discharged the functions of those two first classes and enjoyed the privileges thereof for many years. It is not so important that the construction of a statute as doubtful as this be exactly what Congress intended, as that a construction, acted on for twenty years, should be upheld. The conclusion follows, therefore, that the grade of chief engineer is one grade; that promotion to that grade from first assistant engineer requires examination under sections 1493 and 1496; that the relative rank among the chief engineers changes with their seniority

in that grade, but that such change may be indicated by a notification from the Secretary of the Navy; and that, as they hold the same office, no examination or new appointment or confirmation by the Senate is necessary. The office of chief engineer remains the same. The relative rank, however, is changed by seniority and notification from the Secretary of the Navy. The distinction between rank and office is very clearly brought out in the case of *Wood* v. *United States* (107 U. S., 414), where it was held that a colonel of cavalry who was by brevet a major-general, could have his rank changed by act of Congress, though not his office.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE NAVY.

Approved:

W. H. H. MILLER.

DIRECT TAX—SET-OFF OF INDEBTEDNESS OF STATE.

Where through errors overpayments have been made by the United States to the State of Indiana, it is the duty of the Secretary of the Treasury to withhold from the amount to be paid to that State under the refund of the taxes collected under the direct-tax act, a sufficient amount of money to meet the indebtedness of the State of Indiana to the United States.

DEPARTMENT OF JUSTICE,
March 19, 1892.

SIR: On the 12th of October, 1891, you referred to the Attorney-General a letter of the Second Comptroller, in which that officer requested you to submit to the Attorney-General the question whether in paying to the State of Indiana the amount of direct tax to be ascertained and paid under the act of Congress approved March 2, 1891 (26 Stat., 820), it was your duty to withhold and set off an amount equal to $46,103.01, which said sum, by the report of the Third Auditor and the decision of the Second Comptroller was found to be due to the United States from the State of Indiana. The direct-tax act referred to provides in its first section—

"That it shall be the duty of the Secretary of the Treasury to credit each State and Territory of the United States, and

the District of Columbia, a sum equal to all collections by set-off or otherwise made from said States and Territories and the District of Columbia, or from any of the citizens or inhabitants thereof, or other persons under the act approved August fifth, eighteen hundred and sixty-one, and the amendatory acts thereto."

Section 3 appropriates such sums as may be necessary to reimburse each State, Territory, and the District of Columbia for all money found to be due to them under the provisions of the act, and provides that where any of the sums credited to the States have been collected by the United States from the citizens, either directly or by sale of property, then such sums are to be held by the State in trust for such citizens or their legal representatives.

A second proviso is expressed as follows:

"*And provided further*, That no part of the money collected from individuals, and to be held in trust as aforesaid, shall be retained by the United States as a set-off against any indebtedness alleged to exist against the State, Territory, or the District of Columbia, in which such tax was collected."

The terms of this last proviso raise a necessary implication that the power exists in the Secretary of the Treasury in making payment of the claims under this act to withhold by way of set-off from the payee an amount equal to any indebtedness due from such payee to the United States, except in the case stated in the proviso where the payment is to be made to the State, not as the real creditor, but as trustee for her citizens from whom the tax had been directly collected. The implication in the proviso is, and may properly be founded on the act of March 3, 1875 (18 Stat., 481), which provides—

"That when any final judgment recovered against the United States or other claim duly allowed by legal authority shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of such an amount of such judgment or claim equal to the debt thus due to the United States."

The act of 1875 further provides that if the claimant agrees to the set-off, the Secretary may execute a full release of the

debt. If he denies it, then the Secretary is to withhold enough in addition to the amount to be set off to cover the costs of prosecuting the debt to final judgment, and it is made the duty of the Secretary to cause legal proceedings to be commenced to enforce the same.

I can not see why the claim adjusted under the direct tax act in favor of the State of Indiana is not a "claim duly allowed by legal authority," it having been allowed by the proper accounting officers of the Treasury, and it having been lawfully presented to the Secretary of the Treasury for payment. It is not denied that more than $700,000 of the payment to be made to the State of Indiana is for money paid by her as a State and not for money directly collected from her citizens. This case, then, is not within the proviso in the third section of the direct tax act, which has been quoted, forbidding set-offs. No reason exists, therefore, why the amount named should not be set-off if that amount is a debt due from the State of Indiana to the United States. In order to determine whether this is a valid debt, it is necessary to make a short statement of the facts on which was based the decision of the Third Auditor and the Second Comptroller that the amount is legally due. By the act of July 27, 1861 (12 Stat., 276), it was provided 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."

The act of March 29, 1867 (15 Stat., 9), provided for the appointment of three commissioners, not residents of the State of Indiana, to ascertain the amount of moneys expended by the State of Indiana in enrolling, equipping, subsisting, transporting, and paying such State forces as were called into service in said State after the 1st day of January, 1862, to act in concert with the United States forces in the suppression of rebellion against the United States. These commis-

sioners were to make a written report to the Secretary of the Treasury, who was to cause the same to be examined by the proper accounting officers of the Treasury, and the said officers were to audit the said accounts as in ordinary cases. As a result of the examination and auditing of the expenditures claimed by the State of Indiana under these two acts, a large amount of money, aggregating several millions of dollars, was paid in various warrants to governors of Indiana, and by them deposited in the treasury of the State. The confusion necessarily incident to the immense number of transactions under examination in the accounting offices of the Treasury Department led to a duplication of vouchers and to clerical errors, the result of which was that $46,123.01 was paid to the governors of Indiana and by them deposited in the treasury of the State of Indiana to which the State of Indiana was not properly entitled by such adjustments. The error arose from mistakes in adding columns and in the duplication of vouchers. The State of Indiana therefore has in its possession something more than $46,000 belonging to the United States. It was paid by mistake, and if the two parties were individuals, the State of Indiana would be liable in an action of assumpsit for the money belonging to the United States thus had and received to the use of Indiana. There is no doubt about the legality and equity of a set-off founded on such a debt.

The agent of the State of Indiana and the governor of that State maintain that there is still a large amount of money, aggregating something more than $1,000,000, due to Indiana from the United States under the acts of 1861 and 1867. These claims have been examined at the Treasury Department and either disallowed or suspended for more evidence.

Such as were suspended have been pending for more than twenty years, with no new evidence furnished. The suspended and rejected claims are not before you or me for adjudication, and you can not, in discharging your duty to secure by way of set-off any debt due the United States, have regard to any claims against the United States which are neither liquidated, adjusted, nor allowed by the proper accounting officers of the Treasury. I do not find it anywhere denied that there was not an error of overpayment to the State of

Indiana as decided by the Third Auditor and the Second Comptroller. The error was discovered in 1886, and was at once called to the attention of the governor of Indiana. The correctness of the claim then made by the accounting officers has never been disputed.

Much reliance has been put by the gentlemen representing Indiana upon an opinion rendered by the present Attorney-General in the matter of a set-off against the claim of the State of Vermont under this same direct tax act. That case has no application here. There the question was whether certain arms furnished to the soldiers of the State of Vermont to resist an invasion by Confederate forces assembled on the Canadian border were properly chargeable against the State as a debt to the United States under the old militia law of 1808. It was held that they were not so chargeable, because they were furnished for a national purpose, i. e., of resisting a national invasion, exactly as arms were furnished to volunteers from other States. Here the debt set-off is a simple overpayment of money into the treasury of the State of Indiana, and its validity can not be disputed.

I have the honor to advise that you continue to withhold from the amount to be paid under the direct tax act a sufficient amount of money to meet the indebtedness found due by the Third Auditor and the Second Comptroller from the State of Indiana to the United States. If the State of Indiana is dissatisfied with this decision, she has recourse to the Court of Claims to enforce there the payment of the full amount allowed to be due her under the direct tax act of 1891.

Very respectfully,

WM. H. TAFT,

Acting Attorney-General in this Case.

The SECRETARY OF THE TREASURY.

TONNAGE DUES—COMMISSIONER OF NAVIGATION—THE PRESIDENT.

The President is not clothed with authority to reverse the decision of the Commissioner of Navigation so as to adjust the claims of Sweden and Norway for the return of tonnage dues alleged to have been erroneously exacted. Any application for relief should be addressed to the legislative branch of the Government.

DEPARTMENT OF JUSTICE,
March 23, 1892.

SIR: By documents transmitted the 12th instant I am called upon for an opinion as to whether it is now within the scope of the authority of the Executive to determine and adjust the claim presented by Sweden and Norway, under the shipping acts of 1884 and 1886, construed with the treaty of 1827, for a return of such tonnage dues as are alleged to have been erroneously exacted since said acts went into effect, and for a reduced rate of tonnage duty.

By article 8 of the treaty of July 4, 1827, concluded between the United States and Sweden and Norway (Treaties and Conventions, 1061), it is agreed that (with an exception which is not applicable here) neither party shall "impose upon the navigation between their respective territories, in the vessels of either, any tonnage or other duties of any kind or denomination which shall be higher or other than those which shall be imposed on every other navigation."

In 1828 the Government of the United Kingdom sought to impose tonnage taxes upon vessels classified by geographical tests, placing lower charges on those coming from the ports of Europe than on those coming from ports of the United States.

Upon the demand of this country, and after diplomatic discussion, it was held that it was the purpose of article 8 (to use the words then employed by Mr. Clay) "to restrain either party from demanding higher or other tonnage duties from the vessels of the other than those which should be imposed on every other navigation;" and the excess theretofore exacted from the United States was refunded to her.

The act of June 26, 1884 (23 Stat., 53), relates principally to the merchant marine and the foreign carrying trade of the United States, and consists mainly of amendments to the shipping sections of the Revised Statutes.

Section 14 of the act is in effect amendatory of section 4219, Revised Statutes, and section 11 of the act of June 19, 1886 (24 Stat., 79), amends said section 14.

That portion of amended section 14 presented by this inquiry imposes the 3–15 cent rate per ton of tonnage duty upon all vessels entered in any port of the United States from any foreign port or place in North America, Central

America, or the coast of South America bordering on the Caribbean Sea, or from certain specified islands and the 6-30 cent rate upon all vessels entered from other foreign ports.

Section 3, of the Bureau of Navigation act of July 5, 1884 (23 Stat., 118), so far as applicable, provides, as to the Commissioner of Navigation, that:

"On all questions of interpretation growing out of the execution of the laws relating to * * * the collection of tonnage tax, and to the refund of such tax, * * * his decision shall be final."

It was held by Mr. Attorney-General Garland, in an opinion bearing date June 12, 1885 (18 Opin., 197), that the decision of this officer is final "as to all claims for refunds of the tonnage tax."

The opinion which I had the honor to submit to the Secretary of the Treasury, under date of September 26, 1890 (19 Opin., 661), was based upon an inquiry which assumed the authority of the Commissioner to decide the legality of the tonnage tax there in question, and the rule as laid down in the opinion of June 12, 1885, was followed:

The circuit court of the United States for the district of Oregon in August, 1890, in *Laidlaw* v. *Abraham* (43 Fed. Rep., 297), considered the effect of the Commissioner's decision under this clause, and held that it did not take from an unsuccessful appellant the right to bring an action in the courts to review the decision.

The court says that at first blush it may appear that one paying an illegal tax loses his right to redress in the courts after an adverse decision by the Commissioner, and adds: "But, on reflection, I am satisfied that the word 'final' is used in this connection with reference to the Department, of which the Commissioner is generally a subordinate part.

"In my judgment, the purpose of the provision is to relieve the head of the Department from the labor of reviewing the action of the Commissioner in these matters * * *."

No other decisions upon the question involved have come under my notice.

Notwithstanding the treaty of 1827 and the construction put upon it in 1828, the giving of due weight to the act of July 5, 1884, and to the foregoing decisions appears to pre-

clude the Secretary of the Treasury from repaying tonnage dues already exacted in those cases where the Commissioner of Navigation decides that they should not be refunded.

An application now of the rule adopted in 1828 will give the lower rate to vessels coming to the United States from the United Kingdom.

And the rule thus applied will at the same time tax our own ships sailing between our ports and those of Sweden and Norway at the 6–30 cent rate, while these foreign ships plying between the same ports will come into our ports at the 3–15 cent rate.

It is improbable that Congress intended to give more advantageous rates to the United Kingdom than to any other European nation, and it is quite as improbable that a purpose existed of imposing a lighter tonnage tax upon these foreign ships than upon our own vessels.

While the case presented here has a connection with the treaty of 1827, it bears the color of a claim. It is a claim for a refund of tonnage dues exacted in accordance with the laws applied to all other European nations, and seeks the establishment of a rule that will hereafter give special rates to the United Kingdom.

In this connection, and somewhat to test the purpose of Congress, thought may be given to the confusion which may arise in our relations with many nations in consequence of the "most favored nation" clause which so many treaties contain, if the rule upon which this claim rests shall be established.

In 1887 there was submitted to and passed upon by the Commissioner of Navigation, the claim of the United Kingdom for the same rate of tonnage duty upon the vessels of that Kingdom sailing from its ports to those of the United States as is given by section 14 to vessels plying between the ports of this country and those of the countries and islands included in the first clause of said section.

Under date of June 20, 1887, the Commissioner decided against this claim for a refund of tonnage dues paid at the 6–30 cent rate, and decided that the vessels of the United Kingdom, coming from the ports thereof, are not entitled to enter our ports at the 3–15 cent rate.

It can not well be denied that this determination is fairly

within the enactment quoted, which makes the decision of the Commissioner final on all questions of interpretation growing out of the execution of the laws relating to the collection of the tonnage tax, and to the refund thereof. Of course it is not intended to advise that the Commissioner of Navigation, if convinced that he has made an erroneous ruling, may not make a different ruling. But it is my opinion that the construction of the law declared in due course by that executive officer designated by Congress to interpret the same ought to be regarded, and that, as this case now stands, the Executive is not clothed with authority by reversing that decision to adjust this claim for past exactions.

Any application to be made for relief in the premises should, in my opinion, be addressed to the legislative branch of the Government. The propriety of this course is emphasized by the danger of complications likely to follow a different course as above suggested.

Very respectfully,

W. H. H. MILLER.

The PRESIDENT.

IMMIGRANTS—CRIMINALS—ATTORNEY-GENERAL.

Where immigrants formerly temporarily residing in the United States, but without taking any steps to become citizens thereof, returned to Italy and were convicted there of crime and served out a sentence and upon their discharge were given passports to the United States, they are not exempted from the provisions of sections 2 and 4 of the act of August 3, 1882, chapter 376, and section 1 of the act of March 3, 1891, chapter 551.

It will be safer and better practice not to attempt a definition of the word "immigrant," but to decide each case with reference to its particular circumstances.

DEPARTMENT OF JUSTICE,
March 29, 1892.

SIR: Your letter of the 26th instant, in which you request the opinion of the Attorney-General on the question whether certain immigrants are entitled to land, who some years ago resided temporarily in the United States, and thereafter returned to Italy, were there convicted of crime and served out their sentences of imprisonment, and upon their discharge were given passports and came to the United States, has received my consideration.

Assuming that the persons referred to did not become citizens of the United States, or take steps to that end, it is my opinion that a former temporary residence in this country in no way exempts them from the provisions of sections 2 and 4 of the act of August 3, 1882, and section 1 of the act of March 3, 1891. As was said in an opinion by Attorney-General Garland (18 Opin., 500), construing these sections "The literal sense of statutes * * * yields to the manifest legislative intent." The intent of these laws is to exclude criminals from the country. The exclusion of these persons does no violence to the language of the statute.

I do not attempt any definition of the term "immigrant," as you request. In my opinion it will be safer and more in accordance with the practice of this Department to decide each case with reference to its particular circumstances.

The persons described in your letter are to be deemed both aliens and immigrants within the acts of Congress regulating the subject of immigration, and should be returned, as indicated.

Very respectfully,

CHARLES H. ALDRICH,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

REID CLAIM—JURISDICTION OF PROBATE COURT—UNITED STATES—RES ADJUDICATA.

A claim of one Reid to a portion of certain balances of the *Armstrong* fund remaining in the Treasury, considered in the light of his having obtained letters of administration on the estate of one of the owners of the brig, because of the destruction of which the fund was appropriated, as being a creditor of said owner, and *held* that, as that claim of his being a creditor of said owner had been adjudicated adversely by the State Department ten years previously, the probate court was without jurisdiction to appoint Reid administrator, and that the United States should intervene by way of suggestion to the court, asking that the letters of administration heretofore granted be vacated. (17 Opinions, 590, 600, and 626; and 19 Opinions, 32, followed.)

The United States, both as a trustee for the lawful owner, or if there be no lawful owner, as *ultima haeres*, is a proper party.

DEPARTMENT OF JUSTICE,
April 4, 1892.

SIR: By your letter of March 14, 1892, it appears that "by the act of May 1, 1882, the Secretary of State was authorized and directed to examine and adjust the claims of the captain, owners, officers, and crew of the late private-armed brig *General Armstrong*, growing out of the destruction of the said brig by a British force in the neutral port of Fayal, in September, 1814, * * * and * * * to draw his warrant in favor of said claimants, their heirs, executors, administrators, agents, or assigns for the amount which may be by him found due to said claimants" (22 Stat., 697), and that, acting thereunder, Mr. Frelinghuysen, on the 24th of July, 1882, rendered a decision in which he found that by "an instrument in writing dated December 12, 1885, the owners of the vessel, comprising fifteen persons and firms, 'in consideration of $1 to each of us (them) paid, and in further consideration of the undertaking of Samuel C. 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,' assigned to said Reid all their interest in the brig *General Armstrong*, 'subject to the payment to each of us (them) of the one-half of any moneys that he may recover for or on account of said vessel.'" This finding also recites an instrument in writing dated October 31, 1851, signed by Samuel C. Reid, purporting to assign to his son, Samuel C. Reid, jr., the foregoing interest in the brig *Armstrong* received by assignment from the owners. Your communication states that the amount now proved before the Court of Claims to which amount the appropriation was limited was $70,739, and that as there was no specific evidence of the relative amount of interest of each of the fifteen owners, Mr. Frelinghuysen decided to apportion such interest equally among them. Of the amount above named, $43,000 was awarded to the owners of the brig and $27,739 to the officers and crew. Of the amount awarded the owners, 50 per cent, or $21,500, and of the amount awarded to the officers and crew, 40 per cent, or $10,095.60, were paid to Mr. Reid, making a total payment to him for the prosecution of the claim of $31,595.60. The decision divided the $43,000 into fifteen shares of $2,866.66 each, and awarded

to each of the fifteen owners the sum of $1,433.33, the remaining one-half being awarded to Mr. Reid, as above stated.

You state that Mr. Reid at the time contended that he was entitled as attorney, agent, and assignee of the claimants to the balance of the fund remaining to the credit of the Secretary of State in this case, and that he also claimed to be indemnified for the time, labor, and disbursements made as such agent, attorney, and assignee. These claims were referred to this Department, and an opinion adverse thereto was rendered. (17 Opin., 590.) Upon Mr. Reid's request, this opinion was reconsidered, and afterwards reaffirmed on July 31, 1883 (17 Opin., 600). Mr. Reid then urged his right to be reimbursed for expenses, making the point that the decision of the Attorney-General covered only ordinary expenses, and that the expenses for which he sought reimbursement were extraordinary. This claim was referred to this Department on the 27th of October, 1883, and an adverse opinion given on the 19th of December, 1883 (17 Opin., 626). In June, 1887, Mr. Reid again presented a claim that he should be allowed, in addition to the proportion stated to have been received by him under the decision of the Secretary of State, reimbursement for certain parts of his interest which he alleges he assigned in order to raise money to enable him to prosecute the claim, amounting in the aggregate to $8,281. He contended that the expenses incurred by him in prosecuting the claim should have been charged against the whole fund and deducted therefrom before any distribution was made among the claimants. On June 9, 1887, this Department decided adversely to this claim. (19 Opin., 32.) It now appears from your communication that on December 10, 1891, Mr. Reid procured letters of administration from the supreme court of the District of Columbia upon the estate of Henry Coit, which he presented on that day to your Department and requested payment by you of said Coit's share in the *Armstrong* fund. It also appears that Henry Coit was one of the fifteen owners of the brig. The administration is procured by Mr. Reid upon representations made to the court that he was the agent and attorney of Coit, deceased, in the prosecution of said claim, and that the estate is indebted to him, the petitioner, in the sum of $766.66, just

one-half of Coit's share remaining in the hands of the Department after having been diminished by 50 per cent payment to Mr. Reid as above stated. The petition for administration states that Henry Coit "died in New York City, as petitioner believes, about the year 1862, * * * and that petitioner has no knowledge or information that the said decedent has any legal representatives in this District or elsewhere." It is sufficiently disclosed that Mr. Reid is not a creditor of the estate of Coit except for services and expenses in connection with the prosecution of the claim. That question was adjudicated by the Secretary of State ten years ago, and has since been passed upon four times by the Department of Justice. You state "if the payment is made to Reid in this case, it is presumed that he has equally valid grounds for securing letters upon the estates of the other unpaid claimants, and so of withdrawing from the Treasury the whole balance of the fund, which at this time amounts to about $16,000." You submit to this Department the question whether you are "legally bound to pay the money to Mr. Reid as administrator," and ask "for such other advice or action in the premises" as this Department may deem proper.

The general principle is that the granting of letters of administration is a matter resting exclusively in the jurisdiction of the probate court, and its action therein is binding and conclusive, and its legality can not be questioned in any other court, nor collaterally impeached for irregularity. The only exception to this is the fact of the death of the alleged decedent. This proposition assumes that the probate court making the appointment has jurisdiction. As a general rule, the court of the domicile of the deceased is the court authorized to administer his estate. In many instances laws have been enacted providing for administration where he left property. We do not find any act authorizing the appointment of administrators in this District by reason of the *situs* of property belonging to the deceased within its limits. In any event it may be doubted whether a claim against the United States would justify such appointment. In *Wyman* v. *Halstead* (109 U. S., 654), the court held:

"For the purpose of founding administration, a simple contract debt is assets where the debtor resides, even if a bill

of exchange or promissory note has been given for it, and without regard to the place where the bill or note is found or payable.

"Debts due from the United States are not local assets at the seat of government only."

Mr. Justice Story, in delivering the judgment of the court in *Vaughan* v. *Northup* (15 Pet., 1), is quoted as follows (p. 657):

"The debts due from the Government of the United States have no locality at the seat of government. The United States, in their sovereign capacity, have no particular place of domicile, but possess, in contemplation of law, an ubiquity throughout the Union; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicile. On the contrary, the administrator of a creditor of the Government, duly appointed in the State where he was domiciled at the time of his death, has full authority to receive payment and give a full discharge of the debt due to his intestate in any place where the Government may choose to pay it.

Again, the facts show that Mr. Reid has been fully paid. The only grounds upon which administration can be granted to him, even if this court has jurisdiction, is that he is a creditor.

His claim is also barred by the statute of limitations, and he is not entitled, by securing his own appointment as administrator, to make any acknowledgment of the debt due himself which will remove the bar of such statute.

He is also, in my opinion, precluded from recovery irrespective of the former reason suggested by reason of the decisions of your Department.

In view of the fact that the appointment can not be attacked collaterally, it seems advisable that the United States, acting by the Attorney-General, should intervene by way of suggestion to the court, asking that the letters heretofore granted be vacated and set aside. This can be done without submitting the rights of the Government to the jurisdiction of the court.

The Government has such an interest in the fund as to entitle it to be heard in its disposition. As a trustee, holding the fund for the true owner, it is its duty to defend and protect

the trust estate, and if Coit died without heirs or real creditors, it is suggested that the United States is the *ultima hæres*. At least no other power than the State of the citizenship of the decedent could dispute such a right. The legislation of Congress by which provision is made for the covering of unused appropriations into the Treasury of the United States at least warrants the claim that the Government is the ultimate beneficiary of this fund in the event that no person claiming through Coit can be found.

I therefore advise that you are not bound to make such payment, or to recognize the claim of the administrator, but that it is your duty to refuse so to do. Appropriate action will be taken by this Department.

Very respectfully,

CHARLES H. ALDRICH,
Solicitor-General.

The SECRETARY OF STATE.

Approved:

W. H. H. MILLER.

ROCK CREEK PARK—PURCHASE OF LAND—THE PRESIDENT.

The President having declined to certify that the prices assessed by commissioners of appraisal for lands proposed to be taken for the Rock Creek Park were reasonable because the cost was limited by the act of September 27, 1890, chapter 1001, creating the park to $1,200,000 and the assessed price would bring the entire cost over that sum, and the commission, without filing any new map, having asked the President to certify to the reasonableness of the values assessed by the appraisers as to certain of the parcels, proposing by reducing the area of the park to bring the cost down within the $1,200,000: *Held*, that it is competent for the President to certify whether the prices named are reasonable or unreasonable, the question of the validity of the proceeding not being one for the Executive to determine, but a purely judicial question for the court, as to which no opinion is expressed.

DEPARTMENT OF JUSTICE,
April 5, 1892.

SIR: By your communication of March 23, I am advised of the following facts: Under the act of September 27, 1890, authorizing the establishing of a public park in the District of Columbia, the Rock Creek Park Commission caused to be made and recorded a map of said Rock Creek Park, as pro-

vided in section 3 of the act; that the commission determined as to each tract what would be a just compensation therefor, which determination was approved by you.

I am further advised that, with some of the owners of the ground embraced within the map of said park, the commission agreed as to prices and purchased said tracts; that as to most of said lands they were unable to make such agreements; that thereupon proceedings were taken, pursuant to said act, in the supreme court of the District of Columbia for the appraisement of the lands not purchased as provided by the act, and the appraisements so made having been submitted to you, and the same, together with the cost of the lands purchased, being in the aggregate in excess of the appropriation, you declined to decide the same to be reasonable, upon the ground that the limitation of cost to $1,200,000 being a condition precedent, you had no power to approve selections and valuations for said park in excess of that amount.

You now state, "That the commission, under date of March 11, have filed with me, and request that I will approve, the action of the court in assessing values as to parcels of lands within the lines originally proposed by them for the park, with a view to bringing the cost of the park within the amount named in the statute providing for its establishment." In other words, I am advised that the commission proposes to so reduce the area of the contemplated park as to aggregate only 1,390.27 acres, and in cost less than $1,200,000; this reduction to be accomplished by abandoning a large number of tracts embraced within the map and in the proceedings heretofore had.

I do not understand that any new map has been filed, or that the commission has taken any other action in the premises except upon the original map, by new lines, to indicate the boundaries of the reduced park. It is further my understanding that, in making this reduction, no tract originally included and appraised has been divided; but that the reduced map varies from the original only in that it includes a less number of the tracts originally selected and appraised.

Upon this state of facts you inquire whether, in my opinion, it is competent for you to comply with the request of the commission, by deciding that the valuations of the tracts

within the amended or reduced lines of the proposed park are reasonable or unreasonable; these valuations being the same fixed by the appraisers appointed by the court, hereinbefore referred to.

The answer to this question is to my mind by no means clear. It must, however, have been the intention of Congress that your approval or disapproval of the valuations of these lands should relate to the parcels severally, and it was not the purpose that in so doing you should review or pass upon the regularity of the proceedings. The validity and regularity of the preceedings are properly judicial questions; questions for the court, and not for the Executive. But it is entirely clear that, unless and until you approve or disapprove of these appraisements, no further proceeding, within or out of court, can be had. Until you act, the enterprise stops. Under these circumstances, and without expressing any views as to other legal questions involved, I am of the opinion that you may proceed to determine, parcel by parcel, whether the valuations of these lands are reasonable or unreasonable.

Very respectfully,

W. H. H. MILLER.

The PRESIDENT.

P. S.—I return herewith all papers in the case.

IMMIGRANT FUND—SECRETARY OF THE TREASURY—ELLIS ISLAND.

The Secretary of the Treasury is authorized to expend from the immigrant fund such money as may be necessary for finishing certain contracts and making final payments thereon in connection with putting Ellis Island in condition for use as a receiving station for immigrants.

DEPARTMENT OF JUSTICE,
April 8, 1892.

SIR: Your letter, which bears date the 30th ultimo and relates to expenditures made on Ellis Island, in New York Harbor, in connection with putting the same in condition for use as a receiving station for immigrants, has received due consideration.

It is stated that the improvements are approaching completion, and that "certain contracts are yet unfinished and

final payments thereon yet remain to be made," and I am asked whether you are authorized to expend from the immigrant fund such moneys as are required to properly complete the necessary improvements.

The capitation tax collected from the ship-owners for each and every alien passenger brought from foreign ports constitutes the immigrant fund, which is paid into the Treasury. The statute directs that this fund "shall be used, under the direction of the Secretary of the Treasury, to defray the expense of regulating immigration under this act, and for the care of immigrants arriving in the United States, for the relief of such as are in distress, and for the general purposes and expenses of carrying this act into effect." (22 Stat., 214.)

The Secretary of the Treasury is charged by law with the duty of executing the provisions of the immigration act quoted from, "and with supervision over the business of immigration to the United States," and is vested with the general direction and management of all of the immigration affairs of this Government, and with the general control and application of the funds pertaining to those affairs.

The scope of the duties of the head of the Treasury Department in connection with immigration is shown also in the "contract-labor" laws.

The act of February 26, 1885 (23 Stat., 332), provides for the exclusion of hired aliens, but omits to name an officer to enforce its provisions; but the amendatory act of February 23, 1887 (24 Stat., 414), enacts: "That the Secretary of the Treasury is hereby charged with the duty of executing the provisions of this act," and elaboration is made of the methods which he is authorized to employ; and this authority is still further recognized by Congress (25 Stat., 566, 567; *id.*, 957). The act of March 3, 1891 (26 Stat., 1084), which amends and connects with each other the various immigration acts, extends still further the responsibility of the Secretary of the Treasury.

It must be held that legislation has clothed the Secretary with full general authority over the management of immigration affairs and over the proper use and application of all moneys to be used in such affairs, and especially over all moneys of the immigrant fund.

It is well known that Ellis Island is property of the United States, and that it has been practically dedicated to the uses of the immigration service.

April 11, 1890 (26 Stat., 670), Congress by a joint resolution directed the Secretary of the Navy to remove the naval magazine from that island, appropriating $75,000 for the establishment of the magazine elsewhere.

Said joint resolution concludes as follows:

"And the further sum of seventy-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, to enable the Secretary of the Treasury to improve said Ellis Island for immigration purposes."

The "sundry civil" appropriation act of 1890 (26 Stat., 372), carries the following item:

"For Ellis Island, New York: For improvements upon the island for the business of the immigration service, seventy-five thousand dollars."

The "deficiency act" of March 3, 1890 (26 Stat., 867), makes an appropriation for furniture for the "immigration buildings, Ellis Island, New York."

And the "sundry civil" appropriation act of 1891 (26 Stat., 949) contains the following paragraph:

"For Ellis Island, New York: For completing the building and other improvements on Ellis Island, and for procuring the necessary transportation facilities to and from said island, the sum of one hundred thousand dollars, or so much thereof as may be necessary in addition to the head-money heretofore or hereafter applied to that purpose, be, and the same is hereby, appropriated and made immediately available, and the said sum shall be reimbursed, in installments of twenty-five thousand dollars per annum, from the head-money, license privileges, and rentals received at the port of New York."

It will be seen that Ellis Island was, under the direction of Congress, relieved from its former public charge and turned over to the Secretary of the Treasury to improve for immigration purposes. Appropriations were made from the miscellaneous moneys in the Treasury for the contemplated improvements which were necessary to fit the island for the "business of the immigration service," and, in addition to these appropriations of $150,000 (besides the furniture pro-

vision), there was loaned to the immigration fund for completing the building and other improvements and to procure transportation facilities $100,000, which is to be paid back in four annual installments out of the head-money and other receipts of the immigration business. (26 Stat., 949.)

It is quite significant that Congress loans this $100,000 for the purposes designated "*in addition to the head-money heretofore or hereafter applied to that purpose.*"

Not only is the separate and special character of the immigrant fund made plain, but the previous application of its moneys and their contemplated future use by the Secretary of the Treasury in providing the improvements is distinctly recognized with apparent approval.

In view of the general scope of the powers given by law to the Secretary of the Treasury in immigration affairs, and of the control given to that officer over the immigrant fund, and in view of the statutory provisions for improving Ellis Island and completing its buildings and appurtenances for the governmental use to which the island is now devoted, and especially in view of the statute last cited, which not only, as above, sanctions such use, but distinctly treats the head-money as the primary fund available for making such improvements by requiring the $100,000 appropriated and loaned for that purpose to be repaid out of such head-moneys, it is my opinion that the Secretary is authorized to expend from the immigrant fund such moneys as are required to properly complete the necessary improvements.

As the following opinions, heretofore transmitted to the Secretary of the Treasury, relate in part to the powers possessed by him by virtue of the immigration laws, and have an important bearing upon the question now considered, I beg to call them to your attention, as follows:

Opinion, dated February 8, 1890 (19 Opin., 486); Opinion, dated April 15, 1891; *id.*, dated July 28, 1891; *id.*, dated October 19, 1891.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

An opinion will not be given by the Attorney-General where it does not appear that some question exists calling for the action of the Department requesting it.

DEPARTMENT OF JUSTICE,
April 28, 1892.

SIR: Your communication of April 23 instant, asking an opinion as to the proper construction of certain railroad land grants made by Congress to the State of Minnesota, has received my consideration.

I do not perceive that the questions presented relate to any matter that calls for the action of the Department of the Interior. On the contrary, it seems quite evident, from your letter, that those questions relate to a matter which is now before Congress, and that action with reference to it is contemplated by Congress, and not by the Department of the Interior.

If I correctly understand your relation to the matter in question, it seems quite clear that I can not pass upon the questions submitted without stepping outside of the limits which the law has thrown around me.

Section 356, Revised Statutes of the United States, provides that "the head of any Executive Department may require the opinion of the Attorney-General on any questions of law *arising in the administration of his Department.*

Accordingly, where the head of a Department, at the request of a Senator, asked the opinion of Attorney-General Brewster upon a certain Senate bill, the Attorney-General declined to give an opinion on several grounds, one of which was that no question of law was presented that had arisen in the administration of the Department by whose head the opinion had been requested. (17 Opin., 357. See also 6 Opin., 24; 18 Opin., 77, 107; 19 Opin., 7, 331, 695.)

Furthermore, the questions propounded are judicial in character, and must be decided by the courts, if decided at all, and therefore an expression of opinion on them by me would have no more weight than the opinions of any unofficial person (19 Opin., 56; 13 Opin., 160). But the law intended that the opinions of the Attorney-General should have *authority*, and this object can only be accomplished by con-

fining them to questions strictly appertaining to executive administration. It is true the law does not say what effect shall be given to the opinion of the Attorney-General, yet the general practice of the Government has been to follow it, and this for the reasons stated by Attorney-General Cushing (6 Opin., 334), namely, that an officer going against it "would be subject to the imputation of disregarding the law as officially pronounced," and that, without "the guidance of a single Department of assumed special qualifications and official authority," uniformity and stability in the application of the laws would be hardly attainable.

Very respectfully,

CHARLES H. ALDRICH,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

ATTORNEY-GENERAL—QUESTION OF FACT.

The Attorney-General declines to express an opinion to the Postmaster-General on the question whether a certain publication is within the description of matter which the statute denominates second class, upon the ground that it is a pure question of fact, which it is the province of the Postmaster-General to decide.

DEPARTMENT OF JUSTICE,
May 3, 1892.

SIR: Sections 10, 11, and 14 of the act of March 3, 1879 (20 Stat., 359), chapter 180, entitled "An act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and eighty, and for other purposes," provide as follows:

"SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in section 12 and 14.

"SEC. 11. Publications of the second class, except as provided in section 25, when sent by the publisher thereof, and from the office of publication, including sample copies, or when sent from a news agency to actual subscribers thereto, or to other news agents, shall be entitled to transmission

through the mails at 2 cents a pound or fraction thereof, such postage to be prepaid, as now provided by law.

"SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers: *Provided, however*, That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

My opinion is asked upon the point whether a certain publication called Printers' Ink is a publication "designed primarily for advertising purposes or for free circulation or for circulation at nominal rates," and also whether this publication is shown, by the facts stated, to have "a legitimate list of subscribers."

After having given due consideration to your communication submitting these questions, I am unable to perceive that they involve any matter of law.

I do not understand the questions submitted as indicating any doubt in your mind as to the meaning of the several provisions of the statute to which you direct my attention, but your sole difficulty appears to be whether the publication called "Printer's Ink" comes within the description of matter which the statute denominates "second class."

This, in my judgment, is a pure question of fact, upon which I am not at liberty to express an opinion, under the law.

Section 356, Revised Statutes of the United States, provides that "The head of any Executive Department may require the opinion of the Attorney-General on any ques-

tions of *law* arising in the administration of his Department."

From the foundation of the Government down, this limitation has been imposed on the Attorney-General, and I, in common with my predecessors, have generally obeyed it.

In my opinion of October 21, 1890 (19 Opin., 673), I declined to give the Secretary of the Interior an opinion upon the question whether certain persons had established "their rights to citizenship in the Choctaw Nation," on the ground that it was a pure question of fact.

In his opinion of March 5, 1875 (14 Opin., 541), Attorney-General Williams declined to express an opinion as to whether a certain steamboat had been impressed by the military authorities, upon the ground that an impressment of property was "simply a conclusion of fact to be deduced from other facts established by the evidence," and, therefore, that the determination of the question submitted "appeared to be a matter not appropriate to, or at least not falling within, the duty of the Attorney-General."

In reply to the question what constitutes "a regular publication primarily designed for advertising purposes" under section 14 of the said act of March 3, 1879, submitted for opinion by the Postmaster-General, Attorney-General Devens said (16 Opin., 304, 305):

"I fear that I shall not be able to define these terms (which are in themselves simple and intelligible) so as to aid you in the decision of the various questions which are before you as to the character of individual publications.

"The difficulties presented seem to me to be entirely as to a question of fact with which the Postmaster-General must necessarily deal through the information that he receives in each particular case and those general rules which he may think valuable in deciding such a question."

Again, he says:

"In the variety of publications which are sent out by mail that there will be extreme embarrassment in many instances in determining whether the publication is 'primarily designed' or chiefly intended for advertising purposes can not be doubted. There are certain publications which carry upon their face their object, and an inspection would enable it to be determined; but the difficulty arises with

that class upon which there is conflicting evidence, certain circumstances indicating an intention to publish a journal valuable for literary or scientific purposes, certain others indicating an intention to employ the same journal for advertising purposes. It is impossible, however, to lay down a rule of law in the matter. The fact must be found by the Postmaster-General from such evidence as he may be able to obtain, connected with his own experience and that of his subordinates, so as to determine in each case whether the publication concerning which the question arises is in the first or second class."

I do not overlook the fact that Attorney-General Legare (4 Opin., 10) did undertake to define what was a newspaper, at the request of the Postmaster-General. The question submitted was not dealt with by him as a question of law, and there is nothing to show that his attention had been directed to the question of his power to give an opinion on a matter of fact. Under these circumstances, and in view of the consideration that the law is settled, in this Department at least, that the Attorney-General can not properly decide questions of fact, I must decline to follow the precedent set by my distinguished predecessor.

In order to meet the question presented in the demand of the publishers of "Printer's Ink" that it be passed through the mails as second class matter, you have to determine three questions of fact:

First. Is this document "originated and published for the dissemination of information of a public character, or devoted to literature, science, or art, or some special industry?"

Second. "Does it have a legitimate list of subscribers?"

Third. Is it issued "primarily for advertising purposes at nominal rates?"

These, as already stated, are questions of fact, which you, not I, must determine. These facts being found, the law is plain.

I regret that I find it to be out of my power, under the law, to aid you in determining these questions of fact which appear to involve difficulty.

Very respectfully, your obedient servant,

W. H. H. MILLER.

The POSTMASTER-GENERAL.

TREATY OF WASHINGTON.

Article XXIX of the treaty of Washington was terminated two years after the date of the giving of the notice provided for in Article XXXIII.

DEPARTMENT OF JUSTICE,
May 6, 1892.

SIR: The following is a copy of an opinion I gave you some months ago in response to your verbal request touching the proper construction of certain articles of the treaty of Washington. I send this in response to your personal inquiry of the 4th instant.

Respectfully, yours,

W. H. H. MILLER.

The PRESIDENT.

The treaty between the United States and Her Britannic Majesty, concluded at Washington, May 8, 1871 (twenty-ninth article), reads as follows:

"It is agreed that *for the term of years mentioned in Article XXXIII* of this treaty, goods, wares, or merchandise arriving at the ports of New York, Boston, and Portland, and any other ports in the United States which have been or may, from time to time, be specially designated by the President of the United States, and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper custom-house and conveyed in transit, without the payment of duties, through the territory of the United States under such rules, regulations, and conditions for the protection of the revenue as the Government of the United States may from time to time prescribe; and under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from said ports of the United States.

"It is further agreed that for the like period, goods, wares, or merchandise arriving at any of the ports of Her Britannic Majesty's possessions in North America, and destined for the United States, may be entered at the proper custom-house and conveyed in transit, without the payment of duties, through the said possessions, under such rules and regulations, and conditions for the protection of the revenue as the governments of the said possessions may from time to time prescribe; and under like rules, regulations, and conditions, goods, wares, or merchandise, may be conveyed in transit, without payment of duties, from the United States, through the said possessions to other places in the United States, or for export from ports in the said possessions."

Under this article, (1) merchandise destined for points in Canada may be entered at the ports of the United States, and without the payment of duties may be carried through the United States, and (2) merchandise from Canada may pass through the United States, without the payment of duties, to be exported from the ports of the United States. Also, (3)

merchandise arriving at Canadian ports destined for the United States may pass through Canada without the payment of duties; (4) merchandise may be conveyed from the United States without the payment of duties to ports in Canada for export, and (5) merchandise from the United States, destined to other points in the United States, may be carried through Canada.

The first and second and the third and fourth of those provisions give reciprocal advantages to the citizens of the two countries; but the fifth gives an advantage to the carriers of Canada to assist in carrying from one point to another point in the United States, while the carriers of the United States are not, by its terms, permitted to assist in carrying the merchandise of Canada from one point in Canada to another point in Canada.

It was agreed that this—the twenty-ninth article—should be in force "for the term of years mentioned in Article XXXIII."

It will be observed that there is no reference here to any manner, way, or process of terminating these provisions. The sentence quoted above has relation only to "time," "period," and in no sense to "manner" or "method."

Article XXXIII of the treaty is as follows:

"The foregoing Articles XVIII to XXV, inclusive, and Article XXX of this treaty, shall take effect as soon as the laws required to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the Parliament of Canada, and by the legislature of Prince Edward's Island on the one hand, and by the Congress of the United States on the other. Such assent having been given, the said articles shall remain in force for the period of ten years from the date at which they may come into operation; and further, until the expiration of two years after either of the high contracting parties shall have given notice to the other of the wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of the said period of ten years or at any time afterward."

This article treats both of "time" and "manner." The "time," at least, is the sum of ten years and two years. The "manner" is the recognition of the right to terminate, and the giving of a notice which shall terminate the duration of certain articles. Therefore, I have concluded that it was the intention of the contracting parties that the duration of Article XXIX should be dependent upon the existence of articles named in XXXIII, and that no method independent of the termination of Articles XVIII to XXV was given for its termination.

Section 2866, Revised Statutes, indicates very clearly that the legislative opinion contemporaneous with the conclusion of this treaty was that Article XXIX and the articles named in XXXIII were to have the same duration.

Section 2866, Revised Statutes, is taken from section 4 of the act approved March 1, 1873, entitled "An act to carry into effect the treaty between the United States and Great Britain, signed in the city of Washington the 8th day of May, 1871, relating to the fisheries."

Section 2866, Revised Statutes, is as follows:

"From the date of the President's proclamation declaring that he has evidence that the Imperial Parliament of Great Britain, the Parliament of Canada, and the legislature of Prince Edward's Island have passed laws on their part to give effect to the provisions of the treaty of Washington of May eighth, eighteen hundred and seventy-one, as contained in articles eighteen to twenty-five, inclusive, and article thirty of said treaty, and so long as said articles remain in force, according to the terms and conditions of article thirty-three of said treaty, all goods, wares, or merchandise arriving at the ports of New York, Boston, and Portland, and any other ports in the United States which have been or may, from time to time, be specially designated by the President of the United States and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper custom-house and conveyed in transit, without the payment of duties, through the territory of the United States, under such rules, regulations, and conditions for the protection of the revenue as the Secretary of the Treasury may, from time to time, prescribe; and, under the like rules, regulations, and conditions goods, wares, or merchandise may be conveyed in transit, without the payment of duties, from such possessions, through the territory of the United States, for export from the said ports of the United States."

This section relates only to Article XXIX of the treaty, and in it we find that it is to remain in force as long and only so long as Articles XVIII to XXV and Article XXX are in force.

It is claimed that the debate in the Senate on the passage of the joint resolution approved March 3, 1883, entitled "A joint resolution providing for the termination of articles numbered XVIII to XXV, inclusive, and Article XXX of the treaty between the United States of America and Her Britannic Majesty, concluded at Washington, May 8, 1871," indicates that it was not the purpose of Congress, at least, to abrogate Article XXIX of the treaty. That contention is based upon the fact that the words "so far as it relates to the articles of said treaty to be terminated" were added to the third section of the joint resolution as an amendment.

That section sought to repeal the act of Congress of March 1, 1873 and the section of the Revised Statutes numbered 2866, but it will be noticed that this statute and section ceased to be operative at the time of the abrogation of Articles XVIII to XXV and XXX without repeal. The provisions of the section were not continuing, but were dependent upon the existence of these articles of the treaty (articles 18 to 25 and article 30), and when they were terminated the law ceased to exist by its own terms. Nor could it be revived or continued by the language used in the amendment to the third section of the joint resolution of March 3, 1883, above quoted. Congress thought that some legislation was necessary that with existing law would carry into effect the provisions of the twenty-ninth article and enacted what is now section 2865. The sole purpose of this section is to give effect to this article. It treats of no other subject. But for the article its passage would not be required, and

as its passage was made necessary by the conclusion of the treaty, so its duration should correspond with the duration of the article that required its enactment. Hence, Congress made the statute contemporaneous, as to the time of its taking effect and the time of its repeal, with the period that the twenty-ninth article should be in force. Congress, therefore, said it (section 2866) should remain in force "so long as said articles (18 to 25 and 30) remained in force." Believing at the time of the enactment of section 2866 that Article XXIX terminated with the last-named articles, it merely provided that the provisions of the statute intended to make Article XXIX effective should terminate when it terminated.

I have, therefore, concluded that Article XXIX was abrogated two years after the date of the giving of the notice provided for in Article XXXIII.

CONSULAR JURISDICTION—SERVICE OF SENTENCE.

The appropriation act of 1891 authorized the expenditure of no money for a prison house in China except at Shanghai. The question having arisen whether a sentence could be served outside the limits of the jurisdiction of the consul who imposed sentence: *Held*, that while it is properly a question for the consul himself to decide and does not belong to the Attorney-General, yet as the Secretary of State has been requested by the consul for advice in the matter, the Attorney-General advises that the sentence of imprisonment imposed in any of the consular courts of China may be served out in any portion of China and not necessarily within the limits of the consul's ordinary jurisdiction. Whether the consul's jurisdiction is limited to the cognizance of matters occurring within the territory nearer his consulate than to any other consulate of the United States in China the Attorney-General does not decide, as it is not a proper question for him to answer.

DEPARTMENT OF JUSTICE,
May 7, 1892.

SIR: I have yours of March 5, 1892, by which it appears that an American sailor, named Harkaway, belonging to the U. S. S. *Alert*, then in the harbor of Amoy, became intoxicated while on shore on leave and assaulted and beat three Chinese citizens, one of whom was then, November, 1891, employed in the British consulate. Subsequently upon complaint duly made, the accused pleaded guilty and was sentenced by the consular court to pay a fine of $25, or in default to be imprisoned for twenty-five days. There being no prison at Amoy the accused was dispatched with the U. S. marshal to the consul-general at Shanghai, with proper commitment, who confined him for one day in the jail there and then released him without application therefor, and on his own

motion, for the reason, as given, that he had no jurisdiction to there hold in custody a person convicted in another consular jurisdiction. This action was taken upon the supposed authority of certain opinions of this Department.

The opinions referred to are those of February 4, 1875 (14 Opin., 522); of August 14, 1889 (19 Opin., 377); and June 17, 1890 (not reported).

You state that there is but one consular jail in China and six consular courts; that you have construed the appropriation act of 1891 (26 Stat., 1061), which provides for the "actual expenses of renting a prison at Shanghai for American convicts in China seven hundred and fifty dollars, and for the wages of a keeper of such prison eight hundred dollars" * * * "and for the purpose of paying for the keeping and feeding of prisoners in China, Corea, Japan, Siam, and Turkey nine thousand dollars" * * * to mean that no money is to be spent for a prison house except at Shanghai, and that the second provision is for the sustenance of prisoners and hire of keepers only.

You request an opinion supplemental to those referred to upon the following points, viz:

1. As to the correctness of the construction of the appropriation act above indicated.

2. Whether in the light of the treaty and statutes conferring judicial powers on one consul in China and providing for the exercise of those powers, each consul's judicial functions are limited to the cognizance of matters occurring within the territory nearer to his consulate than any other consulate of the United States in China.

3. Whether the law intends that the sentence of imprisonment imposed by a consular court in China must be enforced and served out within the limits of the consul's ordinary jurisdiction, and not in any other portion of China where prison accommodations have been provided for by law.

The interpretation given to the appropriation act is, in my opinion, the right one. Sec. 4121, Revised Statutes, authorized the President—

"When provision is not otherwise made, * * * to allow, in the adjustment of the accounts of each of the ministers or consuls, the actual expenses of the rent of suitable buildings or parts of buildings to be used as prisons for

American convicts in those countries, not to exceed in any case the rate of six hundred dollars a year; and also the wages of the keepers of the same, and for the care of offenders, not to exceed, in any case, the sum of eight hundred dollars per annum. But no more than one prison shall be hired in Japan, four in China, one in Turkey, and one in Siam, at such port or ports as the minister, with the sanction of the President, may designate, and the entire expense of prison and prison-keepers at the consulate of Bangkok, in Siam, shall not exceed the sum of one thousand dollars a year."

Section 4122 provides:

"The President is authorized to allow, in the adjustment of the accounts of the consul-general at Shanghai, the actual expenses of the rent of a suitable building, to be used as a prison for American convicts in China, not to exceed one thousand five hundred dollars a year; and also the wages of the keepers of the same, and for the care of offenders, not to exceed five thousand dollars a year; and to allow, in the adjustment of the accounts of the consuls at other ports in China, the actual expenses of the hire of constables and the care of offenders, not to exceed in all five thousand dollars a year."

These are substantial reenactments of various statutes passed at different dates, and, so far as they relate to the subject of consular prisons in the Chinese Empire, are, to say the very least, suspended by the act of 1891, above referred to. At the present time but one prison is provided for prisoners convicted in our consular courts in China, which must be located at Shanghai and may cost $750, not being limited to $600 as provided by section 4121, *supra*.

The later act (1891) so designating Shanghai is, in my opinion, "provision otherwise made," and it would not be competent to hire four prisons in China. This is made clear by the general language of the later act describing the building as "a prison at Shanghai for American convicts in China," thus comprehending the entire Empire.

Your second question is not one upon which I feel at liberty to express an opinion, being limited as I am by section 356, Revised Statutes, to questions of law arising in the administration of the Executive Departments of the Government. The jurisdiction of consuls as courts is a judicial question,

subject to review by regular appeal provided by statute, and any opinion thereon would be beyond the power conferred upon me, and might be regarded as an invasion by the executive branch of the Government of another and independent branch, so far as judicial functions are exercised. Moreover, as no case appears to have arisen requiring a decision of this question, it appears to be purely hypothetical.

Your third question is also one for the decision of the consular courts; but as you are called upon by the consul for advice in the matter, although not strictly within the lines of my official duty, I advise that it be answered in the negative.

Assuming that there are in China six consular courts invested with judicial power to try and sentence offenders, and assuming, but not expressing any opinion to that effect, that each consul is limited in jurisdiction to a particular district of the Empire, still, as there appears an intention on the part of the law-making power to sustain but one place for the confinement of such offenders, it follows that a prisoner convicted in any one of these courts can be sent to such prison, without reference to the fact of its being situated within or without the supposed territorial jurisdiction of the consul passing the sentence.

It is not unusual in our jurisprudence for a prisoner to be condemned to serve a sentence in another district of the same country than the one where the conviction is had.

The prior opinions referred to are to be distinguished from the present one in these particulars. In those cases the court convicting and the proposed place of confinement were in different countries, and the rights of our consular officers were determined under different treaties and statutes. Here the same treaty governs, and it is not proposed to send the prisoner beyond the boundaries of the Chinese Empire, and in those cases there was no such legislative intent evinced that but one prison should be sustained as has been discovered in the act of 1891 above referred to.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF STATE.

COMPENSATION—EMPLOYÉS OF THE WEATHER BUREAU.

By the acts of October 1, 1890, chapter 1266, and of March 3, 1891, chapter 544, the Secretary of Agriculture is authorized to reduce the compensation of any person in the Weather Service transferred from the War Department to the Department of Agriculture, and he is also authorized to appoint any person transferred to one of the $1,500 places specified in the latter act, and to promote to the vacancy created by such appointment any other person of the transferred class, although the salary of this promoted person becomes increased.

DEPARTMENT OF JUSTICE,
May 24, 1892.

SIR: Your communication of the 16th instant, relating to compensation of employés of the Weather Bureau, has received due consideration.

The questions which you present depend upon the construction and force of certain provisions of the act of October 1, 1890 (26 Stat., 653), and that of March 3, 1891. (*Id.*, 1044.)

The principal purpose of the act of October 1, 1890, was the transfer of the Weather Service from the War Department to the Department of Agriculture.

That act established the Weather Bureau in the Department of Agriculture on July 1, 1891, and placed the Chief thereof under the direction of the Secretary of that Department.

The Bureau is in charge of the Chief, and is entitled to such necessary civilian employés as Congress may annually provide for.

Section 5 directs the discharge of such portion of the enlisted force of the Signal force as shall not, upon their election, be transferred to the Department of Agriculture, and said section further provides that—

"The compensation of the force so transferred shall continue as it shall be in the Signal Service on June thirtieth, eighteen hundred and ninety-one, until otherwise provided by law: *Provided*, That skilled observers serving in the Signal Service at said date shall be entitled to preference over other persons not in the Signal Service for appointment in the Weather Bureau to places for which they may be properly qualified until the expiration of the time for which they were last enlisted."

Section 9 enacts that "It shall be the duty of the Secre-

tary of Agriculture to prepare future estimates for the Weather Bureau which shall be hereafter specially developed and extended in the interest of agriculture."

The agricultural appropriation act passed March 3, 1891, refers to the transfer made by the act of October 1, 1890, and carries for salaries and expenses of the Weather Bureau the sum of $182,380, and the paragraph relating to this appropriation concludes as follows: "and the Secretary is hereby authorized to make such changes in the personnel of the Weather Bureau, for limiting or reducing expenses, as he may deem necessary."

The concluding paragraph of said act relates to general expenditures for the Bureau, "under the direction of the Secretary of Agriculture, for the benefit of agriculture, commerce, navigation," etc, and provides for "salaries of forecast officials, observers, assistant observers, operators, repairmen, and other necessary civilian employés outside of the city of Washington," and for other specified expenses, and for those of "officers and employés when traveling on business connected with the Bureau," and for "salaries (including twenty local forecast officials, at $1,500 each)."

I am informed that nearly all of the enlisted men of the Signal Corps referred to in section 5 of the act of 1890 were transferred to the Department of Agriculture and went upon its rolls at the same rates of compensation, respectively, that they had received prior to the transfer.

November 19, 1891, the Secretary, with intent to ultimately bring the Weather Bureau force within the classified service, directed that in making appointments and promotions thereafter, the following grades should be observed, to wit: $480, $660, $720, $840, $1,000, $1,200, $1,400, $1,600, and $1,800.

After July 1, 1891, a portion of the transferred men were appointed "local forecast officials at $1,500 each" under that act, and others of the transferred force received promotions to vacancies made by such appointments, and others were promoted to other vacancies.

All of the men affected by the questions now under consideration are employed outside of the city of Washington, and are in the civil service.

Upon the transfer a great diversity of compensation was found to exist among the men transferred June 30, 1891, arising mainly from petty differences in Army pay, rations, and commutations, and an adjustment of these salaries, without essential change in amount, but in accordance with the grading stated, was found to be desirable. Consequently, the transferred men have been classified under said grading.

It is understood that such grading and arrangement is a step in the process of classifying the employés in question, under the third subdivision of section 6 of the civil-service act of January 16, 1883 (Supp. Rev. Stat., 395, 2d ed.), and that such employés as have not been promoted receive no higher compensation than formerly.

I am assured that those who were transferred and who now receive higher rates of compensation than they received at the time of their transfer (and who were not appointed to the $1,500 places mentioned), have been promoted to the places they now occupy under the established practice of the Department.

The current accounts of the Department of Agriculture, when presented to the accounting officers of the Treasury Department, exhibited upon comparison the changes made in compensation without explaining the occasion or grounds thereof.

Thereupon, under date of May 12, 1892, the First Comptroller writes: "It is noticed that in your account for general expenses, Weather Bureau, now before this office for adjustment, the compensation of several of the transferred employés has been increased beyond the amount received by them in the Signal Service for June 30, 1891."

The right of the Secretary of Agriculture to promote, or to appoint any of the persons transferred, to positions where they will receive higher rates than they received at the date of the transfer (except the individuals appointed to the specified $1,500 places), is placed in question.

It is a general rule of administration which applies to each of the Departments, that the head thereof is authorized, within the lines of law, to prescribe regulations for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and to employ such number of clerks, employés, and other

subordinates, and at such rates of compensation, respectively, as may be authorized by law, and to control, subject to the enactments, the promotions which shall be made in his Department.

By the act of February 9, 1889 (Supp. Rev. Stat., 641), the Department of Agriculture is made an Executive Department and included within section 158, Revised Statutes, and the provisions of title 4, Revised Statutes, are made applicable to the new Department.

It is claimed, and the circumstances of the transfer give strength to the claim, that the provision of section 5 of the act of 1890, continuing compensation, was intended as a protection to the men transferred, and not as a limitation of the right which they would otherwise possess by reason of being employed in a service giving opportunities for promotion.

It would be contrary to reason and to the analogies of the public service if it were to be held that persons who had become skillful by long experience should, without fault, be precluded from advancement because of their former service, while new appointees, less qualified by experience to serve the Government, should become entitled to promotion in position and compensation as changes and vacancies occur.

It will be noticed that section 5 especially recognizes the right of skilled observers of the Signal Service to preference for appointment to places for which they may be qualified; and also, that the act of 1891 gives the Secretary authority to make such changes in the personnel of the Bureau for limiting or reducing expenses as he may deem necessary.

Upon the legislation referred to and the related facts and proceedings, it is my opinion that the Secretary of Agriculture is authorized to reduce the compensation to be paid to any of the persons transferred, so as to conform the same to the grading adopted.

It is my opinion, also, that the Secretary was not only authorized to appoint any person transferred to one of the $1,500 places specified, but it was within his power to promote to the vacancy created by such appointment any other person of the transferred class, although the salary of this promoted person became increased.

It is my opinion that Congress did not intend to exclude the persons transferred from the War Department to the

Weather Bureau of the Department of Agriculture June 30, 1891, from the privileges or the benefits of promotion in the service to which they were transferred.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF AGRICULTURE.

DISTRICT ATTORNEYS—COMPENSATION.

A U. S. district attorney is entitled to receive for making inquiry and examination under section 838 of the Revised Statutes in a seizure case which is reported by the collector and afterwards tried or disposed of before the court, such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge; and the receipt of such sum will not preclude him from recovering those fees under section 824, Revised Statutes, to which he would otherwise be entitled.

DEPARTMENT OF JUSTICE,
May 28, 1892.

SIR: In your communication relating to the application of sections 824 and 838 of the Revised Statutes, you present two accounts of the U. S. district attorney named which arise in connection with three several cases of seizure for violation of the statutes against smuggling. The items of both accounts relate respectively to three cases bearing corresponding numbers, each account carrying one item in each case. The three cases were prosecuted in the district court.

Account A presents a charge of $5 in the first case and one of $10 in each of the other cases, and designates the claim as one for "Fees under section 824."

Account B presents a charge of $50 in each case under section 838, and designates the claim as one for "Fees for services in preparing for trial certain cases wherein forfeitures were incurred * * * for violations of the laws * * * relating to customs revenue." * * *

Account A is shown to have been duly and formally approved by the court, and Account B is duly certified by the judge before whom the cases were disposed of.

The three cases under consideration were severally reported to the district attorney by the collector of customs, and the

proceedings for which compensation is sought were commenced in pursuance of such reports.

The statutory sections designated appear in the chapter of the judiciary title which relates to fees, but came from different sources.

Section 824 comes from the act of February 26, 1853 (10 Stat., 161), which establishes a fee bill in lieu of compensation theretofore allowed by law to attorneys and other specified officers.

Section 838 had its inception in the customs act to prevent smuggling, passed July 18, 1866 (14 Stat., 179), and was amended and extended so as to include internal-revenue cases by the act of March 3, 1873 (17 Stat., 580), and upon the revision became the section named.

The questions presented by the facts submitted are these:

First. Is the district attorney entitled to receive, for making inquiry and examination under section 838, in a revenue case which is reported by the collector and is afterwards tried or disposed of before the court, such sum as the Secretary of the Treasury shall deem just and reasonable upon the certificate of the judge?

Second. If the first inquiry is answered in the affirmative and an allowance shall be given to the officer under section 838, is he precluded from receiving those fees under section 824, to which he would otherwise be entitled?

The Supreme Court has held that while the statements made and the opinion advanced by the promoters of an act in the legislative body are inadmissible as bearing upon its construction, yet reference to the proceedings of such body may properly be made for information of the exigencies which occasioned the legislation and the reasons for the enactment.

Section 838, Revised Statutes, came into existence as follows:

March 23, 1866, Senator Chandler, of Michigan, introduced a bill (further to prevent smuggling), the seventh section of which required collectors of customs to report cases of violation of the revenue laws coming to their knowledge to the district attorney, who was directed to proceed substantially in accordance with the requirements which are now set forth in said section.

It was stated by Senator Morrill, of Maine, who had charge of the bill, that the measure was prepared at the Treasury Department, its main feature being to amend the statutes to prevent smuggling. (See p. 2563, part 3, Cong. Globe, first session thirty-ninth Congress.)

Some of the provisions of the bill were debated in the Senate at great length, but the seventh section was adopted without controversy, although many amendments were made therein. (*Id.*, p. 2568.)

The most important amendment made was that which directs that in case the district attorney decides not to prosecute "he shall report the facts to the Secretary of the Treasury for his direction."

The record does not show that any question was raised as to the scope or effect of section 7 in the House of Representatives, and this section was enacted without controversy. The section as enacted appears, 14 Stat., 179.

March 20, 1871, Mr. Poland, of Vermont, introduced in the House of Representatives a bill to amend the "Act to prevent smuggling," and the same was sent to a committee.

January 30, 1872, the bill was reported back with recommendations for amendments.

This original bill provided that internal-revenue cases, as well as customs cases, should be reported to the district attorney and acted upon by him, and contained this clause: "And for the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the Treasury such sum *as* the judge before whom such cases are tried or disposed of shall certify is just and reasonable."

The committee recommended that after the word "as," the paragraph should read as follows: "the Secretary of the Treasury shall deem just and reasonable upon the certificate of the judge before whom such cases are tried or disposed of."

Said amendment was duly incorporated in the bill, which was immediately passed. (P. 712, part 1, Cong. Globe, second session Forty-second Congress).

When the bill was considered in the Senate, Senator Edmunds, who had the same in charge, stated in relation thereto, in substance, that it placed the law as to the compensation of district attorneys of the United States in

customs cases and internal-revenue cases "upon exactly the same footing." The bill was thereupon passed by the Senate. (P. 1250, part 2, Cong. Globe, third session, Forty-second Congress.)

The act became a law March 3, 1873 (17 Stat., 580), and upon the revision became incorporated with several minor changes into section 838 of the Revised Statutes.

It will be noted that section 15 of the act of January 22, 1874 (18 Stat., 189), makes it the duty of collectors of customs to promptly report violations of the customs laws to the district attorney, who, if he deems that the complaint can be sustained, shall cause investigation to be made before a U. S. commissioner, and shall initiate proper proceedings and prosecutions.

It will be noted, also, that by the act of 1866 it is provided that "the district attorney shall receive such allowance as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom the prosecution was had," and that by the act of 1873, after adding internal-revenue cases to customs cases, it is provided: "That for the expenses incurred and services rendered in all such cases the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of."

It will be noticed that by section 3085, Revised Statutes, which provides compensation for district attorneys in certain customs cases, the phraseology of the act of 1866 is substantially adopted by saying that "they shall receive such allowance as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such prosecution was had."

Section 838 directs the district attorney to cause proper proceedings to be commenced and prosecuted for fines, penalties, and forfeitures in cases of the violation of any law of the United States relative to the revenue, unless upon inquiry and examination he shall decide that such proceedings can not probably be sustained, or that the ends of public justice do not require that such proceedings should be instituted; in which case he shall report the facts in customs cases to the Secretary of the Treasury and in internal-rev-

enue cases to the Commissioner of Internal Revenue for their direction; "and for the expenses incurred and services rendered in such cases the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried and disposed of."

In the words last quoted this section adopts the words of the act of 1873 instead of those of the act of 1866, or of section 3085, Revised Statutes.

Many rulings and decisions have been made upon the application and construction of the phraseology of section 838, and of that of the enactments that are merged therein, as to the compensation of district attorneys. It is asserted without being contradicted that the practice of the Treasury Department, ever since the passage of the act of 1873, has steadily supported one construction, although there are indications of efforts to change the practice.

In Keasbey's Case, which is reported 1 Lawrence, dec. 172 (1880), the construction now under consideration was discussed at considerable length.

The fees in the cases involved, authorized by section 824, had been previously paid.

Mr. Secretary Bristow is alleged to have expressed the opinion that the act of 1873 applies only "where the case in question has been 'tried or disposed of' by the certifying judge." He also says that the compensation intended is only for services rendered which are not subject to charge under the fee bill of 1853; and Mr. Secretary Sherman is stated to have approved of the same construction.

Mr. Assistant Secretary of the Treasury French is here quoted as saying that if the fees of the district attorney for the calendar year "do not exceed six thousand dollars he may receive pay for certain services under sections 838 and 3085, Revised Statutes, both of which seem to relate to fines, penalties, and forfeitures, and cover the same class of cases."

He then states that the First Comptroller is understood to hold that under said sections only fees for preparation before trial can be allowed, inasmuch as the fee bill provides for and fixes the fees for service in court.

It is held (p. 182) that "the construction which has been given in the Treasury Department to section 838, Revised Statutes, will be adhered to."

This is the substance of the case, although comments are made which detract somewhat from the force of the Comptroller's decision.

The question was again considered in *Leake's Case* (2 Law., dec. 431, 1881), where the district attorney claimed $1,500 for legal services in the inquiry, examination, and preparation for trial (but not for trial itself) in the district court of cases known as the "Match Bond cases." The cases were tried and disposed of in court and the judge certified to the fee claimed.

The practice of the Treasury Department in allowing payment only for preliminary services in cases that are afterwards tried or disposed of before the court is practically asserted.

In *Connoly's Case* (4 Law, dec. 45), which came before the Comptroller in 1883, that officer ruled substantially as he had ruled in Leake's Case.

It was stated repeatedly in these cases (outside of the question actually passed upon) that a United States attorney was entitled to compensation for preliminary examinations in cases that were not tried or disposed of before the court or judge, and these statements became a disturbing element in the practice of the Treasury Department. Subsequently the question was sharply presented and clearly ruled upon in the District Attorney's Case (5 Law., dec. 138, 1884). In this case the amount included charges for services preparatory to trial in cases that were tried, and also for services in cases that were not tried or disposed of before the judge.

It was held, *first*, that the statute of 1873 (now section 838) did not allow compensation for services during the trial in addition to the regular fees payable under section 824, and, *second*, that said section did allow for services and expenses preparatory to trial in cases that were tried and disposed of before the judge, in addition to the fees allowed under the fee-bill (p. 139).

It is stated that Keasbey's Case, and the like cases were tried and disposed of by a judge, that fees had been allowed

under section 824, and that the only question arising under them was as to the allowance of an additional fee for examination preparatory to trial. It is then held that the established construction of the Department justifying such allowances should not be changed.

In 1884 Mr. Secretary Folger (30 Int. Rev. Rec., 61) says: "My attention having recently been called to the proper construction of section 838, Revised Statutes, I have, after careful consideration, decided to reaffirm what I find to have been the deliberate rulings of my predecessors in 1874 and 1877, viz:

* * * * * * *

"*Third.* That said section does allow compensation 'for the expenses incurred and services rendered' preparatory to trial in *addition* to the regular fees allowed under section 824 in cases 'that are tried or disposed of before' a judge, and which are 'prosecuted for the fines, penalties, and forfeitures in (each) case provided.'"

In 1886 (32 Int. Rev. Rec., 405) Assistant Secretary Fairchild, referring to Mr. Secretary Folger's decision with evident approval, says:

"It is held that said section 838 does not allow compensation for services in cases 'not tried or disposed of before the judge,' but does allow compensation 'for the expenses incurred and services rendered' *preparatory* to trial, in addition to the regular fees allowed under section 824 Revised Statutes, in cases that are 'tried or disposed of before a judge.'"

In May, 1891 (37 Int. Rev. Rec., 158), Assistant Secretary Nettleton declares the ruling of the Department to be that, "The services for which allowances can be made in cases tried or disposed of before a judge were only the services rendered in preparing the cases for trial, in contradistinction to the services that had previously been provided for in the fee-bill, now section 824 Revised Statutes;" and he declares that this has been the uniform rule of the Department since the act of March 3, 1873.

It thus appears that it has been the unbroken practice and the practical construction of the Treasury Department for nearly twenty years, that allowances can be made to district attorneys for services performed in preparing for the trial of

cases that are afterwards disposed of before the judge, such allowances to be independent of the fees allowed by section 824.

The two questions considered in this opinion have been touched upon many times by executive and judicial officers in connection with a contention that has existed, viz, whether a district attorney may be paid under section 838 for investigations made in cases in which no proceedings are ever initiated in any court; but that contention is not involved in either of the three cases submitted, and, therefore, is not before me.

On account of that proper deference which orderly procedure in official affairs requires to be conceded to precedent, the determinations heretofore made by heads of the Treasury Department upon the questions under consideration must be held to be conclusive. No authority to change the law thus established can ordinarily be recognized unless Congress or a court of controlling jurisdiction shall declare a different construction.

The Supreme Court has said (142 U. S., 621) that contemporaneous construction given by an Executive Department, and continued through different administrations thereof, though inconsistent with the literalism of the act, should be considered as decisive of the suit.

It is stated (138 U. S., 572) that "in all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

In my opinion it is established for all purposes of present executive action, that the district attorney is entitled under section 838 to receive, for the preliminary investigation made in each of the three cases presented, such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge.

It is also my opinion that the receipt of such sum will not preclude him from receiving those fees under section 824 to which he would otherwise be entitled.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

REMISSION OF REVENUE TAX—SEAL SKINS.

The tax of $2 prescribed by section 1969, Revised Statutes, can not be remitted upon skins taken from seals killed by the natives for food, but shipped by the lessee company.

DEPARTMENT OF JUSTICE,
June 14, 1892.

SIR: Your letter of June 9, instant, presents for consideration and opinion the question whether the Secretary of the Treasury has the right to "remit" to the North American Commercial Company, the lessee of the United States of the exclusive right of taking seals on the islands of St. George and St. Paul, in the Territory of Alaska, the revenue tax prescribed by section 1969, Revised Statutes, "upon skins killed last year for food by the natives prior to the date when the modus vivendi took effect." You say that these skins, numbering some 6,000, were "taken by the company as merchantable skins," by which I understand you to mean that they were received by the company from the natives, and that it is claimed for the company that they were not subject to the revenue tax because they "were known as *food skins*."

Section 1969, Revised Statutes, provides that "in addition to the annual rental required to be reserved in every lease, as provided in section nineteen hundred and sixty-three, a revenue tax or duty of two dollars is laid upon each fur-seal skin *taken and shipped* from the islands of Saint Paul and Saint George *during the continuance of any lease*, to be paid into the Treasury of the United States," etc.

It seems to me that as the skins in question were "taken and shipped" from these islands by the lessee company it should pay the tax, the fact that these skins were taken from seals captured by the natives for food or clothing being immaterial, for whether captured by the lessees or the natives, it is the former alone that can ship them from the island.

Moreover, to hold that all skins obtained from natives as "food skins" are to be free would be opening a door and offering a premium for an evasion of the tax, as all skins thus obtained would be $2 cheaper than those taken regularly under the lease.

I do not think such a construction of the law warranted.

For quite twenty years this is the meaning that has been put on the statute by the Treasury Department and the former lessees, and it would seem to be too late now to contend for a different interpretation.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

DISMISSAL OF APPEAL—INTEREST AND COSTS.

Where an appeal of the Government in a customs case is dismissed and the order and mandate is silent upon the subject of interest, no interest can be paid or allowed.

DEPARTMENT OF JUSTICE,
June 14, 1892.

SIR: I have yours of June 7, inquiring whether the case of *Marine* v. *Robson*, dismissed at the last term of the Supreme Court, is one falling, so far as relates to the payment of interest and costs, within the scope of the letters of August 7, 1891 (Treasury Synopsis 11616), and December 10, 1891 (Treasury Synopsis 12171).

The importation, which involved the dutiable character of a painting imported by Mr. Robert Garrett, was made August 25, 1890, and the protest thereunder was duly passed upon by the Board of General Appraisers, under the provisions of the act of June 10, 1890. The court held the painting not subject to duty, as being an antique and part of a collection of antiquities. From this decision an appeal was directed both to the circuit court of appeals for the fourth circuit and to the Supreme Court, there then being an uncertainty as to the proper construction of the act establishing the circuit courts of appeal with reference to appeals in customs cases. Through some misunderstanding or oversight the appeal was not taken to the circuit court of appeals but was taken to the Supreme Court of the United States. Afterwards it was decided that in such cases the appeal should be taken to the circuit court of appeals, and the case was dismissed from the Supreme Court upon motion of the Government, no one opposing.

It is the practice of the Supreme Court to allow interest as damages where it affirms the judgment in a customs case. (*Schell* v. *Cochran*, 107 U. S., 625.)

When, however, a dismissal takes place as to this case, and the order is silent upon the subject, no interest can be paid or allowed. (*Schell* v. *Dodge*, 107 U. S., 629.)

The measure of the payment in each case will be found in the order and mandate of the Supreme Court.

Such cases do not fall within the scope of the letters referred to.

Respectfully,

CHARLES H. ALDRICH,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

OCEAN MAIL SERVICE—PAYMENT.

Where a contract is made with a company for carrying foreign mails, pursuant to the act of March 3, 1891, chapter 519, in vessels of the third class provided for in that act, but the Secretary of the Navy accepts the vessels as of the fourth class but not of the third class, the company is not entitled to pay at the rate of $1 per mile, as provided for in section 5 of said act for the third class of vessels nor at the rate prescribed in said act for fourth-class vessels, but must receive its compensation under section 4009 of the Revised Statutes.

DEPARTMENT OF JUSTICE.
June 16, 1892.

SIR: In your letter of June 3, 1892, addressed to the Attorney-General it is stated that the Pacific Mail Steamship Company is under contract with the Post-Office Department to carry the ocean mails agreeably to the provisions of an act entitled "An act to provide for ocean mail service between the United States and foreign ports, and to promote commerce," approved March 3, 1891, for a period of ten years from February 1, 1892, in steamships of the third class, at the maximum compensation provided for in said act ($1 per mile), from New York to Colon, upon the schedule time of six and one-half days for the outward voyage. Two of the vessels offered by the company for said service, and

designed for temporary use only, until they could be replaced by new steamers, failed to meet the speed tests by the fraction of a knot each, to wit, one showed a speed of 13.75 knots and the other of 13.12 knots, and, by means of the failure, were not reported to your Department as having been accepted by the Secretary of the Navy as ships of the third class, in accordance with the provisions of section 4 of said act, but were accepted by him as ships of the fourth class. It is stated that from the commencement of said contract, the mails have been carried from New York to Colon within the contract schedule of six and one-half days. The company demands pay for the service thus performed at the contract-price of $1 per mile, as provided by section 5 of said act, which, so far as it relates to compensation for such service, is as follows:

"Sec. 5. That the rate of compensation to be paid for such ocean mail service of the said first-class ships shall not exceed the sum of four dollars a mile, and for the second-class ships two dollars a mile, by the shortest practicable route, for each outward voyage; for the third-class ships shall not exceed one dollar a mile, and for the fourth-class ships two-thirds of one dollar a mile for the actual number of miles required by the Post-Office Department to be traveled on each outward-bound voyage."

You request an opinion whether you can lawfully pay to the company the contract price of $1 per mile for the service of these ships, thus failing to meet the requirements of the act, or whether you shall pay therefor, as being performed without contract, under the provisions of section 4009 Revised Statutes.

Under the provisions of the act of March 3, 1891 (26 Stat., 830), your powers are limited.

A certain advertisement must precede your contract. The vessels employed are required to be American-built steamships, or owned, officered, and registered in conformity with existing laws. They are divided into classes. It is required by section 3 that "the third class shall be iron or steel steamships, capable of maintaining a speed of fourteen knots an hour at sea in ordinary weather, and of a gross registered tonnage of not less than two thousand five hundred tons."

Sec. 4 is as follows (26 Stat., 830):

"SEC. 4. That all steamships of the first, second, and third classes employed as above, and hereafter built, shall be constructed with particular reference to prompt and economical conversion into auxiliary naval cruisers, and according to plans and specifications to be agreed upon by and between the owners and the Secretary of the Navy, and they shall be of sufficient strength and stability to carry and sustain the working and operation of at least four effective rifled cannon of a caliber of not less than six inches, and shall be of the highest rating known to maritime commerce. And all vessels of said three classes heretofore built and so employed shall, before they are accepted for the mail service herein provided for, be thoroughly inspected by a competent naval officer or constructor detailed for that service by the Secretary of the Navy; and such officer shall report in writing to the Secretary of the Navy, who shall transmit said report to the Postmaster-General; and no such vessel not approved by the Secretary of the Navy as suitable for the service required, shall be employed by the Postmaster-General as provided for in this act."

Unless a vessel met these requirements as to speed, and had been approved by the Secretary of the Navy, you could not by express contract engage it in this service at the compensation provided in this act. Such speed and approval are conditions precedent to any right to act under the contract. Having entered into a contract under this act, you have no power to accept any vessel not meeting these conditions, and service performed in vessels not doing this can not be paid for under this act, or any contract entered into thereunder. To hold otherwise would enable a head of a Department to waive the positive provisions of the statute.

The company must therefore receive its compensation under section 4009, Revised Statutes, referred to by you.

It has been suggested that, inasmuch as the vessels were approved by the Secretary of the Navy as belonging to the fourth class, payment might be made at the rate allowed vessels of that class. The objection to this view is found in the fact that you advertised for proposals for third-class service. and your contract with the Pacific Mail Steamship Company

is for service of that character. This has exhausted your powers until you have again advertised and received public bids. (15 Opin., 556.) Vessels can not be engaged under this act in the fourth-class service without proper advertisement and opportunity for competitive bids.

Very respectfully,

CHARLES H. ALDRICH,
Solicitor-General.

The POSTMASTER-GENERAL.

Approved:

W. H. H. MILLER.

REFUND OF DIRECT TAXES—INTEREST AND PENALTIES—COSTS.

Under the act of March 2, 1891, chapter 496, interest and penalties are collections and should be repaid, but costs should not be repaid. Where redemption of lands held for direct taxes was made the party in interest should have a repayment of the tax penalties and interest paid by him for such redemption. The act supersedes the provision of the appropriation bill of March 3, 1883, inasmuch as it is now the duty of the Secretary of the Treasury to repay not merely the surplus but the entire amounts collected under that law and brought into the Treasury.

DEPARTMENT OF JUSTICE,
June 29, 1892.

SIR: Your letter of June 11, instant, inclosing the letter of Hon. Isham G. Harris in reference to the refund of direct taxes under the act of March 2, 1891 (26 Stat., 822), was duly received.

In that letter you say:

"To summarize: The tax proper having been refunded to the several States, I desire your opinion as to whether additional credit should be given—

"First, for the interest;

"Second, for penalties;

"Third, for costs attending the collection to the several States and Territories;

"Fourth, what amount should be credited, where redemptions have been made under the act of June 7, 1862, and the several acts extending the time of such redemptions; and,

"Fifth, whether or not the act of March 2, 1891, repeals the act of March 3, 1883; and, if so, shall the several States be credited with the surplus produced at the sales over and above the amount of the interest, penalty, and costs; and if said act is not repealed, whether or not said surplus shall be held in the Department to be paid out under the act of March 3, 1883."

By the act of Congress approved August 5, 1861, and the acts amendatory thereof (12 Stat., 294), provision was made for collecting a direct tax from the several States and Territories and the District of Columbia for the purpose of carrying on the war. By the States and Territories upholding the Union, and by the District, this tax was generally paid; but by the States in insurrection such payments were not made. Under the machinery provided in the act, large amounts in some of these insurrectionary States were collected by distress and sale, including considerable sums for penalties, interest, and costs, as prescribed in the law.

The first section of the act of Congress of March 2, 1891, reads as follows:

"That it shall be the duty of the Secretary of the Treasury to credit to each State and Territory of the United States and the District of Columbia a sum equal to all collections by set-off or otherwise made from said States and Territories and the District of Columbia, or from any of the citizens or inhabitants thereof, or other persons under the act of Congress approved August fifth, eighteen hundred and sixty-one, and the amendatory acts thereto."

Section 2 reads as follows:

"That all moneys still due to the United States on the quota of direct tax apportioned by section eight of the act of Congress approved August fifth, eighteen hundred and sixty-one, are hereby remitted and relinquished."

By subsequent sections of the act the matter of such payments and credit is regulated, and provision is made for giving the benefit of such repayments to individual citizens from whom collections have been made.

Your first and second questions, viz, whether this act requires the repayment of penalties and interest collected, are, I think, free from doubt. The language of the law requires you to give credit to each State, Territory, and the

District of Columbia for a "sum equal to *all* collections by set-off or otherwise made from said States and Territories and the District of Columbia, or from any citizens or inhabitants thereof, etc." That interest and penalties are collections within the meaning of this language seems to me too clear for reasonable question. To this view it is objected that if payments had been promptly made interest would not have accrued and penalties would not have attached, and this is true. But it is not to be forgotten that, at the time this tax was assessed and due, the condition of the people in many of these States, notably along the border, was most embarrassing; they were between two fires, not to speak of the fact that they were generally in desperate financial straits. Their situation was such that to pay the tax was to incur the charge of disloyalty and danger of punishment at the hands of the *de facto* Confederate Government, and to refuse to pay the same was to incur the like charge and danger of punishment at the hands of the *de jure* Federal Government. At any rate, it seems to me that it was the plain purpose of Congress, in this act, to restore to these States and people the moneys which had been, under the color of this tax, brought into the Federal Treasury. The legislation is an act of liberality on the part of the Government, and should be literally construed.

Second. The same reasons for the restoration of costs of collection do not seem to me to obtain. The costs presumably have been paid out as compensation for services rendered in collection. They have not come into the United States Treasury at all, and therefore there is no equity in demanding their repayment. It is unlikely that it was within the legislative purpose that the Government should reimburse, either to the States or individuals, the moneys thus expended. To do so is not to pay back something which has been paid into the Treasury by these people, but to pay them money derived from other sources of taxation on account of moneys taken from them for fees or costs, and from which the Government has received no benefit. Your third question is answered in the negative.

Third. Your fourth question seems to be substantially answered by what has already been said. Where, under the act of June 7, 1862 (12 Stat., 422), redemptions of lands

held for direct taxes were made, the same principle heretofore announced should be applied, and the party in interest should have a repayment of the tax, penalties, and interest paid by him for such redemption.

Fourth. In my opinion, the act of March 2, 1891, supersedes the provision in the appropriation bill of March 3, 1883. That provision reads as follows:

"The Secretary of the Treasury is hereby authorized and directed to cause to be audited by the proper accounting officers of the Treasury, and paid, the claims of the original owners of lands which were sold for nonpayment of United States direct taxes, for the surplus proceeds of the same, under the provisions of the act of August fifth, eighteen hundred and sixty-one, and for such purpose the sum of one hundred and ninety thousand dollars, or so much thereof as may be necessary, is hereby appropriated."

By this enactment it was made the duty of the Secretary to repay to the original owners any surplus proceeds of property taken under the direct-tax law of 1861, and an appropriation was made for that purpose. By the act of March 2, 1891, it is made the duty of the Secretary to credit or repay, not merely the surplus, but the entire amounts collected under that law and brought into the Treasury, and an appropriation of such sum as may be necessary is made for that purpose. The greater, of course, includes the less, and the act of 1891 being passed, the act of 1883 is superseded.

Respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

IMMIGRATION ACT—CUSTODY OF IMMIGRANTS PENDING APPEAL.

By the immigration act steamship companies are held responsible for the custody of immigrants pronounced to belong to the prohibited classes by the Commissioner of Immigration at Ellis Island, pending proceedings on appeal or habeas corpus.

Shipowners, chargeable, as above stated, with the safe custody of aliens, may detain them at some suitable place off the ship until the time of sailing, provided the permission of inspection officers be first obtained in every case.

DEPARTMENT OF JUSTICE,
June 30, 1892.

SIR: The act of Congress of March 3, 1891 (26 Stat. 1084) prohibiting the introduction into this country of certain objectionable classes of aliens, provides (section 8) that on the arrival of immigrant ships the inspection officers shall enter them and make inspection of the aliens on board, or they "may order a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made. But such removal shall not be considered a landing during the pendency of such examination."

It is the practice of the port of New York to make inspections of immigrants at Ellis Island, to which point they are taken in barges controlled by the steamship companies engaged in transporting immigrants. The immigrants that appear after examination to belong to the prohibited classes are immediately returned to the vessel in which they came, or a vessel of the same line, for deportation under section 10 of the act.

At the time immigrants are returned as stated the steamship companies are notified in writing of the decision of the Commissioner of Immigration, and if an appeal is taken from his decision to the Superintendent of Immigration or Secretary of the Treasury, under section 8, or the writ of habeas corpus is applied for, it is done after the party taking such action has been returned to the custody of the steamship company that brought him here, the Government looking to the company for his safe-keeping under the penalty prescribed by section 8.

Upon this state of facts the following questions are submitted for opinion:

I. "Whether the Commissioner of Immigration or the steamship companies are responsible for the custody of these people pending proceedings on appeal or habeas corpus, and in whom the authority of detention rests?"

II. "If these proceedings should be determined adversely to the emigrants, at what time prior to the sailing of the vessel they should be returned thereto?"

III. "If it is the duty of the steamship companies to

receive the emigrants, as claimed by the Commissioner of Immigration, whether they will be authorized in detaining them at some suitable place off the ship until the time of sailing?"

It is not easy to see on what provision of the statute the contention rests that aliens held unfit to land, after inspection at Ellis Island, must remain in Government custody until they can be taken out of the country. It may be inconvenient to shipowners to have the responsibility of the safe-keeping of these people, but it is an inconvenience which they have brought on themselves by omitting precautions necessary for their protection and that of the public, and I think it a wise instance of preventive justice that violations of the statute, in this important particular, should entail serious inconvenience.

The statute authorizes (sec. 8) the required examination or inspection of immigrants to be made on board ship, as well as elsewhere, but I do not understand the shipowners to claim exemption from responsibility for the safe-keeping of aliens rejected after inspection on board ship while awaiting deportation, and yet, if the argument of hardship and inconvenience is valid as to aliens rejected after inspection on land, it would seem to be equally so as to those rejected after inspection on shipboard.

It is quite inadmissible to infer that the control of immigrants assumed by the inspecting officers after removal from the ship for inspection was intended to continue as to immigrants rejected on such inspection while awaiting deportation.

I do not think the language of the act can be made to accord with any such understanding of it, for what does it mean when it speaks of the removal of immigrants to the place of inspection as "*temporary*," and declares that they shall be detained there "*until a thorough inspection is made*," if not that after the inspection is accomplished the detention of immigrants so removed shall cease by admission into the country of such as are fit or rejection of such as are not?

But if the Government is to detain these people while appealing from the decision of the Commissioner of Immigration or applying for the writ of habeas corpus, and up to the hour of deportation, as the shipowners contend, what

value has the word "*temporary*" as the attributive of "removal," and how can the right to detain immigrants at "a designated time and place" and "*until a thorough inspection is made*" have reference to appeals or habeas corpus proceedings, which are conducted at places predetermined by law and not by regulation, and which involve *no inspection* or examination of immigrants?

In complete accord with this meaning is section 10 of the act, which makes it an offense "if any master, agent, consignee, or owner of such vessel shall refuse to receive back on board the vessel such aliens, *or shall neglect to detain them thereon*, or shall refuse or neglect to return them to the port from which they came," etc., and suggests inquiry as to the value to be given the significant words "*or shall neglect to detain them thereon*," if what is contended for by the shipowners is correct? It is difficult to believe that these words have reference only to the detention of immigrants on arrival in port and before removal for inspection, or just before deportation. It seems to me that such restriction of their meaning would be quite as inadmissible as it would be to hold that immigrants rejected after inspection *on shipboard* and there awaiting deportation, are at the risk of the United States and not of the violators of the law, the shipowners.

As already suggested, it is far from satisfactory to say that Congress, in leaving it optional to conduct inspections of immigrants on shipboard or elsewhere, intended that in the latter case the Government should be burdened with the custody of rejected immigrants any longer than necessary for thorough inspection. It is to be presumed that Congress intended that public considerations and not caprice should dictate whether inspections should be on board ship or on land, and I can not suppose that it was intended that inspections in the latter case should be more burdensome to the Government than in the former. Besides, the act expressly provides (sec. 10) that the cost of maintaining aliens "*while on land*" and the expense of their return shall be borne by the shipowners, and, if Congress had intended that the Government should have the custody of these people any longer than the purposes of inspection required, it is fair to presume the law would have contained a provision that the ship-

owner should defray the cost of their detention while awaiting to be returned. This disposes of the first and second questions.

The third and last question presents the inquiry whether shipowners, chargeable, as above held, with the safe custody of aliens, "will be authorized in detaining them at some suitable place off the ship until the time of sailing."

It seems to me that it would be an inadmissible construction of the act to hold that the vessel is the only place recognized by it for the detention of aliens unlawfully brought here while awaiting return or the final decision of their claim to admission into the country.

If it is impracticable to return them in the ship that brought them, as section 10 requires, "*if practicable*," or if for any other reason, as, for example, the presence of contagious diseases on the vessel, it becomes necessary or desirable to land them temporarily, I can not doubt that this may be lawfully effected under one of the provisions of section 8, with the permission of the inspection officers, and at the risk and cost of the shipowner.

It is true the statute declares (sec. 8) that the removal for inspection "shall not be a landing during the pendency of such examination;" but it is not a fair deduction from this that removals for other reasons, satisfactory to the inspection officers and *at the request of the shipowner*, are not compatible with a continuing responsibility on his part under the act up to the time of deportation. If the provision for removals for inspection purposes by order of the Government had not been followed by the restrictive words above quoted, an implication unfavorable to the Government might have been the result. But there does not seem to be any room for holding that a temporary landing of aliens at the request of the shipowner and by permission of the inspection officers can affect his responsibility under the act. This view derives support from the recent case of *Nishimura Ekiu* v. *United States* (142 U. S., 651), where it was said by the court that placing a female alien in the mission house at San Francisco and keeping her there pending the decision of the question of her right to land, by agreement between her attorney and the attorney for the United States, "left her in

the same position, so far as regarded her right to land in the United States, as if she never had been removed from the steamship." (P. 661.)

This view of the act is consistent with both its language and intent, and I am therefore of opinion that the third question should be answered in the affirmative, with the qualification that the permission of the inspection officers must in every case be obtained.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

POWER TO SELL GOVERNMENT PROPERTY.

The opinion of December 22, 1891 (20 Opins. 284), covers the question asked in the letter of the Secretary of War of date June 25, 1892.

DEPARTMENT OF JUSTICE,
July 11, 1892.

SIR: Your letter of June 25, 1892, and the inclosure therein referred to, with reference to the sale of the Government property at Fort Union, have received my consideration, and I beg to say in reply that I think it will be found on examination that my opinion of December 22, 1891, covers the subject of your inquiry.

I will direct an inquiry, with a view to bringing to justice the persons guilty of the depredations mentioned in the report of Capt. Patten.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

ATTORNEY-GENERAL.

The Attorney-General will express no opinion where the matter is not one requiring the action of the head of a Department as falling within his official duties.

DEPARTMENT OF JUSTICE,
July 11, 1892.

SIR: Your letter of June 7, 1892, brings to my attention the action of the Second Auditor of the Treasury in directing that a suspension against Lieut. Col. Barr be made to

the extent of $7, the same being the amount of an alleged excessive allowance made to him by Deputy Paymaster-General Gibson for sleeping-car fare.

Several questions are submitted by you for opinion, which I would be glad to answer were it not for the limitation imposed on me by section 356 of the Revised Statutes, which only authorizes the head of an Executive Department "to require the opinion of the Attorney General on any questions of law *arising in the administration of his Department.*"

Now, I do not understand that the action of the Second Auditor of the Treasury, with reference to Lieut. Col. Barr, relates, in any way, to a matter which requires the action of the Secretary of War as falling within the circle of his official duties.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

MEDAL OF HONOR.

A claim for a medal of honor considered and advice given that it be not entertained.

DEPARTMENT OF JUSTICE,
July 11, 1892.

SIR: Dr. John T. Nagle, who was employed as an acting assistant surgeon in the U. S. Army during the late civil war, presented a claim on February 3, 1892, to the Secretary of War to be awarded a "medal of honor" under section 6, of the act of March 3, 1863 (12 Stat., 751), which authorized the President to present "medals of honor" to "such officers, non-commissioned officers, and privates" as should "*most distinguish themselves in action.*"

This claim of Dr. Nagle rests on circumstances of gallantry alleged to have been displayed by him in the battle of Kernstown, in Virginia, on July 24, 1864.

The statement made by Dr. Nagle in his application is not accompanied, however, by an attempt even to explain the cause of the delay of so many years in bringing his case to the attention of the Executive.

My opinion is asked as to the validity of this claim.

Section 6 of the act of March 3, 1863, provides, amongst other things, as follows:

"That the President cause to be struck from the dies recently prepared at the United States mint for that purpose 'medals of honor' additional to those authorized by the act [Resolution] of July twelfth, eighteen hundred and sixty-two, and present the same to such officers, non-commissioned officers, and privates as have most distinguished or who may hereafter most distinguish themselves in action; and the sum of twenty thousand dollars is hereby appropriated out of any money in the Treasury not otherwise appropriated to defray the expenses of the same."

It is reasonable to suppose that Congress, in enacting this provision, proceeded on the idea that the evidence which would chiefly, if not exclusively, guide the judgment of the President in awarding "medals of honor" would be the official reports of battles made to the War Department, in which it may reasonably be expected to find the names of all who specially distinguished themselves in the battles and encounters of the late war. In Dr. Nagle's Case, however, the files of the War Department furnish no evidence tending to substantiate the statement on which he bases his claim, and consequently his application is, in effect, that a "medal of honor" be awarded to him on such unofficial evidence as may be producible after an *unexplained* delay of twenty-eight years in bringing forward his claim.

The statement of the case seems to be its refutation. A court of equity, if it had jurisdiction over such a matter, would decline to consider it at all, on the mere ground of delay unaccounted for, and in obedience to a principle of general jurisprudence, based on the teaching of experience, that "the lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and the other means of judicial proof." (*Godden* v. *Kimmell*, 99 U. S., 212.)

It can hardly be tenable, therefore, that laches which would bar a demand for property in a court of equity, is not sufficient to discredit an application for the medal of honor. He who would claim the distinction of this medal must do so by virtue of an unclouded title. To require less would be to take from its value in the hands of the veterans on whom it has been conferred.

It follows, therefore, that, in my opinion, the claim of Dr. Nagle should not be entertained.

The case presents other interesting questions which, however, need not be considered, as, for example, whether the medal of honor may be the subject of a *claim* against the United States, and whether it may be awarded on evidence that is not *strictly official*.

Very respectfully, yours,

W. H. H. MILLER.

The PRESIDENT.

INTEREST.

Where no appropriation is made for payment of interest on a judgment of the Court of Claims against the United States, interest can not lawfully be paid.

DEPARTMENT OF JUSTICE,
July 18, 1892.

SIR: I have the honor to acknowledge the receipt of your letter of the 13th instant, inclosing an application of Messrs. McDonald, Bright, and Fay, for the payment of interest on the judgment rendered by the Court of Claims, in the matter of *Maloney and Gleason* v. *The United States*, No. 16310, Court of Claims. I am requested to give you an opinion upon the question of whether interest is payable; and, if so, for what time and at what rate. I find that September 30, 1890, an appropriation was made to pay the judgment of the Court of Claims in the above-entitled cause (26 Stat. L., 504, 536), and that the same has been paid. I am not aware of any other appropriation of Congress for the purpose of paying this judgment, or of any appropriation whatsoever for the payment of interest on the same. I am of the opinion, therefore, that you can not lawfully pay the amount claimed as interest.

The papers are herewith returned.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

CITIZENSHIP—EVIDENCE.

A certificate of the governor and commander in chief of the colony of Hong Kong and its dependencies and vice-admiral of the same, to the effect that he believes a person to be a British subject, is not competent evidence to prove such citizenship.

DEPARTMENT OF JUSTICE,
July 19, 1892.

SIR: Your letter of July 7, instant, and the inclosure therein referred to have received my consideration.

The case presented by you for an opinion is, substantially, this: Mr. Ho-Fook, a resident of Hong Kong, China, has presented to the United States consul at that place, for authentication, an invoice averring a shipment of prepared opium to the United States.

Mr. Ho-Fook claims to be a British subject, and in support of the claim exhibited to the consul a certificate of Sir William Robinson, governor and commander in chief of the colony of Hong Kong and its dependencies and vice-admiral of the same, in which that officer sets forth that he has examined "affidavits of birth" and has satisfied himself by such examination that Mr. Ho-Fook "was born in the said colony of Hong Kong of Dutch father and Chinese mother, on the 30th of November, 1863, the King of Holland being, at the above date, in amity with the Queen of England," and that he, therefore, "believes the said Ho-Fook to be a British subject."

This being the only evidence to sustain Mr. Ho-Fook's claim to be a British subject the consul withheld the desired authentication until he should be further advised, and thereupon applied to the Secretary of State for instructions, in view of Article II of the supplemental treaty between the United States and China of November 17, 1880 (22 Stat., 828), which is as follows:

"The Governments of China and of the United States mutually agree and undertake that Chinese subjects shall not be permitted to import opium into any of the ports of the United States; and citizens of the United States shall not be permitted to import opium into any of the open ports of China; to transport it from one open port to any other open port; or to buy and sell opium in any of the open ports of China. This absolute prohibition, which extends to vessels owned by the

citizens or subjects of either power, to foreign vessels employed by them, or to vessels owned by the citizens or subjects of either power and employed by other persons for the transportation of opium, shall be enforced by appropriate legislation on the part of China and the United States; and the benefits of the favored-nation clause in existing treaties shall not be claimed by the citizens or subjects of either power as against the provisions of this article."

The Secretary of State has invited your views on the questions presented in the consul's dispatch, and you request my opinion on the questions (1) whether Mr. Ho Fook may engage in the transportation of prepared opium into the United States, or should be considered as a "Chinese subject" within the meaning of the above-quoted article of the treaty of 1880, and (2) whether the said certificate of the governor of the colony of Hong Kong is legal evidence to establish the claim of Mr. Ho Fook that he is a British subject.

Addressing myself to the second question first, I fail to discover in the governor's certificate an indication that it emanated from an officer authorized to determine the question of British citizenship, or to certify that such a question had been determined. On the contrary, the document seems to show on its face that it finds its source in Mr. Ho Fook's application for it for his own purposes and not in any requirement of British law. No one, I should suppose, would think of exhibiting such a paper in the British dominion as evidence of the right to be admitted to the exercise and enjoyment of the privileges of British citizenship.

Taking the certificate in connection with the use made of it before the consul, I have very little doubt that it was secured by Mr. Ho Fook for the express purpose of obtaining the authentication of the invoice of opium.

In the case of *Urtetiqui* v. *D'Arbel* (9 Pet., 692) the Supreme Court held that a passport signed by the Secretary of State of the United States and bearing the seal of the Department was not evidence to prove citizenship in a suit involving the question of citizenship of the United States, although by usage and the law of nations it is received as evidence of that fact. The court says:

"There is no law of the United States in any manner regulating the issuing of passports or directing upon what

evidence it may be done, or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required by the Secretary of State before issuing a passport. This, however, is entirely discretionary with him. No inquiry is instituted by him to ascertain the fact of citizenship, or any proceedings had that will in any manner bear the character of a judicial inquiry. It is a document which, from its nature and object, is addressed to foreign powers; purporting only to be a request that the bearer of it may pass safely and freely, and is to be considered rather in the character of a political document, by which the bearer is recognized in foreign countries as an American citizen, and which, by usage and the law of nations, is received as evidence of the fact. But this is a very different light from that in which it is to be viewed in a court of justice where the inquiry is as to the fact of citizenship. It is a mere *ex parte* certificate; and, if founded upon any evidence produced to the Secretary of State establishing the fact of citizenship, that evidence, if of a character admissible in a court of justice, ought to be produced upon the trial as higher and better evidence of the fact."

While the duties of consuls of the United States with reference to the authentication of invoices are not strictly judicial, they do however, in some particulars, partake of that character, as in the present instance, and I must confess my inability to perceive why, when a consul is called on to act in a matter of so much importance as that involved in this case, he has not as much right as a court to insist upon original evidence.

The probability is that the personal appearance of Mr. Ho Fook, like his name, strongly indicated Chinese citizenship, and the consul, having in view the importance of the article of the treaty above quoted, acted discreetly in declining for the time being to consider the certificate offered as legal evidence of citizenship.

If, in a suit between private parties, a passport issued by the Secretary of State is no evidence in the Federal courts of the citizenship of the person therein stated to be a citizen of the United States, it can hardly be that the certificate of a similar character, offered to the consul in this case, was competent evidence to prove Mr. Ho Fook's citizenship. Cer-

tainly I can perceive no imaginable reason why the rules of evidence applicable to suits between individuals should be relaxed in an inquiry of so much importance to the United States as that involved in this case.

I am therefore of opinion that the certificate in question was no evidence of Mr. Ho Fook's citizenship.

The conclusion I have reached on the second question makes the first an abstract one, requiring no answer.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

VACANCY.

The acceptance of an appointment as Chief of the Record and Pension Office of the War Department, with the rank and pay and allowance of a colonel, by a surgeon of the U. S. Army, creates a vacancy in the latter office.

DEPARTMENT OF JUSTICE,
July 26, 1892.

SIR: By your communication of July 21, 1892, it appears that Maj. F. C. Ainsworth, surgeon, U. S. Army, has been appointed chief of the Record and Pension Office of the War Department established by the act of May 9, 1892, with the rank, pay, and allowances of a colonel, and has accepted that appointment. An opinion is requested whether the acceptance of this appointment by Maj. Ainsworth makes a vacancy in the office of surgeon. The act of May 9, 1892, under which this appointment was made, reads as follows:

"That the division organized by the Secretary of War in his office for the preservation and custody of the records of the volunteer armies under the name of the record and pension division is hereby established as now organized, and shall hereafter be known as the Record and Pension Office of the War Department; and the President is hereby authorized to select an officer of the Army whom he may consider to be especially well qualified for the performance of the duties hereinafter specified and, by and with the advice and consent of the Senate, to appoint him in the Army to be chief of said office, who shall have the rank, pay, and allowances of a colonel and shall, under the Secretary of War,

have charge of the military and hospital records of the volunteer armies and the pension and other business of the War Department connected therewith; and all laws or parts of laws inconsistent with the terms of this act are hereby repealed."

By the act reorganizing the several staff corps of the Army (Supp. Rev. Stat., 45) it is provided "that the medical department of the Army shall hereafter consist of * * * fifty surgeons, with the rank, pay, and emoluments of majors." The duties of surgeons in the Army are well known, as are the duties of the chief of the Record and Pension Office of the War Department. Each of these positions is an office in the active service of the Army. So, the relative rank of a colonel and a major in the active service in the Army are well known. In rank, in duty, in the insignia evidencing rank they are distinct and diverse. There are numerous decisions to the effect that in the absence of statute a person holding and receiving the emoluments of one office under the Government of the United States is not thereby precluded from holding and receiving the emoluments of another. But in every case in which it has been so held the two positions have not been incompatible, and the discharge of the duties in the one was not inconsistent with the discharge of the duties of the other. In my opinion such is not this case. The duties of a surgeon in the Army are incompatible with those of the chief of the Record and Pension Office of the War Department. The holding of the rank, pay, and emoluments of a colonel is inconsistent with the holding of the rank, pay, and emoluments of a major, both in the active service. In my opinion, therefore, the acceptance and qualification under the appointment in pursuance of the statute of May 9, 1892, by Maj. Ainsworth, vacated his office as surgeon in the Army. But whether this be the correct view or not, I beg to suggest that the appointment of a successor in the office of surgeon, and a confirmation of that appointment by the Senate, would, in any event, displace Col. Ainsworth in that office. (See *Blake* v. *United States*, 103 U. S., p. 227; *Keyes* v. *United States*, 109 U. S., p. 336.)

Very respectfully,

W. H. H. MILLER.

The PRESIDENT.

LEAVE OF ABSENCE—EMPLOYÉS OF BUREAU OF ENGRAVING AND PRINTING.

The act of July 6, 1892, chapter 154, relating to leave of absence to employés of the Bureau of Engraving and Printing, contemplates a maximum absence of thirty days with a continuance of average compensation and a leave of absence and pay during the same to a pieceworker whose service and consequent earnings are less than the maximum determined by the average amount of his work and of his pay therefor.

DEPARTMENT OF JUSTICE,
August 1, 1892.

SIR: Your inquiry under date of July 27, relating to the act allowing leave of absence to employés in the Bureau of Engraving and Printing (act No. 110, approved July 6, 1892) has received due attention.

This act provides that "the employés of the Bureau of Engraving and Printing, including the pieceworkers, shall be allowed leave of absence with pay, not exceeding thirty days in any one year."

The concluding clause of the enactment is as follows:

"*Provided*, That the length of the leave of absence of any employé of said Bureau doing piecework, and the pay during such leave of absence, shall be determined by the average amount of work done by such person and the pay therefor during the several months of the year."

This statute secures the privilege of a leave of absence with pay to the pieceworker, but declares that the extent of the privilege shall be determined by his work and earnings.

It is evident that Congress intended to establish the rule that the pieceworkers referred to, who continue in regular employment throughout the year, may have not exceeding thirty days leave of absence annually, subject to the rules of the Department and the proper supervision of the chief of the Bureau acting under the approval of the Secretary.

The proviso seems to rest upon the theory that one who performs but a small amount of work per year, or who is employed but a fraction or a moiety of the time, is not equitably entitled to an absence, or to compensation during the absence, equal to that allowed to a pieceworker who is employed to the full capacity of a skilled workman through the year.

It is manifest that Congress intended to authorize, subject to the limitations fixed, a leave of absence and current pay to correspond with the extent and value of the service performed by the pieceworkers respectively.

In more direct response to your inquiry I may say, that as the pieceworker is entitled to the leave of absence with pay only in accord with this act it can not be said that any reduction arises from the proviso, but, on the other hand, the proviso designates the measure by which the length of the leave and the amount of leave pay may be determined.

The leave of absence can not extend beyond thirty days per year, and the pay can not exceed the average pay of the employé concerned during the several months of the year.

Thirty days' absence per year, with a continuance of average compensation during the absence, appears to be the maximum allowance of the act in favor of a pieceworker so situated as to receive the greatest benefit therefrom.

The length of the leave of absence and the amount of pay during the same given to a pieceworker whose service and consequent earnings are less than the maximum, must be determined by the average amount of his work and of his pay therefor.

While the proviso may be somewhat obscure as to the method of its execution, its purpose does not admit of question, and authority to make all necessary regulations to execute the act and carry out the intent of the proviso is explicitly given.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

DEED TO LAND—TAX RECEIPTS.

A deed pronounced sufficient to convey to the Government a valid title. Tax receipts are sufficient evidence that the land is discharged and redeemed from a tax sale and taxes.

DEPARTMENT OF JUSTICE,

August 4, 1892.

SIR: I herewith return the deed of Cassie G. Pugh to the United States, together with tax receipts, which accompanied your letter to me of the 27th ultimo in relation to cer-

tain land sought to be purchased for the site of the proposed quarantine station at Port Townsend, Wash. The said receipts are satisfactory evidence that the land referred to is redeemed and discharged from the tax sale and taxes mentioned in my letter to you of the 25th of June last, and the said deed is, in my opinion, sufficient to convey to the Government a valid title to the premises.

I may add that in the last-mentioned letter the premises were erroneously described as the "northwest quarter of the southeast quarter," etc. The correct description is the "northwest quarter of the *southwest* quarter," etc., as set forth in the deed.

Very respectfully,

JOHN B. COTTON,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

CONDEMNATION OF LAND.

Two proceedings for the condemnation of land resulted in an order of the proper court that on the payment of the award, together with the sum taxed as costs of the proceeding, into the registry of the court, the U. S. marshal make and deliver to the United States a good and sufficient deed of the premises. It was stated that on payment of said awards and costs and delivery of said deeds a valid title to the land will vest in the United States.

DEPARTMENT OF JUSTICE,
August 4, 1892.

SIR: I herewith transmit two certified transcripts (marked "A" and "B," respectively) of the record of proceedings recently had on behalf of the United States in the U. S. circuit court for the northern district of Florida, for the acquisition by condemnation of certain lands on Tiger Island, Florida, which have been selected for sites of range lights to guide vessels into the harbor of Fernandina, Fla. These proceedings were instituted by the U. S. attorney for said district, pursuant to instructions given him, agreeably to the request contained in a letter received by this Department from the Secretary of the Treasury, dated November 7, 1890.

Transcript "A" covers the following-described pieces of

land, portions of said island, in township 3 north, range 28 east, in Nassau County, Fla., to wit:

"Tract A," beginning at a stake marked XIII, near the mouth of Tiger Creek, where it empties into Cumberland Sound, and running thence north 83 degrees 30 minutes west, 72½ feet, to a stake; thence north 6 degrees 30 minutes east, 300 feet, to a stake; thence south 83 degrees 30 minutes east, 72½ feet, to a stake; thence south 6 degrees 30 minutes west, 300 feet, to the place of beginning, containing one-half acre, more or less.

"Tract B," beginning at a stake marked XIII, placed 1,295 feet north 88 degrees 30 minutes west from the similarly marked stake first above mentioned, and running thence north 88 degrees west, 72½ feet, to a stake; thence north 2 degrees east, 300 feet, to a stake; thence south 88 degrees east, 72½ feet, to a stake; thence south 2 degrees west, 300 feet, to the place of beginning, containing one-half acre, more or less.

Together with a right of way over and across the land lying between the above-described two pieces of land, etc.

For the above-described two pieces of land, including the aforesaid right of way, the amount awarded in said proceedings is $100, upon payment whereof by the United States, together with the sum of $187.41 taxed as costs of the proceedings, into the registry of the court, the U. S. marshal for said district is by order of the court required to make and deliver to the Government a good and sufficient deed of the premises.

Transcript "B" embraces other pieces of land, portions of the same island, in the same township and range. These pieces are thus described:

"Tract A," beginning at a stake marked XIII, standing at high-water mark on the beach of Amelia River, Florida, and thence south 73 degrees east, 147½ feet, to a stake; thence south 17 degrees west, 147½ feet, to a stake; thence north 73 degrees west, 147½ feet, to a stake; thence north 17 degrees east, 147½ feet, to the place of beginning, containing one-half acre, more or less.

"Tract B," beginning at a stake marked XIII, placed 397 feet south 17 degrees west from the similarly marked stake next above mentioned, and running thence south 73 degrees

east, 147½ feet, to a stake; thence south 17 degrees west, 147½ feet, to a stake; thence north 73 degrees west, 147½ feet, to a stake; thence north 17 degrees east, 147½ feet, to the place of beginning, containing one-half acre, more or less.

Together with a right of way over and across the land lying between the last above-described two pieces of land, etc.

For the two pieces of land last mentioned, including the right of way, the amount awarded is $100, upon payment of which, together with the sum of $133.79 taxed as costs of the proceedings, into the registry of the court, the U. S. marshal is by order of the court required to make and deliver to the United States a good and sufficient deed of the premises.

I am of the opinion that under and by virtue of the aforesaid proceedings, on payment of the awards and costs above mentioned, and the delivery of the marshal's deeds, in conformity to the judgment and order of the court, a valid title to the above-described pieces of land and rights of way will vest in the United States.

Very respectfully,

JOHN B. COTTON,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

NAVY DEPARTMENT—VACANCIES.

A question having arisen as to whether the officers to be promoted in the U. S. Marine Corps to vacancies existing in the offices of major, captain, and first lieutenant, said succession of vacancies having been created on July 10, 1892, should or should not be examined under the act providing for the examination of certain officers of the Marine Corps and regulating proceedings therein, of date July 28, 1892, chapter 315, the opinion was given that the promotions under consideration might be made without the examination in question.

DEPARTMENT OF JUSTICE,
August 10, 1892.

SIR: Yours of the 1st instant states that "On the 10th ultimo a vacancy occurred in the U. S. Marine Corps for the promotion of a captain to the rank of major, a first lieutenant to the rank of captain, and a second lieutenant to the rank

of first lieutenant," and requires my opinion as to whether the officers to be promoted to fill these vacancies should or should not be examined under the act "To provide for the examination of certain officers of the Marine Corps, and to regulate promotion therein" (being act No. 182, approved July 28, 1892), in accordance with the requirements of the third section of the act entitled "An act to provide for the examination of certain officers of the Army, and to regulate promotions therein," approved October 1, 1890. (26 Stat., 562.)

With the exception of a proviso which declares the constitution of examining boards thereunder, the said statute of 1892 is comprised of the following provision, viz:

"That hereafter promotions to every grade of commissioned officers in the Marine Corps below the grade of commandant shall be made in the same manner and under the same conditions as now are or may hereafter be prescribed, in pursuance of law, for commissioned officers of the Army."

The act of October 1, 1890, provides, by section 1, that "hereafter promotion in every grade in the Army below the rank of brigadier-general, * * * shall, subject to the examination hereinafter provided for, be made according to seniority in the next lower grade," etc.

The first paragraph of section 3 enacts:

"That the President be, and he is hereby, authorized to prescribe a system of examination of all officers of the Army below the rank of major to determine their fitness for promotion, such an examination to be conducted at such times anterior to the accruing of the right to promotion as may be best for the interests of the service."

The following provisos are also contained in said section:

"*And provided*, That if any officer fails to pass a satisfactory examination and is reported unfit for promotion, the officer next below him in rank, having passed said examination, shall receive the promotion: *And provided*, That should the officer fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in line of duty he shall be retired with the rank to which his seniority entitled him to be promoted; but if he should fail for any other reason he shall be suspended from

promotion for one year, when he shall be reexamined, and in case of failure on such reexamination he shall be honorably discharged, with one year's pay, from the Army."

The right of the senior captain referred to, to promotion to the rank of major, and that of the senior first lieutenant, to promotion to be a captain, and that of the senior second lieutenant, to be first lieutenant, existed from the 10th of July last.

In accordance with that practice under which an "officer is promoted in due course to fill a vacancy" it is clear that for a period of eighteen days the officers referred to were entitled by law to promotion without examination under the act of 1890.

It appears that the succession of vacancies, which includes the three under consideration, was created by the retirement of Col. Hebb, on the 10th ultimo.

On the 3d instant a lieutenant-colonel and a major were severally nominated by the President and confirmed by the Senate to be colonel and lieutenant-colonel from the 11th of July, 1892, on account of the retirement of Col. Hebb (Cong. Rec., p. 7802).

No suggestion is made that the failure to promote the three officers specified in your letter occurred from any act or omission of their own.

The right to promotion inhering in one who is a commissioned officer is under existing legislation in the nature of a vested right, subject, nevertheless, to being defeated in accordance with the provisions of the laws. The opinions of learned predecessors (17 Opin., 117; and 18 *id.*, 398), in statement and citation are instructive in the premises.

The act of 1892 speaks only from July 28 and creates new conditions as to promotions thereafter to be made in the Marine Corps.

It would be going very far to say that Congress intended that a right of promotion earned by long service, and actually accrued, may, by force of this enactment, be taken away from the officer who has performed the service.

That it is not the purpose of the act of 1890 to have the examinations take place so long subsequent to the occurring of the right to promotion as to be affected by intervening

rights and obligations is indicated by that clause of section 3 which directs the "examination to be conducted * * * anterior to the accruing of the right to promotion."

Following this provision the first rule of the "system of examination" prescribed by the President pursuant to section 3 directs that: "At such time anterior to the accruing of the right to promotion, as may be best for the interests of the service, officers * * * below the rank of major shall be examined by a board," etc. (General Orders, No. 128.)

This general purpose is not affected by the occasional procedure which obtains in analogy to section 1562, Revised Statutes, in cases of necessity.

The executive construction under the act of October 1, 1890, in analogous cases is of much weight in reaching a proper conclusion.

When that act went into effect several officers of different grades below the rank of major were entitled to promotion to then existing vacancies, and the promotions to fill these vacancies were in every instance filled under the law as it existed prior to October 1 without the examination prescribed by that act.

This was a practical executive construction that can not be reversed without assuming the risk of occasioning confusion and violating those rules which require stability and consistency in construction.

In *Schell's executors* v. *Fauche* (138 U. S., 572) the court says:

" * * * In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the Departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

Although it may be fairly claimed that the practice under the act of 1890 has not had sufficient time to ripen into the principle quoted, it should clearly appear that the executive action stated was contrary to law to justify the overruling of this departmental decision.

It is quite important to note that it must be understood that the legislation of 1892 was made by Congress with a full knowledge of the executive construction which had been previously made upon the act of 1890, and the inference is a necessary one that if this construction had not been in

accord with the intent of Congress the act of 1892 would have contained a provision requiring a different executive ruling. Permit me to say, in conclusion, that a construction which requires the three officers specified by you to be examined under the provisions of the act of July 28, 1892, will disregard rights which ought to be treated as vested rights of the officers affected, and will run counter to the established determination of the War Department, and will reverse a decision which has been practically acquiesced in by Congress.

It is my opinion that the promotions under consideration may lawfully be made without the examination in question.

Very respectfully,

CHARLES H. ALDRICH,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

MEMBER OF THE NATIONAL GUARD—GOVERNMENT CLERK ABSENT ON PARADE.

An employé of a Department absent from his duty while at Omaha, Nebr., at a prize drill duly ordered by a superior officer of the National Guard, of which he was a member, is entitled to his pay while absent.

DEPARTMENT OF JUSTICE,
August 11, 1892.

SIR: Your letter of August 2 requests my opinion whether John J. Gavin, jr., an employé of the Treasury Department and a member of the "Fencibles," a company of the National Guard of the District of Columbia, is entitled to pay as such employé while absent at Omaha, Nebr., with the company for the purpose of competing in a prize drill, the period of such absence exceeding the usual thirty days allowed employés of the Departments, under the act of March 3, 1883 (22 Stat., 563), which provides that:

"All absence from the Departments on the part of said clerks or other employés in excess of such leave of absence as may be granted by the heads thereof, which shall not exceed thirty days in any one year, except in case of sickness, shall be without pay."

This is to be read in connection with the act of March 1, 1889, entitled "An act to provide for the organization of the militia of the District of Columbia" (25 Stat., 772). Section 49 of that act is as follows:

"That all officers and employés of the United States and of the District of Columbia, who are members of the National Guard, shall be entitled to leave of absence from their respective duties, without loss of pay or time, on all days of any parade or encampment ordered or authorized under the provisions of this act."

The word "parade" as used in this section is not limited to its popular meaning of a pompous exhibition for purposes of display. As a military term it is defined as "an assembly and orderly arrangement of troops, in full equipments, for inspection or evolutions before some superior officer; a review of troops." (Webster's International Dictionary; subject: "Parade.")

The next inquiry is, What days of parade or encampment are *ordered* or *authorized* by this act?

Section 43 provides: "That the National Guard shall perform not less than six consecutive days of camp duty in each year, at such time as may be ordered by the commanding general."

This is the only section prescribing any fixed time. It plainly appears, however, that it was not contemplated that this annual encampment should be the only service required, as power is given to the commanding general, by section 41, to "prescribe such stated drills and parades as he may deem necessary for the instruction of the National Guard, and may order out any portion of the National Guard for such drills, inspections, parades, escort, or other duties as he may deem proper. The commanding officer of any regiment, battalion, or company may also assemble his command, or any part thereof, in the evening for drill, instruction, or other business, as he may deem expedient; but no parade shall be performed by any regiment, battalion, company, or part thereof, without the permission of the commanding general."

Section 42 provides: "That an annual inspection and muster of each organization of the National Guard, and an inspection of their armories and of public property in their

possession, shall be made at such times and places as the commanding general may order and direct."

Section 40 provides: "That any drill, parade, encampment, or duty that is required, ordered, or authorized to be performed under the provisions of this act, shall be deemed to be a military duty, and while on such duty every officer and enlisted man of the National Guard shall be subject to the lawful orders of his superior officers, and for any military offense may be put and kept under arrest or under guard for a time not extending beyond the term of service for which he is then ordered."

Section 46 provides: "For absence from any other military duty required or ordered under the provisions of this act the penalty shall be such as may be prescribed by the commanding general, or the by-laws of the organization to which the officer or soldier belongs."

Mr. Gavin was thus subject to the orders of his commanding general and superior officers, and to military discipline if he failed to yield the strictest obedience.

Inquiry of the commanding general shows that this company went to Omaha pursuant to regularly published orders by that officer.

It has been suggested that the commanding general had no right to order the company into any encampment, or upon any service beyond the confines of the District of Columbia; that Mr. Gavin could have refused to go beyond the limits of the District, and, in the absence of such refusal, must be held to have voluntarily gone to Omaha.

In the first place, the act does not limit the parades and encampments to the District of Columbia. In the second place, it would be subversive of all discipline, and can not be seriously contended, that a private is required to refuse to obey the orders of his superior officers in order to escape the loss of a few days' pay, and thus subject himself to military trial, and the risk and expense incident thereto. A soldier is not the judge in such cases. His first duty is obedience.

The answer to this suggestion, and to the suggestion contained in the inclosure accompanying your communication, that the civil service might be greatly impeded by long-continued absences by order of the commanding officers, is found

in the presumption against official misuse of power. This danger may well be considered remote where, as in this case, the commanding officer is subject to the orders and directions of the President as commander in chief (section 6), who would doubtless remedy any abuses of the kind suggested.

My conclusion, therefore, is that Mr. Gavin is entitled to his pay while absent under the circumstances herein stated.

Respectfully, yours,

CHARLES H. ALDRICH,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

Where the Attorney-General is not called upon to give an opinion upon any question pending undetermined, but is asked to review and express his conclusions upon the correctness of interpretations and applications of law heretofore made, he is not permitted to give an opinion, nor will he give an opinion upon a hypothetical case as to questions which may arise in the future.

DEPARTMENT OF JUSTICE,
August 17, 1892.

SIR: I have the honor to acknowledge the receipt of a letter from your Department, signed by the Acting Secretary of the Treasury, and bearing date the 6th instant, calling my attention to an act entitled "An act relating to the limitation of the hours of daily service of laborers and mechanics," etc., approved August 1, 1892.

I trust that I may be permitted to employ a paragraph of the opinion of Attorney-General Speed (11 Opin., 188), in saying that "it would give me great pleasure to comply with the request contained in [the] letter if I could clearly see that it is proper for me to do so, in view of the law which prescribes the duties and limits the powers of this office."

After a preliminary paragraph, the letter states as follows:

"In giving practical consideration and application to said law (so far as necessity has arisen for the consideration and application of the same) to cases pertaining to work being or to be done by the day or under contract at the various public buildings under the control of the Treasury Department

(through the office of the Supervising Architect) this Department has held:"

Then follow two decisions set forth at length and designated "first" and "second," which declare the conclusions of your Department upon certain questions which have arisen or may arise under the enactment.

These decisions are followed by a "third" subdivision, which states the "Alterations and additions," provision of certain contracts entered into prior to August 1, and continues:

"In cases where it may become necessary for the Department to order from such contractors any additional work providing for additional materials and labor, under such contracts as have been entered into prior to August 1, 1892, the date of approval of said act, and which said contracts contained the provisions above quoted, the Department holds," etc., setting forth, as I understand, the determination at which your Department has arrived upon the question involved.

The next subdivision of the letter is as follows:

"Fourth, I have the honor to specially request your opinion, as to the correctness of the interpretations and applications of said law as specified in the first, second, and third paragraphs of this letter."

It therefore appears that so far as the questions above referred to are concerned I am not called upon to give an opinion upon any question now pending and undetermined in the Treasury Department, but am asked to review and express my conclusions upon the "correctness of the interpretations and applications of said law" that have heretofore been made.

Numerous and unequivocal precedents concurred in by several Attorneys-General preclude me from rendering an opinion in such a case.

Section 356 of the Revised Statutes under which official opinions are authorized is as follows:

"The head of any Executive Department may require the opinion of the Attorney-General on any question of law arising in the administration of his Department."

It is required not only that the question must be one arising in the administration of a Department, but it must be

one which is still pending. A matter which has been considered and decided is not now a "question" upon which the head of a Department may require an opinion of the head of the Department of Justice. It is said by Mr. Wirt (1 Opin., 493), in speaking of his own action, that "no officer should be permitted to stretch his authority and carry the influence of his office beyond the circle which the positive law of the land has drawn around him."

It may be added in the words of Mr. Taney (2 Opin., 531) that: "Anything, therefore, which I might say in relation to it would be nothing more than the advice of any other counsel you might choose to consult."

Mr. Butler (3 Opin., 39) declines giving an official opinion upon a question submitted, "inasmuch as it appears to have been decided and indefinitely disposed of by the Department," * * * etc. He adds, "I can not undertake to give an official opinion on the question proposed to me without assuming that this office possesses a revisory jurisdiction not conferred upon it by law."

In 9 Opinions, 421, Mr. Black was asked as to the authority of a State to tax a resident employed by the United States. He said: "But this point is not practically raised on the case presented. The tax has been paid, and my opinion is only desired because the same difficulty may occur again. But it may not, and to settle it in advance is to anticipate trouble."

I beg to ask your attention, also, to an opinion rendered June 17, 1889, and appearing 19 Opinions, 331.

I now come to the second general division of the said letter.

It consists of four subdivisions and calls for a general interpretation and application of the provisions of the act of August 1, 1892, as to questions which may at some future time arise in your Department.

No actually existing case requiring present executive action is alleged to be pending in the Department upon which a question of law arises.

The fifth subdivision of the letter is as follows:

"Fifth. In many cases the Department enters into contracts for the supply of certain articles, such as post-office

lock boxes, drawers, and keys, plaster models, etc., manufactured and made by laborers and mechanics employed by contractors with this Department, at private manufactories or workshops, to be delivered, but not placed in position, at various public buildings throughout the United States."

The sixth subdivision goes in the same direction, and further and more into details, but sets forth no actual case or pending question.

The next two subdivisions read thus:

"Seventh. I also have the honor to specifically request your opinion as to the application of said law to the cases specified in the fifth and sixth paragraphs.

"Eighth. I also have the honor to specifically request your opinion in regard to the practical interpretation and application of said law so far as it relates to laborers and mechanics employed, directed, and controlled, either by this Department or by contractors or subcontractors, so far as it relates to public works under the control and jurisdiction of the Treasury Department."

A careful consideration of the several paragraphs leads me to the conclusion that no question of law is here presented.

An opinion submitted to the Secretary of War, October 25, 1889 (19 Opin., 414), in response to suggestions relating to the status of the Quartermaster's Volunteers, sets forth the practice of this Department as follows:

"I am unable to see how this Department has any right to pass upon the suggestions. * * * They do not seem to present any actual existing case arising in the administration of your Department. They apparently call for an opinion in advance as to what this Department would hold in the future upon indefinite and varying facts. In such cases the Department has universally declined to give opinions. I take the liberty of quoting from a late opinion of this Department, which will serve to show how uniformly this rule has been adhered to, and the reasons therefor, as follows: 'From this statement it appears that the question submitted does not spring out of any present, actually existing case arising in the administration of your Department.' It is a question in a hypothetical case, and one, indeed, which

may never arise, and calls in advance for an opinion as to what the Department would hold in the future upon a somewhat indefinite state of facts.

"That being the case, it is respectfully submitted that this Department is not permitted, by statute or precedent, to give an opinion upon it."

Mr. Black says (9 Opin., 82):

"It has always been the rule of this office to give advice only in actual cases where the special facts are set forth by the Department. It is impossible to reply to mere speculative points or supposed cases. The Attorney-General is not required to write abstract essays on any subject.

"If there be a claim pending before you on which you desire to have my advice, and you will be pleased to say how it arises, what are the facts, and wherein the law seems doubtful, I shall with great pleasure give you my opinion."

Mr. Bates says (10 Opin., 267): "I have no power to investigate or decide on facts, but only to give advice and opinions on questions of law as they arise out of facts authoritatively laid before me."

Mr. Speed (11 Opin., 192) declines to prepare an opinion upon a hypothetical case, theoretical in its character.

Mr. Ackerman (13 Opin., 531) points out the necessity for an "*actual case*" by saying:

"It is on questions of law arising in the actual administration of the Departments that the opinion of the Attorney-General may be required. You will readily perceive the inconvenience of giving, upon a hypothetical case, an opinion, which, upon the consideration of an actual case, might require modification on account of circumstances not imagined, and, therefore, not considered in the preparation of an opinion."

In 18 Opinions, 488, the practice is referred to as follows:

"It must, I conceive, be deemed settled that the Attorney-General can only act on a determinate statement of facts furnished by the officer asking his opinion." "Where," says Mr. Attorney-General Stanbery, "a question of law arises upon facts submitted to the Attorney-General, *such facts must be agreed and stated as facts established.*" (12 Opin., 205.)

Said Mr. Attorney-General Williams upon the same point: "I deem it proper here to remind you, that where an official

opinion from the head of this Department is desired on questions of law arising on any case the request should be accompanied by a statement of the material facts of the case, and also the precise questions on which advice is wanted."

Further discussion of the construction under consideration appears in 19 Opinions, pages 331, 414, and 696, to which I beg to invite your attention.

In conclusion, I am constrained to say that, in my opinion, I am not at liberty to submit, in response to said letter, an official opinion for your consideration upon the questions that have been decided, or upon those that may arise, under said enactment of August 1, 1892.

Very respectfully,

CHARLES H. ALDRICH,

Acting Attorney-General.

The SECRETARY OF THE TREASURY.

CONTRACT—HOURS OF LABOR.

Where on July 28, 1892, a formal acceptance of a bid was given, but leaving a minor detail to be agreed upon and a formal contract and bond were afterwards to be prepared and executed, no contract was entered into prior to the passage of the act of August 1, 1892, chapter 352, within the meaning of the third section thereof.

A timber dry dock is one of the "public works" of the United States under this eight-hour law.

DEPARTMENT OF JUSTICE,

August 19, 1892.

SIR: The communication received from your Department under date of August 16, requesting an opinion upon the case which is set forth, and which arises under the act of August 1, 1892, relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works, etc., has received careful attention.

The communication recites as follows:

"Under date of May 12, 1892, an advertisement was issued by the Chief of the Bureau of Yards and Docks, in this Department, inviting proposals for the construction of a timber dry dock at the navy-yard, Brooklyn, N. Y. The proposals received in answer to the above advertisement were opened on the 19th of July last, and on the 28th of

that month the Chief of the Bureau of Yards and Docks, in accordance with the Department's instructions, accepted by letter, making a formal award, one of the bids, that of Mr. John Gillies, of Brooklyn, N. Y., being the lowest received for the construction of the dock, but the contract therefor under the forms prescribed by law has not yet been executed.

"The specifications furnished for the information and guidance of bidders, in connection with the advertisement above mentioned, contained the following paragraph, under the heading 'Hours of work:'

"'The contractor shall not be restricted to the hours of labor established for Government employés, and shall be permitted to prosecute the work night and day, if desired, and on Sundays, if deemed necessary by the contractor for the protection of the work.'"

The following paragraph is set forth in the advertisement for bids upon which the offer and acceptance were based:

"The successful bidder will be required, within fifteen days after the acceptance of his proposal, to enter into a formal contract."

The letter of acceptance sent to Mr. Gillies contained the following clause:

"Considering, however, that the schedule of prices in the printed specification for the proposed dock for material delivered but not worked, and also for material worked in place, exceeds the amount of your bid, the Bureau desires, before the contract is consummated, to have you submit a revised schedule of prices for material and excavation, that you expect to be paid for as the work advances, and a modified scale of prices for excavation and material worked, in order that the gradual payments under the contract may be kept within the total amount of the contract price.

"When this necessary information is supplied to and agreed upon by the Bureau, a form of contract and bond will be prepared accordingly, as soon thereafter as practicable, and forwarded to your address for execution."

Four days after the date of this letter the act under consideration became a law.

It does not appear that any action was taken by the bidder meantime.

It is manifest that there was no such meeting of the minds of the negotiating parties as is required by law to constitute a contract. The bid was not accepted unconditionally. A further agreement upon a minor detail thereof was required to be made, and a formal contract and bond were, afterwards, to be prepared and executed.

It is, of course, borne in mind that section 3744 of the Revised Statutes requires that all contracts of the character of this one shall be reduced to writing and signed by the contracting parties. The Supreme Court has held (*Clark* v. *United States*, 95 U. S., 542) and (*S. B. Iron Co.* v. *United States*, 118 U. S., 38) that contracts contemplated by that section do not become valid until executed in accordance with its requirements.

As this new timber dry dock is intended to be a valuable and permanent improvement of real estate belonging to the United States, and is solely for its use and benefit, it is, in my opinion, to be regarded as one of the "public works" of the United States under this eight-hour law.

It is my opinion, also, that the advertisement for proposals, the proposal of Mr. Gillies, and its acceptance as set forth do not constitute a contract "entered into prior to the passage of the act" within the meaning of the third section thereof.

Very respectfully,

CHARLES H. ALDRICH,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

POSTMASTER—SURETY.

Where a postmaster's commission is to continue until the end of the next session of the Senate, and during that session his nomination as postmaster is sent to the consideration of that body but it adjourns without taking action thereon, the responsibility of the sureties on his official bond will continue for sixty days under the provisions of section 3836, Revised Statutes, if the vacancy is not supplied during that time; and the sureties can lawfully assume possession of the post-office, and the Government property therein, and depute one of their number or another person as acting postmaster, to perform the duties of the office until a successor is appointed and takes possession.

DEPARTMENT OF JUSTICE,
August 22, 1892.

SIR: Yours of August 13, 1892, states the following facts:

"Under date of June 2, 1891, James Hill was commissioned by the President as postmaster at Vicksburg, Miss., his commission under the provisions of the statute to continue until the end of the next session of the Senate, and no longer. After the assembling of Congress, in December, 1891, the nomination of Mr. Hill was duly sent to the Senate for consideration by that body. The Senate has, however, adjourned without taking action thereon. Mr. Hill's commission has therefore expired by limitation of the law, thus creating a vacancy in the office referred to."

Upon this statement of facts you request my opinion as follows:

"1. The post-office at Vicksburg having become vacant, as stated, will the responsibility of the sureties on the official bond of the said James Hill continue for sixty days under the provisions of section 3836, Revised Statutes, provided the vacancy is not supplied during that time?

"2. Can the sureties lawfully assume possession of the post-office and the Government property therein and depute one of their number, or another person, as acting postmaster, to perform the duties of the office until a successor is appointed and takes possession?"

Article 11, section 2, of the Constitution of the United States provides that "The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

Section 1769, Revised Statutes, 1878, repealed by the act of March 3, 1887 (24 Stat., 500), provided that "if no appointment by and with the advice and consent of the Senate is made to an office so vacant, or temporarily filled during such next session of the Senate, the office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until it is filled by appointment thereto by and with the advice and consent of the Senate."

Provision was also made for the discharge of the duties of such office during such interim. Since the repeal of the

tenure of office act, as it was popularly called, no similar provisions have been reenacted.

In my opinion, while Mr. Hill's commission has expired, and he is no longer postmaster *de jure*, it by no means follows that his duties are at an end.

Section 3836, Revised Statutes, to which you refer, is as follows:

"Whenever the office of any postmaster becomes vacant, the Postmaster-General or the President shall supply such vacancy without delay, and the Postmaster-General shall promptly notify the Sixth Auditor of the change; and every postmaster and his sureties shall be responsible under their bond for the safe keeping of the public property of the post-office, and the due performance of the duties thereof, until the expiration of the commission, or until a successor has been duly appointed and qualified, and has taken possession of the office; except that in cases where there is a delay of sixty days in supplying a vacancy, the sureties may terminate their responsibility by giving notice, in writing, to the Postmaster-General, such termination to take effect ten days after sufficient time shall have elapsed to receive a reply from the Postmaster-General; and the Postmaster-General may, when the exigencies of the service require, place such office in charge of a special agent until the vacancy can be regularly filled; and when such special agent shall have taken charge of such post-office the liability of the sureties of the postmaster shall cease."

The words "whenever the office of any postmaster becomes vacant" are general, and, in my opinion, include the case stated by you. The expiration of Mr. Hill's commission does not, in my opinion, put him or his sureties in any different relations to the Government than is occupied by a postmaster and his sureties where a commission for four years has expired. While postmaster he was as fully so as if he had been confirmed by the Senate. The only difference is to be found in the tenure of the office. The President has the same power to commission him or any other person he may choose until the end of the next session of the Senate, as was exercised originally in his case.

Until some action is taken by the President or yourself it is not to be supposed that the duties of the office are to

remain undischarged, and the public service brought to a standstill. To avoid this Congress has provided in the section referred to that "every postmaster and his sureties shall be responsible under their bond for the safekeeping of the public property of the post-office, *and the due performance of the duties* thereof, until the expiration of the commission, or until a successor has been duly appointed and qualified and has taken possession of the office." The word "or" should, in my opinion, be read "and." This is made clear by the following words: "Except that in cases where there is a delay of sixty days in supplying a vacancy, the sureties may terminate their responsibility by giving notice in writing," etc.

This language applies as well to a vacancy caused by expiration of commission as by removal, suspension, resignation, or death.

This section makes it the duty of the appointing power to act promptly by requiring the vacancy to be filled "without delay." It at the same time impliedly recognizes that conditions may exist preventing immediate action. A reasonable time must elapse in any event, and even if the appointing power failed in any case to act, the public interests are protected by making the parties responsible for the due performance of the duties of the office, while at the same time the rights of the sureties are protected against unreasonable delay by the provision that after sixty days they may terminate that liability by notice.

The case is therefore to be distinguished from the case of the *United States* v. *Kirkpatrick* (9 Wheat., 720), where it was held that a bond given for the faithful discharge of the duties of his office by a collector of direct taxes and internal duties appointed (under the act of July 22, 1813, chapter 16) by the President on the 11th of November, 1813, to hold his office until the end of the next session of the Senate, and no longer, expired at the expiration of such Senate, and the sureties were no longer liable. In that case there was no statute continuing the liability, as in this instance. This distinction has been recognized in former opinions of this Department.

Mr. Devens says (15 Opin., 214):

"Whether there is any common-law rule by which a public officer appointed for a special term may hold office beyond that term upon a failure of the proper authority to appoint

or elect his successor has sometimes been deemed a disputed question. The circumstance, however, that Congress has expressly provided that certain officers whose appointments are for a definite term shall hold until their successors are appointed and qualified affords the strongest ground for construing the United States law as one under which no officer continues to hold his office after the expiration of the term for which he was appointed, unless in the case of those officers for whom provision is expressly made."

Mr. Brewster says (17 Opin., 649):

"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."

There are many authorities sustaining this view: *Butler* v. *State* (20 Ind., 169); *McCormick* v. *Moss* (41 Ill., 352); *Kent* v. *Mercer* (12 Up. Can. (C. P.), 30); *State* v. *Minnesota* (20 Mo., 303); *Dunphy* v. *Whipple* (25 Mich., 10); *Placer Co.* v. *Dickerson* (45 Cal., 12); *Wheeling* v. *Black* (25 W. Va., 266), etc.

The test is to be found in the question whether the law-making power has placed any duties upon the officer extending beyond the date of his commission. If so, and he has, as in this case, given bond for the faithful discharge of all duties, his sureties are liable, as such law enters into their contract as fully as if written at length therein.

The case may be stated in this way: Mr. Hill was under no obligation to surrender the office and turn over the property until the expiration of his commission. These acts followed necessarily the expiration of his term of office. How long time can be taken in these necessary acts? The act in question has allowed sixty days in the absence of action by the President or yourself.

I am therefore of the opinion that section 3836 applies to the case stated.

It may be said that this construction enables the President

to fill this and similar offices continuously without the advice and consent of the Senate. I think not. It is not to be presumed that the duty enjoined upon the President of filling such a vacancy without delay will be neglected longer than is necessary to enable him to make the proper selection, or that he will seek to assume power which belongs to him generally in conjunction with the Senate. Such presumptions as has been before said (19 Opin., 264), are "incompatible, with the character of the high office with which the votes of an intelligent people have intrusted the President." The Constitution provides for the expiration of the commission; it in no way affects the office or provides that its duties shall cease. Mr. Hill's term was limited, but Congress has provided for the continuance of the business of the office by providing that the incumbent and his sureties shall continue to manage it and discharge its functions until the vacancy is filled or you send agents to take charge thereof.

I therefore answer both your questions in the affirmative.

Very respectfully,

CHARLES H. ALDRICH,
Solicitor-General.

The POSTMASTER-GENERAL.

Approved:

W. H. H. MILLER.

WORLD'S COLUMBIAN COMMISSION—INDIAN TERRITORY.

The President is authorized to appoint commissioners of the World's Columbian Exposition only from such Territories as are organized and have a political status under the acts of Congress. Indian Territory is not such a Territory.

DEPARTMENT OF JUSTICE,
August 24, 1892.

SIR: By his letter of August 15 the Acting Secretary of State asks whether under the act of Congress approved April 25, 1890, entitled "An act to provide for celebrating the four hundredth anniversary of the discovery of America," etc., it is the duty of the State Department to take any action looking to the representation of the Indian Territory in the World's Columbian Commission.

Section 2 of that act provides—

"That a commission to consist of two commissioners from each State and Territory of the United States and from the District of Columbia and eight commissioners at large is hereby constituted to be designated as the World's Columbian Commission."

Section 3 provides—

"That said commissioners, two from each State and Territory, shall be appointed within thirty days from the passage of this act by the President of the United States on the nomination of the governors of the States and Territories, respectively, and by the President eight commissioners at large and two from the District of Columbia. * * *"

The same section provides for the appointment in the same manner of alternate commissioners, and then says: "And in such nominations and appointments each of the two leading political parties shall be equally represented."

Section 4 requires the Secretary of State, immediately after the passage of this act, to notify the governors of the several States and Territories respectively thereof and request such nominations to be made.

The point to be determined, therefore, is whether this act requires commissioners to be appointed from the Indian Territory. From the other Territories commissioners are to be appointed only upon nominations by the Governor. From the District of Columbia they are to be appointed by the President without nomination. In all of the States, Territories, and the District of Columbia, they are required to be made from the opposite political parties. Within the meaning of this law, there is no governor, nor are there political parties, in the Indian Territory. As a political organization, the Territory has no existence. It is simply a tract of country occupied by various tribes of Indians, under tribal governments and regulations variant in different parts of the Territory. If it had been the purpose of Congress to authorize the appointment of commissioners to represent the people occupying this district of country, provisions would doubtless have been made for their appointment by the President direct, as in the case of the District of Columbia, or upon the nomination of some tribal authority or authorities. In the

absence of such provision, it is my opinion that the President is authorized to appoint commissioners only from such Territories as are organized and have a political status under the acts of Congress, and that no action is therefore required of the Secretary of State in the premises.

This conclusion is confirmed by the opinion of December 19, 1890, holding that, under the same act, Alaska was entitled to be represented by two commissioners in the World's Columbian Commission. (19 Opin., 700.)

Respectfully,

W. H. H. MILLER.

The SECRETARY OF STATE.

EIGHT-HOUR LAW.

The act of August 1, 1892, chapter 352, providing that laborers employed on public works of the United States shall be limited in service to eight hours a day, does not apply to the case of a contract for furnishing materials such as post-office lock boxes.

DEPARTMENT OF JUSTICE,
August 24, 1892.

SIR: I have the honor to acknowledge the receipt of your note of yesterday, in which you state that "* * * this Department received and opened proposals on the 11th instant for the supplying of post-office lock boxes, lock drawers, locks, pulls, plates, etc., for various public buildings throughout the United States, to be delivered by the contractors at the freight depot at the point of destination, and placed in position in the building by the Government, and that before any action can be taken in regard to the acceptance of a proposal, a necessity exists for a formal opinion as to whether or not a contract for the supply of the above-named articles would be embraced within the provisions of the so-called eight-hour law (approved August 1, 1892), under the designation of 'public works,' and therefore I have to request you to submit your formal opinion upon said question."

The language of the act of August 1, to which you make reference, so far as pertinent, is as follows:

"That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the

Government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day." * * *

From your statement of facts, it does not appear that the persons who furnish the lock boxes, lock drawers, etc., are to do any work upon the public buildings. So far as appears, they simply contract to deliver to the Government, at the freight depot at the various points of destination, the goods in question. In other words, their contract is a contract for the furnishing of materials to be used in public buildings, and not for the service and employment of laborers or mechanics to be employed upon such buildings. To hold that in purchasing materials to be used in the erection and fitting up of public buildings the requirement that such materials shall only have been manufactured by persons working eight hours a day would render this law impossible of execution. If the law is applicable to the goods you name, it is not seen why it would not be equally applicable to a purchase of spikes, nails, lumber, brick, etc., entering into the construction of Government buildings.

Your question is, therefore, answered in the negative.

Respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

NOTARY.

A notary's authority to administer an oath does not exist by virtue of his office, but is derived from positive enactment. A notary of Austria-Hungary, not authorized by the laws of his country to administer oaths or take affidavits, lacks the requisite authority to administer the oath prescribed by section 4892 of the Revised Statutes.

DEPARTMENT OF JUSTICE,
August 25, 1892.

SIR: Your communication of the 13th instant, relating to the taking of the oaths prescribed by section 4892 of the Revised Statutes before notaries of foreign countries, who are not authorized by the laws of those countries to administer oaths, with accompanying documents, came to hand duly.

Said section reads:

"The applicant shall make oath that he does verily believe himself to be the original and first inventor or discoverer of the art, machine, manufacture, composition, or improvement for which he solicits a patent; that he does not know and does not believe that the same was ever before known or used; and shall state of what country he is a citizen. Such oath may be made before any person within the United States authorized by law to administer oaths, or when the applicant resides in a foreign county, before any minister, chargé d'affaires, consul, or commercial agent, holding commission under the Government of the United States, or before any notary public of the foreign country in which the applicant may be."

It is shown by the letter of the Commissioner of Patents, and otherwise, that some countries have omitted to give their notaries any statutory authority to administer oaths or to take affidavits. This is the case in Austria-Hungary, and only cases arising there will be considered in this opinion.

The question submitted to me for an opinion is, in substance, whether an oath made by an applicant for a patent, and sworn to before a notary of Austria-Hungary, who has no authority by the law of his domicile to administer an oath or take an affidavit, is to be regarded as a valid and lawful oath under said statute in the procedure of the Patent Office.

It is understood that in many foreign countries, and in all of the States of the United States, notaries are authorized by the local statutes to perform the acts of administering oaths and taking affidavits. It is scarcely to be supposed that in a minor matter of this kind Congress makes inquiry as to the exact status of notaries among all the nations.

It may be fairly inferred that Congress intended by the words "any notary public" to include those, and only those, authorized by their local laws to administer oaths.

Our statute requires that the "applicant shall make oath," and permits that "such oath may be made before any person within the United States authorized by law to administer oaths," as well as before the specified United States officers. It can hardly be implied that it was intended that, outside of this country, persons not authorized to administer oaths were to be called upon to act for this Government in admin-

istering oaths. Our Government neither appoints the foreign notary its officer, nor authorizes him to act; it merely permits the non-resident applicant, for his own convenience, to make oath before a designated local officer, supposed to possess authority to take the affidavit. If a notary public, from the nature of his office, the practice under the law merchant, or the rules of international law, could rightfully be regarded as possessing the right to administer an oath of this character, that would, doubtless, be sufficient to connect the statute with any act that the notary might perform under it; but an assumption that he has this power by virtue of his office is not sustained by the authorities.

Although a notary, or a notary public, is an officer known to the law of nations, and of great antiquity, he is not, according to ancient custom or general usage, authorized to take affidavits, or administer oaths:

"The power to administer oaths is not one of the incidents of the office of notary public, under the general law merchant, nor was it, under the Roman law, from which it was derived. When that power is annexed to the office it is so by virtue of positive enactment." (Proffatt on Notaries, 165, 178.)

Neither the taking of affidavits nor the administering of oaths is done by a notary under the law merchant:

"Authority is given in most of the States to notaries to administer oaths and to take affidavits; but this authority is one derived from statute law and did not belong to the officer originally." (16 A. and E. Ency. of Law, 768.)

The act of administering a solemn oath "calling on God to witness the truth of what is said" by the person sworn, seems of necessity to require the individual officiating to be clothed by law with an especial authority.

For a private person to assume to administer an oath with its adjuration would be presumptuous in the highest degree, to say the least.

Said Lord Coke:

"An oath is an affirmance or denial * * * before one or more that have authority to give the same, calling Almighty God to witness that his testimony is true."

An affidavit is defined to be "an oath or affirmation reduced to writing, sworn or affirmed before some officer who has authority to administer it." (19 Texas, 155.)

It is stated (Wharton's Law Lexicon, 573) that: "The administering of unlawful oaths is an offense against the Government and punishable by penal servitude."

An extrajudicial oath is defined to be: "An oath taken without the direction or authority of law."

It is added that: "An extrajudicial oath, when false, does not expose the person to punishment for perjury." (And. Dic., 720.)

It is true that Lord Eldon states (6 Vesey, 824) that "a notary public by the law of nations has credit everywhere," but it may be fairly contended that this credit must be limited to acts which pertain to the nature of the office, or to such as he is authorized by the laws of his country to perform.

In *Haggett* v. *Iniff* (31 English L. and E., 202) the court refused to receive affidavits taken before a notary public of the State of New York until it was shown that, "according to the law of the United States, a notary public was duly qualified to administer oaths and take affidavits in any law proceedings in that country."

It is also true that the Commissioner of Patents, in a decision dated January 5, 1884, in answer to a suggestion that a "notary in Germany is not authorized to administer an oath—that he acts merely as a conveyancer"—says that "such designated officials in administering the oath act by virtue of the authority conferred by the statute of the United States and not by virtue of any power or authority conferred by the foreign government."

The only question shown to be before the Commissioner was whether an affidavit taken before a judge of the royal Prussian court at Buckan was sufficient to comply with section 4892. No notarial oath or affidavit is referred to as being before the Commissioner. The matter of notarial action and authority was argumentative merely; it was not before the Commissioner for decision and therefore could not have been decided by him. It is not necessary for me to hold that he intended to determine it.

It is clear that the applications to which you refer, and which are illustrated by the communications of Consul-General Goldschmidt and Mr. Jentzsch, viz, those that are

signed, or signed and sworn to, in blank, and afterwards filled in, and those which bear merely a certificate of the signing, but no applicant's oath or affidavit, furnish no sufficient ground for official action in the Patent Office.

The practices referred to relate to administrative matters within the purview of your Department, and are such as may well be called to the attention of Congress, but they are not such as now require an official opinion from me.

In conclusion, it is my opinion that a notary of Austria-Hungary, who is not authorized by the laws of his country to administer oaths or take affidavits, lacks the requisite authority to administer the oath required by section 4892 of the Revised Statutes.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

EIGHT-HOUR LAW—ATTORNEY-GENERAL.

The act of August 1, 1892, chapter 352, is of general application, and the limitation as to public works in said act applies only to such persons as are in the employ of contractors and subcontractors. Whether or not specified persons are such laborers is a question of fact not for the Attorney-General to determine.

DEPARTMENT OF JUSTICE,
August 27, 1892.

SIR: I have the honor to acknowledge the receipt of the note of the Acting Secretary of August 12, transmitting a copy of the act of Congress of August 1, 1892, entitled "An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia."

In this note you ask my opinion upon the questions—

First. Does this act apply *only* to such laborers and mechanics as are employed by the Quartermaster's Department upon *public works*, or does it include all other laborers and mechanics employed in the Quartermaster's Department performing the usual and ordinary service of that character in that department?

Second. Does it include teamsters, watchmen, engineers,

and firemen employed in the public service of the War Department, and all engineers, firemen, deck hands, mates, and seamen on Government vessels in the service thereof?

The act, which is short, reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States, or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the U. S. Government, or of the District of Columbia, or any such contractor or subcontractor, whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day, except in case of extraordinary emergency.

"SEC. 2. That any officer or agent of the Government of the United States, or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States, or of the District of Columbia, who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and, for each and every offense, shall, upon conviction, be punished by a fine not to exceed one thousand dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

"SEC. 3. The provisions of this act shall not be so construed as to in any manner apply to or affect contractors or subcontractors, or to limit the hours of daily service of laborers or mechanics engaged upon the public works of the United States or of the District of Columbia for which contracts have been entered into prior to the passage of this act."

The first question for decision is whether this law applies only to labor performed upon *public works*, or whether, as to laborers and mechanics employed directly by the Government or the District of Columbia, it is general and applicable to

all cases. Upon the reading of the law the question is by no means clear, and one which, without great violence to the language of the statute, might well be decided either way.

First. In the first place the title, "An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," clearly favors the more restricted meaning. While this is by no means conclusive, it is a circumstance worthy of consideration. "Where doubt exists as to the meaning of a statute the title may be looked to for aid in its construction." (*Smythe* v. *Fiske*, 23 Wall., p. 380.)

On the other hand, the punctuation of the act supports the opposite view. If the law were read with a comma after the word "subcontractor," as first used in the first section, then the phrase "upon any of the public works of the United States or of the said District of Columbia" would qualify all the preceding part of the section, and it would be clear that the law should be applied *only* to labor upon the *public works.* If, on the other hand, it be read without such comma, the opposite conclusion would seem to be correct. In the law itself, both as enrolled and printed, there is no such comma. In the reports of both the Senate and House committees recommending the passage of the bill, in stating the substance of the bill, such comma is used, thus favoring a construction apparently at variance with that indicated by the punctuation of the act itself. It is true, as matter of law, that "punctuation is no part of a statute," and "that courts in construing acts of Parliament or deeds should read them with such stops as will give effect to the whole." (*Hammock* v. *Loan and Trust Co.*, 105 U. S., p. 34.) At the same time, it is true that by using or omitting the comma after the word "subcontractor," as above, the grammatical reading of this statute is changed. Without the comma the clause "*public works*, etc.," qualifies only the part relating to contractors and subcontractors; with the comma it qualifies each of the three clauses of the series. So far, then, with the title on the one side and the punctuation on the other, the argument is perhaps fairly balanced.

But another evidence of the legislative intent, more persuasive than either title or punctuation, must be considered.

In 1868 Congress passed an act now standing as section 3738, Revised Statutes, as follows:

"Eight hours shall constitute a day's work for all laborers, workmen, and mechanics who may be employed by or on behalf of the Government of the United States."

This act, without question, was general, applying to all "laborers, workmen, and mechanics" in the direct employment of the United States. In practical administration, however, this section has been held to be merely directory and has not been enforced.

In 1888 another act was passed (Supp. Rev. Stat. 582), containing the following:

"And the Public Printer is hereby directed to rigidly enforce the provisions of the eight-hour law in the department under his charge."

Such was the state of the legislation upon this subject when the act now under consideration was before Congress. It is matter of public history that, ever since the enactment of the statute of 1868, efforts have been made to procure legislation from Congress imperatively requiring the enforcement of that act.

An examination of the debate in the House of Representatives, which was quite extensive (Cong. Rec., 6357, etc.), shows that both the supporters and opponents of the bill understood its purpose to be twofold. First, to render the act of 1868 effectual by imposing penalties for its disregard. Second, to extend that act to the District of Columbia and to contractors and subcontractors of the Government and the District; in short, that the purpose was to make a working day of eight hours for all laborers and mechanics in the employ of the United States or the District of Columbia wherever employed, and to make a like day for contractors or subcontractors upon the public works, and by proper penalties to enforce the observance of such working day. In the Senate the bill was passed without any considerable discussion. (Cong. Rec., 7638.) But the reports of the committees of both Houses of Congress (Senate, 948, and House, 1267), while not directly discussing the question here at issue, clearly evince an understanding of the scope and purpose of the act as above stated.

The statute, while in one sense restricting and in deroga-

tion of the common right of parties to contract, is nevertheless remedial, and is entitled to a fairly liberal construction.

In view, therefore, of the previous legislation upon the subject, of the alleged evils sought to be corrected, and in deference to the legislative understanding and purpose apparent in debate and reports of committees while the act was under consideration, the act itself, without violence to its language, being susceptible of either construction, I am constrained to hold that the law, as to laborers and mechanics in the direct employment of the Government and of the District of Columbia, is general; and that the limitation to *public works* applies only to such persons as are in the employ of contractors and subcontractors.

Second. As to your second question, pertaining to particular employés, I beg to suggest that its answer depends upon matters of fact not stated, and not within my cognizance. If the employés named are ordinary laborers or mechanics, working for the Government for wages under ordinary conditions, the statute would seem to apply. At the same time, it is quite apparent that, as to some of them, it might frequently happen that they would be within the emergency exception named in the statute; and as to others, as, for instance, sailors or others on shipboard, or teamsters, their employment being peculiar, they might well be held to be, as a matter of fact, neither laborers nor mechanics within the meaning of this law.

Respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

ATTORNEY-GENERAL.

Where certain contractors whose bid for the performance of certain work for the Government has been accepted, state before signing the contract that they desire to know what portion of the work the eight-hour law will affect, the Attorney-General is not authorized to give an opinion in the case.

DEPARTMENT OF JUSTICE,
August 27, 1892.

SIR: I have your letter of August 25, as follows:

"I have the honor to inclose herewith copy of letter of the 17th instant, addressed to this Department by Messrs. A. S.

Reed & Bro., of Wilmington, Del., in regard to the execution by them of a contract for supplying certain 'stone and brickwork, roof-covering, approaches, etc., from the line XX as shown on the drawings, the brick and terra cotta or hard tile floor and ceiling arches, with concrete filling and wood strips, concrete and cement floors of window areas, down pipes and basement drains, etc., for the superstructure of the U. S. court-house, post-office, etc., building at Wilmington, Del.,' and stating that before they can enter into a contract for said work they would like to know what portion of the work the eight-hour law will affect; whether it embraces those persons engaged in quarrying the stone, sawing the timber, making the brick, or whether it only affects the work immediately in and around the building.

"I also inclose herewith for your information copy of letter of the 16th instant, addressed to Messrs. A. S. Reed & Bro., by the Supervising Architect of this Department, accepting their proposal for said work.

"As it is desirable that a contract for said work be entered into, and the commencement of the prosecution of the work begun at the earliest practicable date, I have to request your formal opinion as to the provisions of the so-called eight-hour law, approved August 1, 1892, in relation to the questions herein presented."

Section 356 of the Revised Statutes reads as follows:

"The head of any Executive Department may require the opinion of the Attorney-General on any questions of law arising in the administration of his Department."

In other words, the function of the Attorney-General is to advise the several heads of the other Executive Departments upon the questions of law which, in the administration of their respective Departments, they are required to decide. Such is not the case. I know of no law which requires the Secretary of the Treasury to become the legal adviser of a party proposing to enter into a contract with the Government. The request here is made for the benefit of the proposed contractors to enable them to decide questions of interest in their business, and not to enable the Secretary of the Treasury to discharge a public duty. Repeatedly, as often as this question has been presented to my predecessors, it

has been decided that the Attorney-General is not authorized to give an opinion in such a case, and I am constrained to follow these precedents, in which my judgment concurs.

Respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

It is not permissible for the Attorney-General to give an opinion except in a case actually arising in the administration of one of the Departments.

DEPARTMENT OF JUSTICE,
August 29, 1892.

SIR: I have your letter of August 27, as follows:

"I have the honor to submit the question whether the act approved August 1, 1892, known as 'the eight-hour law,' applies to the construction of levees on the Mississippi River.

"I do this at the request of the Hon. T. C. Catchings, and hand you herewith his views in reference to the subject, to wit:

"His letter to the Secretary of War, dated August 17, also his letter to the Secretary dated August 24, and also his letter to the Acting Secretary, dated August 26. I also hand you herewith the views of the Acting Judge-Advocate-General, dated August 22, and my communication to the Hon. Mr. Catchings, dated August 24. Will you kindly return these papers with your opinion upon the question presented.

"Allow me to suggest that specifications have already been prepared with the view to advertising for bids, and it is important that there should be no delay in the prosecution of the work."

Section 356 of the Revised Statutes reads as follows:

"The head of any Executive Department may require an opinion of the Attorney-General on any questions of law arising in the administration of his Department."

Over and over again it has been held by my predecessors, as well as by myself, that under this statute it is not permissible for the Attorney-General to give an opinion, except upon a case actually arising in the administration of one of

the Departments. (See 19 Opin., 7, 331, 414, 670, 695.) No such case appears to be pending in the War Department at this time touching the subject-matter of the construction of levees on the Mississippi River. Indeed, in your letter to the Hon. T. C. Catchings, under date August 26, in response to his request that the question whether such levees are public works within the meaning of the act of August 1, instant, be submitted to me for opinion, you say:

"It is very doubtful whether the Attorney-General would feel justified in giving an opinion upon so general a question. The rule of that Department, as is understood here, is that no opinion is given, and none should be required, until there is a specific case pending in some Department upon which the opinion of the Attorney-General is desired. The specific case does not seem to have arisen; in other words, it probably would not be considered as now pending in this Department."

It is thus evident that the request for this opinion does not rest upon an actual case requiring a decision or action by the Secretary of War. As shown in the opinions above referred to, and the citations therein made, it is neither my duty, nor have I a right, to give an official opinion with a view to the guidance of persons who may propose to enter into contract relations with the United States.

Under the circumstances, therefore, conforming to an unbroken line of precedents, I am constrained to decline to give an opinion upon the question propounded.

I return herewith the inclosures mentioned in your letter, as requested.

Respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

QUARANTINE REGULATIONS—REPEALING STATUTE.

The Surgeon-General of the Marine-Hospital Service and the Secretary of the Treasury may, with the approval of the President, make needful rules and regulations, not inconsistent with the State laws and regulations, for the quarantining of ships coming into our harbors, with a view to the protection of the lives and health of our people.

Where a repealing act expires of its own limitation, the act repealed is revived.

DEPARTMENT OF JUSTICE,
September 1, 1892.

SIR: Answering your question as to the extent of the powers of the Executive in the matter of quarantine regulations, I beg to say:

On the 29th of April, 1878, an act of Congress was approved (20 Stat., 37), giving to the Executive certain powers upon this subject.

On the 2d of June, 1879, another act of Congress was approved (21 Stat., 5), providing for the repeal of many of the most important provisions of the act of 1878; but the later act was limited in its duration to the period of four years; that is, the act of June 2, 1879, expired by limitation on the 2d of June, 1883.

It is a well-settled principle of the common law that the repeal of a repealing act operates to revive the act repealed, just as the repeal of an act changing the common law restores the rule of the common law prevailing before such act was passed. As to the repeal of a repealing act, this rule has been changed by section 12, of the Revised Statutes of the United States, which reads as follows:

"Whenever an act is repealed, which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided."

The act of 1879, however, was not repealed, but expired by limitation, and section 12 of the Revised Statutes, therefore, has no application to this case. In *Collins* v. *Smith* (6 Whart., 294) it was decided, Chief Justice Gibson delivering the opinion, that where a repealing act expires by its own limitation, the act repealed is revived. Accordingly, it was held by the late Mr. Secretary Folger, an eminent jurist, that this particular act of 1878 was revived on June 2, 1883. The same view was taken by my immediate predecessor, Attorney-General Garland, and was acted upon no doubt under his advice by President Cleveland and Secretary Manning in quarantining against smallpox in Canada in 1885. In this view I concur.

By the law of 1878 it is provided, among other things—

First. "That no vessel coming from any foreign port or country where any contagious or infectious disease exists, or

conveying any person or persons, merchandise or animals, affected with any contagious disease, shall come into the United States, except in the manner and subject to the regulations in that act authorized."

Second. "The Surgeon-General of the Marine-Hospital Service shall, under the direction of the Secretary of the Treasury, be charged with the execution of the provisions of this act, and shall frame all needful rules and regulations for that purpose. These rules and regulations shall be subject to the approval of the President, but such rules and regulations shall not conflict with or impair any sanitary or quarantine laws or regulations of any State or municipal authorities now existing, or which may hereafter be enacted."

The policy of Congress has apparently been to mainly leave this branch of the public service with the States, and most of the seaboard States have statutes more or less elaborate on the subject.

The State statutes and regulations, however, may be supplemented by the National Executive. My conclusion, therefore, is that the Surgeon-General of the Marine-Hospital Service and the Secretary of the Treasury, with your approval, have authority to make such needful rules and regulations, not inconsistent with the State laws and regulations, for the quarantining of ships coming into our harbors, with a view to the protection of the health and lives of our people.

Very respectfully,

W. H. H. MILLER.

The PRESIDENT.

QUARANTINE REGULATIONS—POWER OF STATE—FEDERAL POWER.

The only limitation on the powers conferred upon the Surgeon-General of the Marine-Hospital Service and the Secretary of the Treasury, subject to the approval of the President, to make quarantine regulations with reference to immigration from infected ports is that Federal regulations must not interfere with State laws. It is competent for those officials to prescribe a longer quarantine period, both for persons and cargo, than the State law requires, the regulations carefully providing that the Federal jurisdiction should attach upon the expiration of State action.

DEPARTMENT OF JUSTICE,
September 10, 1892.

SIR: By your telegram of yesterday you ask for an opinion as to the extent of the powers conferred upon the Surgeon-General of the Marine-Hospital Service and the Secretary of the Treasury with your approval to make quarantine regulations with reference to immigration and infected ports.

In answer, I have to say that every government is under obligation to take all necessary measures to preserve the life and property of its citizens not only from foreign invasion, but to adopt such sanitary measures as are calculated to protect the people from those pestilences which have been found nearly if not quite as destructive as war.

This is but another application of the maxim that self-preservation is the first law of nature, and, it may be added, of nations.

The right of the State to enact sanitary measures to protect its citizens is conceded. The right of the United States to do the same must be admitted. The maxim *salus populi suprema lex* is as applicable to the one government as to the other.

The powers granted Congress in Article I, section 8, of the Constitution "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or any Department or officer thereof," afford ample warrant for legislation by Congress upon this subject.

This subject is but one of a large number related to and affecting in different degrees the subject of commerce upon which the States in the exercise of the police power are free to act and have acted from the foundation of the Government. Pilotage, wharfage, quarantine, and inspection laws are perhaps the most frequent examples of this class of legislation.

There are other instances of concurrent legislation not at all related to commerce. For example:

The State, in the exercise of its police powers for the regulation of the liquor traffic, requires the payment by a manu-

facturer or dealer in intoxicants of a license. Without at all interfering with that State requirement, it is entirely competent and the common practice for the Federal Government to require the payment of an additional license. So the Federal Government forbids, under a severe penalty, the circulating of counterfeit coins, notes, and securities. Without at all conflicting with the Federal statutes, the State may and does impose penalties for the same acts. So, coming more closely to the subject-matter, it is held competent for the State authorities to impose a tax upon ships for the purpose of paying the expenses of administering her inspection or quarantine laws; and at the same time the General Government may and does impose a tax—head tax on immigrants—for a like purpose; and this is not understood to involve any necessary conflict of jurisdiction. (*Morgan* v. *Louisiana*, 118 U. S., 455.)

These are subjects largely local in their character, and hence doubtless it has been supposed that they could be more effectually and satisfactorily managed through local law.

It can not be doubted, however, that with reference to those subjects confided to the nation that "Congress has the power to go beyond the general regulations which it is accustomed to establish and to descend to the most minute directions if it shall be deemed advisable; and that to whatever extent ground shall be covered by those directions the exercise of State power is excluded. Congress may establish police regulations, as well as the States, confining their operation to the subjects over which it is given control by the Constitution." (Cooley's Constitutional Limitations, pp. 722, 723.) To the extent that Congress does act upon the subjects within the Constitution its authority is paramount. In some of the cases it is said to be exclusive. The distinction established by the authorities is that it is only exclusive where the intention of Congress is shown that it shall be so or when it is necessary to be so to carry out the national will or preserve the functions and powers of the National Government. In all other cases there may exist and be enforced at the same time and upon the same subjects both State and national laws. In so far as there is any conflict the latter prevail.

Quarantine laws are authorized as a part of the powers

derived under the commerce clause of the Constitution, which is held to consist in intercourse and traffic, and includes navigation, transportation, and transit of persons and property, as well as the purchase, sale, and exchange of commodities. (*Morgan* v. *Louisiana*, 118 U. S., 455; *Mobile County* v. *Kimball*, 102 U. S., 69; *The Passenger Cases*, 7 How.; *Gibbons* v. *Ogden*, 9 Wheat., 1.)

The undoubted right of both the Senate and National Government to legislate upon this subject being established, as well as the supremacy of the Federal authority in case of conflict, it remains to examine the existing legislation upon the subject.

From an early period (1799), Revised Statutes 4792 *et seq.*, Congress has adopted the State laws upon the subject of quarantine.

Section 4792 is as follows:

"The quarantine and other restraints established by the health laws of any State, respecting any vessels arriving in or bound to any port or district thereof, shall be duly observed by the officers of the customs revenue of the United States, by the masters and crews of the several revenue cutters, and by the military officers commanding in any fort or station upon the seacoast; and all such officers of the United States shall faithfully aid in the execution of such quarantines and health laws, according to their respective powers and within their respective precincts, and as they shall be directed, from time to time, by the Secretary of the Treasury. But nothing in this title shall enable any State to collect a duty of tonnage or impost without the consent of Congress."

Section 4793 provides for the discharge of the cargo of a vessel in quarantine "whenever by the health laws of any State or by regulations made pursuant thereto any vessel arriving within a collection district of such State is prohibited from coming to the port of entry or delivery by law established for such district, and such health laws require or permit the cargo to be unladen at some other place within or near to such district," etc.

Section 4794 provides for the purchase or erection of quarantine warehouses.

Section 4795 provides for the deposit of goods in such warehouses.

Sec. 4796 is as follows:

"The Secretary of the Treasury is authorized, whenever a conformity to such quarantines and health laws requires it, and in respect to vessels subject thereto, to prolong the terms limited for the entry of the same, and the report or entry of their cargoes, and to vary or dispense with any other regulations applicable to such reports or entries. No part of the cargo of any vessel shall, however, in any case be taken out or unladen therefrom, otherwise than is allowed by law, or according to the regulations hereinafter established."

This law was supplemented by the act of April 29, 1878 (20 Stat., 37), which is yet in force. I quote entire act.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no vessel or vehicle coming from any foreign port or country where any contagious or infectious disease may exist, and no vessel or vehicle conveying any person or persons, merchandise or animals, affected with any infectious or contagious disease, shall enter any port of the United States or pass the boundary line between the United States and any foreign country, contrary to the quarantine laws of any one of said United States, into or through the jurisdiction of which said vessel or vehicle may pass, or to which it is destined, or except in the manner and subject to the regulations to be prescribed as hereinafter provided.

"SEC. 2. That whenever any infectious or contagious disease shall appear in any foreign port or country, and whenever any vessel shall leave any infected foreign port, or, having on board goods or passengers coming from any place or district infected with cholera or yellow fever, shall leave any foreign port, bound for any port in the United States, the consular officer, or other representative of the United States at or nearest such foreign port shall immediately give information thereof to the Supervising Surgeon-General of the Marine-Hospital Service, and shall report to him the name, the date of departure, and the port of destination of such vessel; and shall also make the same report to the health officer of the port of destination in the United States; and the consular

officers of the United States shall make weekly reports to him of the sanitary condition of the ports at which they are respectively stationed; and the said Surgeon-General of the Marine-Hospital Service shall, under the direction of the Secretary of the Treasury, be charged with the execution of the provisions of this act, and shall frame all needful rules and regulations for that purpose, which rules and regulations shall be subject to the approval of the President, but such rules and regulations shall not conflict with or impair any sanitary or quarantine laws or regulations of any State or municipal authorities now existing or which may hereafter be enacted.

"SEC. 3. That it shall be the duty of the medical officers of the Marine Hospital Service and of customs officers to aid in the enforcement of the national quarantine rules and regulations established under the preceding section; but no additional compensation shall be allowed said officers by reason of such services as they may be required to perform under this act, except actual and necessary traveling expenses.

"SEC. 4. That the Surgeon-General of the Marine-Hospital Service shall, upon receipt of information of the departure of any vessel, goods, or passengers from infected places to any port in the United States, immediately notify the proper State or municipal and United States officer or officers at the threatened port of destination of the vessel, and shall prepare and transmit to the medical officers of the Marine-Hospital Service, to collectors of customs and to the State and municipal health authorities in the United States, weekly abstracts of the consular sanitary reports and other pertinent information received by him.

"SEC. 5. That wherever, at any port of the United States, any State or municipal quarantine system may now, or may hereafter exist, the officers or agents of such system shall, upon the application of the respective State or municipal authorities, be authorized and empowered to act as officers or agents of the national quarantine system, and shall be clothed with all the powers of United States officers for quarantine purposes, but shall receive no pay or emoluments from the United States. At all other ports where, in the opinion of the Secretary of the Treasury, it shall be deemed necessary to establish quarantine, the medical officers or other

agents of the Marine-Hospital Service shall perform such duties in the enforcement of the quarantine rules and regulations as may be assigned them by the Surgeon-General of the service under this act: *Provided*, That there shall be no interference in any manner with any quarantine laws or regulations as they now exist or may hereafter be adopted under State laws.

"SEC. 6. That all acts or parts of acts inconsistent with this act be, and the same are hereby, repealed.

"Approved, April 29, 1878."

In my opinion there is nothing in the act of 1879 inconsistent with this act, except that different persons are charged with its enforcement, and therefore both, with the modification noted, are in force and constitute, with such regulations as are or may be prescribed thereunder, the national law upon that subject.

The intent to aid in the enforcement of the State laws upon the subject is manifest, or in the language of the act "there shall be no interference in any manner with any quarantine laws or regulations as they now exist or may hereafter be adopted under State laws." Both shall work to the same end, the keeping away from our homes and people contagion and pestilence; and, in the same spirit, the State officers may become clothed with the national power and "authorized and empowered to act as officers and agents of the national quarantine system," etc.

While this is true, does it follow that nothing can be done except what is authorized by the State law? I think not. The only limitation is that the Federal regulations must not interfere with the State laws. For instance, the quarantine laws for the harbors and port of New York, as established by the State, do not prescribe any quarantine period. That is left to the health officer. Suppose the period named by him is deemed too short. It is in my opinion clearly competent under the acts of Congress above quoted to prescribe a longer period, both for persons and cargo, the regulations carefully providing that the Federal jurisdiction should attach upon the expiration of State action.

The contrary of this proposition is not to be supposed.

A State might be without the machinery to enforce a safe quarantine; its officer might through mistaken opinions or

corrupt motives fail in his duty. It is not to be tolerated that an entire people possessing a government endowed with the powers I have enumerated should be exposed to the scourge of contagion and pestilence through such causes.

Paraphrasing the language of the court *in re* Neagle (135 U. S., 59) it may be safely asserted that any obligation fairly and properly inferable from the Constitution or any duty of any officer to be derived from the general scope of his duties under the laws of the United States is a law of the United States, and it would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the people from contagion and pestilence brought from foreign shores. Nor can Congress be said to have failed to exercise its right to so provide for the protection of our people. In establishing "the national quarantine system," as it is denominated in the act of 1878, and conferring upon certain officers power "to frame all needful rules and regulations for that purpose," which rules when approved by you have all the force of law, an intention is shown to vest here a wide discretion. The only limitation is that such regulations shall not conflict with or impair any sanitary or quarantine regulations of the State or municipal authorities.

In measuring the effect of this limitation it must not be forgotten that the State laws and regulations are in the nature of restrictions, and not in the nature of grants of authority to either immigrants or transportation companies. The authority of immigrants to come and of transportation companies to bring such immigrants is not derived from the State statutes or regulations. The State by its statute and regulations, in the exercise of its police powers, simply provides that immigrants shall not come in, except after compliance with such laws and regulations. The State does not provide, and has no power to provide, as against Federal laws and regulations, that upon such compliance such ships and immigrants shall come in. Hence, consistently with the State laws and regulations, it is entirely competent for Federal regulations to impose additional restrictions, and hence also the imposition of an additional period of quarantine or the total exclusion of all "vessels or vehicles coming from

any foreign port or country where any contagious disease may exist," or "vessels or vehicles conveying any person or persons, merchandise or animals, affected with any infectious or contagious disease" from "any port of the United States," is within the powers conferred upon the officers named in your inquiry acting with your approval.

Very respectfully,

CHARLES H. ALDRICH,
Solicitor-General.

The PRESIDENT.

Approved:

W. H. H. MILLER.

DISTRICT ATTORNEYS—INSOLVENT BANK—COMPENSATION.

A receiver of a failed national bank is an officer or agent of the United States within section 380, Revised Statutes. Suits and proceedings instituted by the receiver of a failed bank to enforce the payment of a debt which may be maintained in a State court as well as in a U. S. court, fall within the provisions of said section.

The compensation of the U. S. attorney appearing for such receiver is not regulated by the fee bill prescribed by statute, nor should it be paid by the Government, and not out of the funds of the trust, but the amount of fees to be allowed in any given case, to the district attorney, is a matter to be adjusted by the Comptroller in the exercise of a legal discretion under the advice of the Solicitor of the Treasury.

DEPARTMENT OF JUSTICE,
October 31, 1892.

SIR: The letter of the Acting Secretary of the Treasury of October 26, inclosing a communication from the Comptroller of the Currency in reference to the proper construction of section 380 of the Revised Statutes, has been duly received and considered. In that communication the Acting Secretary of the Treasury asks five questions as follows:

"1. Has Mr. Frank D. Allen, U. S. attorney, any claim against the failed Pacific National Bank under the circumstances herein set forth? Should his bill for $420 as rendered be allowed, or should he be paid any sum whatever out of the assets of said trust, he having rendered no service to the trust?

"2. Do 'suits and proceedings' instituted by a receiver of a failed bank to enforce the payment of a debt (which may

be maintained in a State court as well as in an U. S. court) fall within the provisions of said section 380?

"3. Is a receiver of a failed national bank an 'officer' or 'agent' of the United States within the meaning of said section?

"4. If questions 2 and 3 are answered in the affirmative and such U. S. attorneys must be employed, is not their compensation regulated by the fee bill prescribed by the U. S. statute, and should not their compensation be paid by the Government and not out of the funds of the trust?

"5. In case their compensation is not so regulated, and must be paid out of such trust funds, is not the amount of such compensation subject to the approval of the Comptroller of the Currency under the advice of the Solicitor of the Treasury?"

Answering the same in their order, I beg to say that the first does not present a question of law, but of fact (at best of mixed law and fact), upon which I can not give an opinion. (See 19 Opin., 633.)

The second and third are answered in the affirmative, and the fourth in the negative, for reasons quite fully stated in a communication of Attorney-General Garland to J. C. Gibson, esq., U. S. attorney, Norfolk, Va., under date of December 1, 1886, as follows:

"Your communication of the 11th of October, 1886, with reference to your duty in the matter of the liquidation of the Exchange National Bank, of Norfolk, Va., now in charge of a receiver appointed by the Comptroller of the Currency, was referred to the Solicitor of the Treasury for an expression of his views, to which, by letter on the 24th of November, he replied.

"It is only necessary to say that your views and his are not in entire accord. The want of harmony arises from a difference in the interpretation of section 380 of the Revised Statutes. That section was originally enacted as section 55 of the act of the 25th of February, 1863, known as 'the general banking act,' which was modified and enlarged by the act of the 3d day of June, 1864, in which latter act it appears as section 56. These acts, as a whole, constitute a general system of banking. The section under consideration must be interpreted with reference to the whole as a system. By

the system new officers, governmental agents, were provided for and new duties assumed by the Government, which the legislative power admitted to be of sufficient public interest to take charge of, in certain events, as public trusts. Among others, it was contemplated that in the discharge of the duties imposed and the administration of the trusts assumed litigation in the courts might arise. That this litigation might be under the direction of responsible *governmental* officers, the section under consideration was enacted in 1863, reenacted in 1864, and included in the general revision as section 380, and is: 'All suits and proceedings arising out of the provisions of the law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the Solicitor of the Treasury.'

"The words 'suits and proceedings' embrace all active legal steps arising out of the provisions of the acts. Such suits and proceedings are then defined and limited to those in which 'the United States or any of its officers or agents are parties.' All such are to be conducted by the district attorney. The Comptroller of the Currency is an officer of the United States; the receiver whom he may have appointed is an agent of the United States. Hence, all suits or proceedings to which they, or either of them, are parties, by virtue of their official or trust relations to a national bank, come within the intent of the law, and by its provisions should be conducted by the U. S. attorney of the proper district. This view is fully corroborated by the opinion delivered by Solicitor-General Phillips as early as July, 1874, and is sustained by the Supreme Court of the United States in the case of *Kennedy* v. *Gibson et al.* (8 Wall., 504), which declares 'the receiver is an agent of the United States, and, according to the fifty-sixth section of the act, this suit should have been conducted by their attorney.' To the same effect is the rule in the *Bank of Bethel* v. *Pahquioque Bank* (14 Wall., 400), which thus states the rule: 'Suits and proceedings under the act in which the United States, or their officers or agents, are parties, whether commenced before or after the appointment of the receiver, are to be conducted by the district attorney under the direction of the Solicitor of the Treasury.' This

section, then, properly interpreted, relieves the Comptroller or receiver of the responsibility of selecting counsel to conduct suits or legal proceedings under the provisions of the act, and devolves the duty upon the U. S. attorney, whose services can not be forestalled by a prior retainer, and who by law is required to take charge of the business, subject to such supervision and direction as may be called for in his action by the Solicitor of the Treasury, who, by the same action, is charged with the duty and responsibility incident thereto.

"The question suggested in the correspondence as to whether section 380 is directory or mandatory is immaterial, as in either event the law is a rule which should be obeyed."

To the fifth question my answer is that the amount of fees to be allowed in any given case to the district attorney is a matter to be adjusted by the Comptroller in the exercise of a legal discretion, under the advice of the Solicitor of the Treasury.

I think the decision in *Gibson* v. *Peters* (35 Federal Reporter, 721) is instructive in relation to the respective rights and duties of the district attorney and the Comptroller in the premises.

Respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

EAST RIVER BRIDGE—SECRETARY OF WAR.

By section 7 of the river and harbor act of 1892 the Secretary of War is authorized to approve or disapprove of the location or plan of a proposed bridge, the construction of which is duly authorized by an act of the legislature of the State, when the waters to be bridged are wholly within the limits of that State.

The waters of the East River comprise navigable waters of the United States lying wholly within the limits of a State.

DEPARTMENT OF JUSTICE,
November 2, 1892.

SIR: Your request for an official opinion as to your right to approve the location and plan of a bridge, authorized by the legislature of the State of New York at its last session,

to be built between the cities of New York and Brooklyn across what is called East River, has been received.

It is assumed that the State enactment is sufficient in terms to convey the right to build the bridge if the water in question is wholly within the limits of the State.

You refer to section 7 of the act of September 19, 1890 (26 Stat., 454), reenacted in 1892 (Stat., 110), and say that the practice of the Department has been to approve or disapprove of the location and plans of bridges across navigable waters wholly within the limits of a State, when the bridge is authorized by the laws of that State, and that it has declined to act upon applications as to bridges across navigable waters not wholly within the limits of a single State unless the bridge is authorized by act of Congress. The inquiry as submitted seems to require the application of said section 7 of the national act, and to involve the determination of the question, whether the channel over which the bridge is proposed to be constructed is a strait in the State of New York, and therefore wholly within the State, or whether it is a portion of Long Island Sound and therefore a portion of a body of water which is not wholly within the limits of the State of New York.

Although your inquiry involves, in one view, a question of fact, and in another, a judicial question that may be said to belong to the courts, yet, as the subject-matter is pending before you for necessary Executive action and involves a question of law, it is, perhaps, proper that an opinion should be given.

By section 7 of the river and harbor bill as enacted in 1890, and also in 1892, it is declared that "it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War: * * * *Provided*, That this section shall not * * * be so construed as to authorize the construction of any bridge, bridge draw, bridge piers and abutments, or other works under an act of the legislature of any State, over or

in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

East River is "a strait which connects the harbor of New York with Long Island Sound" (1 McCulloch's Geog. Dic., 797; Darby's Gaz., 139), and is called a river in contradistinction to the North River. (IV Ency. Americana, 380.)

It is a strait connecting New York Bay with Long Island Sound and extends from Throgg's Neck to said bay. (VI Am. Cyclo., 380; Lippincott's Gaz., 674, 1275.)

Miller v. *Mayor* (109 U. S.), declares the power of Congress to control the navigable waters of the United States so far as may be necessary to insure their free navigation, and adds (p. 396), "East River is such a navigable water. It enters the harbor of New York and connects it with Long Island Sound."

It is quite evident that, in determining your duty in the premises, Long Island Sound must be regarded as limited to the "bay" extending from Fishers Island to the head of the comparatively narrow channel which takes form west of the west boundary of Connecticut.

It does not appear from an examination of the maps, or from a view of the waters constituting this famous passageway, or from the declarations of writers of authority, that East River is a constituent part of that portion of the Atlantic Ocean which is designated Long Island Sound.

It follows that the waters of East River must be held to comprise navigable waters of the United States lying wholly within the limits of a State.

The State has local jurisdiction while the Government of the United States must see that navigation is not obstructed.

For a further discussion of related questions, I beg to refer you to the cases cited and conclusions reached in the opinion submitted to you under date of May 11, 1891, relating to the Chicago River.

It is my opinion that under section 7 of the river and harbor act of 1892 you are authorized to approve or disapprove of the location or plan of a proposed bridge, the construction of which is duly authorized by an act of the legislature of the State, when the waters to be bridged are wholly within the limits of that State.

It is my opinion, also, that you are not prohibited from

acting on the application under consideration by the requirements of the proviso of said section.

It is understood that Congress has given no explicit consent as to the construction of this bridge.

It seems proper to note that this "river," which is made from the ocean and which returns thereto by way of navigable channels, represents in its course the pathway of a vast interstate and international commerce and involves Federal interests of great importance. It should not be assumed in the present state of the law that Congress, by the qualified permission to build a bridge, inferred from section 7, has waived its right to insure free navigation, or has become estopped from hereafter taking legislative action which it may deem necessary in the premises.

Very respectfully,

CHARLES H. ALDRICH,
Acting Attorney-General.

The SECRETARY OF WAR.

PURCHASE OF LAND.

Neither the act of August 19, 1890 (chapter 806), nor the appropriation in the sundry civil act of March 3, 1891 (chapter 542), authorizes the purchase of land adjoining specified routes leading to a part of the Chickamauga and Chattanooga Military Park.

DEPARTMENT OF JUSTICE,
November 3, 1892.

SIR: Your communication of the 19th ultimo in relation to the obtaining of title to certain lands lying adjoining specified roads leading to and constituted part of the Chickamauga and Chattanooga National Military Park, established under the act of August 19, 1890 (26 Stat., 333), has been duly considered.

The question of obtaining the title to these adjoining lands is submitted to me at the request of the park commissioners, and can only constructively be said to be a question pending in your Department.

I do not consider the matter involved one that calls for a formal official opinion, but will make an informal answer to the inquiry submitted.

The highways which are constituted a portion of the park by section 1 of the act are designated as they then existed, and it is not shown that Congress contemplated their extension.

Section 11, which makes the appropriation to carry the act into effect, is not broad enough to authorize the purchase of lands lying outside of the bounds of the park as established by the act, and those boundaries do not extend beyond the limits of the highways in question as they then existed.

The declaring of an existing road to be an approach to and a part of the park can not be construed into authority to purchase more land to extend the road, although its use may demand an extension.

I find no authority granted by the act referred to, or in the appropriation set forth in the sundry civil act (26 Stat., 978), which authorizes the purchase of the lands in question.

In my opinion, the power to reach the result desired rests with Congress.

Very respectfully,

CHARLES H. ALDRICH,
Acting Attorney-General.

The SECRETARY OF WAR.

COMMISSIONER OF SOLDIERS' HOME.

A person duly designated to take charge of the office of Judge-Advocate-General and to perform its duties pending the suspension from duty of the Judge-Advocate-General, is qualified to act as a commissioner of the Soldiers' Home in the District of Columbia.

DEPARTMENT OF JUSTICE,
November 10, 1892.

SIR: By your letter of November 8 you ask whether, under his assignment as Acting Judge-Advocate-General of the Army, Col. Guido N. Lieber is qualified to act as one of the Board of Commissioners of the Soldiers' Home in the District of Columbia, as provided by section 10 of the act of March 3, 1883 (22 Stat., 565). That section reads as follows:

"That the Board of Commissioners of the Soldiers' Home shall hereafter consist of the General-in-Chief commanding the Army, the Surgeon-General, the Commissary-General,

the Adjutant-General, the Quartermaster-General, the Judge-Advocate-General, and the Governor of the Home, and the General-in-Chief shall be president of the board, and any four of them shall constitute a quorum for the transaction of business."

The order assigning Col. Lieber to duty as Acting Judge-Advocate-General was made in pursuance of section 179 of the Revised Statutes of the United States, and is in the following words:

"WAR DEPARTMENT,
"*Washington City, July* 25, 1884.

"During the suspension from duty of the Judge-Advocate-General U. S. Army, Col. Guido N. Lieber, Assistant Judge-Advocate-General, will, by direction of the President, take charge of the office of the Judge-Advocate-General and perform his duties.

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

In my opinion this Executive order devolved upon Col. Lieber all of the duties appertaining to the office of Judge-Advocate-General of the Army, including the authority and the duty to act as one of the board of commissioners in question.

Respectfully,

W. H. H. MILLER.

Gen. JOHN M. SCHOFIELD,
Acting Secretary of War.

SAMOAN ISLANDS—APPROPRIATION.

It is competent for the President to use such part of the appropriation of $500,000, made in the act of February 26, 1889, chapter 278, as he may deem necessary for the protection of the interests of the United States in making contracts for the control, whether by lease or purchase, of land in Pago-Pago Harbor.

DEPARTMENT OF JUSTICE,
November 12, 1892.

SIR: I have the honor to acknowledge the receipt of your letter of yesterday, as follows:

"The diplomatic and consular appropriation act approved February 26, 1889 (25 Stat., 699), appropriated 'for the

execution of the obligations and the protection of the interests of the United States, existing under the treaty between the United States and the Government of the Samoan Islands, five hundred thousand dollars, or so much thereof as may be necessary, to be expended under the direction of the President, this appropriation to be immediately available.'

"The naval appropriation act, approved March 2, 1889 (25 Stat., 814), also appropriated 'For the purpose of permanently establishing a station for coal and other supplies for the naval and commercial marine of the United States, on the shores of the bay of the harbor of *Pago-Pago* in the island of Tutuilla, Samoa, and for the erection of the necessary buildings and structures thereon, and for such other purposes as may, in the judgment of the President, be necessary to confirm the rights of the United States under article 2 of the treaty of eighteen hundred and seventy-eight, between the United States and the King of the Samoan Islands, and the deeds of transfer made in accordance therewith, one hundred thousand dollars, to be immediately available.'

"The treaty to which reference is made may be found in 20 Statutes, page 704, and also in the volume of treaties, page 972.

"About one-half of the $100,000 appropriation for a coaling station in *Pago-Pago* Harbor has already been used for the purchase of land from the natives and otherwise, and the balance is required for docks and necessary improvements. Of the $500,000 appropriation for the protection of our interests in Samoa only about $30,000 has been expended. The further purchase of land in *Pago-Pago* Harbor is now under consideration. This land is desired not so much for the immediate uses of a coaling station as for its general protection through the control of strategic points for its defense and the exclusion from the harbor of conflicting foreign interests.

"I have the honor to request an opinion whether or not the first appropriation above $500,000 is available in the discretion of the President for such purchase."

Article II of the treaty referred to in the act of Congress of Februry 26, 1889, so far as pertinent, reads as follows:

"Naval vessels of the United States shall have the privilege of entering and using the port of Pago-Pago, and estab-

lishing therein and on the shores thereof a station for coal and other naval supplies for their naval and commercial marine, and the Samoan Government will hereafter neither exercise nor authorize any jurisdiction within said port adverse to such rights of the United States or restrictions thereof."

The act of Congress, last above referred to, making the appropriation "for the execution of the obligations and the protection of the interests of the United States existing under the treaty between the United States and the Government of the Samoan Islands, $500,000, or so much thereof as may be necessary, to be expended under the direction of the President, this appropriation to be immediately available," should, in my opinion, receive a liberal construction.

The President is the head of one of the three great Departments of the Government, and is supposed to be endowed with a degree of wisdom and patriotism warranting the exercise by him of a broad discretion in the execution of powers committed to his hands. A grant of this character to be exercised by the President may well, therefore, receive a more liberal construction than a grant in similar language to an ordinary agent of the Government.

As I understand the facts presented by you, it seems that it is necessary that this Government should control in the Pago-Pago Harbor certain property not a part of the coaling station itself, but which is deemed essential for the protection of such coaling station and the other interests of the Government in and about the harbor. In other words, that such property, if its control is not acquired by this Government, is liable to fall into the hands of other foreign powers and be used in hostility to the interests of the United States.

Upon this state of facts, in my opinion, it is competent for the President to use such part of the appropriation of $500,000 in the making and execution of contracts for the control of such property, whether by leasing or purchase, as may, in his judgment, be necessary in the language of the act for the protection of the interests of the United States in the premises.

Respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF STATE.

ATTORNEY-GENERAL.

Where terms are used in a statute in their ordinary acceptation, and the duty of applying it to a particular matter is one of administration merely, that duty can not be devolved upon the Attorney-General.

DEPARTMENT OF JUSTICE,
November 17, 1892.

SIR: Your letter of October 17, 1892, asks an opinion as to whether various kinds of employés in the service of the Mississippi Commission are laborers or mechanics within the meaning of these terms as used in the act of August 1, 1892, entitled "An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia."

The terms "laborers and mechanics" must be presumed to have been used by Congress in their ordinary sense, and I have no doubt were, in point of fact, so used.

I am asked, therefore, to determine whether some or all of the classes of employés mentioned in your letter are or are not laborers or mechanics.

In other words, I am requested to give an opinion upon questions of fact, merely. This I can not do, for Congress has said, expressly, that the opinions of the Attorney-General must be confined to questions of *law* (sections 354, 356, Revised Statutes).

The duty of applying the statute in question to its subject-matter, in the particulars mentioned by you, is one of administration only, and can not, in my judgment, be devolved on the Attorney-General, there being no suggestion that there is any doubt as to whether Congress used the terms "laborers and mechanics" in their ordinary acceptation.

I regret, therefore, that I can not comply with your request.

As desired, the papers that accompanied your letter are returned herewith.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF WAR.

BRIDGE—SECRETARY OF WAR.

The authority conferred upon the Secretary of War by section 7 of the river and harbor act of 1890, chapter 907, is limited to the cases of bridges authorized by State law to be erected over waters, the navigable portions of which lie wholly within the limits of the State.

He is not authorized to approve or disapprove the location and plan of the bridge proposed to be erected over the Monongahela River at Bessemer, Pa.

DEPARTMENT OF JUSTICE,
November 19, 1892.

SIR: Your communication calling for an official opinion as to whether you are authorized by law to approve or disapprove the location and plan of a bridge proposed to be constructed by the Union Railroad Company across the Monongahela River opposite Bessemer, Pa., has been duly considered.

I understand, from your statement of the facts, that the State has passed an act which purports to grant permission to build the bridge, but that Congress has taken no action in the premises.

It is unquestioned that this river is used for the purposes of interstate commerce and that its present actual navigability extends into West Virginia, and that its waters are navigable waters of the United States not wholly within the limits of the State which has given its legislative assent to the construction of the bridge.

The question to which my attention is directed is whether section 7 of the river and harbor act of 1890 (26 Stat., 454) authorizes action on your part as to the location and plan of a bridge proposed to be erected over navigable waters of the United States, which waters are not wholly within the limits of the State that has assumed to authorize the construction.

By said section 7, which remains unchanged so far as applicable to the question now under consideration, Congress enacts that—

"It shall not be lawful * * * to commence the construction of any bridge * * * over or in any * * * navigable river * * * of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge * * * have been submitted

to and approved by the Secretary of War * * * : *Provided*, That this section shall not * * * be so construed as to authorize the construction of any bridge * * * under an act of the legislature of any State, over or in any stream, * * * not wholly within the limits of such State."

It is held by the courts that it is permissible to recur to declarations made by legislators while framing a bill—not to control the construction of the enactment—but "to ascertain the reason as well as the meaning of particular provisions in it" (91 U. S., 79; 141 *id.*, 474); and the purposes and intended scope of the act under consideration may be profitably studied by tracing the history and the method of the formation of section 7 of the act referred to.

It appears, historically, that while the power to protect the navigation of rivers was allowed by Congress to lie dormant, parties, road builders, and transportation companies placed their bridges over navigable streams without being subject to supervision or regulation as to the location or plan. Some bridges were authorized by States and some by Congress, others were built by the legislative assent of both Congress and the State, but many were built and used without any authority or supervision on the part of any government whatever.

From 1816 to 1890 immense amounts of the public moneys were appropriated for and applied to the improvement of rivers and harbors, and it frequently happened that while the public were expending money to increase the facilities of navigation of a river some interested party was serving his or its private interest by placing obstructive bridges or other impediments in the way.

Efforts were made from time to time to protect the waters of the country, and these finally resulted in the general legislation which appears in the river and harbor bill mentioned. Sections 4, 5, 6, 7, and 8 of that law are unmistakable assertions of the purpose of the General Government to exert its power to protect the navigable waters of the United States and to clothe the Secretary of War with the administrative function of enforcing that purpose.

During the consideration of the said river and harbor

bill in the House a section thereof, then numbered 8, was read which prohibited the erection of any structure over any navigable waterway of the United States within the limits of any State, without first obtaining an approval of the plans by the Secretary of War. This section contained a penal clause, and declared an unauthorized structure to be a nuisance. (Record, 51st Cong., 1st sess., p. 5402.) The subject of bridging streams navigable only within a State, and as to structures over those not so limited, was debated at length.

It is distinctly and repeatedly stated that the contemplated approval of the Secretary must be confined to waters lying wholly within the limits of one State, and that navigable waters extending beyond the limits of a State should not be bridged without explicit authority from Congress.

The method of procedure and the scope of the provision sought are very clearly shown in the following statement which was made by Mr. Blanchard, a member of the committee that framed the bill (p. 5403):

"Take the case of a railroad corporation going to the Secretary of War with the plans of a bridge across a river lying wholly within the limits of a State. The Secretary of War asks, "By what authority do you propose to erect this bridge? Have you got an act of Congress?" "No." "Have you got an act of the legislature?" "No." Then the Secretary will refuse to approve the plan. Now, if, on the other hand, the applicant says, "I have not got an act of Congress, but I have got an act of the legislature of this State," then the Secretary of War, giving effect to the authority of the State legislature to authorize the construction of a bridge across a waterway wholly within the limits of that State, will examine the plans of the proposed bridge, and if they are satisfactory to him and such as will conserve the interests of navigation he will approve them; otherwise not."

This section was stricken out of the bill before it passed the House, but, as we shall see, it was placed therein in a new form before the act became a law.

On December 4, 1889, Mr. Senator Dolph introduced Senate bill No. 88, entitled, "To prevent the obstruction of navigable waters," etc.; and the same was referred to the Com-

mittee on Commerce (*id.*, p. 98). It was reported from the Committee with amendments (p. 478), and was amended and passed by the Senate (p. 1319). After going to the House it was reported favorably, with amendments, from the Committee on Rivers and Harbors, and went to the House Calendar (3699). While the river and harbor act was being considered by the Senate discussion arose as to obstructing navigable waters and as to bridging navigable rivers (8602 to 8607), and amendments were submitted with a view of protecting navigation.

Mr. Senator Spooner referred to said Senate bill No. 88 as one that had been suggested by the War Department and that had twice passed the Senate, and stated that there was no reason to anticipate action upon it at the then existing session, and gave notice that he would offer this bill (No. 88) as an amendment to the river and harbor bill (8607).

Said Senator did offer the bill as an amendment (8684). This amendment consisted of seven sections. Sections 1, 2, 3, and 4 thereof are almost identical with sections 6, 7, 8, and 9, respectively, of the law as finally passed (26 Stat., 453, 454).

This amendment was, upon objection, excluded upon the ground that it involved general legislation in violation of an existing rule (8685).

After the passage of the river and harbor bill by the Senate it went to a conference committee of the two Houses, which reported in favor of striking out certain matter contained in Senate, amendments and of inserting specified sections to be numbered 6, 7, 8, etc. (9813).

The conference report was adopted by the House and concurred in by the Senate and this section 7, embodying the principle contended for in the House as shown, and, in substance, identical in phraseology with section 2 of Senate bill No. 88, became section 7 of the law of 1890 to which you call my attention.

A careful consideration of the proceedings taken and declarations made in connection with the origin and enactment of this legislation leads to the conclusion that it was the intent of Congress that your authority to act upon the location and plan of proposed bridges not expressly authorized by act of Congress should be limited to those authorized by a State

law and to be erected over waters the navigable portions of which lie wholly within the limits of the State.

An examination of the terms of said section 7 leads to a similar conclusion. No general law exists providing for or permitting bridges to be built over navigable waters which divide or extend into two or more States, nor does any general legislation confer the power of approval upon the Secretary of War as to bridges over such waters.

Frequent applications were made to Congress both before and since the passage of the act of 1890 for authority to erect such structures, and the custom has been, almost without exception, to grant the request only upon the obtaining of the approval of the location and plan by the Secretary.

The proviso of section 7 taken in connection with the antecedent phraseology, the existing practice of legislation, and the decision of the courts, is, itself, well nigh conclusive that Congress never intended to transfer or concede to the legislatures of the States, even subject to the approval of the Secretary, authority to erect bridges over streams like the one in question.

It is true that the fixing of the limit between waters wholly within a State and such as extend in fact and navigably beyond its boundaries is arbitrary in its application, but in protecting navigation the law-making power was called upon to declare a general rule applicable to all navigable waters or to establish some classification of the waters. In the exercise of its constitutional power Congress saw fit to place navigable waters lying wholly within a State in one class and those navigable in and beyond a State in another, and to grant especial facilities to the State in connection with those waters lying wholly within its borders.

If serious incongruities appear in the applications of the statute to different streams, as may prove to be the case, it will rest with Congress to provide such remedy as it shall deem proper.

Upon the general principles involved, and as to the decisions of the courts upon related questions, I beg to refer you to the opinions relating to Chicago River and to East River, submitted under dates of May 11, 1891, and November 2, 1892, respectively.

In conclusion, permit me to say, it is my opinion that you are not authorized by law to approve or disapprove the location and plan of the bridge proposed to be erected over the Monongahela River at Bessemer.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

ATTORNEY-GENERAL.

Before rendering an opinion the Attorney-General requires a succinct statement of the facts and of the question of law arising thereon as to which an opinion is desired.

DEPARTMENT OF JUSTICE,
November 25, 1892.

SIR: I have the honor to acknowledge the receipt of your letter of the 23d instant, requesting my opinion in reference to certain questions arising out of the advertisement for proposals for dredging Gowanus Bay, in the harbor of New York. With your letter you send a large bundle of papers, comprising apparently not only all the papers directly involved, but all the correspondence in reference to this subject-matter.

Your letter contains no statement of facts, nor does it refer to any particular paper or papers supposed to set forth such facts. In other words, it is apparently expected that I will glean the facts from the papers, and then for myself determine, first, whether the Government is bound by the action of the Chief of Engineers in accepting an alleged conditional bid, and, second, whether a readvertisement is authorized.

The unvarying practice of the Attorney-General, from the foundation of the Government, has been to require a succinct statement of the facts and of the question of law arising thereupon upon which an opinion is desired.

On February 16, 1874, Attorney-General Williams, addressing the Secretary of the Treasury, said:

"I deem it proper here to remind you that where an official opinion from the head of this Department is desired on questions of law arising on any case, the request should be accompanied with a statement of the material facts of the case, and also the precise questions on which advice is wanted." (14 Opin., 367.)

On July 10, 1867, Attorney-General Stanbery, addressing the Secretary of the Treasury, said:

"I can only give my opinion on questions of law. Where a question of law arises upon facts submitted to the Attorney-General, such facts must be agreed and stated as facts established." (12 Opin., 207.)

See also to the same effect 10 Opin., 267, and 9 Opin., 82.

The necessity for such a statement of facts and of the question or questions of law upon which my opinion is desired is emphasized in this case by reason of the fact that, in a personal conversation with you on the evening of the 23d instant, I understood that the question involved was of a certain character, and in a conversation with one of the attorneys for a proposed contractor this morning it was stated that a very different question was involved.

I shall, as you know, be very glad to oblige you by answering as promptly as possible any question or questions submitted; but in view of the rule and the circumstances I think you will readily see that a clear statement of the facts and of the questions of law to be answered ought to be presented.

I return herewith the bundle of papers, as, when such a statement is made, very few of them will be of any use to me in the preparation of the opinion. Of course the briefs and, perhaps, some of the papers will be useful.

Respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF WAR.

INDIAN AGENT—DEPUTY MARSHAL—ATTORNEY-GENERAL.

No statute prohibits a person from acting as an Indian agent and a deputy marshal at the same time. Whether such an appointment would be likely to cause any contention or conflict of authority, not being a legal question, the Attorney-General is precluded from answering.

DEPARTMENT OF JUSTICE,
November 29, 1892.

SIR: Your communication bearing date the 25th instant, relating to the appointment of an Indian agent as a deputy marshal with the view of his performing special specified service, has been duly received.

You ask, first, whether it is permitted by law to appoint an Indian agent who is on duty at the Sac and Fox Agency, Tama, Iowa, a deputy marshal; and, second, in case the appointment can be legally made, whether it "would be likely to cause any confusion or conflict of authority."

Under section 780, Revised Statutes, every marshal may appoint one or more deputies, who shall be removable from office by the judge of the district court, or by the circuit court, at the pleasure of either.

By section 788 the marshals and their deputies are given, in each State, the same powers in executing the laws of the United States as the sheriff and their deputies in such State may have, by law, in executing the laws thereof.

By section 628 marshals and deputy marshals are prohibited from holding or exercising the duties of the office of commissioner of any of the courts.

By section 748 they are prohibited from acting as solicitor, proctor, attorney, or counsel in any case pending in the district or circuit courts of their districts or in any district in which they are officially acting. These sections are in Title XIII, which relates to the judiciary.

Section 2052 of Title XXVIII provides for the appointment, by the President, with the approval of the Senate, of Indian agents, and section 2058 prescribes the duties to be performed by them.

Section 2074 of the same title directs that "no person shall hold more than one office at the same time under this title."

By section 2064 Indian agents are authorized to take acknowledgments, and also to administer oaths in investigations committed to them in the Indian country, pursuant to the rules and regulations prescribed by the Secretary of the Interior.

No statute has been called to my attention, nor is any found by me, which prohibits a person from acting as an Indian agent and a deputy marshal at the same time, nor does it appear that service as such deputy is inconsistent with the duties to be performed under sections 2058 and 2064.

It remains, however, with the marshal to decide whether he deems it proper and desirable to make the appointment to which you refer.

The second question which you submit does not call for a legal opinion, and the rules and precedents of this Department preclude me from making answer thereto.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

CONTRACT—MODIFICATION IN BID.

Where an advertisement is published calling for proposals for performance of certain work for the Government with the specification that it be begun on or before October 1, 1892, and be concluded on or before December 31, 1893, and one of the proposals stated that the bid was that the entire work was to be completed on or before June 1, 1894, and provided for stopping that work in certain contingencies, and the bidder was informed that his work was accepted but no formal contract was signed: *Held,* that no contract was made under section 3744 of the Revised Statutes; and, further, *held,* that the modifications made in the proposals were inconsistent with the specifications and with the spirit and intent of section 3709, Revised Statutes, and with the river and harbor act of 1888.

DEPARTMENT OF JUSTICE,
December 2, 1892.

SIR: Your communication relating to the advertisement and proposals and to action taken in connection therewith in the matter of the Gowanus Bay improvement in the harbor of New York, under the river and harbor act of July 13, 1892, has received due attention.

By said river and harbor act (Stat., 90) $100,000 is appropriated for "improving Gowanus Bay channels," "for distribution between the Red Hook and Gowanus Creek channels," and also $98,000 for completing improvement of Bay Ridge channel, in said bay.

In August, 1892, advertisement was made on behalf of the Government calling for "proposals for dredging the channels in Gowanus Bay," the same to be opened at the U. S. Engineer's office on the 14th of September.

The proposals were required to comply with specifications which were furnished by the Government, and were returned with the bids filed.

By specification 23, "the United States reserves the right

to reject any and all bids, and to waive any informality in the bids received."

The concluding specification is as follows:

"Time.—Work must be commenced on or before October 1, 1892, and completed on or before December 31, 1893. Contractors proposing to build special plant for this work will so state in their bids, mentioning the date at which they will contract to begin work."

In response to the advertisement, proposals or bids were received from divers bidders, setting forth prices at which each would perform the dredging required, respectively, upon the three several improvements.

On September 14 the bids were opened, considered, and recorded.

One of these proposals was submitted by the International Contracting Company. Its bid is, in effect, that it will dredge the channels for 19.7 cents per cubic yard.

In this bid, under the printed heading of the form, "The plant proposed to be used is as follows," these clauses are written, viz:

"Two combination dredges, each of a capacity of 4,000 cubic yards per day, with sufficient scows for the output. One of the said dredges with its scows to commence operations within ninety days of the awarding of the contract, and the other dredge to commence operations nine months thereafter, and the entire work to be completed on or before June 1, 1894. In the event of an epidemic prevailing in this locality, we reserve the privilege of ceasing the work until prudent to resume."

The officer of the engineers in charge at New York came to the conclusion that the bid made by the company was the lowest proposal received, and that it was reasonable in its terms.

The local officer recommended the acceptance of this bid to the Chief of Engineers, which recommendation was approved by that officer September 19, and in pursuance thereof said company was, September 22, informed that its bid was accepted.

On September 23 the Chief of Engineers was advised by the Acting Secretary of War to confer with the Secretary before awarding the contract to said company.

On September 26 the company protested against the giving of any part of the dredging in Gowanus Bay to others, and insisted that the contract should be given to it, and requested an opportunity to be heard.

The company was afterwards heard at length. After the hearing, the Acting Secretary of War decided that the acceptance referred to did not constitute a contract with and was not binding upon the United States.

The statutory requirements as to advertising for proposals and as to the making of contracts are as follows:

By section 3709, Revised Statutes, it is provided, subject to exceptions not now of consequence, that "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."

Following and continuing substantially the requirements of a provision of the river and harbor act of 1878 (20 Stat., 160) the corresponding act of 1888 (25 Stat., 423) declares "That it shall be the duty of the Secretary of War to apply the money herein and hereafter appropriated for improvements of rivers and harbors, other than surveys, estimates, and gaugings, in carrying on the various works, by contract or otherwise, as may be most economical and advantageous to the Government. Where said works are done by contract, such contract shall be made after a sufficient public advertisement for proposals, in such manner and form as the Secretary of War shall prescribe."

By section 3744, Revised Statutes, it is enacted that "it shall be the duty of the Secretary of War, * * * to cause and require every contract made on behalf of the Government, or by officers under (him) appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof." * * *

In the case before us it is manifest that time is an important element of the proposed contract.

The company named recognizes this in its requirement of five months beyond the limit named by the Government.

It may well be that if competing bidders had been offered the additional time their prices would have been less.

If one making proposals is allowed to add five months to the specified time, it is difficult to state where the limit to similar liberties shall be placed.

If one bidder may add one-third to the time specified may not another add one-half, and so forth?

The fairness of contracts upon advertisement, specifications, and competition requires that all bidders shall, as to all matters of consequence, those which affect the cost of the work and the amount of expenditure required to be used in performing it, be subject substantially to the same terms and conditions.

My attention has been called to Army Regulation No. 639, which says that "slight failures on the part of a bidder to comply strictly with the terms of an advertisement should not necessarily lead to the rejection of his bid," etc.

The taking by a bidder, without the knowledge of his competitors, of one-third additional time in which to perform an important and expensive improvement, which from its nature must require a long period, is not in any sense the slight failure to comply strictly, intended by this regulation.

The change made in this case is not a mere informality; it is a radical departure from the proposed terms of the contemplated contract.

Section 3744, Revised Statutes, which comes from the act of June 2, 1862 (12 Stats., 411), was considered and construed by the Supreme Court in *Clark* v. *United States* (95 U. S., 539).

The court held that the statute was intended to operate to prevent reckless engagements and frauds, and that "it makes it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties," and adds: "This is equivalent to prohibiting any other mode of making contracts." It is also stated that a party who makes a contract without having it reduced to writing aids in the violation of the law.

It is held that the contract is affected and must conform to the requirements of the statute.

In the case of the *South Boston Iron Company* (118 U. S., 37), which strongly resembles the one now under consideration, the court again considered the statute in question and explicitly approved the doctrine that was laid down in Clark's Case.

Under these cases it can not be said that the International Contracting Company has entered into a contract under section 3744.

It is my opinion that under the facts stated and the statutes and decisions referred to no legal or binding contract was entered into between the International Contracting Company and the United States.

It is my opinion, also, that the clauses of the proposal made by said company, which substituted new, different, and important conditions as to delaying or postponing the work, are inconsistent with the specifications and in contravention of the purpose, spirit, and intent of the statutes authorizing the letting of contracts upon advertisement.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

ATTORNEY-GENERAL.

The Attorney-General will decline to give an opinion as to whether the so-called eight-hour law is applicable to a certain contract to perform public work, for the reason that the contractor and not the Secretary of the Treasury is responsible for a violation of the law.

DEPARTMENT OF JUSTICE,
December 20, 1892.

SIR: By your letter of December 17 you advise me that, after competitive bidding, a contract has been made with the Vermont Marble Company, of Proctor, Vt., "for furnishing all the labor and materials required for the cut stone and brick work of the superstructure, etc., of the U. S. post-office at Worcester, Mass." From a further statement in your letter, as well as from the papers inclosed, it appears that under this contract the Vermont Marble Company is not only to furnish the material as above, but is to put such materials in place in the structure itself; in other words, is to furnish the material and erect the building, so far as the same consists of stone and brick work above the foundations. You also quote from a letter from the vice-president of the marble company, as follows:

"On behalf of the Vermont Marble Company, of Proctor, Vt., I have the honor to request you to advise me whether

the laborers and mechanics engaged at the quarries, mills, and shops of said company, in Vermont, in getting out the materials to be supplied by them under the contract awarded to them December 5, 1892, for the cut-stone work and brick-work of the superstructure, etc., of the U. S. post-office, etc., building, at Worcester, Mass., come within the application of the act of Congress approved August 1, 1892, entitled 'An act relating to the hours of daily service of laborers and mechanics employed upon the public works of the United States and the District of Columbia.' "

Thereupon you say—

"In view of the fact that the matter grows out of a contract actually established and existing, I have the honor to request your opinion in regard to the question submitted in said letter dated December 13, 1892, by the vice-president of said company, under said contract."

By a reference to the statute known as the eight-hour law (27 Stat., 340), it will be seen that, after providing that eight hours in any one calendar day shall constitute a day's work by a laborer or mechanic in the employ of the Government of the United States, of the District of Columbia, or of a contractor or subcontractor upon any of the public works of the United States, or of said District, it is enacted that—

"It shall be unlawful for any officer of the United States Government or of the District of Columbia or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics, to require or permit any such laborer or mechanic to work more than eight hours in any calendar day, except in case of extraordinary emergency."

The second section provides a penalty for a willful violation of the act by any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor.

It will be observed that the duty prescribed in the first section, and the penalty imposed in the second, is confined to those persons, whether officers or agents of the Government or of the District or contractors or subcontractors, whose duty it is to employ, direct, or control the services of such laborers or mechanics. The Secretary of the Treasury has no such relations to any of the workingmen to be

employed on this job, whether at the quarries or at the building itself. The duty to employ, direct, or control such laborers or mechanics, and the penalty for their wrongful employment, is with the contractor, and not with the Government or any of its officers or agents.

Under the circumstances, it is clear that the question propounded by the marble company to the Secretary of the Treasury is one which the latter is not called upon to answer, and hence it is not, within the language of section 356 of the Revised Statutes, "a question of law arising in the administration of his Department." It is, therefore, not a question upon which I am authorized to give an opinion.

It is, of course, quite needless that a citation shall be made of the very numerous opinions of my predecessors, as well as of myself, upon this point. The rule is as sound in reason as it is well supported by authority. Were the Attorney-General to give an opinion upon this question, and with reference to this contract, with equal reason he could be called upon for an opinion with reference to any question of law arising in the execution of any and every other contract with the Government at the instance of the contractor, through the Secretary. The effect would be not only that the time and labor of the Attorney-General would be occupied with questions unnecessary to be decided by the heads of the Departments, but whenever by reason of disputes arising in the actual execution of a contract, the same questions should be brought in issue in the courts, the Government might be greatly embarrassed by reason of an unnecessary declaration of the Attorney-General in the premises.

The papers forwarded with your letter are herewith returned.

Respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ADJOURNMENT OF CONGRESS—VETO.

Where Congress adjourns, not *sine die*, for a longer period than ten days, exclusive of Sundays, and certain bills at a time less than ten days prior to such adjournment are placed in the President's hands for approval or disapproval, it is competent for him to approve any bill during the period of such adjournment. *Semble*, that bills not signed, coming to him under such circumstances, would not become a law at the expiration of the ten days. In view of the uncertainty it is advised that bills coming to the President during a recess of Congress, or within ten days prior thereto, be signed or vetoed as they meet his approval or disapproval, and in case of veto, be returned to Congress when it reconvenes; any question as to their validity can then be settled by the courts.

DEPARTMENT OF JUSTICE,
December 28, 1892.

SIR: On the 22d of December, by a concurrent resolution, the two Houses of Congress adjourned until the 4th day of January next. That resolution reads as follows:

"*Resolved, by the House of Representatives*, (the Senate concurring,) That when the two Houses adjourn on Thursday, December 22, they will stand adjourned until Wednesday, January 4, 1893."

The time covered by this adjournment, exclusive of Sundays, exceeds ten days. Shortly before the adjournment, certain bills passed by the two Houses of Congress having been placed in your hands for approval or disapproval, you now ask whether it is competent for you to give such approval or disapproval during the period of such adjournment.

Your right to approve is settled in the affirmative by the Supreme Court in *Seven Hickory* v. *Ellery* (103 U. S., 423). That was a case arising under the constitution of Illinois, but as to this question that instrument was identical with the Federal Constitution. The decision goes so far as to uphold the approval of a bill within the ten days even though the adjournment be *sine die*. But the question as to the effect of the temporary adjournment on unsigned bills remains.

No formal opinion by any of my predecessors, so far as the records of this Department show, has been given upon this question. I find, however, certain *memoranda* commun-

icated by Attorney-General Devens to President Hayes, as follows:

"The circumstances under which any bill not signed by the President becomes a law are stated in the clause of the Constitution which is as follows: 'If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.'

"I find no decisions of the courts of the United States in which this clause has been construed. Similar clauses, however, have been construed in three State courts.

"In New Hampshire, where the provision is as follows: 'If any bill shall not be returned by the governor within five days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature by their adjournment prevent its return, in which case it shall not be a law,' it was held in the opinion of the justices (45 N. H., 610) that the last day of the five, which was a day when neither house was in session, was to be counted as one of the five days specified, and that the adjournment referred to in this provision of the constitution of New Hampshire was not the ordinary recess or adjournment from time to time during the continuance of the session, but the final adjournment at the close of the session.

"In the case of *Harpending* v. *Haight* (39 Cal., 206) it was held that the adjournment of either house of the legislature from day to day was not such an adjournment as would prevent the governor from returning a bill with his objections within the ten days prescribed by the constitution of that State.

"On the contrary, in the case of *The People* v. *Hatch* (33 Ill., 135, 139, 153), it was held that where a bill which has passed the two houses of the general assembly is presented to the governor for his consideration he is not required to return it with his objections within ten days after it is so presented to him to prevent its becoming a law unless the general assembly shall continue in session until the end of that period; and that, under the provision of the constitution of

that State which gives him that time in which to determine upon his course of action, the general assembly must be in an organized condition, acting as such a body at the end of that period, if not during the whole time, to require the governor to perform that act. If the members have dispersed, and the officers are not in attendance, he would not be able to return the bill to the house in which it originated. The constitution of that State neither requires nor authorizes him to return the bill to the speaker of the house, to the clerk, or to any other officer, but declares that it shall be returned to the house, and that can only be as a body.

"In this conflict of authorities it is impossible conclusively to answer the question whether if Congress should take a recess after a bill was sent to the President for his signature so long in duration that he would not have an opportunity to return the same within ten days with his objections, such bill having been presented to him at such a time that the ten days would not be given to him for consideration previous to the recess, such bill would become a law in like manner as if he had signed it. At the same time, the best opinion to which I can arrive is that in the case supposed the bill would not become a law at the expiration of the ten days. There is no mode provided by which the President can during the recess communicate with the House, and one of two results must follow: either the bill becomes a law when he has not had the time prescribed by the Constitution for consideration and reflection upon it, or else, Congress taking a recess under such circumstances and thus preventing him from communicating with them, the bill does not become a law because by their own act of adjournment they have prevented him from having the time for consideration which is intended by the Constitution.

"An examination of the earlier portions of section 7, Article I, of the Constitution strengthens this conclusion. If the President shall not approve the bill 'he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and

if approved by two-thirds of that House, it shall become a law. But in all cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively.'

"All these provisions indicate that in order to enable the President to return a bill the Houses should be in session; and if by their own act they see fit to adjourn and deprive him of the opportunity to return the bill, with his objections, and are not present themselves to receive and record these objections and to act thereon, the bill can not become a law unless ten days shall have expired during which the President will have had the opportunity thus to return it. There is no suggestion that he may return it to the Speaker, or Clerk, or any officer of the House; but the return must be made to the House as an organized body."

Hon. George F. Edmunds, President *pro tempore* of the Senate, in a note to President Arthur under date of December 24, 1884, expressing a like opinion says:

"A bill * * * has passed both Houses of Congress and was presented for my signature after both Houses have adjourned until 5th of January. This is more than ten days, and, if it were now presented to you, you could not return it with your objections. I do not know what the practice has been, but it would seem to me as if the bill could not become a law constitutionally; but if you think it can I will send it to you."

This note was probably not carefully considered, but it is of value as the impression of a lawyer and legislator of great ability and experience.

The act of the President in approving or disapproving a bill passed by Congress has been sometimes held to be a legislative act. (Cooley's Constitutional Limitations, 6th edition, pp. 184, 185; *Hardee* v. *Gibbs*, 50 Miss., 802; *Fowler* v. *Pierce*, 2 Cal., 165; *Solomon* v. *Commissioners*, 41 Ga., 157.) This being so, the same authorities require that his action expressing such approval or disapproval shall take place during the session of Congress. This I understand to be in accordance with the usual, if not uniform, practice with relation to bills presented to the President at or near the final adjournment of a session of Congress. But the question is

suggested whether the same rule applies to an adjournment, or, as it is sometimes called, a "recess" during the session. Subdivision 4, section 5, Article I of the Constitution reads as follows:

"Neither House, during the session of Congress shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting."

Recognizing that this provision applies to a recess, so-called, it is laid down in the "Constitution, Manual and Digest, Rules and Practice" of the House of Representatives, second session Fifty-first Congress, page 532, that—

"Where it is proposed to take a recess, by adjournment, for more than three days, the Senate must consent before it can be taken; and a resolution for that purpose is held to be privileged."

In other words, within the meaning of the Constitution, a recess is held to be an adjournment. As an original question I should say that the dispersion of the two Houses of Congress for a definite period, in pursuance of a joint resolution, such as that under consideration, is an adjournment within the meaning of subdivision 2, section 7 of Article I of the Constitution (quoted at the beginning of the paper of Attorney-General Devens, *supra*). If a different rule were to be applied to an adjournment of ten days it might be applied to an adjournment for as many months. Suppose Congress having met on the 1st of December were, on the 1st of February, to adjourn until the 1st of October. What would become of a bill presented to the President and not approved within ten days? It could hardly remain in a state of suspended animation until Congress should reconvene. The President could not veto it in the manner provided by the Constitution; and, this being so, it would appear to follow that if not signed it must fail to become a law.

However, if it has been the practice of the President to return bills with his objections after the lapse of ten days, not being able to return the same within that time by reason of the temporary adjournment, that practice might be held controlling. (*Solomon* v. *Commissioners*, 41 Ga., 157; *People* v. *Bowen*, 21 N. Y., 530.) Upon the whole I advise that bills coming to you during the recess of Congress, or within ten

days prior thereto be signed or vetoed as they meet your approval or disapproval, the bill, in case of veto, being returned when Congress reconvenes, and allow any questions as to their validity to be settled in court.

Very respectfully,

W. H. H. MILLER.

The PRESIDENT.

PRESIDENT—REGISTER OF WILLS AND RECORDER OF DEEDS—BONDS.

It is in the power of the President to require a bond of the register of wills and the recorder of deeds of the district of Columbia, for the faithful accounting by them of the fees received by them, and it is likewise in the power of the President to prescribe periods at which accountings shall be had and payments made by them into the Treasury of the United States.

DEPARTMENT OF JUSTICE,
January 12, 1893.

SIR: By your letter of the 10th instant you call my attention to the recent statute (27 Stat., 153) providing salaries for the register of wills and the recorder of deeds of the District of Columbia, and requiring those officers to account for and pay into the Treasury, to the credit of the District of Columbia, all sums received as fees, in excess of the salaries so provided and the necessary clerk hire and incidental expenses of the offices; thereupon you inquire:

First, whether it is in your power to require a bond from each of these officers for a proper accounting for such fees;

Secondly, whether you have the power and should prescribe the periods at which such accounting shall take place.

These questions assume, of course, as is the fact, that the statute contains nothing in reference to either of these matters.

The Constitution of the United States, Article II, section 3, provides that the President "shall take care that the laws be faithfully executed."

The statute under consideration requires of these officers, of your appointment, certain duties, but does not in detail prescribe the manner and times for the performance of such duties, nor the measures to be adopted to secure such performance.

By authorizing these officers to receive the fees and to pay the expenses of their offices, and their own salaries, out of the same, they are made *quasi* disbursing officers of the United States. If these or any other disbursing officers of the United States fail to discharge, or commit a breach of duty, the provision of the Constitution above quoted would require you, if such breach consisted in a misappropriation of moneys, to take the necessary steps for recovering and bringing the same into the Treasury of the United States; and if such breach amounted to a criminal violation of the law, it would be your duty to see that the offender was prosecuted and punished. It being thus made your constitutional duty to redress a wrong committed by such an officer, it certainly is none the less your duty to use all reasonable means to prevent such wrongdoing.

It is, of course, familiar law that any private person charged with responsibility for money in the hands of a subordinate, may take from such subordinate a bond for a faithful accounting, and such bond will be enforced by the courts.

Very early in the history of the country it was settled that "the United States have a capacity to enter into contracts, and take bonds within the sphere of their constitutional power, although not directly authorized by a statute." (*United States* v. *Tingey*, 5 Peters, 115; *United States* v. *Hodson*, 10 Wallace, 395, and *United States* v. *Mora*, 97 U. S., 413.)

By the same decisions it is established that—

"A voluntary bond taken by authority of the proper officers of the Treasury Department to whom the disbursement of public money is intrusted, to secure fidelity in official duties of a receiver or an agent for disbursing of public moneys, is a binding contract between him and his sureties and the United States, although such bond may not be prescribed or required by any positive law." (*United States* v. *Tingey*, 5 Peters, 115.)

It is doubtful whether such bond should cover any duties other than the faithful accounting for and paying over of the moneys; at least, it is not clear that it would be of any validity as to other duty. (*Postmaster-General* v. *Early*, 12 Wheaton, 136.)

On April 20, 1853, Attorney-General Cushing (6 Opin., 24), in response to an inquiry from the Secretary of War whether an officer of the Corps of Engineers, employed in the superintendency of public works and acting as disbursing officer, was absolutely required to give a bond, said:

"I am of opinion that he is not; and that it is a matter within the discretion of the President to require bonds in such case or not, according to his view of the exigencies of the public service."

My answer, therefore, to your first question is in the affirmative.

From what has already been said it is also equally clear that the second question should have a like answer. In other words, you may prescribe the periods at which accounting shall be had and payments made into the Treasury by the officers in question, and may require bonds to be given to the United States to secure such accounting and payments.

Respectfully, yours,

W. H. H. MILLER.

The PRESIDENT.

SEAL FISHERIES—RENTAL.

The Secretary of the Treasury has the same authority to make a reduction in the rate per skin to be paid by the lessee of the seal fisheries at the islands of St. George and St. Paul, that he has in the case of the other stipulated rental in the lease. (20 Opinions, 51, covers this question also.)

DEPARTMENT OF JUSTICE,
January 17, 1893.

SIR: By your note of the 16th instant you transmit a copy of an opinion given to you on May 4, 1892, by the Solicitor of the Treasury, upon the power of the Secretary of the Treasury to reduce the rental stipulated for in the lease with the North American Commercial Company for the right to take fur seals upon the islands of St. Paul and St. George, in the Bering Sea.

It appears that the lease under which this company is now operating provides for a gross rental of \$60,000 per annum, and an additional payment of \$7.62½ for each skin.

Section 1962, Revised Statutes, contains the following:

"The Secretary of the Treasury may limit the right of killing if it becomes necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as may be proper."

You ask whether your authority to reduce extends to the rate per skin, as well as to the gross rental.

By an opinion rendered to you on March 27, 1891, written by the Solicitor-General, and approved by me, you were advised, generally, that the statutes authorized you to reduce the rental under the current lease in proportion as you might reduce the annual catch.

That opinion seems to me to cover your present question.

The amount paid per skin is no less a part of the rental than the gross sum of $60,000. The contract might have provided that the entire payment should be a gross sum, or that the entire payment should be so much per skin, or that it might be paid, as in the present lease, a part one way and a part the other, provided always that the rental shall not be less than $50,000 per annum, as required by section 1963.

I know of no reason for holding that you have not the same authority to make a reduction in the rate to be paid per skin, as in the other stipulated rental. You are advised, therefore, that the opinion of the Solicitor of the Treasury is correct.

Respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

CONTRACT—ANNULMENT—RESERVE PERCENTAGE.

Where a contract with the Government is duly annulled by the Government, pursuant to its terms, and when it is clear that the Government can not suffer any loss on account of the annulment of the contract in question, then the contractors are entitled to receive the reserved moneys.

DEPARTMENT OF JUSTICE,
January 17, 1893.

SIR: Your communication dated the 5th instant, relating to a claim made on account of a contract entered into by the War Department with James A. Mundy & Co., for river

and harbor improvements in the harbor of Philadelphia, Pa., has been duly considered.

The contract bore date April 23, 1891, and contained the following provision:

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified therein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States."

Several extensions of the contract were granted by the Department from and after December 26, 1891, and on December 22, 1892, the contract was annulled by notice given to the contractors, the ground of such annulment being that in the judgment of the engineer in charge the contractors had not prosecuted the work diligently, and would not be able to complete the same within the time limited.

At the date of such annulment the total of the percentage retained by the Government on the payments made to contractors, under said contract, was $14,584.52.

The amount earned by them previous to the same date, for which no payment had been made, was $11,742.38, less cost of inspection ($517.50) to be deducted.

It is assumed, and seems to be conceded, that the contractors sought earnestly to perform their contract, and that they suffered serious losses in connection with the work, in

the nature of accidents and misfortunes, which occurred without fault on their part.

It is alleged that a dredge was burned, and that scows were sunk, and that other boats and scows were withdrawn by lessors, and that an unknown third revetment was discovered within the scope of the work; all of which occasioned losses and delays, and tended to prevent the contractors from performing the contract according to the terms thereof.

I understand that, by reason of the premises, and in view of such apparent equities as exist in the case, it is the wish of your Department to pay the contractors the reserved percentage, and for all work performed and materials furnished.

My official opinion is asked as to whether you possess lawful authority to direct such payment.

It should be noted in this case, as is stated in the words of Mr. Justice Miller in *Quinn* v. *United States* (99 U. S., 33), that "the authority of the engineer to terminate the contract did not depend on the value of excuses or the difficulty of performance."

The moneys sought by the contractors, and above described, are held by the United States as moneys forfeited by the contractors upon the annulment of the contract.

Nevertheless, the amount is not to be considered as liquidated damages, but as a penalty reserved by the Government for its protection and indemnity.

The position occupied by such a reserve is set forth in *Kennedy* v. *United States* (24 C. Cls., 141), as follows:

"Forfeitures are recognized, but not favored by the law. The due and forfeit of the bond are not to be extended beyond the requirement of the technical right. Courts are loath to enforce penalties or forfeitures, and will not do so except in clear and imperative cases. Forfeitures and estoppels are not favored defenses, and are always subordinated to the equity of the right if possible."

In Quinn's Case the United States profited largely by the annulment of his contract.

It was held that the contractor was not entitled to recover for profits that he might have earned if he had kept his contract; but it was also held that he was entitled to a return

of the percentage reserved, because the Government sustained no pecuniary loss.

When the fact that the United States could lose nothing was ascertained, the reserved fund held as security was freed from the Government claim and became the property of the contractor.

In case the United States shall suffer damages by reason of the failure of James A. Mundy & Co. to carry out and perform their contract, the fund first in order, and perhaps the only one in reach to compensate the United States, is that composed of the reserved moneys under consideration.

It is my opinion that whenever it becomes clear that the United States can suffer no loss on account of the annulment of the contract in question, then the contractors are entitled to receive the reserved moneys.

I do not understand that any question connected with the bond given by the contractors or with any liability of sureties thereon is submitted to me; therefore no such question is passed upon.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

COMMISSIONER OF SOLDIERS' HOME—ARREST OF CRIMINALS.

The board of commissioners of the Soldiers' Home can not delegate to the governor of the Home discretionary police authority for the preservation of good order within its limits. The board can by regulation duly made invest him with authority to expel from the grounds persons not inmates of the Home offending against good order and decency. It can not empower the governor to arrest, detain, and deliver over to the civil authorities non-military persons committing crimes less than capital within the limits of the Home, except in the cases where any person may make an arrest without warrant or precept.

DEPARTMENT OF JUSTICE,
January, 18, 1893.

SIR: In reply to your communication asking an opinion on the question whether the authority conferred by law on the board of commissioners of the Soldiers' Home includes the power to delegate to the governor of the Home "the necessary police authority for the preservation of order, the

expelling from the Home grounds of offensive persons, the arrest and detention of those guilty of crimes and their surrender to the civil authorities," I submit the following conclusions:

As its name indicates, the Soldiers' Home is a military establishment. It exists by authority of Congress, and is the exclusive subject of chapter 2, Title LIX, of the Revised Statutes of the United States, which chapter was subsequently amended and added to by the act of March 3, 1883 (22 Stat., 564, chap. 130).

Section 4815, Revised Statutes, as amended by section 10 of the said act, provides for a board of commissioners, to consist of the General in Chief Commanding the Army and certain other officers, which is clothed with authority "to establish, from time to time, regulations for the general and internal direction of the institution, to be submitted to the Secretary of War for approval; and may do any other acts necessary for the government and interests of the same, as authorized by this chapter;" and section 4824, Revised Statutes, provides that "all persons admitted into the Soldiers' Home shall be subject to the Rules and Articles of War in the same manner as soldiers in the Army."

Section 4816, Revised Statutes, provides that the officers "of each separate site of the Home" shall be a governor, deputy governor, and secretary, to be appointed by the Secrary of War from the Army, on recommendation of the board of commissioners, and to be removed by him on like recommendation.

If what I may term as the first question is correctly understood to be whether the board of commissioners may devolve on the governor of the Home such "police authority" as that officer may think advisable to exercise, as occasion may arise, "for the preservation of good order" within the limits of the Home, my reply is that such an attempted delegation of discretionary power would be void, because whatever police authority the board itself may have to make regulations for the "preservation of good order" at the Home, such authority must be exercised by the board alone, and can not be transferred to the governor or any other officer.

Congress has manifested a clear intention that the institution should be governed by the Rules and Articles of War,

and such regulations as the board of commissioners should properly make, and I can not suppose for a moment that it was contemplated that the governor should exercise any authority outside of those rules and articles and regulations, even by the consent and direction of the board of commissioners.

In answer to the second question, I am of opinion that it would be a proper exercise of power for the board of commissioners, by a regulation duly made, to invest the governor with authority to expel from the Home grounds persons, not inmates of the Home, offending against good order and decency. Such a power must be recognized as reasonable and as necessary for the comfort and well being of the inmates of the Home.

The third question is of a graver character than the other two.

The authority of the governor under article 59 of the Rules and Articles of War, to arrest and detain and deliver over to the proper civil authority an inmate of the Home who has committed a capital crime, or any offense against the person or property of any citizen of the United States, punishable by the laws of the land, would seem to be ample of itself, unless I am to understand that it is thought desirable by the board of commissioners to go further and provide by regulation for the surrender to the civil authority of inmates committing offenses, less than capital, against one another, instead of trying and punishing them by court-martial in the usual way.

But in my judgment the power of the board to make regulations is to be exercised in subordination to the Rules and Articles of War, and consequently I do not think that what I have supposed to be the object of the board could be accomplished by regulation.

It remains to consider whether the board of commissioners may, by regulation, empower the governor to arrest, detain, and deliver over to the civil authority, non-military persons committing crimes less than capital within the limits of the Home.

In my judgment, the general authority of the board to make regulations can not be understood as involving the

power to authorize the arrest and detention by military authority of civilians for crimes committed within the limits of the Home, except under the special circumstances when, at common law, any person may make an arrest without warrant or precept. Nothing short of explicit language would warrant me in holding that Congress intended to bring civilians under military authority, in time of peace, even to the limited extent indicated. I must not suppose, on insufficient grounds, that Congress failed to respect the prejudice against the employment of military power against civilians that permeates all classes of the English speaking race, and, therefore, I am of opinion that the board can not invest the governor with such authority. (*Ex parte* Milligan, 4 Wall., 1.)

This, I believe, disposes of all the questions.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF WAR.

CROW INDIANS OF MONTANA—MODIFICATION OF AGREEMENT.

The fourth paragraph of the agreement concluded with the Crow Indians, August 27, 1892, pursuant to the act of July 13, 1892, chapter 164, is valid and of binding force.

DEPARTMENT OF JUSTICE,
January 18, 1893.

SIR: Your communication, upon the subject of the relations now existing between the Government and the Crow Indians of Montana, was duly received.

You request an official opinion as to whether the fourth paragraph of the agreement made with said Indians under the act of July 13, 1892 (27 Stat., 137), modifies the preexisting agreement of December 8, 1890, so as to authorize an allowance and application of interest in behalf of said Indians as provided in said paragraph.

The statutes which appear to bear upon the question under consideration are as follows:

1. The act of April 1, 1880 (21 Stat., 70), authorizes the Secretary of the Interior to deposit in the Treasury of the United States moneys then held by him, or thereafter to be received by him, as Secretary of the Interior and trustee of the vari-

ous Indian tribes, * * * including all sums received on account of sales of Indian trust lands, etc., whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits; and the United States is directed to pay interest semiannually from the date of deposit, at the rate per annum stipulated by treaties or prescribed by law, payment to be made without further appropriation by Congress.

2. By section 31 of the act of March 3, 1891 (26 Stat., 1039), an agreement made December 8, 1890, with the Crow Indians of Montana, is set forth at length, and is accepted, ratified, and confirmed. By this agreement the United States receives from the Crow tribe a large amount of lands therein described.

In consideration of this cession the United States agrees to pay $946,000 in the manner in the agreement set forth.

By subdivision first, the sum of $200,000 is set apart to be expended in the building of dams, canals, ditches, and laterals for the purpose of irrigation in the valleys of Big Horn and Little Big Horn rivers, and on Pryor Creek and other streams; but not to exceed $50,000 shall be expended annually in this work.

By subdivision eighth of this agreement, the sum of $552,000 is set aside as an annuity fund to be distributed as follows:

"Each Indian of the Crow tribe, male and female, shall receive an annual annuity of twelve dollars in cash for the period of twenty years from the date of said agreement. Said annuity to be paid semiannually in accordance with such rules and regulations as the Secretary of the Interior may prescribe."

By the act of July 13, 1892 (27 Stat., 137), the Secretary of the Interior is authorized "to appoint a commission to negotiate with the Crow Indians of Montana for a modification of the agreement concluded with said Indians December twenty-eighth, eighteen hundred and ninety-one, * * * *Provided*, That no such modification shall be valid unless assented to by a majority of the male adult members of the Crow tribe of Indians, and be approved by the Secretary of the Interior."

The commissioners were duly appointed and entered upon the performance of their duties. An agreement was concluded with the Indians August 27, 1892.

By the preliminary paragraph thereof, it is provided that the agreement of December 8, 1890, shall be amended and modified as set forth in this agreement.

By the third paragraph of this last agreement it is stipulated that $200,000 may be taken from the $552,000 set aside as an annuity fund by the eighth section of the agreement of December 8, 1890, and added to the $200,000 designated by the first section of said agreement of 1890 to be expended in building dams, canals, ditches, and laterals, for purposes of irrigation in the valleys of the streams referred to in said first section, and that not exceeding $100,000 may be expended annually for such purpose. Paragraph fourth of the agreement of 1892 sets forth that it is agreed that the balance of the annuity fund provided for in section eight of the agreement of December 8, 1890, remaining unexpended at the date of the approval of this agreement, shall be placed in the Treasury to the credit of the Crow Indians, and bear interest at the rate of 5 per cent per annum, and the said interest, together with a sufficient portion of the principal to give each Indian an annuity of $12, shall be paid to said Indians, per capita, in cash semiannually.

It is provided by paragraph tenth that this agreement shall take effect upon its approval by the Secretary of the Interior.

This agreement was duly executed on the part of the commissioners, and also on the part of the Indians, and was approved by the Secretary of the Interior October 15, 1892.

It is to be conceded that Congress intended by the act of April 1, 1880, to permit the deposit in the Treasury of moneys held in trust for Indian tribes, and to allow interest thereon at a rate stipulated by treaty or prescribed by law. This action is for the benefit of the Indians affected, and the interest becomes payable without further appropriation. This enactment, so far as it reaches, is an approval by Congress of the policy of allowing interest to Indian tribes upon their funds held in trust and deposited in the Treasury.

By the agreement of December 8, 1890, the United States extinguished the Indian right of occupancy to a large amount

of the public domain, and entered upon a system of irrigation upon the lands reserved to the Indians, for their benefit, as detailed in the agreement.

The sum of $200,000 of tribal funds was set apart for dams, canals, ditches, and laterals, but only $50,000 thereof was allowed to be expended annually.

By section 8 the sum of $552,000 of the purchase price of the Indian title was set aside to be paid in annuities.

It may be fairly inferred from the enactment of 1892 that the efforts being made to render the lands reserved to the Crow tribe in Montana productive needed strengthening.

By the agreement of 1892 $200,000 was authorized to be taken from the $552,000 annuity fund and used for the purposes of the irrigation fund, and the limit of permitted annual expenditure from the irrigation fund was raised from $50,000 to $100,000.

It appears that the $200,000 was transferred to the irrigation fund and that $40,512 of the remaining $352,000 has been paid to the Indians, and that a balance of $311,488 remains in the annuity fund.

It is claimed on behalf of the Crow tribe that this sum should be placed in the Treasury in trust, upon interest, to be applied in accordance with the provisions of paragraph 4 of the agreement of 1892.

It may be conceded that the moving purpose of the agreement of December 8, 1890, was the obtaining of a large amount of land occupied by the Indians.

A large amount of the purchase money to be paid for the Indians' right of occupancy was retained in trust; the act of April 1, 1880, then stood in full force; thereupon the act of July 13, 1892, authorized a modification of the agreement of 1890.

The action of the commissioners indicates that an important purpose of their appointment was a readjustment of the moneys set apart in the former agreement for irrigation and annuity purposes. An object of their action must have been to attempt to render successful the irrigation projects which were being wrought out at the expense of the Indian fund. Having this object in view it was agreed to strengthen the irrigation fund by the transfer of the $200,000, and the

annuity fund was correspondingly weakened. Thereupon, as a part of the proposed modification, it was agreed to place the unexpended balance in the Treasury at 5 per cent interest, and to use the interest, to the extent thereof as it accrued, in payment of the $12 per capita annuity.

It is plain that a modification of the earlier agreement was intended by Congress; it does not appear that the modification actually made was not the one that Congress intended.

The payment of interest on the trust fund is in line with the enactment of 1880 and of the policy then adopted.

Congress recognized that the commissioners were not required to act within specified lines, as it provided that no modification should become valid unless assented to by a majority of the male adult Indians and approved by the Secretary of the Interior.

The modification was made in terms by the agreement, the instrument was formally executed, and the modification was duly assented to by the Indians and was duly approved by the Secretary of the Interior, and executive officers of the Interior Department have taken action thereunder, while Congress is not shown to have taken any action in relation thereto.

In view of the premises, and of the recognized relation which is occupied by the U. S. Government toward its Indian tribes, it is my opinion that you are justified in treating paragraph 4 of the agreement of 1892 as valid and of binding force.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ELECTORAL VOTES—MISSING CERTIFICATES.

The Secretary of State having been notified by the President of the Senate that on the fourth Monday of January he had received by mail packages purporting to contain the electoral votes for President and Vice-President from all the States, and had received similar packages by messenger from all but four States, it is advised that section 141, Revised Statutes, as amended October 19, 1888, makes it his duty to send special messengers to the district judges in whose custody one certificate of the votes from the four above States has been lodged.

DEPARTMENT OF JUSTICE,
January 27, 1893.

SIR: I have your letter of the 26th instant, in which you state as follows:

"I have been informed by the President of the Senate that on the 23d instant, which was the fourth Monday of the month, he had received by mail packages purporting to contain the electoral votes for President and Vice-President from all the States of the Union, and that similar packages had been delivered to him by messengers from all of the States except Indiana, Montana, Oregon, and Wisconsin."

And you inquire "whether in the foregoing contingency it is my duty under the provisions of section 141 of the Revised Statutes, as amended by the act of October 19, 1888 (25 Stat., 613), to send special messengers to the district judges in whose custody one certificate of the votes from the four above States has been lodged."

Section 140 of the Revised Statutes, first enacted in 1792, is as follows:

"The electors shall dispose of the certificates thus made by them in the following manner:

"One. They shall by writing under their hands, or under the hands of a majority of them, appoint a person to take charge of and deliver to the President of the Senate, at the seat of Government, before the first Wednesday in January then next ensuing, one of the certificates.

"Two. They shall forthwith forward by the post-office to the President of the Senate, at the seat of Government, one other of the certificates.

"Three. They shall forthwith cause the other of the certificates to be delivered to the judge of that district in which the electors shall assemble."

Section 3 of the act of February 3, 1887 (24 Stat., 373), preserves this requirement in the following language:

"And such certificate shall be inclosed and transmitted by the electors at the same time and in the same manner as is provided by law for transmitting by such electors to the seat of Government the lists of all persons voted for as President and of all persons voted for as Vice-President."

Section 141 of the Revised Statutes, as amended October 19, 1888 (25 Stats., 613), reads as follows:

"Whenever a certificate of votes from any State has not been received at the seat of Government on the fourth Monday of the month of January in which their meeting shall have been held, the Secretary of State shall send a special messenger to the district judge in whose custody one certificate of the votes from that State has been lodged, and such judge shall forthwith transmit that list to the seat of Government."

Thus, during our entire history, the law has provided that three certificates of the action of the electors shall be made by them; that two of these shall by different means be sent to the President of the Senate, and that the third shall be deposited with the district judge from whom it may be obtained if required. The purpose of this legislation was evidently to prevent fraud, accident, or mistake. It was not merely designed to bring to the President of the Senate notice that the electors had voted for President and Vice-President, but to make sure that the action actually taken had been correctly reported and had been in no way changed. If only one certificate were received by him, the possibility of fraud or mistake en route, or the charge of such, would be greater than if two certificates brought by different means were delivered to him. Such dangers, however, are remote, and in these days of rapid communication it is improbable that the will of any State as expressed by the electors could thus be defeated. And yet in reference to an office so important as that of President of the United States, and concerning which party strife and passions are at times so strongly aroused and the people often so evenly divided, that construction should be given to the laws which is best calculated to exclude every possibility of mistake or dispute.

I am therefore of the opinion that the language "whenever *a* certificate of votes from any State has not been received," etc., is to be construed as though it read "whenever *any* certificate of votes required by law from any State has not been received."

Any other construction would render the provisions of section 140 nugatory, so far as one of its purposes is concerned, or to be disregarded at the will of the electors, while the one here stated gives effect to every provision of the law.

Your question must therefore be answered in the affirmative.

I return the inclosure of your letter, and have the honor to be, very respectfully, yours,

CHARLES H. ALDRICH,
Solicitor-General.

The SECRETARY OF STATE.

Approved:

W. H. H. MILLER.

ATTORNEY-GENERAL.

The question by whose fault or neglect, if anyone's, a wrongful payment has been made is a question of fact, or mixed law and fact, which only a court can determine, and the Attorney-General should not express an opinion thereon.

DEPARTMENT OF JUSTICE,
February 1, 1893.

SIR: Your communication of December 12, ultimo, presents for opinion the following case:

On April 19, 1892, Maj. J. B. Keefer, a paymaster in the U. S. Army, stationed at the city of New York, drew his check on the assistant treasurer at that place for $78.44 in favor of James H. Yardley, or order, using for that purpose a blank from the book of blank checks furnished him by the Treasury Department, and, as nothing appears to the contrary, you assume that the check was drawn in the usual manner.

Yardley, the payee, indorsed the check, in blank, and then Maj. Keefer also indorsed it, in blank, adding his official designation of paymaster, U. S. Army, which, you say, "was intended to identify the signature of Yardley," but the check itself does not state what was the purpose of the indorsment.

After the drawing and indorsing of the check the writing in the body of it was "all removed" and the check filled up for $878.44, payable to the order of the same payee, and it was paid in that form by the assistant treasurer on April 20, 1892.

As soon as it became known to Maj. Keefer that the check had been thus altered and paid he at once notified the assistant treasurer that the check as he drew it was for $78.44 only, and that the check for $878.44, as paid, was a

forgery, and that his account should be credited by the sum of $800, the fraudulent excess, with which request the assistant treasurer refused to comply, and the question submitted is, whether the loss caused by the forgery shall fall on the paymaster or the assistant treasurer.

After due consideration I have reached the conclusion that the question before me is one that I can not decide without stepping beyond the limits of my authority as Attorney-General and invading those of the judicial department. It is the courts alone that can make an authoritative determination of this question of liability, for I have no power to employ judicial methods, but am limited to giving opinions upon statements of fact laid before me by those entitled to call for my opinion, and I am as strictly bound by these statements as a court is by a special verdict.

After stating the facts as above set forth, you say:

"The Paymaster-General of the Army remarks in this matter that if Maj. Keefer is at fault he should be called upon at once to make his accounts conform to those of the assistant treasurer at New York by a deposit of $800 in the subtreasury in that city to meet the checks already drawn as above mentioned and now outstanding. Before acting on this suggestion I have the honor to request your opinion whether, in view of the facts stated, the $800 loss occasioned by the erroneous payment by the assistant treasurer at New York to Yardley, must, under the law, be borne by Maj. Keefer or by the assistant treasurer of the United States at New York City."

In other words, the vital question is by whose fault or negligence, if of any one, has the wrongful payment come about? This is a question of fact or of mixed law and fact, which only a court can determine (19 Opin., 672, 696).

It is manifest, then, that the sureties of the assistant treasurer and the paymaster, who, it is to be remembered, are bonded officers, would have good reason to complain if I should attempt to decide the question of their liability, not upon my own investigation into the facts, but upon an *ex parte* statement made by you for the purpose of requesting an opinion for your guidance as the head of the War Department.

In *Strong's Case* (19 Opin., 450), where this subject received careful consideration, I refused to consider the conflicting claims of Strong and certain of his creditors to a particular fund in the Treasury, and advised the head of that Department to hold on to the fund in dispute until all the claims to it had been determined by a court of competent jurisdiction; and, however much it would gratify me to accede to your request for an opinion, I am, in like manner, constrained to refer you to the courts for an answer to the question submitted.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF WAR.

ATTORNEY-GENERAL.

Where no statement of facts is presented the Attorney-General can not render an opinion.

DEPARTMENT OF JUSTICE,
February 7, 1893.

SIR: I have the honor to acknowledge the receipt of your letter of February 3, as follows:

"I have the honor to inclose herewith a letter addressed to this Department by Messrs. A. Adler & Co., dated New Orleans, La., December 31, 1892, inclosing two communications received by them in the nature of protests against the proposed building of the 'Rebecca Levee,' under the provisions of the river and harbor act, approved July 13, 1892.

"Accompanying the communication from Messrs. Adler & Co. will be found the report of the Chief of Engineers, U. S. Army, dated the 31st ultimo thereon, and the papers therein referred to; and this Department has the honor to request your opinion whether the levee referred to can be built notwithstanding the protests, and without rendering the United States liable for damages.

"With your reply the return of the papers is requested."

Accompanying the letter is a considerable bundle of papers from which it is apparently expected that I will glean the facts and then give the desired opinion. I am very sorry

that, under the uniform rulings of this office, I am unable to comply with this request.

Mr. Attorney-General Stanbery, in 12 Opinions, page 208, says:

"Where a question of law arises upon facts submitted to the Attorney-General, such facts must be agreed and stated as facts established."

So in 14 Opinions, page 367, Attorney-General Williams says:

"I deem it proper here to remind you that where an official opinion from the head of this Department is desired on questions of law arising on any case, the request should be accompanied with a statement of the material facts of the case, and also the precise questions on which advice is wanted. By the observance of this simple rule the real point of difficulty in the case will be at once perceived, much inconvenience avoided, and more practicable and satisfactory results obtained.".

Without further quotations, it is sufficient to say that without, so far as I know, a single exception it has been held that under section 356 of the Revised Statutes it is permissible for the Attorney-General to give an opinion only upon a case succinctly stated; that is, to answer specific questions of law arising upon facts set forth. (19 Opin., 396, 465; 18 Opin., 487.)

I trust you will appreciate that the failure to respond to your request is not a matter of inclination but of obedience to the law.

The inclosures of your letter are returned.

Respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF WAR.

LICENSE—POWER TO REVOKE.

An instrument purporting to convey the use of a strip of land belonging to the Government, although containing the term "lease," held merely a license which could be terminated at the pleasure of the Department giving it, and the licensee could be properly removed from the land by the Government if he refuses to move out on proper notice.

DEPARTMENT OF JUSTICE,
February 7, 1893.

SIR: It appears by your communication of February 1, instant, that your predecessor in office, on August 28, 1890, gave, or attempted to give, to the Delaware Bay and Cape May Railroad Company, for a term of five years, "the use of a strip of land 50 feet wide through the light-house reservation at Cape May, N. J." Coupled with this grant, as the consideration for it, the railroad company contracted to pay an annual rent of $5; to build and keep up a good, strong, and secure picket fence on both sides of the strip of land during the whole term of occupancy; to furnish "in perpetuity" free passage on the road to all officers and employés of the U. S. Light-House Establishment; and on failure of the company to observe and perform each and every of these stipulations the Secretary of the Treasury is empowered to declare the "lease" void, and it is provided that such declaration shall operate to render it null.

It appears that the railroad company is delinquent with regard to its duty under the "lease," and the question submitted is whether the Secretary of the Treasury, after he shall have declared the "lease" void, will have authority to direct the company to remove its property from the reservation?

I am of the opinion that the Secretary of the Treasury has no authority to make a contract of the kind above stated, in the absence of an act of Congress authorizing him to do so.

What is called a "lease," in this case, amounts, in my judgment, to no more than a license, to which the Secretary can put an end whenever he sees fit.

The President and the Secretary of War have long exercised the authority of giving revocable licenses to individuals and corporations to enter and make use of designated parts of military reservations, where such use brings with it some benefit to the United States. Under a revocable authority of this kind, the Baltimore and Ohio Railroad Company, occupied with its tracks, for many years, a part of the Government reservation at Harpers Ferry, and, in 1864, President Lincoln gave a similar license to the Long Branch and Seashore Railroad Company to use a part of the Government land at Sandy Hook, and, in 1869, he gave the same com-

pany a similar license to use the same property in the same way.

On August 4, 1890, I gave an opinion, that, in view of this long-continued practice of the President and Secretary of War to grant such licenses, it was competent for the Secretary of War to give a revocable license to one Llewellyn to construct and maintain an irrigating ditch, of a certain depth and width, and along a certain line, on the military reservation, at Fort Selden, N. Mex., it being made a condition of the license that the water flowing through the ditch might be used for the purposes of the fort, a manifest advantage to men and animals living in that arid region. (19 Opin., 628.)

Following now, that precedent, and also the opinion of Attorney-General Devens of November 22, 1878, I am of opinion that the instrument called a "lease" only operated as a revocable license, if it had any legal effect, and did not convey any estate in the strip of land now occupied by the Delaware Bay and Cape May Railroad Company, and that the Secretary of the Treasury has power to revoke the license at pleasure, and to remove the property of the company from the reservation upon its failure to do so, after reasonable notice. The company, having entered and occupied under the license and authority of the Secretary of the Treasury, is in no condition to question that authority. It is, therefore, unnecessary for me to express any opinion on the question of the Secretary's power to give licenses to persons to use light-house reservations.

I have the honor to be, sir, your obedient servant,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

Whether various schemes are "dependent on lot or chance" within the meaning of the lottery law, is a mere question of fact upon which the Attorney-General is not authorized to give an opinion.

DEPARTMENT OF JUSTICE,
February 10, 1893.

SIR: Your communication of January 19, 1893, asking my opinion as to whether the various schemes therein referred to are schemes "dependent upon lot or chance," within the meaning of the lottery law, presents no question of law, but a mere question of fact, upon which I am not authorized to give any opinion. The meaning of the words of the lottery law, which you quote, is perfectly clear, and the only question for solution is whether the schemes mentioned are, in point of fact, "dependent on lot or chance?"

Very respectfully, yours,
W. H. H. MILLER.

The POSTMASTER-GENERAL.

REMISSION OF PENALTY—CONTRACT LABOR LAW—COMPROMISE.

Section 2 of the act of March 3, 1891, chapter 551, does not of itself give authority to anyone to settle or compromise judgments entered under the contract-labor act of February 26, 1885, by section 3 of said act, nor does any previous law referred to in section 2 of the act of March 3, 1891, confer that power. (19 Opins., 345, adhered to.)

A mistaken opinion of the legislature concerning the law does not make the law.

DEPARTMENT OF JUSTICE,
February 10, 1893.

SIR: Your communication of January 7 brings to my attention the case of Julius Hess, against whom the United States recovered judgment, on February 23, 1892, in the U. S. circuit court for the northern district of Illinois, for $1,000, the amount of the fine prescribed for the violation of the act of Congress approved February 26, 1885, entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia" (23 Stat., 332), by section 3 of the act.

On November 11, 1892, "an order of court" was entered by the district judge (Blodgett), presumably holding the circuit court of the district, reciting that Hess had offered to pay $50 of the said judgment and the costs, amounting to $173.15, as a compromise; that Hess had no property subject to execution; that he appears to be a sober industrious man, and in other respects a law-abiding citizen, and that the U. S. attorney believes that the interests of the United States will be subserved by accepting the offer. It is then "ordered that the consent of this court be, and it is hereby, given to the compromise and settlement of the said judgment upon the terms of the said offer for the aforegoing reasons."

As you say, that order of the court was entered, apparently, under section 2 of the act of March 3, 1891 (26 Stat., 1084), entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor." That section provides as follows:

"That no suit or proceeding for violations of said act of February 26, 1885, prohibiting the importation and migration of foreigners under contract or agreement to perform labor, shall be settled, compromised, or discontinued without the consent of the court entered of record with reasons therefor."

Upon this state of facts, the following questions are submitted for opinion:

1. Whether the section in question confers the power of itself, independent of any other statute, to settle or compromise the judgment in said case?

2. Whether the said section is such a legislative construction of section 3469, or of any other statute, as confers the power to settle the case in question?

3. Whether the word "proceeding" in this section is such a broad term as will authorize the compromise, settlement, or discontinuance of the action after judgment?

4. Whether, in view of the enactment of said section 2 by Congress, you still hold to the opinion given by you in the Church of the Holy Trinity (19 Opin., 345), that it is doubtful whether the Secretary of the Treasury has power to compro-

mise, settle, discontinue, or remit any fine or judgment for penalty rendered by the U. S. courts for the violation of the act of February 26, 1885 (23 Stat., 332), entitled "An act prohibiting the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia?"

It is unnecessary to answer these questions with any particularity, as I am of opinion that section 2 of the act of March 3, 1891 (*supra*), does not, of itself, give authority to anyone to settle or compromise judgments entered under the act of February 26, 1885 (*supra*), and furthermore, that no other previous law, to which Congress can be deemed to have referred in section 2, confers the power in question. The only previous law which might be supposed to contain such a power is section 3469 (Rev. Stat.), but I have held, in a previous opinion, to which you refer (19 Opin., 345), that it is extremely doubtful whether that section gives authority to the Secretary of the Treasury to compromise a judgment for the fine imposed by the act of February 26, 1885, which is the law under which the judgment in this case, against Hess, was rendered. To that opinion I still adhere.

If we are to infer that Congress supposed, when section 2 was enacted, that the power to compromise judgments for the fine prescribed by the act of February, 1885, resided somewhere, under previous law, the supposition was, in my judgment, mistaken, and can not be accepted as equivalent to a legislative act, or as indicating a purpose to enlarge the scope of section 3469 (Rev. Stat.). As Chief Justice Marshall remarked in *Postmaster-General* v. *Early* (12 Wheat, 136, 148), "a mistaken opinion of the legislature concerning the law does not make law." See also *United States* v. *Claflin* (97 U. S., 546, 548); *Town of South Ottawa* v. *Perkins* (94 U. S., 260, 270); *District of Columbia* v. *Hutton* (143 U. S., 18, 27, 28).

The cases cited fully establish the proposition that the question, whether power existed under previous law to compromise judgments like the one here, before section 2 of the act of 1885 was enacted, is not a legislative but a judicial question, which the court or officer called on to interpret the section must decide for himself. As the remission of these

penalties is within the pardoning power of the President, the inability of the Secretary in the premises entails no hardship.

This seems to dispose of all the questions.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

CUSTOMS-REVENUE CASES—CERTIORARI.

The question whether or not the writ of certiorari should be applied for in the customs-revenue cases, decided by the circuit court of appeals, depends upon the extent and value of the importation, the loss to the Government by reason of the adverse decision, the degree of doubt as to the proper construction, the fact that different circuit courts of appeal have reached opposite conclusions upon the same question, and other like considerations.

DEPARTMENT OF JUSTICE,
February 16, 1893.

SIR: I have your letter of February 3, in which you request my opinion "whether, in all customs-revenue cases, decided by the circuit courts of appeals, the question of review by way of certiorari is to be considered and determined as a condition precedent to the settlement of the cases."

In reply, I have the honor to say that, broadly stated, your inquiry must be answered in the affirmative. Under the construction thus far given by the Supreme Court to the act in question, the test in each case is whether the subject of the controversy is of sufficient importance in itself, and there is also sufficient doubt as to how it should be determined. (*Lau Ow Bew, Petitioner*, 141 U. S., 583; *Lau Ow Bew* v. *United States*, 144 U. S., 47.) In the first of these cases (p. 589) the court declares that this branch of jurisdiction should be exercised sparingly and with great caution; and in the latter case it declares that it has the power to issue a certiorari to a circuit court of appeals in any case except one that can be brought up from such court by appeal or writ of error. In *In re* Woods (143 U. S., 202), however, the court refused a writ of certiorari to a circuit court of appeals on the ground that the questions involved were not important.

With reference to the particular case which has caused this inquiry, and all similar cases, I can only say that the question whether or not a writ of certiorari should be applied for depends, in my opinion, upon the extent and value of the importations, the loss to the Government by reason of an adverse decision, the degree of doubt as to the proper construction, the fact that different circuit courts of appeals have reached opposite conclusions upon the same question, and other like considerations.

Very respectfully,

CHARLES H. ALDRICH,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

TEN PER CENT TAX ON CIRCULATION OF NOTES.

A national bank paying out on checks and otherwise notes of a bank chartered in a foreign country is subject to tax of 10 per cent upon the total amount of all notes it has received and used as a circulating medium.

DEPARTMENT OF JUSTICE,
February 17, 1893.

SIR: I have your letter of February 6, 1893, and inclosures. It appears that the Calais National Bank, of Calais, Me., received from its depositors and others, and paid out on checks and otherwise, in the ordinary course of business, notes issued by the Bank of St. Stephen, a corporation in the Province of New Brunswick, Canada, issuing its own bills and circulating and paying them out as currency. It is stated that these bills are redeemable in gold and silver, and are in good credit and standing as a circulating medium, and that large quantities of them get into circulation along the northern border of the United States. You request an opinion whether the bank of Calais is liable for the tax of 10 per cent on the amount of the notes so circulated, under the provisions of sections 19 and 20 of the act of February 8, 1875 (18 Stat., 311). The sections referred to read as follows:

"SEC. 19. That every person, firm, association, other than national bank associations, and every corporation, State bank, or State banking association, shall pay a tax of 10 per centum on the amount of their own notes used for circulation and paid out by them.

"SEC. 20. That every such person, firm, association, corporation, State bank, or State banking association and also every national banking association shall pay a like tax of 10 per centum on the amount of notes of any person, firm, association other than national banking association, or of any corporation, State bank, or State banking association, or of any town, city, or municipal corporation, used for circulation and paid out by them."

It was decided in *Veazie Bank v. Fenno* (8 Wall., 533), construing section 9 of the act of July 13, 1866, amendatory of prior acts upon the same subject, that Congress had thereby undertaken to provide a currency for the whole country, and that the tax of 10 per cent, although restrictive in its character and not calculated to secure a revenue for the Government, was a legitimate exercise of constitutional authority. The sections under consideration were enacted in furtherance of the same end, and by virtue thereof bills and notes of every kind other than those of national banking associations, when used for circulation, are subject to this tax. As declared by the Supreme Court in *Hollister* v. *Mercantile Institution* (111 U. S., 62), "it was no doubt the purpose of Congress in imposing this tax to provide against competition with the established national currency for circulation as money." Within the limits of the decisions already named, if the notes deposited under the circumstances described in your communication, and herein stated, had been those of a bank of the State of Maine there could be no doubt that they would be subject to the tax provided by the statute referred to. In my opinion the fact that the notes were those of a bank chartered by a foreign province or state can make no difference, nor does the fact that they are not redeemable in any way in the United States. Such notes are equally within the prohibition intended by Congress by the legislation referred to.

You are therefore advised that the bank of Calais is sub-

ject to a tax of 10 per cent upon the total amount of all notes of the Bank of St. Stephen that it has received and used as a circulating medium. (*National Bank* v. *United States*, 101 U. S., 1.)

Respectfully,

CHARLES H. ALDRICH,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

ATTORNEY-GENERAL.

The Attorney-General is neither required nor authorized to give an opinion to the head of a Department except in cases actually pending for decision by him in such Department.

DEPARTMENT OF JUSTICE,
February 24, 1893.

SIR: I have the letter of the Acting Secretary of the Interior of February 21, in which he transmits a copy of a communication from the Commissioner of Indian Affairs, and a copy of "an act of the Creek Council, approved November 5, 1892, instructing the delegates of said nation to present to the Attorney-General of the United States, for his official opinion as to the construction of the second article of the Creek treaty of August 11, 1866 (14 Stat., 785), extending to freedmen the right to return within one year after the ratification of said treaty, whether or not it included those colored persons who were held as slaves in the nation but were sold and removed beyond the limits of the Creek Nation prior to the commencement of the civil war."

Section 356 of the Revised Statutes reads as follows:

"The head of any Executive Department may require the opinion of the Attorney-General on any questions of law arising in the administration of his Department."

From the foundation of the Government it has been held that the Attorney-General is neither required nor authorized to give an opinion to the head of a Department except in cases actually pending for decision by him in such Department. (19 Opin., 7; *Ibid.*, 331.)

As this question is asked not to aid the Secretary of the Interior in the solution of a question to be decided by him, but for the use of the Creek Council, I must, in obedience to the rule of law, decline to give an opinion in the premises.

Respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

LICENSE—GOVERNMENT PROPERTY.

Where the Secretary of the Treasury gives to a company "the use of a strip of land 50 feet wide through the light-house reservation at Cape May, N. J.," and the company contracts to pay an annual rent, to keep a strong picket fence on both sides of the strip of land, and to furnish "in perpetuity" free passage on the road to officers and employés of the U. S. Light-House Establishment, and on failure of the company to perform each and every of these stipulations the Secretary of the Treasury is empowered to declare the "lease" void, and where the property covered by the "lease" was occupied by the Government at that time, and therefore not "unoccupied and unprotected property," *Held*, that what is called a lease in the case amounts to nothing but a license revocable at the pleasure of the Secretary of the Treasury, and that the property of the company can be removed if it fails to remove it after reasonable notice.

DEPARTMENT OF JUSTICE,
March 2, 1893.

SIR: It appears by your communication of February 1, instant, that your predecessor in office on August 28, 1890, gave or attempted to give to the Delaware Bay and Cape May Railroad Company, for a term of five years, "the use of a strip of land 50 feet wide through the light-house reservation at Cape May, N. J." Coupled with this grant, as the consideration for it, the railroad company contracted to pay an annual rent of $5 to build and keep up a good, strong, and secure picket fence on both sides of the strip of land during the whole term of occupancy, to furnish "in perpetuity" free passage on the road to all officers and employés of the U. S. Light-House Establishment, and on failure of the company to observe and perform each and every of these stipulations, the Secretary of the Treasury is empowered to declare the "lease" void, and it is provided that such declaration shall operate to render it null.

It appears that the railroad company is delinquent with

regard to its obligations under the "lease," and the question submitted is whether the Secretary of the Treasury, after he shall have declared the "lease" void, will have authority to direct the company to remove its property from the reservation.

In reply to my letter of the 17th February, instant, asking to know "whether the part of the reservation through which the right of way runs was occupied or unoccupied *at the time the lease was made*," you say, in your letter of the 20th February, instant, "that one part of the Cape May reservation is occupied by the buildings of the Light-House Establishment, the other part by those of the life-saving station," from which I understand that the land covered by the "lease" was occupied by the Government at the time the "lease" was made, and therefore not within the terms of the provisions of the act of March 3, 1879 (20 Stat. 383), authorizing the Secretary of the Treasury to make leases of "unoccupied and unproductive property." I am of opinion, therefore, that the Secretary of the Treasury has no power to bind the Government in this case by the contract called a lease.

What it called a "lease" in this case amounts, in my judgment, to no more than a license, to which the Secretary can put an end whenever he sees fit.

The President and the Secretary of War have long exercised the authority of giving revocable licenses to individuals and corporations to enter and make use of designated parts of military reservations, where such use brings with it some benefit to the United States. Under a revocable authority of this kind the Baltimore and Ohio Railroad Company occupied with its tracks, for many years, a part of the Government reservation at Harpers Ferry, and in 1864 President Lincoln gave a similar license to the Long Branch and Seashore Railroad Company to use a part of the Government land at Sandy Hook, and in 1869 he gave the same company a similar license to use the same property in the same way.

On August 4, 1890, I gave an opinion that, in view of this long-continued practice of the President and Secretary of War to grant such licenses, it was competent for the Secretary of War to give a revocable license to one Llewellyn to construct and maintain an irrigating ditch of a certain depth and width, and along a certain line, on the military reserva-

tion at Fort Selden, N. Mex., it being a condition of the license that the water flowing through the ditch might be used for the purposes of the fort, a manifest advantage to men and animals living in that arid region (19 Opin., 628).

Following now that precedent, and also the opinion of Attorney-General Devens of November 22, 1878, I am of opinion that the instrument called a "lease" only operated as a revocable license, if it had any legal effect, and did not convey any estate in the strip of land now occupied by the Delaware Bay and Cape May Railroad Company, and that the Secretary of the Treasury has power to revoke the license at pleasure, and to remove the property of the company from the reservation upon its failure to do so, after reasonable notice. The company, furthermore, having entered and occupied under the license and authority of the Secretary of the Treasury, is in no condition to question that authority.

I have the honor to be, sir, your obedient servant,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—DISCLAIMER BY THE UNITED STATES.

The facts of a controversy reviewed and decided not to warrant a disclaimer on behalf of the United States of the existence of any power or jurisdiction to interfere with the proceedings of a railroad company to extend its lines.

The Attorney-General will not answer a question purely judicial in its nature.

DEPARTMENT OF JUSTICE,

March 3, 1893.

SIR: Your communication relating to the interests of the United States in Holston street from Broad street to the northeast corner of the national cemetery at Knoxville, in the State of Tennessee, has been duly considered.

The principal questions involved are essentially judicial questions, and are not such as I am authorized to determine.

It appears that by the act of July 28, 1886 (24 Stat., 159), Congress appropriated $6,000 "for the purpose of constructing a macadamized road from the intersection of Broad and Holston streets, thence along the line of Holston street to the intersection of said street with Munson street, at the

northeast corner of the national cemetery at Knoxville, Tenn.: *Provided*, That the right of way not less than 50 feet in width shall first be secured to the United States to any part of the ground over which said road shall run not now owned by the United States."

It appears that the "board of mayor and aldermen of the city of Knoxville," September 3, 1886, passed an ordinance reciting the aforesaid action of the General Government, and continuing:

"Therefore be it ordained, * * * that full power and authority be given to the U. S. Government to go upon said Holston street, construct and improve the same for the purposes indicated in said act, and when so constructed to have jurisdiction of, control, and manage said street to the limits above recited: *Provided, however*, The rights of the public to the free use and enjoyment of said street be in nowise restricted or impaired."

It also appears that Mr. J. A. McCampbell, county road commissioner for the county where said street is situated, did, under a statute of the State which granted "full power, control, and authority with the right to open, close, lay out, and classify all the public roads, and to grade, graduate, and improve the same," assume to grant unto the United States full power and authority to go upon said street, to grade and otherwise improve the same, and when improved to exercise dominion over, control of, and supervision of said street in the same manner and to the same extent that he, the said commissioner, might do by law. But it is not clear that the said "board of mayor and aldermen" was authorized by any statute of the State to secure to the United States the right of way specified in the act of Congress, or that the said county commissioner was empowered by law to grant or convey any such right of way. I understand that the road was macadamized by the use of the money appropriated as aforesaid, and that afterwards the city of Knoxville passed an ordinance purporting to grant to the Fountain Head Railroad Company, a corporation organized under the laws of the State in 1887, a right of way over said Holston street, the same "to be vested and continued in said company, its successors and assigns, fifty years," with the right to the company to build and operate a steam or electric railway—the ordinance to

have the effect of a written contract executed by the city and the railway company.

It is further represented that said company also obtained further privileges in connection with its contemplated railroad, and that April 21, 1890, the company sought, obtained, and accepted from the Secretary of War a license, revocable by the terms thereof, to lay its tracks along said Holston street.

It is represented that after said April 21 said company constructed a railroad, at large expenditure of money, upon and beyond said streets, and operated and still continues to operate the same.

On May 19, 1892, said license was formally revoked by the Acting Secretary of War.

Said company now seeks to extend its tracks by adding a switch 200 feet long on Holston street.

On one hand, protests are made against the use of the street by the railroad company, and on the other, the company claims that said ordinance of September 3, 1886, and the grant assumed to be made by the county commissioners referred to, give to the United States no authority to interfere with the use and enjoyment by the company of its claimed right of way alleged to have been received from the city of Knoxville.

Said company also asks the War Department to expressly disclaim, on behalf of the United States, the existence of any power or jurisdiction to interfere with its acts or proceedings in the premises.

It is my opinion that it does not appear that an occasion exists that requires you to make the renunciation asked for.

In relation to such other questions as may be involved, I find it necessary to say that it is not within the scope of my official authority, as prescribed by statute, to determine the respective rights of the Fountain Head Railroad Company and the United States.

Such questions are judicial in their nature, and if a determination thereof shall be required they should be submitted to the decision of the courts.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

PUBLIC DOMAIN—REMOVAL OF TIMBER.

A railway company which has obtained a grant from the United States of every alternate section of the public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile on each side of its railroad, possesses no authority to select and locate its sections and to despoil the sections it has selected. Any surveys made by the company are without legal effect and do not authorize the company to cut or remove timber.

DEPARTMENT OF JUSTICE,
March 6, 1893.

SIR: Your letter of the 20th ultimo, relative to the removal of timber from unsurveyed public lands within the primary limits of the grant to the Northern Pacific Railroad Company in Montana, has, with the accompanying documents, been carefully considered.

It may be admitted at the outset that the United States granted to the company every alternate section of the public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile on each side of the railroad line through Montana; that the words of the act constituted a grant *in præsenti;* that the road was constructed and is now being operated; and that the lands bearing the timber in question are located along the line thereof.

It appears also that the Government has caused but a small portion of the lands lying along said road—those granted and those not granted—to be surveyed.

As most of this land remains unsurveyed it is impossible to point out or specify the sections which will be designated by odd numbers and which belong to the company or distinguish those which are still portions of the public domain.

It is reported that in many cases the timber constitutes the chief value of the lands, and its removal will leave them comparatively valueless.

By the act of March 3, 1891, which amends the law in relation to timber culture, forbidding the cutting of timber on the public lands, etc. (26 Stat., 1093), it is provided that: "The Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he

may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations;" but the Secretary is not authorized to issue permits to cut timber upon the lands in question still belonging to the United States, because no legal surveys have been made and no sections can be specified and described. (14 L. D., 126.)

It appears to be unquestioned that considerable amounts of timber have been cut upon and removed from these Government and railroad lands which are undistinguishable from each other.

It is officially reported to the Department that the managers of the Northern Pacific Company give opportunity and encouragement to those who remove timber from unsurveyed lands aforesaid; that it places side tracks and switches so as to reach their mills and accommodate them, and furnishes cars and facilities for the removal of the timber to market.

It is reported, also, that the railroad company has caused surveys of its own to be made of the lands lying along the line of its road, and has thus designated certain lots as odd-numbered sections, and assumes to claim such sections and the timber thereon under this private survey, and has permitted the cutting and removal of the timber found on such sections, and has employed agents to ascertain the stumpage and estimate the amount of lumber removed, and collects pay for the stumpage at current rates, and afterwards transports, as freighting agents, the manufactured lumber.

It is represented that the unauthorized surveying of these lands by the company, in which trees are blazed, corner posts set, and bearing trees marked, will tend to occasion confusion in relation to the Government survey when made, and to cause injury to intending settlers, who may be misled by the unauthorized lines so made.

It has been suggested that the decision in *United States* v. *Northern Pacific R. R. Co.* (6 Montana, 351) is controlling, and that it holds that no power exists in the United States to prosecute civil or criminal actions against those unauthorizedly severing and removing timber from lands, portions of which have been granted but have not become segregated

or capable of designation, and other undefined portions of which still remain parts of the public domain.

In that case suit was brought by the United States against the railroad company for an accounting to recover $1,100,000, for timber and lumber alleged to have been converted by the defendant from unsurveyed lands set forth as belonging to plaintiff and defendant as tenants in common, and for a perpetual injunction restraining the defendant from further similar taking and converting.

The complaint had been dismissed upon demurrer.

The opinion (p. 360) states the question involved as follows:

"The foundation of appellant's action rests upon the proposition—first, that the United States and the Northern Pacific Railroad Company are tenants in common of the lands from which the trees and timber in question are alleged to have been taken, and, second, that an accounting as between such tenants in common is a proper remedy."

The court held that the parties were not tenants in common; that each as to the other was the owner of alternate sections; that neither had any interest in the lands of the other; that each had full title to its respective lands, and that therefore a suit for an accounting would not lie, and that the complaint was properly dismissed on demurrer.

It can not be said that by this holding the court decided that the United States is without ascertainable rights or legal remedies as to its interests in this great domain.

It is true the court says (p. 369) that the Government can not make its failure to perform its duty in perfecting the survey "the foundation of an action against the company which a survey in accordance with the requirements of section 6 would have rendered impossible," but this conclusion must be limited to the case before the court and can not properly be held to cover other cases involving other remedies.

It can not be that the railroad company because of the undefined location and boundaries of the respective sections possesses a right to cut timber from and denude the whole 20,000,000 acres of land. Neither has it authority to select and locate its sections and then despoil the sections it has selected. The United States makes its own surveys.

Upon judicial investigation it may be determined that the delays in completing the surveys have suspended the establishment of the full rights of the company, and it may, equitably, be entitled to some compensation therefor; but it is not to be permitted to make its own surveys and to enforce them upon the public, nor is it to be justified in removing timber not shown to be upon lands both owned and possessed by it.

It does not appear, in relation to any of the lands where the timber in question has been removed, or is being taken off, that the identification of a granted section has become so far complete as to authorize the grantee to take possession.

In *Deseret Salt Co.* v. *Tarpey* (142 U. S., 249) it is said that words importing a grant *in præsenti* vest a present title in the grantee "though a survey of the lands and a location of the road are necessary to give precision to it and attach it to any particular tract." And see (*id.*) p. 250, 139 U. S., 5; and 143 U. S., 58.

It is to be noted that by the act of July 31, 1876 (19 Stat., 121), it is enacted: "that before any land granted to any railroad company by the United States shall be conveyed to such company, * * * unless such company is exempted by law from the payment of such cost, there shall be first paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or persons in interest." (See 124 U. S., 127; 142 U. S., 253; 43 U. S., 58.)

It must be noted, also, that considerable portions of the territory affected consist of mountainous country supposed to contain valuable mineral lands, none of which would go to the company.

It is my opinion that the private surveys in question, made by the Northern Pacific Railroad Company, neither entitle the company to the possession of land nor authorize the company to cut or remove timber.

Such surveys are without the authority of law and without legal effect.

The questions of the liability of said company, or of others claiming to act in subordination to the grant made to the company, in cutting timber upon unsurveyed lands lying

within the primary limits of the grant and in removing lumber therefrom, are judicial questions to be determined by the courts, and I recommend that measures, to be initiated by you, be promptly taken to fully test and determine the same, and to protect the Government.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

OPINIONS

OF

HON. RICHARD OLNEY, OF MASSACHUSETTS.

APPOINTED MARCH 6, 1893.

RIGHT OF APPEAL—STIPULATION.

While no legal objection would exist if the right of appeal from judgments of the Court of Claims in the direct-tax cases be waived by both parties by stipulations on the record to the payment of such claims prior to the expiration of the ninety days within which appeals may be taken, the Department of Justice deems it unwise to adopt any general rule of giving such stipulations.

DEPARTMENT OF JUSTICE,
March 17, 1893.

SIR: I have the honor to acknowledge the receipt of your letter of the 13th instant, inclosing a communication from Hon. William Elliott, of March 7, 1893, which is herewith returned.

You are right in the suggestion, that if the right of appeal from judgments of the Court of Claims in the direct-tax cases be waived by both parties by stipulations on record, no legal objection would exist to the payment of such claims prior to the expiration of the ninety days within which appeals must be taken. An opinion to that effect, in a somewhat analogous case, was given by this Department in 1889, Mr. Attorney-General Miller adding: "The question remains of administration, and is so referred to the Secretary of the Treasury."

Since that time, however, it has not been the practice of this Department to make such stipulations. For the purpose of enabling the Secretary of the Treasury, in his estimates for appropriations, to place before Congress the amount of judgments by the Court of Claims against the

Government, the only certificate given has been to the effect that it was not the present intention of the Attorney-General to take appeals from such judgments. And the appropriation bills of recent years have expressly provided that judgments of the Court of Claims therein provided for shall not be paid until the right of appeal shall have expired.

It is true that the appropriation for the refunding of the direct tax is made under the act of March 2, 1891 (26 Stat. L., 822), and not in a general appropriation bill, and that this statute does not contain the restrictive clause above referred to. The direct-tax cases are transmitted to the Court of Claims by the Secretary of the Treasury under section 1063 of the Revised Statutes, and section 707 of the Revised Statutes specifically provides for an appeal to the Supreme Court without reference to the amount involved.

In my judgment, however, this Department should pursue with reference to the direct-tax cases the policy indicated in the general appropriation bills above referred to. Ninety days is not an unreasonable length of time for the Government to take in determining whether or not a judgment of the Court of Claims should be appealed from, especially as after rendition of judgment by that court and consideration of the grounds upon which such judgment is founded, new aspects of the law are not infrequently presented.

The suggestion that all matters of law arising in the direct-tax cases have been already adjudicated is not correct. Various important questions have been argued in cases now pending and have not yet been decided.

On these grounds it does not seem to me wise for this Department to adopt any other general rule in the direct-tax cases than the one now in force. Of course there may be exceptional cases in which, for special reasons, the application of the general rule might work peculiar hardship, and in which it would be proper that the rule should be waived on application by the claimant and recommendation by the Secretary of the Treasury. But such cases must be rare and each should be considered on its own facts and decided on its own special merits.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

BRIDGE—DUTY OF SECRETARY OF WAR.

By the act of February 28, 1891, chapter 382, it is made the duty of the Secretary of War not to select or approve of the exact location of the bridge to be built, but to approve the plans, specifications, and materials used and the manner of construction. If in his opinion the place designated by the company for the location of the bridge is, under all the circumstances, a reasonable compliance with the terms of the act, he has authority to relocate it there if requested to do so.

DEPARTMENT OF JUSTICE,
March 18, 1893.

SIR: Your letter of March 16, 1893, requests my opinion upon the following points connected with the location of a bridge of the Washington and Arlington Railway Company across the Potomac River:

"1. As to whether it devolves upon the Secretary of War at all to select or approve the exact location on which the said bridge shall be built.

"2. If it does, whether he may relocate it, as requested.

"3. If it does not, whether the company has authority to build it at the said terminus of M street without the approval of the Secretary of War as to exact location, but on plans approved by him."

An act to incorporate the Washington and Arlington Railway Company was enacted February 28, 1891 (26 Stat., 789). By its terms the company was authorized "to construct and lay down a single or double track railway * * * by the following route, namely: Beginning on Sixth street near B street northwest; along B street and Virginia avenue northwest to Twenty-sixth street; along Twenty-sixth street to M street; along M street and Canal road to a point on the Potomac River at or near the point known as 'The Three Sisters,' where the said company is hereby authorized to construct and maintain a bridge across the Potomac River on such plans as the Secretary of War may approve; and from thence by, on, and over such lines as may be selected by the said company, with the approval of the Secretary of War, to the northwest entrance of the Arlington Cemetery, and thence through the Arlington estate outside of the cemetery grounds to the south or west line thereof, in the State of Virginia: *Provided*, That said road shall cross the Chesapeake and

Ohio Canal on a bridge that shall be so constructed as not to interfere with the use of the bed or towpath of the canal as a waterway or as a railway, and in a manner satisfactory to the Secretary of War.

* * * * * * *

"*And provided*, That no work shall be done on said road in the District of Columbia, until the plans and specifications for the proposed bridge on the Potomac River at or near 'The Three Sisters' shall have been approved by the Secretary of War, and the construction of said bridge actually commenced.

* * * * * * *

"And said company is hereby authorized to run its said railway through the United States reservation known as Fort Myer and such other land of the United States in the State of Virginia, excepting the Arlington Cemetery grounds, as may be necessary to construct the railway between the points named in this bill; only if the Secretary of War shall deem the same promotive of the public interest and always subject to such conditions and regulations as the Secretary of War may from time to time impose.

* * * * * * *

"SEC. 2. That the railway hereby authorized and lying in the District of Columbia and on the bridge shall be constructed by said company of good materials, and in a substantial manner, with grooved rails of the best pattern, and of a suitable gauge, all to be approved by the Commisioners of the District of Columbia and the Secretary of War jointly."

By the act of July 29, 1892 (27 Stat., 327), it is provided that—

"All acts or parts of acts granting the use of the surface of the Canal road, or any part thereof, for laying railway tracks thereon and operating cars thereon are hereby repealed."

It also appears from your communication and the inclosures transmitted therewith that "The Three Sisters," so called, are three groups of rocks in the Potomac River, the lower one being 2,600 feet above the Aqueduct bridge, and the upper one being 3,100 feet above the same point.

The subsequent act of July 29, 1892, only affects the question by withdrawing the authority to use any portion of

Canal road in approaching the place where the bridge across the Potomac shall be located. In this connection it may be observed that upon the information derivable from the papers I infer that no place on the shores of the Potomac opposite "The Three Sisters" can be reached, either from M street or the Canal road, without the condemnation or acquisition of intervening property.

As the legislation now stands the company is authorized to go along M street to its terminus and to build a bridge across the Potomac at or near "The Three Sisters." This, in connection with section 11 of the act of incorporation, gives the company the right to acquire by any ordinary means the intervening property.

The words "at or near" are not, when used in such a connection, words of definite location. They are relative, and the requirements of the statute will be satisfied, if, all circumstances considered, the bridge is located as near to the point named as is practicable. In other words, a wide discretion is conferred upon a road when it is authorized to locate its terminus or a bridge "at or near" a given point.

As was said in *Fall River Iron Works Co.* v. *Old Colony and Fall River Railroad Company* (5 Allen, 221–227):

"If we look to the language of the statute, it is impossible to find in that clause, which empowers the defendants to establish the point of departure of the road, any fixed or definite rule or standard of measurement or distance by which they are to be governed. They are authorized to commence at a given point or near it. If they embrace the latter alternative, a wide range is necessarily left open to them. The word "near" as applied to space, can have no positive or precise meaning. It is a relative term, depending for its signification on the subject-matter in relation to which it is used and the circumstances under which it becomes necessary to apply it to surrounding objects. One of the definitions which lexicographers give to it is 'not distant from,' a paraphrase which serves to illustrate the vagueness of its meaning. It may be appropriately used to designate distances, which, of themselves, widely differ. A town may be properly said to be near to another town or city, if it is within a distance of a few miles; but if a house is spoken of as near to

another, it signifies that it is within a few feet or rods, if within the limits of a city or thickly settled village, or within a fraction of a mile if in the country where the population is more sparse. So an article of furniture is said to be near to a person or object in the same room, if distant therefrom only a few inches. These illustrations serve to show that the word appropriately expresses a different measure of distance according as it is applied to different objects or subjects."

This rule is illustrated in *Union Pacific R. R. Co.* v. *Hall* (91 U. S., 343, 348); *Bartlett* v. *Jenkins* (2 Foster, 53); *The State, The West Jersey R. R. Co.* v. *Receiver of Taxes of Camden* (38 N. J. L., 290, 302); *The Chesapeake and Ohio Canal Co.* v. *Key* (3 Cranch C. C., 599, 604); *Rio Grande R. R. Co.* v. *City of Brownsville* (45 Tex., 88, 94, 95); *Hazelhurst* v. *Freeman* (52 Ga., 244).

An examination of these and other cases that might be cited shows that the question whether the requirements of such a provision with reference to the location of a structure are complied with depends entirely upon the circumstances of the case. In this instance the proposed location is near Georgetown or "the Three Sisters," as compared with its proximity to the Great Falls or other places on the Potomac River. Whether such proposed location is as near to the point designated as it might reasonably be is not a legal question, but a question of fact, for your determination, and concerning which I have no right to express an opinion.

Answering your question specifically, you are advised that it is not your duty to select or approve the exact location upon which the bridge shall be built. (14 Opin., 254, 256.) Your duty is concerned with the approval of the plans and specifications, and the materials and manner of construction. It is not to be inferred from this that you have nothing to do with the location. On the contrary, while the railroad company has a discretion, as we have seen, it is to be exercised within reasonable limits, and it would manifestly become your duty to refuse to approve plans for the construction of a bridge at a place so far removed from the point indicated in the act of Congress as to be plainly beyond its scope.

If in your opinion the place designated by the company is, under all the circumstances, a reasonable compliance with the terms of the act, you are advised that you have authority to so relocate the bridge as requested.

Your third question is answered by the above.

I have the honor to be, yours, respectfully,

CHARLES H. ALDRICH,

Solicitor-General.

The SECRETARY OF WAR.

Approved:

RICHARD OLNEY.

SAMOAN ISLANDS—APPROPRIATION.

The construction of a pier required in providing a naval and coaling station for the United States in the harbor of Pago Pago is within the intent of Congress as expressed in the paragraph of the sundry civil appropriation act of August 5, 1892, containing the following provision: "For providing naval and coaling stations, $250,000, to be expended under direction of the President;" and such portion of the $250,000 as may be needed for building the pier may be lawfully used whenever the President shall so decree.

DEPARTMENT OF JUSTICE,

March 18, 1893.

SIR: Your communication of the 13th instant relating to the application of certain moneys appropriated by the three several acts of Congress specified has received due consideration.

By the first paragraph of Article II, of the treaty of friendship and commerce concluded between the United States and the Government of the Samoan Islands January 17, 1878, and proclaimed February 13, 1878 (20 Stat., 704), it is agreed that—

"Naval vessels of the United States shall have the privilege of entering and using the port of Pago Pago, and establishing therein and on the shores thereof a station for coal, and other naval supplies for their naval and commercial marine, and the Samoan Government will hereafter neither exercise nor authorize any jurisdiction within said port adverse to such rights of the United States or restrictive thereof."

The diplomatic and consular appropriation act of February 26, 1889, contains the following paragraph (25 Stat., 699):

"For the execution of the obligations and the protection of the interests of the United States, existing under the treaty between the United States and the Government of the Samoan Islands, $500,000, or so much thereof as may be necessary, to be expended under the direction of the President, this appropriation to be immediately available."

The naval appropriation act passed March 2, 1889, contains the following paragraph (25 Stat., 814):

"For the purpose of permanently establishing a station for coal and other supplies for the naval and commercial marine of the United States, on the shores of the bay of the harbor of Pago Pago in the island of Tutuilla, Samoa, for the erection of the necessary buildings and structures thereon, and for such other purposes as may, in the judgment of the President, be necessary to confirm the rights of the United States under article second of the treaty of eighteen hundred and seventy-eight, between the United States and the King of the Samoan Islands, and the deed of transfer made in accordance therewith, one hundred thousand dollars, to be immediately available."

The sundry civil appropriation act of August 5, 1892, contains the following appropriating provision (27 Stat., 349):

"For providing naval and coaling stations, two hundred and fifty thousand dollars, to be expended under direction of the President."

Your communication informs me that $42,639.17 of the $100,000 appropriated by the quoted paragraph of the act of March 2, 1889, has been paid out, leaving $57,360.83 unexpended.

It appears, also, that advertisement has been made by the Government inviting proposals for the construction of an iron and steel pier at the United States coaling station in the harbor of Pago Pago, Samoa, in response to which several proposals were received, the lowest of which proposed to perform the work for $78,700, or $21,339.17 less than the balance of that appropriation.

It is stated that all bids were rejected, and that a new advertisement in the premises is in contemplation.

My opinion is requested as to whether moneys other than those constituting the remaining balance of the $100,000 appropriated by the act of March 2, 1889, may be lawfully applied to the construction of a pier at the United States coaling station in the harbor of Pago Pago, Samoa.

It may be noted that $36,041.87 of the deficiency existing in said $100,000 appropriation was for expenses incurred in purchases, shipment, and discharge of coal for the naval station at Pago Pago, the application thereof being approved by a paragraph of the urgent deficiency act of April 4, 1890. (26 Stat., 39.)

But no indication appears of any change of intent on the part of Congress as to establishing the naval and coaling station referred to, or as to the erection of the buildings and structures authorized by the act of March 2, 1889.

It is understood that the United States has from time to time acquired and now holds valuable interests and rights on the shores of the bay in the harbor of Pago Pago.

It is evident that the clause of Article II, above quoted, constitutes an important element of the treaty of agreement entered into by the high contracting parties.

The appropriation of February 26, 1889, is a significant recognition by Congress of the obligations of the Government arising out of the treaty, and of the interests of the United States coming into existence thereunder.

The paragraph of the act of March 2, 1889, under consideration, declares the purpose of permanently establishing a coaling and supply station for the naval and commercial marine of this country on the shores of the bay of the harbor of Pago Pago, and no subsequent legislative expression is found which modifies this declaration.

The provision of the act of August 5, 1892, appropriates $250,000 "for providing naval and coaling stations," the same "to be expended under the direction of the President."

In making this appropriation it must be inferred, necessarily, that Congress did not lose sight of the enactments of March 2, 1889, and April 4, 1890, or of the treaty of 1878, or of the rights and interests of the United States obtained thereunder.

The employment of the moneys specified is only limited to the uses of providing naval and coaling stations, and the

direction of the President is the only condition prescribed to authorize the application.

It has been held that grants of authority of the nature of that contained in this item of appropriation, made to the President, are to be liberally construed.

The character and scope of the paragraph show the intent of placing the moneys in the hands of the Executive subject only to the most general directions, so that he may, upon occasion, and subject to the limitations of the clause, make use of the specified portion of the public funds for the nation's benefit as he shall deem fit.

In this connection permit me to invite your attention to an opinion submitted to the Secretary of the Navy, under date of October 8, 1890, and to one submitted to the Secretary of State, under date of November 12, 1892, by my predecessor in office.

It is my opinion that the construction of a pier required in providing a naval and coaling station for the United States in the harbor of Pago Pago is within the intent of Congress, as expressed in the paragraph of the act of August 5, 1892, under consideration.

It follows, that such portion of the $250,000 appropriated by that paragraph as may be required to secure the building of the pier may be used lawfully in providing the same, whenever the President shall direct such portion to be applied to the purposes of such construction.

In view of the conclusion reached, as stated, I do not deem it of consequence to consider whether moneys carried by the quoted paragraph of the act of February 26, 1889, might lawfully be added to the remainder of the appropriation of March 2, 1889, in order to provide a fund to construct the contemplated pier.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

CIVIL SERVICE COMMISSION—PRODUCTION OF RECORDS.

The boards of civil-service examiners, though subordinate to the Commission, may be regarded as officials of the respective Departments in connection with which they act. Their application and examination papers are official records, or papers of the President, or of a head of a Department, and the production of those papers can not be compelled whenever the general public interest is paramount to the interest of private suitors, and the President or head of a Department having the legal custody of such records must determine when the public interest forbids such production.

DEPARTMENT OF JUSTICE,
March 31, 1893.

SIR: I have your communication of the 22d instant, made at the instance and for the use of the Civil Service Commission, requesting an opinion upon this question:

Can a court require, on subpœna, the production of any application or examination papers or other records of the boards of civil-service examiners?

I assume that what is desired is a statement of rules to be acted upon in the practical conduct of affairs rather than a discussion of the principles and precedents upon which such rules are founded, and, in that view, have the honor to submit the following conclusions:

1. The general power of appointment to office being in the President, qualified only by the right of Congress to vest the appointment of inferior officers in him in the courts of law, or in the heads of Departments, the Civil Service Commission is to be regarded as an advisory board subordinate to the President, reporting to him, and clothed with the function of aiding the President or any head of Department in the exercise of the appointing power.

2. The boards of civil-service examiners are selected by the Civil Service Commission, and, though subordinate to the Commission, may properly be regarded as officials of the respective Departments in connection with which they act.

3. The application and examination papers or other records of the civil-service examiners are therefore the official records or papers of the President or of the head of a Department.

4. Being records and papers of the character described, their production can not be compelled by the courts whenever the general public interest must be deemed paramount to the interests of private suitors.

5. Whether such general public interest forbids the production of an official record or paper in the courts and for the purposes of the administration of justice, is a question not for the judge presiding at the trial in aid of which the record or paper is sought, but for the President or head of Department having the legal custody of such record or paper.

And such question may be determined either as and when arising in each particular case and upon its own peculiar facts and merits, or in advance, by general rules applicable to all records and papers, or by special rules applicable to special classes of records or papers.

Very respectfully,

RICHARD OLNEY.

The PRESIDENT.

DIRECTOR OF THE BUREAU—APPOINTMENT—REMOVAL.

The Secretary of State of the United States is authorized to appoint the director of the Bureau of American Republics without the assent of the other countries contributing to the support of the Bureau, and to remove such director and appoint another in his place without such assent.

DEPARTMENT OF JUSTICE,
April 4, 1893.

SIR: I have your communication of the 30th of March last, submitting for an official opinion, the following questions:

"Your opinion is requested as to the authority of the Secretary of State to appoint the director of the Bureau (of American Republics) himself without requesting the assent of the other countries contributing to the support of the Bureau."

"Second. Whether after the establishment of the Bureau and the appointment of the director as stated, for the benefit of the several republics represented, the Secretary of State has authority to remove the director and appoint another in

his place without the consent of the other governments represented in the Union."

The report of the International American Conference submitted to Congress by the President June 2, 1890 (Senate Ex. Doc., 135), shows that the conference intended that the Bureau should be and remain under the supervision of the Secretary of State of the United States. (Par. 2, Title "II, Bureau of Information.")

It is provided (par. 11) that the maximum expense of the annual maintenance of the Bureau shall be $36,000, and a detailed estimate of the organization of the Bureau, "subject to such changes as prove desirable," is presented, which includes one director, one secretary, translators, and other assistants.

The United States is to advance annually the $36,000, or so much thereof as may be required, and the other governments belonging to the conference are to contribute their respective portions annually, which are to be transmitted to the Secretary of State, who is requested to organize and establish the Bureau.

By the diplomatic and consular appropriation act passed July 14, 1890 (26 Stat., 275), an appropriation of $49,750 is made to enable the President to carry the recommendations of the conference into effect so far as he shall deem it expedient, and it is directed that the same "shall be expended under the direction and subject to the approval of the Secretary of State."

Said act also contains the following paragraph:

"For the organization and establishment, under the direction of the Secretary of State, of 'The International Union of American Republics for the prompt collection and distribution of commercial information,' thirty-six thousand dollars, and the sums contributed by other American Republics for this purpose, when collected, shall be covered into the Treasury."

The corresponding acts passed July 16, 1892, and March 1, 1893, also make appropriations for the support of the Bureau and provide for the covering of the contributions of other nations into the Treasury.

The Bureau having been thus established with a director and other officers and employés, as recommended, the first

bulletin issued by the Bureau, dated January, 1891, refers to such recommendations and adds (p. 6):

"In accordance with this recommendation the Congress of the United States, at its last session, authorized the establishment of the Bureau of American Republics, and made an appropriation to sustain it during the current year."

On the foregoing facts I answer the specific questions submitted as follows:

(1) In my judgment the Secretary of State of the United States was undoubtedly authorized to appoint the director of the Bureau referred to without calling for the assent of the other countries associating as "The International Union of American Republics for the collection and distribution of commercial information."

The recommendations of the International American Conference are for the establishment of a Bureau "under the supervision of the Secretary of State," who is requested by it "to organize and establish" such Bureau.

The language of the act of Congress of 1890 appropriating money for the organization and establishment of such Bureau is equally explicit and declares, in so many words, that it is to be done "under the direction of the Secretary of State."

The reason of the thing is in accord with the language employed. By the scheme for the establishment of the Bureau, an associate neither surrenders any rights or powers nor acquires any. One of them is simply selected to perform an onerous duty in the interest of all, and, if it would accept the burden, might, for obvious reasons, be justly expected to have complete and unlimited authority as to the organization and establishment of the Bureau and all details connected therewith.

The suggestion that, as all the associates contribute to the expense of the Bureau, all might be expected to have a voice in its organization and establishment, is without force when it is considered that the United States advances in the first instance all the moneys required for the expenses of the Bureau, contributing as much as all the rest put together, and can rely for its partial reimbursement only upon their voluntary payment.

(2) In my judgment the power of the Secretary of State of the United States to remove the director is as clear and unqualified as is his power of original appointment.

That the Bureau was meant to be a continuing institution, that is to be maintained as well as to be organized and established is unquestionable.

It inevitably results that the Secretary of State has the power to remove the director whenever in his judgment the interests of the Bureau require, just as he would have the like power if the office became vacant by the resignation of the incumbent or by his death or other disability.

In the cases named and every like case, such power in the Secretary of State is necessarily implied: First, because unless such power exists somewhere, the Bureau can not possibly be maintained; and, second, because no construction can be put upon the report and recommendations of the International American Conference or upon the acts of Congress, which locates the power elsewhere than in the Secretary of State.

If it is not granted to him, it is not granted at all, and the object of the conference in its recommendations, and of Congress in endeavoring to give them effect is inevitably defeated.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF STATE.

DISBURSING OFFICER—FALSE VOUCHER.

Where an Indian agent's account contains a receipt roll which is not an original paper at all but merely an abstract of several subvouchers which accompany it, and where the voucher on which one false item rests is confined to that item and has no relation to any other matter in the account to which it belongs, the penalty of section 8 of the act of July 4, 1884, chapter 180, reaches no further than to take away the agent's right to credit for any part of that item.

And where a false item occurs in a printed form entitled "pay roll of regular employés," and is signed by 12 persons, each stating opposite to his name the kind of work done by him, the receipts so taken are so many separate and distinct vouchers within the meaning of the proviso of the above section.

DEPARTMENT OF JUSTICE,
April 4, 1893.

SIR: It appears by the letter of the Second Comptroller of the Treasury of March 17, 1893, addressed to you, that certain questions of law have arisen in the Comptroller's office with reference to the accounts of J. Lee Hall, Indian agent at the Kiowa, Comanche, and Wichita Agency, for the second quarter of the fiscal year 1886, and for the fourth quarter of the same year. That letter has been referred to me by you for an opinion upon the questions therein stated.

Two questions are presented, and they both arise under section 8 of the act of July 4, 1884, chap. 180 (23 Stat., 97), which is as follows:

"That any disbursing or other officer of the United States, or other person, who shall knowingly present, or cause to be presented, any voucher, account, or claim, to any officer of the United States, for approval or payment, or for the purpose of securing a credit in any account with the United States, relating to any matter pertaining to the Indian service, which shall contain any material misrepresentation of fact in regard to the amount due or paid, the name or character of the article furnished or received, or of the service rendered, or to the date of purchase, delivery, or performance of service, or in any other particular, shall not be entitled to payment or credit for any part of said voucher, account, or claim; and if any such credit shall be given or received, or payment made, the United States may recharge the same to the officer or person receiving the credit or payment, and recover the amount from either or from both, in the same manner as other debts due the United States are collected: *Provided*, That where an account contains more than one voucher the foregoing shall apply only to such vouchers as contain the misrepresentation: *And provided further*, That the officers and persons by and between whom the business is transacted shall, in all civil actions in settlement of accounts, be presumed to know the facts in relation to the matter set forth in the voucher, account, or claim: *And provided further*, That the foregoing shall be in addition to the penalties now prescribed by law, and in no way affect proceedings under existing law for like offenses. That

where practicable this section shall be printed on the blank forms of vouchers provided for general use."

The facts, together with the questions growing out of them, as stated by the Comptroller in his letter already referred to, are as follows:

"A 'receipt roll' constitutes one of the vouchers in the account of Mr. Hall for the second quarter of the fiscal year 1886. It contains a caption: 'We, the subscribers do hereby acknowledge to have received of J. Lee Hall, Indian agent, * * * the sums set opposite our names respectively, being in full of our pay for the objects herein expressed,' etc. W. C. Morrill is among the sixteen persons who signed this roll. He thereby acknowledges to have received $319 for doing certain work therein mentioned. The item, as is the case with every other item on this roll, is supported by a voucher. The voucher in support of this item is as follows:

THE UNITED STATES TO W. C. MORRILL, DR.

1886.		
Apr. 10.	For breaking 56 acres of land, at $2.75 per acre..........	$154
May 26.	For breaking 60 acres of land, at $2.75 per acre..........	165
		319

"Received at K. C. and W. Agency August 26, 1886, of J. Lee Hall, Indian agent, three hundred and nineteen dollars in full of the above account.

"W. C. MORRILL.

"I certify on honor that the above account is correct and just, and that I have actually, this 26th day of August, 1886, paid the amount thereof.

"J. LEE HALL,
"*Indian Agent.*"

"As it is known to this office that this voucher contains a 'material misrepresentation of fact in regard to the amount * * * paid,' the question arises whether under section 8 of the act of July 4, 1884 (23 Stat., 97, 98), credit shall be refused in the settlement of Mr. Hall's account for the second quarter, 1886, for this entire 'receipt roll,' or only for the item contained in it supported by Mr. Morrill's receipt, above quoted.

"In the account of this same agent for the fourth quarter, 1886, there is a 'pay roll of irregular employés' containing

a caption similar to the one on the 'receipt roll,' above mentioned. Thomas Woodard is one of the twelve who sign this pay roll. By his signature it is indicated that J. Lee Hall, U. S. Indian agent, paid him $16 for eight days' work in December, 1886, on grist mill. As at present advised this office believes that this statement is untrue—that it contains a 'material misrepresentation of fact in regard to the * * * service rendered,' and the question arises whether under the section of the act of Congress above mentioned credit shall be refused Mr. Hall for the amount of the whole pay roll, which is $225.75, or for the amount only of the payment to Woodard, $16, there being in this case no receipts or subvouchers from any of the persons who sign this roll.

"In both cases the roll itself is styled in the account of the agent as the voucher, but in the case of the 'receipt roll' in the second quarter's account there are receipts or subvouchers, and in the case of the 'pay roll' in the fourth quarter's account, none."

Through the kindness of the Comptroller, I have before me the 'receipt roll' that forms part of the agent's account for the second quarter, and from which the Comptroller makes an extract in his letter. It seems to be all in the same handwriting, and I am satisfied is not an original paper at all, but merely an abstract of the several subvouchers which accompany it, and so is not a voucher, in any proper sense of the term. In this view, I am at liberty to say, the Comptroller entirely concurs.

This makes it easy to determine the effect of the fraud supposed to exist in the item of $319, for which Agent Hall claims credit in the account for the second quarter.

Section 8 of the act of 1884, after declaring that "any disbursing or other officer of the United States or other person who shall present any voucher account or claim * * * relating to any matter pertaining to the Indian service, which shall contain any material misrepresentation of fact * * * shall not be entitled to payment or credit for any part of said voucher, account, or claim, * * * then provides, as we have seen, "that where an account contains more than one voucher the foregoing shall apply only to such vouchers as contain the misrepresentation."

The voucher, inaptly termed a "subvoucher," on which the

item of $319 rests, being confined to that item, and having no relation to any other matter or thing in the account to which it belongs, I am of opinion that the penalty of the statute reaches no further than to take away the agent's right to credit for any part of that item.

The other question presented relates to the small item of $16, for which the agent claims a credit in his said account for the fourth quarter as money paid to Thomas Woodard, for eight days' work on a grist mill, in December, 1886.

The pay roll, in which this item occurs, is a printed form, and entitled "Pay roll of irregular employés," and begins in this way: "We, the undersigned, irregular employés, hereby acknowledge to have received from J. Lee Hall, U. S. Indian agent, the amount set opposite to our respective names, being in full payment for services rendered at the K. C. and W. Agency, during the *month* of July, August, and September, 1886, signed in triplicate."

The roll is signed by 12 persons, and opposite the name of each one is a statement of the kind of work done by him, the number of days he was employed, and at what rate per day, and the amount paid him. This roll, like the "receipt roll," is referred to as a voucher by the agent in his account, and is so styled at the foot of the roll and in the printed titling on the back of it.

The aggregate of all the payments receipted for in this roll is $221.75, and the roll is referred to in the agent's account as a single voucher supporting a credit for that amount.

The item of $16, alleged to have been paid Thomas Woodward, turns out to be false, and the question arises whether its presence on the pay roll destroys the effect of the whole roll as a voucher for the credit of $221.75, under section 8 of the act of 1884, or whether the law operates only on the particular item tainted with fraud.

It seems clear that the agent might have taken receipts on separate pieces of paper from the employés who signed the pay roll, and that, under section 8 of the act of 1884, fraud in any of the receipts so taken would not have destroyed the effect of the others as vouchers. I am unable to see, then, how it can make a material difference that the agent has, for convenience, taken all the receipts on one piece of paper, and in a way to keep them as distinct from one

another, in every material particular, as though they had been written on separate pieces of paper. It seems to me, therefore to be a reasonable interpretation of the *proviso* placing a restriction on the penal effect of section 8 of the act of 1884, to hold that the receipts thus taken are so many separate and distinct vouchers within the meaning of the *proviso*, and consequently, that under the statute the fraud said to exist in the receipt for $16 only operates to deprive the agent of the right to acredit for any part of that sum, leaving the other receipts unaffected as vouchers.

This, I believe, disposes of the whole subject submitted.

Very respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

WORLD'S FAIR—APPROPRIATION.

The various acts and sections of acts appropriating money for the World's Columbian Exposition, viz, section 6 of the act of April 25, 1890, chapter 156, the act of August 5, 1892, chapter 381, and the paragraph in the sundry civil bill of March 3, 1893, chapter 208, construed and interpreted.

DEPARTMENT OF JUSTICE,
April 10, 1893.

SIR: By your letter of April 6, 1893, you ask my opinion as to the interpretation of the following section of the act making appropriations for the sundry civil expenses of the Government for the fiscal year ending June 30, 1894, approved March 3, 1893:

"To enable said commission and the Board of Lady Managers to give effect to and execute the provisions of section six of the act of Congress approved April twenty-fifth, eighteen hundred and ninety, authorizing the World's Columbian Exposition, and appropriating money therefor, relating to committees, judges, and examiners for the exposition, and the granting of awards, five hundred and seventy thousand eight hundred and eighty dollars, or so much thereof as in the judgment of the lady managers may be necessary, of which sum twenty-five thousand dollars shall be immediately available: *Provided*, That of this sum one hundred thousand dollars shall be devoted to the payment of judges, examiners.

and members of committees to be appointed by the Board of Lady Managers, as authorized by said section. *And provided further*, That said sum of five hundred and seventy thousand eight hundred and eighty dollars shall be charged against the World's Columbian Exposition, and that of the moneys appropriated for the benefit of the World's Columbian Exposition, amounting to two million five hundred thousand dollars, under the act of August fifth, eighteen hundred and ninety-two, five hundred and seventy thousand eight hundred and eighty dollars shall be retained by the Secretary of the Treasury until said World's Columbian Exposition shall have furnished to the satisfaction of the Secretary of the Treasury full and adequate security for the return and repayment by said World's Columbian Exposition to the Treasury of the sum of five hundred and seventy thousand eight hundred and eighty dollars, on or before October first, eighteen hundred and ninety-three; and until such security shall have been furnished by said World's Columbian Exposition, this appropriation, or any portion thereof, shall not be available."

You also quote section 6 of the act of Congress, approved April 25, 1890, referred to in the section cited above, which reads as follows:

"That the said commission shall allot space for exhibitors, prepare a classification of exhibits, determine the plan and scope of the exposition, and shall appoint all judges and examiners for the exposition, award all premiums, if any, and generally have charge of all intercourse with the exhibitors and representatives of foreign nations. And said commission is authorized and required to appoint a board of lady managers of such number and to perform such duties as may be prescribed by said commission. Said board may appoint one or more members of all committees authorized to award prizes for exhibits, which may be produced in whole or in part by female labor."

Also the act of August 5, 1892, which provides:

"That for the purpose of aiding in defraying the cost of completing in a suitable manner the work of preparation for inaugurating the World's Columbian Exposition, authorized by the act of Congress approved April twenty-fifth, anno Domini eighteen hundred and ninety, to be held at the city

of Chicago, in the State of Illinois, there shall be coined at the mints of the United States silver half dollars of the legal weight and fineness, not to exceed five million pieces, to be known as the Columbian half dollar struck in commemoration of the World's Columbian Exposition, the devices and designs upon which shall be prescribed by the Director of the Mint, with the approval of the Secretary of the Treasury; and said silver coins shall be manufactured from uncurrent and subsidiary silver coins now in the Treasury, and all provisions of law relative to the coinage, legal-tender quality, and redemption of the present subsidiary silver coins shall be applicable to the coins issued under this act, and when so recoined there is hereby appropriated from the Treasury the said five millions of souvenir half dollars, and the Secretary of the Treasury is authorized to pay the same to the World's Columbian Exposition, upon estimates and vouchers certified by the president of the World's Columbian Exposition, or in his absence or inability to act, by the vice-president, and by the director-general of the World's Columbian Commission, or in his absence or inability to act, by the president thereof, and the Secretary of the Treasury, for labor done, materials furnished, and services performed in prosecuting said work of preparing said exposition for opening as provided by said act approved April twenty-fifth, eighteen hundred and ninety; and all such estimates and vouchers shall be made in duplicate, one to be filed with the Secretary of the Treasury, the other to be retained by the World's Columbian Exposition: *Provided, however,* That before the Secretary of the Treasury shall pay to the World's Columbian Exposition any part of the said five million silver coins, satisfactory evidence shall be furnished him showing that the sum of at least ten million dollars has been collected and disbursed as required by said act: *And provided,* That the said World's Columbian Exposition shall furnish a satisfactory guaranty to the Secretary of the Treasury that any further sum actually necessary to complete the work of said Exposition to the opening thereof has been or will be provided by said World's Columbian Exposition, but nothing herein shall be so construed as to delay or postpone the preparation of the souvenir coins hereinbefore provided for.

And there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of fifty thousand dollars, or so much thereof as may be necessary to reimburse the Treasury for loss on the recoinage herein authorized.

"SEC. 2. That the appropriation provided in section one of this act shall be upon condition that the said World's Columbian Exposition maintain and pay all the expenses, costs, and charges of the great departments organized for the purpose of conducting the work of the Exposition, said expenses, costs, and charges to be paid out of the funds of the said World's Columbian Exposition."

And state that you desire to be advised upon the following points:

"First. After authorizing by act approved August 5, 1892, cited above, the coinage of 5,000,000 pieces, to be known as the Columbian half-dollar, and the delivery of the same to the World's Columbian Exposition upon certain conditions named in the act, which have been in the main complied with to the satisfaction of the Secretary of the Treasury, and who by reason of the observance of said conditions has delivered to the said World's Columbian Exposition 3,858,240 pieces of said coins, has Congress the power to impose new conditions upon the World's Columbian Exposition unless the said World's Columbian Exposition furnish adequate security that it will return and pay the sum of $570,880 appropriated by the section of the act under consideration.

"Second. In the event that the World's Columbian Exposition decide not to furnish security for the return and repayment of the $570,880, referred to in section 1, quoted above, can the Secretary of the Treasury pay out said $570,880, or any part thereof, for the purposes named in said section?

"Third. If you are of the opinion that on the failure or refusal of the World's Columbian Exposition to furnish adequate security for the return and repayment of said $570,880, and that it is the duty of the Secretary of the Treasury to withhold payment of the whole of said appropriation, shall the Secretary of the Treasury also withhold the payment or delivery of the souvenir coins known as the Columbian half-dollar to the amount and value of $570,880?"

Your first question must be answered in the affirmative.

The World's Columbian Exposition is to be regarded as a national undertaking, the Illinois corporation of that name being simply an agency of the United States for the purpose of carrying out that undertaking, and subject to certain restrictions and conditions as to the expenditure of the money which those composing it, as a State corporation, have undertaken to provide in part, with a view of having the Exposition located at a certain place. Any amounts of money appropriated by Congress must be held to have been appropriated in furtherance of this purpose and in the nature of a bounty upon which Congress may at any time impose new conditions.

Your second and third inquiries may be answered together.

The entire third paragraph of the act of March 3, 1893, indicates haste or carelessness in its preparation or enrollment. Nevertheless, taken in connection with the other sections to which my attention is called, it is my opinion that the intention of Congress is reasonably plain.

The purpose to have a Bureau of Awards, who should dispense the medals and diplomas, prepared under the direction of the Secretary of the Treasury, had been declared by the earlier acts referred to. Provision is also made with reference to these medals and diplomas by the act of March 3, 1893.

It is evident that by the first section quoted Congress did not intend to make a permanent appropriation beyond the $2,500,000 of silver coin, provided for by the act of Congress of August 5, 1892. Therefore, as security that the amount here appropriated, to wit, $570,880, shall be repaid, it enacts that either, first, that amount shall be retained from the $2,500,000 referred to in the act, and of which a sum in excess of the amount appropriated for judges is understood to be subject to the control of the Secretary of the Treasury, or, second, security may be given by the World's Columbian Exposition for the return and repayment of the sum of $570,880 on or before October 1, 1893.

In the latter event both the $2,500,000 appropriated by the earlier act, and the $570,880 are to be subject to payment as in the acts provided. But in the event that the World's Columbian Exposition neglects or refuses to furnish the security contemplated by the act, you are advised that the

appropriation of the amount named in the act under consideration is, nevertheless, in my opinion, provided for. It will then be your duty to retain a like amount from the appropriations under the act of August 5, 1892.

It is not to be supposed that Congress intended that a default in furnishing such security shall both make the amount named in the act a lien against the fund named and also make the amount of the appropriation unavailable. Such a construction would amount simply to a demand for a bond and a withdrawal of aid already given in default of compliance with such demand. Instead of aiding what must be deemed a national enterprise, it would amount to a withdrawal of aid therefrom. This does violence to the known intention of Congress.

Again, $25,000 of the amount appropriated, it is provided, "shall be immediately available," which negatives the idea that no part is available unless security by the World's Columbian Exposition shall have been furnished.

In this connection I would state that I am informed that the words "or so much thereof as in the judgment of the lady managers may be necessary, of which sum $25,000 shall be immediately available," are properly a part of the first proviso, which should read:

"*Provided*, That of this sum one hundred thousand dollars shall be devoted to the payment of judges, examiners, and members of committees to be appointed by the Board of Lady Managers, as authorized by said section, or so much thereof as in the judgment of the lady managers may be necessary, of which sum twenty-five thousand dollars shall be immediately available."

The language, "until such security shall have been furnished by said World's Columbian Exposition, this appropriation, or any portion thereof, shall not be available," must, in my opinion, be limited to the amount of prior appropriation of August 5, 1892, retained as security for the payment of the awards.

It is not my opinion that you should withhold payment of the whole of the unexpended portion of the appropriation of August 5, 1892, but only an amount equal to the amount appropriated by the act of March 3, 1893.

It is also my opinion that you can pay out the sum of $570,880, or any part thereof, for the purposes named in said section.

You also direct my attention to a letter from Edwin Walker, chairman of the Committee on Legislation, World's Columbian Exposition, and ask:

"1. If the World's Columbian Exposition would furnish the security and receive the amount of the appropriation withheld by the Secretary of the Treasury by direction of the last act of Congress, could the World's Columbian Exposition assume the payment of the entire cost of the Bureau of Awards, and thereby relieve itself of the indemnity which it is required to file?

"2. If the World's Columbian Exposition decline to file the security required by the act of Congress which you are asked to construe, can the Secretary of the Treasury pay the cost and expenses of the Bureau of Awards out of the $2,500,000 appropriation reserved by the Department under the last act of Congress?"

The first inquiry must be answered in the negative. It was not intended by this act to allow the World's Columbian Exposition to make any profit through the amount appropriated for the Bureau of Awards. The only conditions upon which the World's Columbian Exposition can obtain control of the expenditure of the money are to be found in the act.

The answers to these inquiries may be summarized in this way: I regard the act of March 3, 1893, as an appropriation of a specific amount of money, devoted to certain purposes, and to be delivered to the World's Columbian Exposition, under the conditions stated in the act, as I have construed the act in this opinion. The expenses of the Bureau of Awards are to be paid out of this appropriation and not out of the $2,500,000 provided by the act of August 5, 1892, of which last-named sum an amount equal to this appropriation is, in my opinion, in the default of security by the World's Columbian Exposition, to be retained in the Treasury, and, by subsequent legislation or proper proceedings, to be covered back into the Treasury for the benefit of the Government, and to recompense the Government to the extent of the actual

expenses on account of the Bureau of Awards. It is held simply as a reserve fund for that purpose, and any unexpended balance, in the present state of legislation, would doubtless apply to the World's Columbian Exposition.

I have the honor to be, respectfully, yours,

CHARLES H. ALDRICH,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

RICHARD OLNEY.

HEAD OF DEPARTMENT—APPROPRIATION—DETAIL FOR DUTY—PROMOTIONS—SECRETARY OF AGRICULTURE.

The head of a Department incurs no personal liability by executing an instrument which should not have been executed if he acts in reliance upon properly chosen subordinates whose ability and good faith he has no reason to question.

The expense of printing and binding such Animal Industry Reports as the Secretary of Agriculture is authorized to publish, may, under his direction, be paid out of the $850,000 appropriation approved July 5, 1892, for the use of the Bureau of Animal Industry in his Department; it was not intended that such expense should be paid out of the $75,000 appropriated and placed in the hands of the Public Printer for use in the Department of Agriculture.

The Secretary of Agriculture may detail a person now in the classified service of his Department to duty elsewhere within the classified service of his Department provided his compensation be not increased. In the Department of Agriculture it is permissible to promote from class 1 to class 3 and from class 2 to class 4, without regard to intermediate steps.

DEPARTMENT OF JUSTICE,
April 12, 1893.

SIR: I have your communication of the 27th of March, submitting for my official opinion four several questions.

1. The first is as follows:

"Is the Secretary of Agriculture justified, at any time, in approving, by his signature, vouchers or other instruments in writing, involving the expenditure of public moneys, merely because such voucher or other instrument has first been approved, in writing, by the chief of division of accounts, who has given bond to the United States in the sum of $50,000 for the faithful performance of his duties?"

It is assumed that the question thus stated is a question not of ethics but of law, and calls for an opinion as to the legal responsibility of the Secretary for signatures to instruments given under the circumstances named. Also that the chief of the division of accounts is an officer selected with due care and charged with the duty of verifying the validity and correctness of such instruments, and that the Secretary is without knowledge or notice of any facts impugning the competency or validity of such officer.

Under such circumstances the signatures of the Secretary do not, in my judgment, involve him in any personal liability, even if it should turn out that the instruments signed by him ought not to have been executed.

The head of a Department like that of Agriculture must of course exercise due care in every official act connected therewith. But as his personal investigation of every detail is in the nature of things impossible, he has a right to act in reliance upon properly chosen subordinates whose ability and good faith he has no reason to question.

2. Your second inquiry, including its preliminary statement, is as follows:

"There is appropriated for the present fiscal year (approved July 5, 1892), $850,000 for the use of the Bureau of Animal Industry, under this Department. The language of the act making this appropriation is as follows:

"'And the Secretary of Agriculture is hereby authorized to use any part of this sum as he may deem necessary or expedient, and in such manner as he may think best, * * * for printing and publishing such reports relating to animal industry as he may direct.'

"A general Department printing fund of $75,000 is appropriated and placed in the hands of the Public Printer for use of the Department of Agriculture, 'of which $10,000 is reserved for the use of the Weather Bureau.'

"It is within the province of the Secretary of Agriculture to direct, in his discretion, as against which one of these two appropriations should be charged the expense of printing and binding pertaining to the Bureau of Animal Industry ('Report on the Sheep Industry of the United States,' for example?)"

In my judgment the expense of printing and binding such

animal industry reports as the Secretary of Agriculture is authorized to publish may, under the direction of the Secretary, be paid out of the $850,000 specified; but, in my opinion, Congress did not intend that the expense of printing and binding should be paid out of the $75,000 above specified.

3. The third question submitted is as follows:

"Is the Secretary of Agriculture at liberty, under the law, if he deems it best for the public service, to detail a person from any position that such person may fill (in the Department of Agriculture), whether such position be statutory or not, to duty elsewhere in the Department, provided the compensation for such detailed service be the same as that received by the person detailed while in the position to which he was appointed?"

As no positions are specified in this inquiry, some uncertainty necessarily exists.

I make answer, however, that in my judgment a person now in the classified service may be detailed to duty elsewhere within the classified service in the Department under the conditions set forth in the foregoing inquiry; but I do not decide that a person within the classified service may be detailed to perform duties outside of such service, or that one not within such service may be detailed to serve in a position in the classified service.

4. The fourth question submitted is:

"Can the Secretary, without violating the civil-service rules or the law, promote an employé in the classified service from, say, class 1 to class 3, or from class 2 to class 4, or must promotions in said service be made *only one* step at a time?"

In response to this question I make answer, that it may be fairly inferred from the enactments applicable and the rules of procedure established thereunder that in the Department of Agriculture it is permissible to promote from class 1 to class 3 and from class 2 to class 4, without regarding intermediate steps. In this connection your attention is respectfully called to subdivision 6 of General Rule III and to Departmental Rule IX, of the revised civil-service rules.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF AGRICULTURE.

MARINE CORPS—DETAIL FOR DUTY.

The Secretary of the Navy has authority to detail men to guard and protect property of the Government placed on exhibition at the World's Columbian Exposition. The cost of transportation and sustenance of such detail must be paid from the fund provided for the Marine Corps and its subsistence, and is only limited by the consideration of the question whether there are sufficient funds available for that purpose, as to which the Secretary of the Navy is the sole judge.

DEPARTMENT OF JUSTICE,
April 19, 1893.

SIR: From yours of April 7, 1893, it appears that the "Navy Department has sent a large amount of valuable stores and other property to Chicago for exhibition, as authorized by the act of April 25, 1890 (26 Stat., 62)." You state that in your opinion it is important that at least 50 men be detailed for duty to guard and protect the property thus placed on exhibition.

You ask my opinion whether you have the power to make such detail, and if this shall be answered in the affirmative, from what fund the cost of the transportation and subsistence of the men thus detailed is to be paid.

Section 1621, Revised Statutes, provides:

"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."

Your first question must therefore be answered in the affirmative.

The cost of such detail must be paid from the fund provided for the Marine Corps and its subsistence, and is only limited by the consideration of the question whether you have sufficient funds available for that purpose, of which you are the sole judge.

It is perhaps proper to direct your attention to the following language found in the act of March 3, 1893, making appropriation for the naval service for the fiscal year ending June 30, 1894, to wit: "And no law shall be construed to

entitle enlisted marines on shore duty to any rations or commutation therefor other than such as now are or may hereafter be allowed to enlist (?) men in the Army."

Very respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

MARINE CORPS—DETAIL FOR DUTY.

The Navy Department is authorized to pay for the actual subsistence of the enlisted men of the Navy employed in taking care of and preserving the stores and other Government property placed on exhibition at the World's Columbian Exposition under the supervision of the Navy Department in pursuance of law. The expenses necessarily accruing out of the transportation and subsistence of the marines detailed for that purpose may be paid from the fund provided for the Marine Corps and its subsistence.

DEPARTMENT OF JUSTICE,
April 25, 1893.

SIR: By your communication bearing date the 8th instant two questions, placed before you by the honorable Second Comptroller, are submitted to me for an official opinion thereon.

It is stated that the Navy Department has sent valuable stores and other property of the Government to Chicago for exhibition, as authorized by the act of April 25, 1890 (26 Stat., 62), and that it is determined that 50 men from the Navy Department will be needed to take care of and preserve the same.

Attention is called to the provision of section 2 of the act of August 5, 1892 (27 Stat., 389), in this connection.

The first question submitted is understood to be:

Whether the Navy Department will be authorized to pay the actual subsistence of enlisted men of the Navy employed as indicated, or any part of such subsistence, from the regular naval appropriations?

Second. It is also stated that the Secretary of the Navy has detailed a number of marines for the Navy Department exhibit at the World's Columbian Exposition; and the second question is:

Whether the expense growing out of the transportation and subsistence of these men so detailed to special service may be paid out of the appropriations designated "Transportation and recruiting, Marine Corps," and "Provisions, Marine Corps?"

In my judgment section 2 of the act of August 5, 1892, referred to, has no application to the expenditures occurring in either of the two cases involved in the foregoing questions.

1. In response to the first question, I answer that, in my opinion, the Navy Department is authorized to pay the actual subsistence of enlisted men of the Navy employed in taking care of and preserving the stores and other Government property placed on exhibition at the exposition, under the supervision of the Navy Department and in pursuance of law.

2. In response to the second question submitted, I make answer that, in my opinion, the expenses necessarily growing out of the transportation and subsistence of the marines detailed as indicated may be paid from the fund provided for the Marine Corps and its subsistence.

Permit me to call to your attention an opinion submitted by me to the honorable Secretary of the Navy, under date of April 19, 1893, which applies to a closely related question, and which I respectfully request the reading of in connection herewith.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

ASSIGNMENT OF CLAIM—DISTRIBUTION.

The head of a Department is prohibited by section 3477, Revised Statutes, from cooperating with a contractor having a balance due him in the Treasury in assigning this balance to an outsider before the issuing of a warrant or warrants for payment of the amount proposed to be assigned. The proper course is not to pay the balance over to some designated person to be distributed among all the creditors under the direction of the courts, but to keep the custody of the balance until the respective rights of various claimants to it have been determined by the decree of a competent court.

DEPARTMENT OF JUSTICE,
May 3, 1893.

SIR: It appears by your letter of March 24, ultimo, that on October 2, 1888, P. H. McLaughlin & Co., of this city, entered into a contract with the United States, through the Secretary of the Navy, to build the new Naval Observatory, and that they brought the work nearly to completion, when they became so seriously in default that the Secretary declared the contract forfeited, by virtue of one of its provisions, and made a new contract with Samuel M. Plumley, of this city, to finish the work.

After debiting the account of McLaughlin & Co., with what was chargeable to them, including the amount paid Plumley under his contract, there stands to the credit of the firm in the Treasury about $13,488.33.

In the hope, no doubt, of intercepting in the hands of the United States whatever might be found due and unpaid to McLaughlin & Co. on the final accounting, certain individuals have filed in the Navy Department, from time to time, claims amounting to about $90.500 for labor and materials furnished for the work whilst it was being carried on by McLaughlin & Co.

McLaughlin & Co. have assigned, or propose to assign, about $12,300 of the balance to their credit in the Treasury to one J. B. Hammond, to pay himself what is due for materials furnished by him and used in the Observatory building, and to pay others for labor expended on the same work; and your cooperation is requested in carrying out this agreement, Hammond proposing to give *you* satisfactory security for the due application of the money to be thus placed in his hands to pay the labor claims.

Passing by the general inquiry as to what disposition shall be made of the balance due McLaughlin & Co. as presenting no definite question of law, I proceed to consider the questions (1) whether the Navy Department can recognize the proposed assignment and pay Hammond according to its terms, or (2) whether the whole balance should be turned over "to some designated person, to be distributed among all the creditors, under the direction of the courts."

The arrangement proposed by McLaughlin & Co. being

the assignment of a claim against the United States would be in violation of section 3477, Revised Statutes, if entered into before the issuing of a warrant or warrants for the payment of the amount proposed to be assigned, it being one of the purposes of that section, as say the Supreme Court, to prevent "the introduction of a party who was a stranger to the original transaction." (*Goodman* v. *Niblack*, 102 U. S., 556, 560.)

It follows, therefore, that you can not cooperate with McLaughlin & Co. in carrying out the proposed arrangement without disregarding the law.

The next question is whether you should turn over the balance due McLaughlin & Co. to some person for distribution "among all the creditors under the direction of the courts."

This question was probably suggested by the seventh clause of the contract, which provides that "the parties of the first part (McLaughlin & Co.) * * * shall be responsible for and pay all liabilities for labor and materials incurred in the prosecution of the work, it being expressly understood, covenanted, and agreed that the Secretary of the Navy may retain a sufficient sum of money from payments that may become due under this contract *to meet all liabilities incurred by the parties of the first part* (McLaughlin & Co.) *on account of work done or materials furnished until satisfied that settlement has been made therefor*."

The power thus given to retain an amount sufficient to pay claims of the character mentioned does not, however, carry with it authority to determine the rights of those claiming an interest in the amount withheld. If they are unable to agree as to those rights the courts must determine them and not the Department. This is the established practice. (19 Opin., 450, Strong's Case.)

To be sure, neither you nor the fund in the Treasury can be subjected to the jurisdiction of any court in a suit for the purpose of settling the rights and priorities of all parties asserting claims in the premises, but as you occupy very much the same relation to the matter in controversy as an ordinary receiver or stakeholder, you and the Treasury might, safely, respect and conform to the decree of a competent court in a suit of the character mentioned (19 Opin., 450),

for it can not be doubted that payment, in obedience to such a decree, would be payment to McLaughlin & Co. or order, as provided in the contract.

As the fund can be nowhere so safe as in the Treasury, I see no reason for changing the custody of it, as suggested, if, indeed, that could be done lawfully, about which I express no opinion.

Very respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

TELEGRAPH SERVICE—RIGHT OF COMPENSATION.

Where the Government has the power to send telegraph messages either by a bond-aided railway's telegraph system or by an independent company system located over the bond-aided railway company's route, and delivers them to the independent company's system without requesting that they be forwarded over the bond-aided railway route, payment must be made at the rate prescribed by the Postmaster-General.

Semble, it is not improper to delay payment of the claim until the case involving the point now soon to be argued in the Supreme Court of the United States is decided.

DEPARTMENT OF JUSTICE,
May 5, 1893.

SIR: A communication from the Treasury Department dated April 29, 1893, requests my opinion respecting an account for $1,482.02 presented by the Western Union Telegraph Company for the transmission of special messages for the Department of Agriculture over wires on routes of bond-aided Pacific Railroad companies. The question is thus stated:

"That is, conceding that on the routes of the bond-aided railroads there were at the time the service was rendered two lines of telegraph, one owned and operated by the roads, and the other owned and operated by the claimant, on the routes of the roads, under some arrangement authorized by the nineteenth section of the act of July 1, 1862; and conceding further, that the messages were delivered to the claimant in the city of Washington, to be sent to San Francisco without direction from the Government over what line to forward

them; and further, that they were sent over the lines of the claimant, located on the bond-aided railroad routes; the question is, whether payment shall be made to the claimant, at the rates fixed by the Postmaster-General in the full amount of the messages over the whole line or distance, or whether credit shall be given the roads as provided by the several statutes on the subject, on their indebtedness to the United States growing out of their construction, at a rate not exceeding the rate charged private parties, for the portion of the distance the several messages were sent over the Western Union lines, located on routes of the roads, and payment of the balance made to the claimant at the rate fixed by the Postmaster-General."

In my judgment, the principle involved in the question thus stated must be regarded as already determined by the circuit court of the United States for the southern district of New York in the case of the *United States* v. *The Union Pacific R. R. Co.* and others (45 Fed. Rep., 221). When the Government has the power to send its messages by either one of two telegraph systems, a bond-aided railway company's system on the one hand, or an independent company's system, located over the bond-aided railway company's route on the other, it must choose between them and indicate its choice by some overt act. If such independent company, like the Western Union Company, has accepted the act of Congress of July 24, 1866, there is not even a presumption that the Government intends to employ the railway company's telegraph line because, though, in the latter case it has the advantage of retaining the price of the transmitted messages towards its own debt, in the former it has the advantage of paying for the messages at rates fixed by itself through the Postmaster-General. As it is conceded that the messages covered by the account in question were forwarded exclusively over Western Union lines, and were delivered to the Western Union Company for that purpose without any request that they should be forwarded over the railway company's lines, either for the whole or any part of the distance, the Western Union Company's right to be paid for the transmission for the whole distance at the rates fixed by the Postmaster-General is directly affirmed by the rule laid down by the circuit court of the United States in the case above cited.

That case, however, has been appealed to the Supreme Court of the United States, where it will probably be argued at the term beginning in October next. It is possible, too, that the final result of another case between the United States and the Western Union Telegraph Company (see 50 Fed. Rep., 28) may be found of importance in connection with the question now under discussion. Unless serious considerations of convenience or justice prevent, therefore, it would seem not to be improper to defer payment of the account under discussion, and of any other accounts involving the like questions, until the final determination by the U. S. Supreme Court of one or both of the cases above referred to.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

The Attorney-General is prohibited from giving an opinion unless an occasion has actually arisen requiring the action of the head of a Department.

DEPARTMENT OF JUSTICE,
May 5, 1893.

SIR: Your letter of March 25 ultimo requests an opinion upon the question, "whether the Washington Loan and Trust Company has the right to do a general fidelity insurance business under its original West Virginia charter, as affected by the provisions of the act of Congress approved October 1, 1890 (26 Stat., 625; Supp. Rev. Stat., 2d ed., 870).

The question thus submitted is referred to by the Comptroller of the Currency in his letter to you of March 24 ultimo, a copy of which accompanied your letter, as "having been mooted," and not as a question that had actually arisen in connection with a matter requiring the action of your Department; and I am unable to discover in your letter or its inclosures that any official action depends on the solution of the question propounded.

If this supposition is correct the restriction contained in section 356, Revised Statutes, limiting the authority of the

Attorney-General to give opinions, on request of the heads of Departments, "to questions of law arising in the administration" of their respective Departments prevents me from having the pleasure of furnishing the opinion requested. My predecessors have uniformly declined to give an opinion on a question not calling for the action of the Department submitting it. (6 Opin., 24; 14 *ibid.*, 178; 18 *ibid.*, 108.)

Very respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

CIVIL-SERVICE RULES.

The President's order of January 5, 1893, amending postal rule No. 1 (under the civil-service act of January 16, 1883, chapter 27), went into effect at once, in so far as it called for classification by the Postmaster General and for the provision of examinations by the Civil Service Commission; otherwise, it went into effect at each free-delivery post-office as soon as the classification was completed and first examination provided at that office.

Extensions of the civil-service rules to new offices do not operate as restrictions upon the right of appointment until examinations have been provided for such offices by the Civil Service Commission. It is not material, however, whether or not such examination produces candidates eligible for the office. In case of failure, non-competitive examinations may at once be demanded.

DEPARTMENT OF JUSTICE,
May 5, 1893.

SIR: I am in receipt of your communication of April 26, asking my official opinion upon the construction of postal rule No. 1, as amended by the President's order of January 5, 1893.

The rule is promulgated under authority of the civil-service act of January 16, 1883 (22 Stat., 403). Section 6 of that act, after providing that the Postmaster-General, within sixty days after its passage, should separately arrange in classes the employés at certain described post-offices, further provided that thereafter, "from time to time, on the direction of the President, it shall be the duty of the Postmaster-General to arrange in like classes the clerks and persons so employed in the postal service in connection with any other post-office." It also provides for revising the classification of any post-

office under like direction. Under this section the President gave the direction contained in the amended rule above mentioned, which reads as follows:

"The classification of the postal service made by the Postmaster-General under section 6 of the act of January 16, 1883, is hereby extended to all free-delivery post-offices; and hereafter, whenever any post-office becomes a free-delivery office, the said classification or any then existing classification made by the Postmaster-General under said section and act shall apply thereto; and the Civil Service Commission shall provide examinations to test the fitness of persons to fill vacancies in all free-delivery post-offices, *and these rules shall be in force therein;* but this shall not include any post-office made an experimental free-delivery office under the authority contained in the appropriation act of March 3, 1891. Every revision of the classification of any post-office under section 6 of the act of January 16, 1883, and every inclusion of a post-office within the classified postal service shall be reported to the President."

The "rules" referred to as to "be in force therein" are those contained in the general code of "revised civil-service rules," of which postal rule No. 1 forms a part. The first clause of this amended rule, read in connection with the statute, is the equivalent of a direction to the Postmaster-General to arrange the clerks in each free-delivery post-office in classes, according to the rules of classification observed in the post-offices previously brought under the civil-service act.

The question submitted for my opinion is whether the amended rule took effect and became operative on the date of its promulgation at all of the free delivery offices, or whether it was in abeyance at each such office until the classification of the office had become complete and an eligible register had been established through examinations by the Civil Service Commission.

There can be no doubt that the amended rule became operative upon the date of its promulgation, in so far as it called for classification by the Postmaster-General and for the provision of examinations by the Civil Service Commission; nor that it required the classification to be made and the examinations provided as soon as practicable in

view of the magnitude of the work and the other calls upon the working force of the Post-Office Department and the Commission.

The practical question, therefore, I understand to be, whether the "revised civil-service rules," as a body, are in force at all of the free-delivery post-offices pending the completion of the work aforesaid; a period, as I am informed, which will amount necessarily to several months in the case of the last offices to be classified.

Examination of the rules and of the statute shows that appointments thereunder can not have been intended to be made until the first examinations had been provided. The civil-service act (section 7) enacts that no person not specially exempt "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." It also directs (section 2) that the examinations shall be open and competitive, with such "necessary exceptions" as "shall be set forth in connection with such rules." General Rule III provides that "no person shall be appointed or employed to enter the civil-service classified," etc., "until he shall have passed an examination" unless specially exempted by the civil-service act or by an exceptance "set forth in connection with the rules regulating admission to the branch of the service he seeks to enter." There is no such exception in the case of ordinary post-office clerks or letter-carriers. Nor in the case of these officials is there any provision for non-competitive examinations except in the case of failure to obtain eligibles by competitive examination "after due notice;" in case of certain promotions and transfers; and "when the exigencies of the service require such examination * * * for temporary appointment for not exceeding thirty days." (General Rule III; Postal Rule II.)

In my judgment, the revised civil-service rules, as amended January 5, 1893, are, with reference to the time when they become operative in free-delivery post-offices, divisible into two portions, each dealing with a distinct subject-matter. So far as they govern the creation of certain machinery they are effective at once; so far as through the working of that machinery they qualify the exercise of the appointment

power, they are necessarily effective only when the machinery is created and is in working order, that is, when the Postmaster-General has completed the required classification and the Civil Service Commission has provided the required examination.

But the removal power is only a part of the appointment power—is its mere incident rather (*Blake* v. *United States*, 103 U. S., 227)—and as such part and incident and not otherwise, is the subject of the amended rules. It follows that both powers remain intact and unaffected until the time above specified, that is, until the Postmaster-General and the Civil Service Commission have respectively completed the work required of them. Any other conclusion is legally impossible in the absence of any expressed provision in the order of January 5, 1893, distinguishing between the appointment and the removal power in respect to the time when the order shall apply to them respectively.

The past practical construction of the act and of the rules confirms the view that as to appointments at least no restriction is imposed by an extension of the rules to any new office until examinations have been provided. Except in its application to free-delivery post-offices, the language of the clause now under consideration is not new. It has come down with phraseology almost unchanged from January, 1885, in connection with previous extensions of the act. (Second Annual Report of the Civil Service Commission, pp. 63, 69; Fourth Annual Report, p. 149; Eighth Annual Report, p. 39.) The language was therefore familiar to the Civil Service Commission when the new rule was promulgated on January 5, 1893. The slight change in wording from the prior rule does not affect its construction in the present connection. The Commission on January 9 issued a circular stating that "as soon as eligible registers have been established at any office the rules will go into effect at that office;" and as to appointments, this construction has continued.

It is not, however, necessary, in my opinion, that eligible registers should always be established before the rules go into effect. It may be that the first competitive examinations noticed produced no eligibles. Neither the language of the rule nor its intent require that this accident should

postpone the application of the civil-service act, as noncompetitive examinations may at once be demanded.

The question submitted is therefore answered as follows: In so far as postal rule 1 required the Postmaster-General to classify the employés at the free-delivery post-offices and required the Civil Service Commission to provide examinations, it went into effect on the day of its promulgation, and required the work to be done in accordance with the revised civil-service rules; otherwise the revised civil-service rules come into force at each free-delivery post-office, in my opinion, as soon as its classification shall have been completed by the Postmaster-General and the first examination shall have been provided by the Civil Service Commission, whether or not such examination shall result in an eligible register.

Very respectfully,

RICHARD OLNEY.

The POSTMASTER-GENERAL.

ATTORNEY-GENERAL.

The power of the Attorney-General to give an opinion on request of the head of a Department is confined to questions of law, arising in the administration of the Department calling for the opinion.

DEPARTMENT OF JUSTICE,
May 6, 1893.

SIR: It appears by your letter of April 5, 1893, that between February 25, 1862, and February 1, 1866, certain buildings belonging to A. H. Herr, and situated on Herrs Island, Jefferson County, W. Va., near Harpers Ferry, were occupied by the U. S. Army; that a board of survey convened on February 28, 1866, fixed the rent due Mr. Herr for the use and occupation of this property at $17,288.53; and that this finding was approved by the Secretary of War on March 16, 1874.

The accounting officers of the Treasury, however, rejected the claim on April 7, 1874, on the ground that it came within the act of Congress of February 21, 1867 (14 Stat. 397, chap. 57) prohibiting the settlement of any claim "for the occupation of or injury to real estate," etc., by the military authorities or troops of the United States where such claim origi-

nated during the late war in a State declared to be in rebellion by the proclamation of the President of the United States of July 1, 1862.

It appears by the papers that the contention of the claimant's counsel is that the action of the Secretary of War of March 16, 1874, fixing the amount due the claimant is, by virtue of section 219, Revised Statutes, a final adjudication of the matters of law and fact involved and, consequently, that the accounting officers had no authority to go behind this action of the Secretary of War.

Upon this state of facts you submit two questions, which may be succinctly stated as follows: (1) Whether the claim in question is within the act of February 21, 1867 (*supra*), and (2) whether the authority vested in the Secretary of War by section 219, Revised Statutes, was such as to make his action in the premises conclusively binding on the Government.

It is quite evident that these questions have no relation to a matter before your Department for action, since the subject out of which they have grown was disposed of finally by the Secretary of War as long ago as March 16, 1874, from which it follows, I regret to say, that I have no authority under the law to comply with your request, for you will see, on turning to section 356, Revised Statutes, that the power of the Attorney-General to give an opinion, on request of the head of a Department, is confined to "qestions of law arising in the administration" of the Department calling for the opinion. My predecessors have uniformly declined to give an opinion on a question not requiring action by the Department submitting it. (6 Opin., 24; 14 *ibid.*, 178; 18 *ibid.*, 108.)

Very respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF WAR.

CRIMES IN FOREIGN COUNTRIES.

No Federal court has jurisdiction to try persons whether or not claiming to be American citizens for crimes committed in foreign countries. There are no common law offenses against the United States.

DEPARTMENT OF JUSTICE,
May 8, 1893.

SIR: I am in receipt of your communication of March 17, in relation to the case of James S. Proctor.

I am informed that said Proctor, claiming to be a citizen of the United States, is charged with murdering a native upon land in one of the New Hebrides Islands; that said islands are under the domain of no civilized power, except that Great Britain exercises some jurisdiction over them through a high commissioner, who, however, declines to exercise jurisdiction over this case; and that the islands are not within the jurisdiction of any consular officer of this Government.

My official opinion is asked as to whether any Federal court would have jurisdiction to try Proctor upon this charge if he should be brought before it under section 730 of the Revised Statutes, which provides that—

"The trial of all offenses committed upon the high seas *or elsewhere* out of the jurisdiction of any particular State or district shall be in the district where the offender is found, or into which he is first brought."

But the word "offenses" means "offenses against the United States." There are no common law offenses against the United States and Congress has not placed wrongs done upon foreign soil in this category.

I am obliged to answer the question in the negative.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF STATE.

ATTORNEY-GENERAL.

Whether certain compilers belong to any of the description of persons named in paragraph 7, of special departmental rule No. 1, of the Civil Service Commission, is entirely a matter of fact as to which the Attorney-General can express no opinion.

DEPARTMENT OF JUSTICE,
May 8, 1893.

SIR: By the act of Congress approved July 5, 1892, chapter 147, entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, eighteen hundred and ninety-three" (Pamphlet laws, first session, Fifty-first Congress, p. 82), an appropriation is made, amongst other things, "for investigations on the relations of climate to organic life."

By virtue of the authority conferred by this appropriation, as I am informed by your letter of April 13 ultimo, the then Secretary of Agriculture appointed expert compilers "for a temporary period, at $1,000 per annum, to make this investigation." These compilers were selected from persons in the Census Bureau or other branches of the public service "who had had experience in the work of compiling," and, as I read your letter, were not subjected to the examination prescribed by the civil-service rules, it being supposed that the persons so appointed were exempt from such examination by the following provision of paragraph 7 of special departmental rule No. 1 (Rules and Regulations of the Civil Service Commission), namely:

"Scientific or professional experts to be employed in investigations specially authorized by Congress, but not to include any persons regularly employed in that Department, nor any person whose duties are not scientific or professional, and who are not experts in the particular line of scientific or professional inquiry in which they are to be employed."

The answer to the question propounded by your letter, "as to whether the Secretary of Agriculture was justified, under the authority in the rule quoted above, in making these appointments," seems to involve one or more of the following inquiries, namely, whether the compilers in question are "scientific or professional experts," or whether their duties are "scientific or professional," and whether they are "experts in the particular line of scientific or professional inquiry" in which they are employed, in the sense of paragraph 7.

But I am not able to discover a question of law in any of these inquiries, which, it seems to me, relate entirely to matters of fact, namely, whether the compilers in question belong to any of the descriptions of persons named in paragraph 7.

Such being the case, I regret that I must decline to answer your question, as the authority of the Attorney-General to give opinions is limited by Congress to "questions of *law*." (See sec. 356, Rev. Stat., and 19 Opin., 673, and the citations therein.)

Very respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF AGRICULTURE.

INFORMERS' COMPENSATION—DEPARTMENTAL PRACTICE.

The anti-moiety act of June 22, 1874, chapter 391, takes away the right of Treasury officials to receive moieties under Revised Statutes, section 4233.

When the meaning of a statute is clear it can not be affected by departmental practice.

DEPARTMENT OF JUSTICE,
May 8, 1893.

SIR: I am in receipt of your communication of April 24, asking my official opinion upon the act of June 22, 1874, chapter 391, entitled "An act to amend the customs-revenue laws and to repeal moieties."

The second section of that act repeals "all provisions of law under which moieties of any fines, penalties, or forfeitures under the customs-revenue laws, or any share therein, or commissions thereon, are paid to informers or officers of customs or other officers of the United States." The fourth section provides that "any officer of the customs or other person" may be allowed certain commissions for detection and seizure of goods, wares, and merchandise in the act of being smuggled, or which have been smuggled. The seventh section provides: "That except in cases of smuggling as aforesaid, it shall not be lawful for any officer of the United States, under any pretense whatever, directly or indirectly, to receive, accept, or contract for any portion of the money which may, under any of the provisions *of this or any other act*, accrue to any such person furnishing information.

It appears that the Treasury Department has been in the practice of allowing to officers of the United States moieties

of fines received for detection of violations of certain of the navigation laws (sec. 4233, Rev. Stat.). I am asked whether an officer of the U. S. Revenue-Marine Service is not debarred from receiving a moiety or informer's share of a fine paid for violation of said section 4233.

In my opinion the statute of 1874 is so clear to the contrary that its meaning can not be affected by departmental practice; and therefore the officer is debarred from receiving any share of the fine.

Very respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

OFFICES ESTABLISHED BY APPROPRIATION ACT.

The act of March 1, 1893, chapter 186, "making appropriations for the support of the Military Academy for the fiscal year ending June 30, 1894," appropriated $2,000, "the pay of one assistant professor," and in the same paragraph provided for the appointment of such a professor in addition to the professors theretofore authorized by law: *Held*, that the term of such new office did not commence until July 1, 1893.

Accepting an appointment to an office, the term of which is to commence in futuro does not, until such term actually commences, affect an office previously held by the appointee.

DEPARTMENT OF JUSTICE,
May 10, 1893.

SIR: I am in receipt of your communication of April 5, asking my official opinion as to the construction of that clause of the Military Academy appropriation act of March 1, 1893, which provides for an additional associate professor of mathematics at West Point.

The act is entitled as follows:

"An act making appropriations for the support of the Military Academy for the fiscal year ending June thirtieth eighteen hundred and ninety-four."

It enacts:

"That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the support of the Military Academy

for the fiscal year ending June thirtieth, eighteen hundred and ninety-four:

* * * * * * *

"For pay of one associate professor of mathematics, two thousand dollars; and there shall be appointed at the Military Academy from the Army, in addition to the professors authorized by the existing laws, an associate professor of mathematics, who shall receive the pay and allowances of a captain mounted," etc.

No other provision of law exists as to this office, nor is any appropriation made for its salary prior to the next fiscal year.

It appears that under this law First Lieut. Wright P. Edgerton has been nominated, confirmed, and commissioned as associate professor, has filed the oath of office and entered upon his duties as such. I am asked whether this appointment and acceptance vacated his position or commission in the Army.

In view of the wording and location of the provision establishing this office, it is my opinion that Congress did not intend the office to commence until the beginning of the next fiscal year, on July 1, 1893.

I am therefore of the opinion that, since Lieut. Edgerton's term of office as associate professor does not commence until July 1 he is still without doubt a first lieutenant in the Army.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

APPROPRIATION.

The appropriation of the sundry civil act of March 3, 1893, chapter 208, for the World's Columbian Exposition is not in subjection to the proviso of the appropriation of August 5, 1892, chapter 381, for the same subject.

DEPARTMENT OF JUSTICE,
May 12, 1893.

SIR: The sundry civil act of March, 1893, chapter 208 (Pamphlet Laws, 52d Cong., 2d sess., p. 586), appropriates $211,375 for the World's Columbian Commission and declares that of the sum appropriated $93,190 "shall be used for the

Board of Lady Managers," and you ask to be informed whether this appropriation is affected by the proviso of the appropriation for the World's Columbian Commission contained in the sundry civil act of August 5, 1892 (Pamphlet Laws, 1st sess., 52d Cong., p. 363), that "all expense of administration and installation in the Woman's building shall be paid by the World's Columbian Exposition."

It is to be remembered that this appropriation of August 5, 1892, was declared to be "*in full of the liability of the United States*" on account of the World's Columbian Exposition, that is to say, it was the last and final installment of the Government subsidy promised by the act of April 25, 1890, chapter 156 (26 Stat., 62).

Congress, believing itself to have done with the World's Columbian Exposition so far as appropriating money was concerned when the said appropriation of the act of August 5, 1892 (*supra*), was made, it is impossible to suppose that when the said *proviso* was attached thereto it was intended that it should apply, *by implication*, to any future donation of money that Congress might possibly be induced to bestow on the Board of Lady Managers as a branch of the World's Columbian Commission. I know of no rule of statutory interpretation that would justify me in placing the appropriation of March 3, 1893, in subjection to the said *proviso* of the appropriation of August 5, 1892.

Very respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

SECRETARY OF CHILEAN COMMISSION.

There is nothing in the treaty concluded by Chile with the United States on August 7, 1892, or in the appropriation for carrying it into effect, which prevents the President from requiring service under the treaty from the American secretary or agent, or from making compensation therefor, at any time before the organization of the commission provided for in said treaty.

DEPARTMENT OF JUSTICE,
May 12, 1893.

SIR: Your communication of April 25, ultimo, brings to my attention for an opinion the following case:

By a treaty concluded between the United States and the Republic of Chile on August 7, 1892, it was agreed (Article I),

that claims of a certain description by the citizens of either country against the Government of the other should be submitted to the final determination of a commission to consist of three members, to be appointed in a prescribed way.

It is also provided (Article V) that the commission shall be bound "to hear, if required, one person on each side whom it shall be competent *for each Government to name as its counsel or agent to present and support claims* on its behalf, on each and every separate claim."

The treaty also contains a stipulation (Article X) that "the Government of the United States and of Chile *may each appoint and employ a secretary* versed in the languages of both countries."

The treaty went into operation on January 28, 1893, by the proclamation of President Harrison, and by the act of March 1, 1893, entitled "An act making appropriations for the diplomatic and consular service of the United States for fiscal year ending June thirtieth, eighteen hundred and ninety-four" (public act No. 100), Congress made the following appropriation for defraying the expenses to be borne by the United States in executing the treaty, that is to say:

"To carry into effect the convention between the United States and Chile for the settlement of certain claims of the citizens of either country against the other, signed at Santiago on the seventh day of August, eighteen hundred and ninety-two, twenty-five thousand dollars, or so much thereof as may be necessary, this appropriation to be immediately available, and to be expended under the direction of the President, in such manner as he shall deem reasonable and proper, for the compensation of the commissioner, secretary, and agent, on the part of the United States, and for the contingent expenses of the commission, including the moiety of the compensation of the third commissioner and the taking of testimony on behalf of the United States: *Provided*, That the compensation of the commissioner on the part of the United States shall not exceed the rate of five thousand dollars a year, that of the secretary on the part of the United States, two thousand five hundred dollars a year, and that of the agent of the United States, four thousand dollars a year; and that the ratable deduction on the amount of the

sums awarded by the commissioners, not exceeding the rate of five per centum on the sums so awarded, which, in accordance with the provisions of the tenth article of said convention, is to be retained in reimbursement of the expenses of the commission, shall be covered into the Treasury."

President Harrison, by and with the advice and consent of the Senate, appointed a secretary and agent, under the convention.

By direction of your predecessor, the secretary thus appointed entered upon an examination, to some extent, of the records of the Department of State appertaining to claims which, it is supposed, will be brought before the commission when it shall have organized and met for business.

You ask to be informed whether, upon this state of facts, there is any duty or service to be performed by this secretary or this agent "*by way of examination of records or otherwise*, in advance of the organization of the commission, and whether any compensation can properly be paid him prior to *such* organization."

Considering the urgency of the treaty and particularly its requirement (Article VIII) that "*every claim* shall be presented to the commissioners *within a period of two months* reckoned from the day of their first meeting for business," it was, in my judgment, competent for the President, in the absence of any regulation on the subject, to appoint the secretary and agent or counsel for this Government at such time after the treaty went into effect as he might think proper, regard being had, it may be presumed, to the character and importance of the business to be brought before the commission by this Government.

The appropriation to carry the treaty into effect having been placed at the disposal of the President, and having been made immediately available, it is, I think, for the President to say whether the agent and Secretary, or either of them, shall begin work now or wait until the organization of the commission before doing so.

Both of them are at the service of the President for the preparation of business against the meeting of the commission. The secretaries are the officers of the Government authorized to "appoint *and employ*" them, and not of the

commission, and they are required to be "versed in the languages of both countries," to enable them to render the proper assistance to the agents or counsel.

It follows, therefore, in my judgment, that there is nothing in the treaty or in the appropriation for carrying it into effect which prevents the President from requiring service under the treaty from the secretary or agent, or from making compensation therefor at any time before the organization of the commission.

This, I believe, disposes of the question submitted.

Very respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF STATE.

WORLD'S FAIR.

Held, construing together the acts of April 25, 1890, chapter 156; July 13, 1892, chapter 165; August 5, 1892, chapter 380, that the branch post-office at the World's Fair of 1893 must be closed on Sundays.

DEPARTMENT OF JUSTICE,
May 13, 1893.

SIR: I am in receipt of your communication of May 8 relative to opening on Sundays the branch post-office in the Government building at the World's Fair.

By the act of April 25, 1890, the Executive Departments of the Government were directed to make exhibits of their work at the World's Fair. I understand that such exhibits have been prepared and are all contained in one building devoted exclusively to that purpose and known as the Government building, and that among them, as one of the exhibits of the Post-Office Department, the Postmaster-General designated a model working post-office.

By section 4 of the act of July 13, 1892, chapter 165, Congress enacted as follows:

"That the Postmaster-General is hereby authorized to establish in the Government building, upon the ground of the World's Columbian Exposition, a branch station of the Chicago, Illinois, post-office; and there is hereby appropriated the sum of forty thousand dollars for clerks, letter-carriers, and incidental expenses necessary to maintain the same, and a further sum of twenty-three thousand dollars

for transportation of mails by railroad and mail-messenger service, the branch office herein to begin not earlier than January first, eighteen hundred and ninety-three."

I understand that the branch post-office thus established is identical with the Post-Office Department exhibit above mentioned, and I assume that in its character as a branch of the Chicago Post-Office it would, in the absence of legislation to the contrary, be opened on Sundays. I assume further that its opening, involving the opening also of the Government building in which it is located, would to some extent throw open other Government exhibits as well.

By a later act, approved August 5, 1892 (chapter 380, page 363), Congress enacted as follows:

"And the sums herein appropriated for the World's Columbian Exposition shall be in full of the liability of the United States on account thereof: *Provided*, that the Government exhibits at the World's Columbian Exposition shall not be opened to the public on Sundays."

By another act of the same date (chapter 381, sec. 4) Congress showed its general intent to use every means in its power to close the Fair on Sundays altogether.

The question presented is whether chapter 380, above quoted, requires the closing on Sundays of the branch post-office, as well as of the other Government exhibits. It is my opinion that this question must be answered in the affirmative.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

PERMANENT SPECIFIC APPROPRIATIONS.

An appropriation to enable the Secretary of Agriculture to prepare certain property for an experiment station and to remove a previous experiment station to the new site, is a permanent specific appropriation within the act of June 20, 1874, chapter 328, section 5.

DEPARTMENT OF JUSTICE,
May 16, 1893.

SIR: I am in receipt of your communication of May 9 concerning the appropriation of $20,000 made by Congress on July 14, 1890, to enable the Secretary of Agriculture to

prepare portions of the Arlington estate as an experimental station, and for expenses incurred in removing the present experimental station of the Bureau of Animal Industry to said estate.

My advice is asked as to the present availability of this appropriation in view of section 5 of the act of June 20, 1874, chapter 328, providing for the covering into the Treasury of unexpended balances of appropriations which shall have remained upon the books of the Treasury for two fiscal years.

The section you refer to contains the following proviso:

"That this provision shall not apply to *permanent specific appropriations*, appropriations for rivers and harbors, light-houses, fortifications, public buildings, or the pay of the Navy and Marine Corps; but the appropriations named in this proviso shall continue available until otherwise ordered by Congress."

I am informed that the appropriation above mentioned comes within the term "permanent specific appropriations" in the above proviso, as that term has been construed by the Treasury Department; and that accordingly the necessary funds are now being held there to meet the appropriation.

In my opinion the departmental construction is the correct one, and the moneys are available for the purpose specified.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF AGRICULTURE.

APPROPRIATION FOR BRINGING HOME FROM FOREIGN COUNTRIES PERSONS ACCUSED OF CRIME.

There is no impropriety in reimbursing the French Government from the $5,000 appropriated in the act of July 16, 1892, chapter 197, in the words "actual expense in bringing home from foreign countries persons charged with crime" for its expenses incurred in taking charge on shipboard of five American seamen charged with the crime of murder and arrested on the request of the U S. consul.

DEPARTMENT OF JUSTICE,
May 18, 1893.

SIR: Your letter and its inclosures bring to my attention the case of five seamen of the American vessel, *Hesper*, charged with the crime of murder, who were arrested by the order of the governor of Tahiti, a dependency of France, on the requi-

sition of the U. S. consul, and sent to San Francisco by the American ship *Tropic Bird* in charge of two French gendarmes.

The *Tropic Bird* arrived at San Francisco on March 18 ultimo, and the accused seamen were there transferred to the custody of the United States.

You ask to be informed whether the expenses incurred by the French authorities in the premises, amounting to the sum of 413 francs, can with propriety be paid out of the appropriation for bringing home from foreign countries persons accused of crime.

The appropriation supposed to be referred to is contained in the act of July 16, 1892, chapter 197, entitled "An act making appropriations for the diplomatic and consular service of the United States for the fiscal year ending June thirtieth, eighteen hundred and ninety-three" (Laws 52d Congress, 1st sess., p. 226), and in the words, "actual expenses incurred in bringing home from foreign countries persons charged with crime, five thousand dollars."

The object contemplated by Congress in making the above appropriation having been practically accomplished in this case, there is, in my judgment, no impropriety in reimbursing the French Government from that appropriation the expenditures incurred by it, which are conceded to be reasonable and moderate.

Very respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF STATE.

SALARIES—SERVICE OF AGENTS.

Probably it is within the power of the head of a Department to compensate agents employed by the Department by stated salaries in full for all traveling expenses as well as for services.

DEPARTMENT OF JUSTICE,
May 26, 1893.

SIR: I have yours of the 17th instant inquiring whether the Secretary of Agriculture can legally compensate agents employed for the Department by stated salaries which shall be in full for all traveling expenses as well as for services. The inclination of my judgment is that the Secretary has that power.

At the same time I feel bound to add that the uniform practice of the various Departments, and the policy of the United States as evinced by numerous statutes, make the matter one of considerable doubt and uncertainty.

You, of course, realize that the validity of the change proposed, if it were actually made, would be sure to be challenged both in and out of Congress because involving a substantial increase of the salaries of many persons, and thus seeming to make, unless and until explained, a considerable addition to the fixed charges of the Government.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF AGRICULTURE.

CHINESE—ATTORNEY-GENERAL.

The owner of a restaurant is not necessarily a laborer within the meaning of the Chinese acts of May 6, 1882, chapter 126, also July 5, 1884, chapter 220, and October 1, 1888, chapter 1064.

The Attorney-General can not be asked in advance to give a list of the occupations employments in which would constitute "laborers" within the meaning of said acts. He can only answer as to each case when it arises.

DEPARTMENT OF JUSTICE,
May 26, 1893.

SIR: I am in receipt of your communication of the 19th asking my official opinion as to whether one Young Hon, a Chinaman, is a Chinese laborer within the meaning of the laws of 1882, 1884, and 1888, prohibiting such persons from entering the United States. The only information afforded me concerning this man is that he is the owner of a Chinese restaurant in New York. It is my opinion that he is not a laborer within the meaning of the laws referred to.

To your general question concerning my views as to the classes of persons whose occupations would place them within the category of laborers, I do not feel that I can give an answer which can be made the basis of departmental action. I can only answer as to each case when it arises.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

RESERVATION—PRIVATE CLAIM—OWNERSHIP OF BUILDINGS.

Where land established as a military reservation includes the private claim of an individual, which was subsequently discovered and the use of the reservation discontinued, and upon the land are erected some twenty-two buildings, but in the patent issued to the claimant there was a clause reserving to the United States its rights to ownership in the buildings. *Held,* that the ownership of the buildings was in the United States.

DEPARTMENT OF JUSTICE,
May 27, 1893.

SIR: It appears by your letter of May 13, instant, and its inclosures, that the now abandoned Fort Craig military reservation, New Mexico, was established by an executive order, dated September 23, 1869, and that about one-half of its area of 24,895 acres lay, as subsequently discovered, within the limits of the private claim of Pedro Armendaris.

On March 3, 1885, the United States discontinued the use of this reservation, and it was regularly transferred to the Department of the Interior, to be disposed of under the act of July 5, 1884 (23 Stat., 103), together with "twenty-two buildings, consisting of officers' quarters, storehouse, guard-house, hospital, corral, etc." These buildings are all situated on that part of the reservation which is covered by the Armendaris claim, and in the patent issued to the claimant by the United States on September 17, 1878, embracing the lands on which the buildings stand, there is a clause reserving to the United States its rights touching these buildings, and the United States have recently given further evidence of relinquishment of all claim to the lands on which the buildings are situated by dismissing the suit which had been instituted by it for the purpose of establishing some supposed right to those lands.

In view of these facts my opinion is requested on the following questions:

"Do the buildings connected with the Fort Craig abandoned military reservation, within the limits of the patented private claim of Pedro Armendaris, No. 34, belong to the United States, or do they belong to the owners of the land upon which they are situated?"

In my judgment, the buildings referred to belong to the United States. A question involving precisely the same

point was decided the same way by my predecessor, Attorney-General Miller, in the case of the Fort Union military reservation. A copy of that opinion is herewith inclosed.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE INTERIOR.

CALIFORNIA DÉBRIS COMMISSION—CIVIL OFFICE.

The members of the California Débris Commission, established by the act of March 1, 1893, chapter 183, do not hold civil office within the meaning of the Revised Statutes, section 1222, nor does Revised Statutes, section 1224, necessitate their withdrawal from the Engineer Corps.

DEPARTMENT OF JUSTICE,
May 29, 1893.

SIR: By your communication of May 24, you request an official opinion as to the *status* of the commissioners appointed under the California débris act of March 1, 1893, chapter 183.

That act establishes a commission of three members, to be known as the California Débris Commission, for the purpose of regulating hydraulic mining in the territory drained by the Sacramento and San Joaquin river systems and preventing injury from the débris resulting therefrom. Its enforcement requires peculiar engineering skill.

The act provides that "the President of the United States shall, by and with the advice and consent of the Senate, appoint the commission from officers of the Corps of Engineers, U. S. Army. Vacancies occurring therein shall be filled in like manner. It shall have the authority and exercise the powers hereinafter set forth, under the supervision of the Chief of Engineers and direction of the Secretary of War."

* * * * * * *

"The members of said commission shall receive no greater compensation than is now allowed by law to each, respectively, as an officer of said Corps of Engineers." (Sections 1, 2.)

The annual report of the commission is to be transmitted to Congress through the Chief of Engineers and the Secretary of War. (Section 7; see also sections 23, 24.) The act seems to contemplate that the commission's work, so far as

not done by the commissioners personally, shall be performed by members of the Engineer Corps "attached" to the commission for that purpose, and "assigned to duty under its orders." (Sections 14, 20.)

Section 1222 of the Revised Statutes provides that "no officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army and his commission shall be thereby vacated."

Section 1224 provides that "no officer of the Army shall be employed on civil works or internal improvements, or be allowed to engage in the service of any incorporated company, or be employed as acting paymaster or disbursing agent of the Indian Department, if such extra employment requires that he shall be separated from his company, regiment, or corps, or if it shall otherwise interfere with the performance of the military duties proper."

Col. G. H. Mendell and two other officers of the Engineer Corps have been, during the recess of the Senate, appointed by the President as a commission to hold until the adjournment of the next session of Congress.

The question submitted is whether, should Col. Mendell accept the appointment and act thereunder, he would thereby cease to be an officer of the Army and his commission in the Army would be vacated.

I am of the opinion that the sections above quoted from the Revised Statutes have no application to this act. They could not operate as a restriction upon subsequent legislation by Congress, and the later act therefore, if inconsistent with the Revised Statutes in any respect, is to be construed as an exception to that extent. I do not think, however, that there is any inconsistency. The California Débris Commissioners act under the direction of the Secretary of War. They belong to the War Dapartment. They do not, within the meaning of the Revised Statutes, hold any civil office or neglect any military duty proper.

Looking at the act of 1893 as a whole, and construing it in accordance with the legislative intent, I do not think that it contemplates a withdrawal of the new commissioners from the Corps of Engineers. (See 10 Opin., 378.)

In my opinion the commissioners remain members of that Corps, merely detailed upon special duty, although the detail is to be effected by the President and Senate instead of by any lesser authority. Your question is therefore to be answered in the negative.

Very respectfully,

LAWRENCE MAXWELL, JR.,

Acting Attorney-General.

The SECRETARY OF WAR.

STATES NOT CORPORATIONS.

The State of Rhode Island is not a person, corporation, or association, within the meaning of the river and harbor appropriation act of September 19, 1890, chapter 907.

DEPARTMENT OF JUSTICE,

May 31, 1893.

SIR: I am in receipt of your communication of May 16, in which you ask my official opinion in relation to removing a bridge over the Sakonnet River in the State of Rhode Island, which is found to be an obstruction to navigation.

It appears that this bridge, although originally built by some private person or corporation, is now the property of said State; that the preliminary steps have been taken under the river and harbor act of 1890 looking toward its removal; but that the State, while willing that any alteration may be made by the Federal Government, declines to go to any expense in the matter itself.

Sections 4 and 5 of said act amend prior provisions of law so as to provide that when the Secretary of War has good reason to believe such a bridge to obstruct navigation it shall be his duty, "first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the U. S. District attorney for the district in which such bridge is situated, to the end

that the criminal proceedings mentioned in the succeeding section may be taken.

* * * * * * *

"That if the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required from the Secretary of War and within the time prescribed by him, willfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor," for which a suitable punishment is to be inflicted.

You ask me whether it is the duty of your Department to serve such a notice upon the State of Rhode Island, and whether the General Government has the right or authority to enforce such notice or order if given.

In my opinion the words "persons, corporation, or association," in the statute do not include a sovereign State. Your question must therefore be answered in the negative.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

ABSENCE ON PAY.

The appropriation act of March 3, 1893, chapter 211, section 5, prohibits any further leave of absence on pay where the employé has before July 1, 1893, been absent for a longer period than ninety days during the calendar year 1893.

DEPARTMENT OF JUSTICE,
June 2, 1893.

SIR: You submit the following question under section 5 of the act of March 3, 1893, making appropriations for the legislative, executive, and judicial expenditures of the Government:

"Where an employé of this Department has been absent for a period longer than ninety days during the current calendar year previous to July 1, 1893, will it be allowable to grant any additional leave after the first day of July, when the act referred to goes into effect?"

I am of opinion that, in the case stated by you, no further

leave, with pay, can be granted during the current calendar year.

The general rule of service prescribed by the appropriation act of March 3, 1893, is the same as that prescribed by the appropriation act of 1883. The only object and effect, therefore, of section 5 of the act of 1893 is to limit the power which the heads of Departments had under act of 1883 to grant sick leave with pay. Whether this limitation takes effect, as you suggest, only from July 1, 1893, or whether it has been in force since the passage of the act, is immaterial to the question put by you, for in either view the limitation is express, and forbids the extension of sick leave with pay beyond sixty days "in any one *calendar* year."

The act applies to the current year, and no exception is made with respect to cases in which the total allowance of leave permitted by the act in "any one calendar year" may have already been exhausted.

Very respectfully,

LAWRENCE MAXWELL, JR.,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

RICHARD OLNEY.

ATTORNEY-GENERAL—COMMISSIONER OF PATENTS.

The Attorney-General should not give an official opinion except to the President or to the head of an Executive Department, with reference to matters in the direct or supervisory control of the head; accordingly he ought not, at the present time, to answer the question as to whether in an inquiry instituted by the Commissioner of Patents under section 467 of the Revised Statutes the commissioner has the power to appoint a referee to take testimony and report the testimony taken, and his conclusions thereon, to the Commissioner of Patents, subject to revision by the Commissioner of Patents and afterwards by the Secretary of the Interior.

DEPARTMENT OF JUSTICE,
June 7, 1893.

SIR: The Attorney-General has referred to me your communication of May 27, addressed to him, inclosing a letter from the Commissioner of Patents, in which the commissioner requests you to obtain the Attorney-General's answer to the following question:

"In an inquiry instituted by the Commissioner of Patents under section 467, Revised Statutes, has the Commissioner of Patents the power to appoint a referee who is not an officer of the Patent Office, to take testimony and report the testimony taken and his conclusions thereon to the Commissioner of Patents, subject to revision by the Commissioner of Patents and afterwards by the Secretary of the Interior?"

In case of a negative answer to the above question, the Commissioner further asks for what purpose and with what powers a referee may be appointed in the proceedings.

Section 487 of the Revised Statutes is as follows:

"For gross misconduct the Commissioner of Patents may refuse to recognize any person as a patent agent, either generally or in any particular case; but the reasons for such refusal shall be duly recorded and be subject to the approval of the Secretary of the Interior."

It has been held frequently that the statutes prescribing the duties of the Attorney-General (Rev. Stat., secs. 354 and 356) do not authorize or require him to give an official opinion except to the President or to the head of an Executive Department; and it would seem to follow that the opinion should be needed for the guidance of the head of a Department, and should relate to some matter calling for action or decision on his part. The reasonableness of this limitation upon the authority of the Departments to call upon the Attorney-General for official opinions is manifest when we remember that the Attorney-General must personally pass upon every question so submitted to him; for although he may, under Revised Statutes, section 358, refer the question to a subordinate for a written opinion, the action of the subordinate must be examined and approved by the Attorney-General to give it effect.

For the guidance of the heads of bureaus and other officers of the Departments in the discharge of their duties, provision is made, by section 361 of the Revised Statutes, for assistance from the officers of the Department of Justice, under the direction of the Attorney-General; and an assistant attorney-general and law clerks have accordingly been assigned to the Department of the Interior, to whom, it seems to me, the Commissioner of Patents should submit his question.

The power of disbarment given by section 487 is conferred upon the Commissioner of Patents. It is only after he has made a decision that his opinion is submitted to review by the Secretary of the Interior. In determining whether he shall make a reference, and if so to whom, he acts in the first instance upon his own responsibility, and not under the supervision or direction of the Secretary of the Interior. An answer to the question submitted by the Commissioner of Patents can not, therefore, at the present stage of the proceeding, be required for the guidance of the Secretary of the Interior; and the Attorney-General, if he should make an answer, would not only overstep the boundaries which appear to be prescribed for him by a long line of decisions and by uniform practice, but would commit himself upon a question which may be properly submitted to him hereafter by the Secretary of the Interior, if the action of the Commissioner of Patents shall come under his review.

It is not meant by this opinion to deny the authority or duty of the Attorney-General to answer questions of law submitted to him by the head of a Department, although at the instance of the head of a bureau, where the question relates to matters within the direct or supervisory control of the head, and is deemed by the head to be of such difficulty or importance as to require the personal attention of the Attorney-General.

It may not be out of place, however, to call your attention to the following statutes which forbid the acceptance of voluntary service by the Government, or the employment of officers whose compensation is not specifically provided for, or the application to such a purpose of moneys appropriated for contingent expenses or for general purposes: Rev. Stat., secs. 171, 3682, sec. 4 of the legislative, etc., act of August 5, 1882, chap. 389; the deficiency appropriation act of May 1, 1884, chap. 37.

Very respectfully,

LAWRENCE MAXWELL, JR.,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved:

RICHARD OLNEY.

LAND FOR PUBLIC BUILDING—CONSENT OF STATE.

Where a State's consent to the purchase of land by the United States provides that the State shall forever retain concurrent jurisdiction over any such place to the extent that all legal and military process issued under the authority of the State may be executed anywhere on such place or in any building thereon or any part thereof, and that any offense against the laws of the State committed on such place may be tried and punished by any competent court or magistrate of the State, it does not satisfy the provision of section 355, Revised Statutes.

DEPARTMENT OF JUSTICE,
June 7, 1893.

SIR: I herewith return a letter of the Chief of Engineers addressed to you under date of the 10th ultimo, together with the certificate of the governor of Wisconsin therein mentioned, and other papers, all of which were transmitted to me by you on the 20th ultimo with a request for an opinion upon the question hereinafter stated.

It appears by these papers that a certain piece of land in Wisconsin, needed for the site of a lock-tender's house, warehouse, and workshop in connection with the Fox River improvement, was condemned in proceedings lately instituted on behalf of the United States under the act of April 24, 1888, entitled "An act to facilitate the prosecution of works projected for the improvement of rivers and harbors;" and that upon application subsequently made to the State authorities for a cession of jurisdiction over the premises, the aforesaid certificate was issued by the governor in conformity to chapter 1, section 2, of the Revised Statutes of Wisconsin, 1878.

The question presented for consideration is substantially this: Whether such certificate satisfies the provision of section 355, Revised Statutes, United States, which requires that, before any public money can be expended upon land purchased by the United States for the purpose of erecting thereon (*inter alia*) a public building of any kind, the "consent of the legislature of the State" wherein the land lies to such purchase shall be given.

By the statute of Wisconsin, cited above, the consent of the legislature of that State is given to "the purchase by the United States of any place or places within the State for the erection of forts, magazines, arsenals, dock yards, or other

needful buildings, under authority of any act of Congress," upon certain conditions therein set forth. It also provides for the execution by the governor of a certificate of such consent, which certificate is declared to be sufficient evidence thereof. Among other conditions in this statute, coupled with the consent thereby granted, is the following: "That the State shall forever retain *concurrent jurisdiction* over every such place to the extent that all legal and military process issued under the authority of the State may be executed anywhere on such place or in any building thereon or any part thereof, *and that any offense against the laws of the State committed on such place may be tried and punished by any competent court or magistrate of the State, to the same extent as if such place had not been purchased by the United States.*" This condition is embodied in the certificate of the governor hereinbefore mentioned.

In acts of the different State legislatures giving consent to the purchase of lands by the United States, as well as in their acts expressly ceding jurisdiction over such lands, it is usual to reserve to the State the right to serve on the land purchased its civil and criminal process, and a reservation of jurisdiction to that extent has always been regarded as consistent with the requirements of the provision in section 355 referred to above. Thus in *Fort Leavenworth R. R. Co.* v. *Lowe* (114 U. S., 525) it is observed by the court: "The reservation which has usually accompanied the consent of the States, that civil and criminal process of the State courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them, but it is admitted to prevent them from becoming an asylum for fugitives from justice."

But the Wisconsin act, already adverted to, goes still further. Besides the right to execute "all legal and military process issued under the authority of the State," it reserves a concurrent jurisdiction over offenses against the laws of the State committed on the place, to the same extent as if such place had not been purchased by the United States. Where an act ceding jurisdiction contained a reservation similar to the latter, Attorney-General Cushing regarded the reservation as insuperably objectionable, declaring it to be "altogether inconsistent with any possible construction of

that 'exclusive' jurisdiction which, according to the letter and intent of the Constitution, are in such cases to be vested in the United States." (8 Opin., 419.)

The above-mentioned provision of 355 is reproduced from the joint resolution of September 11, 1841 (5 Stat., 468), which was in force when Mr. Cushing was Attorney-General, and which, as interpreted by him, demands that a transfer of jurisdiction in order to satisfy its requirements must be coextensive with that contemplated by Article I, section 8, of the Constitution. In this view of the requirements of said provision I fully concur.

I may remark here that in numerous cases, especially in acts authorizing the acquisition of sites for public buildings, Congress has latterly required from the States a cession of jurisdiction for all purposes, *excepting* "the administration of the criminal laws of the State and the service of civil process therein." (See 21 Stat., 142; 22 *ib.*, 94, 152, 161; 23 *ib.*, 282; 24 *ib.*, 544; 25 *ib.*, 444; 26 *ib.*, 724.) In these cases, by force of the exception, there is left to the State the administration of its criminal laws over the premises acquired by the General Government, and consequently the cognizance of offenses against its laws committed thereon, as fully as the same existed before such acquisition.

But the case under consideration is governed wholly by the provision of section 355, to which reference is above made; and as the consent of the State of Wisconsin to the acquisition by the United States of the land in question, which is evidenced by the certificate of the governor, is coupled with an express retention of jurisdiction over offenses against its laws committed on the premises, this qualification of the consent is such as, in my opinion, renders it insufficient to satisfy that provision.

I am, sir, very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

ATTORNEY-GENERAL.

The Attorney-General can not give an official opinion except upon a question of law which has already actually arisen and which is submitted upon a definite statement of facts, and not leaving it to him to draw inferences of fact from correspondence or documents.

DEPARTMENT OF JUSTICE,
June 9, 1893.

SIR: I am in receipt of your letter of June 3, inclosing copies of various correspondence concerning the occupancy by the Pennsylvania Railroad Company, as lessee of the Cleveland and Pittsburg Railroad Company, of a Government pier in Cleveland, Ohio, together with a copy of the agreement under which the pier is occupied, and an opinion thereon by the Acting Judge-Advocate-General. I am asked for my official opinion as to the the proper action which should be taken in the case to secure the full compliance with the terms of said agreement by the railroad company, and whether it should be taken by yourself or the Secretary of War; and in the hypothetical case of the railroad company failing to comply fully with the agreement, I am also asked to advise generally with relation to the proper action that should then be taken.

I am unable to see how, under the circumstances, I am authorized to give an official opinion upon this request.

Section 356 of the Revised Statutes reads as follows:

"The head of any Executive Department may require an opinion of the Attorny-General upon any question of law arising in the administration of his Department." It has been held from a very early date that an official opinion can be required and given only when the question submitted is a question of law; that to obtain this opinion the request therefor should embody a statement of the facts in the nature of an agreed case in an action at law, not leaving it to the Attorney-General to draw interferences of fact from correspondence or documents; and that the question for decision must be one which has already actually arisen, and not a question upon a hypothetical case which may or may not arise in the future. I may call your attention upon these points to the following recent opinions, among others (18 Opin., 487; 19 Opin., 414, 465, 672, 696.) In these opinions

the prior rulings of this Department are fully cited and set forth.

Until, therefore, a present question of law is submitted upon a definite statement of facts, I do not see that I am able to assist you in the matter.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

APPOINTMENTS IN NAVY.

Under the act of March 2, 1889, chapter 396, the vacancies in the lowest grade of commissioned officers in the Line and Marine Corps, must be filled from the final graduates of the line and marine corps at Annapolis; so also as to vacancies in the Engineer Corps. Vacancies in the Line and Marine Corps can not be filled from the engineer corps division, or *vice versa*.

DEPARTMENT OF JUSTICE,
June 10, 1893.

SIR: I am in receipt of your communication of yesterday, asking my official opinion in relation to filling existing vacancies in the Engineer Corps of the Navy.

The act of March 2, 1889, chapter 396, directs that the naval cadets at Annapolis in their fourth year shall be divided into two divisions, one assigned to the "line and marine corps division," and the other assigned to the "engineer corps division," and provided that the two divisions should pursue, to some extent, separate courses of study arranged to fit them for future service in the above-named corps of the Navy respectively. The act further provided that "from the final graduates of the line and marine corps division, at the end of their six years' course, appointments shall be made hereafter as it shall be necessary to fill vacancies in the lowest grade of commissioned officers of the line of the Navy and Marine Corps; and the vacancies in the lowest grades of commissioned officers of the Engineer Corps of the Navy shall be filled in like manner by appointment from the final graduates of the engineer division at the end of their six years' course." Provisos are added to the effect that no greater number of appointments "into the said lowest grades

of commissioned officers" shall be made each year than there are current vacancies to fill; that the appointments shall be made from the final graduates of the year according to their order of merit; but that there shall not be less than twelve appointments each year to the line, two to the Engineer Corps or one to the Marine Corps.

From the above provisions it is clear that the intent of the act is that no appointments shall be made either to the Line or Marine Corps or to the Engineer Corps except from graduates of the cadet division whose studies are directed to such appointments respectively.

A final proviso in the act is that "if the number of vacancies in the lowest grades aforesaid occurring in any year shall be greater than the number of final graduates of that year, the surplus vacancies shall be filled from the final graduates of following years as they shall become available."

It appears that in the present year there are more vacancies in the Engineer Corps than can be filled from the graduates of the six years' course of the engineer corps division, I am asked whether these vacancies can be filled by graduates of the line and marine corps division by authority of this proviso.

I do not think that the proviso in question authorizes any appointment during the year in which the deficiency of graduates occurs. It authorizes appointments only from the final graduates of following years. That is its plain language, and I do not perceive any warrant for giving it a more extended construction. In my opinion if in any year there are more vacancies in the Line and Marine Corps than there are final graduates of the six years' course in the line and marine division, the vacancies must remain unfilled until the following year; and the same rule applies to vacancies in the Engineer Corps. Your question must therefore be answered in the negative.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

GUNBOAT—APPROPRIATION.

The act of March 3, 1893, chapter 212, contemplates construction of light draft protected gunboats of steel, and does not authorize the building of such gunboats on the "composite plan," a vessel of which some other material than steel forms a substantial integral part. If it be the fact that in naval architecture the term "steel," as descriptive of a vessel, has a special meaning, and includes a vessel built on the composite plan, as well as a steel vessel proper, an opposite conclusion might be reached.

DEPARTMENT OF JUSTICE,
June 15, 1893.

SIR: By the act of Congress of March 3, 1893, chapter 212, entitled "An act making appropriations for the Naval Service for the fiscal year ending June thirtieth, eighteen hundred and ninety-four, and for other purposes" (Laws 52d Cong., 2d Sess., 731), it is provided as follows:

"That for the purpose of further increasing the Naval Establishment of the United States, the President is hereby authorized to have constructed, by contract, three light-draft protected gunboats of about one thousand two hundred tons displacement each, to cost, exclusive of armament, not more than four hundred thousand dollars each, excluding any premium that may be paid for increased speed and the cost of armament. The contract for the construction of either of said gunboats shall contain such provisions as to speed and premiums and penalties affected by speed as may in the judgment of the Secretary of the Navy be deemed proper and fitting. In the construction of said vessels all the provisions of the act of August third, eighteen hundred and eighty-six, entitled 'An act to increase the Naval Establishment,' as to materials for said vessels, their engines, boilers, and machinery, the contract under which they are built, the notice of and proposals for the same, the plans, drawings, specifications therefor, and the method of executing said contracts, shall be observed and followed, and said vessels shall be built in compliance with the terms of said act, save that in all their parts said vessels shall be of domestic manufacture."

The act of March 3, 1886, chapter 894, entitled "An act to increase the naval establishment" (24 Stat., 215), referred to in the above-quoted provision declares that the vessels therein authorized to be constructed "*shall be built of steel of domestic manufacture.*"

Your letter of May 29, 1893, asks for an opinion upon the question whether you can legally direct the construction of one or more of the light-draft protected gunboats authorized by the above act of March 3, 1893, on what is called the "composite" plan, that is to say, the hull framing to be of steel but the outer covering of the hull to be of wood planking sheathed with copper, instead of steel plates.

In my judgment, the act of Congress of March 3, 1893, contemplates the construction of light-draft protected gunboats of steel and does not authorize the building of such gunboats on the "composite" plan, by which phrase "composite" is described, as I undersand, a vessel of which some other material than steel forms a substantial and integral part.

A different conclusion might be reached if it were shown as a fact that in naval architecture, or by commercial usage, the term steel, as descriptive of a vessel, had a special meaning and designated a vessel built on the "composite" plan as well as a steel vessel proper.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

ATTORNEY-GENERAL.

The Attorney-General can give official opinions only upon questions of law actually arising in the administration of the Department, which are at the time pending, and which must be determined in order that the work of the Department may be properly administered; he is reluctant to pass upon any question whose answer may bring the Department of Justice into conflict with a judicial tribunal.

A judge of a State court refused a claim of employés of the War Department to exemption from jury duty; he notified the Department, however, that he would excuse the men from such duty if, in the opinion of the Department, not to do so would seriously prejudice the public interest: *Held*, that no such serious occasion had yet arisen as should justify the Attorney-General in reviewing the ruling of the State judge.

DEPARTMENT OF JUSTICE,
June 15, 1893.

SIR: I am in receipt of your communication of the 13th instant, requesting my official opinion upon the question whether artificers and workmen employed in the armories

and arsenals of the United States are exempt from jury duty in State courts under section 1671 of the Revised Statutes.

It appears that one of the workmen in the arsenal at Rock Island, Ill., has been summoned for jury duty in the circuit court of Rock Island County, and that the judge holding that court refuses to recognize his claim for exemption, construing that section as applicable to Federal courts only.

Section 356 of the Revised Statutes of the United States provides "that the head of any Executive Department may require the opinion of the Attorney-General on any question of law *arising in the administration of his Department.*"

It has always been held by successive Attorneys-General that such opinions should be rendered only in cases where a question has actually arisen, and is at the time pending, which must be determined in order that the work of a Department may be properly administered. Moreover, my predecessors have always exhibited great and, it seems to me, proper reluctance to pass upon any question whose answer may bring this Department into conflict with a judicial tribunal.

I learn from the papers transmitted to me with your request, that while the statutory provision above referred to has come down from the year 1800, no claim has ever before been raised by a State judge that workmen employed in arsenals of the United States are liable to jury duty. I do not perceive that even in this case the question is so raised as to require me to give an opinion upon it. The same judge who now disputes the legal exemption of Government workmen from jury duty closes his letter with the following words:

"There is lodged with the court the power to excuse persons called upon to render this service if any serious inconvenience is likely to be suffered in consequence of rendering this service; and if, in your opinion, the public interests are likely to be seriously prejudiced, this will be a sufficient statement for me to excuse the gentleman named in your note."

From this it appears that the exemption, while not formally recognized, will be practically allowed in case of any serious inconvenience to your Department from loss of services to the workman summoned, and that your Department

will itself be the judge of the seriousness of the inconvenience.

I think you will agree with me that under the circumstances no such serious question has arisen in the administration of your Department that I should be called upon to review the ruling of a State judge at the present time. If the claim of right to jury duty from Government workmen shall in the future be so far pressed as to cause serious inconvenience in your judgment, of course I can not then hesitate to meet the question.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

DISTRICT ATTORNEYS—ATTORNEY-GENERAL.

Under the Indian appropriation act of March 3, 1893, chapter 209, district attorneys are not required to represent Indians in suits brought by them in States where they do not reside, founded on claims of inheritance from white persons not members of their tribes. The Attorney-General has no authority to give an opinion upon the reasonableness of fees demanded by persons proposing to act as attorneys for Indian litigants.

DEPARTMENT OF JUSTICE,
June 19, 1893.

SIR: I am in receipt of your communication of June 14. asking my official opinion concerning the suit about to be brought by certain Ogalalla Sioux Indians to recover property in the city of Denver, Colo.

It appears that one Joseph Richard, residing in Denver, Colo., and owning real property there, died in 1863, leaving a widow and children; that this widow was an Ogalalla Sioux Indian, to whom he had been married according to the Indian laws and customs, and who, upon his death, returned with her children and rejoined her tribe on Pine Ridge Reservation, Shannon County, S. Dak.; and that this widow and children are now about to institute an action in the State of Colorado to recover the property aforesaid.

The Indian appropriation act of March 3, 1893, chapter 209, contains the following provision (27 Stat., 631):

"To enable the Secretary of the Interior, in his discretion, to pay the legal costs incurred by Indians in contests initi-

ated by or against them, to any entry, filing, or other claims, under the laws of Congress relating to public lands, for any sufficient cause affecting the legality or validity of the entry, filing, or claim, five thousand dollars: *Provided*, That the fees to be paid by and on behalf of the Indian party in any case shall be one-half of the fees provided by law in such cases, and said fees shall be paid by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, on an account stated by the proper land officers through the Commissioner of the General Land Office. *In all States and Territories where there are reservations or allotted Indians the United States district attorney shall represent them in all suits at law and in equity.*"

I am asked whether the U. S. district attorney is required under this act to represent the claimants in the proposed suit. In my opinion he is not required to do so. Whatever may be the precise scope of the statutory provision, I do not think that it applies to a suit of this kind, prosecuted in a State in which the Indians do not reside, and founded upon a claim of inheritance from a white person, who is not even claimed to have been an adopted member of the tribe.

I have no authority to give an official opinion upon your further question, whether the fees demanded by the Indians' proposed attorneys are or are not reasonable. This is not one of the cases in which the Attorney-General is made the judge of the reasonableness of legal expenses, nor am I possessed of sufficient information to make a proper decision on this point.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE INTERIOR.

DUTY—FEATHER-STITCHED BRAIDS.

The interpretation acquiesced in hitherto by the Department of Justice by a letter to the Secretary of the Treasury, of date January 26, 1893, that "feather-stitched braids" are dutiable as braids under paragraph 354 of the tariff act of 1890, should also be applied to the term "braids" as used in paragraph 324 of the tariff act of October, 1883. Pending cases of protest against a different ruling should be settled in accordance with this settled practice.

Duty—Feather-Stitched Braid.

DEPARTMENT OF JUSTICE,
June 21, 1893.

SIR: Your letter of May 22, 1893, with the inclosure of a letter from Messrs. Comstock & Brown, of New York, dated May 15, 1893, brings to my attention the ruling of the circuit court of the United States for the southern district of New York, that a certain importation of "feather-stitched braids" by Dieckerhoff, Raffloer & Co. was dutiable as "braids," and not as "trimmings," under paragraph 354 of the tariff act of October 1, 1890 (26 Stat., 567), and you refer me to my predecessor's letter to you, dated January 26, 1893, in which he declined to appeal from the said decision of the circuit court, and furthermore, inform me that, accordingly, the collector of customs of the port of New York was instructed to refund the excessive duties exacted, and to apply the instructions then given to similar cases pending at his port.

It seems, however, that under paragraph 325 of the tariff act of March 3, 1883 (22 Stat., 488), merchandise answering to the description of "feather-stitched braids" was classified as "*trimmings*" under the decision of your Department of February 9, 1888 (S. 8664), and the decision of the Board of General Appraisers of October 15, 1890 (G. A. 61 and S. 10, 340), and held dutiable at 40 per cent ad valorem.

As a conviction on your part that the rulings aforesaid under the tariff act of 1883 are erroneous could not be carried into effect, to the prejudice of the Government, without the concurrence of the Attorney-General, as required by section 2 of the act of March 3, 1875 (18 Stat., 469), you ask whether the pending cases under the act of March 3, 1883, awaiting adjustment or suit of protest against the classification of and assessment of duty on "feather-stitched braids," as "trimmings," should be disposed of in accordance with the said ruling of the circuit court under the tariff act of 1890, as being equally applicable to the tariff act of 1883.

Paragraph 324 of the tariff of 1883 lays an advalorem duty of 35 per cent on "braids," and paragraph 325 of the same tariff places a duty of 40 per cent ad valorem on "trimmings."

Paragraph 354 of the tariff of 1890 makes "braids" dutiable at 35 per cent ad valorem and paragraph 373 makes "trimmings" dutiable at 60 per cent ad valorem.

Not being advised of the existence of any conditions of fact, proper to be considered in interpreting the said paragraphs of the tariff of 1890, which did not also exist while the tariff of 1883 was in operation, I am of opinion that the interpretation, expressly acquiesced in by this Department, by a letter to the Secretary of the Treasury of January 26, 1893, that "feather-stitched braids" are dutiable as "braids," under paragraph 354 of the tariff of 1890, should also be applied to the term "braids" as used in paragraph 324 of the tariff of 1883, and that pending cases of protests against a different ruling should be settled in accordance with this settled practice.

Very respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

WORLD'S FAIR.

Appropriations contained in the act of August 5, 1892, chapter 381, for the World's Fair, are still available notwithstanding the fact that the Fair is open on Sundays.

DEPARTMENT OF JUSTICE,
June 23, 1893.

SIR: I have your communication of June 15, asking my official opinion upon the question whether the several appropriations made by acts of Congress approved August 5, 1892, in aid of the World's Fair at Chicago, including the appropriations in aid of the Government exhibit, have been rendered unavailable by what has taken place at Chicago in the matter of the opening of the Fair on Sundays.

In my judgment, the appropriations referred to are as available now as before the decision of the circuit court of appeals permanently opening the World's Fair on Sundays, with the single exception that no more money ought to be paid to the Illinois corporation known as the World's Columbian Exposition.

The grounds for this opinion, briefly stated, are as follows:

While the statutes relating to the subject are confused and obscure, yet, regard being had to their manifest objects and purposes and to the relations of the United States to the Fair as exhibitor, donor, and medium of intercourse

with foreign nations and foreign exhibitors, the intent of Congress can hardly be mistaken. Congress meant and explicitly enacted that the Government exhibits should be closed on Sunday. It also meant that the Exposition as a whole should be closed on Sunday. It did not, however, undertake to pass a law to that effect but contented itself with making certain appropriations conditional, not upon the fact of Sunday closing, but upon the Illinois corporation agreeing to the proposition of Sunday closing, so that regulations to that effect might be made by the Government representative, the World's Columbian Commission. The Illinois corporation did agree to the proposition, the proper rules were made by the Columbian Commission, and the condition upon which the appropriations referred to were made must be regarded as fully satisfied. The rights of the United States and the liabilities of the Illinois corporation consequent upon the latter's violation of its agreement are matters for future consideration and settlement. But such violation, except as it should prevent the payment of any more money to the Illinois corporation, can not be allowed to render the appropriations referred to unavailing, for the most cogent reasons. It would result in great waste because, while only one-third of the term of the Fair has yet elapsed, the Government has already erected a building at a cost of $400,000 and has expended other large sums of money in gathering and installing exhibits, in defraying the expenses of Commissioners and Lady Managers, and in compensation of necessary agents and employés. Further, it would almost amount to bad faith as regards foreign nations and foreign exhibitors, because not merely the awards of medals and diplomas, but their preparation and distribution, have been assumed by and belong exclusively to the United States, acting through the Columbian Commission. Results of this sort can not possibly have been within the contemplation of Congress, which must therefore be regarded as having conditioned its appropriations not upon Sunday closing in fact, but upon an agreement for Sunday closing, which it assumed, however rashly, would not be broken.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

LOUISIANA LEVEES—MISSISSIPPI RIVER COMMISSION.

The State of Louisiana is the owner of a servitude or interest in the land of all riparian owners along the Mississippi River for the purpose of building levees to restrain its waters within definite limits during flood times. The United States having undertaken to share in the task, the State has for that purpose surrendered to the United States its servitude in lands to be occupied by levees of the Mississippi River Commission. The United States will not, therefore, be subjected to liability to persons whose land is taken by the commission for such levees.

DEPARTMENT OF JUSTICE,
June 23, 1893.

SIR: I am in receipt of your communication of February 17, 1893, to my predecessor, asking an official opinion from this Department as to the right of the United States to build a levee on land of a citizen of Louisiana. The proposed levee has been recommended by the Mississippi River Commission under the appropriation of 1892 for the next fiscal year, and I assume that it is one authorized under the Federal Statutes and Constitution. The recommendation has been approved and bids received by the United States for the proposed work.

One of the riparian landowners, across whose land the levee would be built, has protested in writing to your Department. I am not informed that the protesting landowner claims that there are any peculiar circumstances distinguishing his case from those of the numerous other landowners along the Mississippi River, whose lands have been appropriated without compensation for the building of levees by the United States since the establishment of the Mississippi River Commission, or by the State of Louisiana, since the earliest times.

I assume, therefore, that there are no exceptional circumstances to take him out of the general rule.

The State of Louisiana is the owner of a servitude or interest in the land of all riparian owners for the purpose of building levees to restrain the waters of the Mississippi River within defined limits during flood times. The United States, deeming this work to further the interests of interstate commerce, has undertaken, through the Mississippi River Commission, a share in the task. The State of Louisiana, by the Constitution of 1879, has for that purpose

surrendered to the United States its servitude in the lands to be occupied by the commission's levees.

It is my opinion, therefore, that the protesting landowner is without foundation for his protest; for he, or his ancestor, purchased his land subject to the right to place thereon precisely such a levee as your Department proposes to build; and therefore, by building it, you will not render the United States liable to him for damages.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

SET-OFF—SALARY OF FEDERAL JUDGE.

The salary of a Federal judge should not be withheld as falling within the act of March 3, 1875, chapter 149, to meet a judgment recovered against him as surety for a former Government employé.

DEPARTMENT OF JUSTICE,
June 27, 1893.

SIR: It appears by the letter of the First Comptroller of the Treasury of May 27, ultimo, addressed to you, that the United States has recently recovered a judgment in the supreme court of the District of Columbia against the Hon. Nathan Goff, as surety on the official bond of James M. Ewing, formerly disbursing clerk of this Department, for the sum of $9,000, with interest and costs, and you have referred the letter to me for an opinion upon the following questions presented therein:

"1. Does the act of March 3, 1875 (18 Stat., 481), authorize and require the Secretary of the Treasury to withhold the salary due a public officer who is indebted to the United States?

"2. If so, is there any exception in the case of a Federal judge?"

As I may not, however, give an opinion on a hypothetical question without exceeding my power as defined by law, I must, in complying with your request, confine myself to the case calling for the action of your Department, and shall accordingly proceed to consider whether the act of March 3, 1875, chapter 149 (18 Stat., 481), authorizes and requires the

Secretary of the Treasury to withhold Judge Goff's salary as a circuit judge of the United States for the Fourth circuit, until the judgment recovered against him as aforesaid shall have been satisfied in that way.

The act of March 3, 1875, is entitled "An act to provide for deducting any debt due the United States from any judgment recovered against the United States by such debtor," and provides as follows:

"That when any final judgment recovered against the United States, or other claim duly allowed by legal authority, shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States." * * *

It would be, in my judgment, to abandon the ordinary sense of language and to adopt an unlooked-for interpretation to hold that it was in the contemplation of Congress to include, under the expression "claim duly allowed by legal authority," the right of a Federal judge to have his salary paid to him out of money in the Treasury appropriated by law for that purpose.

The allowance of a claim against the United States, involving a discretion which partakes of a judicial character, but it is apparent that there is no room for the exercise, by any "legal authority," of such a discretion with reference to the salary of a judge, which the law requires to be paid, if there is money in the Treasury applicable to it, and failure to pay which is an official delinquency which may be summarily corrected by *mandamus*.

Without going into the constitutional question and the question of policy suggested in the First Comptroller's letter, I content myself with saying that this is not a case where the ordinary sense of the language of the statute should be extended by construction.

Very respectfully, yours,

WM. A. MAURY,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

GETTYSBURG—INJUNCTION.

The Secretary of War is authorized to take condemnation proceedings to acquire land over which a trolley railroad is being constructed—that is a portion of the battlefield of Gettysburg—and may apply to the court for an injunction to restrain the construction and operation of said proposed railroad.

DEPARTMENT OF JUSTICE,
July 7, 1893.

SIR: By the act of March 3, 1893, chapter 208 (27 Stat., 599, 600), "making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-four, and for other purposes," it is, among other things, provided, as follows:

"MONUMENTS AND TABLETS AT GETTYSBURG.—For the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field, and for opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations, with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend, compiled without praise and without censure, the sum of twenty-five thousand dollars, to be expended under the direction of the Secretary of War."

Upon taking steps to carry out the provisions of this act, you say that you find a company known as "The Trolley Company," a corporation under the laws of Pennsylvania, already in possession of a considerable portion of the field, constructing a railroad along and across some of the most important lines of battle and through some of the most hotly contested portions of the field, removing bowlders, trees, and other well-known and historic marks; that the said company has secured a right of way on certain streets inside and certain roads outside of Gettysburg, and the fee or right of way to the lands over which the railroad is being constructed;

and that the construction of this road where and in the manner it is being done is a serious interference with and an obstruction to the work contemplated by the act of Congress; and you submit the following questions:

"1. Whether there is any legal remedy or means to prevent the further construction and operation of the railroad, and if so, what?

"2. Whether the Government can proceed to condemn the land over which said railroad is being constructed and take possession of the same under condemnation proceedings, or of that portion of said land where the construction of the railroad is the most seriously interfering with the carrying out of the act of Congress?"

By an act of the general assembly of the Commonwealth of Pennsylvania, approved May 7, 1889 (Laws of Pa., 1889, No. 113, pp. 106–108), the consent of the Commonwealth of Pennsylvania is given to the acquisition by the United States of such pieces and tracts of land situated upon and in the neighborhood of the battlefield of Gettysburg as may be selected by the Secretary of War, or such officer as he may direct, for the purpose of erecting monuments or tablets for the proper marking of the positions of each of the several commands of the Army of the United States in the battle of Gettysburg, for opening and constructing roads and avenues in connection with the positions occupied by the Federal and Confederate forces engaged in said battle, for the preservation of the grounds covered by said battlefield for historical and other purposes, and for making such other improvements in connection with said battlefield as the Government of the United States may from time to time deem proper. The act cedes jurisdiction to the United States over any lands that may be acquired by it under the act, and provides for the condemnation of lands that can not be acquired.

The provisions of law seem to be ample to enable you by condemnation proceedings to acquire such property and rights as may be necessary to carry out the act of Congress. If you commence such proceeding you would be justified in applying to the court for an injunction to prevent further construction and operation of the railroad pending the condemnation. The proceedings should be had in the United

States court, under the provisions of the act of August 1, 1888, chapter 728 (25 Stat., 357, and Supp. Rev. Stat., 2 ed., p. 601).

Respectfully, yours,

LAWRENCE MAXWELL, JR.,
Acting Attorney-General.

The SECRETARY OF WAR.

EXEMPTION FROM DUTY—FOREIGN-MADE BAGS.

Section 2 of the act of October 1, 1890, chapter 1244, is exhaustive upon the subject of free entry of goods, so that an article not mentioned in said section can not be held to be non-dutiable because of any previous law granting it exemption from duty; consequently, a provision of section 7 of the act of February 8, 1875, chapter 36, admitting foreign-made bags free of duty "after having been exported from the United States filled with grain and returned empty" was repealed by section 55 of the said act of October 1, 1890.

DEPARTMENT OF JUSTICE,
July 20, 1893.

SIR: Your letter of July 10, instant, asks an opinion as to whether there is any existing provision of law under which foreign-made bags are entitled to free entry "after having been exported from the United States filled with grain and returned empty;" in other words, the question is, whether the provision of section 7 of the act of February 8, 1875 (18 Stat., 307), "that bags other than of American manufacture in which grain shall have been actually exported from the United States may be returned empty to the United States free of duty, under regulations to be prescribed by the Secretary of the Treasury," remain still in force and unrepealed by subsequent legislation?

I am of opinion that section 2 of the act of October 1, 1890, chapter 1244 (26 Stat., 567), entitled "An act to reduce the revenue and equalize duties on imports, and for other purposes," which provides that "On and after the sixth day of October, eighteen hundred and ninety, unless otherwise specially provided for in this act, the following articles when imported shall be exempt from duty," was clearly intended by Congress to be exhaustive of the subject of free entry, so that an article not mentioned in said section can not be held to be non-dutiable because of any previous law granting it exemption from duty.

In the case of *In re* Strauss *et al.* (46 Fed. Rep., 522), it was held by the circuit court of the United States for the southern district of New York that, so far, at least, as laying duty was concerned, the tariff act of October 1, 1890, "as a whole and in its entirety, from beginning to end" was intended to be substituted "in the place of all prior tariff legislation," and I am of opinion that, in the matter of providing for the free entry of merchandise, said act was intended to take the place of all prior tariff legislation.

It follows, therefore, that the provision of section 7 of the act of February 8, 1875, quoted in your letter, is repealed by the subsequent act of October 1, 1890, which, by section 55, repeals "all laws and parts of laws inconsistent with this act," it being inconsistent with the intention of Congress, as expressed in that act, that any previous law shall regulate the subject of free entry in any particular whatever.

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

LAWRENCE MAXWELL, JR.,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

REMISSION OF PENALTY FOR BREACH OF CONTRACT.

Where a contract for the construction of a vessel for the Government contains a clause imposing a penalty for each day's delay beyond a stipulated time for finishing the vessel, and further provides that any question as to liability for the infliction of said penalty should be referred to the Secretary of the Navy for decision, and provides that his decision shall be conclusive upon all parties to the contract, it is not proper for a subsequent Secretary of the Navy to remit the amount of penalties imposed by his predecessor and pay that sum to the contractor.

DEPARTMENT OF JUSTICE,
August 4, 1893.

SIR: Under the contract of February 11, 1887, between the Pneumatic Dynamite Gun Company and the United States, for the construction of the U. S. S. *Vesuvius*, it was provided by the sixth clause as follows:

"The vessel shall be completed, equipped, armed, and ready for inspection for the purpose of delivery to the United States on or before twelve months from the date of the contract. * * * In case the completion of the vessel and

machinery and her equipment and armament shall be delayed beyond the said period of twelve months, penalties shall be imposed upon the parties of the first part for each and every day (except Sundays) in excess of said period, and until the vessel, including her machinery, equipment, and armament is complete and ready for inspection," at certain prescribed increasing rates per diem. The contract provided that all penalties thus incurred should be offset from time to time against any payment or payments falling due under the contract, provided that the delay was not caused by the act of the United States.

The contract further provided that:

"In case any question shall arise under the provisions of this contract concerning penalties, as to the liability of the contractors to the infliction of any such penalty, such question, with all the facts relating thereto, shall be submitted to the Secretary of the Navy for consideration, and his decision thereon shall be conclusive and binding upon all the parties to this contract."

There was a delay of four hundred and thirty-four working days in the completion of the vessel, for which the Secretary of the Navy assessed penalties amounting to $39,700, which sum he deducted from the contract price upon final settlement. The date of this settlement is not stated by you, but from the other dates given by you I infer that it occurred in the summer of 1889, four years ago.

In the Fifty-second Congress a bill for the remission of the penalties was passed in the Senate and favorably reported in the House by the Committee on Naval Affairs, but not passed, because, as it is said, it was not reached. The Gun Company in a communication addressed to you, dated June 24, 1893, now makes application to you to pay it the amount of the penalties assessed and deducted by your predecessor, and you submit to me the following questions:

I. Whether under the contract between the Pneumatic Dynamite Gun Company and the United States, the Secretary of the Navy had the power, under the circumstances above stated, to impose the penalties imposed by the sixth clause of said contract, and

II. If said penalties were legally imposed, has the present

Secretary of the Navy the power to remit such penalties and pay the amount thereof to the claimants?

In view of the express provisions of the contract, I have no doubt of the power of the Secretary of the Navy to impose the penalties.

The contractors claim that the delays in the completion of the vessel were due to certain changes which were authorized by the Department and which resulted in increasing her speed and coal capacity and the effectiveness of her armament; but the letter of the Secretary of the Navy approving these changes contained this provision: "It being, however, understood that this provision and authorization will not in any manner affect or impair the responsibility of the contractors or relieve them from any requirement, either express or implied, under any clause or condition in said contract contained."

The contractors also insist that no damages were in fact suffered by the United States, and that the penalties should not therefore have been imposed by your predecessor. But that was the very question which, by the express terms of the contract, was submitted to the decision of the Secretary of the Navy, and the contract declares that his decision thereon shall be conclusive and binding upon all the parties to the contract.

The contract provides that all penalties thus incurred and declared by the Secretary of the Navy shall be offset against any payment or payments falling due under the contract. Accordingly the penalties declared by your predecessor were deducted by him from the contract price in making final settlement for the vessel when she was accepted. This action on the part of your predecessor, declaring the amount due the contractors on final settlement and acceptance, settled the rights of both parties to the contract and fixed and determined the amount payable to the contractors. It was the "decision" which, by the terms of the contract, was to be conclusive and binding upon both parties. As the result of that decision, the contractors became entitled to the sum awarded by your predecessor, to no more and to no less; it was paid to them, and, in my opinion, you have no authority in law to pay any further sum.

The cases referred by counsel for the Gun Company, such as Bowman's Case (6 Opin., 680), where it was held competent for the Secretary of the Interior to reexamine the claim of an officer for pay, which the Secretary had formerly disallowed, and the similar decision in Chorpenning's Case (9 Opin., 387), do not seem to me to be in point. The declaration of the head of a Department on one day that he will not allow, as in Bowman's case, the demand of a person claiming to be a creditor of the Government, presents no insuperable obstacle to his reconsidering the claim and afterwards allowing it. But in the case presented by you there was a contract between the United States and the Gun Company, which provided in express terms that any claim for penalties should be submitted to the Secretary of the Navy for decision, and that his decision should be conclusive and binding on all parties. To the decision made by your predecessor four years ago, in pursuance to this clause, I must give the effect which the contract, volutarily entered into by the parties, declares that it shall have, and hold it to be conclusive and binding upon all the parties.

Very respectfully,

LAWRENCE MAXWELL, JR.,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

RENT OF SEAL FISHERIES—ABATEMENT OF RENT BY THE SECRETARY OF THE TREASURY.

The Secretary of the Treasury has no power under the law now in force to abate the rent provided for in the lease of March 12, 1890, to the North American Commercial Company, nor has he the right to reduce the amount of the bonus of $7.62½ provided for in said lease to be paid upon each skin taken and shipped; the abatements hitherto made were without authority of law, and the balance of the annual rental and of the bonus of $7.62½ per skin not heretofore paid by the lessee, is still due to the United States and recoverable by it.

Where the meaning of the Revised Statutes is obscure or ambiguous, reference may be had to the original acts to assist in determining the revision, but when the meaning is clear and free from doubt, no such reference is necessary or permissible. (20 Opinions, 51 and 510 dissented from.)

DEPARTMENT OF JUSTICE,
August 7, 1893.

SIR: In 1870 the Secretary of the Treasury, in pursuance of the authority conferred upon him by the act of July 1, 1870 (16 Stat., chap. 180, 189), made a lease to the Alaska Commercial Company of the right to engage in the business of taking fur seals on the islands of St. Paul and St. George for a period of twenty years. When the Revised Statutes were adopted this lease was outstanding, and they provided (sec. 1963) that "When the lease heretofore made by the Secretary of the Treasury to 'The Alaska Commercial Company' of the right to engage in taking fur seals on the islands of Saint Paul and Saint George, pursuant to the act of July one, eighteen hundred and seventy, chapter one hundred and eighty-nine, or when any future similar lease expires, or is surrendered, forfeited, or terminated, the Secretary shall lease to proper and responsible parties, for the best advantage of the United States, having due regard to the interests of the Government, the native inhabitants, their comfort, maintenance, and education, as well as to the interests of the parties heretofore engaged in trade and the protection of the fisheries, the right of taking fur seals on the islands herein named, and of sending a vessel or vessels to the islands for the skins of such seal for the term of twenty years, *at an annual rental of not less than fifty thousand dollars*, to be reserved in such lease and secured by a deposit of United States bonds to that amount; and every such lease shall be duly executed in duplicate, and shall not be transferable."

Accordingly, on March 12, 1890, the Secretary of the Treasury made a lease to the North American Commercial Company of the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul for a term of twenty years from May 1, 1890. The lessee agreed "to pay to the Treasurer of the United States each year during the said term of twenty years, as annual rental, the sum of sixty thousand dollars, and in addition thereto agrees to pay the revenue tax, or duty, of two dollars laid upon each fur-seal skin taken and shipped by it from said

islands of St. George and St. Paul, and also to pay to said Treasurer the further sum of seven dollars and sixty two and one-half cents apiece for each and every fur-seal skin taken and shipped from said islands, and also to pay the sum of fifty cents per gallon for each gallon of oil sold by it made from seals that may be taken on said islands during the said period of twenty years." The lessee also agreed "to obey and abide by any restrictions or limitations upon the right to kill seals that the Secretary of the Treasury shall judge necessary, under the law, for the preservation of the seal fisheries of the United States; and it agrees that it will not kill, or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury." The lease also contains this stipulation: "It is understood and agreed that the number of fur seals to be taken and killed for their skins upon said islands by the North American Commercial Company during the year ending May first, eighteen hundred and ninety-one, shall not exceed sixty thousand."

You say that the Secretary of the Treasury, in settling with the company for the seals taken during the first year of the lease, made an abatement of rent, collecting from the lessee, instead of the stipulated rental of $60,000 only the sum of $12,597, being at the rate of 60 cents for each skin taken, the lessee paying also the $7.62½ for each skin taken and shipped by it from the islands during the year. In making settlement for the second year of the lease the Secretary of the Treasury not only abated the $60,000 in accordance with his first year's settlement, but for the bonus he accepted $9,547 instead of $7.62½. A similar course was followed in making the settlement for the third year of the lease.

You now ask me—

1. Whether the Secretary of the Treasury has the power under the law now in force to abate the rent under the said contract.

2. Assuming that he has the power to abate the rental proportionately, whether he has as a matter of law the power to reduce the amount of the bonus of $7.62½ which the company agreed to pay upon each skin taken and shipped.

3. Assuming that the action of the Secretary of the Treas-

ury remitting the sums mentioned in the contract was without authority of law, whether the Government has now any remedy by which it can recover from said company the amount actually due the United States.

Neither the lease itself nor section 1963 of the Revised Statutes, authorizing the lease, contains any suggestion of a right on the part of the Secretary of the Treasury to abate the rent stipulated in the lease. But it is said that section 1963 of the Revised Statutes is but part of a revision of the act of July 1, 1870; that in order to understand the meaning of the section we must therefore refer to the original act; that, so referring, we find that the Secretary of the Treasury had power under the original act to abate the rent not only with respect to the first lease of twenty years authorized by the act, but with respect to any subsequent lease; and that therefore section 1963 of the Revised Statutes, although not giving the power in terms, must nevertheless be construed as conferring it.

I understand the rule to be that where the meaning of the Revised Statutes is obscure or ambiguous, reference may be had to the original acts to assist in interpreting the revision, but when the meaning is clear and free from doubt, no such reference is necessary or permissible. (*Dwight* v. *Merritt*, 140 U. S., 213; *United States* v. *Bowen*, 100 U. S., 508–513.) Applying this rule, it seems to me that no doubt arises under section 1963 which requires us to refer to the original act to ascertain the meaning of the section. We are at least not at liberty, under the guise of interpretation, to add to the section an important term. It may be true—although I doubt it—that under the act of July 1, 1870, the Secretary of the Treasury would have been authorized to abate rent not only under the first lease, but with respect to any subsequent lease made by him under that act, but when the Revised Statutes came to be adopted the lease with the Alaska Commercial Company had been executed. Congress recognized that fact, referred to it in terms, and provided that the Secretary of the Treasury should, upon the expiration of that lease, make a further lease for twenty years *at an annual rental of not less than $50,000*, and there is no suggestion of power on his part to abate the rental so prescribed under

any circumstances. The subsequent sections of the chapter provide in detail for the other terms of the lease.

Nor do I think that power to abate the rent can be derived from section 1962; because that section refers to the period of twenty years from July 1, 1870, and not to the period covered by the lease made to the North American Commercial Company. It is as follows:

"For the period of twenty years from the first of July, eighteen hundred and seventy, the number of fur seals which may be killed for their skins upon the island of Saint Paul is limited to seventy-five thousand per annum; and the number of fur seals which may be killed for their skins upon the island of Saint George is limited to twenty-five thousand per annum; but the Secretary of the Treasury may limit the right of killing, if it becomes necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as may be proper; and every person who knowingly violates either of the provisions of this section shall be punished as provided in the preceding section."

But if it were lawful for the Secretary of the Treasury to abate rent under an ordinary lease executed under Revised Statutes, section 1963, it seems to me that the terms of the lease made to the North American Commercial Company preclude the notion that any such right was reserved with respect to the gross annual payment of $60,000. That sum seems to be payable in any event, and the interests of the lessee dependent upon regulations of the Secretary of the Treasury, affecting the amount of the catch, are protected by the provision of the lease which calls for $7.62½ per seal, but only for seals which are actually taken and shipped. It must be remembered that the limit of 100,000 seals placed by Congress upon the right to take under section 1962, Revised Statutes, expired July 1, 1890; and that the right of this lessee would therefore be unlimited except by regulations prescribed by the Secretary of the Treasury. In view of this change in the condition of affairs it is easy to account for a lease which provided for a rental of $60,000 in any event, and fixed a method of adjusting the further sums payable on the basis of the actual catch.

But if the Secretary of the Treasury were authorized to abate the rent under this lease I do not see upon what ground the abatement for the first year was made so as to charge the lessee only 60 cents for each seal taken; for the lease provided that no more than 60,000 seals should be taken that year, and the rental being $60,000 the proportionate rate per seal would be $1 and not 60 cents.

Nor am I able to understand how the express provision for the payment of $7.62½ "for each and every fur-seal skin taken and shipped" is susceptible of abatement. It is a definite and fixed sum to be paid for each and every seal taken and shipped, and only for those actually taken and shipped. How can the number taken justify a change in the rate, which, according to the express agreement of the parties, is to be the same for "each and *every*" seal taken, and without reference to the number taken?

I am aware that this opinion is not in accord with the opinions of Mr. Solicitor-General Taft of March 27 and April 1, 1891, and of Mr. Attorney-General Miller of January 17, 1893, and it is naturally with much diffidence that I venture to express views contrary to those of gentlemen for whose professional attainments I entertain such high regard, but I must state the case as it appears to me.

Assuming, as it appears from the correspondence to be claimed by the lessee, that the lease was made on a basis of a standard catch of 100,000 seals per year, and that the $60,000 payment was therefore meant to represent a rate of 60 cents per skin, that, added to the bonus of $7.62½ per seal, would give us $8.22½ as the least cost contemplated by the lessee as payable by it for each seal taken, whereas the Government, in the settlements made by your predecessor, received only 1.55\frac{47}{100}$ per skin for the second year. I can not believe that a construction of a lease, on its face apparently so clear and explicit, is permissible, which leads to such results, especially in view of common knowledge as to the value of sealskins.

If I am correct in my conclusions the abatements made by your predecessor were without authority of law, and the balance of the annual rental and of the bonus of $7.62½ per seal not heretofore paid by the lessee, is still due to the United

States and recoverable by it, and is secured by the bonds of the United States deposited by the lessee with the Secretary of the Treasury as a guaranty.

Very respectfully,

LAWRENCE MAXWELL, JR.,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

RICHARD OLNEY.

ATTORNEY-GENERAL.

The Attorney-General can not be asked to authorize an investigation to be made in order that an official opinion may be rendered by him based on the result of such investigation.

DEPARTMENT OF JUSTICE,
August 11, 1893.

SIR: I am in receipt of your communication of August 1, asking my official opinion upon questions which have arisen in connection with the contract of John Gillies for the construction of a timber dry dock at the Brooklyn navy-yard.

You state that you have been informed that a court has held "that another person is interested in the work with Mr. Gillies as his partner," and you ask me to authorize investigation and examinations into the matter, and upon such investigation and examination, to give you my official opinion upon the sufficiency of the bond; and you also ask my official opinion whether it is competent for your Department to make payments under the contract in accordance with a certain power of attorney given by the contractor.

It has been settled by rulings of my predecessors since the earliest days that the Attorney-General can not properly give an official opinion except upon questions of law arising upon facts stated by the official requesting the opinion. The Attorney-General is not authorized to examine evidence and make findings of fact upon which his opinion is to be based. (19 Opin., 672; *id.*, 696.)

The facts upon which I am asked whether or not the bond is good and sufficient are not stated in your letter, nor can I find from any of the papers inclosed therewith any informa-

tion tending to show that the court has made the determination above stated, except a letter from the district attorney, in which he expresses a doubt as to whether "an order of the court establishing that Gillies has a partner does not release the sureties on the contract." An order of the court is inclosed, but the order contains no such determination or even recital. Nor is the power of attorney upon which you desire my opinion contained with the papers.

I transmitted to you yesterday a copy of a letter received by me from the district attorney, relating to this matter, and I inclose herewith a copy of the contract therein referred to; and I would call your attention to the case of *Palmer* v. *Bagg* (56 N. Y., 523), and to the fact that said contract bears date March 14, 1893, while the contract between your Department and Gillies bears date November 17, 1892.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

REMOVAL FROM OFFICE.

By the act of April 25, 1890, chapter 156, the President was authorized to appoint World's Fair Commissioners on nomination of the governors of the States and Territories. The term of office was not fixed. Its duties were executive in nature: *Held*, that commissioners were removable by joint action of the governor and President, and that an appointment "to succeed R. M. W., removed," was sufficient evidence of such removal.

DEPARTMENT OF JUSTICE,
August 14, 1893.

SIR: I am in receipt of your communication of August 5, asking my official opinion as to the rights of J. M. Webster and Richard M. White, rival claimants to position as World's Columbian commissioner from New Mexico.

The act of April 25, 1890, chapter 156, establishing the World's Commission, provides that the commissioners representing the respective States and Territories shall be appointed by the President, on the nomination of the governors of the States and Territories, respectively; and that vacancies in the commission may be filled in the same manner. No express provision is made as to the removal of these

officers. Their term of office is not fixed. Their duties are executive in connection with the World's Fair at Chicago.

It appears that Mr. White was appointed a member of the commission in 1890. On June 5, 1893, upon the nomination of the governor of the Territory of New Mexico, Mr. Webster was appointed by the President commissioner from that Territory, "to succeed Richard Mansfield White, removed."

It is to be inferred that the removal was made by the appointing power, namely, by the concurrent action of the governor and President. It is my opinion that a vacancy was thereby created, and that Mr. Webster's appointment was legally made.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

EXTENSION OF TIME TO WITHDRAW REIMPORTED WHISKY IN BONDS.

No officer of the Government has power to extend for one year the time for the withdrawal of certain reimported whisky now in a bonded warehouse.

DEPARTMENT OF JUSTICE,
August 15, 1893.

SIR: I have yours of August 12, inclosing a letter from Messrs. George Herzog & Co., of Cincinnati, in which they ask the extension for the period of one year of the time allowed by law for the withdrawal of certain reimported domestic whisky now in bonded warehouse at that port.

Your inquiry is whether the time for such withdrawal can be extended. In my judgment, there is no power in the Secretary of the Treasury or any other officer of the Government to make the extension applied for.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

SURETIES UPON GOVERNMENT CONTRACTS.

A surety upon the bond of a Government contractor is not discharged from liability thereon by the contractor's thereafter agreeing to pay the moneys received by him to some third person, or entering into any partnership or being served with an injunction order restraining him from paying out any of such moneys except to the plaintiff in the injunction suit, the Government not recognizing any of such proceedings in any way.

DEPARTMENT OF JUSTICE,
August 17, 1893.

SIR: I am in receipt of your communication of August 16, asking my official opinion upon questions which have arisen in connection with the contract of John Gillies for the construction of a timber dry dock at the Brooklyn navy-yard.

It appears that Gillies was required to give and did give a bond, with three sureties, to secure the performance of his contract; that Edward Freel, one of the sureties, subsequently on March 17, 1893, entered into a subcontract with Gillies, by which he was to receive from the latter all moneys paid by the Government under the contract; that on June 21, 1893, in consideration of certain advances, Gillies gave one Alfred J. Murray a power of attorney to receive all moneys becoming due to him under said contract; that on July 14, 1893, said power of attorney was duly filed with the Second Comptroller of the Treasury; that on July 17, 1893, in an action commenced in the city court of Brooklyn on or shortly after June 21, 1893, brought by Edward Freel against John Gillies, the court appointed one Charles J. Patterson receiver of all moneys received or to be received by John Gillies from the U. S. Government under such contract, with the customary incidental injunction against Gillies; and that the pay inspector of your Department now holds approved vouchers for over $13,000 due Gillies from the United States. It further appears that the power of attorney to Murray has been filed with the Second Comptroller, while Freel has made no claim that the Government should pay him personally.

You ask me whether the Navy Department is "legally bound by the injunction against Gillies;" second, whether a refusal to pay Murray would give the sureties on the contract other than Freel the right to claim that they were relieved from their responsibility by reason of the failure of the Gov-

ernment to comply with its contract to make payment to Gillies as such payments become due; third, whether payment to Murray would "violate or deny any of the equities of Freel;" fourth, "whether the Department of Justice can suggest any method by which this Department can bring the contending parties, Freel, Murray, and Gillies, before the courts to implead."

Answering your first question, I do not think that your Department is affected by the proceedings in court. The paper you refer to is merely an interlocutory order in a suit to which the Government is not a party, and in which the court does not attempt to interfere with the operations of your Department. It does not enjoin Gillies from collecting his moneys from the Government, nor does it purport to give the receiver power over the moneys until after their collection. He is appointed receiver "of all moneys hereafter to be received by said Gillies on said contract," and Gillies is directed "as often as money is hereafter received by him from said Government," to pay it over. What he is enjoined from doing is "paying out except to said receiver." Nor does the order, so far as appears from the papers submitted by you, establish "that Gillies had a partner." It is not necessary to consider whether the agreement of March 14, 1893, had such effect. The agreement was not intended to affect the action of the Government in any way. It gives Freel no right of possession of any moneys payable by the Government to Gillies until they are "received by him." Whether or not he is to be regarded as having any partner to help him in the work and share his profits is entirely immaterial to the Government, as long as it does not recognize the alleged partnership in any way. (*Palmer* v. *Bagg*, 56 N. Y., 523.)

Answering your second and third questions, I would say that, as the moneys are admitted to be due to Gillies, I see no reason why they should not be paid to him by his attorney in fact constituted for that purpose. As far as appears Freel makes no claim that such payment would violate any rights of his own. He has filed no protest with the Department. He has not even filed a copy of the agreement of March 14, of which you would have had no information but for its mention by the U.S. attorney. He has given no notice of his claims except to leave a copy of the order above mentioned

with the pay inspector. An answer to your fourth question does not, therefore, seem to be required.

You refer in your letter to an enlargement of the work required under the contract involving additional compensation of $45,556, and an extension of time for the completion of the dock. This matter has no bearing upon the questions asked with relation to the subsequent dealings with Freel and Murray, and I do not understand that my opinion as to its legal effect is desired.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

QUARANTINE—SUPERVISION OF STATE OFFICIALS.

Under the quarantine act of February 15, 1893, chapter 114, a regulation may properly be made requiring the inspection by Federal authorities of States and local maritime quarantine to ascertain whether the national quarantine regulations are being complied with.

DEPARTMENT OF JUSTICE,
August 24, 1893.

SIR: I am in receipt of your communication of this date, asking an official opinion as to the legality of the proposed additional quarantine regulation to be promulgated by your Department.

The question you ask is whether the proposed regulation is authorized by the act of Congress approved February 15, 1893, chapter 114, entitled "An act granting additional quarantine powers and imposing additional duties upon the Marine-Hospital Service." Section 3 of this act provides:

"That the Supervising Surgeon-General of the Marine-Hospital Service shall, * * * under the direction of the Secretary of the Treasury, cooperate with and aid State and municipal boards of health in the execution and enforcement of the rules and regulations of such boards, and in the execution and enforcement of the rules and regulations made by the Secretary of the Treasury to prevent the introduction of contagious or infectious diseases into the United States from foreign countries. * * * And all rules and regulations made by the

Secretary of the Treasury shall operate uniformly, and in no manner discriminate against any port or place; and at such ports and places within the United States as have no quarantine regulations under State or municipal authority where such regulations are, in the opinion of the Secretary of the Treasury, necessary, * * * and at such ports and places within the United States where quarantine regulations exist under the authority of the State or municipality which, in the opinion of the Secretary of the Treasury, are not sufficient, * * * the Secretary of the Treasury shall, if in his judgment it is necessary and proper, make such additional rules and regulations as are necessary to prevent the introduction of such diseases into the United States from foreign countries. * * * And when said rules and regulations shall have been made, they shall be promulgated by the Secretary of the Treasury and enforced by the sanitary authorities of the States and municipalities where the State or municipal health authorities will undertake to execute and enforce them; but if the State or municipal authorities shall fail or refuse to enforce said rules and regulations, the President shall execute and enforce the same, and adopt such measures as in his judgment shall be necessary to prevent the introduction or spread of such diseases, and may detail or appoint officers for that purpose."

The proposed regulation is confined to maritime quarantines, and is as follows:

"In the execution of the duties imposed upon him by the act of February 15, 1893, the Supervising Surgeon-General of the Marine-Hospital Service shall, from time to time, personally or through a duly detailed officer of the Marine-Hospital Service, inspect the maritime quarantines of the United States, State and local, as well as national, for the purpose of ascertaining whether the quarantine regulations, prescribed by the Secretary of the Treasury, have been or are being complied with. The Supervising Surgeon-General, or the officer detailed by him as inspector, shall at his discretion visit any incoming vessel or any vessel detained in quarantine, and all portions of the quarantine establishment, for the above-named purpose; and with a view to certifying, if need be, that the regulations have been, or are being, enforced."

The right to oversee the enforcement of the regulations of your Department is essential, both that you may modify or add where experience shows imperfection to exist, and that you may ascertain whether the State or municipal authorities are, or are not, carrying them out. It will be the duty of the President himself to execute your regulations if ever the State or municipality shall fail to do so. From the nature of the case, the decision of the question whether or not this time has come must rest with the President; and that he may decide promptly and advisedly the inspection provided by the proposed regulation is essential. Nor, without such inspection, can the Surgeon-General intelligently cooperate with the local boards of health.

Other provisions of the same act show that inspection of local quarantines by officers of your Department is contemplated. Thus, section 6 provides as follows:

"That on the arrival of an infected vessel at any port not provided with proper facilities for treatment of the same, the Secretary of the Treasury may remand said vessel, at its own expense, to the nearest national or quarantine station, where accommodations and appliances are provided for the necessary disinfecting and treatment of the vessel, passengers, and cargoes."

The intent of this section could not be properly carried out without constant inspection by your Department of the facilities afforded by local authorities.

In my opinion, the proposed regulation is therefore lawful and in accordance with the act.

Very respectfully,

EDWARD B. WHITNEY,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—BOARD OF GENERAL APPRAISERS—BICYCLES AS PERSONAL EFFECTS.

While the Treasury Department may accept decisions of the Board of General Appraisers as a rule of action to be followed in the classification of other importations, it is not compelled by law to do so.

Official opinions of the Attorney-General should be followed by other Departments.

The opinion of Attorney-General Brewster (17 Opin., 679), as to exemption from duty of bicycles, that they are "personal effects," adhered to.

DEPARTMENT OF JUSTICE,
August 28, 1893.

SIR: I am in receipt of your communication of August 24, respecting a conflict between rulings of this Department and of the Board of General Appraisers in construing the tariff law of 1883.

The conflict arose in relation to bicycles. It appears that in May, 1884, they were held to be "personal effects," within the meaning of that law, by an official opinion of Attorney-General Brewster (17 Opin., 679), which opinion was concurred in and officially adopted and promulgated by Secretary Folger on April 9, 1884 (Syn. of Dec. Treas. Dept. No. 6384); but that, in November, 1890, the Board of General Appraisers held to the contrary. It does not appear that any express ruling has been made under the tariff act of October 1, 1890.

My opinion is asked as to whether your Department would be justified in following the opinion of Attorney-General Brewster, notwithstanding the adverse decision of the Board of General Appraisers. I concur entirely in the opinion expressed by you, with relation to the decisions of the board, that while your Department may accept such decisions as a rule of action to be followed in the classification of other importations, it is not compelled by law to do so. On the other hand, while the Attorneys-General have never claimed for their official opinions the force of law, it has always been regarded as the proper practice to follow their guidance (5 Opin., 97; 6 Opin., 334; 7 Opin., 699; 9 Opin., 37), and Congress, while never directly legislating upon this point, seems to contemplate that they are to be given practical effect. (Rev. Stat., 358.)

I understand your question, therefore, substantially to be whether, in view of the decision of the Board of General Appraisers, and of the changes in statutory phraseology made by the act of 1890, the opinion of 1884 is still adhered to by this Department. I would answer, after careful consideration, that I see no reason to change it, and that in my opinion bicycles are exempt from duty under the act of 1890 in like cases with other "personal effects."

Very respectfully,

EDWARD B. WHITNEY,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

CIVIL SERVICE COMMISSION—ATTORNEY-GENERAL.

The construction of regulations of the Civil Service Commission is a matter entirely within the province of the Commission, and should not be attempted by the Attorney-General.

Under the civil-service act of January 16, 1883, chapter 27, and the legislative appropriation act of July 11, 1890, chapter 667, any person may apply to be examined for appointment in the departmental service who is and has been for six months an actual, bona fide, resident of the county of which he claims to be a citizen. The President and Civil Service Commissioners can make all reasonable regulations as to the nature of the testimony required to establish these facts; but the Commission can not by regulation annul the definition of the statutory language as by requiring six months' continuous physical presence in the county as well as residence.

The Attorney-General can not properly attempt to frame a definition of statutory language to cover all future cases.

DEPARTMENT OF JUSTICE,
August 29, 1893.

SIR: I have the honor to acknowledge your communication of August 19, inclosing a request submitted to you by the Civil Service Commission, and asking me to furnish an opinion thereon.

The civil-service law, January 16, 1883, chapter 27, provides substantially that the rules promulgated by the President for carrying it into effect shall have the force of law. It provides further that appointments to the departmental service "shall be apportioned among the States and Terri-

tories and the District of Columbia upon the basis of population as ascertained at the last preceding census. Every application for an examination shall contain, among other things, a statement under oath setting forth his or her actual bona fide residence at the time of making the application, as well as how long he or she has been a resident of such place."

General Rule III, promulgated by the President in accordance with this act, provides as follows:

"Every applicant for examination for the classified departmental service and the classified Railway Mail Service must support the statements of his application paper by certificates of persons acquainted with him, residents of the State, Territory, or district in which he claims bona fide residence, and the Commission shall prescribe the form and number of such certificates."

General Rule VIII provides as follows:

"The Commission shall have authority to prescribe regulations under and in accordance with these general rules and the rules relating specially to each of the several branches of the classified service."

By the legislative appropriation act of July 11, 1890, Congress further provided:

"That hereafter every application for examination before the Civil Service Commission for appointment in the departmental service in the District of Columbia shall be accompanied by a certificate of an officer, with his official seal attached, of the county and State of which the applicant claims to be a citizen, that such applicant was at the time of making such application an actual, bona fide resident of said county, and had been such resident for a period of not less than six months next preceding; but this provision shall not apply to persons who may be in the service and seek promotion or appointment in any other branches of the Government."

With intent to effectuate the intent of this law the Civil Service Commission, on March 7, 1893, made the following order:

"That on and after the first day of April next no application shall be accepted for an examination for the departmental service where the appointment would be charged to

the apportionment, unless it shall be shown to the satisfaction of the Commission that the applicant is at the time *and has been for the six months next preceding actually living and residing and having his or her place of abode in the State in which residence is claimed*, or that he or she is employed in the public service of said State or of the United States, or that the applicant pays poll tax or is a voter in said State, or is the wife or minor child of a person who is then in the public service of the State or of the United States as aforesaid, or the wife or minor child of a person who is such voter or pays such poll tax."

Further regulations were then also made as to the form of proof in the four excepted cases.

The question presented for my opinion is, whether the order of March 7, 1893, is a regulation within the power of the Commission to make. This depends upon the construction given to the words "actually living and residing and having his or her place of abode." If such construction does not involve narrowing the statutory requirement of "actual bona fide residence" there is no serious question for my consideration. If, however, the words are construed to require continuous physical presence of the applicant in the county of his residence for six months next before his application then the regulation is in the nature of a statute of frauds and demands careful consideration.

Section 2 of the civil-service law provides for "open competitive examinations." I think that this phrase implies the privilege of competition in every citizen not specially excepted by law. If this view be correct, then if an applicant can show "actual, bona fide residence" at the time of applying, for the period required, and can obtain the required certificates to that fact, he is entitled to demand an examination. The President and commissioners can make all reasonable regulations as to the nature of the testimony required. If a question of fact is presented by the papers the decision of the Commission is conclusive; but I do not think that the Commission can narrow the definition of the statutory phrase.

It would not be proper for me to attempt here a definition of the words "actual, bona fide residence." As stated by Attorney-General Miller, in his opinion rendered to your predecessor on April 1, 1891, it involves "a mixed question of

law and fact, to be determined in each instance upon its own peculiar facts. A general rule applicable to all cases can not be formulated." To attempt such a formulation to cover cases that may arise in the future is beyond the sphere of this Department. (18 Opin., 414.) Nor would it be proper for me to attempt the construction of the regulation. That is a matter entirely within the province of the Civil Service Commission. (18 Opin., 321.)

My answer to the question submitted must therefore simply be that, if the words "living and residing and having his or her place of abode," in the order of March 7, 1893, are construed as equivalent to the words "bona fide residing," the order is a lawful regulation; but that if they are given any more restrictive construction the order is to that extent unauthorized.

Very respectfully,

RICHARD OLNEY.

The PRESIDENT.

SECRETARY OF THE INTERIOR—FREEDMEN'S HOSPITAL AND ASYLUM.

The relations of the Secretary of the Interior and the Freedmen's Hospital and Asylum are unchanged by the act of March 3, 1893, chapter 199, save that the Commissioners of the District of Columbia are given the supervision and control of expenditures for the Freedmen's Hospital and Asylum.

DEPARTMENT OF JUSTICE,
August 31, 1893.

SIR: I have yours of the 28th instant, which in effect calls for my opinion respecting the relations of the Secretary of the Interior to the Freedmen's Hospital and Asylum since the passage of the act of March 3, 1893 (27 Stat., 537), which contains the following: "And hereafter the expenditures for the Freedmen's Hospital and Asylum shall be under the supervision and control of the Commissioners of the District of Columbia."

In my judgment, the opinion of the attorney for the District of Columbia contains a correct statement of the law. With the exception that the Commissioners of the District of Columbia are given the supervision and control of expenditures for the Freedmen's Hospital and Asylum, the powers

and duties of the Secretary of the Interior are unchanged by the act of March 3, 1893, and remain the same as before its enactment.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE INTERIOR.

APPROPRIATION.

Under the terms of the joint resolution of Congress approved February 25, 1893, the Secretary of State can not lawfully authorize the construction of a wharf different in character from that specified in the resolution, even if from a change of circumstances the construction of that sort of wharf with that appropriation has become impracticable.

DEPARTMENT OF JUSTICE,
September 4, 1893.

SIR: Yours of the 31st ultimo asks my opinion upon the question whether, under the terms of the joint resolution of Congress approved February 25, 1893, the Secretary of State can lawfully authorize the construction of a wharf different in character from that specified in the resolution, which describes the structure as a wharf "of cast-iron screw piles, with timber deck, and planned and estimated for by Col. Thomas L. Casey."

The language of the resolution is too clear and explicit to leave room for difference of construction. The Secretary of State is not empowered to build any wharf which will answer the purposes Congress may be supposed to have in view. He is empowered to accomplish those purposes, or to aim to do so, by a wharf of a particular design and built of certain specified materials. He can lawfully apply the appropriation made by the resolution only to that sort of wharf, and he gets no additional power in the premises because, from a change of circumstances, the construction of that sort of wharf with that appropriation has become impracticable. For that state of things the only appropriate remedy is in additional legislation by Congress.

Respectfully,

RICHARD OLNEY.

The SECRETARY OF STATE.

DISTRICT ATTORNEY—EXTRA COMPENSATION.

The opinions of Attorneys-General Garland and Miller (18 Opin., 192; 19 Opin., 354) followed as to construction of Revised Statutes 827, relating to extra compensation of the district attorney for the southern district of New York.

DEPARTMENT OF JUSTICE,
September 7, 1893.

SIR: In your communication of September 2, you ask my official opinion as to whether the district attorney for the southern district of New York is entitled to compensation, under section 827 of the Revised Statutes, for appearing in customs cases in his district, in addition to the salary of $6,000 which is provided "for all his services" in section 770.

Departmental service has always allowed additional compensation in the cases referred to, notwithstanding the restrictive words of section 770. This practice was not adopted inadvertently, but received careful consideration from the Solicitors of the Treasury and Commissioners of Customs. The question was also submitted to my immediate predecessors, Attorneys-General Garland and Miller, each of whom, in an official opinion, held that the practice was correct. (18 Opin., 192; 19 Opin., 354.) I see nothing which would warrant me to reverse their decisions. Your question is therefore answered in the affirmative.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

COMPTROLLER—SOLICITOR OF THE TREASURY—ATTORNEY-GENERAL.

The Comptroller and Commissioner of Customs have no legal status as advisers of the Secretary of the Treasury upon legal questions. Their opinions are purely extra official and rendered by courtesy only.

The opinion of the Solicitor of the Treasury may be asked upon any question of pure law or of mixed law and fact arising in the Treasury Department, except questions involving the construction of the Constitution of the United States. His opinions have, however, no binding force.

Questions of pure law actually arising in the administration of the Treasury Department, and requiring the personal consideration of the Secretary, may be referred to the Solicitor of the Treasury or to the Attorney-General. If referred to the latter, however, his answer should be regarded by the Department as law until withdrawn by him or overruled by the courts.

DEPARTMENT OF JUSTICE,
September 8, 1893.

SIR: I am in receipt of your communication of August 30, inclosing reports from the First and Second Comptrollers, the Commissioner of Customs and the Solicitor of the Treasury, in relation to the extent of their respective jurisdictions and the extent to which they are customarily called upon to give legal opinions. You ask me to advise you what I consider to be the limits of the jurisdiction of each of the said officers in this matter.

I do not think that the First or Second Comptroller or the Commissioner of Customs has any legal status as an adviser upon legal questions. These gentlemen are accounting officers holding great power, but their function is to take action, not to advise others how to act. Each is the trial judge within his own sphere, and, as provided by section 191 of the Revised Statutes, the balances certified by him upon the settlement of public accounts "shall not be subject to be changed or modified by the heads of Departments, but shall be conclusive upon the Executive branch of the Government, and be subject to revision only by Congress or the proper courts." It is, however, customary to ask their opinions on questions of law, and this custom is a convenient and proper and even necessary one within certain limits. The custom doubtless arose from the importance of knowing beforehand when expenses were to be incurred what the decision of the Comptroller would be afterwards when the question of legality should come up upon the settlement of accounts. In form the Comptroller is asked for legal advice; in fact, what is desired is information as to his future action. He is in no way bound in settling accounts to follow his own unofficial opinion previously formed. He does, however, do so on the principle of *stare decisis*. I should infer from the reports of the Comptrollers that their advice is often asked on other points of law which are not anticipatory of future decisions by themselves. Answering such questions is a

merely voluntary matter, and the answers are, of course, purely extra-official. The advice thus given is doubtless intrinsically most valuable, but otherwise it differs in no way from advice on the same subject by any outsider.

The Solicitor of the Treasury is, however, an adviser recognized by the law. Section 349 of the Revised Statutes provides that "there shall be in the Department of Justice a Solicitor of the Treasury." Section 350 provides that "the officers named in the preceding section shall exercise their functions under the supervision and control of the head of the Department of Justice." Section 360 provides that "the Attorney-General may require any solicitor or officer of the Department of Justice to perform any duty required of the Department or any officer thereof." Section 361 provides that "the officers of the Department of Justice, under the direction of the Attorney-General, shall give all opinions and render all services requiring the skill of persons learned in the law necessary to enable the President and heads of Departments and the heads of bureaus and other officers in the Departments to discharge their respective duties."

The Solicitor of the Treasury had been, prior to the act of June 22, 1870, establishing the Department of Justice, an officer of the Treasury Department. It had, as I am informed, been the custom, long prior to that time, for him to give legal advice to the Treasury Department. That statute provided that he, with the Solicitor of Internal Revenue and other officers, "shall be transferred from the Departments with which they are now associated to the Department of Justice." I have not found any general instructions in writing from the Attorney-General to the Solicitor of the Treasury in relation to the performance of his duties subsequent to the taking effect of the act of 1870. This is, perhaps, due to the fact that at that time the two officers occupied adjoining rooms in the Treasury Department, so that communication between them was oral. The Solicitor of the Treasury, however, has ever since continued to advise the Secretary of the Treasury and heads of bureaus subordinate to him; and such advice has been regarded as rendered by him in the character of assistant to the Attorney-General and in accordance with the

provision of section 361 above quoted. His advice may be asked upon any question of pure law or of mixed law and fact arising in the Treasury Department, with the single exception of questions involving the construction of the Constitution of the United States, which should be submitted to the Attorney-General for his personal opinion. (Rev. Stat., 358.) The Solicitor's opinions, however, have in no way binding force, nor are they distinguishable from those rendered by the Comptrollers, except by the fact that the advice of the Comptrollers is purely voluntary, while it is the Solicitor's duty to render legal assistance. This is one of the duties for which he receives compensation, while to compensate the Comptrollers for such work would be a violation of law. (Rev. Stat., 189.)

The Solicitor of the Treasury is the only person from whom legal advice can be required by the Treasury Department, except upon questions of pure law actually arising in the administration of the Department and requiring the personal consideration of the head of the Department, as distinguished from mere questions of administration arising in its subordinate bureaus. The advisory relation of the Solicitor to the Secretary of the Treasury is precisely that of the Assistant Attorney-General, appointed in pursuance of the act of February 25, 1871, to the Secretary of the Interior. This Assistant Attorney-General is not expressly endowed by statute with any advisory relation to the Interior Department, but he performs there, by assignment of the Attorney-General, under section 361, the same general duties which the Solicitor of the Treasury performs in the Treasury Department by like assignment. As illustrative, therefore, of the functions of the Solicitor of the Treasury in your Department, I may quote from an opinion rendered to the Secretary of the Interior on June 7, 1893, by Solicitor-General Maxwell and approved by myself. In that case the question was whether the Commissioner of Patents could legally appoint a referee to take testimony in a disbarment proceeding before him. He was advised that this question was not a question of law arising in the administration of the Department such as could properly be submitted to the Attorney-General for an official opinion. The following language was used:

"It has been held frequently that the statutes prescribing the duties of the Attorney-General (Rev. Stat., 354, 356) do not authorize or require him to give an official opinion except to the President or to the head of an Executive Department; and it would seem to follow that the opinion should be needed for the guidance of the head of a Department, and should relate to some matter calling for action or decision on his part. * * * For the guidance of the heads of bureaus and other officers of the Departments in the discharge of their duties, provision is made by section 361 of the Revised Statutes for assistance from the officers of the Department of Justice, under the direction of the Attorney-General; and an Assistant Attorney-General and law clerks have accordingly been assigned to the Department of the Interior, to whom, it seems to me, the Commissioner of Patents should submit his question. * * * It is not meant by this opinion to deny the authority or duty of the Attorney-General to answer questions of law submitted to him by the head of a Department, although at the instance of the head of a bureau, where the question relates to matters within the direct or supervisory control of the head, and is deemed by the head to be of such difficulty or importance as to require the personal attention of the Attorney-General."

There is thus, in the matter of rendering opinions, an exclusive jurisdiction of the Attorney-General, an exclusive jurisdiction of the Solicitor of the Treasury, and a concurrent jurisdiction in both. Whether questions arising in the concurrent jurisdiction (that is, questions of pure law actually arising in the administration of the Department and relating to matters within the direct or supervisory control of its head) shall be referred to the Attorney-General, to the Solicitor of the Treasury, or to both, is entirely within the discretion of the Secretary of the Treasury. I do not feel that I can intelligently advise as to the exercise of this discretion, nor would it, indeed, be proper for me to do so (17 Opin., 332). Any suggestions made by me must be considered extra-official and as coming from one whose lack of practical knowledge of the administration of the Department makes his opinion on this point far inferior in value to your own. I would, however, call attention to one point in

which the opinions of the Attorney-General differ from those of the Solicitor of the Treasury.

The act of 1870, section 4, establishing the Department of Justice, provided that written opinions prepared by a subordinate in the Department may be approved by the Attorney-General, and that "such approval so indorsed thereon shall give the opinion the same force and effect as belong to the opinions of the Attorney-General." This provision is embraced in substantially the same language in section 358 of the Revised Statutes. Evidently, therefore, Congress contemplates that the official opinions signed or indorsed in writing by the Attorney-General shall have some actual and practical force. Congress's intention can not be doubted that administrative officers should regard them as law until withdrawn by the Attorney-General or overruled by the courts, thus confirming the view which generally prevailed, though sometimes hesitatingly expressed, previous to the establishment of the Department of Justice. (5 Opin., 97; 6 Opin., 334; 7 Opin., 699,700; 9 Opin., 36, 37.)

Instances have recently come to my notice where official opinions of former Attorneys-General have been practically overruled by the Solicitor of the Treasury or administrative boards. These cases were probably due to inadvertence, yet I would suggest that questions of great importance and involving the future course of practice should be referred to the Attorney-General, and that the fact of such reference and the opinion when received should be brought to the notice of the gentlemen whose advice is customarily asked in your Department, that uniformity of rulings may be secured.

Very respectfully,

RICHARD OLNEY

The SECRETARY OF THE TREASURY.

"ADDITIONAL DUTIES"—PENALTIES—REMISSION OF FORFEITURE.

The "additional duties" provided for by the customs administrative act of June 10, 1890, chapter 407, are penalties within the meaning of Revised Statutes, sections 5292 and 5293, and the anti-moiety act of June 22, 1874, chapter 391.

The Secretary of the Treasury may, therefore, remit such additional duties, but has no power to remit any part of the duties strictly so called, however erroneously they may have been assessed.

The law looks at facts, not names.

A construction which would make the results of a law unreasonable should be avoided.

DEPARTMENT OF JUSTICE,
September 9, 1893.

SIR: I have given careful consideration to the questions raised by your communication of August 11, relating to the remission of penalties by the Treasury Department. I understand that you desire no opinion as to the case of the Madison Square Garden Company. This leaves two questions to be answered.

First. The first question you ask is whether the so-called "additional duties" provided for by section 7 of the customs adminstrative act of June 10, 1890, chapter 407, are penalties within the meaning of sections 5292–3 of the Revised Statutes, and sections 17–20 of the antimoiety act of June 22, 1874, chapter 391.

Although this question was substantially decided in the affirmative by the Attorney-General under prior acts of like import as long ago as 1843, yet recent rulings of the Secretaries of the Treasury have been to the contrary, supported by an opinion of the Solicitor of the Treasury rendered in 1886. While these rulings have not established a practice so continuous as to govern the statutory construction, yet, as I adhere to the opinion expressed by my predecessor, they call for a more extended discussion of the subject than is usual in opinions rendered by this Department.

Section 7 of the act of 1890 provides as follows:

"And if the appraised value of any article of imported merchandise shall exceed by more than 10 per cent the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to 2 per cent of the total

appraised value of each 1 per cent that such appraised value exceeds the value declared in the entry; and the additional duties shall only apply to the particular article or articles in each invoice which are undervalued; and if such appraised value shall exceed the value declared in the entry more than 40 per cent, such entry may be held to be presumptively fraudulent, and the collector of customs may seize such merchandise and proceed as in cases of forfeiture for violations of the customs laws."

The sections above cited from the Revised Statutes and the anti-moiety act of 1874 provide procedure by which "any fine, penalty, or forfeiture" may be remitted in a proper case by the Secretary of the Treasury. This system of remission has come down with some changes of detail from the act of March 3, 1797, chapter 13. The power of remission applies by section 5292 of the Revised Statutes to "any person who shall have incurred any fine, penalty, forfeiture, or disability * * * by authority of any provisions of law for imposing or collecting any duties or taxes * * *;" by section 5293 to "a fine, penalty, or forfeiture"; by section 17 of the act of 1874 to "any person who shall be charged with having incurred any fine, penalty, forfeiture, or disability other than imprisonment." The act of 1797, under which the opinion of my predecessor above referred to was given, relates to "any person or persons who shall have incurred any fine, penalty, forfeiture, or disability * * * by force of any present or future law of the United States for the laying, levying, or collecting any duties or taxes * * *." There is no doubt that if the "additional duty" is a penalty, these provisions apply to the case, as they are to be construed as forming, with the act of 1890, one complete system of tariff legislation.

On principle, it is clear that the so-called "additional duty" is a penalty. It is not provided for the purposes of revenue. It is no less a penalty because proof of fraud or other willful misconduct is not a necessary preliminary to its infliction. It is in its essence a fine inflicted to promote honesty; nor is it less a penalty because it is called something else. The law looks at facts, not names. As will be shown, it was in fact called a penalty when it first appeared in the statute book. The results of the contrary construc-

tion would be most unreasonable and therefore to be avoided if possible. One result would be that the Secretary of the Treasury could remit when fraud was charged; otherwise, not. If the increase of valuation on the appraisement amounts to 40 per cent, the goods may be seized for presumptive fraud, according to the express provisions of the law, and then the Secretary's power of remission attaches. If, however, the increase in valuation by the appraisement is between 10 and 40 per cent only, then, according to the construction adopted by the Treasury Department, no seizure can be made unless there is some positive indication of fraud. If there are indications of fraud, a seizure can be made, followed by a remission. If there are no indications of fraud, there can be no remission, because there can be no seizure. Such intent should not be imputed to Congress except in a very clear case.

It now remains to trace the history of the statutory provisions and consider decisions of the courts and opinions of the Attorney-General under the language of the older statutes.

The "additional duties" of the act of 1890 originated as early as the act of April 20, 1818, chapter 79. Section 11 of that act, after providing for appraisal of goods subject to *ad valorem* duties on suspicion of undervaluation, enacts that "if the value at which the same shall be appraised shall exceed by 25 per cent the invoice prices thereof, then in addition * * * there shall be added 50 per cent on the appraised value; on which aggregate amount the duties on such goods, wares, and merchandise shall be estimated." In this and other early acts the penal duty was arrived at by the method of enlarging the basis on which the *ad valorem* duty was computed, not as now by simply increasing the percentage of the duty.

Section 25 of this act enacted: "That all *penalties and forfeitures* incurred by force of this act shall be *sued for*, recovered, *distributed*, and accounted for in the manner prescribed by" the act of March 2, 1799, "and may be *mitigated or remitted* in the manner prescribed by" the act of March 3, 1797. Attorney-General Wirt, in his opinion of February 19, 1821 (5 Opin., 730), ruled that the 50 per cent could not be remitted; but this was because he thought Congress to

have "confined the mitigating and remitting power of the Secretary of the Treasury to such penalties and forfeitures as are, according to the provisions of the act, to be recovered *by suit*." This construction would have prevented the distribution of moieties out of this 50 per cent among the customs officers; it seems either to have been retracted or disregarded, with the subsequent approval of the Supreme Court (*Bartlett* v. *Kane*, 16 How., 263, 274).

The act of March 1, 1823, chapter 21, section 13, repeated the language quoted from section 11 of the former act, adding the following words: "*Provided*, That nothing herein contained shall be construed to impose *the said penalty of 50 per cent* for a variance between the bona fide invoice of goods produced in the manner specified in the proviso of the fifth section of this act, and the current value of the said merchandise in the country where the same may have been originally manufactured or produced." The fifth section referred to "*the penalty* provided for in the thirteenth section of this act."

The tariff act of May 19, 1828, provided in section 8 for an appraisal in all cases of goods subject to *ad valorem* duties, or to any other duties regulated according to the value of the article, and enacted in section 9 that where the appraised value "shall by 10 per cent exceed the invoice value thereof, in addition to the duty imposed by law on the same, if they had been invoiced at their real value, as aforesaid, there shall be levied and collected, on the same goods, wares, and merchandise, 50 per cent of the duty so imposed on the same goods, wares, and merchandise, when fairly invoiced: *Provided, always*, that nothing in this section contained shall be construed to impose the said last-mentioned *duty of 50 per cent* for a variance between the bona fide invoice of goods produced in the manner specified in the proviso to the eighth section of this act, and the current value of the said merchandise in the country where the same may have been originally manufactured or produced: And, further, that the *penalty of 50 per cent* imposed by 'the act of 1823' shall not be deemed to apply or attach to any goods, wares, or merchandise which shall be subject to the additional *duty of 50 per cent*, as aforesaid, imposed by this section of this act."

It will be noticed that this first proviso is substantially a copy of the proviso in the act of 1823, only changing the

word "penalty" to "duty;" but that in referring to the former act it still retains the word "penalty." The change of wording was probably made, in accordance with the extreme high-tariff policy of the framers of this famous act, to prevent a strict construction in favor of the importer. This purpose failed, as we shall see, if it ever existed, for the Supreme Court looked through the name at the substance of the thing, and found it to be still a penalty, as unconsciously confessed by the legislators in this second proviso.

The tariff act of August 30, 1842, chapter 270, section 17, repeated the language of section 9 of the act of 1828, but without the provisos. By section 26 prior laws as to "the recovery, collection, distribution, and remission of all fines, penalties, and forfeitures," were continued as if reenacted.

It was under this act that the opinion of Attorney-General Legare was asked by the Secretary of the Treasury whether he had power to remit the 50 per cent as a penalty, within the meaning of the act of 1797. This question was answered in the affirmative on June 7, 1843 (4 Opin., 182), the Attorney-General stating that he was "very clear that the 50 per cent * * * is a penalty."

The "act relative to collectors and other officers of the customs" of February 11, 1846, chapter 7, impliedly recognized the correctness of this opinion by providing that "no portion of the additional duties provided by" the act of 1842, section 17, "shall be deemed a fine, penalty, or forfeiture *for the purpose of being distributed to any officer of the customs;* but the whole amount thereof, when received, shall be paid directly into the Treasury."

The tariff act of July 30, 1846, chapter 74, section 8, after providing for entry and appraisement of imported goods, enacted that if the appraised value thereof shall exceed by 10 per cent 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 cent *ad valorem* on such appraised value." This act was held not to repeal the administrative provisions of customs law not expressly reenacted (*Ring* v. *Maxwell*, 17 How., 147).

In *Greely* v. *Thompson*, 10 How., 225, and *Maxwell* v. *Griswold*, *id.*, 242, a strict construction was placed by the Supreme

Court on these provisions of the acts of 1842 and 1846, respectively, on the ground that they were penal in nature. In *Bartlett* v. *Kane*, 16 How., 263, 274, the court called the 20 per cent under the latter act an "amercement," and held that, not being a duty in the true sense of the word, its return could not be demanded upon reexportation. Speaking of these "additional duties," Mr. Justice Campbell said that "they were enacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the acts this additional duty has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, and in reference to the subject of drawback and debenture, it must still be regarded in the light of a penal duty." (See also *Ring* v. *Maxwell*, 17 How., 147, 150, 151; *Stairs* v. *Peaslee*, 18 How., 521, 527–529; *Belcher* v. *Lawrason*, 21 How., 251, 256; *Tappan* v. *United States*, 2 Mason, 393, 402; *Swanston* v. *Morton*, 1 Curt., 294; *Kriesler* v. *Morton*, 2 Curt., 239; 17 Opin., 268; *id.*, 436).

The act of June 30, 1864, chapter 171, section 23, in terms reenacted the provision above quoted from the act of 1846; and section 22 continued all existing laws. Section 23 was repealed, but reenacted in this particular, by the act of March 3, 1865, chapter 80, section 7, and its language was incorporated in section 2900 of the Revised Statutes, which remained the law until the enactment of the customs administrative act of 1890 now in question. Under the latter, as under its predecessors, the so-called "additional duty" is recognized by the Supreme Court to be a penalty (*Passavan* v. *United States*, 148 U. S., 214, 218, 221, 222).

I am, therefore, constrained to hold that, being a penalty, it is subject to remission like other fines, penalties, and forfeitures.

Second. The second question presented by you relates to the seizure of the paintings of Mr. E. Roberts for alleged undervaluation. It appears that Mr. Roberts had paid duties upon part of his importation and entered the remainder free as "antiquities." After the seizure, the importer failed to take the proceedings provided for the case of persons dissatisfied with the appraisement or classification of their merchandise. Instead, he brought a proceeding under section

5292 of the Revised Statutes and the act of 1874 for a remission of the forfeiture. A summary investigation was had before the United States commissioner, who certifies the evidence to you and finds that the pictures entered as "antiquities" were entitled to free entry as such, and that the value of the other articles as declared in the invoice is greater than their true market value in the country of production. You ask to be advised as to the weight and effect of this proceeding and of the findings of the commissioner, and as to any action which it is incumbent for you to take under the circumstances. I can only answer this question so far as it relates to your power to remit in the premises.

I do not understand that you question your own power to remit the forfeiture upon payment of the proper duties as estimated upon the appraised value of the pictures. Your doubt concerns the right to remit also in this proceeding the difference between the duties actually paid at the time of importation and the duties as they would be assessed were the appraisement and classification by the custom-house authorities assumed to be correct. It is evident that such a remission would be equivalent to a reappraisement by a U. S. commissioner and the Secretary of the Treasury instead of in the manner provided by the customs administrative act. Were such a practice established, importers would substantially have a choice of forum. They could appeal either to the Board of General Appraisers or to yourself through the U. S. commissioner in remission proceedings. I do not think that any such position is tenable. The sums assessed by the custom-house authorities (exclusive of the amercement under section 7 of the customs administrative act) are in no sense penalties, but are duties in the strict sense of the term, however erroneously arrived at. I therefore advise that you have the power to remit the forfeiture, but only on payment of the duties as so estimated.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

A Chinaman resident of the United States asked the Secretary of the Treasury whether, if he should revisit his native country, he could lawfully return to the United States afterwards: *Held*, that this was not a question arising in the administration of the Treasury Department, and therefore the official opinion of the Attorney-General could not be asked upon it.

DEPARTMENT OF JUSTICE,
September 13, 1893.

SIR: In your communication of September 9 you ask my official opinion as to whether a certain Chinaman is or is not a Chinese laborer within the meaning of the legislation of Congress. It appears that the Chinaman in question, through his attorney, has asked to be advised by you on the point, because he desires to visit his native country, if that will not cut off his future residence here.

Section 356 of the Revised Statutes authorizes me to give an official opinion only upon questions arising in the administration of one of the Executive Departments. I am unable to perceive that this case comes within the statutory provision. The time within which certificates can be granted to Chinamen under the act of May 5, 1892, under your supervision, has expired. I do not see that any question can arise from your Department with relation to this particular Chinaman until his return to this country, if he shall decide to depart. An unofficial opinion upon the present law would be of no greater value than the opinion of his own legal adviser, who has evidently given the question careful attention; nor, if the law should happen to be changed during his absence, would anything said or done now protect him (*Chinese Exclusion Case*, 130 U. S., 581). I do not think, therefore, that it would be proper for me to give the opinion requested.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

PRESIDENT'S PARDONING POWER—AMNESTY.

The President's constitutional pardoning power covers the case of the offense in Utah of unlawful cohabitation. The pardoning power of the President is absolute, and not a subject of legislative control.

DEPARTMENT OF JUSTICE,
September 20, 1893.

SIR: I return herewith the papers in the case of David A. Sanders, of Utah, applicant for "amnesty" for the offense of unlawful cohabitation, which papers have been referred to me for an opinion as to the power of the President in the premises.

Though the application is for what is called "amnesty," and though the same term is used in the reference to me for an opinion, the applicant intends to ask—indeed his application expressly so states—for the exercise in his favor of the President's constitutional pardoning power, so that I assume the real question to be whether that power includes the applicant's particular case.

In my judgment it does include his case beyond all question. The only suggestion to the contrary is that the Edmunds law, so called, operates as a limitation of the President's pardoning power by confining the "amnesty" therein authorized to offenders who were such before a designated time.

But, in the first place, if any intent of the sort could be imputed to Congress, it must necessarily fail of effect, because the pardoning power granted to the President is absolute, and is not a subject of legislative control. In the second place, no such intent can fairly be ascribed to Congress, which undoubtedly used the word "amnesty" advisedly, and only meant to indicate by the whole "amnesty" clause that if the President, in his discretion, saw fit, by act of executive clemency, to embrace a whole class of offenders instead of dealing with the case of each separately, such a course would not be inconsistent with the purposes and objects Congress had in view.

Respectfully,

RICHARD OLNEY.

The PRESIDENT.

PARADE—EMPLOYÉS ABSENT FROM DUTY.

Employés of the United States who are members of the National Guard are not entitled to leave of absence from their respective duties without loss of pay or time in order to engage in rifle practice, even although in the general orders of the commanding general of the militia such rifle practice may be called a parade.

DEPARTMENT OF JUSTICE,
September 29, 1893.

SIR: Your letter of the 21st September, 1893, asks my opinion upon the following questions, viz: Are the men in the employ of the War Department who were absent from their duties in the Department to attend the rifle practice under General Order No. 9, from the headquarters of the District of Columbia militia, of June 28, 1893, entitled to that absence without loss of pay or time?

In the order referred to it was announced *inter alia*—

"The troops of the National Guard will parade for rifle practice as follows, etc.

* * * * *

"Government employés will be given certificates for one day of duty performed under the requirements of this order."

Section 49, chapter 328, Statutes at Large, volume 25, page 779, provides "that all officers and employés of the United States and of the District of Columbia, who are members of the National Guard, shall be entitled to leave of absence from their respective duties, without loss of pay or time, on all days of any *parade* or *encampment* ordered or authorized under the provisions of this act."

The inquiry involves the ascertainment of the sense in which the term *parade* is employed in the act of Congress.

From the dictionaries we learn that etymologically it is formed from *paratus*, and was applied to the ground prepared for the assembly of troops, and, that a secondary meaning was the assembly itself that was held on the ground. In the military art it has acquired varied but definite significations.

For the present purpose it is important to ascertain rather what the term does not than what it does embrace.

Section 41 provides "That the commanding general shall prescribe such stated *drills* and *parades* as he may deem nec-

cessary; * * * that he may order out any portion of the National Guard for such *drills*, *inspections*, *parades*, *escort*, or *other duties* as he may deem proper; that the commanding officer of any regiment * * * may also assemble his command, or any part thereof, in the evening for *drill instruction* or *other business;* * * * but no *parade* shall be performed * * * without the permission of the commanding general."

From which it would seem to be clear that to the terms *drill*, *parade*, *inspection*, and *instruction* distinct and separate meanings attach, and that *parade* can not be held to embrace the service or duty signified by either of the other terms.

"Rifle practice" is certainly embraced within the terms "drill" or "instruction," or else it falls within the general expression of "other duties." It can not, with any regard to propriety of expression, be termed a *parade* or an *encampment;* and hence I am of the opinion that employés of the United States who are members of the National Guard are not entitled to leave of absence from their respective duties without loss of pay or time in order to engage in rifle practice, even although in the general orders of the commanding general of the militia such rifle practice may be called a *parade.*

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

EMPLOYÉS ABSENT ON PAY.

Under section 5 of the legislative, executive, and judicial appropriation act of March 3, 1893, chapter 211, the heads of the Departments seem to have no authority to grant leave with pay for more than sixty days in any one case in any calendar year. The act applies to the current year, and absences prior to July 1, 1893, must be taken into account in computing the total leave to which an employé may be entitled during the calendar year ending December 31, 1893.

DEPARTMENT OF JUSTICE,
October 12, 1893.

SIR: I have the honor to acknowledge the receipt of your letter of the 10th instant, in which you ask the following questions:

1. Whether section 5 of the legislative, executive, and judicial appropriation act, passed March 3, 1893 (chap. 211, 27 Stats., 675), "is retroactive, in that leave of absence prior to July 1, 1893, should be considered in the present calendar year?"

2. Whether, "when an employé of the War Department has been granted a leave of absence for thirty days on account of sickness, the case being an 'exceptional and meritorious' one, 'when to limit such sick leave would work peculiar hardship,' the head of the Department has in his discretion the power to *extend* such sick leave for a period of sixty days, thus making a total of ninety days' absence with pay on account of sickness?"

Prior to the passage of the act referred to, the subject was governed by section 4 of the legislative, executive and judicial act passed March 3, 1883, chapter 128 (22 Stat., 531), under which the heads of the Departments had authority to grant sick leaves with pay in their discretion and without limit as to time. In all other respects the provisions of the two acts are identical. The only purpose, therefore, of the act of 1893 was to restrict the unlimited discretionary power which the heads of the Departments then enjoyed of granting sick leaves with pay. The restrictions imposed are two. The first relates to the nature of the illness; the second to the time for which the leave may be granted. The provision is that no such leave with pay can be granted, even for a day, except in case of personal illness of the employé, or when some member of his "immediate family is afflicted with a contagious disease and requires the care and attendance of such employé, or where his or her presence in the Department would jeopardize the health of fellow-clerks;" and in all ordinary cases the leave thus permitted is limited to thirty days in any one calendar year. But "in exceptional and meritorious cases, where to limit such sick leave would work peculiar hardship, it may be extended, in the discretion of the head of the Department, with pay, not exceeding sixty days in any one case or in any one calendar year." I read this provision as authorizing, even in the exceptional and meritorious cases mentioned, a total allowance on account of sickness of not more than sixty days in any one calendar year in any one

case. It has been urged that it authorizes the extension of an original leave of thirty days for sixty days additional, so as to make ninety days in all. The language is not entirely free from doubt, but it occurs as a proviso to a statute which directs "the heads of the several Executive Departments, *in the interest of the public service*, to require of all clerks and other employés, of whatever grade or class, in their respective Departments, not less than seven hours of labor *each day*," except Sundays and holidays, and must therefore be strictly construed. I do not read the proviso as being confined to cases in which original leave is extended in the sense of being enlarged, but as authorizing the head of a Department to extend, in the sense of to grant, sixty days' sick leave in any one calendar year where it would work peculiar hardship to limit the leave to thirty days.

The act applies to the current year; no exception is made with respect to absences prior to the 1st of July, 1893, and these absences must therefore be taken into account in computing the total leave to which an employé may be entitled during the calendar year ending December 31, 1893. In this view the act is not retroactive, because it does not affect the case of one who has had sick leave of more than sixty days prior to July 1, 1893, except to provide that such person shall have no further sick leave with pay during the rest of the year. The rule adopted by Congress was furthermore known as early as March 3, the date of the passage of the act, and employés were in position from that time on to regulate their applications for leave with reference to its provisions.

I appreciate the merit and the hardship of the cases to which you refer, but relief must be sought, if at all, from Congress. The heads of the Departments seem to have no authority to grant leave with pay for more than ninety days in any one case in any calendar year.

Respectfully,

LAWRENCE MAXWELL,
Solicitor-General.

The SECRETARY OF WAR.

Approved:

RICHARD OLNEY.

ATTORNEY-GENERAL.

In answer to the general question whether "building, loan, and savings associations" are "corporations doing the business of bankers, brokers, or savings institutions" within the meaning of Revised Statutes, section 5243: *Held*, That an official opinion should not be given on the question, as the name of the association does not alone afford him sufficient information, and as the question was one belonging rather to the judicial than to the executive branch of the Government.

DEPARTMENT OF JUSTICE,
October 24, 1893.

SIR: I am in receipt of your communication of October 17, asking my official opinion as to the question whether it is a violation of section 5243 of the Revised Statutes for "building, loan, and savings associations" to use the word "national" as a "part of their title." The statutes prohibit the use of this word "as a portion of the name or title" by "persons or corporations doing the business of bankers, brokers, or savings institutions." Prima facie a savings association is the same as a savings institution and would, therefore, come under the wording of the act. Whether building or loan associations are subject to the act can not, in my judgment, be ascertained without more information than the mere name affords. I do not see, therefore, that I can give an opinion in the matter without knowing the circumstances of each case under consideration.

For another reason, also, I do not see that an official opinion can properly be given by this Department, which has always been reluctant to pass upon questions which properly belong to the judicial rather than the executive branch of the Government. (19 Opin., 56; *id.*, 670.) In the opinion first cited Attorney-General Garland said:

"It seems to me, therefore, that as the only way to settle the questions submitted is by judicial proceedings it would be hardly proper for me to express an opinion on them."

Your request is substantially a request for advice as to whether or not a prosecution had better be instituted.

My opinion would not bind a court in any way; it could as well be asked before instituting every civil suit or prosecution

for crime. I do not think that the statutes, in providing for official opinions by the Attorney-General, intended to cover such a case.

Very respectfully,

RICHARD OLNEY,
Attorney-General.

The SECRETARY OF THE TREASURY.

COMMON CARRIERS OF MERCHANDISE.

Section 3 of the act of June 10, 1880, chapter 190, authorizes the Secretary of the Treasury to modify the form of the contract made with common carriers so as to permit them to remove the goods from a vessel and place them in a warehouse or other secure place, provided care be taken to stipulate that the liability as common carriers shall continue until custody and possession of the merchandise has been delivered to and accepted by the collector.

DEPARTMENT OF JUSTICE,
November 13, 1893.

SIR: I have the honor to acknowledge your letter of November 9, 1893, referring to section 3 of the act approved June 10, 1880, entitled "An act to amend the statutes in relation to immediate transportation of dutiable goods, and for other purposes."

This section provides for the delivery of merchandise to common carriers; that such carriers shall be responsible to the United States as common carriers for the safe delivery of such merchandise to the collector of the port of its destination; and that "they shall become bound to the United States in bonds of such form and amount and with such conditions, not inconsistent with law, and such security as the Secretary of the Treasury shall require."

It appears that the common carriers have asked permission to remove the goods from such vessel and place them in warehouse, or other secure place, at their risk, until delivery is made.

It is within the power of the Secretary of the Treasury, under the authority given him by this section, to so modify the form of the contracts made by him with the common carriers as to allow them to remain in custody and possession

of the merchandise, after the unloading of the conveyance or vehicle in which it had been carried, and to store the same in a depot or warehouse of the carrier until custody of the same has been assumed by the collector, care being taken to stipulate in the bond that the liability of the common carrier shall continue as such until custody and possession of the merchandise has been delivered to and accepted by the collector.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

CHIEF OFFICERS OF THE CUSTOMS.

Neither inspectors nor general agents are "chief officers of the customs," within the meaning of our tariff legislation.

The phrase "chief officers of the customs" refers to the collector or acting collector of each collection district, including the surveyor of any district in which there is no collector, and also to the officer legally in charge of any statutorily recognized port, not being the headquarters of a collection district.

DEPARTMENT OF JUSTICE,
November 17, 1893.

SIR: Your communication of October 28 asks my official opinion upon the meaning of the phrase "chief officer of the customs," as used in the anti-moiety act of June 22, 1874, chapter 391, section 4. It appears from the papers that compensation is asked under that act by one claiming to have furnished information to the U. S. inspector of customs at Vancouver, British Columbia, and to a special agent of the Treasury, which information related to the seizure of some smuggled opium.

The act referred to repeals "all provisions of law under which moieties of any fines, penalties, or forfeitures under the customs-revenue laws, or any share therein or commission thereon, are paid to informers or officers of customs, or other officers of the United States." It provides, however, compensation from the proceeds of the seizure for "any officer of the customs, or other person," who "shall detect and seize goods, wares, or merchandise in the act of being smuggled, or which have been smuggled;" and it authorizes also

that compensation may be given when "any person not an officer of the United States shall furnish to a district attorney, or to any chief officer of the customs, original information concerning any fraud upon the customs revenue, perpetrated or contemplated, which shall lead to the recovery of any duties withheld, or of any fine, penalty, or forfeiture incurred, whether by importers or their agents, or by any officer or person employed in the customs service."

The special agent above referred to was appointed under section 2649 of the Revised Statutes "for the purpose of making the examinations of the books, papers, and accounts of collectors and other officers of the customs, and to be employed generally under the direction of the Secretary in the prevention and detection of frauds on the customs revenue." The inspector referred to I understand to have been a person appointed under section 2606, and specially detailed for work in the foreign port. The question is whether either of these persons was a "chief officer of the customs."

It is evident that the act of June 22, 1874, discriminates between "officers of the customs" in general and a "chief officer of the customs." It does not appear from the act what is the scope of the latter phraseology. This, however, is made evident by an examination of prior tariff legislation.

From the beginning of this legislation, in the act of July 31, 1789, chapter 5, is found the present system by which the country is divided into various collection districts, many containing more than one port each, by which a distribution is made of collectors, deputy collectors, surveyors, and naval officers among the various districts, with directions as to the ports at which they should reside; and by which it is provided for some of the districts that deputy collectors or surveyors should be stationed at specified ports other than the main port of the district where the collector's office is situated.

The phrases "chief officer of the customs of the district" and "chief officer of the customs at the port" date from our second tariff law, the act of August 4, 1790, chapter 35, sections 13, 16. This act contains the present provision that in case of death or disability of the collector of the district his place shall be filled by the deputy collector, naval officer, or surveyor, in the order mentioned. It provides for forfeiture of goods unladen without authority, except in case of unavoid

able accident, necessity, or distress, proved "before the collector or chief officer of the customs of the district within the limits of which such accident, necessity, or distress shall happen," etc.; and it provides that every vessel arriving at any recognized port of the United States shall be reported "at the office of the chief officer of the customs at such port." These provisions were reenacted in the "act to regulate the collection of duties on imports and tonnage" of March 2, 1799, chapter 22, and are at present found in the Revised Statutes as sections 2867 and 2774, respectively.

In my opinion, therefore, the phrase "chief officer of the customs" in the act of June 22, 1874, refers, first, to the collector or acting collector of each collection district (including the surveyor of the district of Pittsburg, where there seems to be no collector provided by law); and, second, to the officer legally in charge of any statutorily recognized port not being the headquarters of a collection district, including such officers as the deputy collector at Calais, Me., the surveyor at Greenport, N. Y., and the assistant collector at Jersey City, N.J. (Rev. Stat., 2518, 2536.) I do not think, therefore, that either the inspector at Vancouver or the special agent of the Treasury is a chief officer of the customs within the meaning of the statutes, and I do not think that the information claimed to have been imparted to them entitled the informer to any compensation.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

POSTMASTERS' ACCOUNTS—AUDITOR FOR POST-OFFICE DEPARTMENT.

The Auditor of the Treasury for the Post-Office Department and the postmasters' account in his custody are to be deemed papers in the Treasury Department within the meaning of Revised Statutes, section 1076. The history of the Auditor's Office since 1789 discussed.

DEPARTMENT OF JUSTICE,
November 17, 1893.

SIR: I have the honor to acknowledge your communication of November 8, asking my official opinion upon the question, "Whether the accounts of postmasters, after they are ren-

dered and audited, are under the control of the Postmaster-General or the Sixth Auditor of the Treasury for the Post-Office Department."

The question appears to arise upon a call for information by the Court of Claims, under section 1076 of the Revised Statutes. The law is clear that the Sixth Auditor is the custodian of all accounts arising in the Post-Office Department, or relative thereto, with the vouchers necessary to a correct adjustment thereof. This custody, however, is subject to the control of the head of the Department to which the Sixth Auditor belongs; and it is necessary definitely to fix his status in this connection because, by section 1076 aforesaid, "the head of any Department may refuse and omit to comply with any call for information or papers when in his opinion such compliance would be injurious to the public interest." It is now necessary, therefore, to ascertain whether the Secretary of the Treasury or the Postmaster-General is the judge as to the propriety of the information demanded.

The status of the Sixth Auditor is not clearly defined by the Revised Statutes. The main provisions relating to his office are comprised in Title VII, under the heading "Department of the Treasury." He is appointed and his duties described in sections relating also to the five other auditors. (Secs. 276, 277.) The Auditors are not, however, like the Comptrollers, stated to be "in the Department of the Treasury" (sec. 268); they are merely stated to be "connected with the Department of the Treasury." (Sec. 276.)

In fact, the Sixth Auditor occupies an entirely anomalous position, being to a large extent a comptroller as well as an auditor, and being in part the subordinate to the Postmaster-General as well as of the Secretary of the Treasury. The five other auditors certify the balances ascertained by them, with the vouchers and certificates, to the First or Second Comptroller, as the case may be. The First Comptroller examines the accounts settled by the First and Fifth Auditors, certifies the balances to the Register, and superintends the preservation of these accounts. (Sec. 269.) The Second Comptroller examines all accounts settled by the Second, Third, and Fourth Auditors, certifies the balances to the Secretary of War, or the Secretary of the Navy, as the case may be, and superintends the preservation of these accounts (sec.

273); which he is obliged to do, however, by returning them to the Auditors. (Sec. 283.) The Sixth Auditor, however, certifies the balances direct to the Postmaster-General, and preserves the accounts and vouchers himself. He reports both to the Secretary of the Treasury and to the Postmaster-General in manner provided by statute; and he reports, further, to either as either may require. His decisions are not subject to review, except in rare cases where an appeal is taken to the First Comptroller. (Sec. 270.) He is, and for sixty years has been, actually located in the building of the Post Office Department. His clerks, however, are "in the Department of the Treasury." (Sec. 235.) In cases of litigation with the Post-Office Department, he communicates with the Department of Justice direct. (Sec. 296.) The question is so difficult, that while the Assistant Attorney-General of the Post-Office Department regards the Sixth Auditor as belonging to that Department, the Sixth Auditor himself claims to belong to the Treasury.

It is necessary under these circumstances to go behind the Revised Statutes and trace the history of the Auditor's office from the beginning.

In the original organization of the Treasury Department by the act of September 2, 1789, chapter 12, one Comptroller and one Auditor were provided. It was made "the duty of the Auditor to receive *all public accounts*, and after examination to certify the balance, and transmit the accounts, with the vouchers and certificate, to the Comptroller for his decision thereon." By subsequent statutes accountants were provided in the War and Navy Departments, and a portion of the jurisdiction of the Auditor thus taken away from him. By the well-known "act to provide for prompt settlement of public accounts" of March 3, 1817, chapter 45, these new offices were abolished, and it was provided 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 Treasury Department." By this act the Second, Third, Fourth, and Fifth Auditors and the Second Comptroller were created; and the act provided that "it shall be the duty of the Fifth Auditor to receive all accounts accruing in or relative to the Department of State,

the *General Post-Office*, and those arising out of Indian affairs, and examine the same, and thereafter certify the balance and transmit the accounts, with the vouchers and certificate, to the First Comptroller for his decision thereon." The "General Post-Office" thus referred to corresponds to the present Post-Office Department (Act of April 30, 1810, chap. 37). The act of March 3, 1825, chapter 64, "to reduce into one the several acts establishing and regulating the Post-Office Department," directed, in section 1, that the Postmaster-General "shall once in three months render to the Secretary of the Treasury a quarterly account of all the receipts and expenditures in the said Department, to be adjusted and settled as other public accounts." A process of adjusting the Postmaster-General's accounts seems by section 31 of the act to have been established in the Post-Office Department; but the same act provides that, if the accounts shall have been "lodged in the Treasury," certified copies are to be furnished when necessary by the Register. Up, therefore, to 1836, the accounts of the Post-Office Department seem to have been finally settled in the Treasury through the Fifth Auditor and First Comptroller, like ac-accounts of the other Government Departments. The act of July 2, 1836, chapter 270, section 8, created "an Auditor of the Treasury for the Post-Office Department," with the present right of appeal from his decision to the First Comptroller. As at present, he was directed by that act to keep and preserve the accounts and vouchers, and report both to the Secretary of the Treasury and to the Postmaster-General. Section 21 of the same act provided that his clerks and messengers "shall be employed by the Secretary of the Treasury * * * in lieu of the same number of clerks now employed in the office of the Fifth Auditor of the Treasury, in adjusting the accounts of the Post-Office Department;" and his clerks and messengers have ever since been, and still are, employed by the Secretary of the Treasury.

I think that, in view of this history, the former "Auditor of the Treasury for the Post-Office Department" (now "Sixth Auditor") must be regarded, as an officer of the Treasury Department, and the accounts in his possession, like the accounts of other Departments in the custody of other Auditors or Comptrollers, are to be regarded as in the Treasury

Department; so that the Secretary of the Treasury is the person whose judgment is to control in case of application from the Court of Claims.

In coming to this decision I have not overlooked the provisions of the appropriation acts, or the apparently conflicting enactments regarding the disposition of waste papers referred to by the Assistant Attorney-General for your Department. That too great weight can not be put upon such Congressional legislation will be recognized by the learned Assistant Attorney-General, who is himself an officer of the Post-Office Department, appointed by the Postmaster-General (sec. 390), while his salary is appropriated for every year under the head of "Department of Justice." In fact, I find that by the first appropriation act after the establishment of the Sixth Auditor's Office (act of March 3, 1837, chap. 33), he is called "the Auditor of the Post-Office" and classed with other officials of that Department. His appropriations have now for a long time, however, been classed with those of the other Auditors under the Treasury Department.

Very respectfully,

RICHARD OLNEY.

The POSTMASTER-GENERAL.

TAX ON STATE BANK CIRCULATION.

The tax on State banks imposed by the act of February 8, 1875, chapter 36, section 19, applies only to promissory notes and not to other negotiable or quasi negotiable paper.

If there is any doubt as to the meaning of a statute imposing this tax, the doubt must be resolved in favor of exemption.

DEPARTMENT OF JUSTICE,
November 21, 1893.

SIR: I have the honor to acknowledge the receipt of your communication of November 15, asking my official opinion as to whether certain papers inclosed are notes within the meaning of the act of February 8, 1875, chapter 36, section 19, which reads as follows:

"That every person, firm, association, other than national bank associations, and every corporation, State bank, or State banking association, shall pay a tax of ten per centum

on the amount of their own notes used for circulation and paid out by them."

The section referred to is contained in an act entitled "An act to amend existing customs and internal-revenue laws, and for other purposes." It is "to be construed in connection with those laws. It is also part of the system adopted by Congress to provide a currency for the country, and to restrain the circulation of any notes not issued under its own authority." (*Hollister* v. *Mercantile Institution*, 111 U. S., 62, 63.)

If there is any doubt as to the meaning of the statute imposing this tax, the doubt must be resolved in favor of exemption. (*United States* v. *Isham*, 17 Wall., 196.)

Comparing the statute in question with the other statutes referred to in *Hollister* v. *Mercantile Institution*, *supra*, it evidently applies only to the case of a promissory note, and does not cover other negotiable or quasi negotiable paper. For the Revised Statutes in force when the act of 1875 was passed provided for a tax upon bank circulation "including as circulation all certified checks and all notes and other obligations calculated or intended to circulate or to be used as money" (sec. 3408); and they made it unlawful to "make, issue, circulate, or pay out any note, check, memorandum, token, or other obligation for a less sum than one dollar, intended to circulate as money or to be received or used in lieu of lawful money of the United States (sec. 3583)."

Three of the instruments submitted by you are plainly not notes, but checks, and may be left out of consideration. The two other papers are substantially alike, one of them being as follows:

ALBANY CLEARING-HOUSE CERTIFICATE, $10. ALBANY, GEORGIA.

No. —.] ALBANY, GA., *August* 29, 1893.

This certifies that the First National Bank of Albany, Ga., has deposited with the undersigned officers of the Albany clearing house securities of the value of twenty dollars for the payment of the sum of ten dollars to said bank or bearer in lawful money of the United States, at six months from date, or earlier, at option of said bank. But no certificate is to be issued bearing date later than Jan-

uary 1, 1894. This certificate will be received on deposit by any bank or banker belonging to the Clearing House Association of Albany at par at any time before its maturity.

——— ———, *President.*

——— ———, *Secretary.*

Indorsed: "The following banks compose the Albany Clearing House Association: First National Bank, Commercial Bank, Exchange Bank."

The paper is not signed anywhere by the First National Bank. It is plainly not an instrument upon which either that bank or the Clearing House Association could be sued in an action at common law and a money judgment recovered by proving and introducing the paper alone without further evidence. In my opinion, therefore, the paper is not a note within the meaning of the statute; and it is unnecessary to answer the further question asked by you.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

CUSTOMS ADMINISTRATIVE ACT.

Forfeitures provided for by the customs administrative act of June 10, 1890, chapter 407, section 9, are not confined (except as to the general clause covering every "willful act or omission") to cases in which the United States has been actually deprived of lawful duties.

DEPARTMENT OF JUSTICE,
November 21, 1893.

SIR: I have the honor to acknowledge the receipt of your communication of November 18, asking me whether under section 9 of the customs administrative act of June 10, 1890, "such cases as are referred to where there has been no loss of duty should be reported to the district attorney for forfeiture or other proceedings."

Section 9 of that act, so far as necessary for consideration, is as follows:

"That if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement,

written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited," and the act has made it an offense punishable by fine or imprisonment, or both.

In my opinion, the section down to and including the word "whatsoever" is not conditional upon loss of duty; but the words "by means whereof the United States shall be deprived," etc., qualify only the words "or shall be guilty of any willful act or omission." This being the legal construction of the act, executive officers should govern themselves accordingly.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

REENLISTMENT.

Under the act of February 27, 1893, chapter 168, service in the Navy can not be counted, and a man can not be reenlisted as a private unless he has already served as such in the Army for twenty years.

DEPARTMENT OF JUSTICE,
November 23, 1893.

SIR: I have yours of the 22d instant, calling for my opinion upon the question whether, under the act of February 27, 1893 (27 U. S. Stat., 478), permitting the reenlistment of men who have served in the Army as privates for twenty years or upwards, service in the Navy can be counted as a part of said twenty years' service. I think service in the Navy can not be so counted, and that a man can not be reenlisted as a private unless he has already served as such in the Army for twenty years.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF WAR.

REMISSION OF FINES—ALIEN IMMIGRATION LAW.

The fines imposed after a verdict of guilty of the statutory misdemeanor of allowing certain foreign pauper immigrants to land after being ordered to detain them are not a claim within the meaning of section 3469 of the Revised Statutes, and can not be compromised under that statute.

DEPARTMENT OF JUSTICE,
November 23, 1890.

SIR: I have the honor to acknowledge receipt of your letter of the 21st instant asking for my opinion, "Whether or not the Secretary of the Treasury may authorize a compromise of a claim under section 3469, Revised Statutes of the United States, founded on a judgment rendered in favor of the United States in a civil action to recover fines of $1,200, incurred by Frederick Warren under section 10, act of March 3, 1891 (26 Stat., 1084), through failure to detain certain alien passengers on board the steamship *Kansas*."

The papers accompanying your letter do not, as I understand them, show that any judgment has been rendered in favor of the United States in a civil action against Frederick Warren to recover fines of $1,200. I am, therefore, precluded from giving any opinion upon the question propounded in your letter.

If it be meant to ask whether fines to the amount of $1,200 imposed by way of sentence after a verdict of guilty found against said Warren as the result of a trial upon an indictment for the statutory misdemeanor committed by him in allowing certain foreign pauper immigrants to land after he had been ordered to detain them can be compromised, I concur in the opinion of the Solicitor of the Treasury that such fines are not a "claim" within the meaning of section 3469 of the Revised Statutes of the United States, and can not be compromised under that statute.

Respectfully,

RICHARD OLNEY.

HON. WM. E. CURTIS,
Acting Secretary of the Treasury.

CONGRESSMAN—RETIRED ARMY OFFICER.

The question whether Congressman Sickles can receive pay as a retired Army officer is one of grave doubt which only a determination of the Supreme Court can satisfactorily settle.

DEPARTMENT OF JUSTICE,
December 5, 1893.

SIR: Yours of the 24th ultimo, in which you state that you still desire my opinion upon the right of Congressman, Maj. Gen. D. E. Sickles, to be paid as a retired Army officer, is at hand.

Section 1763 of the Revised Statutes provides that "no person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law."

In view of the provisions of this section, the Supreme Court of the United States has held that a consul-general of the United States at London, whose salary amounted to $2,500, could not draw pay as a retired Army officer.

But in the same case the court affirmed the doctrine that a person holding two offices or employments under the Government, when the services rendered or which might be required under them were not incompatible, is not precluded from receiving a salary or compensation of both, and stated among other grounds for its judgment that it agreed with the Treasury Department in the conclusion that the duties of the offices of the plaintiff as consul-general at London and of a retired Army officer were incompatible.

Further, the court of appeals of the State of New York has held in a forcible and elaborate judgment that a retired Army officer, unless and until assigned to duty at the Soldiers' Home, does not hold an office within the meaning of that word as used in section 1763 of the Revised Statutes. This proposition does not seem to have been argued, or, if argued, not to have been considered by the Supreme Court of the United States in its decision in the Badeau case.

Under these circumstances and in this state of the adjudications, and in view of Article I, section 6, of the Constitution, providing that "no person holding any office under the

United States shall be a member of either House during his continuance in office," the question whether Congressman Sickles can receive pay as a retired Army officer is one of grave doubt, which only a determination of the Supreme Court can satisfactorily settle. It can be brought before that court if so desired in the same manner as the Badeau case was brought there; that is, by a transmission of Gen. Sickles's claim to the Court of Claims in the manner prescribed by section 1063 of the Revised Statutes.

The departmental practice to pay in such cases, as in that of Gen. Rosecrans and others, has, I believe, been called to your attention.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF WAR.

OFFICERS OF THE ARMY DETAILED TO COLLEGES.

The act of November 3, 1893, chapter 13, leaves it within the discretion of the President to make the detail of officers of the Army for colleges wholly from the active list of the Army, or wholly from retired officers who, "upon their own application," may be detailed for those services, or from both lists in such proportion as he sees fit and the applications for such detail from the retired officers will allow. No other limit than 100 is set to the number of such officers that can be detailed from either list. The "five years' service in the Army," as well as the limit of detail to four years, applies to officers detailed from either list. Officers of the retired list detailed for college duties prior to November 3, 1893, and still on duty under such detail, are entitled to full pay, beginning from the passage of the act. Section 1260, Revised Statutes, refers to additional compensation from the United States, not from the colleges.

DEPARTMENT OF JUSTICE,
December 8, 1893.

SIR: Your communication of December 2, 1893, desires my construction of the act of November 3, 1893, entitled "An act to increase the number of officers of the Army to be detailed to colleges" and submits several specific inquiries to which your request replies.

On June 14, 1869 (13 Opin., 99), Attorney-General Hoar, in response to a letter of inquiry from the Secretary of War on the subject of officers of the Army who had been retired,

said: "The status of an officer placed upon the retired list is not very distinctly set forth in the statutes." Subsequent legislation has not dispelled the obscurity to which my predecessor in office referred.

By act of August 3, 1861 (12 Stat., 287), provision was first made for the retirement of officers of the Army. By act of July 17, 1862, the provision was extended, and by section 12 it was enacted that "The President is hereby authorized to assign any officer retired under this section or the act of August third, eighteen hundred and sixty-one, to any appropriate duty; and such officer thus assigned shall receive the full pay and emoluments of his grade while so assigned and employed."

By act of January 21, 1870, it was provided, "That no retired officer of the Army shall hereafter be assigned to duty of any kind or be entitled to receive more than the pay and allowances provided by law for retired officers of his grade."

By act of July 15, 1870 (16 Stat., 320), it was provided that "any retired officer may, on his own application, be detailed to serve as a professor in any college. (But while so serving such officer shall receive no additional compensation.")

Several amendments of section 1225, Revised Statutes, not material however to the present inquiry, were subsequently enacted.

By the act of November 3, 1893, section 1225, Revised Statutes, was further amended "so as to permit the President to detail, under the provisions of said act, not to exceed one hundred officers of the Army of the United States, and no officer shall be thus detailed who has not had five years' service in the Army, and no detail to such duty shall extend for more than four years. And officers on the retired list of the Army may, upon their own application, be detailed to such duty, and, when so detailed, shall receive the full pay of their rank."

Under section 1094, Revised Statutes, "the Army of the United States shall consist of * * * the officers of the Army on the retired list * * *."

In *United States* v. *Tyler* (105 U. S., 246), the Supreme Court decided that officers of the Army on the retired list are still in the military service.

I am then of opinion—

1. That the law does *authorize* the detail of 100 officers from the active list of the Army, but that it does not *require* it. It is within the discretion of the President to make the detail wholly from the active list of the Army, or wholly from officers of the retired list who, "upon their own application," may be detailed for this service, or he may make the detail in such proportions as he sees fit (and the applications for such detail from the retired officers will allow) from both lists.

2. The details which may be made from all the officers of the Army are limited by the act of November 3, 1893, to 100 of such officers, and these may be taken by the President from either the active or the retired lists of the Army, or from both. No other limit is set to the number of such officers that may be detailed from the retired or the active lists.

3. The "five years' service in the Army" required by section 1225 applies as well to officers on the retired as to those on the active lists of the Army.

4. The limit of detail to four years applies as well to officers detailed from the retired as to those from the active lists of the Army.

5. Officers of the retired list who were detailed for college duties prior to November 3, 1893, and who are still on duty under such details, are entitled to full pay only from the passage of the act, under and by virtue of which alone is their right to full pay derived.

Section 1260, Revised Statutes, which authorized the detail of a retired officer for college duties, provided, "that while so serving such officer shall be allowed no additional compensation." That this does not refer to any additional compensation from the college, but from the United States, is evident from the language employed, which does not prohibit the *receiving* but the *allowing* of the additional compensation. And then section 1259, which provides for the assignment to duty of retired officers at the Soldiers' Home, provided, "that they receive from the Government only the pay and emoluments allowed by law to retired officers."

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

INFORMERS' COMPENSATION.

Informers are not entitled to compensation under the anti-moiety act of June 22, 1874, chapter 391, section 4, unless the information is conveyed directly to the chief officer of the customs. Giving information to an inferior officer is not necessarily equivalent thereto. If desirable that informers should communicate with the collector otherwise than personally, the Secretary of the Treasury can make regulations for the future covering that case.

DEPARTMENT OF JUSTICE,
December 11, 1893.

SIR: I have the honor to acknowledge your communication of November 21, in which you ask whether information given to a deputy collector or to an inspector in the customs service, who is not himself within the meaning of the law a "chief officer of the customs," is nevertheless information furnished to the chief officer of the customs within the meaning of section 4 of the anti-moiety act of June 22, 1874, so as to entitle the informer to compensation.

The question is a somewhat difficult one. In one sense every report made to an inferior officer of the customs is a report to the chief officer, as it is the duty of the inferior officer forthwith to make complaint to the collector of the district by section 15 of the same act. If, however, every report to an inferior officer is equivalent to a report to the chief officer, the word "chief," apparently carefully selected in section 4, would become altogether surplusage. The purpose of Congress seems to have been to restrict as far as possible the temptation to inferior customs officers to get fees as informers indirectly through outside confederates. I think, therefore, that Congress intended information for which compensation was to be demanded to be given to the chief officer of the customs of the district or port either personally or in such manner as the Treasury Department might prescribe, to insure against subsequent claims of inferior officers, as afterthought, that their confederates had furnished the means of detecting fraud.

Of course there may be circumstances where the information was transmitted through the inferior officer in such a way that it could be properly considered as coming to the chief officer within the meaning of the statute. These cases

would depend largely on questions of fact, as to which I am not made competent to advise. If it is for the convenience of the service that informers communicate with the collector otherwise than personally, I think it would be in your power to make regulations for the future covering the case.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

OBLIGATIONS AND SECURITIES OF THE UNITED STATES.

A canceled postage stamp is not an obligation or security of the United States within the Revised Statutes, section 5430.

DEPARTMENT OF JUSTICE,
December 30, 1893.

SIR: Your communication of December 26 incloses an advertising pamphlet, the cover of which contains the facsimile of an envelope bearing a 2-cent United States postage stamp, and asks my official opinion whether the engraving of the die or printing of the stamp is contrary to the United States law.

"Stamps and other representatives of value of whatever denomination, which have been or may be issued under any act of Congress," are included in the definition of the words "obligation or other security of the United States" in section 5413 of the Revised Statutes, and that the "printing, photographing, making, or executing any engraving, photograph, print, or impression in the likeness of any such obligation or other security, * * * except under the authority of the Secretary of the Treasury," is made a criminal offense by section 5430.

It may be seriously doubted whether the question of likeness or similitude is not a question of fact, as to which I am not authorized to give an official opinion. This doubt it is unnecessary to resolve, however, for in my opinion postage stamps are not representatives of value and are not obligations or securities of the United States except so long as they remain uncanceled and unused. The stamp on the advertisement shown me is represented with a postmark

over it; wherefore, without considering any other questions, it is my opinion that the engraving of the die and printing of the stamp are not contrary to law.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

ADVANCES TO CONTRACTORS—BOND OF INDEMNITY.

A proposed bond of indemnity for advances to a contractor for building a vessel deemed unsafe, and the suggestion made that the contractor be required to execute a refunding bond with adequate personal or real security, or both, to cover as well advances heretofore made as any which may be made hereafter.

DEPARTMENT OF JUSTICE,
January 5, 1894.

SIR: I have considered the subject of your letter of January 3 and inclosures therewith, and am of the opinion that the Treasury Department can not with safety make advancements to the constructor without first obtaining from him adequate security to indemnify the Government against loss by reason of such advancement.

While the law governing the case is correctly stated in the text-books and decisions cited in the letter of December 29, 1893, from the Solicitor of the Treasury, and may be found further stated with perhaps more persuasive authority in the text and notes of the latest edition of Benjamin on Sales, yet for the guidance of an Executive Department of the Government it is not necessary to look further than the decisions of the Supreme Court of the United States, which are not merely persuasive, but binding here; and that court in the case of *Clarkson* v. *Stevens* (106 U. S., 505) has stated the rule with a perspicuity which repels further attempt at elucidation.

I have grave doubt whether the form of a bond of indemnity which accompanies your letter will secure the end desired. It seems to recognize an absolute sale of the vessel in its present condition to the United States in consideration of the money already and to be advanced. Then in its condition it reserves to the United States the right to reject

the said vessel and to insist upon an accurate fulfillment of the said contract. These two provisions seem to me to be repugnant, besides the further objection to allowing the Government to become the owner by purchase of the unfinished vessel and thus become liable to any loss that may result from the destruction of the vessel before completion, or from the failure of the contractor to complete it at all.

As the matter stands now the Government is secured against loss resulting from the conduct of the contractor by his bond with sureties, and that security might perhaps be imperiled by a change of ownership of the vessel.

I suggest, as the safest and simplest plan for securing the Government against loss by reason of advancements, that the contractor be required to execute a refunding bond with adequate personal or real security, or both, to cover as well advancements heretofore made as any which may be made hereafter.

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

CHINESE LABORERS—CERTIFICATE BY CONSULAR OFFICERS OF CHINA.

Consular officers of China stationed in foreign countries, being duly empowered by the Chinese Government, may properly issue the certificates required by section 6 of the act of July 5, 1884, chapter 220, and certificates issued by such duly authorized consular officers of China in foreign countries accurately conforming to the requirements of section 6, are the certificates contemplated by the law.

Semble, Chinese laborers coming to this country merely en route to some other country may lawfully be permitted to pass through the United States.

DEPARTMENT OF JUSTICE,
January 8, 1894.

SIR: I have the honor to acknowledge your letter of December 27th ultimo, requesting my opinion upon the questions—

1. Whether or not under section 6 of the act approved July 5, 1884, entitled "An act to amend an act entitled 'An act to execute certain treaty stipulations relating to the Chinese,' approved May 6, 1882," consular officers of China stationed in foreign countries can properly certify to the statements which under the law cited the certificates are required to set forth.

2. Whether or not the certificates issued by the consular officers of China in a foreign country are the certificates contemplated by the law.

3. Whether or not the transit through the United States of Chinese laborers, alleged to be destined to other countries, is permitted by law.

Section 6, referred to above, provides:

"That, in order to a faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come into the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign Governments of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government which certificates shall be in the English language and shall show such permission with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States."

The requirement of this section is that the "permission" to and "identification" of the Chinese person shall be "evidenced by a certificate issued by such Government." The Government can act, in the issuance of such certificates, only through and by its officers and agents. If it chooses to select its consular officers in foreign countries as such officers and agents it has the right so to do, and it is not competent for this Government to question the propriety or fitness of the choice.

I am of the opinion that such consular officers of China, being duly empowered by the Chinese Government, may properly issue the certificates in question.

2. Certificates issued by the duly authorized consular officers of China in foreign countries and accurately conforming in their contents to the requirements of section 6 are the certificates contemplated by the law.

3. In my judgment, and while there is room for difference of opinion, Chinese laborers coming to this country merely en route to some other country may lawfully be permitted to pass through the United States.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

NOTES IN CIRCULATION.

Notes of a National Banking Association, signed by the proper officers, are not "notes in circulation" within sections 5214 and 5215 of the Revised Statutes, so long as the bank has never parted with any interest in or control over them, and may either issue them or cause them to be canceled or destroyed at its option.

DEPARTMENT OF JUSTICE,
January 10, 1894.

SIR: I have the honor to acknowledge yours of the 8th instant, inquiring whether the notes of a national banking association are "notes in circulation" within the meaning of sections 5214 and 5215 of the Revised Statutes simply because they have been signed by the proper officers of the bank.

In my judgment the notes referred to can not be regarded as in circulation simply because duly executed, nor so long as the bank has never parted with any interest in or control over them, and may either issue them or cause them to be canceled or destroyed at its option.

Respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

CLAIMS AGAINST THE UNITED STATES.

Revised Statutes, section 190, prohibiting certain employés of the United States from prosecuting certain claims against the Government for two years after the termination of their employment, applies to all claims which were pending in any of the Departments while the employé was in the employ of the Government.

The statutory prohibition covers persons receiving regular employment who take oath of office and have power to administer oaths to witnesses, although they hold no office known to the statute law, but are employed and paid under a general appropriation for detection of crimes, investigation of official acts, etc.

DEPARTMENT OF JUSTICE,
January 12, 1894.

SIR: Your communication of January 6 refers to me a letter of the First Comptroller concerning the construction of section 190 of the Revised Statutes, and asks me for my official opinion upon the following questions propounded by him:

"1. Does section 190, Revised Statutes, apply only to an ex-employé of the same Department in which he is prosecuting the claim which was pending while he was in the employ of such Department?

"2. If not, does it apply only to a claim which was pending in the Department in which he was employed while he was so employed and which claim is now being prosecuted before another Department, or does it apply to all claims which were pending in any of the Departments while he was employed in one of the Departments?

"3. Does this section prohibit an examiner of the Department of Justice from prosecuting claims of the prohibitive character, or is such an examiner not within the provisions of section 190?"

Section 190 is as follows:

"It shall not be lawful for any person appointed after the first day of June, one thousand eight hundred and seventy-two, as an officer, clerk, or employé in any of the Departments to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said Departments while he was such officer, clerk, or employé, nor in any manner, nor by any means to aid in the prosecution of any such claim within two years next after he shall have ceased to be such officer, clerk, or employé."

This section is a reenactment of section 5 of the post-office appropriation act of June 1, 1872, chapter 256. In revising the section the words "either of", which do not appear in the original act, were inserted.

In my opinion, the first question propounded is clearly to be answered in the negative, and the last clause of the second question in the affirmative.

The third question propounded relates to the case of "an examiner of the Department of Justice." No such officer is known to our statute law. The examiners, so called, in this Department are persons employed by the Attorney-General under the annual appropriations "for the detection and prosecution of crimes against the United States preliminary to indictment; for the investigation of official acts, records, and accounts of officers of the courts," etc. (See, for example, the sundry civil appropriation act of March 3, 1893, chap. 208, 27 Stat., 607.) The persons so employed, however, receive regular appointments, take the oath of office, are regarded as officers or clerks of the Department, and as such administer oaths to witnesses under section 183 of the Revised Statutes. They are not employed by the job, but are employed generally to perform such work as they may be called upon to do until death, resignation, or removal. I think that an examiner is clearly within the provisions of the section referred to.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

OBLIGATIONS AND SECURITIES OF THE UNITED STATES—ATTORNEY-GENERAL.

An uncanceled postage stamp is an obligation or security of the United States within the meaning of the Revised Statutes, section 5430.

The question of "similitude" under such statute is a question of fact as to which the Attorney-General is not permitted to render an official opinion.

DEPARTMENT OF JUSTICE,
January 16, 1894.

SIR: I am in receipt of your communication of January 11 with relation to my opinion of December 30 concerning the use in advertisements of facsimiles of canceled postage stamps. You ask whether my answer is intended to convey the opinion that it is not unlawful for an unauthorized person to evade the law by printing an exact copy of a 2-cent

postage stamp. You inform me further that the die used in printing the imitation stamp submitted for my former opinion is a perfect likeness of the die for printing an uncanceled 2-cent postage stamp, and that in printing the advertisement then submitted the cancellation mark was made by a separate and distinct die.

My former opinion had no reference to the use of dies for printing the facsimiles of uncanceled postage stamps. Section 5430 of the Revised Statutes provides that "every person who engraves, or causes or procures to be engraved, or assists in engraving any plate in the likeness of any plate designed for the printing of" any obligation or security of the United States, "or who brings into the United States from any foreign place any such plate, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent in either case than that such plate be used for the printing of obligations or other securities of the United States; or who has in his control, custody, or possession any metallic plate engraved after the similitude of any plate from which such obligation or other security has been printed, with intent to use such plate or suffer the same to be used in forging or counterfeiting any such obligation or security, or any part thereof," is punishable with fine and imprisonment. I would call your attention in this connection also to the act of February 10, 1891, chapter 127, section 4.

I am of opinion that an uncanceled postage stamp is an obligation or security of the United States within the meaning of section 5430; and my opinion of December 30 has no reference to a plate or likeness of any plate designed for the printing of postage stamps. Whether any particular dies or plates possess such similarity as to come within the section is a question of fact as to which I am not permitted by the statute to render an official opinion.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—LIQUORS.

A request for an opinion of the Attorney-General should contain a clear statement of facts—a clear statement of the question an answer to which is asked. He should not be left to seek out the facts and infer the question submitted, from correspondence inclosed.

The word "liquors" in the tariff act of October 1, 1890, chapter 1244, paragraph 10, does not include whisky.

DEPARTMENT OF JUSTICE,
January 18, 1894.

SIR: I am in receipt of your communication of January 13 inclosing a copy of a letter from Mr. Albert Scott, of Louisville, Ky., and an opinion thereon from the Solicitor of the Treasury. Mr. Scott requests to be advised "whether or not bonded manufacturing warehouses can be established for the bottling of whisky and the labeling thereof with any original brand or trade-mark for export."

As I gather from the correspondence inclosed in your letter, Mr. Scott bases his claim upon section 10 of the McKinley tariff act of October 1, 1890, chapter 1244. The Solicitor of the Treasury has decided that "no authority is given by said section for the establishment of warehouses for bottling or labeling whisky for export," and in inclosing me the opinion you say: "I have to request an expression of your views thereon."

No question of law is clearly stated in your letter, as required in case of an application for an official opinion from the Attorney-General. It is well settled that the question to which an answer is required, as well as the statement of facts upon which the question is based, should be clearly contained in the request for the opinion, and that the Attorney-General should not be left to seek out the facts and infer the question submitted from the correspondence inclosed.

Section 10 of the act referred to relates to warehouses for the manufacture of "medicines, preparations, compositions, perfumery, cosmetics, cordials, and other liquors manufactured wholly or in part of domestic spirits, intended for exportation." I understand the question of law submitted by you to be whether whisky is a liquor within the meaning of this section. The word "liquor" has different significa-

tions in different portions of our tariff legislation. (*Hollender* v. *Magone*, 149 U. S., 586.) I think that in this section the Solicitor of the Treasury is clearly right in holding that it does not include whisky.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

SURVEYOR OF CUSTOMS.

If there be no collector of the port at Galena, Ill., and all the duties of that office are imposed upon the surveyor of customs, then his acts done in the performance of the duties and functions of the office of collector of the port are as valid and effective as if done by a collector of the port. His certificate in conjunction with that of the local inspector of steamboats is sufficient to authorize the Secretary of War to draw his warrant as provided in the act of Congress authorizing the city of Galena, Ill., to complete certain improvements of the channel of the Galena River.

DEPARTMENT OF JUSTICE,
January 18, 1894.

SIR: I have your communication of the 16th of January, in which, after reciting so much of the act of Congress authorizing the city of Galena, Ill., to complete certain improvements of the channel of Galena River, as provides that "if the conditions of this act have been complied with the collector of the port of Galena and the local inspectors of steamboats for that district shall certify to the fact," etc., you state that "Mr. Charles H. Miller, who signed the certificate, is the surveyor of customs for that port and acts as collector." And you request my opinion "whether the certificate presented is sufficient authority for the Secretary of War to draw his warrant as provided in the act of Congress above quoted."

The power or duty imposed by the statute upon the collector of the port of Galena, Ill., is an official and not a personal power or duty. If there is no collector of the port at Galena, but all the duties of that office are imposed upon the surveyor of customs, then his acts done in the performance of the duties and functions of the office of collector of the

port are valid and as effective as if done by a "collector of the port;" and in this case his certificate is sufficient, when made in conjunction with the "local inspector of steamboats," to authorize the Secretary of War to draw his warrant as provided in the act of Congress referred to.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

REFUND OF DIRECT TAXES.

Under the act for the refund of direct taxes, the Secretary of the Treasury is authorized to pay to the governor of Tennessee, as trustee, moneys received by the United States on the resale of land in Tennessee in excess of the tax assessed thereon and of the amount bid therefor at the original sale made for the collection of the direct tax.

DEPARTMENT OF JUSTICE,
January 20, 1894.

SIR: I have yours of the 22d of September last, inquiring whether, under the provisions of an act of Congress, entitled "An act to credit and to pay to the several States and Territories and the District of Columbia all moneys collected under the direct tax levied by the act of Congress approved August 5, 1861," the Secretary of the Treasury is authorized to pay to the governor of Tennessee, as trustee, moneys received by the United States on the resale of lands in Tennessee in excess of the tax assessed thereon, and of the amount bid therefor, at the original sale made for the collection of the direct tax under an act of Congress approved August 5, 1861, and other acts amendatory thereof.

In my judgment, while the construction of the act is not free from difficulty, the better opinion is that it authorizes and requires the Secretary of the Treasury to pay the moneys in question to the governor of Tennessee. Congress meant to refund collections by the United States from individuals as well as from the States. But, to relieve the Secretary of the Treasury from the auditing of a multitude of small accounts and to enable the parties interested to prove their claims and get their money in the easiest and most expeditious manner, the general purpose of the act manifestly

is that moneys reimbursed to individuals shall reach them through the medium of the governor or some other State officer or agent constituted by the legislature of the State a trustee for that purpose.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

The advisability of bringing suit is not a question of law upon which the Attorney-General's opinion may be asked.

It is inexpedient for the Attorney-General to render an official opinion as to whether a civil suit or criminal prosecution if brought by the Government ought to be decided by the courts in its favor.

DEPARTMENT OF JUSTICE,
January 29, 1894.

SIR: Your communication of January 24 incloses certain correspondence terminating in an opinion by the Solicitor of the Treasury advising that suit should be brought against an alleged Canadian smuggler by attaching his goods in transit through the State of Maine. You ask my opinion as to the advisability of bringing this suit. Section 356 of the Revised Statutes authorizes the Attorney-General to give opinions upon questions of law. The advisability of bringing the suit is not a question of law and not a question upon which the Attorney-General's opinion can be required or given. It has been, moreover, considered inexpedient for the Attorney-General to render an official opinion as to whether a civil suit or criminal prosecution, if brought by the Government, ought to be decided by the courts in its favor, such questions being "essentially judicial in character." (19 Opin., 670.) For these reasons I am obliged to return the papers without answering the question submitted.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

DEPARTMENT OF AGRICULTURE—CHIEFS OF DIVISION—ATTORNEY-GENERAL.

Chiefs of division in the Department of Agriculture are subject to all the regulations in accordance with law which may be prescribed by the head of the Department. While the regulations posted in the Department of Agriculture seem to be valid, yet until the lawfulness of some particular regulation is actually called in question no opinion respecting its legality can properly be asked for or given.

DEPARTMENT OF JUSTICE,
January 29, 1894.

SIR: I have the honor to acknowledge your letter of January 26, 1894, asking my opinion—

1. As to the power of the chief clerk of the Department of Agriculture, in his relation to the "chiefs of divisions" in said Department.

2. Whether the copy of rules and regulations for employés of the Department of Agriculture are in accordance with law.

In reply I beg to say that by section 161, Revised Statutes—

"The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

Section 166 Revised Statutes provides:

"Each head of a Department may, from time to time, alter the distribution among the various bureaus and offices of his Department, of the clerks allowed by law, as he may find it necessary and proper to do."

Generally, the term "chief of division," with the duties attached to the office, are mere matters of convenience, designed for the economic and efficient dispatch of business, and rest altogether within the discretion of the head of the Department.

In the Department of Agriculture the term appears to be recognized by Congress in the appropriation acts as attached to the persons in charge of the several divisions of natural science which are employed in accomplishing the objects of that Department.

I am of opinion, however, that such chiefs of divisions are yet subject to all the regulations in accordance with law which may be prescribed by the head of Department.

The regulations posted in your Department, copies of which accompany your letter, appear to be legal and valid. But it should be added that until the lawfulness of some particular regulation is actually called in question, no opinion respecting its legality can properly be asked for or given.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF AGRICULTURE.

NOTES IN CIRCULATION.

Section 5214, Revised Statutes, means instruments binding the banks to the holder or holders as promises to pay; therefore bank notes signed and actually paid out over the counter, or otherwise so dealt with as to become liabilities of the bank, are notes in circulation; but notes merely held in the vault of the bank, whether signed or unsigned, and notes so signed and held, and carried on the books of the bank, are not notes in circulation, and notes that have been obligations of the bank, but cease to be so, return and remain in the bank for whatever period, are not during such period its notes in circulation.

DEPARTMENT OF JUSTICE,
February 2, 1894.

SIR: I have yours of the 31st ultimo, requesting a construction of section 5214 of the Revised Statutes of the United States, providing for a tax or duty upon a national bank calculated upon the average amount of its "notes in circulation," and asking that the opinion given may answer the following questions, to wit:

(1) Whether notes received from the Comptroller are to be regarded as in circulation when held in the vault of the bank unsigned; or (2) when so held in the vault of the bank signed; or (3) when so held and signed and taken up on the books of the bank as cash but not actually paid out over its counter; or (4) when so signed and actually paid out over the counter of the bank; or (5) when, having been signed and actually paid out by the bank, they are returned to it and remain in the bank for a longer or shorter time.

The true meaning of section 5214 is to be arrived at by considering not merely its own particular provisions, but those of various other statutes of the United States in which the same subject-matter, to wit, "notes in circulation," is dealt with. Without referring to them in detail, an examination of them makes it entirely clear that by "notes in circulation," as used in section 5214, Congress means instruments binding the bank to the holder or holders as promises to pay. So long as they are not obligations of the bank to be redeemed or paid according to their tenor they are not "notes in circulation."

The answers to the specific questions above stated can therefore be readily given. Bank notes signed and actually paid out over the counter, or otherwise so dealt with as to become liabilities of the bank, are "notes in circulation." But notes merely held in the vaults of the bank, whether signed or unsigned, and notes so signed and held and carried on the books of the bank, are not its "notes in circulation." For the same reason notes that have been obligations of the bank, but cease to be so and return and remain in the bank for whatever period, are not, during such period, its "notes in circulation."

Respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

REMISSION OF FINE—ALIEN IMMIGRATION LAW.

The case of a fine or penalty incurred for violation of the alien immigration law does not fall within the purview of the statutes embraced under Title LXVIII, and the Secretary of the Treasury is not authorized to remit the same.

DEPARTMENT OF JUSTICE,
February 3, 1894.

SIR: Your letter of December 11, 1893, requests my opinion "whether the Secretary of the Treasury has power under Title LXVIII of the Revised Statutes to remit or mitigate the penalties incurred in the case."

The "case" referred to appears from your letter to have been a proceeding at the suit of the United States against Frederick Warren, to recover the penalty prescribed for vio-

lation of section 10, chapter 551, act of March 3, 1891, which provides: * * * "and if any master, agent, consignee, or owner of such vessel shall refuse to receive back on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port whence they came, or to pay the cost of their maintenance while on land, such master, etc., shall be deemed guilty of a misdemeanor, and shall be punished by a fine not less than three hundred dollars for each and every offense." * * *

In this proceeding there was conviction and judgment against the defendant for $1,200. Upon writ of error to the circuit court of appeals this judgment was affirmed. The final order, however, is suspended, awaiting the action of the Secretary of the Treasury upon the application of the convict for a remission of the fine ascertained against him by the judgment of the court.

The power of the Secretary of the Treasury to remit penalties and fines and forfeitures has been the subject of frequent opinions from this Department, as well as some causes adjudicated in the courts.

In the case of *The Margaretta* (2 Gall., 517–518), Judge Story said:

"The power to remit penalties and forfeitures is one of the most important and extensive powers which can be exercised under the Government. It vitally affects the rights, the revenues, and the prerogatives of the United States. These can not be waived or extinguished except in cases and by the persons provided by law. The party, therefore, who sets up a Treasury pardon to purge away a forfeiture must show that such pardon is within the purview of the powers confided to that Department."

And in *Gray Jacket* (5 Wall., 369), which was a case of maritime prize of war, the court said:

"The power of the Secretary to remit forfeitures and penalties is defined and limited by law. The jurisdiction is a special one, and he may not transcend it. If he do, his act is void."

On December 14, 1868, my predecessor in office, Mr. William M. Evarts, in response to an inquiry from the Secretary of the Treasury as to the power of the Secretary under the act of March 3, 1863, section 10 (sec. 3469, Rev. Stat.), to

compromise a claim in favor of the United States against a surety in a forfeited recognizance given for the appearance in the United States district court of a person charged with robbing the mails, said:

"The statute was not intended to vest in the Secretary of the Treasury any authority, or impose upon him any duty touching the administration of the criminal laws of the United States. Its purpose simply was to enable the Government to realize the largest amounts from money claims which might be of doubtful recovery or enforcement, and to accomplish this object the Secretary of the Treasury was empowered to compromise such claims upon the recommendation of the counsel having charge of them and of the Solicitor of the Treasury. This power is strictly, therefore, a fiscal one, and is to be exercised in each case upon fiscal conditions alone."

He concludes, however:

"But if it was made to appear to the Secretary of the Treasury that the United States could not realize by judgment and execution the full amount of the debt by reason of the insolvency of the surety or other impediment, the Secretary was authorized, upon the concurring recommendations of the district attorney and the Solicitor of the Treasury, to effect a compromise of the claim upon the best terms that could be obtained." (12 Opin., 543.)

January 30, 1879, my predecessor in office, Hon. Charles Devens, in reply to an inquiry from the Secretary of the Treasury as to the power of the Secretary to accept a "compromise offered in discharge of a claim of the United States before judgment, where the proponent is fully able to pay the entire amount claimed, but in which case the district attorney recommends the acceptance upon the ground that he doubts his ability to obtain a judgment for want of evidence," said (16 Opin., 260):

* * * "It seems to me that a compromise may properly be recommended, not upon the ground that the case is a hard one as against the defendant, but upon the ground upon which contested claims are often compromised by parties, in view of the uncertainty as to their obtaining a judgment."

And on June 27, 1889 (19 Opin., 345), my immediate pred-

ecessor in office, Hon. W. H. H. Miller, in reply to a request from the Secretary of the Treasury for an opinion upon the very subject-matter now submitted by you, concludes a lengthy opinion by stating:

* * * "That it is extremely doubtful whether the power to compromise given in section 3469 extends to the case of a fine; and I am confirmed in this view by the consideration that there is, as already stated, another section in the Revised Statutes (sec. 5292) which invests the Secretary of the Treasury with ample power to mitigate or remit all fines growing out of infractions of the revenue and navigation laws."

As far back as March 3, 1797, Congress provided by law for the remission of fines, penalties, and forfeitures. The act appears as section 5292, Revised Statutes. As it is there printed, it is liable to erroneous construction by reason of defective punctuation. It provides:

"Whenever any person who shall have incurred any fine, penalty, or forfeiture, or disability, or may be interested in any vessel or merchandise which has become subject to any seizure, forfeiture, or disability by authority of any provisions of law," etc.

This might seem to provide for two distinct classes of cases, to wit, "*any* person who shall have incurred any fine," etc., or who "may be interested in any vessel or merchandise which has become subject to any seizure, forfeiture, or disability." But by reference to the original act, which will be found 1 Statutes, page 506, it will be seen that the title is "An act to provide for mitigating or remitting the forfeitures, penalties, and disabilities accruing *in certain cases therein mentioned.*"

From which it would seem that the language "any person," and "any fine, penalty," etc., is limited to the "certain cases therein mentioned," which are cases "levying or collecting any duties or taxes," and "registering recording of ships," "enrolling and licensing of ships," etc.

And upon examining the statutes collated under Title LXVIII, entitled "Remission of fines, penalties, and forfeitures," it will be seen that section 5292 provides for remission of fines by the Secretary after and upon a summary investigation of the case by the district judge.

Section 5293 provides for the remission of fines by the Secretary, in a limited class of cases, upon investigation of the facts under rules prescribed by the Secretary himself.

Section 5294 relates to the remission by the Secretary of fines, etc., provided for in laws relating to steamboats, etc.

The case of a fine or penalty incurred for violation of the provisions of the alien immigration law does not therefore, in my judgment, fall within the purview of the statutes embraced under Title LXVIII.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

DISTRICT ATTORNEY—COMPENSATION.

Sections 299 and 824 of the Revised Statutes have no application to services rendered under section 827 of the Revised Statutes, compensation for which is to be fixed and allowed in the manner prescribed by the provisions of the latter statute.

DEPARTMENT OF JUSTICE,
February 6, 1894.

SIR: I have the honor to acknowledge yours of February 1, transmitting the account of Edward Mitchell, U. S. attorney, southern district of New York, for the quarter ending December 31, 1893, for fees for services rendered under section 827, Revised Statutes, on behalf of the United States, in suits brought against collectors of customs, and inquiring "whether, in view of the provisions of section 299, Revised Statutes, the allowance under section 827 of the Revised Statutes should be limited to the fees prescribed in section 824."

The question has on several occasions been considered by my predecessors with the uniform result, in which I concur, viz, that sections 299 and 824 of the Revised Statutes have no application to services rendered under section 827 of the Revised Statutes—the compensation for which is to be fixed and allowed in the manner prescribed by the provisions of the latter statute.

I return Mr. Mitchell's account.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

SAMPLE PACKAGES.

A contract with the Government construed as in itself not meaning to use the term "sample packages" in the restricted sense of merchandise free of duty as samples only and of no commercial value.

DEPARTMENT OF JUSTICE,
February 7, 1894.

SIR: I beg to acknowledge the receipt of your letter of February 3, 1894, submitting the contract between William Utz and the Secretary of the Treasury of the 31st January, 1888, and the claim "for $6,760.80 for cartage on 50,080 packages of dutiable merchandise to the public stores," asserted thereon for said Utz through his attorneys, and the opinion of the Solicitor of the Treasury of July 13, 1893.

My opinion is asked "as to whether or not the contractor, Mr. Utz, is entitled under his contract to such allowance as is now claimed."

In the letter of February 6, 1893, from the attorneys of the claimant, presenting his claim, it is said: "We have advised Mr. Utz that under the terms of the contract he was required to carry for 1 cent per package only such as contained merchandise of no commercial value and which would be submitted free of duty as samples only."

I do not concur in this view of the contract.

The language of the contract is that the contractor is to be paid "at the rate of 14½ cents per package for all packages from the importing vessel and from general order store and warehouse to the public store, with the exception of sample packages, and that said party of the first part will cart all sample packages from all points at the rate of 1 cent per package."

Article 345, Customs Regulations 1892, recognizes two kinds of articles imported as samples, to wit:

"Articles of no mercantile value imported as samples, not for sale, nor subject to duty, nor to formal entry," and

"Samples imported in quantities and intended to be sold by jobbers are dutiable."

The contract is silent as to the kind of "sample package" contemplated in it, and there is nothing in the accompanying papers to indicate which of the two kinds was in the minds of the parties at the time of the contract.

I am of opinion, then, that on the basis of the contract alone Mr. Utz is not entitled to the amount claimed by him merely because the packages "contained merchandise of dutiable value on which duty was assessed and collected by the Government."

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

SIOUX MIXED BLOOD—ATTORNEY-GENERAL.

The question whether or not the Sioux half-breed or quarter blood is an Indian within the meaning of the act of March 2, 1889, chapter 405, is to be determined not by the common law, but by the laws or usages of the tribe.

Such laws or usages are not matters of which judicial notice can be taken, but present questions of fact upon which the Attorney-General can not advise.

Affirmatively, a person apparently of mixed blood residing upon a reservation and claiming to be an Indian is in fact an Indian.

Requests for opinions of the Attorney-General should be accompanied by a definite statement of the material facts and formulation of the questions to which an answer is desired.

The Attorney-General can not be asked to exercise appellate jurisdiction upon mixed questions of fact and law.

DEPARTMENT OF JUSTICE,
February 9, 1894.

SIR: Your letter of January 4, asking my opinion with relation to the citizenship of Jane E. Waldron, and the opinions of Assistant Attorneys-General Shields and Hall, therewith transmitted, have received my careful attention.

It appears that Mrs. Waldron's mother was a half-breed Sioux Indian. Her father was white and supported his family off the reservation until 1883 or 1884, after she came of age. At that time, meeting with reverses, they came to the agency and were placed on the roll as entitled to rations, etc. Mrs. Waldron's husband is also a white man.

Mrs. Waldron claims the rights of a Sioux Indian under the act of March 2, 1889, chapter 405, entitled "An act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations, and to secure the relinquishment of the Indian title to the remainder, and

for other purposes." This act carves out six small reservations from the great reservation of the Sioux Nation, and releases the balance of the land to the United States. Various provisions are made in the act for allotment of lands in severalty, and under one of these plaintiff claims as an "Indian receiving and entitled to rations and annuities at either of the agencies mentioned in this act at the time the same shall take effect."

Her claim to an allotment has raised a number of interesting questions in your Department, among which you submit the question, "Whether the common-law rule that the offspring of free persons follow the condition of the father prevails in determining the status of children born to a white man, a citizen of the United States, and an Indian woman, his wife."

It will be noticed that the act under consideration was dependent for its validity upon the consent of the Indians. (Sec. 28.) In other words, it was substantially a treaty with the Sioux Nation; acts in this form having taken the place of the ancient Indian treaty since the latter was prohibited by act of Congress in 1871. By the agreement confirmed in this act the Sioux Nation gave up a large amount of territory, and the rights conferred on the nation or on individuals were in consideration thereof. The persons entitled to such rights are the persons who at the time of the agreement constituted the Sioux Nation and were lawful members thereof. The question, therefore, whether any particular person is or is not an Indian within the meaning of this agreement is to be determined, in my opinion, not by the common law, but by the laws or usages of the tribe. (See *Western Cherokee Indians* v. *United States*, 27 C. Cls., 1, 54; *United States* v. *Old Settlers*, 148 U. S., 427, 479.) As to these laws or usages, I am not informed and am not qualified to advise. I do not think that they can be regarded as matters of which judicial notice can be taken. They present rather questions of fact like other local usages. Presumptively, a person apparently of mixed blood residing upon a reservation and claiming to be an Indian is, in fact, an Indian. (*Famous Smith* v. *United States*, 151 U. S., decided January 3, 1894.)

Other interesting questions are discussed in the opinion,

but they are not presented in such a way that I can answer them. No definite statement of facts is submitted, nor are the questions to which an answer is desired separately formulated. "Where an official opinion from the head of this Department is desired on questions of law arising on any case, the request should be accompanied by a statement of the material facts of the case, and also the precise questions on which advice is wanted." (14 Opin., 367, 368; 18 Opin., 487, 488; 19 Opin., 465, 466, 696.)

You submit all the evidence for my consideration, requesting my opinion "upon all of the questions considered in the opinion of the Assistant Attorney-General for the Department of August 18, 1893." This substantially asks me to exercise appellate jurisdiction over a decision upon mixed questions of fact and law. This I am not empowered to do.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE INTERIOR.

NAVIGABLE WATERS OF THE UNITED STATES.

The St. Louis and Cloquet rivers, being navigable waters of the United States, can be obstructed by dams only by permission of the Secretary of War, to whom Congress has by express statute given exclusive jurisdiction of the subject.

DEPARTMENT OF JUSTICE,
February 9, 1894.

SIR: I have the honor to acknowledge yours of the 7th instant, in which, referring to the application of the Altemonte Water Company for permission to construct dams across the St. Louis and Cloquet rivers, you ask my opinion whether the Secretary of War has jurisdiction in the premises.

Upon the facts as stated in your letter, both the St. Louis and Cloquet rivers must be deemed navigable waters of the United States. Being such, they can be obstructed by dams only by permission of the Secretary of War, to whom Congress by express statute has given exclusive jurisdiction of the subject.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF WAR.

ATTORNEY-GENERAL—TREASURY DEPARTMENT.

The Solicitor of the Treasury is an officer of the Department of Justice and not of the Treasury Department.

Actions to recover moneys due the United States, not involving any issue of fraud, do not come in any way under the direction of the Secretary of the Treasury. (Rev. Stat., 376.)

The question whether such an action is maintainable is a question arising in the Department of Justice, and therefore the Attorney-General's opinion can not be asked upon it by the Treasury Department.

The "collection of the revenue" under the superintendence of the Secretary of the Treasury within the meaning of Revised Statutes 249 relates to the proceedings of the collectors and their subordinates, and not to those of district attorneys.

DEPARTMENT OF JUSTICE,
February 10, 1894.

SIR: On January 29 you asked my opinion upon the advisability of attaching certain goods of an alleged debtor to the United States while in transit through the State of Maine in bond en route from England to Canada. That opinion I declined to give, because the advisability of bringing a suit is not a question of law and because also it is inexpedient for the Attorney-General to render an official opinion as to how the suit, if actually brought, ought to be decided by the courts. You now refer the matter to me again, asking my opinion whether these goods can be attached by the laws of the State of Maine and whether such attachment would be in contravention of treaty or statute. The second of the grounds stated for declining an opinion upon the former question applies to these questions as well.

And for another reason I am debarred from rendering an official opinion. Although brought to recover the duties on goods previously smuggled by the defendant, yet the proposed action would be simply an action of *assumpsit* for moneys due. No issue of fraud would be involved. It would, therefore, not come under the direction of the Secretary of the Treasury by section 376 of the Revised Statutes. It would be a suit "in which the United States is a party, or interested," within the meaning of section 379 of the Revised Statutes. As to such suits, "the Solicitor of the Treasury shall have power to instruct the district attorneys," etc., by the terms of that section. The Solicitor of the Treasury is an officer of this Department, as is also the dis-

trict attorney for the district of Maine. The questions of law stated in your communication, therefore, arise in the Department of Justice, and not in the Treasury Department, and are not questions upon which I am authorized to give an opinion to the Treasury Department by section 356 of the Revised Statutes. It is true that by section 249 it is in your province to "direct the superintendence of the collection of the duties on imports." I do not think, however, that this section is intended to substitute the Secretary of the Treasury for the Attorney-General as the officer controlling the actions of the Solicitor of the Treasury in such suits. I have held in the Bloch and Cutajar cases that by the peculiar provisions of section 376 prosecutions for frauds or attempted frauds upon the revenue are to be directed by the Secretary of the Treasury instead of by the Attorney-General. This, however, is an anomaly, and the word "collection" in section 249 applies, in my opinion, to the proceedings of collectors and their subordinates, and not to those of district attorneys.

For these reasons the papers are again returned without opinion upon the questions submitted.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

NOTE.—The following is the letter referred to in the foregoing opinion:

OCTOBER 21, 1893.

SIR: Your letter of October 13, 1893, in relation to frauds upon the revenue at the port of New York by one Cutajar, and the failure of the U. S. attorney to act upon information furnished by the collector, seems to raise the same question of departmental authority which has been discussed between us in the case of United States against Bloch. On reviewing the statutes I am still unable to perceive that I have any proper authority in this matter of punishing frauds upon the revenue.

The act of August 2, 1861 (12 Stat., 285), charged the Attorney-General "with the general superintendence and direction of the attorneys and marshals of all the districts in the United States and Territories as to the manner of discharging their respective duties." An explanatory act was passed on August 6, 1861 (12 Stat,, 327), providing that the above enactment should not be "construed to repeal, modify, or in any way affect any law now in force confining or regulating the duties of the Solicitor of the Treasury."

By the act of March 3, 1863 (12 Stat., 739), "the Solicitor of the Treasury, under direction of the Secretary of the Treasury," was

directed to "take cognizance of all frauds or attempted frauds upon the revenue," and charged with "a general supervision over the measures for their prevention and detection, *and for the prosecution of persons charged with the commission thereof.*" For the purpose of enabling him to perform these duties he was authorized to employ not more than three additional clerks. The statute seems impliedly to have abrogated the statute of 1861, in so far as direction of district attorneys with relation to these prosecutions was concerned. This act was entitled "An act to prevent *and punish* frauds upon the revenue," etc.

The act establishing the Department of Justice (act of June 22, 1870, 16 Stat., 162) transferred the Solicitor of the Treasury from the Treasury Department to the Department of Justice, and directed that he should exercise his functions "under the supervision and control of the head of the Department of Justice." This act might be construed to abrogate the act of 1863 so far as it placed the Solicitor under direction of the Secretary of the Treasury in the matter of frauds upon the revenue.

The Revised Statutes, however, reenact all of the statutory provisions above referred to, which appear as sections 349, 350, 362, and 376. The reenactment of the provision of the statute of 1863, that the Solicitor of the Treasury, as to certain of his duties, is to act under the direction of the Secretary of the Treasury, seems to me to constitute an exception to the provision of section 350, directing that he shall be under the supervision and control of the Attorney-General.

There does not seem to have been any uniformity of ruling upon this point, and I have been reluctant to rule definitely upon it. Practical considerations, however, seem to me to confirm the opinion above expressed. The Solicitor of the Treasury is familiar with the details of all these matters, and has a special clerical force assigned to him for that purpose. The civil and criminal proceedings arise out of the same transactions, and should be under the supervision of the same officer. I think, therefore, that in this Cutajar Case, as well as the Bloch Case and all others of a similar nature, I should refrain from interfering by directions to district attorneys.

* * * * * * *

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

DEPARTMENT CLERKS.

The word "meritorious" relating to Department clerks asking sick leave under the legislative appropriation act of March 3, 1893, chapter 211, section 5, is surplusage.

The word "exceptional" in the same act raises a question of fact upon which the Attorney-General can not advise.

The statute construed with relation to the inclusion of Sundays and holidays in annual leave and sick leave.

DEPARTMENT OF JUSTICE,
February 10, 1894.

SIR: I am in receipt of your communication of January 22, asking my opinion as to various questions raised by section 5 of the legislative appropriation act of March 3, 1893. This section, after provisions as to the length of the working day of Department clerks, contains the following provisos:

"*And provided further*, That the head of any Department may grant thirty days' annual and thirty days' sick leave, with pay, in any one year to each clerk or employé the sick leave to be allowed in cases of personal illness only, or where some member of the immediate family is afflicted with a contagious disease and requires the care and attendance of such employé, or where his or her presence in the Department would jeopardize the health of fellow-clerks: *And be it further provided*, That in exceptional and meritorious cases, where to limit such sick leave would work peculiar hardship, it may be extended, in the discretion of the head of the Department, with pay not exceeding sixty days in any one case or in any one calendar year."

You ask me first as to the meaning of the phrase "exceptional and meritorious" in the second of these provisos; whether the phrase refers to the employé's record, to his general condition and circumstances, or both. In my opinion the word "meritorious" in this proviso is but surplusage. If the case is not meritorious the employé should not receive any sick leave at all. The phrase must, therefore, be read as equivalent to "exceptional as well as meritorious." The word "exceptional" I do not think susceptible of precise definition as matter of law. It is the evident intent of Congress that sick leave beyond thirty days should be granted only in extraordinary cases. Whether the cases are or are not extraordinary must, however, be left to the discretion of the heads of Departments. Whether it is to be applied only to cases of great penury, or to cases of great merit in the employé's past services, or to cases where the Government is peculiarly responsible for the illness, as in the matter of the victims of the recent Ford's Theater disaster, or in the case of an employé broken down by overtime work, are questions not capable of solution from the words of the law alone. It

may, indeed, be important that the practice of all the Executive Departments should be the same in this regard; but, if so, the practice must be fixed by agreement between the heads of Departments themselves.

For the same reason I can not state as matter of law whether the case of an employé who has already taken his thirty days' annual leave as well as his thirty days' sick leave can be considered exceptional.

You also ask me whether, in computing the annual leave and sick leave under the first proviso, Sundays and holidays occurring during absence should be charged against the absentee. Upon this question I am informed that the practice of the different Departments has not been uniform. No aid, therefore, is afforded by departmental practice in the solution of this question. It has been the practice of this Department to charge Sundays and holidays against the absentee when they intervene during the period of absence. That is, if an employé obtain leave of absence from Monday to Saturday, inclusive, he is not charged with any Sunday as part of his period of absence. If, however, his leave is from Saturday to Saturday, inclusive, he is charged with the Sunday included in that period. In the absence either of general and uniform departmental practice, or of specific direction from Congress, it is my opinion that the practice of this Department is the correct interpretation of the law. Unless otherwise specially stated, statutory provisions for notice, etc., of a given number of days are usually considered to include Sundays and holidays in the count, at least unless the period of notice is very short. Statutes, therefore, often specifically except them. This conclusion is somewhat strengthened by the fact that the statutory annual leave is made thirty days, or, as near as may be, one-twelfth of the calendar. It would seem to be the Congressional intent that each employé might take a month's vacation, the length thereof being expressed in days on account of the varying lengths of the calendar months.

Your last question is, therefore, to be answered in the affirmative.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

ATTORNEY-GENERAL—BICYCLES "AS PERSONAL EFFECTS"—STATUTORY CONSTRUCTION.

The opinions previously rendered by this Department (17 Opin., 679; 20 Opin., 648) as to the dutiability of bicycles adhered to.

When Congress adopts substantially the language of a previous statute, whether from the statute book of the United States or from that of any State, it is presumed to adopt therewith the judicial construction already placed upon the language of the act.

The same principle applies in lesser degree to long-settled departmental construction.

The opinion of September 8, 1893 (20 Opin., 648), as to the effect to be given to opinions of the Attorney-General adhered to.

DEPARTMENT OF JUSTICE,
February 12, 1894.

SIR: Your communication of January 29, relating to bicycles brought into the United States by travelers for purposes of travel, has received careful attention. The question in dispute in your Department has been whether bicycles can be considered in any case as personal effects within the meaning of paragraph 752 of the McKinley tariff act of 1890, placing on the free list the following articles:

"Wearing apparel and other personal effects (not merchandise) of persons arriving in the United States; but this exemption shall not be held to include articles in actual use and necessary and appropriate for the use of such persons for the purposes of their journey and present comfort and convenience, or which are intended for any other person or persons, or for sale."

The present difficulties in your Department arise from a series of rulings, commencing with the opinion of Attorney-General Brewster, rendered April 4, 1884, on the corresponding paragraph of the tariff act of 1883. (17 Opin., 679.) That tariff act placed on the free list "wearing apparel in actual use and other personal effects (not merchandise) * * * of persons arriving in the United States." It did not contain the qualifying clause above quoted from the act of 1890. That clause, however, so far as it affects bicycles brought in for the purpose of a bicycle trip by the importer himself, has rather a favorable bearing than otherwise on the importer's claim. If the changes since made, therefore, have any effect on Attorney-General Brewster's

ruling that bicycles are personal effects within the meaning of the statute, their effect is to strengthen his position.

When the question was first under consideration, and up to the time of Attorney-General Brewster's decision, there was some room for argument on both sides. On one hand Acting Attorney-General Taft, following precedents in cases on the construction of wills, which restricted the general meaning of the word "effects" by application of the rule *ejusdem generis* had held that carriages were neither "personal effects" nor "household effects" within the meaning of similar provisions of the Revised Statutes. (15 Opin., 113, 125.) The circuit court, reversing his decision, had held them to be household effects in the case of *Morgan* v. *Arthur*, from which it might be argued that they were not personal effects, and that if carriages were not personal effects neither were bicycles; on the other hand, it could be argued that bicycles were distinctly personal, as distinguished from household effects; that they could be used only by one person at a time; that they were even like saddles, differently constructed for the use of the different sexes; that they are customarily carried on baggage cars as personal baggage; and that when imported for the purpose of a bicycle trip, the bicycle accompanies the importer even more steadily than his trunk or the majority of his wearing apparel. On one hand it could be likened to a carriage, on the other to crutches or a walking stick. On one hand the rule *ejusdem generis* might be appealed to by the Government, as bicycles are so different in nature from wearing apparel. On the other hand, the applicability of this principle was questionable; and, indeed, it was shortly after shaken by the Supreme Court of the United States in *Arthur* v. *Morgan*. (112 U. S., 495, 499.)

The whole question was presented, as I have said, to Attorney-General Brewster for his determination. He decided it in the affirmative, and his decision was duly adopted and promulgated by the Treasury Department. (Syn. Dec., No. 6384). No court has ever decided to the contrary.

Years afterwards in some manner the question came before one of the Boards of General Appraisers appointed under the customs administrative act of 1890. How it came before them I am not informed, as it was the duty of the collector to admit the articles free under the Secretary's instructions.

In this instance, however, the collector held them dutiable, and the appraisers sustained his decision. (Syn. Dec., No. 10395.) This decision was under the law of 1883.

Meanwhile the act of 1890 had already been passed. This act was drawn by persons doubtless thoroughly familiar both with the previous law and with the Treasury decisions thereunder. The fact that it contained no provision looking to the exclusion of bicycles from the position of personal effects has weight as evidence that the decision was in accordance with the intent of Congress. It is a familiar principle that when Congress adopts substantially the language of a previous statute, whether from the statute book of the United States or from that of any State, it intends to adopt therewith the judicial construction already placed upon the language of the act. The same principle applies in lesser degree to long-settled departmental construction. While inclining to agree with Mr. Brewster's opinion, regarded as *res nova*, notwithstanding the learned argument of the appraisers to the contrary, I feel also that after this lapse of time, and under these circumstances, the matter should have been considered at rest by all administrative officers.

The question was submitted by you last summer, whether the ruling of this Department would be modified by reason of the decision of the appraisers or the intervention of the act of 1890. On August 28, 1893, the then Acting Attorney-General answered that the opinion of Attorney-General Brewster was still adhered to, and was applicable to the act of 1890 as well as to that of 1883. This ruling also was adopted and promulgated by the Treasury Department. (Syn. Dec., No. 14368.) By some cause not explained this decision, however, was not universally conformed to, but duty was again sought to be collected on a bicycle, and the question thus came again before the appraisers, who, on January 12, 1894, reiterated their former decision.

Your communication of January 29 now asks my opinion whether, under the circumstances, the instructions of your Department should be modified to conform to the decision of the appraisers.

In answer to this question I can do no more than quote from my opinion rendered to you on September 8, 1893, on the legal force of the rulings of this Department.

"The act of 1870, section 4, establishing the Department of Justice, provided that written opinions prepared by a subordinate in the Department may be approved by the Attorney-General, and that 'such approval so indorsed thereon shall give the opinion the same force and effect as belong to the opinions of the Attorney-General.' This provision is embraced in substantially the same language in section 358 of the Revised Statutes. Evidently, therefore, Congress contemplates that the official opinions signed or indorsed in writing by the Attorney-General shall have some actual and practical force. Congress's intention can not be doubted that administrative officers should regard them as law until withdrawn by the Attorney-General or overruled by the courts, thus confirming the view which generally prevailed, though sometimes hesitatingly expressed, previous to the establishment of the Department of Justice." (5 Opin., 97; 6 Opin., 334; 7 Opin., 699, 700; 9 Opin., 36, 37.)

The question now presented is substantially the same as that presented last summer. The duty of this Department ended with the rendition of the opinion, and it can not with propriety advise further. (17 Opin., 332.)

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

REIMPORTED WHISKY.

Reimported whisky when withdrawn from bond is taxable according to the number of gallons at the time of importation.

DEPARTMENT OF JUSTICE,
February 12, 1894.

SIR: I have the honor to acknowledge yours of the 8th instant, asking for an opinion upon the question whether reimported domestic whisky when withdrawn from bond is to be assessed on the basis of the quantity as ascertained at the time of the withdrawal, or as ascertained at the time of the entry.

The precise question seems to have been decided in the circuit court of the United States for the district of Kentucky (*Louisville Public Warehouse Co.* v. *The Surveyor of*

the Port of Louisville, 48 Fed. Rep., 372), where it was held that reimported whisky when withdrawn was taxable according to the number of gallons at the time of importation. That adjudication should be considered as settling the matter until and unless called in question by some other adjudication of equal weight.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

The owners of a vessel inquired of the Secretary of the Treasury whether if they rebuilt the vessel in Canada it could be thereafter reregistered as a vessel built in the United States: *Held*, That this was not a question arising in the administration of the Treasury Department, and therefore the official opinion of the Attorney-General could not be asked upon it.

DEPARTMENT OF JUSTICE,
February 17, 1894.

SIR: Your communication of February 15, 1894, asks my opinion whether if a certain American steamer shall be rebuilt in Canada by being lengthened amidships she can be reregistered on her return as a vessel built in the United States.

It appears that the question is not presented to you for your present action, but that the owners of the vessel, which is still unrepaired, inquire as to what your future action would be in case they decided to have the repairing done in Canada.

I do not think this a question arising in the administration of your Department within section 358 of the Revised Statutes, and therefore, for the reasons stated in my opinion of September 13, 1893, in the case of a Chinese laborer, it would not be proper for me to give the opinion requested.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

Requests for the opinions of the Attorney-General must be accompanied with a statement of facts and separate formulation of the questions to which an answer is desired.

The opinion asked must be one needed for the guidance of the officer asking.

The Attorney-General's opinion can not be asked upon questions relating only to the duties of the Commission to the Five Civilized Tribes appointed under the Indian appropriation act of March 3, 1893, chapter 209, section 16.

DEPARTMENT OF JUSTICE,
February 19, 1894.

SIR: Your communication of February 16 asks my opinion as to the present validity and effect of certain land grants to railroads in the Indian Territory. It does not submit a definite statement of facts, or formulate separately the questions to which an answer is desired, and for that reason I am not warranted by the precedents in giving an opinion. These precedents are cited in my opinion rendered to you February 9, 1894, in the matter of the mixed-blood Sioux Indians.

For another reason, moreover, I am not authorized to give you an official opinion in this matter. Section 356 of the Revised Statutes provides that an opinion may be required by the head of any Executive Department "on any questions of law arising in the administration of his Department." It has always been held that questions not so arising can not be answered on such requisition. (See opinion in the matter of the Utah Commission, 19 Opin., 7.) "The opinion should be needed for the guidance of the head of a Department, and should relate to some matter calling for action or decision on his part." (Opinion in the matter of the Commissioner of Patents, June 7, 1893.)

The questions now asked are submitted by you at request of the Commission to the Five Civilized Tribes, appointed by section 16 of the Indian appropriation act of March 3, 1893, chapter 209. You are not given any control over the proceedings of the Commissioners, except to pass upon their accounts and receive their reports for transmission to Congress. Advice which can not be asked directly by the Commissioners I am not authorized to answer, even when they put the question through the head of another Department. (18 Opin., 107.)

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE INTERIOR.

SILVER CERTIFICATES—LAWFUL MONEY.

Silver certificates are not lawful money within the meaning of section 4 of the act of June 20, 1874, chapter 343, and section 9 of the act of July 12, 1882, chapter 290.

DEPARTMENT OF JUSTICE,
February 20, 1894.

SIR: I have the honor to acknowledge your favor of the 17th instant requesting my opinion upon the question whether silver certificates authorized by section 3 of the act of February 28, 1878, are lawful money within the meaning of section 4 of the act of June 20, 1874 (18 Stat. L., chapter 343), and section 9 of the act of July 12, 1882 (22 Stat. L., chapter 290).

Silver certificates are just what they purport to be on their face and by their terms—that is, they attest the fact that the United States has on deposit so many silver dollars which will be paid to the holder upon the presentation and surrender of such certificates. If they can be regarded as money at all it is only because the United States agrees to receive them "for customs, taxes, and all public dues," and only to that extent and for those specific purposes.

In my opinion they are not "lawful money" within the meaning of the statutes above referred to, to wit: Section 4 of the act of June 20, 1874 (18 Stat. L., chapter 343), and section 9 of the act of July 12, 1882 (22 Stat. L., chapter 290).

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

OPIUM—TRANSFER THROUGH UNITED STATES.

The Secretary of the Treasury has not the power to prohibit the transfer of goods through the United States destined to Mexico.

DEPARTMENT OF JUSTICE,
February 20, 1894.

SIR: Your letter of February 12, 1894, requests my opinion as to the authority of the Secretary of the Treasury to authorize the transportation through the United States to Mexico of opium imported at San Francisco.

Chapter 190, Supplement Revised Statutes, page 293, provides: "That when any merchandise * * * imported at the ports * * * San Francisco, shall appear by the invoice or bill of lading and manifest of the importing vessel to be consigned to and destined for either of the ports specified in the seventh section of this act, the collector at the port of arrival shall allow the said merchandise to be shipped immediately after the entry prescribed in section two of this act has been made."

The seventh section referred to designates Brownsville, Tex., as one of the ports.

This chapter repeals sections 2990–2997, Revised Statutes.

Section 3002, Revised Statutes, provides:

"Any imported merchandise in the original packages, which shall have been duly entered and bonded in pursuance of the provisions relating to warehouses, may be withdrawn from warehouse for immediate exportation without payment of duties, to Chihuahua, in Mexico" (by routes indicated in that section).

Customs Regulations, 1892, Treasury Department, articles 572–574, provide for "withdrawals for transportation and exportation to Mexico;" and, articles 442–452, "for merchandise in transit to Mexico."

By several statutory provisions the importation of opium into the United States is restricted and regulated. But I have been able to find no statute touching the importation of opium in conflict with the general provisions above referred to for the importation of merchandise at ports of the United States in transit for Mexico.

I, therefore, concur in the opinion of the Solicitor of the Treasury that the Secretary of the Treasury has not the power to prohibit the transit of goods through the United States destined to Mexico.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

FINES, PENALTIES, AND FORFEITURES—REMEDY.

While sections 17 and 18 of the act of June 22, 1874, chapter 391, offer a remedy to one who is exposed to a fine, penalty, or forfeiture in the cases therein provided for, yet such a remedy is not exclusive, but the relief may also be extended under section 3469, Revised Statutes.

DEPARTMENT OF JUSTICE,
February 20, 1894.

SIR: I have the honor to acknowledge your letter of the 9th instant, asking my opinion "as to whether this case, the amount involved exceeding $1,000, comes properly within the provisions of section 5292, Revised Statutes, and of sections 17 and 18 of the act of June 22, 1874, and is thereby excluded from the provisions of section 3469, Revised Statutes."

I am of opinion that while sections 17 and 18, chapter 391 (18 Stat. L.), afford a remedy to one who is exposed to a fine, penalty, or forfeiture in the cases provided for in that chapter, that such remedy is not exclusive, but that the relief may also be extended under section 3469, Revised Statutes.

While section 3469 is found, under title 36, providing for "debts due by or to the United States," yet it will be seen that section 3473, under the same title, treats duties on imports as being among such debts, and this view of the scope of section 3469 appears to have been taken by my predecessors in office (16 Opin., 259, 570; 18 Opin., 72).

The question is by no means free from doubt. But under the circumstances of this case, as detailed in the letter from Henry C. Platt, U. S. attorney, southern district of New York, of February 3, 1894, and the letter of the Solicitor of the Treasury of February 5, 1894, I think the Secretary of the Treasury can safely act under section 3469.

As to the further inquiry contained in your letter, I reply that under section 20, chapter 391, "it shall be the duty of such collector and district attorney to furnish to the Secretary of the Treasury all practicable information necessary to enable him to protect the interests of the United States.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

DEPARTMENT CLERKS—ATTORNEY-GENERAL.

The provisions of the act of March 3, 1893, chapter 211, section 5, relating to the hours of service annually and sick leave of Department clerks, are applicable to the Department of Agriculture.

The nature of the evidence required from applicants for leave and sufficiency of reasons for extending or limiting hours of labor are matters within the discretion of the Secretary as to which the Attorney-General can not advise.

When an employé is not connected with the Department during the entire calendar year his leave should be prorated.

The Assistant Secretary of Agriculture is not a clerk or employé within the meaning of the statute; as to the chiefs of divisions, quaere.

There is no limit to the right of the head of a Department to demand service of his subordinates.

The head of a Department can not require the Attorney-General's opinion as to his power to do an act unless it is his intention to do it if he has the power.

DEPARTMENT OF JUSTICE,
February 21, 1894.

SIR: I am in receipt of your communication of January 31, submitting a number of questions raised by the act of March 3, 1893, chapter 211, section 5, relating to the hours of labor, annual leave, and sick leave of clerks and employés in the Executive Departments. This section is, in my opinion, applicable to your Department. Your questions relating to the length of sick leave allowable and to the method of computing Sundays and holidays are answered in an opinion recently given to the Secretary of the Navy, a copy of which I herewith inclose. The nature of the evidence to be required from an employé applying for annual or sick leave, and the sufficiency of reasons for extending or limiting hours of labor are matters intrusted by the statute to your discretion, as to which I can not advise. An employé not connected with the Department during the entire calendar year is not entitled to the full annual or sick leave, which should be prorated.

The Assistant Secretary of Agriculture, who is an officer appointed by the President, with the advice and consent of the Senate, is not a clerk or other employé within the meaning of the section under consideration. Chiefs of divisions in the Treasury Department have been held by my predecessors to be clerks (15 Opin., 3, 6), and if the chiefs of divisions in your Department have similar duties the same ruling

would apply to them. This would seem to be true of part of your chiefs of divisions at least.

The above remarks dispose of all the questions submitted by you, except your general question whether there is "any exemption below the Secretary as to punctuality, hours of labor, and daily attendance, without the permission of the Secretary." The answer to this question is to be found in section 161 of the Revised Statutes, which gives you authority to prescribe regulations not inconsistent with the law for the government of your Department, the conduct of its officers and clerks, and the performance of its business. There seems to be no limitation to your right to demand service of your subordinates. The only limit that I can find upon your authority is in the section above referred to, which prohibits you from allowing more than a certain latitude to the persons therein described. I do not understand that you desire either to shorten the hours or lengthen the annual or sick leave of any official of your Department. If there be no such intention, the question as to your power to do so in the case of any given official would not be one presently arising in the administration of your Department and which, therefore, I would be authorized to answer.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF AGRICULTURE.

CHINESE—ATTORNEY-GENERAL.

Natives of China who are subjects of Great Britain are prohibited entrance to this country by the act of July 5, 1884, chapter 220.

The Attorney-General should not express an official opinion upon a judicial question as to which the circuit courts are in conflict.

The Attorney-General can not give an official opinion upon a case which has not yet actually arisen.

DEPARTMENT OF JUSTICE,
February 21, 1894.

SIR: Your communication of February 17, as I understand it, asks my opinion whether Chinese laborers who have become subjects of some foreign power other than China are prohibited from entering the United States by our anti-Chinese legislation. The cases before your Depart-

ment appear to relate to Chinamen who have become subjects of Great Britain. You refer to a decision of the circuit court in *United States* v. *Douglas* (17 Fed. Rep., 634). That decision was rendered prior to the act of July 5, 1884, which provides in section 15—

"That the provisions of this act shall apply to all subjects of China, and Chinese whether subjects of China or of any other foreign power."

It is clear from this provision that persons of Chinese race, subjects of Great Britain, are prohibited entrance to this country, with the possible exception of such persons who are not natives of China. It may be questioned whether the word "Chinese" in that act applies to persons who are Chinese only by race, but natives of another country who never owed allegiance to China. It has been decided in the California circuit (*In re* Ah Lang, 18 Fed. Rep., 28) that such persons were prohibited entrance even before the passage of the act of 1884. A solution of the doubt was attempted by the act of September 13, 1888, chapter 1015, section 3, the present validity of which act is, however, still an unsettled question. (See also act of May 5, 1892, chap. 60, secs. 2, 3, 4.) As this question is one upon which the circuit courts have differed in opinion, and which has not apparently been settled by appeal or by statute, I do not think that it is one upon which I should express an official opinion.

As to persons of Chinese race not natives of Great Britain, I can not undertake to give an opinion until the cases actually arise. They may depend upon the construction of special treaty stipulations. (The Cherokee Robacco, 11 Wall., 616, 621; *Whitney* v. *Robertson*, 124 U. S., 190, 194.)

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

DEPARTMENTAL PRACTICE.

On a doubtful question as to fees chargeable in customs matters after it has been long settled by Departmental practice founded on a decision of the Board of General Appraisers, the Attorney-General will not undertake to pass independent judgment as to the original merits.

DEPARTMENT OF JUSTICE,
February 21, 1894.

SIR: Your communication of February 12 asks my opinion whether the fee of 25 cents "for receiving manifest of each railroad car or other vehicle laden with goods, wares, or merchandise from a foreign contiguous territory" was abolished by section 22 of the customs administrative act of June 10, 1890. It appears that this question was submitted to the Board of General Appraisers, and by them decided in the negative September 13, 1890. (Syn. Dec., No. 10247.) This view apparently was approved by the then Secretary of the Treasury, and the departmental practice has been in accordance therewith. The question being a doubtful one, I do not think that the practice so adopted ought to be changed at this late day without a decision of the court. I would, therefore, answer your question in the negative without passing any independent judgment upon its original merits. I do not understand from your letter that there has been any change in practice which could affect the question.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

REPORT—EXAMINER.

A report signed by an examiner or clerk appointed pursuant to section 2940, Revised Statutes, and approved by the appraiser, is not in compliance with the requirements of section 2615, Revised Statutes.

DEPARTMENT OF JUSTICE,
February 21, 1894.

SIR: I have the honor to acknowledge your communication of the 15th of February in regard to the administration of the customs laws at the port of New York and asking my opinion "as to the legality of a return signed by an examiner or clerk and approved by the appraiser."

It appears from your letter that the "reports," provided for in section 2615, Revised Statutes, have sometimes been signed by persons other than the officer who actually made the examination and inspection of the merchandise. That section requires that the assistant appraiser at the port of New York shall examine and inspect such merchandise as the appraiser may direct "and truly report to him the true

value thereof, according to law. Such report shall be subject to revision and correction by the appraiser, and when approved by him shall be transmitted to the collector, and shall be deemed an appraisement by the U. S. local appraiser of the district, of such merchandise, required by law."

Section 2940, Revised Statutes, provides for the appointment of examiners at the port of New York "to aid each of the assistant appraisers in the examination, appraisement, and inspection of merchandise." The qualifications for this office appear to be the same as those of assistant appraiser.

No reason is apparent why the examiner may not perform all duties of the assistant appraiser. The report required in section 2615 is the report of the assistant appraiser and should be authenticated as such by his signature. A report signed by an examiner or clerk can not be said to be the report of the assistant appraiser.

Inasmuch, however, as the statute appears to limit the functions of the examiner to examination and inspection of merchandise and requires that the report of such examination and inspection shall be made by the assistant appraiser, I am of opinion that a report signed by the examiner or clerk and approved by the appraiser is not in compliance with the requirements of section 2615.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

RENT OF SEAL FISHERIES—COMPROMISE.

It is competent for the United States to recover by proper legal proceedings the difference between the amounts actually received as rent and bonus from the seal fisheries and the amounts called for by the terms of the lease as rent and bonus for the same years, notwithstanding the action of a prior Secretary of the Treasury in reducing sums due under the lease by what his estimate was of the lessee's claims for damage, inasmuch as it appears such claims were not legal and valid. Such action of the prior Secretary, even if it binds his successor, as to which quære, does not conclude the United States.

DEPARTMENT OF JUSTICE,

February 23, 1894.

SIR: I have yours of January 9, last, relating to the indebtedness to the United States of the North American Commercial Company, lessees of the seal islands of Alaska.

In an opinion given by this Department under date of August 7, 1893, the conclusion was reached that the Secretary of the Treasury was without power to reduce either the rent reserved in the lease to the North American Commercial Company or the bonus of $7.62½ therein agreed to be paid upon each skin taken and shipped, and that the differences between the amounts actually received by the Secretary of the Treasury as rent and bonus for the years 1890–'92 and the amounts called for as such rent and bonus by the terms of the lease were still due to and recoverable by the United States.

You now call attention to a claim of the company—not before brought to my notice—that the reductions of rent and bonus allowed the company by Secretary Foster were the result of a compromise by which the demands of the United States under the lease were abated as a consequence and in consideration of the release by the company of certain large claims for unliquidated damages.

The alleged compromise involves the doubtful question of any general authority belonging to the Secretary of the Treasury, independently of any express statute and simply by virtue of his office, over claims against the United States for unliquidated damages. It is also open to the serious objection that the company's claims, if a legitimate subject of compromise by the Secretary, could be so compromised only in the manner pointed out by the provisions of section 3649 of the Revised Statutes of the United States. Without now insisting upon these objections, however, and assuming for present purposes only that the facts are as stated, I am still unable to see that the result reached in the opinion already given is in any wise affected. It was there taken for granted that the lawful demands of the Government had been reduced without consideration, on grounds of sympathy or sentiment, or on general considerations of what was proper and liberal under the circumstances. The new feature now presented is .that they were reduced for a consideration, to wit: The release of certain claims by the company. That new feature puts in issue the nature of that consideration, and necessitates the inquiry whether the claims released were or were not legally valid claims. If they were not the act of the Secretary in allowing them, and in abating the

just demands of the United States by reason of them, was without authority of law and beyond his jurisdiction. An examination of the papers submitted shows that such was the character of the company's claims. They were claims for damages caused by the act of the United States in reducing the company's catch of fur seals to 7,500 per year. But this precise thing the United States reserved to itself the absolute right to do by the express terms of the lease, the language of which is: "It (the company) also agrees to obey and abide by any restrictions or limitations upon the right to kill the seals that the Secretary of the Treasury shall judge necessary, under the law, for the preservation of the seal fisheries of the United States; and it agrees that it will not kill or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury."

It follows, therefore, that notwithstanding Secretary Foster's action in reducing the sums due to the United States under the lease by what must be assumed to have been his estimate of the fair value of the company's claims for damages, it is, nevertheless, competent for the United States to recover the difference between what it should have received and what it actually received, by proper legal proceedings. The company strenuously insists that Secretary Foster's action in the premises must be regarded as a finality, and can not be reopened and reviewed by his successor. Whether that position be or be not correct, it is not material to consider. Even if it be correct, nothing more follows than that the present Secretary of the Treasury can not by and of himself reconsider or revise the action of his predecessor. But such action, if it concludes the Secretary, does not conclude the United States. It may still assert its rights through the courts and may therein recover of the company any sum which is justly due to it, and which has thus far not been realized through the unwarranted proceeding of one of its agents.

Respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

SUSPENSION OF PENSIONS.

The urgent deficiency act of December 21, 1893, chapter 3, prohibits a suspension, without notice, of payments under forged or fraudulent pensions and prohibits further suspension of payments under pensions theretofore ordered to be suspended.

At the expiration of the statutory notice, however, the Commissioner of Pensions may decide the case and stop payment of the pension without precluding himself from thereafter reopening the case at the request of the pensioner when justice requires.

Although a statute may have apparently unreasonable and extraordinary results, yet there is no rule of construction to avoid those results when there is no ambiguity.

Suspension is a continuing act.

DEPARTMENT OF JUSTICE,
February 24, 1894.

SIR: I am in receipt of your communication of February 21, inclosing a letter from the Commissioner of Pensions and asking advice concerning the interpretation of the proviso to the urgent deficiency act of December 21, 1893, which proviso is as follows:

"That any pension heretofore, or that may hereafter be, granted to any applicant under any law of the United States authorizing the granting and payment of pensions on application made and adjudicated upon, shall be deemed and held by all officers of the United States to be a vested right in the grantee, to that extent that payment thereof shall not be withheld or suspended until, after due notice to the grantee of not less than thirty days, the Commissioner of Pensions after hearing all the evidence shall decide to annul, vacate, modify or set aside the decision upon which such pension was granted. Such notice to the grantee must contain a full and true statement of any charges or allegations upon which such decision granting such pension shall be sought to be in any manner disturbed or modified."

Your first question is as follows:

"Where facts come to the knowledge of the Commissioner from which it appears clearly that a pension was obtained by fraud or forgery, does the proviso of the act of December 21, 1893, take from the Commissioner the power to suspend the payment of the pension until after he shall have given the notice mentioned in the proviso, and shall have acted

definitely in the case, after the lapse of the thirty days or longer time stated in the notice?"

The Commissioner states, as an example, that there are some hundreds of suspended pensions involved in frauds at Norfolk, Va., part of which at least are confessedly based on perjury and even forged testimony, the claim agent being now in the penitentiary, and several of his accomplices having been also convicted. A still larger number in New Mexico are said to be in the same position, the claim agent having pleaded guilty and being now in the penitentiary. Some hundreds of pensions obtained by a claim agent in Iowa are stated to have strong presumptive evidence of fraud, over thirty indictments having been returned against him by the grand jury. Yet the Commissioner states that at the time of writing the evidence upon these pensions is not all in. If the proviso under consideration applies to pensions granted upon forged or fraudulent papers, then the United States must pay out large sums of money in cases like these without any hope of its subsequent recovery.

If there were any room for doubt as to the meaning of the statute, courts would lean strongly against a construction carrying such extraordinary results. I can find, however, no ambiguity in it so far as it bears on this question. It clearly applies to every certificate that has been lawfully granted by the Pension Office, whether the evidence upon which the office acted was complete or incomplete, honest, fraudulent, or forged. Such certificate may still, of course, be canceled upon charges made, but until the thirty days' notice is given, the evidence received, and a decision reached, the money must continue to be paid, even though the crime has been confessed and the criminal may be already serving his term of sentence. In fact, the statute practically abolishes the right to suspend payments *pendente lite* in these cases.

I have not overlooked the fact that the statute uses the words "vested right," and that the attribute thus given to these pension certificates is not one belonging to other vested rights. Contracts and judgments are vested rights, yet payments under a contract induced by fraud or even mutual mistake of fact, and payments under a judgment induced by fraud or even invalid for some jurisdictional defect, may properly be withheld *pendente lite*, and proceedings to collect

the money will be restrained when necessary by an injunction from the courts. The right to withhold payments in such cases, pending legal investigation, belongs to the Government as well as to the individual. "It repeatedly and unavoidably happens in transactions with the Government that money due to an individual is withheld from him for a time, and payment suspended in order to afford an opportunity for more thorough examination." (*Kendall* v. *Stokes*, 3 How., 87, 98.) If, therefore, the statute under consideration declared a pension lawfully granted to be a vested right, and stopped there, it would doubtless be altogether without legal effect upon the practice of suspension pending investigation under charges of fraud.

But the statute plainly shows a contrary intent. It is to be read as if it simply provided that pensions which have been granted as therein described should not be withheld or suspended until after due notice, etc.

Your second question is as follows:

"Where prior to the passage of the act of December 21, 1893, referred to, the Commissioner, upon reliable information that a pension was obtained by fraud or forgery, had ordered the suspension of the payment of the pension, and was proceeding in the investigation of the case, but without having given such notice as contemplated in the said proviso of said act, must he, on the passage of said act, revoke such prior order of suspension and allow payment of such pension to be resumed until he shall have given such notice, and have definitely acted in the case, after the lapse of time, not less than thirty days, named in such notice?"

In other words, Is or is not the withholding or suspension of a pension a continuing act? I think that it is. Does the statute refer to the actual detention of the money, or to the issuance of an order directing that the money be detained? I think it clearly refers to the detention itself, and that it applies, therefore, to pension moneys, the withholding of which has already been ordered. I am aware that a judge of the supreme court of the District of Columbia has held otherwise, and in an ordinary case I should be inclined to follow such a decision as long as it is not overruled or reversed. That decision, however, was made in the case of a single pensioner, while the interests of a very large number

of pensioners are involved in the question. I can not believe that Congress took such a narrow view of the question. It seems to me plain that they intended the statute to relieve all pensioners alike, whether or not the order directing suspension had happened to be made before December 21, 1893. The second question, therefore, is also answered in the affirmative.

I do not wish to be understood, however, as advising that the decision of the Commissioner of Pensions, referred to in the proviso under consideration, is necessarily a final and irrevocable decision. It may occasionally happen that, while at the expiration of the thirty days the evidence before him seems clearly to require a revocation of the pension, the pensioner is still promising to procure further testimony in support of his claim, and begging for delay. I do not think that the Commissioner is put in a dilemma requiring him either to continue paying money on an apparently fraudulent claim, or, on the other hand, to foreclose forever all rights of the pensioner. On production of further evidence, he would have jurisdiction to reopen the case. His proper course, therefore, would be to make a decision at the close of the thirty days on the evidence before him, and if further testimony thereafter produced should alter the case, to reopen his decision and reinstate the pension, allowing to the pensioner as arrears any installments which may meanwhile have accrued.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE INTERIOR.

ATTORNEY-GENERAL—SOLICITOR OF THE TREASURY.

The Attorney-General can not be asked to examine and approve codes of rules or forms of applications, etc., adopted by a Department, to apply to cases arising in the future.

The Solicitor of the Treasury is empowered to give such advice as to matters pending in the Treasury Department.

DEPARTMENT OF JUSTICE,
February 26, 1894.

SIR: I am in receipt of your communication of February 23, concerning proposed special lay order permits. You inclose therewith a proposed set of rules for customs

officers, which rules provide forms of application for prompt discharge of cargo by steamships in foreign trade, order granting application, permit for immediate landing thereunder, indemnity bond, and oaths of sureties thereto. You ask me to advise you "whether such plan may legally be established."

Section 356 of the Revised Statutes provides for the submission to me of questions of law arising in the administration of any of the Executive Departments. The questions so provided for have always been understood as being questions which have already actually arisen and require decision by the head of a Department. (19 Opin., 331, 414.) I am not aware that the section has ever been construed to require from the Attorney-General his personal examination and approval of codes of rules adopted to meet future cases. Still less has he been required to examine and approve forms of applications, permits, bonds, and affidavits for future use in the other Departments. The establishment of such a practice would require his entire time. The Solicitor of the Treasury, an officer of this Department, is instructed to advise upon such matters, as they may come up for consideration in the Treasury Department. His familiarity with the details of the operations of your Department especially qualify him for such a task. I do not think that the statute requires me to undertake the task of examining codes of rules and collections of blank forms, imagining the various contingencies in which their validity might in future be questioned, and passing judgment on these possible future problems. For these reasons the papers are returned without opinion.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—SECRETARY OF WAR.

Under section 12, chapter 907, Supplement to the Revised Statutes, the establishment of a certain line as essential to the preservation and protection of a harbor rests in the discretion of the Secretary of War alone, and his judgment in the matter must be final and conclusive until modified by him.

The Attorney-General can not be called upon for an opinion which involves the examination of evidence and the settling of questions of fact.

DEPARTMENT OF JUSTICE,
March 7, 1894.

SIR: I have the honor to acknowledge your letter of March 5, with the accompanying "statement of facts and legal propositions submitted by the attorney of the East River Gas Company," and also the "brief prepared in answer to the said statement," and also a tracing of the eastern shore of East River, showing the "pier and bulkhead line" as established by you under chapter 907, Supplement to Revised Statutes, act of September 19, 1890, in which letter you ask my opinion upon the following questions:

"1. Whether the establishment of pier and bulkhead lines as indicated by the red line is authorized by law?

"2. Whether its establishment and maintenance is an interference with the legal rights of the riparian owners?"

Section 12 of chapter 907, Supplement to the Revised Statutes, provides:

"Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may and is hereby authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended, or deposits made, except under such regulations as may be prescribed from time to time by him."

From which it appears that the determination of the question of fact, that the establishment of a certain line is essential to the preservation and protection of a harbor, is referred to the discretion of the Secretary of War alone, and his judgment in the matter must be final and conclusive until modified by him.

It appears, further, that such a line has been established by the Secretary of War, which the East River Gas Com-

pany complains is an infringement of its rights as a riparian owner.

That the Secretary of War has the power to establish a harbor line there can be no doubt. Whether that power has in this case been legally exercised must depend upon the consideration of facts which entered into and controlled the judgment of the Secretary of War. What those considerations were is not disclosed in the letter or papers submitted to me.

The Attorney-General is required to give his opinion to the head of any Executive Department of the Government on any question of law arising within the administration of his Department. It has, however, been uniformly held by my predecessors in office that the Attorney-General can not be called upon for an opinion which involves the examination of evidence and the settling of questions of fact. (7 Opin., 494; 10 Opin., 267; 11 Opin., 189; 14 Opin., 367, 368, 541; 18 Opin., 487; 19 Opin., 672.)

It appears to be conceded here that if the waters through which the red line passes are navigable, the harbor line may be rightly established there. But the question whether these waters are navigable or not can not be submitted to the Attorney-General for his determination.

Again, the Secretary of War appears to have fully exercised the power given to him by the statute, by having established the harbor line on the eastern shore of the East River, and the question presented here is as to whether the line so established "is authorized by law."

I do not think it advisable to express an opinion upon a question that has already been determined and carried into effect by the head of a Department.

Whether the establishment and maintenance of this harbor line is an interference with the legal rights of the riparian owners is a mixed question of law and fact, upon which, in the absence of any statement of the facts, it is not proper—for reasons already stated—that I should express an opinion.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF WAR.

SIOUX MIXED BLOODS—ATTORNEY-GENERAL.

The Attorney-General can not consider matter merely evidential in character and make findings of fact thereupon. Questions referred to him are analogous to questions referred to the Supreme Court upon certificate of division of opinion in lower courts. He has no general appellate power.

Opinion of February 9, 1894 (20 Opin., 711), as to the meaning of the word "Indians" given in legislation regarding the Sioux, reaffirmed.

An Indian may accept an allotment of property as an individual under a treaty and at the same time rejoin his tribe without objection so far as the United States is concerned.

History of the Sioux half-breed scrip under the treaty of Prairie du Chien considered.

DEPARTMENT OF JUSTICE,
March 13, 1894.

SIR: Your communication of February 21 submits a new statement of facts in the matter of Mrs. Jane E. Waldron, which was the subject of my opinion of February 9, and asks me whether on this statement of facts she is entitled to an allotment of land on the ceded Sioux Reservation within the provisions of the act of March 2, 1889, chapter 405. Included in your statement of facts are some matters merely evidential in character, and I am not authorized to consider these for the purpose of making a finding of fact therefrom for myself. Under the precedents I can use only facts found by you and submitted, as in the case of an agreed statement of facts submitted to a court.

Mrs. Waldron's mother was a half-breed of the Sioux race. She was recognized by the United States as a person entitled to Sioux half-breed scrip under the act of July 17, 1854, chapter 83. She actually received and accepted her portion of this scrip, as did her parents, both of whom were half-breeds. Whether they then resided with their tribe, or upon the land in exchange for which the scrip was given, or elsewhere, is not stated.

She thereafter married a white man, Arthur Van Meter. who is stated to have supported his family off the reservation. It is not stated where her daughter, Mrs. Waldron, was born, but it appears that she was brought up off the reservation. It is not stated whether or not the father, Van Meter, is an adopted member of the tribe. From 1883 on, he and his family, including Mrs. Waldron, have been recog-

nized by the United States as Sioux Indians, and have drawn rations as such at the Indian Agency. As I understand your statement, they have resided upon the reservation. Mrs. Waldron's husband, however, is a white man not claiming Sioux citizenship.

My opinion has already been given you to the following effect: As Mrs. Waldron is a person partly of Sioux blood, residing on the reservation and claiming to be an Indian, the presumption is that she is in fact an Indian until the contrary is shown. The controlling question, however, is whether or not she had a right by the laws and usages of the Sioux tribe to claim membership therein at the date of the agreement of 1889; and this is a question of fact which I am not qualified to decide. The fact may be ascertained by circumstantial evidence in default of direct proof, but I have no general appellate authority, and as above stated, can not weigh evidence and make findings therefrom. Questions referred to the Attorney-General in a case of this kind are analogous to questions referred to the Supreme Court upon certificate of division of opinion in the lower courts. His decision can not operate as a disposition of the whole case if there is any doubt or incompleteness in the facts. I can not, therefore, consider the statements of American Horse before the Sioux Commission referred to in your letter. Assuming there to be no sufficient evidence one way or the other on the question of her right to recognition by the tribe, the case rests upon the general presumption of her Indian citizenship, unless this is affected in some way by the treaty of Prairie du Chien and her mother's subsequent receipt of scrip thereunder. The language of the treaty of Prairie du Chien of July 15, 1830 (7 Stat., 328), is referred to as tending to prove that the word "Indian" in documents relating to the Sioux excludes half-breeds and other mixed bloods. Very clear language would be required to have this effect. Half-breeds residing with their tribes have, as a general rule, always been regarded as Indians, and even whites adopted by the tribes have been regarded as Indians so far as property rights are concerned. (See 4 Opin., 258, 260; 7 Opin., 174, 753; Oklahoma act of May 2, 1890, secs. 30, 31.) Treaty stipulations accordingly are deemed to apply to half-breeds as well as full bloods, unless otherwise therein specially provided. (*Pennock* v. *Com-*

missioners, 103 U. S., 44, 46). The treaty of Prairie du Chien does not purport to be with the entire Sioux Nation, but only with six bands therein mentioned, joined with the Sacs and Foxes and other tribes not belonging to the Sioux at all. These tribes obtained permission by the treaty to bestow certain lands on "the half-breeds of their nation," "their half-breeds," "the half-breeds of said tribes and bands." This language implies that the half-breeds are members of the tribes, although for some reason then intending to make a separate settlement. The phraseology in this regard varies in different Indian treaties, even in the treaties with different bands or tribes of the Sioux Indians. Sometimes half-breeds or mixed bloods are distinguished from "Indians;" sometimes full bloods are referred to as a subdivision only. No great stress can be put on these variations of language occurring in treaties or legislation relating to particular bands, and at great intervals of time. (See Yankton treaty of April 19, 1858, Art. VI, VII; Sisseton and Warpeton treaty of February 19, 1867, Art. VIII, IX; agreement of August 15, 1876, with Ogalalla and other bands, art. 7, incorporated in the act of February 28, 1877, chap. 72; Indian appropriation act of May 15, 1886, chap. 333, 24 Stat., 39.)

It remains to consider whether the special provision made for Mrs. Waldron's ancestors by the treaty of Prairie du Chien, and her mother's receipt of scrip therefrom arising, operate in any way to bar her present claim. That treaty was intended, among other things, to separate the full-blooded Indians from the half-breeds of the tribes therein mentioned, and the half-breeds were given a right of occupation of a specified tract of country on the Mississippi River, in the present State of Minnesota, "holding by the same title and in the same manner that other Indian titles are held;" but the treaty provided that the President might thereafter assign to any of the said half-breeds in fee simple portions of said tract, not exceeding 640 acres to each individual. The half-breeds, however, refused to avail themselves of these provisions, and by a subsequent treaty it was provided that $150,000 should be paid them by the United States in lieu thereof. This provision, however, was rejected by the Senate, and the treaty amended accordingly Sep-

tember 4, 1852. (10 Stat., 954–958.) Many of the mixed bloods, however, were actually in occupation of the land, and accordingly Congress passed the act of July 17, 1854, chapter 83, known as the Sioux half-breed scrip act. This act authorized the President to obtain from the Sioux mixed bloods the land in question by exchange, and for that purpose to issue scrip, giving to each person not less than 40 nor more than 640 acres of land, to be located within said reservation or elsewhere, and to expose the balance of the land to public sale.

The state of facts then existing, and the reason for passing a statute instead of making a treaty, are shown in the Congressional proceedings of May 5, 1854. (28 Cong. Globe, 1114, 1115.) The half-breeds in question were not regarded as a tribe with whom a treaty could be made but as individuals. On the other hand, the Sioux Nation had parted with the land, so that no treaty with them could accomplish the object of opening up the land for settlement. Part of the half-breeds had remained on the land and were supporting themselves in a civilized manner, while the rest had moved away and were living an uncivilized life, but were still regarded as having a legal interest in an equal share. It was for this reason, in order to ascertain all the persons entitled, whether resident or not, that a census was directed by section 2 of the act.

It does not appear whether Mrs. Van Meter or her parents were among the civilized Indians who remained or the uncivilized Indians who went West. In the latter case they probably followed their tribe and never severed their connection with it. The question, however, I regard as immaterial. As the tribe had the right to adopt white members, so it had the right to readopt half-breeds who had been left behind in its migrations. Mrs. Van Meter subjected herself to no estoppel as against the Sioux Indians by taking the scrip. It represented individual property; perhaps, even, a wholly unlooked-for bounty from the U. S. Government. Nor was Mrs. Waldron subject to any estoppel in 1889 as against the United States, which dealt with the Sioux Nation as a body. It is well settled that an Indian may hold individual property under treaty allotment and at the same time rejoin her tribe without objection, so far as the United States is concerned. (*Pennock* v. *Commissioners*, *supra*, at p. 48.)

For these reasons I do not think that the treaty of 1830, or any of the proceedings thereunder, overthrow the presumption arising from Mrs. Waldron's race, residence, and claim to Indian citizenship, and the recognition of said claim by the United States officials before and at the time of the agreement of 1889.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE INTERIOR.

PART PAYMENTS UNDER GOVERNMENT CONTRACT—DEPARTMENTAL PRACTICE.

Part payments can not be made upon Government contracts unless the United States thereupon becomes the owner of the work paid for.

In case of ambiguity in a statute, departmental practice may affect its construction, when long-continued, uniform, and familiar, but not when merely recent and occasional.

DEPARTMENT OF JUSTICE,
March 15, 1894.

SIR: I have the honor to acknowledge your communication of February 28, asking my opinion in the matter of the contract for the construction of the revenue steamer *Calumet*. The material facts, as I understand them, are as follows:

A contract has been made by your Department for the construction of this steamer, and it is part built. The contract provides for part payments at your option, and you regard it as advisable to make a part payment at the present time if lawful. The work for which the payment is asked has been already performed. You do not state whether or not the contract provides that the United States shall have the ownership of the boat before its completion, or whether it shall have any lien on the uncompleted boat for such part payments. I am informed, however, that there is no such provision in the contract; that part payments made during the construction of the vessel are protected only by the personal responsibility of the contractor and his bondsmen; that if every installment but one had been paid upon the vessel, and it were substantially completed, it could nevertheless be transferred by the contractor to a third party, with no remedy to the United States but an action for damages.

Section 3648 of the Revised Statutes provides as follows:

"No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service or the delivery of articles of any description for the use of the United States, payment shall not exceed the value of the service rendered or of the articles delivered previously to such payment." * * *

The intent of this provision is that the United States should not pay for any work or materials until it had received their benefit. The true construction of the section, in my opinion, should be in accord with its intent. It matters not that the work for which pay is asked has already been done. No benefit therefrom has as yet accrued to the United States. I think that the section should be construed to prevent any part payments unless the United States thereupon becomes the owner of the work paid for. The precedents to which I have been referred, as showing an established practice to the contrary, are not fully analogous. It is true that part payments are made upon the construction of public buildings, docks, etc. These, however, are real estate, and the materials become the property of the United States as the work goes on. The contracts for building vessels made by the Navy Department contain special stipulations giving the United States a lien upon the work done and paid for.

You state "that the practice has been to make partial payments." It is possible that such a practice may be so long continued, uniform, and familiar as to affect the construction of the statute. No merely recent or occasional practice could have this effect. (*Merritt* v. *Cameron*, 137 U. S., 542, 551, 552.) I am not sufficiently informed by your letter to advise upon this point.

Since, upon the facts as now presented, your question as to the right to make part payments must be answered in the negative, the other questions put by you do not require attention.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

LOTTERY.

A certain company's plan of business considered and declared a lottery within section 3894, Revised Statutes, as amended by the act of September 19, 1890, chapter 908.

DEPARTMENT OF JUSTICE,
March 19, 1894.

SIR: I have the honor to acknowledge yours of the 1st of February last, inclosing a copy of bond and booklet issued by the Provident Bond and Investment Company, and, as I understand, requesting my opinion upon the question whether the company's plan of business is or is not a "lottery" within the meaning of section 3894 of the Revised Statutes of the United States, as amended by the act of September 19, 1890.

It appears that before submitting the question to me the Assistant Attorney-General for your Department reached and expressed an opinion upon it, after a thorough study of the facts and all the legal principles involved. His discussion of the matter seems to me to have practically exhausted the subject, and makes it only necessary for me to add that, in my judgment, the conclusion arrived at by him is unquestionably correct. It has the support, so far as I have been able to ascertain, of every judicial utterance upon the subject that has yet been given. Indeed, in view of the judgment and opinion of the Supreme Court of the United States in *United States* v. *Horner* (147 U. S., 449), it is difficult to see how any other result than that reached by the Assistant Attorney-General is possible.

Very respectfully,

RICHARD OLNEY.

The POSTMASTER-GENERAL.

SURETIES.

Two supplemental contracts made with a contractor when the contract itself had contemplated and provided for such changes, which have been made in the manner fixed by the contract, do not impair the obligations of the sureties on the contractor's bond.

DEPARTMENT OF JUSTICE,
March 19, 1894.

SIR: I have the honor to acknowledge yours of the 6th instant inclosing copies (1) of contract of John Gillies with the Navy Department, for construction of a dry dock at

Brooklyn, N. Y., together with the specifications for work under the contract; (2) of John Gillies's bond with sureties for the fulfillment of the contract; and (3) of supplemental contract arising out of the lengthening of the dock.

You state that another change in the dimensions of the dock was made by widening the same, the change being made in the manner stipulated in the contract and being provided for, as I understand, by another supplemental contract.

Your inquiry is whether these changes have affected the liabilities of the sureties on the contractor's bond, so that if the contract be declared forfeited under section 11 the United States could not hold them for damages growing out of the contractor's failure to perform his contract.

It may be observed that if the liabilities of the sureties could be released by the changes made in the requirements of the contract that mischief has already been done and will not be aggravated by the forfeiture of the contract under the eleventh section.

It is clear, however, in my judgment, that such changes have in no way impaired the obligations of the sureties on the contractor's bond. They are changes which the contract itself contemplated and provided for and which have been made in the manner fixed by the contract. In executing the bond, therefore, the sureties agreed to the changes in advance, and their liability is now exactly the same as if the requirements resulting from them had formed part of the original contract.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE NAVY.

ASSIGNABILITY OF INDEBTEDNESS—CHEROKEE NATION.

The assignability of the indebtedness of the United States to the Cherokee Nation is justified under the general law and under the proviso contained in section 10 of the act of March 3, 1893, chapter 209.

DEPARTMENT OF JUSTICE,
March 21, 1894.

SIR: I have the honor to acknowledge receipt of your communication of this date, requesting my opinion upon the question whether the Cherokee Nation, under the general

law, or under the proviso contained in section 10 of the act of March 3, 1893, has authority to make a transfer of the indebtedness of the United States to said nation. You submit an opinion given upon the question by Assistant Attorney-General Hall and approved by yourself.

The discussion of the matter by the Assistant Attorney-General is ample and any addition to it, if feasible, would be superfluous. It is only necessary to add, therefore, that I entirely concur in the conclusions reached by him and approved by yourself, and that in my judgment the assignability of the indebtedness of the United States to the Cherokee Nation is fully justified, both under the general law and under the proviso contained in section 10 of the act of March 3, 1893.

Respectfully, yours,

RICHARD OLNEY.

The SECRETARY OF THE INTERIOR.

DETAIL OF CLERKS—OFFICERS OF THE ARMY.

It is competent for a head of a Department to alter the disposition among the various bureaus and officers of the Department of the clerks allowed by law as he may find it necessary and proper to do, taking care that in no case shall any such clerk be paid from any appropriation made for contingent expenses or for any specific or general purpose unless such payment is specifically provided for in the law granting the appropriation.

The Secretary of Agriculture can legally detail any such officers or employés from his Department as may be requested by the Civil Service Commission, but he can not assign an officer of the Army detailed for service in the Weather Bureau to any other duties than those for which he is by law authorized to be detailed in the Weather Bureau.

DEPARTMENT OF JUSTICE,
March 21, 1894.

SIR: I have the honor to acknowledge your letter of the 13th instant, submitting for my opinion the following questions:

1. Whether a clerk, or clerks, who are drawing salaries from a lump sum, appropriated for a specific purpose, can be

legally detailed to perform work in other divisions of the same Department, or for duty to the Civil Service Commission?

2. Can it be inferred that when an officer, or officers, of the Army are detailed for duty to the Weather Bureau of the Department of Agriculture, they are to be confined to expert and scientific work connected with the Weather Bureau; or has the Secretary of Agriculture the power to detail such officers to fill statutory offices, or to perform the administrative functions, such as are required of civilians, when appointed to statutory offices?

By act of 5th of August, 1882, Supplement Revised Statutes, chapter 389, section 4, page 374, it is provided:

"And no civil officer, clerk, * * * shall hereafter be employed at the seat of Government in any Executive Department or subordinate bureau or office thereof, or be paid from any appropriation made for contingent expenses, or for any specific or general purpose, unless such employment is authorized and payment therefor specifically provided in the law granting the appropriation, and then only for services actually rendered in connection with and for the purposes of the appropriation from which payment is made, and at the rate of compensation usual and proper for such services."

In *Nathan Plummer* v. *The United States* (24 C. Cls., 517) the petitioner had been employed by the Attorney-General as an expert accountant, he being at the time a duly appointed clerk in the Department of Justice. His services as expert accountant were more valuable than his services as an ordinary clerk. The Court of Claims declined to allow the claim for compensation as expert accountant, and referring to the act of Congress above-cited, said:

"The purpose of Congress in these provisions can not be mistaken. It is to deprive officers of the Government of all authority to employ in any of the Executive Departments *at the seat of Government*, or in the subordinate bureaus or offices thereof, civil officers, clerks, * * * except such as may be specifically appropriated for by Congress. The second paragraph, as above quoted, makes the same prohibition against the employment of such persons at the seat of Government to be paid from appropriations for specific as well as general purposes." * * *

The court holding that the Attorney-General had no authority to employ the clerk as an expert accountant, denies his claim for extra services.

Section 166, Revised Statutes, provides that: "Each head of a Department may, from time to time, alter the distribution among the various bureaus and offices of his Department of the clerks allowed by law as he may find it necessary and proper to do."

And this section is expressly excepted from repeal, or modification, by anything in the act of August 5, 1882, above referred to.

In answer to your first question, then, I am of opinion that it is competent for you, as head of a Department, to "alter the disposition among the various bureaus and offices of" your "Department of the clerks allowed by law, as you may find it necessary and proper to do;" taking care, however, that in no case shall any such clerk be paid from any appropriation made for contingent expenses, or for any specific or general purpose, unless such payment is specifically provided for in the law granting the appropriation.

By chapter 211 (27 Stat. L., 682) it is required that "the heads of the respective Executive Departments shall detail from time to time such officers and employés as may be required by said Commission (Civil Service) in their investigations."

I am of opinion then that the "Secretary of Agriculture can legally detail" any such officers and employés from his Department as may be requested by the Civil Service Commission.

In reply to your second question I beg to say that by chapter 1266 (26 Stat. L., 653) the Weather Bureau was attached to the Department of Agriculture and made to consist of "one Chief of Weather Bureau and such civilian employés as Congress may annually provide for: * * * *Provided*, That the Chief Signal Officer of the Army may, in the discretion of the President, be detailed to take charge of said Bureau, and in like manner other officers of the Army, not exceeding four, expert in the duties of the weather service, may be assigned to duty with the Weather Bureau, and while so serving shall receive the pay and allowances to which they are entitled by law."

I do not think that the Secretary of Agriculture can legally assign such Army officers, so detailed, to any other duties in his Department than those for which they are by law so authorized to be detailed in the Weather Bureau.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF AGRICULTURE.

LIMITATION OF CLAIMS.

The six years' limitation of time for presenting claims under the act of March 3, 1887, chapter 359, applies only to suits in the Court of Claims.

DEPARTMENT OF JUSTICE,
March 23, 1894.

SIR: Answering your inquiry of March 20 whether you are debarred by the Tucker Act of March 3, 1887, chapter 359, section 1, from allowing claims filed in your Department more than six years after the rights have accrued for which the claims are made, I have the honor to advise you that the limitation in said act is by its terms applicable only to suits in the Court of Claims, and does not restrict your jurisdiction in any way.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

INTERNATIONAL COPYRIGHT LAW.

Uncopyrighted lithographs may be imported, although they may be copies of the copyrighted paintings.

DEPARTMENT OF JUSTICE,
March 24, 1894.

SIR: Answering your communication of March 19, I have the honor to advise you that, in my opinion, the international copyright act of March 3, 1891, chapter 565, does not prohibit the importation of uncopyrighted lithographs, although these lithographs may be copies of copyrighted paintings.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

INFORMERS' COMPENSATION—OFFICERS.

Informers who are appointed special inspectors without compensation except their interest as informers in the result of seizures are not officers of the United States within the anti-moiety act of June 22, 1874, chapter 391, section 4.

Nor are persons on the pay roll as temporary laborers but at the time off duty—that is, receiving no pay.

DEPARTMENT OF JUSTICE,
March 26, 1894.

SIR: Your communication of March 23 incloses a letter from the collector of customs at San Francisco, asking whether certain persons described by him are officers of the United States within section 4 of the anti-moiety act of June 22, 1874, chapter 391. The persons described by him belong to the classes, first, informers, who, after conveying information of frauds on the customs to the collector, are appointed by him special inspectors for the purpose of making seizures, without further compensation than their interest in possible moieties arising therefrom; and, second, persons appearing on the weigher's pay roll as temporary laborers, but who, at the time of obtaining and giving the information, are off duty—that is, receiving no pay. It is my opinion that neither of these classes of persons are officers of the United States within the meaning of the statute referred to.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

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ABSENCE FROM DUTY.

1. A clerk in a department absent from duty while at Omaha, Nebr., at a prize drill, duly ordered by the superior officer of the National Guard, of which he is a member, is entitled to pay while so absent. 437.
2. Employés of the United States, who are members of the National Guard, are not entitled to leave of absence from their respective duties without loss of pay or time, in order to engage in rifle practice, even although in the general orders of commanding general of the militia, such rifle practice may be called a parade. 669.

ABSENCE ON PAY.

1. Section 4 of the act of March 3, 1883, chapter 128, inhibits heads of Departments and the Executive from granting leave of absence to Department clerks with pay and without charging the time against the period of absence allowed annually by law in every case, except that of the sickness of the clerk concerned. 303.
2. The appropriation act of March 3, 1893, chapter 211, section 5, prohibits any other leave of absence on pay where an employé has, before July 1, 1893, been absent for a longer period than ninety days during the calendar year 1893. 607.
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ADDITIONAL DUTY.

1. The additional duty imposed by section 7 of the customs administrative act of June 10, 1890, is not subject to drawback. 247.
2. The additional duties provided by the customs administrative act of June 10, 1890, chapter 407, are penalties within the meaning of Revised Statutes, paragraphs 5292 and 5293, and the anti-moiety act of June 22, 1874, chapter 391. 660.

ADJOURNMENT OF CONGRESS.

3. When Congress adjourns, not sine die, for a longer period than ten days, exclusive of Sundays, and certain bills in less than ten

ADJOURNMENT OF CONGRESS—Continued.

days before such adjournment are placed in the hands of the Executive for approval or disapproval, it is competent for him to approve such a bill during the period of such adjournment; probably such a bill not signed would not become a law at the expiration of the ten days. At any rate, the best plan would be, in case of the bill not meeting Executive approval, to return it vetoed when Congress reconvenes; than its validity can be passed on by the court. 503.

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AMNESTY.

The President has the constitutional power, without Congressional action, to issue a general pardon or amnesty to classes of criminals. 330.

APPOINTMENT.

1. The Secretary of War is authorized to assign recent graduates, non-commissioned officers, and civilians to the cavalry or infantry, although "additional" second lieutenants remain in the engineers and artillery, and no vacancies exist in the last-named branches. 149.
2. An appointment inadvertently made upon certification from the eligible list of one State, where the appointee was at the time of the appointment a resident of another State, is not invalid. 274.

APPOINTMENT IN NAVY.

Under the act of March 2, 1889, chapter 96, vacancies in the Line and Marine Corps in the lowest grade of commissioned officers, must be filled from final graduates of the line and marine corps at Annapolis; so also as to vacancies in the Engineer Corps. Vacancies in the Line and Marine Corps can not be filled from the engineer corps division, or vice versa. 615.

APPROPRIATION.

1. The unexpended balance of the amount of the appropriations of June 14, 1880, and March 3, 1881, hitherto transferred from the books of the War to those of the Interior Department, now relieved by the act of August 19, 1890, chapter 807, from the use to which by said transfer it had been assigned, can now properly go back into the original fund. 300.
2. The money appropriated by the two first acts was applicable for the payment of damages, as well as for the costs of the improvement. *Ib.*
3. The President may lawfully use such portion of the $500,000 appropriated by the act of February 26, 1889, chapter 278, as he may deem necessary for the protection of the interests of the

APPROPRIATION—Continued.

United States at that place in making contracts for the control, whether by lease or purchase, of land in Pago-Pago Harbor. 484.

4. The President may lawfully direct that such portion of the $250,000 appropriated by the sundry civil act of August 5, 1892, "for providing naval and coaling station" as may be necessary, be used for the construction of a pier required in providing a naval and coal station in the harbor of Pago-Pago, Samoan Islands. 553.
5. The expense of printing and binding animal industry reports, such as the Secretary of Agriculture may publish, is to be paid out of the $850,000 appropriation approved July 5, 1892; not out of the $75,000 appropriated and placed in the hands of the Public Printer for the Department of Agriculture. 573.
6. The cost of transportation and subsistence of the men detailed by the Secretary of the Navy to guard Government property at the World's Columbian Exposition must be paid from the fund provided for the Marine Corps and its subsistence. 576, 577.
7. The appropriation of the sundry civil act of March 3, 1893, for the World's Columbian Commission is not in subjection to the proviso of the appropriation act of August 5, 1892, chapter 391, for the same subject. 594.
8. An appropriation to enable the Secretary of Agriculture to prepare certain property for an experiment station and to remove a previous experiment station to a new site, is a "permanent specified appropriation" within the act of June 20, 1874, chapter 328, section 5. 599.
9. The French Government may be reimbursed its expenses in taking charge of American seamen brought back accused of crime on the requisition of the United States consul, from the $5,000 appropriation of the act of July 16, 1892, chapter 197, for expenses bringing home persons charged with crime. 600.
10. The act of March 3, 1893, chapter 212, contemplates a gunboat built of steel, not on the "composite" plan. 617.
11. It is not permitted the Secretary of State, by the joint resolution of Congress approved February 25, 1893, to authorize the construction of a wharf different in character from that specified in the resolution, even if from a change in the circumstances the construction of that sort of wharf with that appropriation has become impracticable. 653.

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APPROPRIATION FOR PUBLIC BUILDINGS.

1. An appropriation for a public building must be made in express terms. 54.
2. The act of March 3, 1891, chapter 527, does not carry an appropriation. 54.

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Under section 4787, Revised Statutes, as amended March 3, 1891, the money commutation in lieu of an artificial limb can be had every three years, and the periods of three years run from the time when such limb was furnished, not from July 17, 1870. 83.

ASSIGNABILITY OF INDEBTEDNESS:

The assignability of the indebtedness of the United States to the Cherokee Nation is justified under the general law and under the proviso contained in section 10 of the act of March 3, 1893, chapter 209. 749.

ASSIGNMENT OF CLAIM.

The head of a Department is prohibited by section 3477, Revised Statutes, from cooperating with a contractor having a balance due him in the Treasury in assigning this balance to an outsider before the issuing of the warrant or warrants for payment of the amount proposed to be assigned. 578.

ASSIGNMENT TO SERVICE.

The Secretary of War may appoint recent graduates, non-commissioned officers, and civilians to cavalry and infantry service, although they remain "additional second lieutenants" in the engineer's and artillery service, and there are no vacancies in said service. 149.

ATTORNEY-GENERAL.

1. The Attorney-General is not authorized to give an official opinion to the head of a Department as to questions arising in any other Department. 50.
2. The Attorney-General is not authorized to review an interpretation of the law laid down by the Civil Service Commission at the request of the Secretary of the Interior, where no question in the matter is pending in the Interior Department. 158.
3. The Attorney-General is not authorized to give to the Secretary of the Treasury his opinion as to the proper construction of a pension appropriation act, because the Treasury Department is bound to follow the rulings of the Department of the Interior in considering that act. 178.
4. The Attorney-General declines to advise the Secretary of the Treasury as to whether certain pictures of coins are a violation of section 3 of the act of February 10, 1891, chapter 127, on the ground that this is a question for the courts and not for the Executive Department. 210.
5. The Attorney-General declines to give an opinion where the request for the opinion contains no statement of facts and presents no question of law. 220.
6. The Attorney-General will not give an opinion where the subject-matter submitted shows no question of law arising in the administration of the Department submitting it. 249.

ATTORNEY-GENERAL—Continued.

7. The Attorney-General is not required to give an opinion except on such questions as are necessary to guide the head of the Department. 251.
8. The Attorney-General is required only to answer questions of law, and can not consider questions of fact upon evidence submitted. 253.
9. The Attorney-General does not give opinions where the question is so general as not to show what the question is that has arisen in any Department. 258.
10. The Attorney-General can not investigate the papers and records for the purpose of ascertaining the facts upon which a question arises. 270.
11. The Attorney-General can not reverse the decision of the Civil Service Commission or require it to issue a certificate of reinstatement. 270.
12. In the absence of action on the part of Congress declaring forfeiture or directing suit, the Attorney-General is not warranted in instituting proceedings to recover to the United States the title and possession of the land granted by section 19 of the act of March 3, 1877, chapter 108. 307.
13. The Attorney-General can not at the instance of the Secretary of the Treasury express an opinion on the question whether the Civil Service Commission should issue a certificate of reinstatement to a clerk in the Treasury Department. 312.
14. The Attorney-General is not authorized to give an opinion on a question judicial in character. 314.
15. The Attorney-General can not properly give an opinion where it does not appear that some question exists calling for the action of the Department requesting it. 383.
16. The Attorney-General declines to express an opinion to the Postmaster-General on the question whether a certain publication is within the description of matter which the statute denominates "second class," on the ground that it is a pure question of fact which it is the province of the Postmaster-General to decide. 384.
17. The Attorney-General can not properly decide what are the limits of the jurisdiction of the consul in China. 391.
18. The Attorney-General will express no opinion where the matter is not one requiring the action of the head of a Department as being within his official duties. 420.
19. Where the Attorney-General is not called upon to give an opinion upon any question pending undetermined, but is asked to review and express his conclusion upon the correctness of interpretation and applications of law heretofore made, he is not permitted to give an opinion, nor will he give an opinion upon a hypothetical case as to questions which may arise in the future. 440.
20. Whether or not certain persons are within the so-called eight-hour labor law is a question of fact not for the Attorney-General to determine. 459.

ATTORNEY-GENERAL—Continued.

21. Where certain contractors whose bid for performing certain work for the Government has been accepted, state that before signing the contract they desire to know what portion of the work the eight-hour law will affect, the Attorney-General is not authorized to give an opinion in such case. 463.
22. It is not permissible for the Attorney-General to give an opinion except in a case actually arising in the administration of one of the Departments. 465.
23. Where terms are used in a statute in their ordinary acceptation and the duty of applying it in a particular matter is one of administration merely, that duty can not be devolved upon the Attorney-General. 487.
24. Before rendering an opinion, the Attorney-General requires succinct statements of the facts and of the question of law arising thereon, upon which the opinion is desired. 493.
25. The Attorney-General is precluded from giving an opinion as to whether an appointment would be likely to occasion confusion or a conflict of authority. 494.
26. The Attorney-General will decline to give an opinion as to the applicability of the so-called eight-hour law to a certain contract for public work, for the reason that the contractor, not the Secretary of the Treasury, is liable for the violation of the law. 500.
27. The question by whose fault or negligence, if anyone's, a wrongful payment has been made, is a question of fact or of mixed law and fact which only the court can determine, and the Attorney-General should not express an opinion thereon. 524.
28. Where no statement of facts is presented, the Attorney-General can not render an opinion. 526.
29. Whether various schemes are "dependent upon lot or chance," within the meaning of the lottery law, is a mere question of fact, upon which the Attorney-General is not authorized to give an opinion. 530.
30. The Attorney-General is neither required nor authorized to give an opinion to the head of a Department, except in cases actually pending for decision by him in such Department. 536.
31. The Attorney-General will not answer a question purely judicial in its nature. 539.
32. The question as to the right of a State to tax land on an Indian reservation is judicial and not administrative. The Attorney-General ought not to express an opinion on it. 277.
33. The Attorney-General is prohibited from giving an opinion unless an occasion has actually arisen requiring the action of a head of a Department. 583.
34. The power of the Attorney-General to give an opinion on request of the head of a Department is confined to questions of law arising in the administration of the Department calling for the opinion. 588.
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is entirely a matter of fact, as to which the Attorney-General can express no opinion. 590.

36. The Attorney-General can not be asked to give a list in advance of the occupations, employment in which would constitute "laborers" within the meaning of the Chinese acts. He can only answer as to each case when it arises. 602.

37. The Attorney-General should not give an official opinion, except to the President or to the head of an Executive Department, with reference to matters in the direct or supervisory control of the head; accordingly he should not at present answer the question whether the Commissioner of Patents, in an inquiry instituted under section 467, Revised Statutes, has the power to appoint a referee to take testimony and report with his conclusions thereon, subject to revision by the Commissioner of Patents, and afterwards by the Secretary of the Interior. 608.

38. The Attorney-General can not give an official opinion except upon a question of law which has already arisen and which is submitted upon a definite statement of facts, not leaving it to him to draw inferences of fact from correspondence or documents. 614.

39. The Attorney-General can give official opinions only upon questions of law actually arising in the administration of the Department, and which are at the time pending, and which must be determined in order that the work of the Department may be properly administered. He is reluctant to pass upon any question whose answer may bring the Department of Justice into conflict with a judicial tribunal. 618.

40. A judge of a State court refused a claim of employés of the War Department to exemption from jury duty. He notified the Department, however, that he would excuse the men from such duty if, in the opinion of the Department, it would seriously prejudice the public interest: *Held*, That no such serious occasion has yet arisen as would justify the Attorney-General in reviewing the ruling of the State judge. 618.

41. The Attorney-General has no authority to give an official opinion upon the reasonableness of fees demanded by persons proposing to act as attorneys for Indian litigants. 620.

42. The Attorney-General can not be asked to authorize an investigation to be made, in order that an official opinion may be rendered by him based on the result of such investigation. 640.

43. Official opinions of the Attorney-General are to be followed by the other Departments. 648.

44. The Attorney-General can not attempt to frame a definition of statutory language to cover all future cases. 649.

45. The construction of regulations of the Civil Service Commission is a matter entirely within the province of the Commission, and should not be attempted by the Attorney-General. 649.

46. Questions of pure law actually arising in the administration of the Treasury Department and requiring the personal attention

ATTORNEY-GENERAL—Continued.

of the Secretary of the Treasury, may be referred to the Solicitor of the Treasury or to the Attorney-General. If referred to the latter, his answer should be regarded by the Department as law, until withdrawn by him or overruled by the courts. 654.

47. A Chinaman, resident in the United States, asked the Secretary of the Treasury whether if he should revisit his native country he could lawfully return to the United States afterwards: *Held*, That this was not a question arising in the administration of the Treasury Department and therefore the official opinion of the Attorney-General could not be asked upon it. 667.

48. The Attorney-General should not answer the general question "whether loan and savings associations" are corporations doing the business of bankers, brokers, or savings institutions within the meaning of section 5243 of Revised Statutes, as the question is rather a judicial than an executive one, and moreover, the name alone does not offer sufficient information. 673.

49. The question of "similitude" under Revised Statutes, section 5430, is a question of fact as to which the Attorney-General is not permitted to render an official opinion. 697.

50. A request for an opinion of the Attorney-General should contain a clear statement of the question an answer to which is asked. He should not be left to seek out the facts and infer the questions submitted from correspondence inclosed. 699.

51. The advisability of bringing suit is not a question of law upon which the Attorney-General's opinion may be asked. 702.

52. It is inexpedient for the Attorney-General to render an official opinion as to whether a civil suit or criminal prosecution, if brought by the Government, ought to be decided by the courts in its favor. 702.

53. While the regulations posted in the Department of Agriculture seem to be valid, yet until the lawfulness of some particular regulation is actually called in question no opinion respecting its legality can properly be asked for or given. 703.

54. The laws or usages of a tribe of Indians are not matters of which judicial notice can be taken, but present questions of fact upon which the Attorney-General can not advise. 711.

55. Requests for opinions of the Attorney-General should be accompanied by a definite statement with the material facts, and a formulation of the questions to which an answer is desired. 711.

56. The Attorney-General can not be asked to exercise appellate jurisdiction upon mixed questions of law and fact. 711.

57. The Solicitor of the Treasury is an officer of the Department of Justice and not of the Treasury Department. 714.

58. The question whether an action to recover money due the United States not involving an issue of fraud, is maintainable, is a question arising in the Department of Justice and therefore the Attorney-General's opinion can not be asked upon it by the Treasury Department. 714.

ATTORNEY-GENERAL—Continued.

59. The word "exceptional" in the act of March 3, 1893, chapter 211, section 5, raises a question of fact upon which the Attorney-General can not advise. 716.
60. The owners of a vessel inquired of the Secretary of the Treasury whether, if they rebuilt the vessel in Canada, it could be thereafter reregistered as a vessel built in the United States: *Held*, That this was a question arising in the administration of the Treasury Department and therefore the official opinion of the Attorney-General could not be asked upon it. 723.
61. Requests for the opinions of the Attorney-General must be accompanied with a statement of facts and separate formulation of the questions to which an answer is desired. 723.
62. The opinion asked must be one needed for the guidance of the officer asking it. 724.
63. The head of a Department can not require the Attorney-General's opinion as to his power to do an act unless it is his intention to do it if he has the power. 728.
64. The nature of the evidence required from applicants for leave and the sufficiency of reasons for extending or limiting the hours of labor are matters within the discretion of the head of the Department, as to which the Attorney-General can not advise. 728.
65. The Attorney-General should not express an official opinion upon a judicial question as to which the circuit courts are in conflict. 729.
66. The Attorney-General can not give an official opinion upon a case which has not yet actually arisen. 729.
67. The Attorney-General can not be called upon for an opinion which involves the examination of evidence and the settling of questions of fact. 740.
68. Twenty opinions, 648, followed as to the effect to be given to the opinions of the Attorney-General. 719.
69. The Attorney-General's opinion can not be asked on questions relating only to the duties of the Commission to the Five Civilized Tribes, appointed under the Indian appropriation act of March 3, 1893, chapter 209, section 16. 724.
70. On a doubtful question as to fees chargeable in customs matters, after it has been long settled by departmental practice founded on a decision of the Board of General Appraisers, the Attorney-General will not undertake to pass independent judgment as to the original merits. 730.
71. The Attorney-General can not be asked to examine and approve codes of rules, or forms of application, etc., adopted by a Department to apply to cases arising in the future. 738.
72. The Attorney-General can not consider matter merely evidential in character and make findings of fact thereupon. Questions referred to him are analogous to questions referred to the Supreme Court upon certificate of division of opinion in the lower courts. He has no general appellate power. 742.

AUDITOR FOR POST-OFFICE DEPARTMENT.

See POSTMASTER'S ACCOUNTS.

BICYCLES.

The opinions previously rendered by the Department of Justice that bicycles are "personal effects" within the meaning of our tariff acts adhered to. 648, 719.

BID.

A bid made under a mistake of fact may be recalled. 1

See CONTRACT, Nos. 1, 3, 4, 5.

BONA FIDE RESIDENCE.

The meaning of the term "bona fide residence" in a particular act, that of July 11, 1890, chapter 667, appropriating money for the expenses of the Civil Service Commission, laid down. 60.

BOND.

1. A surety company is a proper bondsman on the bond of consular officials. 16.
2. A bond executed in a firm name by a partner duly authorized by power of attorney so to execute it is obligatory upon the firm. 311.
3. The President can require a bond from the register of wills and recorder of deeds of the District of Columbia for the faithful accounting by them of fees received by them. 508.

BOND-AIDED RAILROAD.

The Government having contracted with a corporation for the transportation of United States seamen from New York to San Francisco, and a portion of the route having been over railroads aided by the Government under the act of July 1, 1862, chapter 120: *Held*, That all compensation earned by the said bond-aided railroad should be withheld until determined in accordance with that act or until judicially determined. 11

BOND OF INDEMNITY.

A proposed bond of indemnity for advances to a contractor engaged in building a vessel deemed unsafe, and the suggestion made that the contractor be required to execute a refunding bond with adequate personal or real security or both to cover as well advances heretofore as any which may be made hereafter. 692.

BOUNTIES.

Bounties are not payable on sugar made between April 1, 1891, and July 1, 1891. 2.

BRIDGE.

1. The Secretary of War is authorized by section 7 of the river and harbor acts of 1890 and 1892 to approve or disapprove the location or plan of a bridge, the construction of which is duly author-

BRIDGE—Continued.

ized by an act of the legislature of the State, when the waters to be bridged are wholly within the limit of that State. 101.

2. The authority conferred upon the Secretary of War by section 7 of the river and harbor act of 1890, chapter 97, is limited to the cases of bridges authorized by State law to be erected over waters the navigable portions of which lie wholly within the limits of the State. 488.

3. The duty of the Secretary of War, considered with reference to the act of February 28, 1891, chapter 382, incorporating the Arlington Railway Company, and laid down to be to approve the specifications, manner of constructing, and materials of the proposed bridge. He is authorized to relocate it if the place designated by the company is a reasonable compliance with the terms of the act. 549.

BURDEN OF PROOF.

When a person of the Chinese race found unlawfully in this country claims he should be removed to some other country than China, the burden of proof is upon him to show that he is a subject of such other country. 171.

BUREAU OF PRINTING AND ENGRAVING.

1. The Bureau of Printing and Engraving can not now use steam plate-printing presses. 33.

2. The Bureau of Printing and Engraving is still required by section 2 of the act of March 3, 1883, chapter 123, to submit estimates of the cost of executing work for the Post-Office Department. 132.

CALIFORNIA DÉBRIS COMMISSION.

The members of the California Débris Commission do not hold civil office within meaning of Revised Statutes, section 1222, nor does Revised Statutes, section 1224, necessitate their withdrawal from the Engineer Corps. 604.

CARTAGE.

Only the cartage actually paid for by the Government is required to be let out by public bidding. 35.

CERTIFICATE.

See SURVEYOR OF CUSTOMS.

CERTIFICATE OF CONSULAR OFFICERS OF CHINA.

Consular officers of China stationed in foreign countries and duly empowered by the Chinese Government may properly sign the certificates required by section 6 of the act of July 5, 1884, chapter 220, and certificates issued by such duly authorized consular officers of China in foreign countries, accurately conforming to the requirements of section 6, are the certificates contemplated by the law. 693.

CERTIFICATION OF LAND.

The certification of land already covered by a homestead or preemption entry, is erroneous and without authority of law. 224.

CERTIORARI.

The question whether or not a writ of certiorari should be applied for in any customs revenue cases decided by the circuit court of appeals depends upon the extent and value of the importations; the loss to the Government by reason of an adverse decision; the degree of doubt as to the proper construction; the fact that different circuit courts of appeal have reached opposite conclusions upon the same question, and other like considerations. 533.

CHEROKEE NATION.

The assignability of the indebtedness of the United States to the Cherokee Nation is justified under the general law and under the proviso contained in section 10 of the act of March 3, 1893, chapter 209. 749.

CHIEF ENGINEERS.

The relative rank among the chief engineers changes with the seniority in that grade, but such change may be indicated by a notification from the Secretary of the Navy. No examination or appointment or confirmation by the Senate is necessary. 358.

CHIEF OFFICERS OF THE CUSTOMS.

1. Neither inspectors nor agents are "chief officers of the customs" within the meaning of our tariff legislation. 675.
2. The phrase "chief officer of the customs" refers to the collector or acting collector of each collection district, including the surveyor of any district in which there is no collector, and also to an officer legally in charge of any statutorily recognized port, not being the headquarters of the collection district. 675.

CHIEFS OF DIVISION.

Chiefs of division in the Department of Agriculture are subject to all the regulations in accordance with law which may be prescribed by the head of the Department. 703.

CHINA.

The appropriation act of 1891 authorizes the expenditure of no money for a prison house at China except at Shanghai. 391.

CHINESE.

1. Chinese persons found unlawfully in the United States must be removed directly to China, unless they show they are subjects of any other foreign power, and the burden of proof is upon them to show this. 171.
2. The owner of a restaurant is not necessarily a laborer within the meaning of the Chinese acts. 602.

CHINESE—Continued.

3. Natives of China, though subjects of Great Britain, are prohibited entrance to this country by the act of July 5, 1884, chapter 220. 729.

CHINESE LABORERS.

Semble: Chinese laborers coming to this country merely en route to some other country may lawfully be permitted to pass through the United States. 693.

CIRCULATION OF NOTES.

A national bank paying out on checks or otherwise notes of a bank chartered in a foreign country is subject to a tax of 10 per cent upon the total amount of all notes it has received and used as a circulating medium. 534.

CITIZEN.

A citizen of the United States who expatriates himself can not use his adopted country as a means of arbitration for acts of the United States done when he was a citizen thereof. 118.

CITIZENSHIP.

A certificate of the governor and commander in chief of the colony of Hongkong and its dependencies, and vice-admiral of the same, to the fact that he believes the person to be a British subject is not evidence to prove such citizenship. 424.

CIVIL OFFICE.

The members of the California Débris Commission, created by the act of March 1, 1893, chapter 183, do not hold civil office within the meaning of section 1222, Revised Statutes, nor does section 1224 necessitate their withdrawal from the Engineer Corps. 604.

CIVIL SERVICE.

Employés of the Weather Bureau of the Department of Agriculture on duty away from and outside of the city of Washington are not members of the classified civil service. 345.

CIVIL SERVICE COMMISSION.

1. It is not within the authority of the Attorney-General to reverse the decision of the Civil Service Commission, or to require it to issue a certificate of reinstatement. 270.
2. The members of civil service commissions are officials of the respective Departments in connection with which they act. Their application and examination papers are the official records or papers of the President or of the head of a Department, and their production can not be compelled in court when the President or head of Department having legal custody of them decides that the public interest will forbid their production. 557.

CIVIL SERVICE COMMISSION—Continued.

3. By the civil service act of January 15, 1883, chapter 27, and by the legislative appropriation act of July 11, 1890, chapter 667, any person may apply to be examined for appointment in the departmental service who is and has been for six months an actual bona fide resident of the county of which he claims to be a citizen. 649.

4. The President and Civil Service Commissioners can make all reasonable regulations as to the nature of the test required to establish the fact of six months actual bona fide residence in the State, but the Commissioners can not by regulation construe a definition of the statutory language so as to require six months continual physical presence in the State as well as residence. 649.

CIVIL SERVICE RULES.

1. Extension of the civil service rules to new offices does not operate as restrictions upon the right of appointment until examinations have been provided for such offices by the Civil Service Commission. It is not material, however, whether or not such examinations produce candidates eligible for the offices. In case of failure, noncompetitive examinations may at once be demanded. 584.

2. The President's order of January 5, 1893, amending postal rule No. 1 (under the civil service act of January 15, 1883, chapter 27), went into effect at once, in so far as it calls for classification by the Postmaster-General and for the provision of examinations by the Civil Service Commission; otherwise it went into effect at each free-delivery post-office as soon as the classification was completed and first examination provided at that office. 584.

CLAIMS.

Claims under the act of March 3, 1883, known as the Bowman Act, must be paid to the party or to his legal representative. 115.

CLAIMS AGAINST THE UNITED STATES.

1. Section 190, Revised Statutes, prohibiting employés of the United States from prosecuting certain claims against the Government for two years after the termination of their employment, applies to all claims which were pending in any of the Departments while the employé was in the employ of the Government. 695.

2. The statutory prohibition of section 190, Revised Statutes, includes persons receiving regular employment who take oath of office and have power to administer oaths to witnesses, although they hold no office known to the statute law and are employed and paid under a general appropriation for the detection of crime. 695.

COAL.

Bituminous coal, imported for the use of the Government, is dutiable under the act of October 1, 1890, chapter 1244, paragraph 432. 314.

COMMISSIONER OF INDIAN AFFAIRS.

The Commissioner of Indian Affairs and his subordinates and Indian agents have full discretion to remove from the Indian reservation any person not of the tribe of Indians entitled to remain there, and an order of the State court restraining him from so doing should be disregarded. 245.

COMMISSIONER OF NAVIGATION.

The President is not clothed with authority to reverse the decision of the Commissioner of Navigation so as to adjust the claims of Sweden and Norway for the return of tonnage dues alleged to have been erroneously exacted. 367.

COMMISSIONER OF PENSIONS.

The Commissioner of Pensions and Department of the Interior have sole jurisdiction to administer and construe the pension laws. 178.

COMMISSIONER OF SOLDIERS' HOME.

1. The Commissioners of the Soldiers' Home may permit the governor, deputy governor, and treasurer of the Home, who are retired Army officers and who reside at the Home, to make use of ordinary supplies of fuel, light, forage, etc., produced at the Home or purchased for it, and they may pay the treasurer, out of the funds of the Home, a salary for his services. 350.
2. A person duly designated to take charge of the office of Judge-Advocate-General and to perform its duties pending the suspension from duty of the Judge-Advocate-General is qualified to act as a commissioner of the Soldiers' Home in the District of Columbia. 483.
3. The Board of Commissioners of the Soldiers' Home can not delegate to the governor of the Home discretionary police authority for the preservation of good order within its limits. 514.
4. They can not empower him to arrest, detain, or deliver over to the court authorities non-military persons committing crimes less than capital, except in the cases where any person may make an arrest without warrant or precept. 514.

COMMISSIONERS OF DISTRICT OF COLUMBIA.

See SECRETARY OF THE INTERIOR.

COMMON CARRIERS.

By section 3 of the act of June 10, 1880, chapter 190, the Secretary of the Treasury may modify the form of contract made with common carriers so as to permit them to remove the goods from the vessel and place them in the warehouse or other secure place, providing care be taken to stipulate that the liability as common carriers shall continue until custody and possession of the merchandise has been delivered to and accepted by the collector. 674.

COMPENSATION.

1. Retired officers of the Army detailed for college duties prior to the passage of the act of November 3, 1893, chapter 13, and still on duty under said detail, are entitled to full pay, beginning from the passage of that act. 657.
2. Sections 299 and 824 of the Revised Statutes have no application to services rendered under section 827 of the Revised Statutes, compensation for which is to be fixed and allowed in the manner prescribed by the provisions of the latter statute. 709.

See DISTRICT ATTORNEY, Nos. 1, 2, 4, 5; WEATHER BUREAU, No. 2.

COMPROMISE.

1. Section 2 of the act of March 3, 1891, chapter 551, does not of itself give authority to anyone to settle or compromise judgments entered under the contract-labor law of February 26, chapter 176, by the third section thereof. 530.
2. The fines imposed after a verdict of guilty of the statutory misdemeanor of allowing certain pauper immigrants to land after being ordered to detain them, are not a claim within the meaning of section 3469 of the Revised Statutes, and can not be compromised under that statute.
3. It is competent for the United States to recover by proper legal proceedings the difference between the amounts actually received as rent and bonus from the seal fisheries and the amounts called for by the terms of the lease as rent and bonus for the same years, notwithstanding the action of a prior Secretary of the Treasury in reducing sums due under the laws by what his estimate was of the lessee's claims for damage, inasmuch as it appears such claims were not legal and valid. Such action of the prior Secretary, even if it binds his successor, which is doubtful, does not conclude the United States. 732.

COMPTROLLER.

The Comptroller and Commissioner of Customs have no legal status as advisers of the Secretary of the Treasury upon legal questions. 654.

COMPTROLLER OF THE CURRENCY.

The Comptroller of the Currency can not inquire what use the creditors of a bank propose to make of a dividend paid. 269.

CONDEMNATION OF LAND.

Two proceedings for condemnation of land resulted in an order of the proper court that upon payment of the award, together with the sum taxed as costs, into the registry of the court, the United States marshal deliver a proper deed to the United States: *Held*, That on payment of said award and delivery of said deed a valid title will vest in the United States. 431.

See PARK COMMISSION.

CONGRESSMAN.

The question whether a Congressman can receive pay as a retired army officer is one of grave doubt, which only the determination of the Supreme Court can satisfactorily settle. 686.

CONSENT OF STATE.

See LAND FOR PUBLIC BUILDING.

CONSULAR DUTIES.

A person in charge of a consular office, but without the appointment and qualifications prescribed by the law, can not lawfully perform the duties of the consulate, nor should he be permitted to perform unofficial duties, such as notarial service. 92.

CONSULAR JURISDICTION.

The sentence of imprisonment imposed in a consular court in China need not be served within the limits of the consul's ordinary jurisdiction, but may be served in any prison in China. 391.

CONTRACTS.

1. Where the Government advertises for bids on designated routes for carrying the mails a formal acceptance of the bid binds the Government. 293.
2. A contract for the carrying of foreign mail for a term of years can not be changed by agreement between the parties to service for another term of years unless a new contract is submitted to competition and awarded to the original party to the contract. 321.
3. When on July 28, 1892, a formal acceptance of bid was given, but a minor detail was left to be agreed upon and the formal contract and bond were afterwards to be prepared and executed, no contract was executed prior to the passage of the act of August 1, 1892, chapter 352, within the meaning of the third section thereof. 445.
4. A bid that prescribes a time for completing work some months later than the specification, and that also provides for cessation of work on a certain contingency, is inconsistent with the specification and contrary to the spirit of section 3709, Revised Statutes, and the river and harbor act of 1888. 496.
5. No binding contract is entered into by merely writing a party of the acceptance of his bid that modifies the specification, when no formal contract is signed as provided by section 3744, Revised Statutes. *Ibid.*
6. Where a contract with the Government is duly annulled by the Government, pursuant to its terms, when it becomes clear that the Government can not suffer any loss on account of the annullment of the contract in question, then the contractors are entitled to receive the reserve moneys. 511.

See SURETIES, Nos. 3, 4.

CONTRACT-LABOR LAW.

1. Persons coming to this country for the sole purpose of aiding exhibitors at the World's Fair do not fall within the contract-labor laws. 89, 151.
2. Neither section 2 of the act of March 3, 1891, chapter 551, nor any previous law referred to in that section, gives the power to set-

CONTRACT-LABOR LAW—Continued.

tle or compromise judgments entered under section 3 of the contract-labor law of February 26, 1885, chapter 164. 530.

CORPORATIONS.

1. A corporation organized under the laws of any State is a citizen of the United States within the meaning of the act of March 3, 1891, chapter 519, providing for foreign mail service. 161.
2. The State of Rhode Island is not a corporation within the meaning of the river and harbor act of 1890, chapter 907. 606.

COSTS.

The refunds adjudged to be made by the United States in suits for illegal assessment of duties do not include costs. 273.

COSTS OF SUIT.

The term "costs of suit" means taxable costs, not attorneys fees. 49.

CREDIT.

The act of September 30, 1890, chapter 1126, is mandatory, and compels the Postmaster-General to credit the sum named in the act on the accounts of the postmaster named therein. 315.

CRIMES IN FOREIGN COUNTRIES.

No Federal court has jurisdiction to try persons, whether or not claiming to be American citizens, for crimes committed in foreign countries. There are no common law offenses against the United States. 590.

CRIMINALS.

See IMMIGRANTS, No. 3; COMMISSIONER OF SOLDIERS' HOME, Nos. 3, 4.

CROW INDIANS.

See INDIANS, No. 4.

CUSTOMS ADMINISTRATIVE ACT.

1. The customs administrative act of June 10, 1890, chapter 407, does not repeal the act of May 1, 1876, chapter 89, providing for separate packages in one importation. 5.
2. Section 14 of the customs administrative act of June 10, 1890, chapter 407, requires the importer, if he desires to make a contest, to protest and pay the duties and charges within ten days after liquidation where goods are entered for consumption, or to protest within ten days where entered in bond only. 183.

DEFINITIONS.

1. The words "costs of suits" in the appropriation act for the Navy Department of June 30, 1890, chapter 640, relate to the ordinary taxed costs of suits and not to fees of counsel. 49.
2. A general rule, applicable to all cases, can not be formulated as to what constitutes "actual bona fide evidence" under the act of July 11, 1890, chapter 66. 60.

DEFINITIONS—Continued.

3. The word "mile," as used in the act of March 3, 1891, chapter 519, section 5, means a mile of 5,280 feet. 98.
4. It is safer practice for the Attorney-General not to attempt to define the word "emigrant," but to consider each case on its particular merits. 371.
5. A timber dry dock is one of the "public works" of the United States under the eight-hour law of August 1, 1892, chapter 352. 445.
6. Rifle practice is not a parade within the meaning of the act of March 1, 1889, chapter 328. 669.
7. Neither inspectors nor agents are "chief officers of the customs" within the meaning of our tariff legislation. 675.
8. The phrase "chief officer of the customs" refers to the collector or acting collector of each collection district, including the surveyor of any district in which there is no collector and also to an officer legally in charge of any statutorily recognized port, not being the headquarters of the collection district. 675.
9. The word "liquors" in the tariff act of October 1, 1890, chapter 1244, section 10, does not include whisky. 699.

DEPARTMENTAL PRACTICE.

1. When the meaning of a statute is clear it can not be affected by departmental practice. 592.
2. On a doubtful question as to fees chargeable in customs matters, after it has been long settled by departmental practice founded on a decision of the Board of General Appraisers, the Attorney-General will not undertake to pass independent judgment as to the original merits. 730.
3. In a case of ambiguity in a statute, departmental practice may affect its construction when long continued, uniform, and familiar, but not when merely recent and occasional. 746.

See Statutory Construction, No. 18.

DEPARTMENT CLERKS.

1. The word "meritorious," relating to Department clerks asking sick leave under the legislative appropriation act of March 3, 1893, chapter 211, section 5, is surplusage. 716.
2. The act of March 3, 1893, chapter 211, section 5, construed as regards the inclusion of Sundays and holidays in annual leave and sick leave. 716.
3. When an employé is not connected with the Department during the entire calendar year, his leave of absence should be prorated. 728.
4. The nature of the evidence required from applicants for leave and the sufficiency of reasons for extending or limiting the hours of labor are matters within the discretion of the head of the Department, as to which the Attorney-General can not advise. 728.

See Absence from Duty; Absence on Pay.

DEPARTMENT OF AGRICULTURE.

1. Chiefs of divisions in the Department of Agriculture are subject to the regulations in accordance with law which may be prescribed by the head of the Department. 728.
2. The provisions of the act of March 3, 1893, chapter 211, section 5, relating to the hours of service, annual and sick leave of Department clerks are applicable to the Department of Agriculture. 728.
3. The Assistant Secretary of Agriculture is not a clerk or employé within the meaning of the act of March 3, 1893, chapter 211, section 5. Query as to the chiefs of divisions. 728.

DEPUTY MARSHAL.

An Indian agent is not prohibited by statute from acting as a deputy marshal. 494.

DESERTER.

A soldier enlisted for three years in August, 1862, who deserts in a short time and then reenlists in October, 1862 for nine months and serves faithfully and is discharged and is then arrested in January, 1864, for desertion, is admitted to an hospital and again deserts, is, by his second desertion, barred of relief under the act of March 2, 1889, chapter 390. 288.

DETAIL FOR DUTY.

The Secretary of the Navy may detail men to guard property of the Government placed on exhibition at the World's Columbian Exposition. 576, 577.

DETAIL OF CLERKS.

It is competent for a head of a Department to alter the disposition among the various bureaus and offices of the Department of the clerks allowed by law as he may find it necessary and proper to do, taking care that in no case shall any such clerk be paid from any appropriation made for contingent expenses or for any specific or general purpose, unless such payment is specifically provided for in the law granting the appropriation. 750.

DIRECTOR OF THE BUREAU OF AMERICAN REPUBLICS.

The director of the Bureau of American Republics may be appointed or removed by the Secretary of State of the United States without the assent of the Republics contributing to the support of the Bureau. 558.

DIRECT TAX.

The indebtedness of the State of Indiana arising from an overpayment should be set-off against the money coming to that State under the act of March 2, 1891, chapter 496. 363.

See SET-OFF, No. 1.

DISBURSING AGENTS.

A disbursing agent is liable for moneys deposited in private banks, not designated by the Secretary of the Treasury as places of deposit, although authorized by the board of town site trustees to deposit in those banks. 24.

See VOUCHER.

DISCLAIMER BY THE UNITED STATES.

In a certain case, the facts held not to justify a disclaimer on the part of the United States of its power to interfere with the extension of a railway company. 539.

DISTRIBUTION OF MONEYS DUE CONTRACTOR.

When a balance is due a contractor and there are conflicting claimants the proper course is to keep the custody of the balance until the respective rights of claimants to it have been determined by a decree of the court. 578.

DISTRICT ATTORNEY.

1. A United States district attorney is entitled to receive for making examination under section 838, Revised Statutes, in a seizure case tried or disposed of by the court, such sum as the Secretary of the Treasury shall deem reasonable upon the certificate of the judge, and the receipt of said sum will not preclude him from recovering under section 824, Revised Statutes, the fees he would be entitled to. 399.
2. Suits and proceedings by the receiver of a failed bank are within the duties of a district attorney within section 380 of the Revised Statutes. His compensation is not regulated by the fee bill prescribed by statute, nor should it be paid by the Government and not out of the fund of the trust, but the amount of fees to be allowed in any given case is a matter to be adjusted by the Comptroller in the exercise of a legal discretion under the advice of the Solicitor of the Treasury. 476.
3. Under the Indian appropriation act of March 3, 1893, chapter 209, district attorneys are not required to represent Indians in suits brought by them in States where they do not reside, founded on claims of inheritance from white persons, not members of their tribes. 620.
4. The opinion of Attorneys-General Garland and Miller (18 Opin., 192, and 19 Opin., 354) followed as to the construction of Revised Statutes, section 827, relating to extra compensation for the district attorney for the southern district of New York. 654.
5. Sections 299 and 824 of the Revised Statutes have no application to services rendered under section 827 of the Revised Statutes, compensation for which is to be fixed and allowed in the manner prescribed by the provisions of the latter statute. 709.

DRAWBACK.

The additional duty imposed by section 7 of the customs administration act of June 10, 1890, chapter 407, is not a subject of drawback. 247.

DUTIES.

1. The duty on refined sugar imported since April 1, 1891, on which a drawback had been collected prior to April 1, 1891, is levied at the rate prescribed by the tariff act of March 3, 1883, chapter 121. 77.
2. When duties are based on weight under the tariff act of October 1, 1890, the provisions of the act apply to all importations, whether made before or since the act took effect. 80.
3. Bituminous coal imported for the use of the United States is now subject to duty. 314.
4. The President having proclaimed that enumerated imports from designated countries shall cease to be free of duty on March 15, goods shipped prior to that date are admitted at the old rate of duty. 357.
5. The interpretation acquiesced in hitherto by the Department of Justice by letter to the Secretary of the Treasury of date January 26, 1893, that "feather-stitched braids" are dutiable as braids under paragraph 354 of the tariff act of 1890, should also apply to the term "braids" as used in paragraph 324 of the tariff act of October, 1883.
6. The provision of section 7 of the act of February 8, 1875, chapter 36, admitting foreign-made bags free of duty, they having been exported from the United States filled with grain and returned empty, was repealed by section 5 of the act of October 1, 1890, chapter 1244. 630.
7. The opinion of Attorney-General Brewster (17 Opin., 679) as to bicyles being personal effects and exempt from duty adhered to. 648.
8. Reimported whisky, when withdrawn from bond, is taxable according to the number of gallons at the time of importation. 722.

EAST RIVER.

The waters of the East River comprise navigable waters of the United States lying wholly within the limits of a State. 479.

EIGHT-HOUR LAW.

1. The eight-hour law does not apply to a contract for furnishing materials, such as post-office locks, to be used in a Government building. 454.
2. The so-called eight-hour law is of general application, and the limitation of public works applies only to those under a contractor or subcontractor. 459.

ELECTORAL VOTES.

Unless the President of the Senate has in his custody by the fourth Monday of January, two certificates from each State of the electoral vote for President and Vice-President, it is the duty of the Secretary of State to send special messengers for the certificate under the control of the district judge of the district in which the State is included whose certificate is missing. 521.

ELLIS ISLAND.

See IMMIGRANT FUND, No. 2.

EMPLOYÉS OF BUREAU OF ENGRAVING AND PRINTING.

The act of July 6, 1892, chapter 154, relating to leave of absence of employés of the Bureau of Engraving and Printing contemplates a maximum absence of thirty days with a continuance of average compensation and a leave of absence and pay during the same to a piece worker whose services and consequent earnings are less than the maximum determined by the average amount of his work and of his pay therefor. 429.

EMPLOYÉS OF THE UNITED STATES.

See CLAIMS AGAINST THE UNITED STATES.

ENGINEERS CORPS.

Members of the California Débris Commission are not required by Revised Statutes, section 1224, to withdraw from the Engineer Corps. 533.

ENTRY.

The separate entry of the packages contained in one importation is still permitted. 5.

EVIDENCE.

A certificate of the governor and commander in chief of the colony of Hongkong and its dependencies that he believes a person to be a British subject is not competent evidence to prove such citizenship. 424.

EXAMINER.

A report signed by an examiner or clerk appointed in pursuance to section 2940 of the Revised Statutes, and approved by the appraiser, is not in compliance with the regulations of section 2615, Revised Statutes. 731.

EXAMINATION.

See NAVY.

EXCLUSIVE JURISDICTION.

A State statute that the United States "shall have the right of exclusive legislation and concurrent jurisdiction" is not a compliance with an act of Congress for the erection of a building providing for exclusive jurisdiction save as to the administration of the criminal laws of the State and the service of civil process thereunder. 242.

See LAND FOR PUBLIC BUILDING.

EXTENSION OF TIME.

No officer of the Government has power to extend for one year the time for the withdrawal of certain reimported whisky, now in the bonded warehouse. 642.

EXTRA COMPENSATION.

1. Extra compensation to soldiers is not now authorized by law. 18.
2. The act of March 3, 1891, chapter 540, appropriating money for a new edition of the Postal Laws and Regulations, does not authorize the Postmaster-General to grant extra compensation to any officer of his Department whom he may designate to perform that work. 221.
3. Suits against the United States, under section 15 of the act of June 10, 1890, chapter 1244, are directly within the line of duty of the district attorneys, and fall within section 824 of the Revised Statutes, and the compensation of district attorneys for their services in defending such suits is limited to the fees prescribed by section 824 of the Revised Statutes. 228.

See DISTRICT ATTORNEY, Nos. 1, 2, 4, 5.

FEATHER-STITCHED BRAIDS.

See DUTIES, No. 5.

FEES.

See EXTRA COMPENSATION; DISTRICT ATTORNEY.

FERRY SERVICE.

See IMMIGRANTS, No. 1.

FOREIGN-BUILT VESSELS.

Where a foreign-built vessel wrecked in foreign waters and repaired in an American shipyard at an expense exceeding three-fourths of the cost of the vessel when repaired sails under a foreign flag and is then sold by the foreign owner to a citizen of the United States, she is entitled to registry under section 4136 of the Revised Statutes. 253.

FOREIGN MAIL SERVICE.

Where a contract is made with a company for carrying the foreign mails pursuant to the act of March 3, 1891, chapter 519, in vessels of the third class, provided for in that act, but the Secretary of the Navy accepts the vessels as of the fourth class, but not of the third class, the company can not be paid at the rate of compensation provided for in the act for vessels of the third class, nor even at the rate prescribed for vessels of the fourth class, but must be paid under section 4009 of the Revised Statutes. 409.

See OCEAN MAIL SERVICE.

FORFEITURES.

Forfeitures provided for by the act of June 10, 1890, chapter 407, section 9, are not confined (except to the general clause covering from "lawful act or omission") to cases in which the United States has been actually deprived of lawful duties. 683.

See PENALTIES; REMEDY.

FREEDMEN'S HOSPITAL AND ASYLUM.

See SECRETARY OF THE INTERIOR.

GENERAL APPRAISERS.

1. The General Appraisers are limited on an appeal to a review of the duty imposed upon articles as to which a reappraisal is ordered. 39.
2. While the Treasury Department may accept decisions of the Board of General Appraisers as a rule of action to be followed in the classification of importations, it is not compelled by law to do so. 648.

GETTYSBURG.

See INJUNCTION, No. 2.

GOVERNMENT PROPERTY.

1. A perpetual license to use Government property can not be granted by the Secretary of War unless authorized by act of Congress. 93.
2. No authority exists either in the President or in the Secretary of War to sell expensive improvements erected by the Government on land that was the subject of a prior grant, but supposed to be a part of the public domain. An application to sell should be made to Congress. 284, 420.

GUNBOAT.

The act of March 3, 1893, chapter 212, contemplates a gunboat built of steel, not one on the "composite plan." 617.

HEAD OF A DEPARTMENT.

The head of a Department incurs no personal liability by executing an instrument that should not have been executed, if he acts in reliance upon properly chosen subordinates whose ability and good faith he has no reason to question. 573.

IMMIGRANT FUND.

1. The salary of the Superintendent of Immigration and of his clerical assistants authorized by section 7 of the act of March 3, 1891, chapter 551, may be paid by the Secretary of the Treasury out of the immigrant fund. 69.
2. The Secretary of the Treasury is authorized to expend from the immigrant fund such money as may be necessary for finishing certain contracts and making final payments thereon in connection with putting Ellis Island in condition for use as a receiving station for immigrants. 379.

IMMIGRANTS.

1. The Secretary of the Treasury is authorized to enter into a contract for ferry transportation to Ellis Island for a reasonable term, and confer the exclusive privilege of transportation on the contractor with the right to collect a reasonable charge,

IMMIGRANTS—Continued.

provided the right be subject to the rights of the Government and its employés and to such legislation as Congress may enact and to such rules as he may adopt. 217.

2. A supervising inspector or special inspector may be appointed by the Secretary of the Treasury to perform such services as in his judgment will best promote the efficient administration of the immigrant-inspection service, and may be properly compensated from the immigrant fund. 259.

3. Immigrants who reside here, taking no steps to become citizens, return to a foreign country and are convicted of crime and serve out a sentence, and then attempt to return to the United States, fall within sections 2 and 4 of the act of August 3, 1882, chapter 376, and section 1 of the act of March 3, 1891, chapter 551, and should not be permitted to land. 371.

4. By the immigration act of March 3, 1891, chapter 551, the steamship companies are responsible for the safe custody of immigrants pronounced improper persons to land by the commissioner of immigration at Ellis Island, pending an appeal in proceedings of habeas corpus, but shipowners so responsible may, provided in every case they first obtain permission of the inspection officer, detain the immigrants in some suitable place offship until the time of sailing. 415.

See REMISSION OF FINES; REMISSION OF PENALTY.

IMMIGRATION AND CONTRACT-LABOR LAWS.

1. Our immigration and contract-labor laws do not apply to skilled assistants at the World's Fair, coming to assist in putting up the goods of foreign exhibitors. 89.

2. Our immigration and contract-labor laws do not apply to workmen coming solely to assist exhibitors at the World's Columbian Exposition. 151.

IMPORTATIONS.

A crank shaft and a steamer shaft brought to this country from a foreign country to repair a vessel of that country lying disabled in our ports are articles imported into the country within the meaning of section 2503 of the Revised Statutes, and section 2502 of the tariff act of 1883. 194, 257.

IMPROVEMENTS.

When the Government expends large sums of money on improvements erected on what is supposed to be the public domain, but proves to be the subject of a prior grant, the title to the buildings so erected vests in the United States. 284, 603.

INDIAN AGENT.

An Indian agent is not prohibited by statute from acting as a deputy marshal. 494.

INDIANS.

1. Allotment of land may be made to individual Indians of the Nez Perce tribe under the act of February 8, 1887, chapter 119. 42.

INDIANS—Continued.

2. Pueblo Indians are not covered by section 5 of the act of August 15, 1876, chapter 289, nor by the act of July 31, 1882, chapter 360. 215.
3. An order of a State court restraining an Indian agent from ousting trespassers fron an Indian reservation should be disregarded as without jurisdiction. 245.
4. The fourth paragraph of the agreement concluded with the Crow Indians August 27, 1892, pursuant to the act of July 13, 1892, is valid and of binding force. 517.
5. An Indian may accept an allotment of property as an individual under a treaty, and at the same time rejoin his tribe without objection so far as the United States is concerned. 742.

See COMMISSIONER OF INDIAN AFFAIRS; SIOUX MIXED BLOOD; DISTRICT ATTORNEY, NO. 3.

INDIAN TERRITORY.

The President is not authorized to appoint a commissioner of the World's Columbian Exposition from Indian Territory. 452.

INFORMER'S COMPENSATION.

1. The antimoiety act of June 22, 1874, chapter 391, takes away the right of Treasury officials to receive moieties under the Revised Statutes, section 4233. 592.
2. Informers are not entitled to compensation under the antimoiety act of June 22, 1874, chapter 391, section 4, unless the information is conveyed directly to the chief officer of the customs. Giving information to an inferior officer is not necessarily equivalent thereto. If it be desirable that informers should communicate with the collector otherwise than personally, the Secretary of the Treasury can make regulations for the future—covering that case. 690.
3. Informers who are appointed special inspectors without compensation except their interest as informers in the result of seizures are not officers of the United States within the antimoiety act of June 22, 1874, chapter 391, section 4. Neither are persons on the pay roll as temporary laborers, but at the time off duty—that is, receiving no pay. 754.

INJUNCTION.

1. An order of a State court restraining an Indian agent from ousting trespassers from an Indian reservation should be disregarded as without jurisdiction. 245.
2. The Secretary of War is authorized to take condemnation proceedings to acquire land over which a trolley railroad is being constructed, that is a portion of the battlefield of Gettysburg, and may apply to the court for an injunction to restrain the operation and construction of said railroad. 628.

INSANE ALIEN IMMIGRANT.

An insane alien immigrant may be permitted to land in this country under proper bond that the Government be protected against loss from her coming here. 79.

INTEREST.

1. No authority exists for the payment of interest upon refunds made in conformity with judgments obtained in cases on appeal under section 15 of the customs-administrative act of June 10, 1890, chapter 407. 238.
2. Where an appeal by the Government is dismissed in a customs case and the mandate of the court says nothing upon the subject of interest, none can be paid or allowed. 408.
3. The act of March 2, 1891, chapter 496, contemplates the repayment of interest and penalties collected by the Government under the direct-tax act. 412.
4. Interest can not lawfully be paid on a judgment of the Court of Claims against the United States where no appropriation is made for the payment of interest. 423.

INTERNATIONAL COPYRIGHT LAW.

Noncopyrighted lithographs may be imported, although they may be copies of copyrighted paintings. 753.

JURISDICTION.

Where a statute providing for a public building requires a cession by the State of jurisdiction over the property to the United States, a statute of that State, conferring exclusive legislation and concurrent jurisdiction with the State to the United States, is not a compliance with the terms of the statute. 298.

LAND FOR PUBLIC BUILDING.

The consent of a State ceding land for a public building providing that the State shall forever retain concurrent jurisdiction over the place to the extent that all legal and military processes issued under the authority of the State may be executed anywhere on such place or in any building thereon, does not satisfy the provision of section 355 of the Revised Statutes. 611.

LAND GRANT.

See ATTORNEY-GENERAL, No. 12.

LANGFORD.

The claim of one Langford to lands allotted in severalty to Indians of the Nez Perce tribe discussed and considered. 42.

LAWFUL MONEY.

Silver certificates are not lawful money within the meaning of section 4 of the act of June 20, 1874, chapter 343, and section 9 of the act of July 12, 1882, chapter 290. 725.

LEAVE OF ABSENCE.

The act of July 6, 1892, chapter 154, relating to leave of absence of employés in the Bureau of Engraving and Printing contemplates a maximum absence of thirty days, with a continuance of average compensation, and a leave of absence and pay during the same to a pieceworker whose services and earnings are less than the maximum, determined by the average amount of his work and of his pay therefor. 429.

LICENSE.

1. An instrument purporting to convey the use of a strip of land belonging to the Government, although containing the word "lease," *held* merely a license, revocable at the pleasure of the Department giving it, and the property of the licensee properly removed from the land by the Government if he refuses to remove it after reasonable notice. 527, 537.
2. An irrevocable license to use Government property can not be granted by the Secretary of War unless authorized by act of Congress. 93.

LIMITATION OF CLAIMS.

The six years' limitation of time for presenting claims under the act of March 3, 1887, chapter 359, applies only to suits in the Court of Claims. 753.

LIQUORS.

The word "liquors" in the tariff act of October 1, 1890, chapter 1244, section 10, does not include whisky. 699.

LOCATION OF PUBLIC BUILDINGS.

While the Secretary of the Treasury has the power to locate the public building at Portland, Oreg., within the present limits of that city, yet it would be more in accord with the intent of the act of Congress of January 24, 1891, chapter 91, to locate the building in the limits as they existed at the time said act was passed. 320.

LOST HORSES.

Claims filed in 1890 for horses lost in the Indian war of 1855 and 1866 are barred by the proviso of the appropriation act of March 3, 1873. 152.

LOTTERY.

A certain company's plan of business considered and declared a lottery within section 3894 of the Revised Statutes, as amended September 19, 1890. 203, 748.

LOUISIANA LEVEES.

The State of Louisiana is the owner of a servitude or interest in the land of riparian owners along the Mississippi River for the purpose of building levees to restrain its waters within definite limits during flood times. The United States having undertaken to share in the task, the State has for that purpose surrendered to the United States its servitude and land to be occupied by levees of the Mississippi River Commission. The United States will not, therefore, be subjected to liability to persons whose land is taken by the Commission for such levees. 625.

McKINLEY ACT.

The President has no power to issue the proclamation provided for in section 3 of the act of October 1, 1890, chapter 1244, to take

McKINLEY ACT—Continued.

effect *in futuro*, nor has he the power to reimpose duties on one or more of the five articles named in said section, but not on the others. In the proclamation the particular country on whose products the duties are to be reimposed should be named. 290.

MACHINERY.

Machinery brought to this country from a foreign country to repair a disabled vessel of that country lying in our ports is imported into the country within the meaning of our tariff acts and is subject to the duty prescribed by those acts. 194, 257.

MAILS.

A pamphlet and the accompanying papers decided to be lottery advertisements and unmailable matter. 203.

See FOREIGN MAIL SERVICE and OCEAN MAIL SERVICE.

MAPS.

The Secretary of Agriculture is authorized to procure the maps appropriated for his Department. 41.

MARINE CORPS.

1. The Marine Corps may be detailed to guard the Government exhibition at the World's Columbian Exposition. 576, 577.
2. The actual subsistence of enlisted men of the Navy employed in taking care of the wares and other Government property placed on exhibition at the World's Columbian Exposition may be paid from the fund provided for the Marine Corps and its subsistence. 576, 577.

MASTER OF STEAM VESSELS.

Section 14 of rule 5 of General Rules and Regulations, adopted by the Board of Supervising Engineers and approved by the Secretary of the Treasury, was authorized by section 4405 of the Revised Statutes, and has now the force of law. 212.

MEDAL OF HONOR.

A claim for a medal of honor considered and advice given that it be not entertained. 421.

MILE.

The word "mile" interpreted in the act of March 3, 1891, chapter 519, section 5, to mean a mile of 5,280 feet. 98.

MISSING CERTIFICATE.

See ELECTORAL VOTE.

MITIGATION OF SENTENCE.

The summary court act of October 1, 1890, chapter 1259, does not permit the reviewing officer to mitigate or to approve of part and disapprove of another part of a sentence of a summary court. 346.

NATIONAL GUARD.

See Absence from Duty; Absence on Pay.

NAVIGABLE WATERS OF THE UNITED STATES.

1. What are navigable waters of the United States, discussed and defined. 101.
2. The Chicago River and its branches are navigable waters of the United States. 101.
3. The St. Louis and Cloquet rivers, being navigable waters of the United States, can be obstructed by dams only by permission of the Secretary of War, to whom Congress has, by express statute, given exclusive jurisdiction of the subject. 713.

NAVY.

The officers to be promoted in the U. S. Marine Corps to the succession of vacancies arising July 10, 1892, need not be examined under the act of July 28, 1892, chapter 315, providing for the examination of certain officers of the Marine Corps. 433.

NOTARY.

A notary's authority to administer an oath exists not by virtue of his office, but by positive enactment. A notary of Austria-Hungary not authorized by the laws of his country to administer oaths or take affidavits lacks the necessary authority to administer oaths prescribed by section 4892 of the Revised Statutes. 455.

NOTES IN CIRCULATION.

1. Notes of a national banking association signed by the proper officers are not "notes in circulation" within the meaning of sections 5214 and 5215 of the Revised Statutes, so long as the bank has never parted with any interest in or control over them, and may either issue them or cause them to be canceled, at its option. 695.
2. Section 5214, Revised Statutes, means instruments binding the bank to the holder or holders, as promise to pay. Therefore bank notes signed and actually paid out over the counter, or otherwise so dealt with as to become liabilities of the bank, are notes in circulation, but notes merely held in the vault of the bank, whether signed or unsigned, and notes so signed and held and carried on the books of the bank, are not notes in circulation, and notes that have been obligations of the bank but ceased to be so, and return and remain in the bank for whatever period, are not, during such period, its notes in circulation. 704.

NOTICE.

1. An unconditional announcement by the Secretary of the Treasury that the interest on 4½ per cent bonds payable at the pleasure of the Government would cease after a certain day, would require the Secretary to pay all the bonds covered by the notice. 127.

NOTICE—Continued.

2. It would seem competent for the Secretary of the Treasury to insert in a notice that interest on bonds would terminate on a certain day, a statement that if the holders desired them continued at the pleasure of the Government at a lower rate of interest the request would be granted if the bonds were deposited before a certain time. 127.

NUMBER IN GRADE.

See REMISSION ORDER.

OATH.

The form of oath for separate packages contained in one importation was not changed by the act of June 10, 1890, chapter 407, repealing section 2841 of the Revised Statutes. 5.

See NOTARY.

OBLIGATIONS AND SECURITIES OF THE UNITED STATES.

1. A canceled postage stamp is not an obligation or security of the United States within the meaning of Revised Statutes, section 5430. 691.
2. An uncanceled postage stamp is an obligation or security of the United States within the meaning of Revised Statutes, section 5430. 697.

OCEAN MAIL SERVICE.

1. The act of March 3, 1891, chapter 519, entitled "An act to provide for ocean mail service between the United States and foreign ports and to promote commerce," should be construed so as to lead to certainty. 161.
2. There is no authority in the act of March 3, 1891, chapter 519, for insertion in the contracts of a condition by which the Postmaster-General and the contractor may subsequently vary the terms of the contract without submitting it to competition. *Ibid.*
3. The Postmaster-General is not authorized after the commencement of foreign mail service, to increase the number of trips and increase the compensation proportionately. *Ibid.*
4. The Postmaster-General is not permitted to have any vessels, other than those of the first class, leave mails at Great Britain, even if on the way to a port on the continent. *Ibid.*
5. A corporation organized under the laws of any State is a citizen of the United States within the meaning of the act of March 3, 1891, chapter 519. *Ibid.*
6. A person bidding pursuant to the act of March 3, 1891, chapter 519, on various routes for foreign mails, can not refuse to carry out one bid because another was not accepted, even if he verbally said his bid was conditioned on his receiving both contracts. 293.
7. Section 817, Postal Laws and Regulations, does not apply to contracts made under the act of March 3, 1891, chapter 519. 293.

OCEAN MAIL SERVICE—Continued.

8. A person honestly refusing to carry out his bid because another route was not also awarded him, can not be prosecuted under section 3954, Revised Statutes, as amended August 11, 1876. 293.

9. The Postmaster-General may properly accept from the holder of a contract to perform second-class services, a proposal to perform first-class services, under the act of March 3, 1891, chapter 519, on the condition that if the proposal be accepted the existing contract shall be rescinded; but he ought, before advertising for such first-class services, to require the holder to stipulate that in consideration of the above, the existing contract shall, at the option of the Postmaster-General, be void in case some other party than the company shall be the successful bidder for such first-class services. 304.

10. A contract for ocean mail service for ten years can not be changed to one with the same party for five years, unless the party procure the same by new bidding, after due advertisement, and any change in the original contract releases the sureties from their liability thereunder. 321.

11. Where a proposal for carrying foreign mails is accepted in vessels of the third class, which the Secretary of the Navy subsequently accepts as of the fourth class, the company is entitled to receive compensation, under section 4009, Revised Statutes, but not at the rate prescribed in the act of March 3, 1891, chapter 519, for vessels either of the third or fourth class. 409.

OFFICERS.

Informers who are appointed special inspectors without compensation, except their interest as informers in the result of seizures, are not officers of the United States within the antimoiety act of June 22, 1874, chapter 391, section 4. Neither are persons on the pay roll as temporary laborers, but at the time off duty—that is, receiving no pay. 754.

OFFICERS OF THE ARMY.

The Secretary of Agriculture can legally detail such officers or employés from his Department as may be requested by the Civil Service Commission, but he can not assign an officer of the Army detailed for service in the Weather Bureau to any other duties than those for which he is by law authorized to be detailed in the Weather Bureau. 750.

OFFICERS OF THE ARMY DETAILED TO COLLEGES.

The act of November 3, 1893, chapter 13, leaves it within the discretion of the President to make the detail of officers of the Army for colleges wholly from the active list of the Army, or wholly from retired officers who "upon their own application may be detailed" for this service, or from both lists in such proportion as he sees fit and the application for such detail from the retired officers will allow. No other limit than 100 is set to the number

OFFICERS OF THE ARMY DETAILED TO COLLEGES—Continued.
of such officers that can be detailed from either list. The five years' service in the Army is the limit of detail. The four years applies to officers detailed from either list. 687.

OFFICES.
Accepting an appointment to an office the term of which is to commence in future does not, until it commences, affect an office previously held by the appointee. 593.

OFFICES ESTABLISHED BY APPROPRIATION ACTS.
The term of the new professor at the Military Academy created by the act of March 1, 1893, chapter 186, did not commence until July 1, 1893. 593.

OPIUM.
The Secretary of the Treasury has not the power to prohibit the transfer of opium through the United States destined to Mexico. 725.

PARDON.
1. The President's constitutional pardoning power covers the case of the offense in Utah of unlawful cohabitation. 330, 668.
2. The President has the constitutional power without Congressional action to issue a general pardon or amnesty to classes of offenders. 330, 668.

PARK COMMISSION.
1. Where a park commission is limited by the act creating it to the expenditure of a certain sum of money, and has made offers within the sum limited by the act creating it, but fears that owing to many of these offers not being accepted the award in judicial proceedings would be higher than the amount limited by the act, it is nevertheless the duty of the commission to proceed with its work, and then possibly, if the awards are higher than the amount of the appropriation, it can abandon a portion of the territory included in its map. 67.
2. The mere fact that a commission instructed by the act creating it to institute condemnation proceedings to acquire certain lands for a public park—unless an agreement for the purchase thereof can be made within thirty days from the filing of its maps has begun such proceeding—does not preclude it from later coming to an agreement with the purchaser as to the purchase price of the land. 129.

PARTNER.
If a power of attorney, signed by the individual members of a firm as well as in the firm name, confers explicit authority upon one of its members to use the partnership name in signing checks and executing certain custom-house bonds, acts done in compliance with it are obligatory upon the firm. 311.

PART PAYMENTS.

Part payments can not be made upon Government contracts unless the United States thereupon becomes the owner of the work paid for. 746.

PATENT RIGHTS.

The Secretary of the Navy may lawfully contract with an ensign of the Navy for the purchase of patent rights in improvements of B. L. R. ordnance for the use of the Navy where the ensign was not employed to make experiments, but pays the expense of obtaining letters patent, and where no expense was authorized or facility furnished by the Board of Ordnance to aid him in making or perfecting his invention. 329.

PAYMENT.

1. A proper construction of the Bowman Act does not warrant the making of a Treasury draft payable to any other parties than those named in the act, or their executors or administrators. 115.
2. The act of March 3, 1875, chapter 149, does not apply to an unliquidated claim in favor of a State arising out of charges which are subject to equitable recoupment in an unadjusted transaction, and payment may properly be made to the State of Vermont of its share of the money collected from it under the direct tax act of August 5, 1861. 134.
3. The payment of duties and charges on goods entered for consumption, as well as the protest, must be made within ten days after their liquidation if the importer desires to contest the rate of duty assessed. 183.
4. Payments can not be made upon Government contracts unless the United States thereupon becomes the owner of the work paid for. 746.

PENALTIES.

While sections 17 and 18 of the act of June 22, 1874, chapter 391, offer a remedy to one who is exposed to a fine, penalty, or forfeiture in the cases therein provided for, yet such a remedy is not exclusive, but the relief may also be extended under section 3469, Revised Statutes. 727.

See ADDITIONAL DUTIES, No. 2; SECRETARY OF THE TREASURY, Nos. 11, 12; OCEAN MAIL SERVICE, No. 2.

PENSION.

A person who enlisted in a regiment of the Pennsylvania militia, pursuant to the President's proclamation for six months' volunteers, even if the regiment was not actually mustered into the service of the United States, but was engaged in its service, has a pensionable status under the first subdivision of section 4693 of the Revised Statutes. 322.

PINKERTON LAND CLAIM.

The claim of one Pinkerton to certain land discussed, and the remedy, if he has one, pointed out. 118.

POSTMASTER.

If a postmaster be commissioned to serve until the end of the next session of the Senate, and during that session his nomination is sent for confirmation to the Senate but remains unacted upon by that body at its adjournment, the responsibility of his sureties will continue for sixty days under the provision of section 3836 of the Revised Statutes, if the vacancy is not supplied during that time, and they can lawfully depute anyone to act as postmaster until a successor is appointed, assuming possession of the Government property. 447.

POSTMASTER-GENERAL.

The Postmaster-General advised that he may act favorably toward the acquisition of certain records and books of the postal department of the late Confederate States. 260.

POSTMASTERS' ACCOUNTS.

The Auditor of the Treasury for the Post-Office Department and the postmasters' accounts in his custody are papers in the Treasury Department, within section 1076, Revised Statutes. 677.

POWER OF ATTORNEY.

See PARTNER.

PRESIDENT.

1. The President has constitutional power without Congressional sanction to issue a general pardon or amnesty to classes of offenders. 330.
2. The pardoning power of the President is absolute; not subject to legislative control. 330, 668.
3. The President's constitutional pardoning power covers the case of the offense in Utah of unlawful cohabitation. 330, 668.
4. The President has the power to require a bond of the register of wills and the recorder of deeds of the District of Columbia for the faithful accounting by them of the fees received by them, and it is likewise his power to prescribe the periods at which accountings shall be had and payments made into the Treasury of the United States. 508.

See PUBLIC PARK.

PROCLAMATION.

See MCKINLEY ACT.

PRODUCTION OF PAPERS.

See CIVIL SERVICE COMMISSION, No. 2.

PROMOTIONS.

See SECRETARY OF AGRICULTURE, No. 3; CHIEF ENGINEERS; NAVY.

PUBLIC BUILDING.

An appropriation for a public building is not presumed unless given in express language. 54.

PUBLIC CARTAGE OF MERCHANDISE.

Section 25 of the act of June 22, 1874, chapter 391, regarding the letting out of the cartage of merchandise in the custody of the Government to the lowest bidder, applies only to such cartage as is paid for by the Government and not to cartage the expense of which is paid by the individual importer. 35.

PUBLIC DOMAIN.

A railroad company to which has been granted by the United States every alternate section of the public land not mineral, designated by odd numbers, to the extent of twenty alternate sections per mile on each side of its railroad, possesses no authority to select its own lands, locate them in sections, and then cut timber from the land which it has so surveyed. 542.

PUBLIC MONEYS.

Public money can not be deposited in private banks unless authorized by the Secretary of the Treasury. 24.

PUBLIC PARK.

Where an appropriation for acquiring title to land for a public park is limited to $1,200,000, and the law requires the President to decide that the price to be paid for various parcels of land was reasonable, and a commission has presented for his decision a report of appraisers in condemnation that would make the cost of the park considerably exceed that sum, it would not be lawful for the President to decide that the price so submitted was reasonable. 326.

PUEBLO INDIANS.

Section 5 of the act of August 15, 1876, chapter 289, and the act of July 31, 1882, chapter 360, are not applicable to the Pueblos of New Mexico. 215.

PURCHASE OF LAND.

Neither the act of August 19, 1890, chapter 806, nor the appropriation in the sundry civil act of March 3, 1891, chapter 542, authorizes the purchase of lands adjoining specified roads leading to and part of the Chickamauga and Chattanooga Military Park. 482.

See JURISDICTION.

QUARANTINE REGULATIONS.

1. The Surgeon-General of the Marine-Hospital Service and the Secretary of the Treasury may, with the approval of the President, make proper quarantine regulations. 466.
2. The only limitation on the powers conferred upon the Surgeon-General of the Marine-Hospital Service and the Secretary of the Treasury, subject to the approval of the President, to make quarantine regulations with reference to immigration from infected ports, is that the Federal regulations must not interfere with State laws. It is competent for these officials to prescribe

QUARANTINE REGULATIONS—Continued.

a longer period of quarantine, both for persons and cargo, than the State laws prescribe, the regulations carefully providing that the Federal jurisdiction should attach upon the expiration of State action. 468.

3. Under the quarantine act of February 15, 1893, chapter 114, a regulation may properly be made requiring inspection by official authorities of State and local maritime quarantines, to ascertain whether the national quarantine regulations are being complied with. 645.

RATE OF COMPENSATION.

See TELEGRAPH SERVICE; OCEAN MAIL SERVICE, No. 11.

REAPPRAISAL.

A reappraisal by a general appraiser can be had only as to articles as to which the appraisal is complained of. 39.

RECORDER OF DEEDS AND REGISTER OF WILLS.

The President can require a bond of the recorder of deeds and register of wills of the District of Columbia for the proper accounting of fees received by them, and can prescribe time for such accounting and for payment into the Treasury of the United States. 508.

REENLISTMENT.

Under the act of February 27, 1893, chapter 168, service in the Navy can not be counted and a man can not be reenlisted as a private unless he has served already as such for twenty years in the Army. 684.

REFUND.

1. The Secretary of the Treasury should insist upon the right of set-off against the demand of West Virginia for a refund of the direct tax to the extent of the equitable proportion of the debt of Virginia for which West Virginia is liable. 240.

2. Under the act of March 2, 1891, chapter 496, interest and penalties are collections, and should be repaid, but costs are not. Where redemption of lands held for direct taxes was made, the party in interest should be repaid the taxes, penalties, and interest paid by him for such redemption. 412.

REFUND OF DIRECT TAXES.

Under the act for the refund of direct taxes the Secretary of the Treasury is authorized to pay to the governor of Tennessee as trustee moneys received by the United States on the resale of land in Tennessee in excess of the tax assessed thereon, and of the amount bid therefor at the original sale made for the collection of the direct tax. 701.

REID CLAIM.

The claim of one Reid to moneys in the Treasury discussed and rejected as already passed upon adversely. 372.

REMEDY.

1. The remedy of a party for a land claim in New Mexico is under the act of March 3, 1891, chapter 539. 118.
2. While sections 17 and 18 of the act of June 22, 1874, chapter 391, offer a remedy to one who is exposed to a fine, penalty, or forfeiture in the cases therein provided for, yet such a remedy is not exclusive, but the relief may also be extended under section 3469, Revised Statutes. 727.

REMISSION OF FINES.

The fines imposed after a verdict of guilty of the statutory misdemeanor of allowing certain pauper immigrants to land after being ordered to detain them, are not a claim within the meaning of section 3469 of the Revised Statutes and can not be compromised under that statute. 685.

REMISSION OF PENALTY.

The case of a fine or penalty incurred for violation of the alien immigration law does not fall within the purview of the statutes embraced in Title LVXIII, and the Secretary of the Treasury is not authorized to remit the same. 705.

See RES ADJUDICATA, No. 3.

REMISSION OF REVENUE TAX.

The tax of $2 prescribed by section 1969 of the Revised Statutes can not be remitted upon skins taken from seals killed by the natives for food. 407.

REMISSION ORDER.

An order remitting the unexecuted sentence of a suspended lieutenant-commander retaining his number in grade does not advance him two numbers in grade above two corresponding officers promoted during his suspension from duty, although their commissions bore date subsequent to his. 243.

REMOVAL FROM OFFICE.

By the act of April 25, 1890, chapter 156, the President is authorized to appoint World's Fair Commissioners on nomination of the governors of the States and Territories. The term of office was not fixed. Its duties were executive in nature. Such commissioners are removable by joint action of the President and governor. An appointment "to succeed R. M. W., removed," is sufficient evidence of such removal. 641.

RENT OF SEAL FISHERIES.

1. It is competent for the Secretary of the Treasury under the existing lease of the right of taking fur-seal skins on the islands of St. Paul and St. George to make a reduction of the yearly rental for the year ending May 1, 1891, proportionate to the reduction made by him below the limit named in the lease of the number of seals which the lessee has been permitted to kill on these islands. 51.

RENT OF SEAL FISHERIES—Continued.

2. The Secretary of the Treasury has the same authority to make a reduction in the rate per skin to be paid by the lessee of seal fisheries at the islands of St. Paul and St. George, Alaska, that he has in the case of the other stipulated rental in the lease. 510.
3. There is no power in the Secretary of the Treasury to remit the rent provided for under the lease of March 12, 1890, to the North American Commercial Company, nor has he the right to reduce the amount of the bonus of $7.62½ provided for in said lease to be paid upon each skin taken and shipped. The abatements hitherto made were without authority of law and the balance of the annual rental and of the bonus of $7.62½ per skin not hitherto paid by the lessee is still due to the United States and recoverable by it. 634.
4. It is competent for the United States to recover by proper legal proceedings the difference between the amounts actually received as rent and bonus from the seal fisheries, and the amounts called for by the terms of the lease as rent and bonus for the same years, notwithstanding the action of a prior Secretary of the Treasury in reducing sums due under the laws by what his estimate was of the lessee's claim for damage, inasmuch as it appears such claims were not legal and valid. Such action of the prior Secretary, even if it binds his successor, as to which query, does not conclude the United States. 732.

See SECRETARY OF THE TREASURY, NO. 5.

REPEAL.

Where a repealing statute expires by its own limitation the act repealed is thereby revived. 466.

The act of May 1, 1876, chapter 89, was not repealed by section 29 of the customs administrative act of June 10, 1890, chapter 407. 5.

REPORTS.

A report signed by an examiner or clerk appointed in pursuance to section 2940 of the Revised Statutes, and approved by the appraiser, is not in compliance with the regulations of section 2615, Revised Statutes. 731.

RES ADJUDICATA.

1. The principle of *res adjudicata* applies to departmental action of a final nature. 280.
2. A claimant to moneys in the Treasury is bound by a decision of the proper Department adversely to his claim until the decision is set aside. 372.
3. When a contract for the construction of a vessel for the Government contains a clause imposing a penalty for each day's delay beyond the stipulated time for finishing the vessel, and providing that any question as to liability for the collection of said penalty should be referred to the Secretary of the Navy for

RES ADJUDICATA—Continued.

decision and his decision shall be conclusive upon all parties to the contract, it is not proper for a subsequent Secretary of the Navy to remit the amount of penalties imposed by the predecessor and pay that sum to the contractor. 631.

RETIRED ARMY OFFICER.

The question whether a Congressman can receive pay as a retired Army officer is one of grave doubt which only the determination of the Supreme Court can satisfactorily settle. 686.

REVOCATION OF ORDER OF SUSPENSION.

1. An order revoking a selection for appointment can not be revoked. 64.
2. Where an order suspending pay of a mail contractor is properly made by the Postmaster-General, it should not be revoked on an unsupported application to vacate it, disclosing no substantial ground for the application. 280.

REWAREHOUSING.

The act of March 28, 1854, section 3000, Revised Statutes, does not authorize repeated rewarehousing, but where merchandise has been rewarehoused in conformity with the regulations and practice of the Department, the action of the Department can not be declared unauthorized. 309.

See EXTENSION OF TIME.

RIPARIAN OWNERS.

See LOUISIANA LEVEES.

RIVER AND HARBOR ACT.

The effect of the river and harbor act of September 19, 1890, chapter 907, on the rights of the States over navigable waters discussed. 101.

ROCK CREEK PARK.

1. It is the duty of a park commission limited by the act creating it to an expenditure of $1,200,000, which has itself assessed valuations at $830,000, but fears it will be unable to agree with all the property owners to accept its estimate of value, and that if it institutes condemnation proceedings the award will exceed the amount limited in the act, to go ahead and perform its duty under the statute. 67.
2. The President may certify to the reasonableness of the price of land proposed to be taken under the act of September 27, 1890, chapter 1001, for Rock Creek Park, where the total price to be paid does not exceed the amount appropriated by that act. 377.

SALARIES.

1. Probably it is within the province of the head of a Department to compensate agents employed by the Department by stated salaries in full for all traveling expenses as well as for services. 601.

SALARIES—Continued.

2. The salary of the Superintendent of Immigration is payable from the immigration fund. 69.
3. The salary of an official should not be withheld as falling within the act of March 3, 1875, chapter 149, to meet a judgment recovered against him as surety for a former Government employé. 626.

SAMOAN ISLANDS.

See APPROPRIATION, Nos. 3, 4.

SAMPLE PACKAGES.

A contract with the Government construed as in itself not meaning to use the term "sample packages" in the restricted sense of merchandise free of duty as samples only and of no commercial value. 710.

SEALED CARS.

1. The Secretary of the Treasury is not precluded by the seals from examining the contents of cars sealed in a contiguous foreign country whether the merchandise was produced in that country or imported into it and then imported into the United States. 26.
2. Section 3102, Revised Statutes, allows the Secretary of the Treasury to impose similar regulations as to sealed cars, and an entry similar to that required by the immediate transportation act. 86.

SEAL FISHERIES.

See RENTAL OF SEAL FISHERIES.

SEALSKINS.

The tax of $2 prescribed by section 1969 of the Revised Statutes can not be remitted upon skins taken from seals killed by the natives for food. 407.

SECRETARY OF AGRICULTURE.

1. The Secretary of Agriculture has authority to procure the maps and charts for which an appropriation was made for his Department by the act of March 3, 1891, chapter 544. 41.
2. The Secretary of Agriculture may detail a person now in the classified service of his Department to duty elsewhere in the classified service of his Department provided his compensation be not increased. 573.
3. He may promote from class 1 to class 3 and from class 2 to class 4 without regarding intermediate steps. 573.
4. The Secretary of Agriculture can legally detail such officers or employés from his Department as may be requested by the Civil Service Commission, but he can not assign an officer of the Army detailed for service in the Weather Bureau to any other duties than those for which he is by law authorized to be detailed in the Weather Bureau. 750.

SECRETARY OF THE CHILEAN COMMISSION.

There is nothing in the treaty concluded by Chile and the United States on August 7, 1892, or in the appropriation for carrying it into effect, which prevents the President from requiring service under the treaty from the American secretary or agent or from making compensation therefor at any time before the organization of the commission. 595.

SECRETARY OF THE INTERIOR.

The relations of the Secretary of the Interior to the Freedmen's Hospital and Asylum are unchanged by the act of March 3, 1893, chapter 199, save that the Commissioners of the District of Columbia are given the supervision and control of expenditures for the Freedmen's Hospital and Asylum. 652.

SECRETARY OF STATE.

The Secretary of State of the United States is authorized to appoint and to remove the director of the Bureau of American Republics without the consent of the other Republics contributing to its support. 558.

SECRETARY OF THE NAVY.

The Secretary of the Navy is not prohibited by section 3718 of the Revised Statutes from contracting with an ensign of the Navy for the purchase of patent rights and improvements in B. L. R. ordnance for use in the Navy, where the ensign was not employed to make experiments, paid for his own patent, and was afforded no facilities by the Board of Ordnance for the improvement of his invention. 329.

SECRETARY OF THE TREASURY.

1. The Secretary of the Treasury has no authority to appoint special inspectors of sealed cars. 26.
2. The Secretary of the Treasury may have an examination made of cars sealed in a foreign country for passage through this country. 26.
3. The Secretary of the Treasury may modify the regulations with Great Britain as to sealed cars. 26.
4. The Secretary of the Treasury has power to reduce the rent of the seal fisheries proportionate to the reduction of the catch of seals prescribed by him. 51.
5. The Secretary of the Treasury may treat the lease of the seal fisheries as modified to conform to the intention of the parties at the time it was made. 62.
6. The Secretary of the Treasury is not permitted to grant an irrevocable license to use Government property. 93.
7. The power of the Secretary of the Treasury to contract with State commissions of immigration was withdrawn by the act of March 3, 1891, chapter 551. 69.
8. The power of the Secretary of the Treasury to issue silver certificates under the act of July 14, 1890, chapter 708, considered. 124.

SECRETARY OF THE TREASURY—Continued.

9. The Secretary of the Treasury has, apparently, power to insert in a notice stating that the interest on bonds would terminate after a certain day the statement that if the holders desired a continuance of the bonds at a smaller rate of interest during the pleasure of the Government the request would be granted within certain limits, provided the bonds be deposited before a certain date. 127.
10. The Secretary of the Treasury has no power to seize pictures of coins. 210.
11. The Secretary of the Treasury may remit the "additional duties" provided for by the customs-administrative act of June 10, 1890, chapter 407, but he has no power to remit any part of the duties, strictly so called, however erroneously they may have been assessed. 660.
12. The case of a fine or penalty incurred for violation of the alien immigration law does not fall within the purview of the statutes embraced under Title LVXIII, and the Secretary of the Treasury is not authorized to remit the same. 705.
13. Actions to recover moneys due the United States, not involving any issue of fraud, do not come in any way under the direction of the Secretary of the Treasury. (Rev. Stat., sec. 376.) 714.
14. "Collection of the revenues" under the superintendence of the Secretary of the Treasury within the meaning of Revised Statutes, section 249, relates to proceedings of collectors and their subordinates and not to those of district attorneys. 714.
15. The Secretary of the Treasury has not the power to prohibit the transfer of goods through the United States destined to Mexico. 724.

See IMMIGRANT FUND, Nos. 1, 2; IMMIGRANTS, Nos. 1, 2; RENT OF SEAL FISHERIES, Nos. 2, 3, 4.

SECRETARY OF WAR.

1. The duty of the Secretary of War in case of a bridge obstructing navigable waters considered. 101.
2. The Secretary of War has power to appoint recent graduates, non-commissioned officers, and civilians to the cavalry or infantry service, although "additional" second lieutenants remain in the engineer and the artillery service and no vacancies exist in said service. 149.
3. The Secretary of War has no power to prevent the deposit of ballast in New York Harbor at a distance of more than three miles from the shore at low-water mark. 293.
4. The Secretary of War is authorized by section 7 of the river and harbor act of 1892 to approve or disapprove the location or plans of a bridge duly authorized by a State legislature over waters wholly within the limits of a State. 479.
5. The Secretary of War is not authorized to approve or disapprove the plans or locations of bridges authorized by a State legislature over waters the navigable portions of which do not lie wholly within the limits of a State. 488.

SECRETARY OF WAR—Continued.

6. By the act of February 28, 1891, chapter 382, incorporating the Washington and Arlington Railroad Company, the Secretary of War is empowered to approve the specifications, plans, and materials of the proposed bridge and the manner of its construction and to consent to its relocation at a place which under the circumstances is a reasonable compliance with the act. 549.
7. The St. Louis and Cloquet rivers, being navigable waters of the United States, can be obstructed by dams only by permission of the Secretary of War, to whom Congress has, by express statute, given exclusive jurisdiction of the subject. 713.
8. By section 12, chapter 907, Supplement to the Revised Statutes, the establishment of a certain line as essential to the preservation and protection of a harbor rests in the discretion of the Secretary of War alone, and his decision in the matter must be final and conclusive until modified by him. 740.

SELECTION FOR APPOINTMENT.

When an order is made revoking a selection for appointment that order can not be revoked. 64.

SERVICE OF SENTENCE.

See CONSULAR JURISDICTION.

SET-OFF.

1. By section 3481 of the Revised Statutes it is the duty of the Secretary of the Treasury to set-off against the demand of West Virginia for a refund of the direct tax the equitable proportion of the debt of Virginia to the United States for which West Virginia is liable. 240.
2. There should be set-off under the act of March 3, 1875, chapter 149, the indebtedness of the State of Indiana to the United States arising from an overdemand against the same coming to that State by the act of March 2, 1891, chapter 496. 363.
3. The salary of a Federal judge should not be withheld as falling within the act of March 3, 1875, chapter 149, to meet a judgment recovered against him as surety for a former Government employé. 626.

SIOUX MIXED BLOOD.

1. The question whether or not a Sioux half-breed or quarter blood is an Indian within the meaning of the act of March 2, 1889, chapter 405, is to be determined not by the common law, but by the laws and usages of the tribe. 711.
2. A person, apparently of mixed blood, residing upon a reservation and claiming to be an Indian is in fact an Indian. 711.
3. History of the Sioux half-breed scrip under the treaty of Prairie du Chien considered. 742.
4. The opinion of February 9, 1894 (20 Opin., 711), as to the meaning of the word "Indians," given in legislation regarding the Sioux, reaffirmed. 742.

SILVER BULLION.

Under the act of July 14, 1890, chapter 708, silver certificates can be issued on the seigniorage arising from purchases under this act, but Treasury notes can not be issued on said seigniorage. 124.

SILVER CERTIFICATES.

Silver certificates are not lawful money within the meaning of section 4 of the act of June 20, 1874, chapter 343, and section 9 of the act of July 12, 1882, chapter 290. 725.

SOLDIER.

Extra compensation to soldiers is not now authorized by law. 18.

SOLICITOR OF THE TREASURY.

1. The opinion of the Solictor of the Treasury may be asked upon any question of pure law, or of mixed law and fact, arising in the Treasury Department, except questions involving the construction of the Constitution of the United States. His opinions have no binding force. 654.
2. The Solicitor of the Treasury is an officer of the Department of Justice and not of the Treasury Department. 714.
3. The Solicitor of the Treasury is empowered to give advice as to codes of rules and forms of applications as to matters pending in the Treasury Department. 738.

STATE.

1. The power of a State to legislate as to navigable waters is subject to the paramount power of Congress when it has acted in the matter. 101.
2. The invasion of the State of Vermont in 1864 considered historically, and concluded to have been an attack on the United States by the Confederates. 134.
3. The State of Rhode Island is not a person, corporation, or association within the meaning of the river and harbor appropriation act of 1890, chapter 907. 606.

STATUTE OF LIMITATIONS.

The proviso of the appropriation act of March 3, 1873, bars claims for horses lost in the Indian war of 1855–'56 and not presented nntil the year 1890. 152.

STATUTORY CONSTRUCTION.

1. Section 6 of the act of July 1, 1862, chapter 120, includes seamen as well as land troops. 11.
2. A statute should not be construed so as to lead to an absurdity. 89.
3. The act of March 3, 1883, chapter 123, requiring the Bureau of Printing and Engraving to submit estimates of the cost of certain work for the Post-Office Department, is mandatory in its provisions. 132.
4. The words "such arms or corps," in the act of May 17, 1886, chapter 338, refer to the "arm or corps" the duties of which the graduate has been adjudged competent to perform, and the word

STATUTORY CONSTRUCTION—Continued.

"vacancy" used in the same act, contemplates a vacancy in the arm of the service in which an additional second lieutenant is then employed. 149.

5. The act of March 3, 1891, chapter 519, providing for ocean mail service between the United States and foreign ports, should be construed strictly, so as to lead to definiteness and certainty in view of the object of Congress in passing said act. 161.

6. Statutes of doubtful language should be read in the light of the circumstances under which they were passed. 183.

7. Section 4136 of the Revised Statutes should be construed in connection with section 4132 and in the light of the purpose of Congress in passing both sections. 253.

8. Section 2 of the act of October 1, 1890, chapter 1244, is exhaustive upon the subject of free goods, so that an article not mentioned in said section can not be held to be nondutiable because of any previous law granting it exemption from duty. 314.

9. Where a repealing statute expires by its own limitation the act repealed is thereby revived. 466.

10. A mistaken opinion of the legislature concerning the law does not make the law. 530.

11. When the meaning of a statute is clear it can not be affected by departmental practice. 592.

12. Where the meaning of the Revised Statutes is obscure or ambiguous a reference may be had to the original to assist in determining the revisions, but when the meaning is clear and free from doubt no such reference is necessary or permissible. 634.

13. The law looks at facts, not names. 660.

14. A construction which would make the results of a law unreasonable should be avoided. 660.

15. Section 5 of the act of March 3, 1893, chapter 211, applies to the current year, and absence prior to July 1, 1893, must be taken into account in computing the time to which an employé may be entitled during the calendar year. 670.

16. If there is any doubt as to the meaning of a statute imposing a tax on State-bank circulation the doubt must be resolved in favor of exemption. 681.

17. Section 1260, Revised Statutes, refers to additional compensation from the United States, not to that received from colleges. 687.

18. When Congress adopts substantially the language of a previous statute, whether from the statute book of the United States or from that of any State, it is presumed to adopt therewith the judicial construction already placed upon the language of the act. The same principle applies in lesser degree to long settled departmental construction. 719.

19. Although a statute may have apparently unreasonable and extraordinary results, yet there is no room for construction to avoid these results when there is no ambiguity. 735.

20. In a case of ambiguity in a statute departmental practice may affect its construction when long continued, uniform, and familiar, but not when merely recent and occasional. 746.

STEAM PLATE PRESSES.

Steam plate-printing presses can not be used in the Bureau of Printing and Engraving since the act of March 2, 1889, chapter 411, without a compliance with the terms of that law. 33.

STIPULATION.

While no legal objection would exist if the right of appeal from judgments of the Court of Claims in the direct-tax cases be waived by the parties by stipulation on record to the payment of such claims prior to the expiration of the ninety days within which appeals may be taken, yet the Department of Justice deems it unwise to adopt any general rule of giving such stipulations. 547.

SUBPŒNA.

See CIVIL SERVICE COMMISSION, No. 2.

SUGAR.

Refined sugar imported since April 1, 1891, on which a drawback was collected when exported prior to that date, is subject to the rate of duty prescribed by the tariff act of 1883. 77.

SUMMARY COURT ACT.

The act of October 1, 1890, chapter 1259, does not give the reviewing officer power to mitigate or approve a part and disapprove another part of the sentence of the summary court. 346.

SUPERINTENDENT OF IMMIGRATION.

See SALARIES, No. 2.

SUPERVISION OF STATE OFFICIALS.

See QUARANTINE REGULATIONS.

SURETIES.

1. Any change in a contract for ocean mail service between the parties thereto, releases the sureties from subsequent liabilities. 321.
2. If a postmaster be commissioned to serve until the end of the next session of the Senate, and during that session his nomination is sent for the consideration of the Senate, but remains unacted upon at its adjournment, the responsibilities of his sureties continue for sixty days under the provision of section 3836, Revised Statutes, if the vacancy is not filled during that time, and the sureties can lawfully take possession of the Government property and depute anyone to act as postmaster until the vacancy be filled. 447.
3. A surety upon the bond of a Government contractor is not discharged from liability thereon by the contractor thereafter agreeing to pay the moneys received by him to some third person, or entering into any partnership, or being served with an injunction order restraining him from paying out any of such moneys except to the plaintiff in the injunction suit, the Government not recognizing any of such proceedings in any way. 643.

SURETIES—Continued.

4. Two supplemental contracts made with a contractor when the contract itself contemplated and provided for such changes, which have been made in the manner fixed by the contract, do not impair the obligations of the sureties on the contractor's bond. 748.

SURETY COMPANY.

A surety company authorized by the laws of the State where it is organized, to act as bondsman, is a proper surety on the bonds of United States consular officials. 16.

SURVEYOR OF CUSTOMS.

If there be no collector of the port of Galena, Ill., and all the duties of that office are imposed upon the surveyor of customs, then his acts done in performance of the duties and functions of the office of collector of the port are as valid and effective as if done by a collector of the port. His certificate in conjunction with that of the local inspector of steamboats is sufficient to authorize the Secretary of War to draw his warrant as provided in the act of Congress authorizing the city of Galena, Ill., to complete certain improvements of the channel of the Galena River. 700.

SUSPENSION OF PENSIONS.

1. The urgent deficiency act of December 21, 1893, chapter 3, prohibits the suspension without notice of payments under forged or fraudulent pensions and prohibits further suspension of payments under pensions theretofore ordered to be suspended. 735.
2. At the expiration of the statutory notice the Commissioner of Pensions may decide the case and stop payment of a pension without precluding himself from thereafter reopening the case at the request of the pensioner when justice requires it. 735.
3. Suspension is a continuing act. 735.

TARIFF ACT OF 1890.

1. Refined sugar imported since April 1, 1891, on which a drawback has previously been taken, is subject to the rate of duty prescribed by the tariff act of 1883. 77.
2. Where duties are bases on weight by the tariff act of 1890, it applies to all importations and not merely to those imported since the act took effect. 80.

TAX ON STATE BANK CIRCULATION.

The tax on State banks imposed by the act of February 8, 1875, chapter 36, section 19, applies only to promissory notes and not to quasi negotiable paper. 681.

TAX RECEIPTS.

Tax receipts are satisfactory evidence that land is redeemed and discharged from a tax sale and taxes. 430.

TELEGRAPH SERVICE.

Where the Government has power to send telegraph messages by a bond-aided railway system or by an independent company's system located partly over the bonded railway company's route, and delivers them to the independent company's system without request that they be forwarded over the bond-aided railway route, payment must be made at the rate prescribed by the Postmaster-General. 581.

TEN PER CENT TAX ON CIRCULATION OF NOTES.

A national bank paying out on checks and otherwise notes of a bank chartered in a foreign country, is subject to tax of ten per cent upon the total amount of all notes it has received and used as a circulating medium. 534.

TONNAGE DUES.

See COMMISSIONER OF NAVIGATION.

TRANSFER.

See APPROPRIATION, No. 1.

TREASURY NOTES.

1. Treasury notes can not be issued on the seigniorage made under the silver bullion act of July 14, 1890, chapter 708. 124.
2. The notes authorized to be issued in payment of silver bullion by the act of July 14, 1890, chapter 708, are not receivable on deposit in exchange for the currency certificates authorized by the act of June 16, 1872, chapter 346. 317.

TREATY OF WASHINGTON.

Article 29 of the Treaty of Washington was terminated two years after the date of the giving of the notice provided for in article 33 of said treaty. 388.

UNITED STATES.

1. Where the United States, either as a trustee for others, or as *ultima hæres*, may be interested in the disposition of certain moneys in the Treasury, they should move to vacate the letters of administration granted by a probate court without jurisdiction, obtained by a person wrongfully claiming to be a creditor of the person to whom the moneys belong. 372.

2. The act of March 3, 1887, chapter 556, is mandatory and makes it the duty of the United States to bring a suit to restore title to the United States, if the party to whom the land was erroneously certified under a prior certification does not give or procure a relinquishment or reconveyance. 224.

See LOUISIANA LEVEES.

UNITED STATES ATTORNEY.

See EXTRA COMPENSATION DISTRICT ATTORNEY.

UNITED STATES NOTES.

See TREASURY NOTES.

VACANCY.

The acceptance of an appointment as chief of the Record and Pension Office of the War Department, with the rank, pay, and allowances of a colonel by a surgeon of the United States Army creates a vacancy in the latter office. 427.

VACANCY IN HEAD OF DEPARTMENT.

A vacancy in the head of a Department can not be temporarily filled for a longer period than ten days, either by operation of law or by designation of the President. 8.

VERMONT.

The invasion of the State of Vermont in 1864 was really an invasion of the United States. 134.

VETO.

See ADJOURNMENT OF CONGRESS.

VOUCHER.

Where an Indian agent's account consists of a receipt roll, not the original paper, but merely the abstract of several vouchers accompanying it, one of which contains but one item that is false that bears no relation to the other items in the account, the penalty of section 8 of the act of July 4, 1884, chapter 180, reaches no further than to take away the agent's right to credit for any part of that item. And where the false item occurs in the printed form entitled "Pay roll of regular employés," and is signed by twelve persons, each setting opposite his name the kind of work done by him, the receipts thus taken are so many separate and distinct vouchers within the meaning of the proviso of the above section. 561.

WEATHER BUREAU.

1. The employés of the Weather Bureau of the Department of Agriculture on duty outside of and away from the city of Washington are not members of the classified civil service. 345.

2. The acts of October 1, 1890, chapter 1266, and March 3, 1891, chapter 544, permit the Secretary of Agriculture to reduce the compensation of any person in the weather service transferred from the War Department to his Department, and also permit him to appoint to the $1,500 positions provided for in the latter act any of the persons so transferred, and to promote to the vacancies created by such appointment any other persons so transferred, even if the salary of the person so promoted is thereby increased. 395.

WEIGHT.

See TARIFF ACT OF 1890, No. 2.

WHISKY.

Reimported whisky when withdrawn from bond is taxable according to the number of gallons at the time of importation. 722.

WORLD'S COLUMBIAN EXPOSITION.

1. It is competent for the Secretary of the Treasury to make payment for her services to the secretary of the Ladies' Board of Managers of the World's Columbian Exposition. 237.

2. The President is authorized to appoint commissioners of the World's Columbian Commission only from such Territories as are organized and have a political status under the acts of Congress. Indian Territory is not such a Territory. 452.

See REMOVAL FROM OFFICE.

WORLD'S FAIR.

1. Various acts and sections of acts appropriating money for the World's Columbian Exposition construed and interpreted. 566.
2. *Held*, considering together the acts of April 25, 1890, chapter 156, July 13, 1892, chapter 165, and August 5, 1892, chapter 380, that the branch office of the World's Fair of 1893 must be closed on Sunday. 598.
3. Appropriations contained in the act of August 5, 1892, chapter 381, for the World's Fair are still available, notwithstanding the fact that the fair is open on Sundays. 623.