U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SOLICITOR.
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LAWS, DECISIONS, AND OPINIONS APPLICABLE TO THE NATIONAL FORESTS.

Revised and compiled by
R. F. FEAGANS,
UNDER THE DIRECTION OF THE SOLICITOR.

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LETTER OF TRANSMITTAL.

U. S. Department of Agriculture,
Office of the Solicitor,
Washington, D. C., September 1, 1915.

Sir: I have the honor to transmit herewith, and to recommend for publication, a compilation of laws and parts of laws of a general nature affecting the administration and protection of the National Forests, with citations to acts of special or local application, and references to the more important decisions of the courts, the Interior Department, the Attorney General, the Comptroller of the Treasury, and the Solicitor of the Department of Agriculture. This compilation was requested by the Forester, and under my direction was revised and compiled by Mr. R. F. Feagans, of this office.

Respectfully,

Francis G. Caffey,
Solicitor.

Hon. D. F. Houston,
Secretary of Agriculture.

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SEC. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

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Act of March 4, 1907 (34 Stat., 1256).

* * * Forest reserves * * * shall be known hereafter as National Forests * * *

Authority to revoke, modify, or suspend proclamations.

Act of June 4, 1897 (30 Stat., 11).

* * * To remove any doubt which may exist pertaining to the authority of the President thereunto [in regard to the National Forests], the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests: * * *

The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by any such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.

Creation of additional forests restricted.

Act of March 4, 1907 (34 Stat., 1256).

Hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of Congress. (California added by act of Aug. 24, 1912.)

Transfer act.

Act of February 1, 1905 (33 Stat., 628).

The Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the pro-

visions of section twenty-four of the act entitled "An act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands.

Administration of National Forests.

Act of June 4, 1897 (30 Stat., 11).

All public lands heretofore designated and reserved by the President of the United States under the provisions of the act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said act, shall be as far as practicable controlled and administered in accordance with the following provisions:

Purposes of establishment.

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

Regulation of occupancy and use.

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States.

Sale of timber.

For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated,

respectively, but not for export therefrom. (Export permitted by later acts *infra.*)

[Before such sale shall take place, notice thereof shall be given * * * for not less than thirty days, by publication in one or more newspapers of general circulation, as he may deem necessary, in the State or Territory where such reservation exists: *Provided*, *however*, That in cases of unusual emergency the Secretary of the Interior may, in the exercise of his discretion, permit the purchase of timber and cord wood in advance of advertisement of sale at rates of value approved by him and subject to payment of the full amount of the highest bid resulting from the usual advertisement of sale: *Provided further*, That he may, in his discretion, sell without advertisement, in quantities to suit applicants, at a fair appraisement, timber and cord wood not exceeding in value one hundred dollars stumpage: *And provided further*, That in cases in which advertisement is had and no satisfactory bid is received, or in cases in which the bidder fails to complete the purchase, the timber may be sold, without further advertisement, at private sale, in the discretion of the Secretary of the Interior, at not less than the appraised valuation, in quantities to suit purchasers:] * * * Such timber before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior, not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make report in writing * * * of his doings in the premises.

(The matter in brackets in the above section is taken bodily from the act of June 6, 1900 (31 Stat., 661), and, since the passage of the agricultural appropriation act of June 30, 1906 (34 Stat., 669), is the timber sale law for all National Forests, except as modified by the act of Feb. 1, 1905 (33 Stat., 628), transferring the jurisdiction of the National Forests to the Secretary of Agriculture.) As to sale of timber to settlers and farmers at cost, see infra, p. 97.

Free-use permits.

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

Ingress and egress of settlers.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior.

Prospecting and location of mining claims.

Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, includ-

ing that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

Schools and churches within forests.

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of the said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church.

Civil and criminal jurisdiction.

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

Waters.

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

Restoration of certain lands to public domain.

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation, which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain.

Location and entry of mineral lands.

And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

GENERAL DECISIONS.

Validity of rules and regulations of Secretary.

United States *v.* Grimaud et al., 220 U. S., 506 (syllabus).

Under the acts establishing forest reservations, their use for grazing or other lawful purposes is subject to rules and regulations established by the Secretary of Agriculture, and it being impracticable for Congress to provide general regulations, that body acted within its

constitutional power in conferring power on the Secretary to establish such rules; the power so conferred being administrative and not legislative, is not an unconstitutional delegation.

While it is difficult to define the line which separates legislative power to make laws and administrative authority to make regulations, Congress may delegate power to fill up details where it has indicated its will in the statute, and it may make violations of such regulations punishable as indicated in the statute; and so held that regulations made by the Secretary of Agriculture as to grazing sheep on forest reserves have the force of law and that violations thereof are punishable under act of June 4, 1897, chapter 2 (30 Stat., 35), as prescribed in section 5388, Revised Statutes.

Congress can not delegate legislative power (Field *v.* Clark, 143 U. S., 692), but the authority to make administrative rules is not a delegation of legislative power, and such rules do not become legislation because violations thereof are punished as public offenses.

Even if there is no express act of Congress making it unlawful to graze sheep or cattle on a forest reserve, when Congress expressly provides that such reserves can only be used for lawful purposes subject to regulations and makes a violation of such regulations an offense, any existing implied license to graze is curtailed and qualified by Congress; and one violating the regulations when promulgated makes an unlawful use of the Government's property and becomes subject to the penalty imposed.

A provision in an act of Congress as to the use made of moneys received from Government property clearly indicates an authority to the executive officer authorized by statute to make regulations regarding the property to impose a charge for its use.

Where the penalty for violations of regulations to be made by an executive officer is prescribed by statute, the violation is not made a crime by such officer, but by Congress, and Congress and not such officer fixes the penalty, nor is the offense against such officer, but against the United States. (Same.)

Light *v.* United States, 220 U. S., 523 (syllabus).

Congress may authorize an executive officer to make rules and regulations as to the use, occupancy, and preservation of forests, and such authority so granted is not unconstitutional as a delegation of legislative power. (Following United States *v.* Grimaud, 220 U. S., 506.)

At common law the owner was responsible for damage done by his live stock on land of third parties, but the United States has tacitly suffered its public domain to be used for cattle so long as such tacit consent was not canceled, but no vested rights have been conferred on any person, nor has the United States been deprived of the power of recalling such implied license.

While the full scope of section 3, Article IV, of the Constitution has never been definitely settled, it is primarily a grant of power to the United States of control over its property (Kansas *v.* Colorado, 206 U. S., 89); this control is exercised by Congress to the same extent that an individual can control his property.

It is for Congress and not for the courts to determine how the public lands shall be administered.

Congress has power to set apart portions of the public domain and establish them as forest reserves, and to prohibit the grazing of cattle thereon, or permit it subject to rules and regulations.

Fence laws may condone trespasses by straying cattle where the laws have not been complied with, but they do not authorize wanton or willful trespass, nor do they afford immunity to those willfully turning cattle loose under circumstances showing that they were intended to graze upon the lands of another.

Where cattle are turned loose under circumstances showing that the owner expects and intends that they shall go upon a reserve to graze thereon, for which he has no permit and he declines to apply for one, and threatens to resist efforts to have the cattle removed, and contends that he has a right to have his cattle go on the reservation, equity has jurisdiction, and such owner can be enjoined at the instance of the Government, whether the land has been fenced or not.

Quære, and not decided, whether the United States is required to fence property under laws of the State in which the property is located.

Status of mining locations within forests.

Mineral lands (at least if not located as such at the time of withdrawal) become a part of the National Forest, and their subsequent location does not (prior to patent) withdraw or exclude them therefrom. (United States *v.* Rizzinelli, 182 Fed., 675; see also U. S. *v.* Lavenson, 206 Fed., 755.)

Under a forestry proclamation declaring "that the withdrawal made by this proclamation shall, as to all lands at this time legally appropriated * * * be subject to and shall not interfere with or defeat legal rights under such appropriation * * * so long as such appropriation is maintained," a mining location existing at the date of the proclamation becomes a part of the National Forest, subject only to the rights of the owner thereof, under the mineral laws. (2 Sol. Op., 763; id., 865.)

Status of lands covered by rights of way.

Lands covered by railroad and ditch rights of way at the time of withdrawal become part of the National Forests subject to such rights of way. (2 Sol. Op., 790; id., 728.)

Waters within National Forests.

Waters flowing over the public domain in natural channels are not the property of the United States or subject to its control or disposition. They are publici juris and are subject, under the Constitution, to the jurisdiction and control of the States, except for purposes of commerce and navigation. The Government can acquire a right to their use for purposes other than navigation only by appropriating them under the provisions of State laws. (1 Sol. Op., 590.)

Where, however, the Government, by a treaty made prior to the admission of the State into the Union, has reserved certain waters for the use of an Indian tribe, there is no power in the State to divert them from such uses. (Winters *v.* United States, 207 U. S., 564.)

Nor can a State, even upon the nonnavigable portions of a stream, authorize any uses which will impair the navigability of the navi-

gable portions. (United States *v.* Rio Grande Irrigation Co., 174 U. S., 690.)

The waters of mineral, medicinal, and saline springs on the public domain are under the sole control of the United States, as a landowner, and are not subject to appropriation under State laws or to the riparian right to continued flow. (2 Sol. Op., 951.)

Fish and game within forests.

While it is no doubt within the power of Congress to prevent intrusion upon the National Forests for the purposes of taking fish and game, yet in view of the long-established policy by which the public domain has been opened for these purposes it can not be held that the general powers conferred upon the Secretary of Agriculture by the forest administrative act of June 4, 1897, or any other legislation empowers him to prohibit or to make regulations in relation to the taking of fish and game on the National Forests. (23 Op. Atty. Gen., 589; 1 Sol. Op., 78 and 174.)

The fish and game laws of the States and Territories are applicable to National Forest lands and to persons other than Indians on Indian reservations, but not to Indians upon their reservations. (1 Sol. Op., 201; Ex parte Crosby, 149 Pac., 989.)

Forest officers may be authorized by the Secretary of Agriculture to exterminate predatory animals on National Forest lands when necessary to conserve the purposes for which the National Forests were created, and the States have no power to deprive the Secretary of this authority. But a forest official, by virtue of his employment in the Forest Service, does not have any rights whatsoever to engage in trapping or hunting in violation of the State game laws where carried on for his own amusement or profit. (Sol. Op., Feb. 12, 1915.)

LEGISLATION AFFECTING CERTAIN NATIONAL FORESTS.

Act of October 1, 1890 (26 Stat., 650), setting aside certain lands in California as forest reservations.

Act of February 7, 1905 (33 Stat., 702), to exclude from Yosemite National Park certain lands and attach the same to the Sierra Forest Reserve.

Joint resolution of June 11, 1906 (34 Stat., 831), accepting recession of Yosemite Valley, etc., and changing boundaries of the National Park.

Act of April 28, 1904 (33 Stat., 526), replaced by section 55 of the Penal Code. (See Trespass, p. 109, post.)

Act of May 23, 1908 (35 Stat., 268), establishing the Minnesota National Forest and containing various special provisions in relation to sales of timber, the preservation of seed trees, the preservation and adjustment of the rights of Indians, etc. See also act of June 27, 1902 (32 Stat., 400).

Act of June 25, 1910 (36 Stat., 855), relating to Indian lands, proviso near bottom of page 862.

The Indian appropriation act of March 3, 1905 (33 Stat., 1048 at p. 1070), authorizes the President to add parts of the Uinta Indian Reservation to the Uinta National Forest.

Act of March 3, 1899 (30 Stat., 1074, 1095), authorized homestead entries by metes and bounds in the Black Hills National Forest by bona fide settlers prior to September 19, 1898.

Act of March 1, 1907 (34 Stat., 1053), grants certain lands in the San Juan National Forest to the city of Durango, Colo., for reservoir purposes, reserving to the Forest Service the right to dispose of the timber on certain parts thereof.

Act of February 18, 1909 (35 Stat., 626), as amended by act of May 7, 1912 (37 Stat., 108), authorizing acquisition of lands in California for a National Forest to be known as the Calaveras Big Tree National Forest.

Act of February 28, 1911 (36 Stat., 960), authorizes the exchange of lands in the Kansas National Forest for privately owned lands within its boundaries.

Act of March 4, 1911 (36 Stat., 1357), authorizes the Secretary of the Interior to exchange certain desert lands, specifically described, for other described lands, within National Forests in Oregon.

Act of April 9, 1912 (37 Stat., 80), authorizes the exchange of certain lands within the Sierra and Stanislaus National Forests and provides the terms on which such exchange may be made.

Act of July 25, 1912 (37 Stat., 200), authorizes Secretary of the Interior to exchange certain lands in Paulina National Forest, Oreg., for private lands within the forest.

Act of July 31, 1912 (37 Stat., 241), authorizes the exchange of certain lands with the State of Michigan and provides the terms on which such exchange may be made.

Act of August 22, 1912 (37 Stat., 323), authorizes the Secretary of Agriculture to exchange timber in the Pecos National Forest, N. Mex., for privately owned lands within the boundaries of the Zuni National Forest.

The agricultural appropriation act of August 10, 1912 (37 Stat., 269), declares that the Fort Wingate Military Reservation, N. Mex., shall become a part of the Zuni National Forest, subject to unhampered use for military purposes. See also act of October 3, 1914 (38 Stat., 726).

Act of February 27, 1913 (37 Stat., 684), provides for the protection of the water supply of the city of Colorado Springs and the town of Manitou, Colo. See also act of August 24, 1914 (38 Stat., 705), incorporating certain lands in Pike National Forest.

Act of December 19, 1913, grants rights of way through Stanislaus National Forest to city and county of San Francisco, Cal.

Act of March 14, 1914 (38 Stat., 308), provides for the protection of the water supply of Baker, Oreg., Whitman National Forest.

Act of April 14, 1914 (38 Stat., 346), reserves and incorporates certain lands as a part of the Caribou National Forest, Idaho.

Act of May 13, 1914 (38 Stat., 376), consolidates certain lands in the Sierra National Forest and Yosemite National Park, Cal.

Act of May 14, 1914 (38 Stat., 377), authorizes the exchange of certain privately owned lands in Cache National Forest, Utah.

Act of June 24, 1914 (38 Stat., 387), authorizes the consolidation of certain forest lands in the Ochoco National Forest, Oreg.

Act of June 30, 1914 (38 Stat., 415), authorizes furnishing of young trees from Nebraska National Forest to residents of arid regions.

Act of July 28, 1914 (38 Stat., 556), authorizes the exchange of certain lands within the Fishlake National Forest, Utah.

Act of September 19, 1914 (38 Stat., 714), provides for the protection of the water supply of Salt Lake City, Utah, Wasatch National Forest.

GAME REFUGES.

Act of January 24, 1905 (33 Stat., 614), authorizes the President to set aside lands within the Wichita National Forest as a game refuge and declares that the purpose of the act is to protect the land of the United States from trespass, and not to interfere with local game laws, etc. Penal provisions of the act will be found under "Trespass," page 109, post.

Act of June 29, 1906 (34 Stat., 607), relating to the Grand Canyon game refuge contains provisions substantially like those of the act next above cited.

DECISION.

The Secretary of the Interior [now Agriculture] can not, without express authority of law, prescribe rules and regulations by which the National Forests may be made refuges for game, or by which the hunting, killing, or capture of game thereon may be forbidden. As to the National Forests in general, no such authority is conferred either by the act of June 4, 1897, or any other provision of law. (23 Op. Atty. Gen., 589.)

WEEKS LAW AND AMENDMENTS.

Act of March 1, 1911 (36 Stat., 961), to enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers.

That the consent of the Congress of the United States is hereby given to each of the several States of the Union to enter into any agreement or compact, not in conflict with any law of the United States, with any other State or States for the purpose of conserving the forests and the water supply of the States entering into such agreement or compact.

Cooperation with States for fire protection.

SEC. 2. That the sum of two hundred thousand dollars is hereby appropriated and made available until expended, out of any moneys in the National Treasury not otherwise appropriated, to enable the Secretary of Agriculture to cooperate with any State or group of States, when requested to do so, in the protection from fire of the forested watersheds of navigable streams; and the Secretary of Agriculture is hereby authorized, and on such conditions as he deems wise, to stipulate and agree with any State or group of States to cooperate in the organization and maintenance of a system of fire protection on any private or State forest lands within such State or States and situated upon the watershed of a navigable river: *Provided*, That no such stipulation or agreement shall be made with any State which has not provided by law for a system of forest-fire protection: *Provided*

further, That in no case shall the amount expended in any State exceed in any fiscal year the amount appropriated by that State for the same purpose during the same fiscal year.

Purchase of lands.

SEC. 3. That there is hereby appropriated, for the fiscal year ending June thirtieth, nineteen hundred and ten, the sum of one million dollars, and for each fiscal year thereafter a sum not to exceed two million dollars for use in the examination, survey, and acquirement of lands located on the headwaters of navigable streams or those which are being or which may be developed for navigable purposes: *Provided*, That the provisions of this section shall expire by limitation on the thirtieth day of June, nineteen hundred and fifteen.

Appointment of commission.

SEC. 4. That a commission, to be known as the National Forest Reservation Commission, consisting of the Secretary of War, the Secretary of the Interior, the Secretary of Agriculture, and two Members of the Senate, to be selected by the President of the Senate, and two Members of the House of Representatives, to be selected by the Speaker, is hereby created and authorized to consider and pass upon such lands as may be recommended for purchase as provided in section six of this act, and to fix the price or prices at which such lands may be purchased, and no purchases shall be made of any lands until such lands have been duly approved for purchase by said commission: *Provided*, That the members of the commission herein created shall serve as such only during their incumbency in their respective official positions, and any vacancy on the commission shall be filled in the manner as the original appointment.

Reports to Congress.

SEC. 5. That the commission hereby appointed shall, through its president, annually report to Congress, not later than the first Monday in December, the operations and expenditures of the commission, in detail, during the preceding fiscal year.

Duties of Secretary of Agriculture.

SEC. 6. That the Secretary of Agriculture is hereby authorized and directed to examine, locate, and recommend for purchase such lands as in his judgment may be necessary to the regulation of the flow of navigable streams, and to report to the National Forest Reservation Commission the results of such examinations: *Provided*, That before any lands are purchased by the National Forest Reservation Commission said lands shall be examined by the Geological Survey and a report made to the Secretary of Agriculture, showing that the control of such lands will promote or protect the navigation of streams on whose watersheds they lie.

Secretary to purchase.

SEC. 7. That the Secretary of Agriculture is hereby authorized to purchase, in the name of the United States, such lands as have been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said commission: *Provided*, That no deed or other instrument of conveyance shall be accepted or ap-

proved by the Secretary of Agriculture under this act until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purposes of preserving the navigability of navigable streams.

Passing upon titles.

SEC. 8. That the Secretary of Agriculture may do all things necessary to secure the safe title in the United States to the lands to be acquired under this act, but no payment shall be made for any such lands until the title shall be satisfactory to the Attorney General and shall be vested in the United States.

Reservation of timber and minerals.

SEC. 9. That such acquisition may in any case be conditioned upon the exception and reservation to the owner from whom title passes to the United States of the minerals and of the merchantable timber, or either or any part of them, within or upon such lands at the date of the conveyance, but in every case such exception and reservation and the time within which such timber shall be removed and the rules and regulations under which the cutting and removal of such timber and the mining and removal of such minerals shall be done shall be expressed in the written instrument of conveyance, and thereafter the mining, cutting, and removal of the minerals and timber so excepted and reserved shall be done only under and in obedience to the rules and regulations so expressed.

Sale of agricultural lands.

SEC. 10. That inasmuch as small areas of land chiefly valuable for agriculture may of necessity or by inadvertence be included in tracts acquired under this act, the Secretary of Agriculture may, in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain the location and extent of such areas as in his opinion may be occupied for agricultural purposes without injury to the forests or to stream flow and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and offer them for sale as homesteads at their true value, to be fixed by him, to actual settlers, in tracts not exceeding eighty acres in area, under such joint rules and regulations as the Secretary of Agriculture and the Secretary of the Interior may prescribe; and in case of such sale the jurisdiction over the lands sold shall, ipso facto, revert to the State in which the lands sold lie. And no right, title, interest, or claim in or to any lands acquired under this act, or the waters thereon, or the products, resources, or use thereof after such lands shall have been so acquired, shall be initiated or perfected, except as in this section provided.

Administration as National Forests.

SEC. 11. That, subject to the provisions of the last preceding section, the lands acquired under this act shall be permanently reserved, held, and administered as national forest lands under the provisions of section twenty-four of the act approved March third, eighteen hundred and ninety-one (volume twenty-six, Statutes at Large, page eleven hundred and three), and acts supplemental to and amendatory thereof. And the Secretary of Agriculture may from time to time

divide the lands acquired under this act into such specific National Forests and so designate the same as he may deem best for administrative purposes.

Jurisdiction of States.

SEC. 12. That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this act shall not be affected or changed by their permanent reservation and administration as national forest lands, except so far as the punishment of offenses against the United States is concerned, the intent and meaning of this section being that the State wherein such land is situated shall not, by reason of such reservation and administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State.

Five per cent of receipts to States.

SEC. 13.[1] That five per centum of all moneys received during any fiscal year from each National Forest into which the lands acquired under this act may from time to time be divided shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such National Forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such National Forest is situated: *Provided*, That when any National Forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein: *Provided further*, That there shall not be paid to any State for any county an amount equal to more than forty per centum of the total income of such county from all other sources.

Expenses of commission.

SEC. 14. That a sum sufficient to pay the necessary expenses of the commission and its members, not to exceed an annual expenditure of twenty-five thousand dollars, is hereby appropriated out of any money in the Treasury not otherwise appropriated. Said appropriation shall be immediately available, and shall be paid out on the audit and order of the president of the said commission, which audit and order shall be conclusive and binding upon all departments as to the correctness of the accounts of said commission.

Appropriation continued.

Act of August 10, 1912 (37 Stat., 269).

And in order to carry out the purposes mentioned in section three of the Act of March first, nineteen hundred and eleven, entitled "An Act to enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers," there is hereby appropriated and made available until expended so much of the maximum sums mentioned in said section for the fiscal years nineteen hundred and twelve to nineteen hundred and fifteen,

[1] Word "five" struck out and word "twenty-five" inserted in lieu thereof. Act of June 30, 1914 (38 Stat., 415), infra, p. 21.

inclusive, as shall remain unexpended at the close of each of said fiscal years.

Easements, reservations, etc.

Act of March 4, 1913 (37 Stat., 828).

That section nine of the Act of March first, nineteen hundred and eleven (Thirty-sixth Statutes, page nine hundred and sixty-one), entitled "An Act to enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers," be amended to read as follows:

"That such acquisition by the United States shall in no case be defeated because of located or defined rights of way, easements, and reservations, which, from their nature will, in the opinion of the National Forest Reservation Commission and the Secretary of Agriculture, in no manner interfere with the use of the lands so encumbered, for the purposes of the Act: *Provided*, That such rights of way, easements, and reservations retained by the owner from whom the United States receives title, shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection, and administration, and that such rules and regulations shall be expressed in and made part of the written instrument conveying title to the lands to the United States; and the use, occupation, and operation of such rights of way, easements, and reservations shall be under, subject to, and in obedience with the rules and regulations so expressed."

Fire protection.

Act of March 4, 1913 (37 Stat., 855).

For cooperation with any State or group of States in the protection from fire of the forested watersheds of navigable streams, under the provisions of section two of the Act of March first, nineteen hundred and eleven, entitled "An Act to enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers," $75,000: *Provided*, That any and all unused balance of the sum of $200,000 heretofore appropriated by the Act of March first, nineteen hundred and eleven, to enable the Secretary of Agriculture to carry out the purposes mentioned in said section two, remaining unexpended July first, nineteen hundred and thirteen, shall continue available until the end of the fiscal year nineteen hundred and fifteen for the purpose for which it was appropriated.

Amendment of section 13.

Act of June 30, 1914 (38 Stat., 415).

That section thirteen of the Act entitled "An Act to enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers," approved March

first, nineteen hundred and eleven (Thirty-sixth Statutes at Large, page nine hundred and sixty-three), is hereby amended by striking out the word "five" in the first line of said section, and inserting in lieu thereof the word "twenty-five."

RESERVATIONS FOR WATER-POWER SITES AND OTHER PURPOSES.

Power site and other withdrawals.

Act of June 25, 1910 (36 Stat., 847).

That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress.

SEC. 2 [as amended by the act of Aug. 24, 1912, 37 Stat., 497]. That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: *Provided further*, That this act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June twenty-fifth, nineteen hundred and ten: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of Congress.

SEC. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

DECISIONS.

Although a withdrawal of public land from sale by the Secretary of the Interior for public use in connection with a forest reservation was unauthorized at the time, it was validated by the continued recognition of the withdrawal and use of the land since act June

25, 1910, c. 421, sec. 1, 36 Stat., 847 (Comp. St., 1913, sec. 4523), expressly authorizes such withdrawals by the President. (United States *v.* Hodges et ux., 218 Fed., 87.)

The long continued practice of the President, with the acquiescence of Congress, of withdrawing in the public interest from entry or location, public land that otherwise would have been open to private acquisition, operated as a grant of implied power to the President to make temporary withdrawals in aid of proposed legislation. (United States *v.* Midwest Oil Co. et al., 236 U. S., 309.)

The existence of such power of the Executive is not negatived by the provisions of the act of June 25, 1910 (36 Stat., 847). (United States *v.* Midwest Oil Co. et al., *supra.*)

This act confers upon the President power to withdraw National Forest lands for the purposes therein stated. "Public lands," as used therein, includes National Forest lands. (Informal opinion of Attorney General to Secretary of Agriculture of Nov. 23, 1910.)

The Secretary of Agriculture has no authority to issue a power permit affecting National Forest lands withdrawn under this act for a power site (2 Sol. Op., 817); nor can he make leases, under the act of Feb. 28, 1899, or authorize other uses of lands similarly withdrawn around mineral and medicinal springs in Alaska. (2 Sol. Op., 870.)

WITHDRAWALS FOR THE PRESERVATION OF ANTIQUITIES.

Act of June 8, 1906 (34 Stat., 225).

SEC. 2. That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected: *Provided*, That when such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is hereby authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

SEC. 3. That permits for the examination of ruins, the excavation of archæological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and War to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulations as they may prescribe: *Provided*, That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.

SEC. 4. That the Secretaries of the Departments aforesaid shall make and publish from time to time uniform rules and regulations for the purpose of carrying out the provisions of this act.[1]

DECISION.

The purpose of this act is to permanently preserve objects of antiquity and historic interest for the instruction and enjoyment of the people, and the three Secretaries are not authorized to make regulations which will in effect prohibit access thereto by the general public. They can not, therefore, restrict access to those only who are accompanied by accredited guides and pay a reasonable charge for such services. (1 Sol. Op., 224.)

LAWS AFFECTING OPERATION.[2]

PERSONNEL.

Act of February 1, 1905 (33 Stat., 628).

SEC. 3. That forest supervisors and rangers shall be selected, when practicable, from qualified citizens of the States or Territories in which the said reserves, respectively, are situated.

Annual and sick leave.

Act of May 23, 1908 (35 Stat., 251).

The employees of the Department of Agriculture, outside of the city of Washington, may hereafter, in the discretion of the Secretary of Agriculture, be granted leave of absence not to exceed fifteen days in any one year, which leave may in exceptional and meritorious cases where such an employee is ill, be extended, in the discretion of the Secretary of Agriculture, not to exceed fifteen days additional in any one year.

Annual leave, Alaska employees.

Act March 4, 1913 (37 Stat., 828).

That hereafter the employees of the Forest Service who are assigned to permanent duty in Alaska may, in the discretion of the Secretary of Agriculture, without additional expense to the Government, be granted leave of absence not to exceed thirty days in any one year, which leave may, in exceptional and meritorious cases where such an employee is ill, be extended, in the discretion of the Secretary of Agriculture, not to exceed thirty days additional in any one year.

Aid in enforcement of State laws.

Act of May 23, 1908 (35 Stat., 251).

And hereafter officials of the Forest Service designated by the Secretary of Agriculture shall, in all ways that are practicable, aid in the enforcement of the laws of the States and Territories with regard to stock, for the prevention and extinguishment of forest fires, and for the protection of fish and game, and, with respect to National Forests, shall aid the other Federal bureaus and depart-

[1] Section 1 of the above act, which is purely penal in character, is printed under "Trespass," p. 109, infra. Printed copies of the uniform rules and regulations may be secured from the Interior Department.

[2] See also laws and decisions under "Fiscal Management and Appropriations."

ments, on request from them, in the performance of the duties imposed on them by law.

Compensation in event of injury or death.

Act of March 11, 1912 (37 Stat., 74).

That the provisions of the act approved May thirtieth, nineteen hundred and eight, entitled "An act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment," shall, in addition to the classes of persons therein designated, be held to apply to any artisan, laborer, or other employee engaged in any hazardous work under the Bureau of Mines or the Forestry Service of the United States: *Provided*, That this act shall not be held to embrace any case arising prior to its passage.

(The act above made applicable is printed next below.)

Compensation for injuries.

Act of May 30, 1908 (35 Stat., 556).

That when, on or after August first, nineteen hundred and eight, any person employed by the United States as an artisan or laborer in any of its manufacturing establishments, arsenals, or navy yards, or in the construction of river and harbor or fortification work or in hazardous employment on construction work in the reclamation of arid lands or the management and control of the same, or in hazardous employment under the Isthmian Canal Commission, is injured in the course of such employment such employee shall be entitled to receive for one year thereafter, unless such employee, in the opinion of the Secretary of Commerce and Labor, be sooner able to resume work, the same pay as if he continued to be employed, such payment to be made under such regulations as the Secretary of Commerce and Labor may prescribe: *Provided*, That no compensation shall be paid under this act where the injury is due to the negligence or misconduct of the employee injured, nor unless said injury shall continue for more than fifteen days. All questions of negligence or misconduct shall be determined by the Secretary of Commerce and Labor.

Compensation to widows and children.

SEC. 2. That if any artisan or laborer so employed shall die during the said year by reason of such injury received in the course of such employment, leaving a widow, or a child or children under sixteen years of age, or a dependent parent, such widow and child or children and dependent parent shall be entitled to receive, in such portions and under such regulations as the Secretary of Commerce and Labor may prescribe, the same amount, for the remainder of the said year, that said artisan or laborer would be entitled to receive as pay if such employee were alive and continued to be employed: *Provided*, That if the widow shall die at any time during the said year her portion of said amount shall be added to the amount to be paid to the remaining beneficiaries under the provisions of this section, if there be any.

Reports of injuries.

SEC. 3. That whenever an accident occurs to any employee embraced within the terms of the first section of this act, and which results in death or a probable incapacity for work, it shall be the

duty of the official superior of such employee to at once report such accident and the injury resulting therefrom to the head of his bureau or independent office, and his report shall be immediately communicated through regular official channels to the Secretary of Commerce and Labor. Such report shall state, first, the time, cause, and nature of the accident and injury and the probable duration of the injury resulting therefrom; second, whether the accident arose out of or in the course of the injured person's employment; third, whether the accident was due to negligence or misconduct on the part of the employee injured; fourth, any other matters required by such rules and regulations as the Secretary of Commerce and Labor may prescribe. The head of each department or independent office shall have power, however, to charge a special official with the duty of making such reports.

Affidavits in case of death.

SEC. 4. That in the case of any accident which shall result in death the persons entitled to compensation under this act or their legal representatives shall, within ninety days after such death, file with the Secretary of Commerce and Labor an affidavit setting forth their relationship to the deceased and the ground of their claim for compensation under the provisions of this act. This shall be accompanied by the certificate of the attending physician setting forth the fact and cause of death, or the nonproduction of the certificate shall be satisfactorily accounted for. In the case of incapacity for work lasting more than fifteen days, the injured party desiring to take the benefit of this act shall, within a reasonable period after the expiration of such time, file with his official superior, to be forwarded through regular official channels to the Secretary of Commerce and Labor, an affidavit setting forth the grounds of his claim for compensation, to be accompanied by a certificate of the attending physician as to the cause and nature of the injury and probable duration of the incapacity, or the nonproduction of the certificate shall be satisfactorily accounted for. If the Secretary of Commerce and Labor shall find from the report and affidavit or other evidence produced by the claimant or his or her legal representatives, or from such additional investigation as the Secretary of Commerce and Labor may direct, that a claim for compensation is established under this act, the compensation to be paid shall be determined as provided under this act and approved for payment by the Secretary of Commerce and Labor.

Medical examinations.

SEC. 5. That the employee shall, whenever and as often as required by the Secretary of Commerce and Labor, at least once in six months, submit to medical examination, to be provided and paid for under the direction of the Secretary, and if such employee refuses to submit to or obstructs such examination his or her right to compensation shall be lost for the period covered by the continuance of such refusal or obstruction.

Payment to beneficiaries.

SEC. 6. That payments under this act are only to be made to the beneficiaries or their legal representatives other than assignees, and shall not be subject to the claims of creditors.

Contracts to exempt from liability void.

SEC. 7. That the United States shall not exempt itself from liability under this act by any contract, agreement, rule, or regulation, and any such contract, agreement, rule, or regulation shall be pro tanto void.

Repeal.

SEC. 8. That all acts or parts of acts in conflict herewith or providing a different scale of compensation or otherwise regulating its payment are hereby repealed.

Removal of employees from classified service.

Act August 24, 1912 (37 Stat., 539).

SEC. 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same: * * * The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.

MATÉRIEL.

Buildings.

Act of March 4, 1915 (38 Stat., 1086).

General Expenses, Forest Service: * * * to erect necessary buildings: *Provided*, That the cost of any buildings erected shall not exceed $650.

(By the Agricultural appropriation act of Mar. 4, 1907 (34 Stat., 1269), the limit of cost for buildings was fixed at $1,000. This was reduced to $500 by the appropriation act of May 23, 1908 (35 Stat., 259), and increased to $650 by the act of Mar. 4, 1911 (36 Stat., 1235). The same limit of cost has been fixed by subsequent appropriation acts.

Construction of telephone lines.

Act of March 4, 1913 (37 Stat., 828).

* * * That hereafter the Secretary of Agriculture, whenever he may deem it necessary for the protection of the National Forests from fire, may permit the use of timber, free of charge, for the construction of telephone lines: * * *.

Construction of roads and trails.

Act of March 4, 1913 (37 Stat., 828).

That hereafter an additional ten per centum of all moneys received from the national forests during each fiscal year shall be available at the end thereof, to be expended by the Secretary of Agriculture for the construction and maintenance of roads and trails within the national forests in the States from which such proceeds are derived; but the Secretary of Agriculture may, whenever practicable, in the construction and maintenance of such roads, secure the cooperation or aid of the proper State or Territorial authorities in the furtherance of any system of highways of which such roads may be made a part; * * *

Construction of ranger stations on homestead lands.

Act of June 30, 1914 (38 Stat., 415).

* * * That hereafter no part of the appropriation made by this act shall be used for the construction, repair, maintenance, or use of buildings or improvements made for forest ranger stations within the inclosed fields of bona fide homestead settlers who have established residence upon their homestead lands prior to the date of the establishment of the forest reservation in which the homestead lands are situated, without the consent of the homesteader; * * *

Contributions toward cooperative work in forest investigations, protection, and improvement.

Act of June 30, 1914 (38 Stat., 415).

That hereafter all moneys received as contributions toward cooperative work in forest investigations, or the protection and improvement of the national forests, shall be covered into the Treasury and shall constitute a special fund, which is hereby appropriated and made available until expended, as the Secretary of Agriculture may direct, for the payment of the expenses of said investigations, protection, or improvements by the Forest Service, and for refunds to the contributors of amounts heretofore or hereafter paid in by them in excess of their share of the cost of said investigations, protection, or improvements: *Provided*, That annual report shall be made to Congress of all such moneys so received as contributions for such cooperative work.

Reimbursement for property lost, damaged, or destroyed.

Act of March 4, 1913 (37 Stat., 828).

That hereafter the Secretary of Agriculture is authorized to reimburse owners of horses, vehicles, and other equipment lost, damaged, or destroyed while being used for necessary fire fighting, trail, or official business, such reimbursement to be made from any available funds in the appropriation to which the hire of such equipment is properly chargeable.

Sale or exchange of animals.

Act of March 4, 1915 (38 Stat., 1095).

Hereafter the Secretary of Agriculture is authorized to sell in the open market or to exchange for other live stock such animals or

animal products as cease to be needed in the work of the department, and all moneys received from the sale of such animals or animal products or as a bonus in the exchange of the same shall be deposited in the Treasury of the United States as miscellaneous receipts.

Sale of condemned property.

Act of March 4, 1907 (34 Stat., 1256).

* * * and hereafter he [Secretary of Agriculture] may dispose of photographic prints (including bromide enlargements), lantern slides, transparencies, blue prints, and forest maps at cost and ten per centum additional, and condemned property or materials under his charge in the same manner as provided by law for other bureaus.

DECISIONS.[1]

Employees.

An officer or employee of the Federal Government is exempt from the operation of State legislation in so far as it may interfere with, or impair, his efficiency in performing the functions by which he is designed to serve that Government. Otherwise he does not cease to be subject to the laws of the State under whose jurisdiction he may be by reason of becoming a Federal officer or employee. (Sol. Op., Aug. 14, 1915.) See also 2 Sol. Op., 841.

It is the opinion of this office that the levy against a Federal officer or employee of a poll road tax, to be paid in money, does not hinder the performance of his duty to the United States Government, and that he is not entitled to exemption from the tax by reason of being such officer or employee. Whether, in such case, the officer or employee is liable to the tax depends upon the interpretation and application of the particular State statute which imposes it. (Id.)

In the case at hand, it appears that for a period of more than 12 months Mr. ——— has actually lived in ———, Idaho, has received the protection of the laws of the State, and has probably used its roads. Under these circumstances it is believed that he should pay the road poll tax of $4 assessed against him under the Idaho statute. (Id.)

Forest supervisors are not authorized to commute leave without pay to leave with pay. (1 Sol. Op., 73.)

An employee of this department can not receive compensation from it while on leave with pay from the Indian Service. (1 Sol. Op., 102.)

Forest officers, being charged with the duty of protecting the National Forests and invested with authority to make arrests, may carry concealed weapons, if necessary to the discharge of these duties, and in doing so are not subject to the State laws regarding the carrying of concealed weapons. (1 Sol. Op., 112.)

It is not the duty of forest officers directly to prosecute in a State court a person accused of violating State statutes by starting a fire which spreads to National Forest lands. In such case they would perform their full duty by calling the attention of the proper State officers to the alleged crimimnal offense, suggesting action and offering to aid in all proper ways. (2 Sol. Op., 693.)

[1] See also decisions under "Fiscal Management."

Buildings.

The limitation of $500 on the cost of buildings, contained under "General expenses," in the appropriation for 1911, applies also to ranger cabins erected under the appropriation for "Improvement of National Forests." (Comp. Dec. of May 23, 1911, unpublished.)

Under the provision in the appropriation act for 1912 an existing ranger cabin may be enlarged to meet the present needs of the Forest Service, provided the total cost of the enlarged building does not exceed $650. (2 Sol. Op., 679.)

The foregoing provision does not, however, authorize additional expenditures on old cabins merely for the purpose of making them more comfortable and commodious for the same number of rangers and the same amount of business as they were originally constructed to provide for. (2 Sol. Op., 679.)

One who has contracted for the construction of a ranger station may transfer such contract to another party; the United States may recognize the assignment and require the assignee to complete the ranger station. (2 Sol. Op., 1094.)

Roads.

An appropriation for the "improvement of the National Forest," with a provision that the money appropriated may be expended as the Secretary of Agriculture may direct, authorizes him to cooperate with county commissioners in the construction of a county road through a National Forest, by contributing money for that purpose. (1 Sol. Op., 154.)

Telephone lines.

The Forest Service may legally enter into an agreement for the cooperative construction of a telephone line where under the terms of such agreement the United States is to retain title to all timber taken from the National Forests used either in the construction or maintenance of said line, the other contracting party to furnish all other materials and labor necessary. (2 Sol. Op., 999.)

Where telephone lines belonging to the Forest Service have been constructed over public lands, in the patents issued to such lands there will be inserted a clause excepting from the conveyance the telephone line and all appurtenances thereto, together with the right of the United States, its officers, agents, or employees, to maintain, operate, repair, or improve such telephone line so long as needed or used for or by the United States. (Letter (D–17542) of Assistant Secretary Sweeney, dated Aug. 31, 1915, directed to the Commissioner of the General Land Office.)

Sale of condemned property.

Government property in the nature of fixtures, such as cabins, fences, etc., may be sold as personal property either before or after the land to which they are attached is released from withdrawal for administrative use of the Forest Service. (1 Sol. Op., 272.)

Logs from deserted cabins on National Forests may be sold by the Forest supervisors under authority of Revised Statutes, section 3618. (1 Sol. Op., 109.)

Illegal occupancy of ranger station sites.

The United States may maintain a suit in equity for an interlocutory mandatory injunction and a final decree of abatement to restrain continuous trespass and waste upon public land which has been withdrawn from sale and devoted to governmental use for a ranger station in connection with a forest reservation. (United States *v.* Hodges et ux., 218 Fed., 87.)

Payment of State fees on shipment of horses.

Payment of cost of mallein test for glanders required on interstate shipment of ranger's horses not authorized by General Order No. 145. (2 Sol. Op., 1025.)

LANDS.

CLAIMS WITHIN NATIONAL FORESTS.

To the Commissioner, chief of field service, chiefs of field divisions, registers and receivers, General Land Office, Department of the Interior; the Forester, district foresters, Forest Service, the Solicitor, and district assistants to the Solicitor, Department of Agriculture.

GENTLEMEN: Better to effectuate cooperation in protecting the interests of the Government and settlers and other claimants to lands within National Forests, the following order is made, effective on and after October 1, 1915, superseding order of November 25, 1910 (39 L. D., 374):

1. Hereafter, when a person files application to make entry, or to amend an existing entry, embracing lands within a National Forest, basing the right of entry, or amendment, on settlement prior to the establishment of the forest, the register and receiver will require such person to file with his application a statement under oath, in duplicate, containing his name and address, description and character of the land involved, the date he established residence on the land, his absence from the land, kind and character of improvements placed thereon, and the amount of land cleared and cultivated, accompanied by the affidavit, in duplicate, of at least one disinterested person, corroborating the statement. The register and receiver will immediately forward the duplicate of such statement and affidavit to the supervisor of the National Forest in which the lands are embraced, with information as to the date of filing the application, the date of filing the township plat of survey covering the land, and any other facts of record affecting the application, and will suspend action on the application for 60 days, or upon the request of the forest supervisor, where climatic or other conditions require, for such time, not to exceed 6 months, as will enable him to make an examination of the claim, unless in the meantime they shall receive notice of no protest, as hereinafter provided.

2. The register and receiver, in issuing notice of intention to make final proof upon claims, either mineral or nonmineral, within a National Forest, shall immediately furnish a copy thereof to the supervisor in charge of such forest, and, other than to publish such notice and receive final proof, will, except in mineral cases as herein-

after prescribed, suspend action on the final proof for 60 days from date thereof, or, upon the request of the forest supervisor, where climatic or other conditions require, for such time, not to exceed 6 months, as will enable him to make an examination of the claim, unless in the meantime they shall receive notice of no protest as hereinafter provided. In each case, however, where the register and receiver, upon examination of the final proof at any time after its submission, find it to be incurably defective, the same will be rejected and the Forest Service so advised, notwithstanding the time within which a protest may be filed hereunder has not expired.

3. The forest supervisor, upon receipt of the statement mentioned in paragraph 1, or the notice mentioned in paragraph 2, will at once make investigation of the claim and will submit to the district forester a report thereon, unless immediate investigation is impossible because of climatic or other conditions, when an extension of time will be requested as provided in paragraphs 1 and 2 hereof, and the investigation will be made and the report submitted as soon as possible within the period of extension. The district forester will promptly consider the report and if of opinion that no protest should be filed, will so advise the register and receiver. If the district forester is of opinion that a protest should be made, he will transmit the papers to the district assistant to the Solicitor, who will prepare for his signature a protest, not under oath or corroborated, in which shall be plainly and briefly stated the grounds upon which the protest is based. The protest shall be filed in triplicate with the register and receiver of the proper local land office.

4. Upon receipt of the protest, the register and receiver shall immediately forward a copy thereof to the Commissioner of the General Land Office, in accordance with rule 4 of the Rules of Practice, and in every case immediately issue the notice required by rule 5 thereof, accompanied by a copy of the protest, stating that unless the adverse party appears and answers the allegations of said notice within 30 days after service thereof, the allegations of the protest shall be taken as confessed. Upon the filing of the answer, the register and receiver shall set a date for a hearing, after consultation with the district assistant to the Solicitor, and notify parties as provided in the Rules of Practice. Upon failure of the claimant to appear at the hearing the allegations of the protest will be taken as confessed. Hearings shall be conducted in accordance with the Rules of Practice. In other than mineral cases action upon the application and upon the final proof, which may be offered in the usual manner, shall be suspended pending the final determination of the protest, except as provided in paragraph 2 hereof for the disposition of incurably defective proof. In mineral applications for patent the proof should be considered on its merits, and if found regular, certificate issued, but the claimant should be advised in such case that patent will be witheld by the General Land Office pending determination of the protest.

5. If no protest be filed within the time limit as provided in paragraphs 1 and 2 hereof, the register and receiver shall take appropriate action upon the application or the final proof. But in no case, in the absence of the filing of a protest or a no-protest notice as hereinabove provided, shall patent issue until the Commissioner of the General Land Office is notified by, or ascertain from, the Forester that the claim will not be protested as provided in paragraph 6 hereof.

6. A protest may be initiated against any claim, mineral or nonmineral, embracing lands within National Forests at any time prior to patent, by the Solicitor, or the district assistant to the Solicitor, of the Department of Agriculture, filing in the local land office, in triplicate, a complaint signed by the Forester or the district forester, not under oath or corroborated, setting forth clearly and briefly the grounds of the protest. Upon receipt of such complaint, the register and receiver shall forward a copy thereof to the Commissioner of the General Land Office, issue the notice required by rule 5 of the Rules of Practice, accompanied by a copy of the complaint, and arrange for a hearing, if applied for, as provided in paragraph 4 hereof.

7. In all hearings affecting lands or claims within a National Forest the district assistant to the Solicitor will be entered of record as appearing on behalf of the Government, and will conduct the Government's side of the case.

8. Forest lieu and school selection cases will be handled by the chiefs of field division of the General Land Office in like manner as heretofore. The forest officers will, upon request of the chiefs of field division, render any assistance possible in the making of investigations, and the district assistants to the Solicitor of the Department of Agriculture will cooperate with the chiefs of field division in the conduct of hearings in such cases, and thereafter will take action in like manner as heretofore, including the taking of appeals to the Secretary of the Interior.

9. In all Government cases before registers and receivers involving lands or claims within a National Forest, the district assistant to the Solicitor shall be served with copies of all answers, appeals, motions, orders, and decisions required to be noted under the rules in cases of private contests. The proper law officers of the Department of Agriculture shall also have a right of appeal from any decision by the Commissioner of the General Land Office, and to file motion for rehearing in the Department of the Interior, or take other like action in the same manner as a private contestant and shall receive like notices of proceedings and decisions: *Provided, however*, That the Department of Agriculture shall not be required to take formal appeals from decisions of registers and receivers.

10. Chiefs of field division and special agents will not hereafter take action in regard to any claims within a National Forest, except as provided in paragraph 8 hereof, unless specifically directed by the Commissioner of the General Land Office or the Secretary of the Interior: *Provided*, That chiefs of field division may, on request of a district forester, assign mineral examiners to assist in the investigation of cases involving mining claims.

11. Costs of hearings will be paid from the appropriation for expenses of hearings in land entries as now provided for other Government contests. Prior to June 1 of each year the district assistant to the Solicitor will mail to the chief of field division in whose division the lands involved lie, an estimate of the funds necessary to cover the hearings during the first quarter of the ensuing fiscal year. Like action will be taken on the first day of each month which immediately precedes the other quarters of the fiscal year. Such estimates should be accompanied by a list of the cases to be heard, which should in-

clude the names of claimants, local land office, and serial number of entry or application, and character of entries or filings. The chief of field division will transmit the lists and estimates received from the district assistant to the Solicitor to the Commissioner of the General Land Office at the same time he submits his estimates for hearings involving lands in his district outside of National Forests. When these lists and estimates are received in the General Land Office the appropriation will be allotted for the quarter and each chief of field division will be advised of the amount which will be allowed for forest cases and he will advise the district assistant to the Solicitor thereof. Payment for the expenses of hearings from the appropriation so allotted will be made by special disbursing agents upon proper vouchers, as is now provided for Government contests in cases outside of National Forests, but such vouchers must be approved by the district assistant to the Solicitor and by the chief of field division before payment is made.

Respectfully,

FRANKLIN K. LANE,
Secretary of the Interior.
DAVID F. HOUSTON,
Secretary of Agriculture.

WASHINGTON, D. C., *August 5, 1915.*

AGRICULTURAL LANDS IN NATIONAL FORESTS.

Forest homestead act of June 11, 1906 (34 Stat., 233).

The Secretary of Agriculture may, in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain as to the location and extent of lands within permanent or temporary forest reserves, except the following counties in the State of California, Inyo, Tulare, Kern, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego: which are chiefly valuable for agriculture, and which, in his opinion, may be occupied for agricultural purposes without injury to the forest reserves, and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and file the lists and descriptions with the Secretary of the Interior, with the request that the said lands be opened to entry in accordance with the provisions of the homestead laws and this act.

Upon the filing of any such list or description the Secretary of the Interior shall declare the said lands open to homestead settlement and entry in tracts not exceeding one hundred and sixty acres in area and not exceeding one mile in length, at the expiration of sixty days from the filing of the list in the land office of the district within which the lands are located, during which period the said list or description shall be prominently posted in the land office and advertised for a period of not less than four weeks in one newspaper of general circulation published in the county in which the lands are situated: *Provided*, That any settler actually occupying and in good faith claiming such lands for agricultural purposes prior to January first, nineteen hundred and six, and who shall not have abandoned the same, and the person, if qualified to make a homestead entry, upon whose application the land proposed to be entered was examined and

listed, shall each in the order named, have a preference right of settlement and entry: *Provided further*, That any entryman desiring to obtain patent to any lands described by metes and bounds entered by him under the provisions of this act shall, within five years of the date of making settlement, file, with the required proof of residence and cultivation, a plat and field notes of the lands entered, made by or under the direction of the United States surveyor general, showing accurately the boundaries of such lands, which shall be distinctly marked by monuments on the ground, and by posting a copy of such plat, together with a notice of the time and place of offering proof, in a conspicuous place on the land embraced in such plat during the period prescribed by law for the publication of his notice of intention to offer proof, and that a copy of such plat and field notes shall also be kept posted in the office of the register of the land office for the land district in which such lands are situated for a like period; and further, that any agricultural lands within forest reserves may, at the discretion of the Secretary, be surveyed by metes and bounds, and that no lands entered under the provisions of this act shall be patented under the commutation provisions of the homestead laws, but settlers, upon final proof, shall have credit for the period of their actual residence upon the lands covered by their entries.

Additional homestead rights.

SEC. 2. That settlers upon lands chiefly valuable for agriculture within forest reserves on January first, nineteen hundred and six, who have already exercised or lost their homestead privilege, but are otherwise competent to enter lands under the homestead laws, are hereby granted an additional homestead right of entry for the purposes of this act only, and such settlers must otherwise comply with the provisions of the homestead law, and in addition thereto must pay two dollars and fifty cents per acre for lands entered under the provisions of this section, such payment to be made at the time of making final proof on such lands.

Black Hills Forest Reserve.

SEC. 3. That all entries under this act in the Black Hills Forest Reserve shall be subject to the quartz or lode mining laws of the United States, and the laws and regulations permitting the location, appropriation, and use of the waters within the said forest reserves for mining, irrigation, and other purposes; and no titles acquired to agricultural lands in said Black Hill Forest Reserve under this act shall vest in the patentee any riparian rights to any stream or streams of flowing water within said reserve; and that such limitation of title shall be expressed in the patents for the lands covered by such entries.

SEC. 4. That no homestead settlements or entries shall be allowed in that portion of the Black Hills Forest Reserve in Lawrence and Pennington Counties in South Dakota [except the following described townships in the Black Hills Forest Reserve, in Pennington County, South Dakota, to wit: Townships one north, one east; two north, one east; one north, two east; two north, two east; one south, one east; two south, one east; one south, two east; and two south, two east, Black Hills meridian], except to persons occupying lands therein prior to January first, nineteen hundred and six, and the provisions

of this act shall apply to the said counties in said reserve only so far as is necessary to give and perfect title of such settlers or occupants to lands chiefly valuable for agriculture therein occupied or claimed by them prior to the said date, and all homestead entries under this act in said counties in said reserve shall be described by metes and bounds survey.

(Section 4 is amended to read as above by the act of February 8, 1907 (34 Stat., 883).)

Settlement forbidden.

SEC. 5. That nothing herein contained shall be held to authorize any future settlement on any lands within forest reserves until such lands have been opened to settlement as provided in this act, or to in any way impair the legal rights of any bona fide homestead settler who has or shall establish residence upon public lands prior to their inclusion within a forest reserve.

(The act of May 30, 1908, 35 Stat., 554, provides that the above act "be amended by striking out of section 1 the following words: 'Except the following counties in the State of California: Inyo, Tulare, Kern, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego.'" It will be noted that while the excepting words are stricken out the names of San Luis Obispo and Santa Barbara Counties are not stricken out.)

Certain lands in Lawrence and Pennington Counties, S. Dak., excepted from the operation of section 4 of the act of June 11, 1906, but continued subject to all other provisions of said act. (Act July 3, 1912, 37 Stat., 188.)

Status of lands listed.

Act of August 10, 1912 (37 Stat., 269).

For the expenditure under the direction of the Secretary of Agriculture for survey and listing of lands within forest reserves chiefly valuable for agriculture and describing the same by metes and bounds, or otherwise, as required by the act of June eleventh, nineteen hundred and six, and the act of March third, eighteen hundred and ninety-nine, thirty-five thousand dollars: *Provided, however*, That any such servey and the plat and field notes thereof paid for out of this appropriation shall be made by an employee of the Forest Service under the direction of the United States Surveyor General, but no land listed under the act of June eleventh, nineteen hundred and six, shall pass from the forest until patent issues.

Segregation of agricultural lands.

Act of August 10, 1912 (37 Stat., 269).

That the Secretary of Agriculture is hereby directed and required to select, classify, and segregate, as soon as practicable, all lands within the boundaries of National Forests that may be opened to settlement and entry under the homestead laws applicable to the National Forests, and the sum of twenty-five thousand dollars is hereby appropriated for the purposes aforesaid.

Act of March 4, 1913 (37 Stat., 828).

That the Secretary of Agriculture is hereby directed and required to select, classify, and segregate, as soon as practicable, all lands

within the boundaries of National Forests that may be opened to settlement and entry under the homestead laws applicable to the national forests, and the sum of $100,000 is hereby appropriated for the purposes aforesaid: *Provided*, That not to exceed $35,000 of this sum may be expended under the direction of the Secretary of Agriculture for the examination, survey, and platting of certain lands now listed or to be listed within National Forests chiefly valuable for agriculture and describing such lands by metes and bounds, as required by the act of June eleventh, nineteen hundred and six (Thirty-fourth Statute, page two hundred and thirty-three), and the act of March third, eighteen hundred and ninety-nine (Thirtieth Statute, page ten hundred and ninety-five), and hereafter such surveys, and the plats and field notes thereof, shall be made by employees of the Forest Service, to be designated by the United States surveyor general, and such surveys and the plats and field notes thereof shall be approved by the United States surveyor general: *Provided further*, That any unexpended balance of an appropriation of $35,000 to be expended "under the direction of the Secretary of Agriculture for survey and listing of lands within the Forest reserves chiefly valuable for agriculture and describing the same by metes and bounds or otherwise," and so forth, provided by the Act of August tenth, nineteen hundred and twelve, entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and thirteen," be, and the same is, hereby continued and made available for and during the fiscal year ending June thirtieth, nineteen hundred and fourteen, for the purpose of this appropriation; * * *.

Act of June 30, 1914 (38 Stat., 415).

For the selection, classification, and segregation of lands within the boundaries of national forests that may be opened to homestead settlement and entry under the homestead laws applicable to the National Forests, $100,000;

For the survey and platting of certain lands, chiefly valuable for agriculture, now listed or to be listed within the national forests, under the Act of June eleventh, nineteen hundred and six (Thirty-fourth Statutes, page two hundred and thirty-three), and the Act of March third, eighteen hundred and ninety-nine (Thirtieth Statutes, page one thousand and ninety-five), as provided by the Act of March fourth, nineteen hundred and thirteen, $85,000: *Provided*, That any unexpended balance of an appropriation of $35,000 to be expended "under the direction of the Secretary of Agriculture for survey and listing of lands within the forest reserves chiefly valuable for agriculture and describing the same by metes and bounds or otherwise," and so forth, provided by the Act of March fourth, nineteen hundred and thirteen, entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and fourteen," be, and the same is hereby, continued and made available for and during the fiscal year ending June thirtieth, nineteen hundred and fifteen, for the purpose of this appropriation;

Act of March 4, 1915 (38 Stat., 1099).

For the selection, classification, and segregation of lands within the boundaries of National Forests that may be opened to homestead

settlement and entry under the homestead laws applicable to the National Forests, $100,000:

For the survey and platting of certain lands, chiefly valuable for agriculture, now listed or to be listed within the National Forests, under the act of June eleventh, nineteen hundred and six (Thirty-fourth Statutes, page two hundred and thirty-three), and the Act of March third, eighteen hundred and ninety-nine (Thirtieth Statutes, page ten hundred and ninety-five), as provided by the Act of March fourth, nineteen hundred and thirteen, $85,000: *Provided*, That any unexpended balance of an appropriation of $85,000 to be expended "for the survey and platting of certain lands, chiefly valuable for agriculture," and so forth, provided by the Act of June thirtieth, nineteen hundred and fourteen, entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and fifteen," be, and the same is hereby, continued and made available for and during the fiscal year ending June thirtieth, nineteen hundred and sixteen, for the purpose of this appropriation;

DECISIONS.

Authority of Secretary to list lands.

Authority conferred by act of June 11, 1906 (34 Stat., 233), to list agricultural lands "not needed for public purposes," authorizes the Secretary of Agriculture to refuse to list lands within National Forests when needed for public recreation purposes, although such lands are of an agricultural character. (Opinion of the Solicitor in connection with City of Los Angeles case, dated Mar. 27, 1914.)

Lands within an abandoned military reservation included within a National Forest are subject to listing and entry under the act of June 11, 1906 (34 Stat., 233), without regard to the act of July 5, 1884 (23 Stat., 103), providing for the appraisal and sale of land in abandoned military reservations. (43 L. D., 33.)

Lands included in a temporary withdrawal with a view to the creation or enlargement of a National Forest, and which are chiefly valuable for agriculture, may be listed for entry under this act. (28 Op. Atty. Gen., 424, 522.)

The Secretary of Agriculture has authority, on his own motion, to list lands for entry under the act of June 11, 1906; and where lands are so listed by him, no preference right is awarded by the statute nor can be claimed except by settlers who were actually occupying the lands prior to January 1, 1906. (Benton *v.* Lynes, 42 L. D., 175.)

The act of June 11, 1906, contemplates that the lands which the Secretary of Agriculture may, in his discretion, list with the Secretary of the Interior with request that they be opened to entry under the homestead laws, shall be lands which are subject to homestead entry. (Benton *v.* Lynes, 42 L. D., 175.)

The act of June 11, 1906, specifically declares that upon the listing of lands thereunder, "by the Secretary of Agriculture," the Secretary of the Interior shall declare such lands open to settlement and entry, but that they shall not be subject to settlement and entry until the expiration of 60 days from the filing of the list in the local office; and these requirements are mandatory and jurisdictional and can not

be dispensed with by the Land Department. (Elizabeth Davis, 43 L. D., 522.)

The act of June 11, 1906, authorizing the opening of agricultural lands within National Forests to homestead entry, does not authorize either the Secretary of the Interior or the Secretary of Agriculture to impose upon entrymen thereunder, or insert in patents issued upon the lands, any conditions, limitations, restrictions, or reservations not specifically authorized by existing laws. (M. R. Hibbs, 42 L. D., 408.)

Effect of application for listing.

No rights are acquired by the filing of an application for the listing of lands under the act of June 11, 1906, while such lands are embraced in a prior uncanceled homestead entry. (Benton *v.* Lynes, 42 L. D., 175.)

Effect of listing and entry.

The provision in the Agricultural appropriation act of August 10, 1912 (37 Stat., 269), that "no lands listed * * * shall pass from the forest until patent issues," taken in connection with the words preceding them, mean only that the lands shall not pass by virtue of the listing, and they do not limit the power of the President to eliminate lands by proclamation or Executive order. (Solicitor to the Forester, Aug. 31, 1912.)

Prior to the enactment of the provision quoted in the preceding paragraph, the Comptroller of the Treasury and the Solicitor had both made the following ruling:

Lands once listed under the act of June 11 are segregated from the National Forest, and the Forest Service is not authorized to expend its appropriations for surveying the same. (Op. Comp. Treas., Oct. 21, 1910 (unpublished); 1 Sol. Op., 363.)

Lands within a National Forest listed under the act of June 11, 1906, are not subject to disposition under the enlarged homestead act of February 19, 1909 (35 Stat., 639). (Burtis F. Oatman, 39 L. D., 604.)

A settler upon unsurveyed lands subsequently included in a National Forest may elect to stand upon his rights as a settler and await survey of the township, when he may make entry of 160 acres or less under the general homestead laws, or he may, without waiting for the regular survey, apply for listing of the lands under the act of June 11, 1906; and where he applies for listing under that act and makes entry of such part of the land embraced in his settlement as is found to be of the character subject to listing and opened to entry under the act he thereby waives all claim to the remainder and can not, after survey of the township, make entry under the general homestead law for the entire area covered by his settlement claim. (Hans Hansen Hedemark, 43 L. D., 237.)

The words "chiefly valuable for agriculture" as used in this statute mean merely more valuable for agriculture than for forestry purposes and a listing of the lands involves no determination as to their mineral or nonmineral character. (1 Sol. Op., 188.)

One who in good faith settled upon lands prior to their withdrawal for forestry purposes and who makes entry thereof under the act of

June 11, 1906, is entitled to claim credit for residence from the date of such settlement. (John T. Brunskill, 42 L. D., 475.)

A survey and entry of lands in a National Forest under the act of June 11, 1906, need not include the entire body of land applied for, listed, and opened to entry under that act, but the entryman may take any portion thereof in compact form. (John W. Hickcox, 42 L. D., 573.)

Form of area listed.

Any forest reserve homestead listed under the act of June 11, 1906, which does not exceed 160 acres in area and which may be contained in a square mile the sides of which extend in cardinal directions will be regarded as within the provisions of said act limiting such homestead entries to "not exceeding 160 acres in area and not exceeding one mile in length." (Instructions, 42 L. D., 20.)

The form of agricultural tracts within forest reserves listed for entry under the act of June 11, 1906, is wholly within the discretion of the Secretary of Agriculture, so long as the inhibitions contained in the act are not violated; and the Land Department has no jurisdiction to prescribe the form of an entry under that act, provided it is not more than 1 mile in length and does not embrace more than 160 acres. (Zera W. Ballinger, 42 L. D., 148.)

Any tract of agricultural land within a forest reserve, not exceeding 160 acres in area, which may be contained in a square mile the sides of which extend in cardinal directions is within the purview of the act of June 11, 1906. (Zera W. Ballinger, 42 L. D., 148.)

It is no objection to a homestead untry under the act of June 11, 1906, that it extends across a township line and lies partly in each of two adjoining townships. (John W. Hickcox, 42 L. D., 573.)

Elimination of lands listed.

Where by change of boundary lands are eliminated from a National Forest which had prior thereto been listed by the Secretary of Agriculture for restoration under the act of June 11, 1906, upon the application of a qualified homesteader, or had been settled upon prior to January 1, 1906, and the settlement since maintained, the preference right secured to such applicant or settler under said act is not terminated or defeated by such elimination. (Instructions, 42 L. D., 425.)

Where lands in a National Forest embraced within a pending entry are restored to the public domain, and the entry is permitted to remain intact, publication of the usual formal notice of restoration should not be made. (Frank A. Devault, Jr., 42 L. D., 471.)

Occupancy under permit.

One who applies to have land within a National Forest listed for opening under the act of June 11, 1906, and is thereafter granted a special-use permit to occupy the land, is entitled, in submitting proof upon his entry made in pursuance of such listing, to credit for residence since the dates of the special-use permit. (Robert G. McDougall, 43 L. D., 186; see also J. Paul Holden, 43 L. D., 525.)

GENERAL HOMESTEAD LAWS.

Rights of way over homestead claims.

SEC. 2288. Any bona fide settler under the preemption, homestead, or other settlement law shall have the right to transfer by warranty against his own acts any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, telegraph, telephones, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim. (As amended Mar. 3, 1905, 33 Stat., 991.)

Persons entitled to claims.

SEC. 2289. Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres. (As amended Mar. 3, 1891, 26 Stat., 1098.)

Mode of procedure.

SEC. 2290. That any person applying to enter land under the preceding section shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person, except himself, or herself, and upon filing such affidavit with the register or receiver on payment of five dollars, when the entry is of not more than eighty acres, and on payment of ten dollars, when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified. (As amended Mar. 3, 1891, 26 Stat., 1098.)

Residence and cultivation.

SEC. 2291. No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law. (Amended by act of June 6, 1912 (37 Stat., 127), infra, p. 44.)

Rights of infant children.

SEC. 2292. In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children, for the time being, have their domicile, sell the land for the benefit of such infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States on the payment of the office fees and sum of money above specified.

Persons in military or naval service.

SEC. 2293. In case of any person desirous of availing himself of the benefits of this chapter, but who, by reason of actual service in the military or naval service of the United States, is unable to do the personal preliminary acts at the district land office which the preceding sections require; and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a bona fide improvement and settlement have been made, such person may make the affidavit required by law before the officer commanding in the branch of the service in which the party is engaged, which affidavit shall be as binding in law, and with like penalties, as if taken before the register or receiver; and upon such affidavit being filed with the register by the wife or other representative of the party, the same shall become effective from the date of such filing, provided the application and affidavit are accompanied by the fee and commissions as required by law.

Proofs and fees.

SEC. 2294. That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising Federal

jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated: *Provided*, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law. That if any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, willfully, or corruptly swear falsely to any material matter contained in said proofs, affidavits, or oaths he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register. That the fees for entries and for final proofs, when made before any other officer than the register and receiver, shall be as follows:

"For each affidavit, twenty-five cents.

"For each deposition of claimant or witness, when not prepared by the officer, twenty-five cents.

"For each deposition of claimant or witness, prepared by the officer, one dollar.

"Any officer demanding or receiving a greater sum for such service shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by a fine of not exceeding one hundred dollars." (As amended Mar. 4, 1904, 33 Stat., 59.)

Record of applications.

SEC. 2295. The register of the land office shall note all applications under the provisions of this chapter, on the tract books and plats of his office, and keep a register of all such entries, and make return thereof to the General Land Office, together with the proof upon which they have been founded.

Liability of claim for debt.

SEC. 2296. No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor.

Absence for six months.

SEC. 2297. If, at any time after the filing of the affidavit, as required in section twenty-two hundred and ninety, and before the expiration of the five years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government: *Provided*, That where there

may be climatic reasons the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe. (As amended Mar. 3, 1881, 21 Stat., 511.) (This section amended by act June 6, 1912, 37 Stat., 123.)

Limited to quarter section.

SEC. 2298. No person shall be permitted to acquire title to more than one quarter section under the provisions of this chapter.

Commutation.

SEC. 2301. Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of section twenty-two hundred and eighty-nine from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months, and the provision of this section shall apply to lands on the ceded portion of the Sioux Reservation by act approved March second, eighteen hundred and eighty-nine, in South Dakota, but shall not relieve said settlers from any payments now required by law. (As amended Mar. 3, 1891, 26 Stat., 1098.)

Mineral lands not subject to entry.

SEC. 2302. No distinction shall be made in the construction or execution of this chapter on account of race or color; nor shall any mineral lands be liable to entry and settlement under its provision.

Special provisions in favor of soldiers and sailors.

Revised Statutes sections 2300; 2304 and 2305, both as amended by act of March 1, 1901 (31 Stat., 487); 2306 and sundry civil appropriation act of August 18, 1894, sec. 1 (28 Stat., 397); 2307; 2308 and act of June 16, 1898 (30 Stat., 473); 2309.

Three-year homestead law.

Act of June 6, 1912 (37 Stat., 123).

That section twenty-two hundred and ninety-one and section twenty-two hundred and ninety-seven of the Revised Statutes of the United States be amended to read as follows:

"SEC. 2291. No certificate, however, shall be given or patent issued therefor until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead his widow, or in case of her death his heirs or devisee, or in case of a widow making such entry her heirs or devisee, in case of her death, proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States, then in such case he, she, or they, if at that time citizens of the United States, shall be

entitled to a patent, as in other cases provided by law: *Provided*, That upon filing in the local land office notice of the beginning of such absence, the entryman shall be entitled to a continuous leave of absence from the land for a period not exceeding five months in each year after establishing residence, and upon the termination of such absence the entryman shall file a notice of such termination in the local land office, but in case of commutation the fourteen months' actual residence as now required by law must be shown, and the person commuting must be at the time a citizen of the United States: *Provided*, That when the person making entry dies before the offer of final proof those succeeding to the entry must show that the entryman had complied with the law in all respects to the date of his death and that they have since complied with the law in all respects, as would have been required of the entryman had he lived, excepting that they are relieved from any requirement of residence upon the land: *Provided further*, That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry, and until final proof, except that in the case of entries under section six of the enlarged-homestead law double the area of cultivation herein provided shall be required, but the Secretary of the Interior may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation: *Provided*, That the above provision as to cultivation shall not apply to entries under the act of April twenty-eighth, nineteen hundred and four, commonly known as the Kinkaid Act, or entries under the act of June seventeenth, nineteen hundred and two, commonly known as the reclamation act, and that the provisions of this section relative to the homestead period shall apply to all unperfected entries as well as entries hereafter made upon which residence is required: *Provided*, That the Secretary of the Interior shall, within sixty days after the passage of this act, send a copy of the same to each homestead entryman of record who may be affected thereby, by ordinary mail to his last known address, and any such entryman may, by giving notice within one hundred and twenty days after the passage of this act, by registered letter to the register and receiver of the local land office, elect to make proof upon his entry under the law under which the same was made without regard to the provisions of this act. [But see next below, from sundry civil appropriation act Aug. 24, 1912.]

"SEC. 2297. If, at any time after the filing of the affidavit as required in section twenty-two hundred and ninety and before the expiration of the three years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office that the person having filed such affidavit has failed to establish residence within six months after the date of entry, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government: *Provided*, That the three years' period of residence herein fixed shall date from the time of establishing actual permanent residence upon the land: *And provided further*, That where there may be climatic reasons, sickness, or other unavoid-

able cause, the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe."

Right of election to make proof.

Act of August 24, 1912 (37 Stat., 455).

That the failure of a homestead entryman to give notice of election of making his proof as required by the act of June sixth, nineteen hundred and twelve, being an act to amend sections [twenty-] two hundred and ninety-one and [twenty-] two hundred and ninety-seven of the Revised Statutes of the United States, relating to homesteads, shall not in anywise prejudice his rights to proceed in accordance with the law under which such entry was made.

Settlement rights, time for filing.

Act of May 14, 1880, sec. 3 (21 Stat., 140).

SEC. 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the preemption laws to put their claims on record, and his right shall relate back to the date of settlement the same as if he settled under the preemption laws.

Canceled or relinquished entries reinstated.

Act of March 3, 1911 (36 Stat., 1084).

That all homestead entries which have been canceled or relinquished, or are invalid solely because of the erroneous allowance of such entries after the withdrawal of lands for national forest purposes, may be reinstated or allowed to remain intact, but in the case of entries heretofore canceled applications for reinstatement must be filed in the proper local land office prior to July first, nineteen hundred and twelve.

SEC. 2. That in all cases where contests were initiated under the provisions of the act of May fourteenth, eighteen hundred and eighty, prior to the withdrawal of the land for national forest purposes, the qualified successful contestants may exercise their preference right to enter the land within six months after the passage of this act.

Second homestead and desert-land entries.

Act of September 5, 1914 (38 Stat., 712).

That any person otherwise duly qualified to make entry or entries of public lands under the homestead or desert-land laws, who has heretofore made, or may hereafter make, entry under said laws, and who, through no fault of his own, may have lost, forfeited, or abandoned the same, or who may hereafter lose, forfeit, or abandon same, shall be entitled to the benefits of the homestead or desert-land laws as though such former entry or entries had never been made: *Provided*, That such applicant shall show to the satisfaction of the Secretary of the Interior that the prior entry or entries were made in good faith, were lost, forfeited, or abandoned because of

matters beyond his control, and that he has not speculated in his right nor committed a fraud or attempted fraud in connection with such prior entry or entries.

See also act of June 5, 1900, section 2 (31 Stat., 267); act of May 22, 1902, section 2 (32 Stat., 203); act of February 8, 1908 (35 Stat., 6); act of February 3, 1911 (36 Stat., 896).

Limitation to 320 acres under all land laws, excepting mineral laws.

Act August 30, 1890 (26 Stat., 391).
Act March 3, 1891, section 17 (26 Stat., 1095).

Free homesteads on certain Indian lands opened to settlement.

Act May 17, 1900 (31 Stat., 179).
Act June 26, 1901 (31 Stat., 740).

Additional homestead entries.

Act March 2, 1889, section 6 (25 Stat., 854).
Act April 28, 1904, sections 2 and 3 (33 Stat., 527).

Enlarged homesteads in certain States.

Act February 19, 1909 (35 Stat., 639).
Act June 17, 1910 (36 Stat., 531).

Contests and cancellation of claim. Preference right.

Act May 14, 1880, section 2 (21 Stat., 140), as amended by act July 26, 1892 (27 Stat., 270).
Act March 3, 1911, section 2 (36 Stat., 1084).

Commutation provisions.

Act June 3, 1896, section 2 (29 Stat., 197).
Act May 29, 1908, sections 9 and 10 (35 Stat., 465).

Homestead by married woman.

Act June 6, 1900 (31 Stat., 683).

Settlers who become insane.

Act June 8, 1880 (21 Stat., 166).

Leaves of absence.

Act March 2, 1889 (25 Stat., 864), and various acts of local application.

Final-proof notices.

Act March 3, 1879 (20 Stat., 472).
Act March 2, 1889, section 7 (25 Stat., 854).

Distinction between offered and unoffered lands abolished.

Act May 18, 1898 (30 Stat., 418).

Relinquishments.

Act May 14, 1880 (21 Stat., 140).

General provisions of the homestead laws extended to certain lands in the Yellowstone (now Shoshone) National Forest, etc.

Act March 15, 1906 (34 Stat., 62).

Homesteads in former Siletz Indian Reservation.

Act August 15, 1894 (28 Stat., 286, p. 326).
Act March 4, 1911 (36 Stat., 1356).

Homestead laws extended to Alaska, with modifications, etc.

Act May 14, 1898, section 1 (30 Stat., 409), as amended by act March 3, 1903 (32 Stat., 1028).

Lands in the Black Hills Forest Reservation, settled upon and improved before September 19, 1898, may be entered under the homestead laws, etc.

Sundry civil appropriation act of March 3, 1899 (30 Stat., 1074, p. 1095).

DECISIONS.

Lands subject to settlement and entry.

Land not susceptible of cultivation or other agricultural use can not be entered under the homestead law; and an affidavit charging such facts is sufficient basis for a hearing. (Davis *v.* Gibson, 38 L. D., 265.)

Land which is so mountainous, rough, broken, heavily timbered, and of such poor quality that it is impossible of cultivation is not subject to homestead entry. (Winninghoff *v.* Ryan, 40 L. D., 342.)

One who makes homestead entry of land so heavily timbered that the greater part is not subject to cultivation except at a very great expense for clearing, assumes a burden commensurate with such undertaking to establish his bona fides in making the entry for homestead purposes. (Benjamin Chainey, 42 L. D., 510.)

The fact that land is covered with valuable timber does not exclude it from entry under the homestead law, where of such character that it would be suitable for agricultural use if the timber were removed; but land of a character not adaptable to any agricultural use is not subject to homestead entry. (Finley *v.* Ness, 38 L. D., 394; see also Davis *v.* Gibson, 38 L. D., 265.)

Lands having little or no agricultural value and chiefly valuable as containing the entrance to an extensive and beautiful cavern is not enterable under the homestead laws by one whose acts show that he desires the land for the control of the cavern and not for a bona fide agricultural home. (South Dakota Min. Co. *v.* McDonald, 30 L. D., 357.)

Qualifications of entrymen.

Section 2289 of the Revised Statutes specifically declares that one who is the proprietor of more than 160 acres of land is disqualified to make homestead entry, and the Land Department is therefore without power of invoking the maxim de minimis non curat lex to hold so qualified one who owns more than 160 acres, notwithstanding the excess may be less than 1 acre. (In this case homestead entryman owned 160 acres and a town lot 50 by 142 feet.) (Sorli *v.* Berg, 40 L. D., 259.)

One who enters into an oral agreement to purchase land and makes part payment of the purchase price is not the proprietor of land within the meaning of the provisions of the homestead law declaring disqualified to make homestead entry one who is the proprietor of more than 160 acres where under the laws of that State such oral agreement and part payment do not constitute such part performance as will take the contract out of the statute of frauds. (Earhart *v.* Rein, 38 L. D., 613.)

An absolute conveyance of property, although made to defraud creditors, is, as between the parties to the deed, a valid conveyance of the title, and not merely a conveyance in trust; and one vested with title under such conveyance to more than 160 acres is disqualified to make homestead entry. (Martha J. Westfall, 40 L. D., 209.)

Heirs.

On the death of a homesteader leaving widow and heirs the widow takes the homestead right of her husband free from any claim on behalf of the heirs, and is vested with full power to complete the entry for her own benefit or relinquish the same, if she so elects. (Steberg *v.* Hanelt, 26 L. D., 436.)

On the death of the entryman the right goes to the widow, or in case of her death to the heirs or devisee, who may complete the entry by either residing on the land or cultivating the same for the required period, but need not do both. (Heirs of Stevenson *v.* Cunningham, 32 L. D., 650; see also Meeboer *v.* Heirs of Schut, 35 L. D., 335.)

The heirs of a deceased homestead entryman, who during his lifetime failed to comply with the law, may complete the entry by either residing upon or cultivating the land for the full period of five years, if sufficient of the lifetime of the entry remains for that purpose, or may commute upon a showing of residence and cultivation for a period of 14 months, but can not commute upon a showing of cultivation alone. (Wilson *v.* Heirs of Smith, 37 L. D., 519.)

Upon the death of an entryman those upon whom the statute casts the right to perfect title under the entry are merely required to continue cultivation and improvement of the land, so that failure to cultivate in any given year subjects the entry to contest and possible cancellation. (Hon *v.* Martinas, 41 L. D., 119.) This case overrules Heirs of Stevenson *v.* Cunningham, Meeboer *v.* Heirs of Schut, and Wilson *v.* Heirs of Smith, supra, so far as in conflict.

Squatters on unsurveyed lands.

Settlement may be made under the homestead laws by all persons qualified to make either an original or a second homestead entry, * * * and in order to make settlement a settler must personally go upon and improve or establish residence on the land he desires. By making settlement in this way, the settler gains the right to enter the land settled upon as against all other persons, but not as against the Government, should the land be withdrawn by it for other purposes. (Par. 4, Suggestions to Homesteaders and Persons Desiring to Make Homestead Entries, approved Apr. 20, 1911.)

The qualifications requisite on the part of a homesteader must exist at the date of entry and if, after settlement and prior to entry, the settler for any reason becomes disqualified, the privilege gained by settlement is lost. (Brown *v.* Cagle, 30 L. D., 8.)

The widow of a homestead settler who had not prior to his death established bona fide residence on the land must thereafter both reside on and cultivate the land in her own right at least in the presence of a forest withdrawal. (Susan A. Leonard, 40 L. D., 429.)

Residence.

The object of the homestead laws is the donation of public lands to persons seeking to establish and maintain agricultural homes thereon, conditioned upon actual occupancy of the same as a home and cultivation and improvement of the land; and mere occasional visits to the claim do not meet the requirements of the law. (Oscar O. Reeg, 40 L. D., 206.)

The homestead law contemplates that an entry thereunder shall constitute the entryman's home and family homestead to the exclusion of a home elsewhere; and mere personal presence of the entryman upon the land does not meet the requirements of the law as to residence where he maintains a family residence elsewhere. (Benjamin Chainey, 42 L. D., 510.)

The homestead law contemplates a continuous compliance both as to residence and cultivation, beginning with the date of entry. (Hon *v.* Martinas, 41 L. D., 119.)

The law contemplates that the entryman shall make the land his permanent home to the exclusion of a home elsewhere; and an entry merely for the purposes of a summer home during three or four months of the year while maintaining a home elsewhere the rest of the time is invalid. (George W. Harpst, 36 L. D., 166.)

A homestead entry made with no intention of establishing a permanent bona fide home upon the land, but merely with a view to submitting a showing sufficient to support commutation, must be canceled, notwithstanding the proof shows full technical compliance with respect to inhabitancy of the land for the period ordinarily required in commutation cases. (Gilbert Satrang, 37 L. D., 683, syllabus.)

Credit for constructive residence during official employment will not be allowed to homestead entrymen appointed to office on or after March 1, 1909. Such credit will be given only to entrymen who establish residence on their claims and are thereafter elected to office. (37 L. D., 449.)

Commutation—Residence.

The purpose of the homestead law is the donation of the public lands to actual settlers seeking to establish bona fide homes thereon, and the provision respecting commutation in no wise changes that purpose, but merely affords a means of commuting further residence to cash in meritorious cases lawfully initiated and prosecuted to the date of commutation. (Gilbert Satrang, 37 L. D., 683, syllabus.)

Credit for constructive residence during official employment will not be allowed in the commutation of homestead entries. Commutation may be allowed only upon a showing of actual and substantially continuous presence upon the land for the required period. (Ed. Jenkins, 37 L. D., 434.)

The fact that lands may be chiefly valuable for the timber thereon does not exclude them from settlement and entry under the homestead law, but it must clearly appear that the settlement or entry was made in good faith, for the purpose of making the tract a home, and where the entryman in such case submits commutation proof and pays a price to cut short the period of residence required by the homestead law, he invites scrutiny and challenges judgment as to the good faith of his entry. (Patten *v.* Quackenbush, 35 L. D., 561.)

Commutation proof upon homestead entries showing less than 14 months' residence should not be received, except in cases where statutory authority exists to the contrary. (Charles O. Asp, 41 L. D., 505.)

Cultivation.

Cultivation is an essential requisite to compliance with the homestead law, and a hearing may be had on a charge of noncultivation,

even when unaccompanied by a sufficient charge of nonresidence. (Norton *v.* Ackley, 29 L. D., 561.)

Under the three-year homestead law a mere breaking of the soil will not meet the terms of the statute, but such breaking or stirring of the soil must also be accompanied by planting or the sowing of seed and tillage for a crop other than native grasses. Circular of July 15, 1912 (41 L. D., 103, 105).

The homestead law "requires not only bona fide residence upon the land, but actual cultivation. Claimant's cultivation is grossly inadequate to meet the requirements of the law, and in its inadequacy casts further doubt upon the bona fides of the residence. The cutting of wild hay from a homestead entry can not be considered seriously as cultivation of the land. This is particularly true when the part of the land from which the hay was not cut has not been used for grazing purposes; and also when the total cultivation during the life of the entry amounts to not more than half an acre planted to crops and an additional acre plowed. A pretense of cultivation can not satisfy the requirements of the law any more than a pretense of residence." (Ingelev J. Glomset, 36 L. D., 255.)

The use of land for the raising of hogs is an agricultural use, and where the land is better adapted to that use than tillage of the soil, meets the requirements of the homestead law with respect to cultivation. (George Hathaway, 38 L. D., 33, syllabus.)

Cultivation must be continuous from date of entry. (Hon *v.* Martinas, 41 L. D., 119.)

One who makes homestead entry of land subject and generally known to be subject to climatic or other conditions making compliance with the requirements of the law more or less difficult, takes upon himself a burden commensurate with such conditions; and so long as he retains the entry he must comply with what the law requires in the matter of residence, improvement and cultivation. (Fred H. Parker, 42 L. D., 96.)

Summer fallowing can not be accepted as the equivalent of cultivation under the homestead laws. (Matthew L. Kagle, 41 L. D., 531.)

Merely remaining upon public land without bona fide cultivation and reasonably diligent effort in the way of improvement is not the maintenance of such a settlement as the law contemplates shall reserve a tract from other appropriation—especially at the hands of a prior claimant who makes first application to enter the same. (Stephenson *v.* Pashgian, 42 L. D., 113.)

Where a claimant for a tract of public land appeals to the letter of the law as against an adverse claimant, he must himself stand or fall by the letter of the statute. (Id.)

The planting and care of fruit trees, in the development of a fruit farm, is cultivation to agricultural crops within the contemplation and purview of both the general homestead law and the three-year homestead act of June 6, 1912. (Ferdinand J. Clifford, 42 L. D., 535.)

Planting a crop with no expectation or intention of securing a return therefrom is not compliance with the homestead law in the matter of cultivation. (Reas *v.* Ludlow, 22 L. D., 205.)

Contest and protest.

In this case there is no individual adverse claimant, but the Government, by its Chief Executive, has claimed the land within the boundaries of said reservation for a specific public purpose (i. e., a forest reservation), excepting only the lands coming within the above category; and the Executive order, reserving the land for a specific public purpose must be held to be at least as effective upon the claims of settlers as would be the adverse claim of one who wished the land for his own use. *Held*, therefore, that a settler who failed to file his application for entry within three months after the plat of survey was filed in the local land office, was precluded from making entry in the presence of an intervening forestry withdrawal. (Joshua L. Smith, 31 L. D., 57; see also Hattie E. Bradley, 34 L. D., 191, 193, and Esther F. Filer, 36 L. D., 360, 363.)

A decision by the Secretary of the Interior that a telegram and letter from a special agent of the General Land Office, alleging fraud in a number of commuted entries and suggesting delay in issuing patents pending further examination, constitutes a "protest" in the meaning of the act of March 3, 1891 (26 Stat., 1099), requiring issuance of patent within two years after final receipt when no "contest or protest is pending," is not reviewable on an application for a writ of mandamus. (Fisher *v.* United States ex rel., Grand Rapids Timber Co. (Ct. of Appeals D. C.), 40 L. D., 278; see also Jacob A. Harris, 42 L. D., 611.)

Section 2 of the act of March 3, 1911 (36 Stat., 1084), validating certain homestead entries in national forests applies to all contests initiated under the act of May 14, 1880, prior to the forestry withdrawal, where cancellation of the entry results therefrom, regardless of whether the cancellation was procured prior or subsequent to the withdrawal. (Sante Fe Pacific R. R. Co., 39 L. D., 611.)

Miscellaneous.

The excepting clause of the Olympic National Forest proclamation ceases to apply in behalf of a settler who fails to make entry or filing for the lands within the time allowed by law. (Arnold Wink, 31 L. D., 47.)

On the relinquishment of a homestead entry within the San Francisco Mountains Forest Reserve, the lands become a part of the forest reserve and are not open to subsequent entry. (E. S. Gosney, 29 L. D., 44.)

Where a homestead entryman was in default at the time of reservation of the lands for forest purposes, he can not thereafter cure the default in the face of the reservation. (Svan Hoglund, 43 L. D., 538.)

Commutation of a homestead entry included within a forest reservation can not be allowed unless it be shown that at the date of the reservation the homestead law was being complied with by the entryman. (Id.)

By the excepting clause in the proclamation of May 6, 1905, creating the Klamath Forest Reserve, it was intended to except from the reservation those legal entries upon which the entrymen were at that time complying with the law and continued to comply with the law after the reservation was made. (Id.)

MINING LAWS.

Basic provisions of the mining laws.

SEC. 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

Mineral lands open to purchase.

SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Size of lode claims.

SEC. 2320. Mining claims upon veins or lodes of quartz or other rocks in place bearing gold, silver, cinnibar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other.

Locators' rights.

SEC. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior

parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

Owners of tunnel sites.

SEC. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid, but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

Regulations of miners; assessment work, etc.

SEC. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his pro-

portion of the expenditure required by this section his interest in the claim shall become the property of his co-owners who have made the required expenditures. [*Provided*, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two. Amendment of Jan. 22, 1880, 21 Stat., 61.]

How patents obtained.

SEC. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. [*Provided*, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits re-

quired to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits. Amendment of Jan. 22, 1880, 21 Stat., 61.]

Description of claim in patent.

SEC. 2327. The description of vein or lode claims upon surveyed lands shall designate the location of the claims with reference to the lines of the public survey, but need not conform therewith; but where patents have been or shall be issued for claims upon unsurveyed lands, the surveyors general, in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the true location of such claims as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based, and surveyors general in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto. (As amended April 28, 1904: 33 Stat., 545.)

Placer claims.

SEC. 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

Size of placer claim.

SEC. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide preemption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

Conformity to surveys.

SEC. 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May,

eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or preemption purposes.

Period of possession required.

SEC. 2332. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

Payment and proceedings for patent.

SEC. 2333. Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim and twenty-five feet of surface on each side thereof. The remainder of the placer claim or any placer claim not embracing any vein or lode claim shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

Survey of claim.

SEC. 2334. The surveyor-general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to

employ any United States deputy surveyor to make the survey. The Commissioner of the General Land Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated for the publication of mining notices in such district, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the other papers in the case, to the Commissioner of the General Land Office.

Verification of affidavits.

SEC. 2335. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party can not be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

Rights where veins intersect.

SEC. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

Mill sites.

SEC. 2337. Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

Lands containing salt deposits.

Act of January 31, 1901 (31 Stat., 745).

That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer-mining claims: *Provided*, That the same person shall not locate or enter more than one claim hereunder.

Lands valuable for building stone.

Act of August 4, 1892 (27 Stat., 548).

That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer-mineral claims: *Provided*, That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

Lands valuable for oils.

Act of February 11, 1897 (29 Stat., 526).

That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided*, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.

Other provisions of the mining laws.

Proof of citizenship. (Rev. Stat., sec. 2321.)

Proceedings on adverse claim. (Rev. Stat., sec. 2326; act Mar. 3, 1881, 21 Stat., 505; act Apr. 26, 1882, 22 Stat., 49.)

Pending applications, existing rights preserved. (Rev. Stat., sec. 2328.)

Local legislation for working, drainage, etc. (Rev. Stat., sec. 2338.)

Rights to water and ditches confirmed. (Rev. Stat., sec. 2339.)

Patents, etc., subject to vested rights of way and water rights. (Rev. Stat., sec. 2340.)

Homesteads on lands classed as mineral. (Rev. Stat., sec. 2341, 2342.)

Mineral laws not applicable to Michigan, Wisconsin, Minnesota, Missouri, and Kansas. (Rev. Stat., sec. 2345; act May 5, 1876, 19 Stat., 52.)

Mineral laws extended over Wichita lands, Oklahoma. (Act of Mar. 2, 1895, 28 Stat., 876.)

Expenditures in tunnels applicable to lodes. (Act of Feb. 11, 1876, 18 Stat., 315.)

Mining laws in Alaska.

Mining laws extended; mining districts, records, etc. (Act of May 17, 1884; sec. 8, 23 Stat., 24; act June 6, 1900, secs. 15 and 26, 31 Stat., 321, 326, 330.)

Mining rights extended to native citizens of Canada. (Act of May 14, 1898, 30 Stat., 415.)

Labor and improvements. (Act of Mar. 2, 1907, 34 Stat., 1243.)

Extension of time for filing adverse claims and suits. (Act of June 7, 1910, 36 Stat., 459.)

Amendments and modifications of mining laws in Alaska. (Act of Aug. 1, 1912, 37 Stat., 242.)

DECISIONS.

Rights of locators.

The Secretary of Agriculture has authority to require the locators of mining claims within National Forests to permit the United States, or its vendees, means of ingress and egress over their claims for the purpose of removing timber, and administering and protecting the National Forests. (Sol. Op., Nov. 4, 1915.)

Under the act of June 4, 1897, authorizing the location of mining claims within forest reserves, the rights of the locator are substantially the same as those of a locator on the public lands under section 2322, Revised Statutes. (United States *v.* Rizzinelli (C. C. A.), 182 Fed., 675.)

The general mining laws are operative with respect to deposits of gold within the limits of National Forests or power-site withdrawals the same as with respect to like deposits elsewhere on the public domain. (Cataract Gold Mining Co. et al., 43 L. D., 248.)

The owner of a mining claim has the right of exclusive possession and enjoyment, but for mining purposes alone (citations infra.). Prior to patent he can not maintain a liquor saloon on his claim (United States *v.* Rizzinelli, 182 Fed., 675); or sell timber or hay therefrom (Teller *v.* United States, 113 Fed., 273; 1 Sol. Op., 188). Nor, on the other hand, can the Secretary of Agriculture authorize any use of the claim, even for purposes foreign to mining, against the objection of the owner, but if the latter waives his right of exclusive possession by arrangement with a power permittee, the power permit becomes effective on the land, and the Government may impose a charge for its use. (2 Sol. Op., 763; see also 2 Sol. Op., 865.)

Where, however, timber on a mining claim, by reason of insect infestation, is a menace to the surrounding National Forest timber, the Government may sell it. (Lewis *v.* Garlock—United States, intervenor, 168 Fed., 153.)

Powers and duties of Land Department.

The Government is a party in interest in every case involving the disposal of the public lands, and when such lands are sought to be acquired under any of the public-land laws (in this case the mineral laws) it is not only within the power but it is the duty of the Land Department to see that the lands are disposed of according to law, and not in violation or evasion of the law. (Grand Canyon Ry. Co. *v.* Cameron, 36 L. D., 66.)

Should the question of the character of the land be properly presented at any time before patent, it would manifestly be the duty of

the [Interior] Department to ascertain whether or not the land contains "valuable deposits" in an ex parte case or a contest. The fact that a claim is contested would not change the character of the land to be taken under this law. In any event, it must contain "valuable deposits." (The Royal K Placer, 13 L. D., 86–89.)

The Land Department has full authority of its own motion or at the instance of others to inquire into and determine whether mining locations within the National Forests were preceded by the requisite discovery of mineral and whether the lands are of the character subject to occupation and purchase under the mining laws, notwithstanding the locator has not applied for patent; and if the locations are found invalid the lands covered thereby will be administered as part of the National Forest without regard to such locations. (H. H. Yard et al., 38 L. D., 59.) Reversed in decision of October 24, 1913, Nichols and Smith case, La Grande, 07670, but pending on motion for rehearing.

Lands belonging to the United States can not be lawfully located or title thereto by patent legally acquired under the mining laws for purposes or uses foreign to those of mining or the development of minerals; and should it be shown in case of an application for mineral patent that the claims applied for were not located in good faith for mining purposes, but for the purpose of securing control of a trail upon lands belonging to the United States, susceptible of such control by reason of the surrounding physical conditions, so as to place the claimant in a position to charge for the privilege of using the trail, and thereby to prevent the free and unrestricted use thereof by the public, such claims would be fraudulent from their inception and patents thereto could not be obtained under the mining laws. (Grand Canyon Ry. Co. *v.* Cameron, 36 L. D., 67.)

Lands subject to mineral entry—Discovery.

If the land contains gold or other valuable deposits in loose earth, sand, or gravel which can be secured with profit, that fact will satisfy the demand of the Government as to the character of the land as placer ground, whatever the incidental advantages it may offer to the applicant for a patent. (United States *v.* Iron Silver Mining Co., 128 U. S., 673, 684.)

A mining location is not perfected or completed until a discovery of mineral within the limits of the claim has been made; and where no discovery was made prior to the filing of an application for patent, such application and the proceedings thereunder, being without legal foundation, can not be recognized as a basis for mineral entry or patent. (Bay City Oil Co. et al. *v.* Alvarado Oil Co., 43 L. D., 397.)

To attach mineral character to public lands it is not sufficient to demonstrate that adjacent lands are mineral in character. Outcroppings on the land itself are more or less evidentiary, but by no means conclusive of its mineral character, and off the land their value as evidence rapidly lessens. (United States *v.* Kostelak et al., 207 Fed., 447.)

To constitute a discovery sufficient to initiate a mining right it is necessary that mineral-bearing rock in place be found under such circumstances and of such character that a reasonably prudent man, not necessarily a skilled miner, would be justified in expending time

and money in developing it, with the reasonable expectation of finding ore in paying quantities. (United States *v.* Lavenson, 206 Fed., 755.)

To constitute a valid discovery upon a lode mining claim three elements are necessary: (1) There must be a vein or lode of quartz or other rock in place; (2) the quartz or other rock in place must carry gold or some other valuable mineral deposit; and (3) the two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine. (Jefferson-Montana Copper Mines Co., 41 L. D., 320.)

To sustain an application for mineral patent, as against persons alleging the land to be nonmineral, it must appear that mineral exists in quantity and value sufficient to subject it to disposal under the mining laws. In other words, the land must be shown to contain valuable deposits of mineral, which means more than a mere discovery that might be sufficient to support a location in the first instance. (Brophy *v.* O'Hare, 34 L. D., 596.)

Under the established rule that when public land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, the finding of colors of gold, even though fairly good prospects of gold, in placer prospecting, is not sufficient to establish the mineral character of the ground and sustain a mineral location thereof as against a prior entry under the homestead laws. (Steele *v.* Tanana Mines R. Co., 148 Fed., 678, syllabus.)

Land not shown to contain valuable minerals of the kinds usually developed by mining operations, but which is chiefly valuable because it controls the entrance to a cavern containing crystalline deposits, specimens of which are sold for profit, is not subject to location under the mineral laws. (South Dakota Mining Co. *v.* McDonald, 30 L. D., 357.)

While the statute does not prescribe what is necessary to constitute a discovery under the mining laws of the United States, it is essential that it gives reasonable evidence of the fact either that there is a vein or lode carrying precious minerals, or if it be claimed as placer ground that it is valuable for such mining; and where there is not enough in what a locator claims to have seen to justify a prudent person in the expenditure of money and labor in exploitation this court will not overthrow a finding of the lower court that there was no discovery. (Chrisman *v.* Miller, 197 U. S., 313, syllabus.)

The exposure of substantially worthless deposits on the surface of a lode mining claim; the finding of mere surface indications of mineral within its limits; the discovery of valuable mineral deposits outside the claim, or deductions from established geological facts relating to it, one or all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral deposit exists within the claim, will neither suffice as a discovery thereon, nor be entitled to be accepted as the equivalent thereof. (East Tintic Consolidated Mining Claim, 40 L. D., 271; see same case, 43 L. D., 79.)

The exposure of substantially valueless deposits on the surface of a lode mining claim, in themselves insusceptible of practicable develop-

ment, but which taken in connection with other established geological and mineralogical conditions in the district lead to the hope or belief that a valuable mineral deposit exists within the claim, does not constitute the discovery of a vein or lode within the meaning of the law nor afford a valid basis for a lode location. (Rough Rider and other Lode Claims, 41 L. D., 243; see same case, 42 L. D., 584.)

Country rock in which it is claimed "kidneys" of copper ore may be expected to be found, is not itself a lode within the meaning of the mining laws, and the exposure of such rock within the limits of a lode claim, which may or may not contain mineral, does not constitute the discovery of a vein or lode within the meaning of the law, and is not a sufficient basis to support a lode location. (Rough Rider and other Lode Claims, 41 L. D., 255; see same case, 42 L. D., 584.)

The location of a lode mining claim must be supported by the discovery of the vein or lode within the limits of the claim located; and the exposure of substantially worthless deposits on the surface of a claim, which from observation and geological inference are supposed to indicate that other and unconnected veins or lodes lie at a greater depth, does not constitute a discovery within contemplation of the law, and is not a sufficient basis for a valid location. (East Tintic Consolidated Mining Co. (on rehearing), 41 L. D., 255; see 43 L. D., 79.)

Vein or lode "as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." "In general, it may be said that a lode or vein is a body of mineral or mineral body of rock, within defined boundaries, in the general mass of the mountain." (Iron Silver Mining Co. *v.* Cheesman, 116 U. S., 529, 534.)

Discovery is a prerequisite to initiation of title under the mining laws. (Bakersfield Fuel & Oil Co., 39 L. D., 460.)

To constitute a valid discovery upon a lode mining claim for which patent is sought there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes. (East Tintic Consolidated Mining Claim, 40 L. D., 271; 43 L. D., 79; see also Waskey *v.* Hammer, 223 U. S., 85.)

Deposits of slate, which do not carry deposits of any other valuable mineral, when found in quantity and quality sufficient to render the land more valuable on that account than for agricultural purposes, are subject to appropriation under the placer mining laws. (Roy McDonald et al., 40 L. D., 7.)

Valuable deposits of onyx in well-defined fissures in rock in place are subject to appropriation under the lode mining laws. (Utah Onyx Development Co., 38 L. D., 504.)

The act permitting entry under the placer mining laws of lands chiefly valuable for building stone applies only to deposits of stone of special or peculiar value for structural work, such as the erection of houses, office buildings, and such other recognized commercial uses as demand and will secure the profitable extraction and marketing of the product. It does not apply to stone suitable only for building foundations, fences, abutments, or other rough work and which is widely distributed over large regions of territory. (Ex parte Stanislaus Electric Power Co., 41 L. D., 655.)

A deposit of clay suitable for use in the manufacture of Portland cement does not render the land containing it subject to disposition under the placer mining laws. (Battancourt *v.* Fitzgerald, 40 L. D., 620.)

A deposit of brick clay is not mineral within the meaning of the mining laws. (King et al. *v.* Bradford, 31 L. D., 108.)

Deposits of gravel and sand, suitable for mixing with cement for concrete construction, but having no particular property or characteristic giving them special value, and deriving their chief value from proximity to a town, do not render the land in which they are found mineral in character within the meaning of the mining laws, or bar entry under the homestead laws, notwithstanding the land may be more valuable on account of such deposits than for agricultural purposes. (Zimmerman *v.* Brunson, 39 L. D., 310.)

A placer location of 160 acres made by eight persons, which is invalid for lack of discovery, can not be perfected after its transfer to a single individual by a subsequent discovery. (H. H. Yard et al., 38 L. D., 59.)

A single discovery of mineral sufficient to authorize the location of a placer claim does not conclusively establish the mineral character of all the land included in the claim, and the question as to the character of the land is open to investigation by the land department at any time until patent issues. (American Smelting & Refining Co., 39 L. D., 299.)

In determining the character of land embraced in a placer location, 10-acre tracts, normally in square form, are the units of investigation and determination, and if any such area is found to be nonmineral it should be eliminated from the claim. (American Smelting & Refining Co., 39 L. D., 299.)

Location and boundaries—Conflicts—Errors of description.

The position of conflicting mining claims and their positions with relation to each other, must be determined as the claims are defined and established on the ground, and all errors of description must give way thereto. (United States Mining Co. *v.* Wall, 39 L. D., 546.)

Improvements.

Labor and improvements are deemed to have been made upon a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development—that is, to facilitate the extraction of the metals—though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or at a distance from the claim itself, as where the labor is performed for the turning of a stream or the introduction of water, or where the improvement consists in the construction of a flume to carry off the débris or waste material. (Smelting Co. *v.* Kemp, 104 U. S., 636, 655; Copper Glance Lode, 29 L. D., 542.)

Labor or improvements to be credited toward meeting the requirements of the statute as to expenditures on a mining claim must actually promote or directly tend to promote the extraction of mineral from the land, or forward or facilitate the development of the claim as a mine or mining claim, or be necessary for its care or the

protection of the mining works thereon or pertaining thereto. (Highland Marie and Manilla Mining Claims, 31 L. D., 37.)

An expenditure of $500 in labor or improvements to be available as a basis for patent to a mining claim must have been made upon or for the benefit of the location for which patent is sought; and the work performed upon and for the benefit of a 20-acre placer location is not available as a patent expenditure for the benefit of a maximum location of 160 acres by eight persons embracing the 20-acre location and 140 acres of entirely new ground. (Charles H. Head et al., 40 L. D., 135.)

In determining whether the requisite expenditure of $500 in labor or improvements has been made upon a mining claim for which patent is asked, the proper test is whether the reasonable value of the work performed or improvements relied upon amounts to that sum. Proof of the actual amount paid or of the actual number of days spent in prosecution of such work is not conclusive. (Samuel B. Beatty et al., 40 L. D., 486.)

Improvements made prior to the location of the mining claim or claims to which their value is sought to be accredited are not available toward meeting the requirements of the statute relative to expenditures. (Tough Nut No. 2 and Other Lode Claims, 36 L. D., 9; see also C. A. Sheldon et al., 43 L. D., 152.)

No part of a wagon road lying partly within and partly without the limits of a group of mining claims, constructed and used for the purpose of transporting machinery and supplies to, and ore from, the group is available toward meeting the requirement of the statute respecting expenditures prerequisite to patent. (Fargo Group No. 2 Lode Claims, 37 L. D., 404; Modified Tacoma etc. Co., 43 L. D., 128.)

Mill site.

The continued use or occupancy for mining or milling purposes is necessary to maintain a valid mill-site location. (Weber *v.* Carroll, unreported; decided by the Secretary of the Interior, January 16, 1905.)

A mill-site location may be contiguous with the side of a lode claim. (Yankee Mill Site, 37 L. D., 674.)

A mill site is required to be used or occupied distinctly and explicity for *mining* or *milling* purposes in connection with the lode claim with which it is associated * * *. Some step in or directly connected with the process of *mining* or some feature of *milling* must be performed upon or some recognized agency of operative *mining* or *milling* must occupy the mill site at the time patent thereto is applied for to come within the purview of the statute. (Alaska Copper Co., 32 L. D., 128.)

A decision by the Department of the Interior canceling a mill-site entry, without passing upon the validity of the mill-site claim or location or the claimant's possessory rights or ownership in the premises, in no wise affects the legal rights, if any, the claimant may have in the mill-site claim; and where the land is included within the limits of a National Forest, but excepted from the operation of the proclamation creating the same, by reason of the mill-site claim,

the subsequent cancellation of the mill-site entry does not have the effect to make the land a part of the National Forest or deprive the Secretary of the Interior of jurisdiction to reinstate the canceled entry with a view to the issuance of patent thereon. (Alaska Copper Company et al., 43 L. D., 257.)

COAL-LAND LAWS.

Entry of coal lands.

SEC. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Preemption of coal lands.

SEC. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

Time of filing claims.

SEC. 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

Only one entry allowed.

SEC. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the

benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

Conflicting claims.

SEC. 2351. In case of conflicting claims upon coal-lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

Rights reserved.

SEC. 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper.

Surface patents on good-faith entries of coal lands.

Act of March 3, 1909 (35 Stat., 844), for the protection of the surface rights of entrymen.

Agricultural entry for surface of lands classified or withdrawn as coal lands. (Not applicable to Alaska.)

Act of June 22, 1910 (36 Stat., 583), to provide for agricultural entry of coal lands.
Act of April 30, 1912 (37 Stat., 105), supplementing above.

Coal-land laws extended to Alaska.

Act of June 6, 1900 (31 Stat., 658).

Amendments to coal-land laws in Alaska.

Act of April 28, 1904 (33 Stat., 525).
Act of May 28, 1908 (35 Stat., 424).

DECISIONS.

Coal lands are mineral lands within the meaning of the act of June 4, 1897, and as such are subject to entry, when found in forest reserves, the same as other mineral lands within such reserves. (T. P. Crowder, 30 L. D., 92; see also Brown *v.* N. P. R. R. Co., 31 L. D., 29.)

Citizens in need of coal for their own use, who have not initiated claims under coal-land laws, have no authority to take any coal from

National Forest lands, either with or without a permit from the Secretary of Agriculture. (1 Sol. Op., 477.)

The act of April 28, 1904 (33 Stat., 525), amending the coal-land laws, as theretofore extended to Alaska, did not remove the restriction as to the quantity of such lands enterable by one person or association, but merely provided a method by which unsurveyed coal lands in Alaska could be acquired subject to the limitations of the general coal-land laws. (The Cunningham claims (United States *v.* Schofield et al., 41 L. D., 176); affirmed on rehearing 41 L. D., 244.)

Open cuts and tunnels made merely for the purpose of ascertaining whether a group of claims contains coal and not with the intent to develop operating mines do not satisfy the statutory requirement as to opening and improving. (Id.; see also Thad Stevens, 37 L. D., 723; Esther Filer, 35 L. D., 360.)

Persons who file declartory statements and then abandon them without valid cause or excuse are disqualified to make new entries. (Id.)

No right of location and entry under the act of April 28, 1904, is acquired by merely discovering an outcrop of coal, staking the claim, recording the notice of location, and applying for patent. (John L. Long, 43 L. D., 305.)

The benefits of the act of May 28, 1908, authorizing the consolidation of claims or locations of coal lands in Alaska, can be shared only by persons who made such locations in good faith—that is, honestly and lawfully—prior to November 16, 1906, in their own interests individually, without fraud, collusion, or deceit, or any purpose to violate any provision of the law. (Op. Atty. Gen., 38 L. D., 86.)

An individual or association expending time and money in an honest effort to open and develop coal deposits is not a trespasser and is entitled to the coal extracted as an incident to the reasonable prosecution of the work. (Ghost *v.* United States (C. C. A. Eighth Circuit), 168 Fed., 841.)

It is unlawful for a corporation, some of whose stockholders have made coal entries, to acquire coal lands in excess of 320 acres as the result of a scheme whereby some of its officers and employees make entries in their own names but for its benefit and at its expense, and, after securing patents, convey the lands to the corporation. An incorporated company is an "association of persons," in the meaning of the coal-land laws. (United States *v.* Trinidad Coal Co., 137 U. S., 160.)

TIMBER AND STONE LAWS.

Act of June 3, 1878 (20 Stat., 89).

That surveyed public lands of the United States within the (public land[1]) States, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale,[2] according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or asso-

[1] Amendment of Aug. 4, 1892 (27 Stat., 348).

[2] The distinction between offered and unoffered lands was abolished by the act of May 18, 1898 (30 Stat., 418), as to homestead and timber and stone entries.

ciation of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: *Provided*, That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes: *And provided further*, That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

Mode of procedure.

SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belonged to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expira-

tion of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office. * * *

Limitation to 320 acres under all land laws excepting mineral laws.

Act of August 30, 1890 (26 Stat., 391).
Act of March 3, 1891, section 17 (26 Stat., 1095).

DECISIONS.

Regulations under the timber and stone law, including method of appraisement (43 L. D., 37).

An Executive order reserving lands for forestry purposes has the same effect, as against an application to purchase under the timber and stone laws, as adverse claim of an individual. (Hattie E. Bradley, 34 L. D., 191.)

Where an applicant fails to submit proof on the day fixed in the published notice, or, in case of accident or unavoidable delay causing default, within 10 days thereafter, a forestry withdrawal theretofore made immediately attaches and becomes effective on the land regardless of the fact that the applicant, within such 10-day period, has filed application to readvertise notice of intention to submit proof. (Id.; see also M. Edith Curtis, 33 L. D., 265.)

An agreement or contract made by a timber and stone entryman, prior to final proof and the issuance of certificate for the sale of the timber on the land, is a violation of the provisions against speculative entry for the benefit of another. (Granville M. Boyer, 34 L. D., 581.)

After full payment of the purchase price and the issuance of final certificate under the timber and stone laws, the land department is without jurisdiction except to determine whether the land was subject to entry and whether the entryman was qualified to make the entry and had in all respects complied with the law; and a subsequent withdrawal for power purposes is unauthorized and does not warrant the withholding of patent. (Charles W. Pelham, 39 L. D., 201.)

The entire management of these entries was in the hands of an agent of the Martin-Alexander Co. It furnished the moneys both for the purchase prices and all expenses, and it is not easy to believe that it did all this on a mere expectation that after the entries had been made it would purchase the timber. It is a much more reasonable conclusion that it had an understanding with the parties making the entries respecting purchases and prices. * * * We agree with the Court of Appeals that the testimony points strongly to the fact that the entries were in pursuance of an understanding or agreement with the Martin-Alexander Co. that, as it was advancing all the money, the entryman should convey to it the standing timber at a fixed price. (United States *v.* Detroit Lumber Co., 200 U. S., 321.)

The act does not in any respect limit the domain which the purchaser has over the land after it is purchased from the Government, or restrict, in the slightest, his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If, when the title passed from the Government, no one save the purchaser has any claim for it, the act is satisfied. Montgomery might rightfully come or send into that vicinity and make known generally or to individuals a willingness to buy timberland at a price in excess of that which it would cost to obtain it from the Government, and any person knowing of that offer might rightfully come to the land office and make application and purchase a timber tract from the Government. (United States *v.* Budd, 144 U. S., 154.)

A person desiring to purchase a large tract of timberlands of the United States may lawfully express such desire to another, and contract with him to purchase the lands and advance money to enable the seller to acquire the land from the entryman, and he is not bound to inquire into the method by which such seller acquires the title, nor chargeable with any fraud therein which would render the patent subject to cancellation, of which he has no actual knowledge. (U. S. *v.* Barber Lumber Co. (C. C. A.), 194 Fed., 24.)

To warrant the cancellation of a patent for lands on account of fraud, the evidence must be clear, unequivocal, and convincing, and it can not be done on a bare preponderance of evidence which leaves the issue in doubt. (Idem.)

Application under the timber and stone act (sworn statement) must be based on a personal examination of the land and not made on information and belief or by agent. (Ness *v.* Fisher, 223 U. S., 683; see also case of Frank L. Chambers et al., 40 L. D., 85.)

Section 1 of the act of March 3, 1911, authorizing the reinstatement of homestead entries canceled or relinquished because of the erroneous allowance of such entries after the withdrawal of lands for national forest purposes makes no provision for the reinstatement of canceled timber and stone entries. (Albert L. Knight, 41 L. D., 261.)

Where the smallest legal subdivision embraced in a timber and stone entry contains but little timber, and is chiefly valuable because it is the site of, and controls access to, a spring, such legal subdivision should be eliminated from the entry. (Ada B. Millican, 43 L. D., 553.)

DESERT-LAND LAWS.

Act March 3, 1877 (19 Stat., 377).

That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty-five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land it situated, that he intends to reclaim a tract of desert land not exceeding one section,[1] by conducting water upon the same, within the period of three years[2] thereafter: *Provided, however*, That the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands, and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to extisting rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years[2] after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him: *Provided*, That no person shall be permtted to enter more than one tract of land and not to exceed six hundred and forty acres, which shall be in compact form.

What are desert lands.

SEC. 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert land, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

Laws applicable only in certain States.

SEC. 3. That this act shall only apply to and take effect in the States of California, Oregon, and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.

Act March 3, 1891 (26 Stat., 1095), amending desert land laws.

SEC. 2. That an act to provide for the sale of desert lands in certain States and Territories, approved March third, eighteen hundred and

[1] Limited to 320 acres by act next following, section 7.
[2] Extended to four years by act next following, section 7.

seventy-seven, is hereby amended by adding thereto the following sections:

Maps showing mode of irrigation.

"SEC. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections or fractional parts of sections of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements.

Expenditure of $3 per acre required.

"SEC. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid, the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register, proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid, the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: *Provided*, That proof be further required of the cultivation of one-eighth of the land.

Existing rights preserved—Election.

"SEC. 6. That this act shall not affect any valid rights heretofore accrued under said act of March third, eighteen hundred and seventy-seven, but all bona fide claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed; or said claims, at the option of the claimant, may be perfected

and patented under the provisions of said act, as amended by this act, so far as applicable; and all acts and parts of acts in conflict with this act are hereby repealed.

When patent issues.

"SEC. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold, by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands; but this section shall not apply to entries made or initiated prior to the approval of this act: *Provided, however*, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands and moneys paid therefor shall be forfeited to the United States.

Colorado.

"SEC. 8. That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located."

Limitations and restrictions—Extension of time.

Act of March 28, 1908 (35 Stat., 52).

That from and after the passage of this act the right to make entry of desert lands under the provisions of the act approved March third, eighteen hundred and seventy-seven, entitled "An act to provide for the sale of desert lands in certain States and Territories," as amended by the act approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes," shall be restricted to surveyed public lands of the character contemplated by said acts, and no such entries of unsurveyed lands shall be allowed or made of record: *Provided, however*, That any individual qualified to make entry of desert lands under said acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office.

Assignments restricted.

SEC. 2. That from and after the date of the passage of this act no assignment of an entry made under said acts shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said acts of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

Extension of time.

SEC. 3. That any entryman under the above acts who shall show to the satisfaction of the Commissioner of the General Land Office that he has in good faith complied with the terms, requirements, and provisions of said acts, but that because of some unavoidable delay in the construction of the irrigating works, intended to convey water to the said lands, he is without, fault on his part, unable to make proof of the reclamation and cultivation of said land, as required by said acts, shall, upon filing his corroborated affidavit with the land office in which said land is located, setting forth said facts, be allowed an additional period of not to exceed three years, within the discretion of the Commissioner of the General Land Office, within which to furnish proof, as required by said acts, of the completion of said work.

Second desert-land entries.

Act of March 26, 1908 (35 Stat., 48).
Act of February 3, 1911 (36 Stat., 896).

Limitation to 320 acres under all land laws, excepting mineral laws.

Act of August 30, 1890 (26 Stat., 391).
Act of March 3, 1891, section 17 (26 Stat., 1095).

Secretary of Interior authorized to grant further time for making final proof.

Act of April 30, 1912 (37 Stat., 106).

DECISIONS.

Land that produces a natural growth of timber is not subject to desert entry, and it is immaterial whether such timber is of value or not. (15 L. D., 271.)

Lands that, one year with another, for a series of years will not without artificial irrigation produce reasonably remunerative crops are desert within the meaning of the desert land law. (Penderson *v.* Parkinson, 37 L. D., 522.)

Lands situated within a notoriously arid or desert region, and themselves previously desert within the meaning of the desert land law, do not necessarily lose their character as desert lands merely because of unusual rainfall for a few successive seasons their productiveness was increased and larger crops were raised thereon; and under such circumstances a strong preponderance of evidence will be required to take them out of the class of desert lands. (Id.)

One who makes desert entry of such lands must, however, clearly show, in submitting proof, not only that he has the right to a sufficiency of water to irrigate successfully the lands, and that the system of ditches is adequate for that purpose, but also that the necessary

supply of water has been actually used on said lands in a manner to prove the beneficial results. (Id.)

SCHOOL LANDS—DECISIONS.

Title to school sections does not pass until approval of the survey by the General Land Office and a withdrawal for National Forest purposes, between the date of actual survey in the field and the date of such approval, prevents the vesting of the State's title. (F. A. Hyde, 37 L. D., 164; Black Hills National Forest (S. Dak.), 37 L. D., 469; State of Montana, 38 L. D., 247; State of Oregon, 41 L. D., 259.)

This doctrine followed by the Federal courts in the cases of United States *v.* Cowlishaw, 202 Fed., 317; Cobban *v.* Hyde, 212 Fed., 480; Sawyer *v.* Osterhaus, 212 Fed., 765; dissenting opinion, Judge Gilbert, Morrison *v.* United States (C. C. A.), 212 Fed., 29, 37; *contra* Morrison *v.* United States (C. C. A.), 212 Fed., 29; decision of the Supreme Court of Washington in State *v.* Whitney, 120 Pac., 116; dictum of the Supreme Court of Idaho in Balderson *v.* Brady, 107 Pac., 493. (See also Heydenfelt *v.* Daney, 93 U. S., 634; Minnesota *v.* Hitchcock, 185 U. S., 373; U. S. *v.* Bonners Ferry Lumber Co., 184 Fed., 187; U. S. *v.* Montana Lumber Co., 196 U. S., 573.)

While the trust created by a compact between the States and the United States that section 16 be used for school purposes is a sacred obligation imposed on the good faith of the State, the obligation is honorary and the power of the State, where legal title has been vested in it, is plenary and exclusive. (Alabama *v.* Schmidt, 232 U. S., 168.)

Funds received by the Territory of New Mexico for leases of sections 16 and 36 during the period from June 20, 1910, the date of the enabling act, to January 6, 1912, the date of statehood, belong to the United States subject to the proportionate share of the State. (2 Op. Sol., 1080.)

School sections surveyed before inclusion within the boundaries of a National Forest have vested in the State, and are not affected by the forestry proclamation. The State is not empowered to select other lands in place of such sections under Revised Statutes, sections 2275, 2276, as amended by the act of February 28, 1891. (Hibberd *v.* Slack, 84 Fed., 571.)

Under the grants to North and South Dakota, Montana, and Washington (act Feb. 22, 1889, 25 Stat., 676), the States take no right until the lands are surveyed. (Clemmons *v.* Gillette, 33 Mont., 821; 83 Pac., 879.)

The State of Idaho can not authorize the cutting of timber from unsurveyed school sections. (United States *v.* Bonners Ferry Lumber Co., 184 Fed., 187.)

The acts of Congress "reserving" sections 16 and 36 for the Territory of Arizona did not vest any title in the Territory, even after survey, but such sections remain subject to the plenary power of disposal by Congress. (2 Sol. Op., 793.)

The provisions in the enabling act of New Mexico that the grants of sections 2, 16, 32, and 36 within National Forests shall not vest title in the State while the National Forests continue to exist, and that said sections "shall be administered as a part of said forests," fixes and controls the status of all these sections, notwithstanding

the previous grant of sections 16 and 36 to the Territory. (2 Sol. Op., 848.)

School sections in National Forests in New Mexico are subject to administration by the Forest Service, whether surveyed or unsurveyed, and the title remains in the United States so long as the forests exist. (2 Sol. Op., 863.)

An application by the governor of a State for the survey of public lands for purposes of selection under the provisions of the act of August 18, 1894 (28 Stat., 394), and the withdrawal of the lands for that purpose by the Secretary of the Interior, does not prevent the President from including the lands in a National Forest and thereby defeating the State's preference right of selection. (27 Op. Atty. Gen., 605.)

Such application for survey and the withdrawal thereon do not constitute a "legal entry," a "lawful filing," or a "valid settlement" in the meaning of the exceptions contained in a forestry proclamation. (Id., 605.)

LIEU SELECTIONS.

The act of June 4, 1897, authorizing selections of land in lieu of those embraced in forest reserves was repealed by the act of March 3, 1905. (33 Stat., 1254.)

A pending unapproved application to make forest lieu selection will not prevent withdrawal of lands embraced therein for the purpose of reserving the power sites thereon for public uses. (Sherar *v.* Veazie, 40 L. D., 549.)

An application to make forest lieu selection of unsurveyed lands not identified with reference to natural boundaries or monuments or such markings upon the ground as would constitute notice to intending settlers is no bar to the attachment of rights under the act of May 14, 1880; and while approval of the township plat of survey is an identification of the lands as of the date of such approval, and, by relation, as against the Government, as of the date of the filing of the application, it does not and can not so attach as to cut out intervening adverse settlement claims. (F. A. Hyde et al., 40 L. D., 284.)

Upon approval of an application to make forest lieu selection the title of the Government to the lands relinquished as base therefor attaches, under the doctrine of relation, as of the date the selection was perfected and entitled to be approved. (A. G. Strain, 40 L. D., 108.)

The Government survey creates, and does not merely identify, selections of land, and a filing of selections of lieu lands by numbered sections before survey is wholly ineffective. (Sawyer et al. *v.* Gray et al., 205 Fed., 160; see also United States *v.* Montana Lumber Co., 196 U. S., 573.)

Filing of deeds of relinquishment to forest reserved land on selection papers for lieu lands under the act of June 4, 1897 (30 Stat., 34), held not to give the applicant any vested right in the land selected until the approval of the exchange by the General Land Office. (Daniel *v.* Wagner, 205 Fed., 235.)

No such right is acquired by a forest lieu, railroad or State selection, prior to approval thereof by the proper officer of the United

States, as will except the land from withdrawal by the Government under the act of June 25, 1910. (Administrative ruling, 43 L. D., 293.)

Where an application to make forest lieu selection fails because of defective base, amendment thereof by the substitution of new base can not be allowed in the face of an intervening withdrawal for forestry purposes. (Fred A. Kribs, 43 L. D., 146.)

Forest lieu selections of unsurveyed lands are not defeated by settlements made with full knowledge of such prior claims. (Ayres et al. *v.* Rose et al., 43 L. D., 331.)

EXCHANGE OF SCHOOL LANDS.

State of Montana.

Act of March 4, 1913 (37 Stat., 854).

To enable the Secretary of Agriculture to effect an exchange of lands and indemnity rights with the State of Montana, $25,000, to be available until expended when the said State shall have appropriated a like amount to be used in cooperation with the Forest Service for the aforesaid purpose: *Provided*, That such exchanges shall be made on the basis of approximately equal area and value.

State of Washington.

Act of March 4, 1915 (38 Stat., 1113).

To enable the Secretary of Agriculture to carry out an agreement heretofore made by and between him and the State of Washington, through its proper officers, looking to the exchange of lands and indemnity rights with said State, $50,000, or so much thereof as may be necessary, to be available until expended when the said State shall have made available a like amount to be used for carrying out the aforesaid agreement: *Provided*, That such exchanges shall be made on the basis of approximately equal area and value.

RAILROAD-GRANT LANDS.

Unclassified odd sections within the primary limits of the Northern Pacific Railroad grant, even though not surveyed, form no part of the National Forests within which they lie, and the Forest Service has no power to administer over them. (1 Sol. Op., 79; reversed 1 Sol. Op., 294 and 541.)

Legal title to all odd sections, not mineral, within the 10-mile limit passed to the Central Pacific Railroad Co., upon definite location of its line, without the issuance of patent. (2 Sol. Op., 897.)

The exception of lands returned and denominated as mineral must also be held to operate, as of the date of the definite location of the road. A subsequent survey and return as mineral of lands not mineral in fact would not divest the company's title. (Id.)

The mineral or nonmineral character of lands within the grant limits of the Southern Pacific Railroad Co. can be conclusively determined by the Department of the Interior, either by the issuance of patent upon the Surveyor General's ex parte return as to the character of the lands, or after a hearing properly applied for to test the return of the Surveyor General. (Id.)

A railroad company acquires no title to land included within an indemnity selection list prior to the approval thereof by the Secretary of the Interior. (Sol. Op., Apr. 19, 1913.)

A person holding a lease from a railroad company for lands embraced in an unapproved indemnity selection list, which lands are included within a National Forest, is liable for any damage sustained by the United States as a result of the occupancy under the lease, in the event the indemnity list is canceled. (Sol. Op., Apr. 19, 1913.)

A selection by the Northern Pacific Railway Co. under the act of March 2, 1899 (30 Stat., 993), is a "lawful filing" such as excepts the land from a forestry proclamation. Should the selection fail, however, the land would become a part of the National Forest. (1 Sol. Op., 463.)

Neither the railway company nor its assignee has any right to cut timber from an unapproved selection made under that act. (Id.)

Land embraced in a bona fide settlement claim is not subject to selection by the Northern Pacific Railway Co. under the act of March 2, 1899, and a selection allowed for land at the time covered by such claim can not stand notwithstanding the settlement claim may have been subsequently abandoned. (Frank et al. *v.* N. P. Ry. Co. on review, 37 L. D., 502.)

RIGHT-OF-WAY LAWS.

Railroads and wagon roads.

Act of March 3, 1899 (30 Stat., 1214.)

In the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby.

Highways.

SEC. 2477. The right of way for the construction of highways over public lands not reserved for public uses is hereby granted.

Grant of rights of way for railroads.

Act of March 3, 1875 (18 Stat., 482).

The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Joint use of canyon, pass, or defile.

SEC. 2. That any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

Condemnation proceedings.

SEC. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and, where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act (to amend an act entitled an act) to aid in the construction of a railroad and telegraph line from Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

Filing of map.

SEC. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

Act not applicable to reservations.

SEC. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed.

Amendment and repeal.

SEC. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

(This act is made applicable, at least conditionally, to National Forest lands by the act of Mar. 3, 1899, ante, p. 79.)

Ditches constructed by United States.

Act of August 30, 1890 (26 Stat., 371, on p. 391).

In all patents for lands hereafter taken up under any of the land laws of the United States * * * west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States.

RIGHTS OF WAY FOR IRRIGATION.

Grant under State laws confirmed.

SEC. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Patents subject to vested rights.

SEC. 2340. All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

Irrigation rights of way.

Act of March 3, 1891 (26 Stat., 1095).

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and

the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

Maps to be filed and approved.

SEC. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Rights granted subject to forfeiture.

SEC. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: *Provided*, That if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

Limitation of use.

SEC. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch. [See provision next below.]

Additional and subsidiary uses.

Act of May 11, 1898 (30 Stat., 404).

SEC. 2. That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act entitled "An Act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, may be used for pur-

poses of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation.

RIGHTS OF WAY FOR POWER PURPOSES.

Act of May 14, 1896 (29 Stat., 120), amending act of June 21, 1895 (28 Stat., 635).

SEC. 2. That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and the forest reservations of the United States, by any citizen or association of citizens of the United States for the purposes of generating, manufacturing, or distributing electric power.

Power permits.

Act of February 15, 1901 (31 Stat., 790).

The Secretary of the Interior * * * is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

Rights of way for municipal and mining purposes.

Act of February 1, 1905 (33 Stat., 628).

SEC. 4. That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

Grant of easements for transmission, telephone, and telegraph lines.

Act of March 4, 1911 (36 Stat., 1235).

That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, National Forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided*, That such right of way shall be allowed within or through any national park, National Forest, military, Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided*, That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

That any citizen, association, or corporation of the United States to whom there has heretofore been issued a permit for any of the purposes specified herein under any existing law, may obtain the benefit of this act upon the same terms and conditions as shall be required of citizens, associations, or corporations hereafter making application under the provisions of this statute.

SPECIAL LEGISLATION GRANTING RIGHTS OF WAY.

Act of May 1, 1906 (34 Stat., 163), granting permit, revocable by Secretary for certain causes, to occupy for hydroelectric purposes, lands in San Bernardino, Sierra, and San Gabriel National Forests, Cal.

Act of June 30, 1906 (34 Stat., 801), authorizing the Secretary of the Interior to sell to the city of Los Angeles, Cal., certain public lands in California, and granting rights in, over, and through the Sierra Forest Reserve, the Santa Barbara Forest Reserve, and the San Gabriel Timber Land Reserve, Cal., to the city of Los Angeles, Cal.

Act of May 18, 1898 (30 Stat., 418), granting the Santa Fe & Grand Canyon Railroad Co. right of way for railroad purposes through the Grand Canyon Forest Reserve in northern Arizona.

Act of June 27, 1898 (30 Stat., 493), granting right of way through the Pikes Peak Timber Land Reserve and the public lands to the Cripple Creek District Railway Co.

Act of July 8, 1898 (30 Stat., 729), granting right of way through the Pikes Peak Timber Land Reserve and the public lands to the Cripple Creek Short-Line Railway Co.

Act of January 10, 1899 (30 Stat., 783), granting the Saginaw Southern Railroad Co. a right of way for railroad purposes through the San Francisco Mountains Forest Reserve.

Act of February 28, 1899 (30 Stat., 910), to grant to the Pasadena & Mount Wilson Railway Co. right of way and certain lands for railroad purposes through the San Gabriel Forest Reserve.

Act of June 6, 1900 (31 Stat., 657), to grant right of way over Government lands for a pipe line for the conveyance of water to Flagstaff, Ariz.

Act of February 25, 1903 (32 Stat., 907), granting the Central Arizona Railway Co. a right of way for railroad purposes through the San Francisco Mountains Forest Reserve, in the Territory of Arizona.

Rights of way in Alaska—Railroads, tramroads, and wagon roads.

Act of May 14, 1898, sections 2–9 (30 Stat., 409).

DECISIONS.

Rights of way for Government use.

The Secretary of Agriculture has authority to require the locators of mining claims within National Forests to permit the United States, or its vendees, means of ingress and egress over their claims for the purpose of removing timber, and administering and protecting the National Forests. (Sol. Op., Nov. 4, 1915.)

Where telephone lines belonging to the Forest Service have been constructed over public lands, in the patents issued to such lands, there will be inserted a clause excepting from the conveyance the telephone line and all appurtenances thereto, together with the right of the United States, its officers, agents, or employees, to maintain, operate, repair, or improve such telephone line so long as needed or used for or by the United States. (Letter (D–17542) of Assistant Secretary Sweeney, dated Aug. 31, 1915, directed to the Commissioner of the General Land Office.)

A way of necessity is reserved to the Government where a tract of National Forest land is entirely cut off from a public highway by other lands formerly a part of the public domain. (2 Sol. Op., 973; see also U. S. *v.* Rindge, 208 Fed., 611.)

Act of August 30, 1890 (26 Stat., 371, 391), reserves right of way for Government reclamation projects and is valid. (United States *v.* Van Horn, 197 Fed., 611.)

Act of August 30, 1890 (26 Stat., 371, 391), reserves right of way for Governmental purposes only. (Solicitor to Forester, Oct. 3 1910.)

The Secretary of Agriculture is authorized to acquire, by purchase or condemnation, rights of way for roads needed as outlets for National Forest timber. Such rights of way are not additions to National Forests within the meaning of the prohibition contained in the act of March 4, 1907. (Id.)

Construction of Forest Service telephone lines over unreserved public lands need not be protected by prior reservation of a right of way by the Interior Department, but as a matter of policy a reservation should be requested. (1 Sol. Op., 276.)

The construction and maintenance of roads and trails by the Forest Service upon unsurveyed vacant public lands, although such lands are outside the National Forests, is authorized and such construction and maintenance operates as a reservation of right of way which will not be affected by subsequent sale or disposition of the lands. (1 Sol. Op., 482.)

The consent of the landowner must be secured for the construction of a Forest Service telephone line along a public high way passing over patented land. (1 Sol. Op., 295.)

Powers and discretion of Secretary.

The exercise of the jurisdiction of the Secretary of the Interior over applications for rights of way within reservations under these acts involves more than a mere legal discretion and he should look beyond the mere technical sufficiency of the application and in a broad view subserve the interests of the whole people. (California-Nevada Canal Water & Power Co., 40 L. D., 380.)

"Under act of March 3, 1891, c. 561, §§18, 19, 26, Stat. 1101, 1102 (U. S. Comp. St., 1901, pp. 1570, 1571), granting right of way for irrigating canals, ditches, and reservoirs over the public lands to irrigation companies, upon the filing of a map thereof and its approval by the Secretary of the Interior, such approval is essential, and where it was refused as to a reservoir because the site had been previously withdrawn from sale or entry and reserved by the United States, the company acquired no right or easement by the filing of its maps." (United States *v.* Rickey Land & Cattle Co. et al., 164 Fed., 496.)

While the United States retains the fee to land crossed by a railroad right of way acquired under the provision of the act of March 3, 1875 (18 Stat., 482), it does not have the right to cross such right of way with a telephone line unless the railroad company consents thereto. (2 Sol. Op., 1090.)

A right of way for an irrigation project can not be acquired over a National Forest without the approval of the proper executive officers of the Government; nor can any right of occupancy or use thereof be acquired by private parties, save upon the exercise of a discretion by the proper department as to whether such use will interfere with the purpose of the reserve. (United States *v.* Henrylyn Irrigation Co. et al., 205 Fed., 970.)

The right to an injunction is not affected by the fact that the Secretary of the Interior may have improperly delayed or refused to act on an application made for a right of way through a reservation for canals and tunnels. (United States *v.* Henrylyn Irrigation Co. et al., 205 Fed., 970.)

Railroad rights of way.

Lands within a National Forest are not subject to appropriation by a railroad company for right of way and other railroad purposes under the provisions of the act of March 3, 1875 (18 Stat., 482), which by section 5 expressly excepts from its operation lands "specially reserved from sale." (United States *v.* Chicago, M. & St. P. Ry. Co., 207 Fed., 164; affirmed by C. C. A., 218 Fed., 288.)

Under the provisions of the act of March 3, 1875 (18 Stat., 482), which excepts from the operation of the act lands "specially reserved from sale," the rights of a railroad company seeking to acquire benefits thereunder are fixed by the status of the land at the time when the railroad company first seeks to give a practical effect to the grant by the definite location of its line, either by the filing of its map of final location or by the actual construction of its road, and not as of the time when it qualified itself as a grantee by filing articles of incorporation. (Id.)

The Secretary of the Interior may under the provisions of the act of March 3, 1899 (30 Stat., 1233), grant or refuse to grant railroad rights of way through the forest reserves, and as a condition of making the grant, he may impose conditions, as by requiring the company to execute a bond with sureties binding itself and its successors to pay for any and all damage to the public lands, the timber, natural curiosities, and other public property thereon from such occupation and use of the reservation. (United States *v.* Bailey, 178 Fed., 302.)

In such a case a receiver of the railroad is its "successor," and the bondsmen will be liable with him in a suit on the bond. (Id.)

On application for a railroad right of way over lands upon which are possible power sites examination should be made to determine whether the lands may be used to the best advantage for power sites or other power purposes, and the question of approving the application will then be determined by considerations of the greatest public good to result from the one or the other use. If the decision is in favor of the power use, the lands will then be withdrawn, unless the road can be so located as not to interfere with future power uses. (Continental Tunnel Ry. Co., 39 L. D., 86; see also Denver & Rio Grande R. R. Co., 39 L. D., 209, and Skagit Power Co., 39 L. D., 89.)

Where a railroad company consents in writing to the location of a store upon its right of way within a National Forest, thus waiving its right to exclusive possession, the Forest Service may issue a permit for such store, thus legalizing the occupancy so far as the Government is concerned. (2 Sol. Op., 790.)

Under the act of March 3, 1875 (18 Stat., 482), granting to railroads the right of way through public lands, such grant took effect upon the construction of the road. (Jamestown & Northern R. Co. *v.* Jones, 177 U. S., 125; Minneapolis, etc., R. Co. *v.* Doughty, 208 U. S., 251; Stalker et al. *v.* Oregon Short Line R. R. Co., 225 U. S., 142.)

A railroad company does not acquire a vested right under the act of March 3, 1875 (18 Stat., 482), over unsurveyed land by filing a map of the route in the local and General Land Offices. (1 Sol. Op., 459.)

No rights are acquired as against the United States until the line has been ascertained by actual construction or the application has

been approved by the Secretary of the Interior, and rights initiated subsequent to temporary or permanent withdrawals are subject to such withdrawals. (Id.)

The title to a railroad right of way acquired over public lands under a grant by Congress can not be acquired against the grantee by limitation; but the right to grant it may be lost by abandonment in case the land ceases to be used for the special purpose for which the grant was made. (Denver & Rio Grande Railway Co. *v.* Mills (C. C. A.), 222 Fed., 481.)

Whether a railroad company has abandoned a right of way acquired by it is to a great extent a question of intent, and the intent to abandon may be established by acts of the company clearly indicating its purpose not to use such right of way and by long nonuser thereof. (Id.)

Irrigation rights of way.

Prior to approval by the Secretary of the Interior, the inchoate right acquired by an application for right of way under the act of March 3, 1891, is subject to the power of Congress to deny the right by making other disposition of the lands affected. (Sierra Ditch Water Co., 38 L. D., 547.)

The United States may maintain a suit to enjoin the unauthorized construction of irrigation canals and tunnels within a National Forest reservation. (United States *v.* Henrylyn Irrigation Co. et al., 205 Fed., 970.)

Regulations of the Interior Department under the provisions of the act of March 3, 1891 (26 Stat., 1095), governing rights of way upon unsurveyed National Forest lands. (43 L. D., 448.)

Rights of way for pipe lines may be allowed under the provisions of the act of March 3, 1891 (26 Stat., 1095), as amended by the act of May 11, 1898 (30 Stat., 404), granting rights of way for reservoirs, canals, and laterals, where the rights sought are to be utilized for the main purpose of irrigation. (Fraser Sources Irrigation & Power Co., 43 L. D., 110.) Overrules Malone Land & Water Co., 41 L. D., 138.

The Secretary of Agriculture is not authorized to require the execution of stipulations which impose a condition upon, or limit, the rights to be acquired by one seeking to secure a grant of irrigation rights of way under the provisions of the act of March 3, 1891 (26 Stat., 1095). (Sol. Op. in case E. L. & C. L. Saffel, May 26, 1914.)

The approval by the Secretary of Agriculture of an application for a right of way under the acts of March 3, 1891, and May 11, 1898, for a reservoir site within a National Forest does not vest an easement in the applicant, but is merely advisory to the Secretary of the Interior and subject to his paramount jurisdiction under the said acts. (California-Nevada Canal, Water & Power Co., 40 L. D., 380.)

Approval of applications for rights of way under the act of March 3, 1891, as amended by the act of May 11, 1898, for primary purposes of irrigation, are subject to all valid existing rights and upon the express condition that the right of way be used for the main purpose of irrigation; that any electrical power or energy developed thereunder is to be primarily used for the purpose of irrigation; and any abandonment or violation of such use, or neglect to comply with the provisions of the law, will work a forfeiture which will be enforced

by appropriate proceedings. (Instructions, case of Pamma Power & Irrigation Co., 39 L. D., 309; see also Kern River Co., 38 L. D., 302.)

Applications for rights of way under the provisions of the act of March 3, 1891, and section 2 of the act of May 11, 1898, will not be allowed except upon a satisfactory showing that the right of way is desired for the primary purpose of irrigation. (Inyo Consolidated Water Co., 37 L. D., 79.)

Whenever in his judgment the granting of a right of way under the act of March 3, 1891, over a national park would interfere with proper occupation of the reservation by the Government, the Secretary of the Interior may withhold his approval therefrom. (Sierra Ditch & Water Co., 38 L. D., 547.)

There is no authority under the irrigation right of way act of March 3, 1891, to require the applicant to keep the reservoir or lake open to the public for fishing purposes. (1 Sol. Op., 174.)

Electric-power rights of way.

A company organized chiefly for the purpose of generating and distributing power is not within the purview of the act of March 3, 1891; and where an application by such a company for right of way under that act has been approved, for lands now within a National Forest, the company may be permitted to relinquish all rights under such approval and amend its application to bring it within the act of February 15, 1901, failing to do which, action should be taken by the Land Department with a view to revocation of such approval. (The Kern River Co., 38 L. D., 302.)

A right of way for the development of electric power could not be acquired under the act of 1866 (Rev. Stat., 2339). Congress did not, in that act, contemplate power companies, because none were then in existence. (The Kern River Co., 38 L. D., 302, 309; U. S. *v.* Utah Power & Light Co. (C. C. A.), 209 Fed., 554, contra.)

Under the act of February 15, 1901, the Secretary of the Interior may, in his discretion, refuse to approve an application until the applicant files a stipulation to comply with "all laws or regulations now in force or which may hereafter be passed or promulgated." (Decision of Secretary of the Interior of Sept. 16, 1912 (unpublished), in case of Central Colorado Power Co.)

The rights of way granted by section 4 of the Forest Transfer Act are limited to municipal and mining purposes, including the milling and reducing of ores, and an application under it should not be allowed where it appears that the chief purpose for which the right is desired is the generation of power for commercial use and that its utilization for mining operations is merely incidental to such purpose. (Northern California Power Co., 37 L. D., 80.)

A right of way for a ditch for mining purposes, acquired under the act of July 26, 1866, prior to the creation of a National Forest, can not legally be used to convey water for the exclusive purpose of generating hydroelectric power for commercial sale. (2 Sol. Op., 728.)

A right of way for a mining ditch acquired under the act of 1866, prior to the creation of a National Forest is a mere easement, and the lands affected become part of a subsequently created National

Forest, subject, however, to the easement for mining purposes. (2 Sol. Op., 728.)

A power permit may be issued for lands embraced in a mining claim, and if by a private arrangement with the power company the mineral claimant waives his right of exclusive possession, this department may collect from the power company the usual charge for the use of such land for power purposes. (2 Sol. Op., 763.)

The approval of a map of right of way under the act of May 14, 1896, confers merely a permission amounting to a personal license revocable by operation of law through transfer or assignment, or expressly by the Secretary. (2 Sol. Op., 925.)

There is no authority in the Secretary of Agriculture to grant a power permit affecting National Forest lands withdrawn by the President as a power site under the act of June 25, 1910. Applications for such permits may, however, be received for submission to the President. (2 Sol. Op., 817.)

The act of February 15, 1901, authorizing the granting of revocable power permits, etc., does not extend to Alaska (2 Sol. Op., 803), but permits for power rights of way may be granted under the act of June 4, 1897 (30 Stat., 11). (2 Sol. Op., 1032.)

No rights are acquired in an easement over public lands, under the provisions of section 2339 of the Revised Statutes, until the claimant has completed the construction of the ditch or reservoir and put the same to the beneficial use intended. (2 Sol. Op., 1036; see also decision of the District Court of the State of Utah, United States *v.* Utah Light & Railway (Traction) Co., unreported.)

Under the Constitution of the United States, Article IV, section 3, which vests in Congress "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," title or rights in the public lands can not be acquired by a private person or corporation in the exercise of a State sovereignty, but only by virtue of some act of Congress and in accordance with the procedure prescribed. (United States *v.* Utah Power & Light Co. (C. C. A.), 209 Fed., 554.)

By the provision of the enabling act and State constitution of Utah forever disclaiming on the part of the people of the State all right and title to the unappropriated public lands lying within the State, and providing 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, the Government's full right of control over such lands is expressly recognized. (Id.)

Act of May 14, 1896, chapter 179, section 2, 29 Stat., 120 (U. S. Comp. St., 1901, p. 1573), which specifically authorizes the Secretary of the Interior, under rules and regulations to be fixed by him, to grant right of way and the use of ground on the public lands or forest reservations to electric power companies, supersedes, or at least modifies and limits, as to such companies, the general provisions of the Revised Statutes, section 2339 (U. S. Comp. St., 1901, p. 1437), enacted in 1866, recognizing vested water rights and rights of way for ditches and canals acquired in accordance with local customs and laws, to the extent that since its passage rights in public lands can be acquired by such a company only by a grant from the Secretary. (Id.)

A hydroelectric power company is not authorized to maintain or operate any portion of its plant upon a National Forest without first complying with the rules and regulations of the Secretary of the Department of Agriculture relating to power permits where such power plant was constructed upon lands of the United States subsequent to their withdrawal for National Forest purposes. (Decision (unpublished) Judge Marshall, District of Utah, dated March 31, 1913, United States *v.* Beaver River Power Co.)

The authority of the Secretary of Agriculture to permit the use of National Forest lands is not sufficient to authorize the construction of dams across navigable streams within National Forests. (Sol. Op. in case Clarks Fork Power Co., Jan. 13, 1915.)

Section 4 of the act of February 1, 1905 (33 Stat., 628) does not vest the Secretary of the Interior with authority to grant rights of way for transmission lines within, through, or across the National Forests. (30 Op. Atty. Gen., 263.)

Applications for revocable permits under the act of February 15, 1901 (31 Stat., 790), should be filed with and passed upon by the Secretary of Agriculture when they relate to lands within the National Forests. (30 Op. Atty. Gen., 263.)

Section 4 of the act of February 1, 1905 (33 Stat., 628), authorizes the acquisition of rights of way over National Forest lands for hydroelectric development for municipal and mining purposes, and for the milling and reduction of ores. (Op. Atty. Gen., Apr. 21, 1915.)

Transmission lines, etc.

The authority to grant 50-year easements for transmission and other lines under the act of March 4, 1911 (36 Stat., 1235), is vested in the Secretary of Agriculture when and in so far as the lands to be affected constitute portions of the National Forests. (29 Op. Atty. Gen., 303.)

A hydroelectric power company is not authorized by sections 2339 and 2340 of the Revised Statutes to maintain transmission lines, telephone lines, tramways, or buildings upon National Forest lands without first securing permission from the Secretary of Agriculture. (Decision (unpublished) of Judge Marshall, district of Utah, dated Mar. 31, 1913, in case of United States *v.* Utah Power & Light Co.)

Telegraph lines.

The act of July 24, 1866 (now Rev. Stat., sec. 5263), granting rights of way for telegraph lines, does not apply to National Forest lands. (1 Sol. Op., 266, 452.)

INDIAN ALLOTMENTS IN NATIONAL FORESTS.

Act. June 25, 1910 (36 Stat., 855).

SEC. 31. That the Secretary of the Interior is hereby authorized, in his discretion, to make allotments within the National Forests in conformity with the general allotment laws as amended by section [16] of this act, to any Indian occupying, living on, or having improvements on land included within any such National Forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation

was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture, who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.[1]

TOWN SITES.

Section 2286 and sections 2380 to 2394, inclusive, Revised Statutes, provide methods of acquiring public land for town-site purposes on the vacant unreserved lands of the United States.

Act of March 3, 1877 (19 Stat., 392), provides for additional town sites.

Act March 3, 1891 (26 Stat., 1101), provides for town sites on mineral lands.

There are also various acts applicable to individual States. See circular Department of Interior of August 7, 1909 (38 L. D., 92).

A town site actually settled and occupied before the creation of a National Forest is excepted from the proclamation, even though the land is unsurveyed; and an occupant of lands within the town site can not be required to take out a Forest Service permit. (2 Sol. Op., 726.)

ADMINISTRATIVE SITES.

The withdrawal of an administrative site riparian to a stream does not of itself reserve water for administrative uses on such site; and the right to such water can be secured only by appropriation under the State laws. (1 Sol. Op., 590.)

The establishment of a forest reserve does not contemplate the actual use or occupancy of any particular tract within the designated boundaries of the reserve; hence there is no incongruity in providing that, after the creation of the reserve, lands may be prospected, and, if shown to be mineral in character, located and entered under the mining laws. The purposes for which the withdrawal now proposed to be made (administrative site) contemplates and requires the actual use and occupancy of each tract and the expenditure of money upon each or most of such tracts, and this of necessity excludes the operation of any other claim. Land not known at the time to be mineral in character may be devoted to purposes recognized by law as proper in the aid of the objects sought to be attained by establishment of forest reserves, or coming within the purview of the appropriation acts for protection and administration of such reserves and subsequent discovery of mineral therein will not affect its use for those purposes or render it liable to exploration, location, or entry under the mining laws. (Opinion of the Assistant Attorney General, 35 L. D., 262–268.) See decisions under "Operation," page 29.

[1] This section does not apply to the Minnesota National Forest. (Letter Secretary of the Interior to Secretary of Agriculture, Sept. 27, 1912.)

SPECIAL-USE PERMITS.

Permits for summer homes, hotels, stores, etc.

Act of March 4, 1915 (38 Stat., 1101).

That hereafter the Secretary of Agriculture may, upon such terms as he may deem proper, for periods not exceeding thirty years, permit responsible persons or associations to use and occupy suitable spaces or portions of ground in the national forests for the construction of summer homes, hotels, stores, or other structures needed for recreation or public convenience, not exceeding five acres to any one person or association, but this shall not be construed to interfere with the right to enter homesteads upon agricultural lands in national forests as now provided by law.

Special-use permit for land adjacent to mineral springs.

Act of February 28, 1899 (30 Stat., 908).

The Secretary of the Interior * * * hereby is authorized, under such rules and regulations as he from time to time may make, to enter or lease to responsible persons or corporations applying therefor suitable spaces and portions of ground near, or adjacent to, mineral, medicinal, or other springs, within any forest reserves established within the United States, or hereafter to be established, and where the public is accustomed or desires to frequent, for health or pleasure, for the purpose of erecting upon such leased ground sanitariums or hotels, to be opened for the reception of the public. And he is further authorized to make such regulations, for the convenience of people visiting such springs, with reference to spaces and locations, for the erection of tents or temporary dwelling houses to be erected or constructed for the use of those visiting such springs for health or pleasure. And the Secretary of the Interior is authorized to prescribe the terms and duration and the compensation to be paid for the privileges granted under the provisions of this act.

DECISIONS.

A special-use permit for the use of lands for a summer home remains in full force and effect and gives the permittee complete right of possession and use as against subsequent locators of a mining claim. (Le Roy et al. *v.* Swanson; unpublished findings of the county court of Colorado for Clear Creek County, Feb. 6, 1912.)

The waters of mineral, medicinal, and saline springs on the public domain are under the sole control of the United States, as a landowner, and are not subject to appropriation under State laws or to the riparian right to continued flow. (2 Sol. Op., 951.)

Authority to administer the act of 1899 as to springs and lands in the National Forests passed to the Secretary of Agriculture under the forest transfer act of February 1, 1905. (Id.)

The said act does not authorize a lease of the springs themselves or the granting of special privileges therein. Nor does it contemplate a lease of all the available hotel or sanitarium sites to one party. (Id.)

The mineral springs act of February 28, 1899, extends to National Forests in Alaska. (2 Sol. Op., 870.)

National Forest lands in Alaska surrounding hot or mineral springs, and which have been withdrawn by the President under the

act of June 25, 1910, can not be leased under the act of February 28, 1899, or their use permitted under the act of June 4, 1897, while the withdrawal remains in force. (2 Sol. Op., 870.)

The Secretary of Agriculture is authorized to grant permits for the occupancy of National Forest lands adjacent to mineral, medicinal, or other springs. See act of June 4, 1897 (30 Stat., 11); act of March 4, 1915 (39 Stat., 1101), and that of February 28, 1899 (30 Stat., 908), for such authority. (2 Sol. Op., 1067.) See also Sol. Op., November 1, 1915.

CANCELLATION OF PATENTS.

Act of March 3, 1891 (26 Stat., 1093).

That section eight of an act entitled "An act to repeal timber-culture laws, and for other purposes" approved March third, eighteen hundred and ninety-one, be, and the same is hereby amended so as to read as follows:

"SEC. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. And in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same; but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domains: *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 this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for cutting of timber on mineral lands.

DECISIONS.

The United States can only avoid the self-imposed limitation of the act of March 3, 1891 (26 Stat., 1099), which provides that suits by the United States to annul patents to public lands thereafter issued shall only be brought within six years after the date of the issuance of such patents by alleging specific facts showing that its failure to discover the cause of action within the statutory period was due to concealment by the adverse party or that the fraud was of a self-concealing nature and the failure to discover it was not due to negligence or want of diligence. (United States *v.* Puget Sound Traction, Light & Power Co., 215 Fed., 436; see also United States *v.*

Exploration Co., 203 Fed., 387; Linn & Lane Timber Co. *v.* United States, 196 Fed., 593; id., 203 Fed., 394; id., 236 U. S., 574.)

Suits must be based on a showing of fraud as distinguished from noncompliance with law, and the evidence of fraud must be clear, unequivocal, and convincing, and not a bare preponderance of evidence which leaves the issue in doubt. (United States *v.* Barber, 194 Fed., 24.)

Despite satisfactory proof of fraud in obtaining the patent, if the legal title has passed, bona fide purchase for value is a perfect defense; but it is an affirmative one which the grantee must establish in order to defeat the Government's right to cancel a patent which fraud alone is shown to have induced. (Wright-Blodgett Co. *v.* United States, 236 U. S., 397.)

Where the bills to set aside patents for fraud have been filed and subpœnas issued and delivered for service before the statute has run, and reasonable diligence shown in getting service, the running of the statute is interrupted and the rights of the United States against the patents are saved. (Linn & Lane Timber Co. *v.* United States, 236 U. S., 574.)

Where a secret transfer of wrongfully held land is made through the medium of a corporation for the purpose of busying the United States with the wrong person until the statute has run, service on the man thus put forward is sufficient to avoid the statute. (Id.)

While courts of equity have the power to set aside, cancel, or correct patents or other evidences of title obtained from the United States by fraud or mistake, and to correct under proper circumstances such mistakes, this can only be done on specific averments of the mistake or the fraud, supported by clear and satisfactory proof. (Maxwell Land-Grant case, 121 U. S., 325.)

In a suit by the United States to cancel a patent of public land the burden of producing the proof and establishing the fraud is on the Government, from which it is not relieved although the proposition which it is bound to establish may be of a negative nature. (Colorado Coal & Iron Co. *v.* United States, 123 U. S., 307.)

The presumption of the regularity of all proceedings prior to the issue of a patent for public lands, which is made against collateral attacks by certain parties, does not exist in proceedings where the United States assail the patent for fraud in their officers in its issue, and seek its cancellation. (Moffat *v.* United States, 112 U. S., 24.)

The United States does not guarantee the integrity of their officers, nor the validity of the acts of such, and are not bound by their misconduct or fraud. (Id.)

A land patent issued to a fictitious person conveys no title which can be transferred to a person subsequently purchasing in good faith from a supposed owner. (Id.)

OPENING TO ENTRY RESTORED LANDS.

Act of September 30, 1913 (38 Stat., 113).

That hereafter when public lands are excluded from National Forests or released from withdrawals the President may, whenever in his judgment it is proper or necessary, provide for the opening of the lands by settlement in advance of entry, by drawing, or by

such other method as he may deem advisable in the interest of equal opportunity and good administration, and in doing so may provide that lands so opened shall be subject only to homestead entry by actual settlers only or to entry under the desert-land laws for a period not exceeding ninety days, the unentered lands to be thereafter subject to disposition under the public-land laws applicable thereto.

Extended to previous restorations.

SEC. 2. That where under the law the Secretary of the Interior is authorized or directed to make restoration of lands previously withdrawn he may also restrict the restoration as prescribed in section one of this Act.

SILVICULTURE.

TIMBER SALES.

Timber sales provisions of act of June 4, 1897 (30 Stat., 11, 35), as amended by act June 6, 1900 (31 Stat., 661).

Appraisal and sale.

For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively; but not for export therefrom.[1]

Advertisement.

[2] [Before such sale shall take place notice thereof shall be given * * * for not less than thirty days, by publication in one or more newspapers of general circulation, as he may deem necessary, in the State or Territory where such reservation exists: *Provided, however*, That in cases of unusual emergency the Secretary of the Interior may, in the exercise of his discretion, permit the purchase of timber and cord wood in advance of advertisement of sales at rates of value approved by him and subject to payment of the full amount of the highest bid resulting from the usual advertisement of sale: *Provided further*, That he may, in his discretion, sell without advertisement, in quantities to suit applicants, at a fair appraisement, timber and cord wood not exceeding in value one hundred dollars stumpage: *And provided further*, That in cases in which advertisement is had and no satisfactory bid is received, or in cases in which the bidder fails to complete the purchase, the timber may be sold, without further advertisement, at private sale, in the discretion of the Secretary of the Interior, at not less than the appraised valuation, in quantities to suit purchasers: *And provided further*, That the provisions of this act shall not apply to existing forest reservations in the State of

[1] Modified by agricultural appropriation act of Mar. 4, 1915 (39 Stat., 1096), printed next following.

[2] The matter in brackets is taken bodily from the act of June 6, 1900 (31 Stat., 661), which amends the original act by substituting this language.

California, or to reservations that may be hereafter created within said State].[1]

Export of timber.

* * * Such timber before being sold shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make report in writing * * * of his doings in the premises.

Cutting and removal.

Act of March 4, 1915 (38 Stat., 1096).

And the Secretary of Agriculture may, in his discretion, permit timber and other forest products cut or removed from the National Forests to be exported from the State or Territory in which said forests are respectively situated.

Sales of timber to settlers and farmers.

Act of August 10, 1912 (37 Stat., 269).

That the Secretary of Agriculture, under such rules and regulations as he shall establish, is hereby authorized and directed to sell at actual cost, to homestead settlers and farmers, for their domestic use, the mature, dead, and down timber in national forests, but it is not the intent of this provision to restrict the authority of the Secretary of Agriculture to permit the free use of timber as provided in the Act of June fourth, eighteen hundred and ninety-seven.

The act of June 3, 1878 (20 Stat., 88), authorizing the citizens of Colorado, Nevada, New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, and Montana, and "all other mineral districts of the United States"[2] to fell and remove timber on the public domain for mining and domestic purposes, is printed on page 104, post, under "Trespass."

Timber sales in California.

Act of June 30, 1906 (34 Stat., 669).

[684] Hereafter sales of timber on forest reserves in the State of California shall in every respect conform to the law governing such sales in other States, as set forth in the act of June sixth, nineteen hundred (Thirty-first Statutes at Large, page six hundred and sixty-one).

Timber sales, Minnesota National Forest.

For timber sale provisions relating especially to the Minnesota National Forest see section 2 of the act of May 23, 1908 (35 Stat., 268).

FREE-USE PERMITS.

Free use of timber and stone.

Act of June 4, 1897 (30 Stat., 11, 35), as amended by act of June 6, 1900 (31 Stat., 661).

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reser-

[1] This proviso is repealed by a provision in the agricultural appropriation act of June 30, 1906 (34 Stat., 669, 684), supra.

vations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.[1]

Young trees furnished free, Nebraska National Forest.

Act of March 4, 1913 (37 Stat., 828).

Nebraska National Forest, Nebraska, * * * That from the nurseries on said forest the Secretary of Agriculture, under such rules and regulations as he may prescribe, may furnish young trees free, so far as they may be spared, to residents of the territory covered by "An Act increasing the area of homesteads in a portion of Nebraska," approved April twenty-eighth, nineteen hundred and four; * * *

Timber and stone for United States reclamation works.

Act of February 8, 1905 (33 Stat., 706).

In carrying out the provisions of the national irrigation law approved June seventeenth, nineteen hundred and two, and in constructing works thereunder, the Secretary of the Interior is hereby authorized to use and to permit the use by those engaged in the construction of works under said law, under rules and regulations to be prescribed by him, such earth, stone and timber from the public lands of the United States as may be required in the construction of such works, and the Secretary of Agriculture is hereby authorized to permit the use of earth, stone and timber from the forest reserves of the United States for the same purpose, under rules and regulations to be prescribed by him.

Free use of earth, stone, and timber by Navy.

Act of March 4, 1915 (38 Stat., 1100).

That hereafter the Secretary of Agriculture, under regulations to be prescribed by him, is hereby authorized to permit the Navy Department to take from the national forests such earth, stone, and timber for the use of the Navy as may be compatible with the administration of the national forests for the purposes for which they are established, and also in the same manner to permit the taking of earth, stone, and timber from the national forests for the construction of Government railways and other Government works in Alaska: *Provided*, That the Secretary of Agriculture shall submit with his annual estimates a report of the quantity and market value of earth, stone, and timber furnished as herein provided.

Export of pulp wood from Alaska.

Forest transfer act of February 1, 1905 (33 Stat., 628).

SEC. 2. That pulp wood or wood pulp manufactured from timber in the district of Alaska may be exported therefrom.

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[1] Locality of use, provision modified by act of Mar. 4, 1907 (34 Stat., 1270), which proviso was repeated in the Agricultural appropriation acts of May 23, 1908, Mar. 4, 1909, May 26, 1910, and Mar. 4, 1911. See further act of Mar. 4, 1915 (39 Stat., 1096).

Plants, trees, etc., imported free.

Tariff act of June 29, 1909, free list, paragraph 652 (36 Stat., 11, on p. 78).

652. Plants, trees, shrubs, roots, seed cane, and seeds imported by the Department of Agriculture or the United States Botanic Garden.

DECISIONS.

Contracts.

The United States can not by suit in equity enforce specific performance of a timber sale contract. (Sol. Op. in re Standard Lumber Co., Mar. 26, 1915.)

The general rule is that when one enters into a contract with the Government, his obligation thereunder becomes fixed beyond the power of any Government official to modify its terms so as to relieve him of any of the burdens imposed upon him. (2 Sol. Op., 744, and cases there cited.)

It seems, however, that the proper Government officials may, by acquiescence, waive the time limit in a contract by allowing the contractor to continue the work. In such cases all the other requirements of the contract govern the relations of the parties. (Id.)

It seems also that the head of a department can waive penalties or forfeitures provided for in a contract in case of nonperformance within the time limit, when the Government suffers no damage by the delay; or if it suffers some damage less than the amount of the penalty or forfeiture, he may remit all above the actual damage which the Government has suffered. (Id.)

It seems further that in cases where the interests of the Government clearly so require, the head of a department may modify or abrogate a contract with or without the consent of the contractor. If done without the consent of the contractor and he suffers damage or loss thereby, he probably has a claim against the United States for the amount thereof. The officer modifying or abrogating a contract may or may not have power to settle the claim, depending upon the circumstances and the terms of the statute under which he is acting. (Id.)

The Comptroller of the Treasury applies the foregoing general rules to timber sale contracts in the same manner and to the same extent as to other contracts with the Government. (See Comptroller's decision of Dec. 27, 1911, unpublished.)

Under the provisions of a contract which provided for possible extensions of time, the sureties on the bond, which was part of the contract, were not discharged by reason of the extensions which were granted pursuant to the contract. (United States *v.* McMullen et al., Administrators, 222 U. S., 460.)

Where, before expiration of a timber sale contract, the purchasers notify the forestry officials that they have sold their sawmill and equipment, because the contract is unprofitable, and it appears that they have done no work under it for several months, the Government may treat the contract as abandoned, and sell the remaining timber to other parties; but there is no authority to cancel the old contract so as to relieve the purchasers thereunder from liability for damages thereunder in case any shall have been found to have been sustained by the United States. If, in such case, the Government sells the re-

maining timber to others and receives from them the full price fixed in the original contract, then it could not collect such price from the original contractors. (2 Sol. Op., 758.)

Upon certificate of the proper forest officer that no damage has been sustained by the Government through the abandonment of a timber sale contract, a refund may be made to the purchaser of any amounts paid by him and remaining in the hands of the Government, over and above what is due for timber actually taken and for such expenses as the Government may have incurred. (Solicitor to his assistant at Albuquerque, Oct. 3, 1912.)

The decision in 28 Op. Atty. Gen., 12, is limited to the case actually presented and decided, namely, that an executive officer may refrain from enforcing a contract when some action of the Government, in its sovereign capacity, has made it inequitable to do so, although the waiver may be prejudicial to its pecuniary interests. That decision can not be applied where the only ground for releasing the contractor is that the contract has become less profitable than he expected. (Letter of Attorney General to Secretary of Agriculture, dated June 10, 1911.)

It is illegal to include in a timber sale contract a clause providing for a reduction in stumpage price in consideration of the purchaser's reforesting portions of the sale area (Solicitor's letter of Nov. 20, 1911, to the Forester), or constructing fire lines (1 Sol. Op., 437).

Timber which has been cut by the purchaser and not removed before the date fixed in clause 12 of timber sale Form 202 nevertheless belongs to the purchaser when he has paid the double stumpage price provided for by clause 14. He may, therefore, remove it from the forest after the date fixed in clause 12, but must do so in a reasonable time and under the supervision and direction of the forest officers supervising the sale. (2 Sol. Op., 836.)

Secretary of Agriculture may sell insect-infested timber, which is a menace to the National Forest, from an unperfected mining claim thereon, even without the consent of the claimant. (Lewis et al. *v.* Garlock, United States intervenor, 168 Fed., 153.)

In view of the exigency created by the great forest fires of the summer and fall of 1910, and of the facts presented showing the rapid deterioration of fire-killed timber in the northern and northwestern States, the Secretary of Agriculture may permit the claimants to sell such timber from homestead and other claims and from unsurveyed or unclassified railroad sections, taking a bond, with adequate security, from the purchaser to protect the interest of the United States, as the same may ultimately appear. (Letter of the Attorney General to the Secretary of Agriculture dated Nov. 23, 1911.)

It is understood that the foregoing opinion is limited to the situation created by the great fires of 1910, and is not to be applied generally, even to fire-killed timber, especially in regions where such timber does not rapidly deteriorate. (Solicitor to his assistant at San Francisco, Jan. 22, 1912.)

NOTE.—Prior to the receipt of the above-mentioned letter of the Attorney General, the Solicitor had rendered the decisions digested in the four paragraphs next following, which are still applicable, except as above stated.

The Forest Service is not authorized to sell fire-killed timber upon homesteads, or to enter into an agreement with homesteaders to sell the timber to purchasers and deposit the proceeds in the Treasury to be refunded upon the patenting of the claim. (1 Sol. Op., 327.)

There is no authority to make an agreement permitting an assignee of the Northern Pacific Railroad Co. to cut over lands covered by an unperfected selection under the act of March 2, 1899 (30 Stat., 993), at his own risk, upon filing a bond to indemnify the Government should such selection fail. (1 Sol. Op., 463.)

Neither the Northern Pacific Railroad Co. nor the Forest Service, nor the two acting together under agreement, can legally dispose of timber upon unsurveyed, unclassified, odd sections within the primary limits of the railroad grant. (1 Sol. Op., 327.)

A mining claim properly marked upon the ground is presumed to be valid until its validity is determined by the Interior Department in a proper proceeding and the Forest Service can not sell timber from such a claim merely because it appears to the Forest Service to be invalid. (1 Sol. Op., 181.)

If mining locations within National Forests have been abandoned, even though the boundaries thereof are still plainly marked, the Forest Service may properly sell the timber thereon. (2 Sol., Op. 1110.)

Free-use permits.

The provisions of the act of June 4, 1897 (30 Stat., 11), do not authorize the issuance of a free-use permit to the State of Montana for timber to construct a State building. (Sol. Op., May 26, 1913.)

The free-use provisions of the act of June 4, 1897 (30 Stat., 11), do not authorize the issuance of free-use permits for fire wood to be used in county courthouses or county high schools. (Sol. Op., June 30, 1915.)

By the free-use provisions contained in the act of June 4, 1897 (30 Stat., 11), Congress intended to provide for the granting of timber free of charge to persons who, in their individual capacities, wish to secure National Forest timber for the establishment or maintenance of their individual property, claims, or possessory rights within or near the forests. (Sol. Op., Nov. 5, 1915.)

A free-use permit (Form 874–8) for the taking of timber from National Forest lands constitutes an executory contract between the Government and the permittee for the taking of the timber after it has been severed from the soil, or has been reduced to the possession of the permittee, together with a license to enter upon National Forest lands for the purpose of cutting and removing it. (2 Sol. Op., 1076.)

Where clause 2 of the form (Permit) has been waived, the license thus created to enter and take the timber covered by such free-use permit is irrevocable as to that portion of the timber which has been severed from the soil, or which being dead and down has been reduced to the possession of the permittee in the form of personal property answering the description in the permit, but is revocable while it remains executory, or as to that portion of the timber which had not been severed from the soil or reduced to the possession of the permittee. (2 Sol. Op., 1076.)

GRAZING.

There are no statutes specifically relating to grazing upon the National Forests. The grazing regulations are based on the provision in the act of June 4, 1897 (30 Stat., 11, 35), which reads as follows:

"The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States."

DECISIONS.

The Secretary of Agriculture has the authority to make a charge for the use of lands in a National Forest for grazing. (United States *v.* Grimaud et al., 220 U. S., 506, 522.)

The usual grazing permit constitutes merely a license revocable at the discretion of the Secretary of Agriculture. (2 Sol. Op., 895.)

A person who has secured a waiver of grazing privileges in his favor can not rely on the prior issuance of a permit to the person from whom he purchased as creatng an estoppel aganst the Government to cancel the permit, there being no mutuality between the Government and such transferee. (Id.)

The Forest Service may collect the usual kidding or lambing charge for kidding or lambing on an unperfected mining claim within a National Forest where the claimant waives his right to exclusive possession under the mining laws. (2 Sol. Op., 865.)

For decisions relating to grazing trespasses, see "Trespass, grazing," post, p. 116.

TRESPASSES.

National Forest rules and regulations.

Act of June 4, 1897 (30 Stat., 11).

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-

three hundred and eighty-eight of the Revised Statutes of the United States.

NOTE.—The statutes referred to in the closing lines of the above act were both expressly repealed in the revised criminal code of 1909. The amending act (25 Stat., 166) is, however, printed next below. For effect of repeal, see U. S. *v.* Gibson, "Decisions," infra, page 111.

Penalty for violation of regulations

Act of June 4, 1888 (25 Stat., 166).

Section fifty-three hundred and eighty-eight of the Revised Statutes of the United States be amended so as to read as follows: "Every person who unlawfully cuts, or aids or is employed in unlawfully cutting, or wantonly destroys or procures to be wantonly destroyed, any timber standing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under authority of the United States, shall pay a fine of not more than five hundred dollars or be imprisoned not more than twelve months, or both, in the discretion of the court."

TIMBER TRESPASSES.

Criminal Code of March 4, 1909 (36 Stat., 1088, 1098).

SEC. 49. Whoever shall cut, or cause or procure to be cut, or shall wantonly destroy, or cause to be wantonly destroyed, any timber growing on the public lands of the United States; or whoever shall remove, or cause to be removed, any timber from said public lands, with intent to export or to dispose of the same; or whoever, being the owner, master, or consignee of any vessel, or the owner, director, or agent of any railroad, shall knowingly transport any timber so cut or removed from said lands, or lumber manufactured therefrom, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both. Nothing in this section shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or in the preparation of his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States. And nothing in this section shall interfere with or take away any right or privilege under any existing law of the United States to cut or remove timber from any public lands.

SEC. 50. Whoever shall unlawfully cut, or aid in unlawfully cutting, or shall wantonly injure or destroy, or procure to be wantonly injured or destroyed, any tree, growing, standing, or being upon any land of the United States which, in pursuance of law, has been reserved or purchased by the United States for any public use, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both. (As amended by act June 25, 1910, 36 Stat., 855, 857.)

SEC. 51. Whoever shall cut, chip, chop, or box any tree upon any lands belonging to the United States, or upon any lands covered by or embraced in any unperfected settlement, application, filing, entry, selection, or location, made under any law of the United States, for the purpose of obtaining from such tree any pitch, turpentine, or other substance, or shall knowingly encourage, cause, procure, or aid in the cutting, chipping, chopping, or boxing of any such tree, or shall buy, trade for, or in any manner acquire any pitch, turpentine, or other substance, or any article or commodity made from any such pitch, turpentine, or other substance, when he has knowledge that the same has been so unlawfully obtained from such trees, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both.

Cutting of timber on mineral lands.

Act of June 3, 1878 (20 Stat., 88).

[This act applies only to unreserved land not within National Forests.]

SEC. 1. All citizens of the United States and other persons, bona fide residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.

NOTE.—By virtue of power granted to the Secretary of the Interior under act of June 3, 1878 (20 Stat., 88), said Secretary provides, in his "rules and regulations governing the use of timber on the public mineral lands," (29 L. D., 571):

"SEC. 9. Persons felling or removing timber under the provisions of this act must utilize all of each tree cut that can be profitably used, and must dispose of the tops, brush, and other refuse in such manner as to prevent the spread of forest fires."

Duty of land officers.

SEC. 2. It shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

Penalty.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misde-

meanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

Cutting of timber for agricultural, etc., uses.

Act March 3, 1891 (26 Stat., 1093), amending section 8 of the act to repeal the timber culture laws.

SEC. 8. * * * And in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timberlands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, 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 this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands.

The above act was extended to New Mexico and Arizona by the amending act of February 13, 1893 (27 Stat., 444), and to California, Oregon, and Washington by the amending act of March 3, 1901 (31 Stat., 1436).

FIRE TRESPASSES.

Criminal Code of March 4, 1909 (36 Stat., 1088, 1098, and 1099).

SEC. 52. Whoever shall willfully set on fire, or cause to be set on fire, any timber, underbrush, or grass upon the public domain, or shall leave or suffer fire to burn unattended near any timber or other inflammable material, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both.

SEC. 53. Whoever shall build a fire in or near any forest, timber, or other inflammable material upon the public domain, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or upon any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall before leaving said fire, totally extinguish the same; and whoever shall fail to do so shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both. (As amended by act June 25, 1910, 36 Stat., 855,557.)

SEC. 54. In all cases arising under the two preceding sections the fines collected shall be paid into the public school fund of the county in which the lands where the offense was committed are situated.

MISCELLANEOUS OFFENSES AGAINST THE UNITED STATES.

Act of February 25, 1885 (23 Stat., 321).

Unlawful fencing.

SEC. 1. That all inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited.[1]

Civil suit; injunction.

SEC. 2. That it shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States that section one of this act is being violated, showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by governmental subdivisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation, as nearly as may be, and by description, if the name can not on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district or circuit court, or Territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also hereby conferred on any United States district or circuit court, or Territorial district court, having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure; and any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day. In

[1] It is unlawful under this act for persons who have acquired the right to use railroad odd sections to construct a fence located entirely on the odd sections, but in such a manner as to inclose with the odd sections some of the even sections belonging to the Government. (Camfield *v.* United States, 167 U. S., 538.) In this case the court relied upon the maxim that one must use his own so as not to injure another; and as this gave rise to the suggestion that the result would involve the exercise by the United States of police power within a State, the court said, "We do not think the admission of a Territory as a State deprives it (Congress) of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of State legislation."

any case, if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court.

Obstruction forbidden.

SEC. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: *Provided*, This section shall not be held to affect the right or title of persons who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.

Criminal action.

SEC. 4. That any person violating any of the provisions hereof, whether as owner, part owner, agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor, and fined in a sum not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, for each offense. (As amended by act Mar. 10, 1908, 35 Stat., 40.)

Removal by force.

SEC. 5. That the President is hereby authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any of said lands, and to employ civil or military force as may be necessary for that purpose.

Inclosures of less than 160 acres.

SEC. 6. That where the alleged unlawful inclosure includes less than one hundred and sixty acres of land, no suit shall be brought under the provisions of this act without authority from the Secretary of the Interior.

Pending suits.

SEC. 7. That nothing herein shall affect any pending suits to work their discontinuance, but as to them hereafter they shall be prosecuted and determined under the provisions of this act.

Criminal Code of March 4, 1909 (36 Stat., 1088).

Destruction of Government telephone line or property.

SEC. 60. Whoever shall willfully or maliciously injure or destroy any of the works, property, or material of any telegraph, telephone, or cable line, or system, operated or controlled by the United States, whether constructed or in process of construction, or shall willfully or maliciously interfere in any way with the working or use of any such line, or system, or shall willfully or maliciously obstruct, hinder, or delay the transmission of any communication over any such line, or system, shall be fined not more than one thousand dollars, or imprisoned not more than three years, or both.

Destruction of Government survey corners or marks.

SEC. 57. Whoever shall willfully destroy, deface, change, or remove to another place any section corner, quarter-section corner, or meander post, on any Government line of survey, or shall willfully cut down any witness tree or any tree blazed to mark the line of a Government survey, or shall willfully deface, change, or remove any monument or bench mark of any Government survey, shall be fined not more than two hundred and fifty dollars, or imprisoned not more than six months, or both.

Breaking inclosures, stock trespass.

SEC. 56. Whoever shall knowingly and unlawfully break, open or destroy any gate, fence, hedge, or wall inclosing any lands of the United States which, in pursuance of any law, have been reserved or purchased by the United States for any public use; or whoever shall drive any cattle, horses, hogs, or other live stock upon any such lands for the purpose of destroying the grass or trees on said lands, or where they may destroy the said grass or trees; or whoever shall knowingly permit his cattle, horses, hogs, or other live stock, to enter through any such inclosure upon any such lands of the United States, where such cattle, horses, hogs, or other live stock may or can destroy the grass or trees or other property of the United States on the said lands, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both: *Provided*, That nothing in this section shall be construed to apply to unreserved public lands.

False personification of United States officer.

SEC. 32. Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States or any department, or any officer of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, any money, paper, document, or other valuable thing, shall be fined not more than one thousand dollars, or imprisoned not more than three years, or both.

Robbery of United States property.

SEC. 46. Whoever shall rob another of any kind or description of personal property belonging to the United States, or shall feloniously take and carry away the same, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both.

Embezzlement, theft, etc.

SEC. 47. Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

Receiving stolen property.

SEC. 48. Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable

thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender.

Perjury.

SEC. 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

Hunting on bird refuges.

SEC. 84. Whoever shall hunt, trap, capture, willfully disturb, or kill any bird of any kind whatever, or take the eggs of any such bird, on any lands of the United States which have been set apart or reserved as breeding grounds for birds by any law, proclamation, or executive order, except under such rules and regulations as the Secretary of Agriculture may, from time to time, prescribe, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.

(The foregoing section seems to be a codification of the act of June 28, 1906 (34 Stat., 536). That act, however, is not specifically repealed, and it contains the following proviso: "*Provided*, That the provisions of this act shall not apply to the Black Hills Forest Reservation, in South Dakota.")

Act of January 24, 1905 (33 Stat., 614); act of June 29, 1906 (34 Stat., 607). The foregoing acts, which authorize the establishment of the Wichita game and bird refuge and the Grand Canyon game refuge contain penal provisions substantially the same as in section 84, supra.

Trespass on Bull Run National Forest.

SEC. 55. Whoever, except forest rangers and other persons employed by the United States to protect the forest, Federal and State officers in the discharge of their duties, and the employees of the water board of the city of Portland, State of Oregon, shall knowingly trespass upon any part of the reserve known as Bull Run National Forest, in the Cascade Mountains, in the State of Oregon, or shall enter thereon for the purpose of grazing stock, or shall engage in grazing stock thereon, or shall permit stock of any kind to graze thereon, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.

Protection of American antiquities.

Act of June 8, 1906 (34 Stat., 225).

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity,

situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

The remainder of the foregoing act, authorizing the establishment of national monuments, is printed ante, page 23.

DECISIONS.

A homestead entryman does not have the right to remove sand and gravel from the land embraced in his unperfected entry for the purpose of sale. (Litch *v.* Scott, 40 L. D., 467.)

Persons obstructing either ingress or egress to a National Forest over trails constructed by the department, even over lands lying outside the National Forests, may be proceeded against in trespass and by proceedings for the removal of their fences and other obstructions. (1 Sol. Op., 482.)

The willfull and malicious cutting of Forest Service telephone lines is punishable under section 60 of the Criminal Code of March 4, 1909. (1 Sol. Op., 283.)

Forest officers are authorized under the act of February 6, 1905, to make arrests for depredations on national monuments within National Forests. (2 Sol. Op., 670.)

Persons injuring or defacing the Oregon Caves, which have been reserved as a national monument, may be prosecuted under the criminal provisions of the national monument act. (2 Sol. Op., 670.)

An affidavit of settlement, made by an applicant to enter agricultural lands within a forest reserve, under the act of June 11, 1906, as required by the Commissioner of the General Land Office, was one taken in a case in which a law of the United States authorizes an oath to be administered, as provided by section 5392, Revised Statutes, and was therefore a proper subject for prosecution for perjury. (United States *v.* Nelson, 199 Fed., 464.)

AUTHORITY OF FOREST OFFICERS.

Power to arrest.

Act of February 6, 1905 (33 Stat., 700).

All persons employed in the forest reserve and national park service of the United States shall have authority to make arrests for the violation of the laws and regulations relating to the forest reserves and national parks, and any person so arrested shall be taken before the nearest United States commissioner, within whose jurisdiction the reservation or national park is located, for trial; and upon sworn information by any competent person any United States commissioner in the proper jurisdiction shall issue process for the arrest of any person charged with the violation of said laws and regulations; but nothing herein contained shall be construed as preventing the arrest by any officer of the United States, without process, of any person taken in the act of violating said laws and regulations.

Administering oaths.

SEC. 183, R. S. Any officer or clerk of any of the Departments lawfully detailed to investigate frauds or attempts to defraud on the

Government, or any irregularity or misconduct of any officer or agent of the United States, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation.

DECISIONS.

General decisions, timber trespass.

Decision of November 20, 1913, by Judge Riner, of District Court of Wyoming, on motion to dismiss certain counts in an indictment against William Gibson for cutting of timber on Targhee National Forest in violation of regulations of Secretary of Agriculture: The penal provision in the act of June 4, 1897 (30 Stat., 11), which refers to the act of June 4, 1888 (25 Stat., 166), for the penalty, is not affected by the repeal of the latter act; nor does the act, (Mar. 4, 1909; 36 Stat., 1088), revising the penal laws of the United States impliedly repeal the penal portion of the act of June 4, 1897 (30 Stat., 11).

By a modification of the earlier doctrine of equity, injunction will now lie to prevent irremediable mischief to the substance of the estate as by the mining of ores or the cutting of trees by one in possession of lands while the title is in litigation. (Erhardt *v.* Boaro, 113 U. S., 537.)

Where one has unlawfully cut timber from lands of the United States it is no defense that he acted in accordance with a general custom in the locality, known to the general land office, of entering lands and cutting the timber before patent issued. (Teller *v.* United States (C. C. A.), 113 Fed., 273.)

An instruction to the jury that if defendant entered upon public land knowing it to be such, without having complied with the provisions of law giving him a right to do so, and cut timber therefrom, they would be authorized to find the requisite criminal intent, fairly states the law, and is as favorable as the defendant is entitled to. (Teller *v.* United States (C. C. A.), 113 Fed., 273.)

Timber trespass upon mineral lands.

The act June 3, 1878 (20 Stat., 88), seems to apply only in the States and Territories specifically mentioned therein. (United States *v.* Smith, 11 Fed., 487; United States *v.* Benjamin, 21 Fed., 285; United States *v.* English, 107 Fed., 867.)

The right to cut timber under this act extends only to lands valuable for minerals and not to lands adjacent thereto, or lying in a recognized mineral region, but not themselves valuable for their minerals. (United States *v.* Plowman, 216 U. S., 327.)

The cutting of timber from mineral lands for roasting of ores is authorized by the act of 1878, whether this process be considered a part of the mining or as smelting. In either event the use is for "domestic purposes." (United States *v.* United Verde Copper Co., 196 U. S., 207.)

One who cuts timber from public mineral lands and sells the same, or the lumber manufactured therefrom, without taking from the purchaser a written statement of the purposes for which the same is intended to be used, as required by the regulations of the Secretary of the Interior, is guilty of a violation of the statute. (United States *v.* Redes, 69 Fed., 965.)

The act of 1878 (20 Stat., 88) and the act of March 3, 1891 (26 Stat., 1093), have been construed by the land department as having practically the same scope and purpose, the one applying only to mineral and the other only to nonmineral lands. *Held*, therefore, on the authority of United States *v.* United Verde Copper Co., *supra*, that the latter statute authorizes the use of timber for smelting purposes. (34 L. D., 78.)

Jurisdiction over matters relating to the cutting of timber upon lands within the surface area of mining claims within National Forests is vested in the Department of Agriculture and not in the Department of the Interior. (H. T. Mecum, 43 L. D., 465.)

Timber trespass upon homestead claims.

The settler upon a homestead claim may cut such timber as is necessary to clear the land for cultivation or to build him a house, outbuildings, and fences, and, perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes, but not to sell the same for money, except so as the timber may have been cut for the purpose of cultivation. While, as was claimed in this case, such money might be used to build, enlarge, or finish a house, the toleration of such practice would open the door to manifold abuses, and be made an excuse for stripping the land of its valuable timber. One man might be content with a house worth $100, while another might, under the guise of using the proceeds of the timber for improvements, erect a house worth several thousands. A reasonable construction of the statute—a construction consonant both with the protection of the property of the Government in the land and the rights of the settler—we think restricts him to the timber actually cut or the lumber exchanged for such timber and used for his improvements, and to such as is necessarily cut in clearing the land for cultivation. Shiver *v.* United States, 159 U. S., 491, 498; see also United States *v.* Cook, 19 Wall., 591; Conway *v.* United States (C. C. A.), 95 Fed., 615; U. S. *v.* Niemeyer, 94 Fed., 147; U. S. *v.* Haymaker, 199 Fed., 644.)

The cutting and removal of timber from a homestead claim must be for a legitimate purpose, having some connection with the cultivation and improvement of the land, but it is error to instruct the jury that the timber could only be cut "in pursuance of a definite plan that the plow should follow the ax," and that if the timber was cut from lands "not put in cultivation, and not to be put immediately into cultivation, then the law presumes that they intended to violate the law." (Grubbs *v.* United States (C. C. A.), 105 Fed., 314; see also Stone *v.* United States, 167 U. S., 194.)

After final proof and the issuance of final certificate, homestead entrymen may cut and remove timber from their claims for any purpose. (1 Sol. Op., 327.)

Timber trespass upon mining claims.

An occupant of a mineral claim, who has applied for patent, has no right to cut and sell the timber thereon before payment of the Government price and issuance of final certificate, and a license from him to so cut the timber is no protection to the licensee. (Teller *v.* United States (C. C. A.), 113 Fed., 273; see also United States *v.* Nelson, 5 Sawyer, 68.)

When, however, the timber on a mining claim in a National Forest is infested with insects so as to be a menace to the young and growing trees, the Government, having the paramount title, may, through the Forest Service, sell and dispose of such timber, even without the consent of the claimant. (Lewis et al. *v.* Garlock (United States, intervenor), 168 Fed., 153.)

Timber trespass upon railroad lands.

The grant to the Northern Pacific Railroad Co. vested in the grantee a present title to the odd sections on the definite location of the road, but the Government makes its own surveys, and until survey by the Government the United States retains at least a special property in all the timber in the township and may recover for timber cut by the company or its grantees, notwithstanding a survey made by the company shows the land cut over to be an odd section. Such a survey is inadmissible as evidence that the land is part of an odd section. (United States *v.* Montana Lumber Co., 196 U. S., 573.)

The mineral return of the Surveyor General under the grant to the Central Pacific Railroad Co., of July 1, 1862, and July 2, 1864, is merely prima facie evidence of the mineral character of the land, which may be inquired into by the Department of the Interior at any time before patent. (2 Sol. Op., 897.)

The Department of Agriculture is not authorized to handle the sale of timber cut in trespass upon lands within the primary limits of the Northern Pacific Railroad grant, even though such lands lie within the exterior limits of a National Forest. (1 Sol. Op., 541.)

Timber trespass upon lieu selection.

Prior to the approval of a selection under the indemnity school and university land grants, title in the land remains in the United States and no one has a right to go upon the land and cut the timber therefrom. (1 Sol. Op., 468.)

Damages—Innocent and willful trespasses.

One innocently purchasing timber unlawfully and willfully cut from Government lands and transported to market by his vendor is liable for its value at the time and place of his purchase without any deduction for value added by the acts of the willful trespasser. (Woodenware Co. *v.* United States, 106 U. S., 432.)

In a case of innocent trespass the measure of damages is the value of the timber after it was cut at the time and place where it was cut. (United States *v.* St. Anthony R. R. Co., 192 U. S., 524; 1 Sol. Op., 298; 40 L. D., 518, 525.)

In a letter of instructions to the United States attorney at Helena, Mont., dated September 7, 1910, the Acting Attorney General, after reviewing the authorities and discussing the conflicting cases, says:

"After a somewhat careful examination of the authorities cited and many others, the department is of the opinion that, where timber has been inadvertently cut from the public lands, (1) the timber immediately after felling becomes the personal property of the United States (Sampson *v.* Hammond, 4 Cal., 184); (2) an action of

trover will lie for its conversion (Sampson *v.* Hammond, supra; White *v.* Yawkey, 108 Ala., 270, 275); (3) the value of the property when first taken is the measure of damages recoverable (Woodenware case, 106 U. S., 432, 434); and (4) the value of the property when first taken, within the meaning of the Woodenware case, is its value immediately when it takes the form of personal property—i. e., immediately after severance from the freehold (White *v.* Yawkey, 108 Ala., 270, 274, 275)."

In Pine River Logging Co. *v.* United States (186 U. S., 279, 293) the doctrine of the Woodenware case as to willful trespasses is stated to be that "if the trespass be willfully committed the trespasser can obtain no credit for the labor expended upon it, and is liable for its full value when seized"; and this rule was applied in the case under consideration, the parties in the possession of the timber at that time being found to have participated in the trespass.

Where timber is cut upon public land by one who knows that the land belongs to the Government, or who has no reasonable ground to believe that it belongs to himself or to some one under whom he claims, the trespass is a willful one. (Bly *v.* United States, Fed. case No. 1581, 4 Dill., 464.)

In actions of trespass where the injury has been wanton and malicious or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something further by way of punishment or example, which has sometimes been called "smart money." (Day *v.* Woodworth, 13 How., 362, 371; see also Barry *v.* Edmunds, 116 U. S., 550.)

Where the defendant admits the cutting and removal of timber from public lands, the Government is entitled to at least nominal damages, in the absence of direct evidence of the value of the standing trees. (United States *v.* Mock, 149 U. S., 273; see also United States *v.* Taylor, 35 Fed., 484.)

In trover for crude turpentine unlawfully but not willfully taken from pine trees, the measure of damages is its value at the time of conversion with interest. (Quitman Naval Stores Co. *v.* Conway, 58 So. Rep., 840; Solicitor to his assistant at Albuquerque, Dec. 26, 1912.)

Where, in an action for timber trespass, the jury found from the evidence that defendants had taken logs from public lands, but the number taken was uncertain, they were entitled to indulge every reasonable inference supported by the evidence in determining the number. (United States *v.* McCaskill, 200 Fed., 332.)

Fire trespasses.

In United States *v.* Henry Clay (unreported), Southern District of California, the defendant was indicted under section 52 of the Criminal Code, and the jury were charged by Judge Wellborn in part as follows:

"It is immaterial whether the fire * * * originated on private land if it was set wilfully and if in the course of nature and in view of all the surroundings the said fire would reasonably be expected to be communicated to the public domain. A man has no lawful right to set fire to his own property if he has reason to believe or intends

that such fire will be communicated to the property of others and destroy it."

In an action by the United States against a railroad company to recover for loss of timber alleged to have been burned through defendant's negligence in permitting inflammable material to accumulate on its right of way, in which fire was started from an engine and spread into the timber on a forest reservation, a letter written by a forest inspector to the secretary of defendant some time before the fire, inclosing a report from a ranger as to the dangerous condition of the right of way, and asking that it be remedied, was not inadmissible as a self-serving declaration, but was properly admitted to show actual notice to defendant of the condition referred to therein, the fact being otherwise proved. (United States *v.* Corvallis & E. R. Co., 191 Fed., 310.)

On an issue as to the condition of a locomotive alleged to have caused a fire on defendant's right of way because of its defective condition, which permitted the escape of fire and sparks, the admission in evidence of the testimony of the fireman of defendant's machine shop as to the condition of the engine, both before the fire and after its return from the trip on which the fire occurred, the purpose being to show its condition before and at the time of the fire, was not prejudicial error. (Id.)

(Liability of railroads for injuries by fire as affected by management of locomotives, see note to Woodward *v.* Chicago, M. & St. P. Ry. Co., 75 C. C. A., 598.)

Injunction will lie to prevent the accumulation of inflammable material upon a railroad right of way within the National Forests when such accumulation is shown to be dangerous to the forests. (1 Sol. Op., 300, 526.)

There is no authority in the department to make settlement with the Great Northern Railway Co. of a fire trespass, by which the company shall pay at once for all timber destroyed or damaged, with an agreement that any money received from the sale of damaged timber to a third party, less costs of the sale, shall be paid over to the company. (1 Sol. Op., 496.)

It is not the duty of forest officers directly to prosecute in a State court a person accused of violating a State statute by setting out a fire which spread to National Forest lands. In such case they would perform their full duty by calling the attention of the proper State officers to the alleged criminal offense, suggesting action and offering to aid in all proper ways. (2 Sol. Op., 693.)

The acquittal of a fire trespasser in a State court is no bar to his prosecution in a United States court for a violation of the Federal laws arising out of the same acts. (Solicitor to his assistant at Denver, Sept. 10, 1912.)

The Government is entitled to recover for damage to reproduction (United States *v.* Corvallis & Eastern R. R. Co., 191 Fed., 310; United States *v.* N. P. R. R. Co., Dec. 2, 1911, in United States District Court, Western District of Washington, and case of United States *v.* C. O. Bailey, receiver for Mo. Pac. Ry. Co. and Title Guarantee Surety Co., in United States District Court for South Dakota, Sept. 7, 1910), the verdicts in which cases include such damage. (See also United States *v.* C., M. & St. P. Ry. Co., 207 Fed., 164.)

Grazing trespasses.

In an action for damages sustained through the herding and grazing of sheep upon the plaintiffs' lands it is proper, in establishing the amount of damages, to inquire into the ease or difficulty in securing other pasture near by and the market price of similar pasture, or the price of such foodstuffs as would have been necessary to have kept and fed plaintiffs' live stock, or to have shown the price the plaintiffs could have secured for their pasture, or the number of live stock they could have pastured thereon and the value per month for the pasturage for each head of such live stock, and such other evidence of kindred and similar import which would have enabled the jury to have intelligently fixed the value of the property destroyed at the time of its destruction. (Risse et ux. *v.* Collins (Sup. Ct. Idaho), 87 Pac., 1006.)

The damages for injuries to growing grass, through incursions of animals, may be established by evidence tending to show how many cattle could be grazed upon the land trespassed upon and what such pasturage would be worth. (Buttles *v.* Chicago, etc., Ry. Co., 43 Mo. App., 280; see also Vermilja *v.* Chicago, etc., Ry. Co., 66 Iowa, 606.)

The Secretary of Agriculture may authorize Forest Service officers to assess and collect both punitive and actual damages in willful grazing trespass cases where the trespasser is willing to make settlement without reference of the case to court. (Sol. Op., Apr. 1, 1915.)

An owner of stock is not liable for the damage caused by such stock while trespassing upon lands of the United States where the stock are in the possession and under the control of another who is not merely an agent, or servant, of the owner, but who holds the stock as lessee, bailee, or under the terms of an agreement whereby he secures an equitable interest in the same. (2 Sol. Op., 1065.)

Under the acts establishing forest reservations their use for grazing or other lawful purposes is subject to rules and regulations established by the Secretary of Agriculture, and it being impracticable for Congress to provide general regulations, that body acted within its constitutional power in conferring power on the Secretary to establish such rules; the power so conferred being administrative, and not legislative, is not an unconstitutional delegation. (United States *v.* Grimaud, 220 U. S., 506.)

At common law the owner was responsible for damage done by his live stock on land of third parties, but the United States has tacitly suffered its public domain to be used for cattle so long as such tacit consent was not canceled, but no vested rights have been conferred on any person, nor has the United States been deprived of the power of recalling such implied license. (Light *v.* United States, 220 U. S. 523.)

Congress has power to set apart portions of the public domain and establish them as forest reserves and to prohibit the grazing of cattle thereon or permit it subject to rules and regulations. (Id.)

Fence laws may condone trespasses by straying cattle where the laws have not been complied with, but they do not authorize wanton or willful trespass, nor do they afford immunity to those willfully turning cattle loose under circumstances showing that they were intended to graze upon the lands of another. (Id.)

Where cattle are turned loose under circumstances showing that the owner expects and intends that they shall go upon a reserve to graze thereon, for which he has no permit and he declines to apply for one, and threatens to resist efforts to have the cattle removed and contends that he has a right to have his cattle go on the reservation, equity has jurisdiction, and such owner can be enjoined at the instance of the Government, whether the land has been fenced or not. (Id.)

Injunctions to restrain grazing trespassers.

[Shannon *v.* United States (C. C. A. Ninth Circuit), 160 Fed., 870.]

Where defendant drove large bands of cattle into a 320-acre pasture which was inclosed on three sides, but open on the side toward a public forest reserve, knowing that there was no water in the pasture, and that it was insufficient to sustain the cattle, and that they must of necessity drift onto the reserve for pasture and water, defendant could not claim freedom from responsibility for the cattle trespassing on the reserve because he at no time drove them there and because the reserve was not inclosed.

The creation of a forest reserve severs the reserved land from the public domain and appropriates it to public use, so that it is no longer subject to the implied license to pasture on public lands.

The rules promulgated by the Secretary of the Interior regulating the number of cattle and other live stock that may be pastured on a forest reserve, and the manner in which the owners may obtain permission to use the reservation for that purpose, are reasonable and within the power granted by act of Congress of June 4, 1897, chapter 2 (30 Stat., 34 U. S. Comp. St. 1901, p. 1542), giving the Secretary of the Interior power to make rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests from destruction.

The Federal Constitution delegates to Congress the general power, absolutely and without limitation, to dispose of and make all needful rules and regulations concerning the public domain independent of the locality of the land, whether situated in a State or Territory, the exercise of which power can not be restricted in any degree by State legislation.

Congress had no power to relinquish any of its jurisdiction over the public domain by a compact with the State of Montana on admission of the State into the Union, nor had the State any power to reserve any such control.

Public lands in the State of Montana were not subject to the stock and fence laws of the State, which were applicable only to lands subject to the State's dominion.

Where the United States brought suit to restrain the trespass of defendant's cattle on a forest reserve, the fact that in such suit it acted in its proprietary capacity and was subject to the ordinary rules of pleading, practice, and laws applicable to the case did not operate as a waiver of any of its sovereign rights to the land sought to be protected.

It was no defense to an injunction restraining defendant's use of a United States forest reserve as a pasture that its issuance would impose a grievous burden on him to restrain the cattle in his adjoin-

ing close, it also appearing that he could relieve himself of such burden by restoring a fence on one side thereof.

Substantially to the same effect as the foregoing was the earlier decision in Dastervignes *v.* United States, by the Circuit Court of Appeals for the Ninth Circuit (122 Fed., 30). The two following paragraphs of the syllabus of that case are of additional interest:

A bill filed by the United States to enjoin the pasturage of sheep in a forest reservation, in violation of the regulations prescribed by the Secretary of the Interior, alleged that the sheep pastured within the reservation were committing great and irreparable injury to the public lands therein and to the undergrowth, timber, and water supply. Affidavits filed in support of such allegations recited that the sheep of defendants destroyed undergrowth, young and growing trees and seedlings, and ate and destroyed the roots of the vegetation and grasses, leaving the ground bare and subject to disastrous washings by the rains, to the irreparable injury of the reservation, *Held*, that such allegation and showing constituted a sufficient ground for the granting of a preliminary injunction.

A bill by the United States against a number of defendants, to enjoin them from pasturing sheep in a forest reservation, is not subject to the objection of misjoinder and multifariousness where it alleges that defendants are pasturing two bands as sheep in the reservation and contains no averments which show or indicate any separate or distinct rights or different interests as between the several defendants.

An action of trespass is not maintainable as against one grazing unpermitted stock on private land, the exclusive use of which has been waived by the owner, there being no authority in this department to administer other than National Forest land. (1 Sol. Op., 544.)

FISCAL MANAGEMENT AND APPROPRIATIONS.

Annual estimates.

Act of May 26, 1910 (36 Stat., 416).

The Secretary of Agriculture for the fiscal year nineteen hundred and twelve, and annually thereafter, shall transmit to the Secretary of the Treasury for submission to Congress in the Book of Estimates detailed estimates for all executive officers, clerks and employees below the grade of clerk, indicating the salary or compensation of each, necessary to be employed by the various bureaus, offices, and divisions of the Department of Agriculture.

The agricultural appropriation act of March 4, 1911 (36 Stat., 1235, 1264), repeals the provision of the appropriation act of March 4, 1907 (34 Stat., 1256, 1270), requiring the submission to Congress of classified reports of the receipts and expenditures of the Forest Service.

Portion of receipts to States.

Act of May 23, 1908 (34 Stat., 251).

That hereafter twenty-five per centum of all money received from each forest reserve during any fiscal year, including the year ending June thirtieth, nineteen hundred and eight, shall be paid at the end thereof by the Secretary of the Treasury to the State or Territory in which said reserve is situated, to be expended as the State or Ter-

ritorial legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated: *Provided*, That when any forest reserve is in more than one State or Territory or county the distributive share to each from the proceeds of said reserve shall be proportional to its area therein.

Portion of receipts for roads.

Act of March 4, 1913 (37 Stat., 828).

That hereafter an additional ten per centum of all moneys received from the national forests during each fiscal year shall be available at the end thereof, to be expended by the Secretary of Agriculture for the construction and maintenance of roads and trails within the national forests in the States from which such proceeds are derived; but the Secretary of Agriculture may, whenever practicable, in the construction and maintenance of such roads, secure the cooperation or aid of the proper State or Territorial authorities in the furtherance of any system of highways of which such roads may be made a part; * * *

Cooperative contribution fund.

Act of June 30, 1914 (38 Stat., 415).

That hereafter all moneys received as contributions toward cooperative work in forest investigations, or the protection and improvement of the national forests, shall be covered into the Treasury and shall constitute a special fund, which is hereby appropriated and made available until expended, as the Secretary of Agriculture may direct, for the payment of the expenses of said investigations, protection, or improvements by the Forest Service, and for refunds to the contributors of amounts heretofore or hereafter paid in by them in excess of their share of the cost of said investigations, protection, or improvements: *Provided*, That annual report shall be made to Congress of all such moneys so received as contributions for such cooperative work.

Advances for fire-fighting purposes.

Act of May 23, 1908 (34 Stat., 251).

* * * and hereafter advances of money under any appropriation for the Forest Service may be made to the Forest Service and by authority of the Secretary of Agriculture to chiefs of field parties for fighting forest fires in emergency cases, who shall give bond under such rules and regulations and in such sum as the Secretary of Agriculture may direct, and detailed accounts arising under such advances shall be rendered through and by the Department of Agriculture to the Treasury Department.

Transportation of personal property.

Act of March 4, 1911 (36 Stat., 1235).

That hereafter officers and employees of the Department of Agriculture transferred from one official station to another for permanent duty, when authorized by the Secretary of Agriculture, may be allowed actual traveling expenses, including charges for the transfer of their effects and personal property used in official work, under such rules and regulations as may be prescribed by the Secretary of Agriculture.

Per diem and car fare allowances.

Act of August 10, 1912 (37 Stat., 269).

That hereafter, when officials and employees of the Department of Agriculture are traveling on official business in the United States, they may be allowed necessary railroad and steamboat fares, sleeping berth, and stateroom on steamboats, livery hire and stage fare, and other means of conveyance between points not accessible by railroad, but in lieu of subsistence and all other traveling expenses they may receive a per diem allowance, to be fixed by the Secretary in each case, in addition to their regular salaries, subject to such rules and regulations as the Secretary of Agriculture may prescribe.

That hereafter officials and employees of the Department of Agriculture may, when authorized by the Secretary of Agriculture, receive reimbursement for moneys expended for street-car fares at their official headquarters when expended in the transaction of official business.

Reimbursement for property lost, damaged, or destroyed.

Act of March 4, 1913 (37 Stat., 828).

That hereafter the Secretary of Agriculture is authorized to reimburse owners of horses, vehicles, and other equipment lost, damaged, or destroyed while being used for necessary fire fighting, trail, or official business, such reimbursement to be made from any available funds in the appropriation to which the hire of such equipment is properly chargeable.

Refunds of Forest revenues covered into Treasury.

Act of March 4, 1907 (34 Stat., 1256).

That all money received after July first, nineteen hundred and seven, by or on account of the Forest Service for timber, or from any other source of forest reservation revenue, shall be covered into the Treasury of the United States as a miscellaneous receipt and there is hereby appropriated and made available as the Secretary of Agriculture may direct out of any funds in the Treasury not otherwise appropriated, so much as may be necessary to make refunds to depositors of money heretofore or hereafter deposited by them to secure the purchase price on the sale of any products or for the use of any land or resources of the national forests in excess of amounts found actually due from them to the United States.

Additional refund provisions.

Act of March 4, 1911 (36 Stat., 1235).

That so much of an act entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and eight," approved March fourth, nineteen hundred and seven (Thirty-fourth Statutes at Large, pages twelve hundred and fifty-six and twelve hundred and seventy), which provides for refunds by the Secretary of Agriculture to depositors of moneys to secure the purchase price of timber or the use of lands or resources of the National Forests such sums as may be found to be in excess of the amounts found actually due the United States, be, and is hereby, amended hereafter to appropriate and to include so much as may be necessary to refund or pay over to the

rightful claimants such sums as may be found by the Secretary of Agriculture to have been erroneously collected for the use of any lands, or for timber or other resources sold from lands located within, but not a part of, the national forests, or for alleged illegal acts done upon such lands, which acts are subsequently found to have been proper and legal; and the Secretary of Agriculture shall make annual report to Congress of the amounts refunded hereunder.

Transfers from lump-sum appropriations.

Act of August 26, 1912 (37 Stat., 595).

SEC. 7. No part of any money contained herein or hereafter appropriated in lump sum shall be available for the payment of personal services at a rate of compensation in excess of that paid for the same or similar services during the fiscal year nineteen hundred and twelve; nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation a rate of compensation greater than such specific salary, and the heads of departments shall cause this provision to be enforced.

Amendment of act, supra.

Act of March 4, 1913 (37 Stat., 828).

That hereafter section seven of the Act approved August twenty-sixth, nineteen hundred and twelve (Thirty-seventh Statutes, page six hundred and twenty-six), and any amendments thereto, shall not apply to the payment, out of moneys appropriated or which may be hereafter appropriated in lump sum for the Department of Agriculture, for personal services of employees engaged in strictly scientific or technical work: *Provided*, That nothing contained herein shall be construed to authorize the transfer of any person employed at a specific salary and the payment of compensation from lump-sum appropriations at a rate greater than said specific salary.

And hereafter every officer or employee of the Department of Agriculture whose rate of compensation is specified herein shall receive compensation at the rate so specified.

Purchase of tree seed.

Act of June 30, 1914 (38 Stat., 415).

* * * That hereafter the Secretary of Agriculture may procure such seed, cones, and nursery stock by open purchase, without advertisements for proposals, whenever in his discretion such method is most economical and in the public interest and when the cost thereof will not exceed $500; * * *

Compromise of claims.

SEC. 3469, R. S. Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly. But the provisions of this section shall not apply to any claim arising under the postal laws.

DECISIONS.

Where judgments are recovered in actions for trespass on National Forests, such amounts thereof as represent punitive damages, costs of suit, or amounts to cover replanting are not such revenues of the National Forests as are subject to the 25 per cent deduction for distribution to the States and Territories in which the National Forest concerned is located. (17 Comp. Dec., 688.)

A force employed in the District of Columbia to supervise and control the field work of employees engaged in making examinations, surveys, etc., under the Weeks forestry law of March 1, 1911, can not be paid from the appropriation made by that act. (17 Comp. Dec., 780.)

Publications of advertisements affecting national forests made by supervisors or rangers pursuant to written instructions from the Forester, issued under authority of the Secretary of Agriculture, specifying the newspapers to be used are publications authorized by Revised Statutes, section 3828. (13 Comp. Dec., 446.)

The withholding of moneys due a corporation by the United States is not authorized as a set-off against the liability of such corporation to the United States for indefinite profits arising out of a timber trespass committed by another person. (15 Comp. Dec., 113.)

Costs adjudged against forest officers in the prosecution by them, before a justice of the peace, of one arrested for setting a fire which spreads to National Forest lands, are not chargeable against the United States and can not be paid from Forest Service appropriations. (Comp. Dec. of May 6, 1912; 2 Sol. Op., 693.)

Expenses of Government officers in going, returning, and in attendance on court, when sent away from the usual place of their duties, as witnesses, for the Government, as the result of knowledge obtained in the discharge of their official duties, are payable from the appropriate appropriation of the department from which they are sent, and not from the judicial appropriations for fees of witnesses. (12 Comp. Dec., 391; see also 14 Comp. Dec., 80 and 516; 15 id., 154, 298 and 757.)

Where authority is exercised by a special class of officers in the arrest of persons for violations of the laws of the United States, all expenses incident to such arrests are defrayed by the Government and paid out of appropriations made for certain purposes, and not until prisoners come into the custody of the United States marshal by virtue of a duly recognized authority can it be said that a judiciary appropriation may be available for the payment of such expenses. (8 Comp. Dec., 127; 11 id., 753; 15 id., 602; 16 id., 371; 17 id., 566.)

When an offender is arrested by a forest officer for violation of the forestry laws or regulations and taken before a United States Commissioner, the liability of the judiciary appropriations would commence with the complaint and warrant; but in no case would such appropriations be liable for any fees or expenses of the forest officer where it is his duty to aid in the detection, prosecution, and punishment for violations of such laws and regulations. (14 Comp. Dec., 113.)

The appropriation for general expenses of the Forest Service can not be used to pay for the support of a prisoner confined in a State

jail for violation of the rules and regulations relating to the forest reserves under a commitment issued by a United States Commissioner. Such payments are chargeable to the judiciary appropriation. (14 Comp. Dec., 113.)

A forest officer keeping a privately owned automobile for official business can not receive compensation for carrying another forest officer in the car, both being on an official trip. (2 Sol. Op., 782.)

General expenses.

The appropriation for the general expenses of the Forest Service can not be used to pay an impounding fee under a village ordinance for horses of the Government taken up and impounded by the village authorities. (1 Sol. Op., 642.)

The expense of transporting horses of employees of the Forest Service, needed in the performance of their official duties, is payable from the appropriation for general expenses. (1 Sol. Op., 350.)

The expenses of identification and eradication of poisonous plants within the National Forests may be paid from general expenses under the appropriation for 1910. (1 Sol. Op., 199.)

The fire-fighting fund provided under general expenses in the act of March 4, 1911, is available for paying the cost of repairs to a vehicle unavoidably damaged while under hire to the Forest Service for conveying men to a forest fire, with the express agreement to be responsible for damages. (2 Sol. Op., 740.)

Salaries of stream gaugers working under cooperative agreement with the Geological Survey are payable from the appropriation for general expenses of the Forest Service. (2 Sol. Op., 719.)

Telephone lines consisting of insulated wire laid upon the ground and temporarily used in one part of the forest and then removed and used in the same way in another part should be charged, under general expenses, for the "purchase and maintenance of all necessary field * * * supplies," etc. (1 Sol. Op., 651.)

Labor employed in constructing such lines should be paid for from the appropriation for general expenses, as a field expense of the particular forest. (1 Sol. Op., 651.)

Expenses of a forest officer while attending, in his official capacity, the examination or trial of a person charged with violation of the laws relating to timber trespass on National Forests are payable from the general expenses for the Forest Service. (1 Sol. Ap., 383.)

The appropriation for the construction and maintenance of roads, trails, bridges, etc., in the appropriation act of August 10, 1912, is not exclusive, but is interchangeable with the item for general expenses "to pay all expenses necessary to protect, administer, and improve the National Forests." (Solicitor to his assistant at San Francisco, Sept. 7, 1912.)

Improvements.

Enlargement and improvement of ranger stations. See under "Operation," page 30, ante.

The installation for the first time of bathroom fixtures in the Fort Valley experiment station, in the same manner as similar fixtures are usually installed in the ordinary city house, are not repairs within the meaning of the appropriation act. (2 Sol. Op., 768.)

Fruit trees, grapevines, and rosebushes purchased for planting on ranger stations can not be paid for out of any appropriation for the Forest Service made in the appropriation act of 1911. (1 Sol. Op., 556.)

A contract for the construction of a cabin for use as a ranger station need not be supported, necessarily, by a bond, since such cabin is not a "public building" within the meaning of that term as used in the act of February 24, 1905 (33 Stat., 811). (Opinion of Solicitor dated Feb. 19, 1914.)

Fire-fighting fund.

Fees of an employment agency for services in securing fire fighters may be paid from the appropriation for fighting forest fires and other unforseen emergencies. (1 Sol. Op., 349.)

Reforestation.

The appropriation for the year 1911 of $166,640 "For silvicultural and other experiments," etc., is available, in the discretion of the Secretary, for allotment to the various forests, not for experiments and investigations merely, but to carry on the work of reforestation. The amounts allotted may be used cumulatively with the amounts authorized in the appropriations for the various forests by name. (2 Sol. Op., 705.)

Supplies.

Supplies ordered under annual contracts for one fiscal year, but not delivered in that year, may be paid for at prices fixed by the contracts out of the appropriations for the succeeding year. (1 Sol. Op., 311.)

If the need for ordering wire existed in the fiscal year 1910, and the contract in question was properly made under the appropriation for that year, the purchase price may be paid from that appropriation, even though the wire was not delivered until the next annual appropriation has become effective, and it can not be put to physical use until some time in the next fiscal year. (Id.)

Refunds.

The refund provision in the agricultural appropriation act of March 4, 1907, contemplates cases of sales of National Forest products and does not apply to erroneous or excess collections for trespass on National Forest lands, or to erroneous collections for products of lands not a part of the National Forests. (17 Comp. Dec., 204.)

No refund can be made, under the act of March 4, 1907, of money paid for timber cut in the construction of an irrigation ditch under permit from the Forest Service, pending approval of maps filed with the Secretary of the Interior, even though the lands affected have been eliminated from the National Forest. (2 Sol. Op., 676.)

Where a timber-sale contract expired by limitation before all the timber paid for was cut, the right to damages, either actual or liquidated, became vested in the United States, and could not be waived or released by any officer of the Government. If in such case the contract provided for liquidated damages, or if the United States sustained actual damages by reason of the breach, and the amount deposited did not exceed the sum of the purchase price of the timber cut

and removed plus the amount of such damages, then no refund could be made. (Case of Orleans Longacre, Comp. Dec., Dec. 27, 1911.)

The provision in a timber-sale contract that "all moneys paid or promised under this agreement" shall become the property of the United States "as liquidated damages and not as a penalty," on the failure of the purchaser to fulfill "all and singular" the numerous requirements of the contract, some of which are comparatively trivial and if broken can result in little damage, is, in legal substance and effect, a provision for a penalty, and a refund can be made where money has been deposited in excess of the actual damages suffered. (2 Sol. Op., 831.)

The provision in timber-sale Form 202 that refunds will be made "only at the discretion of the Forester, except when the amount of such deposits is more than the value of the timber on the cutting area covered by this agreement," does not empower the Forester to make refunds without limitation and without reference to the damages which may accrue to the Government by a breach of the contract. (2 Sol. Op., 831.)

Where an applicant for a timber-sale contract deposits money to cover the cost of advertising the sale, and dies before submitting a bid, the deposit may be regarded as made "to secure the purchase price on the sale" of forest products, and may be refunded to his legal representatives after deducting any expense incurred by the United States in consequence of the application. (Case of C. W. Dutrow, Comp. Dec., Dec. 27, 1911.)

Where timber unlawfully cut is seized and subsequently released to the trespasser on payment of its value and his agreement to clean up the cut-over area, the transaction amounts to a sale on condition subsequent, and on his failure to perform the condition the money, less damages caused by the breach, may be refunded under the act of March 4, 1907, and the trespasser be held liable for the trespass. (1 Sol. Op., 355.)

The amended refund provision contained in the act of March 4, 1911, being clearly remedial in character, is retrospective in its operation. (2 Sol. Op., 685; Comp. Dec., Dec. 27, 1911.)

Moneys erroneously collected on account of a special-use permit to occupy lands listed under the act of June 11, 1906, could not be refunder under the act of March 4, 1907 (34 Stat., 1256), but may be under the retroactive amendment contained in the appropriation act of March 4, 1911. (2 Sol. Op., 685; Comp. Dec., Dec. 27, 1911.)

Where by mistake the amount agreed upon in settlement of a trespass by boxing for turpentine is twice paid, the excess payment may be refunded under the amending provision contained in the appropriation act of March 4, 1911, as "money erroneously collected for the use of any lands." (Case of C. J. Conger, Comp. Dec., Dec. 27, 1911.)

Moneys collected for a trespass in cutting timber from an unperfected homestead claim can not be refunded under the amending act merely because final proof has since been made and final certificate issued. If the cutting was in fact illegal when done, the subsequent proof and issuance of certificate does not satisfy the statutory requirement that the act be "subsequently found to have been legal and proper." (Case of Haney, Comp. Dec., Dec. 27, 1911.)

Where it is found that money has been collected in excess of the sum properly assessable for cutting timber on National Forest land, the excess may be refunded as "erroneously collected for the use of any lands." (Case of Lopez, Comp. Dec., Dec. 27, 1911.)

Money collected under a timber-sale contract for timber supposed to have been cut from National Forest land, but afterwards found to have been cut from private land, may be refunded to the owner of the land under the amending act. (2 Sol. Op., 743.)

No refund can be made to a special-use pasture permittee for deprivation of use by a mere trespasser who removes his fence and grazes part of the land. (1 Sol. Op., 662.)

Unliquidated damages due on account of a trespass can not be set off against moneys in the hands of the Government which should be refunded under the act of March 4, 1907. (2 Sol. Op., 355.)

Purchase of land, and rights of way.

In view of section 3736 of the Revised Statutes, providing that no land shall be purchased on account of the United States except under a law authorizing such purchase, *held*, that an appropriation authorizing the Secretary of Agriculture "to erect necessary buildings" does not imply authority to purchase lands upon which to erect such buildings. (Solicitor's opinion in Mink Creek Ranger Station case, dated Nov. 17, 1914.)

In view of the long-continued practice of the Department of Agriculture in using appropriations for the construction and maintenance of roads, trails, etc., for the acquisition of rights of way necessary in the construction of such roads, the assumption is justified that Congress made the appropriations with knowledge that the roads were to be constructed over privately owned lands, and it was the intention of Congress, in making the appropriations, to authorize the acquisition of such necessary rights of way. (Mss. Dec. Comp., Nov. 9, 1915; see also 2 Sol. Op., 973; 21 Comp. Dec., 326.)

The word "purchase," as used in section 3736 of the Revised Statutes, will not operate to prohibit the acceptance by the United States of a gift of real property. (2 Sol. Op., 991.)

Acceptance by the United States of a grant of realty upon a consideration of $1 is not a purchase within the meaning of section 3736 of the Revised Statutes. (2 Sol. Op., 991.)

Reimbursement for property lost, damaged, or destroyed.

Reimbursement can not be made to a Government employee who at his own expense replaces equipment belonging to another which has been "lost, damaged, or destroyed." The act of March 4, 1913 (37 Stat., 843), provides for the reimbursement of the "owners" of such property. (Sol. Op., Nov. 12, 1914.)

The act of March 4, 1913, *supra*, is broad enough in its terms to permit of reimbursement for the loss of an animal, resulting from sickness or disease, if the loss occurred while the animal was being used by the Government and as an incident to such use. (Sol. Op., Nov. 2, 1914.)

The act of March 4, 1913, *supra*, vests the Secretary of Agriculture with authority to determine whether the loss of, or damage to, the property for which reimbursement is sought resulted "while it was

being used for necessary fire-fighting, trail, or official business," and as an incident to such use, and the amount of loss or damage. (21 Comp. Dec., 250.)

Employees of the Forest Service who are required by the terms of their contract of employment to furnish horses, wagons, etc., as part of their equipment, are not entitled to reimbursement for such property lost, damaged, or destroyed while being used on official business of the Forest Service. (Mss. Decision of Comptroller, Aug. 5, 1914.)

If horses, or other articles of equipment, are hired from an employee of the Forest Service, not in his capacity as an employee but as an owner, such owner is entitled to reimbursement under the provisions of the law as is an owner who is not an employee of the Forest Service. In such case there must be a bona fide contract of hiring, the cost of which is to be charged against the same appropriation available for hiring from outside parties on the same project, and an agreement for hire should not be made by the same person acting as agent for the Government and as owner. (Mss. Decision of Comptroller, Sept. 16, 1914.)

Transportation of personal effects.

A regulation made by the Secretary of Agriculture pursuant to or in execution of the act of March 4, 1911, relating to the transfer by officers and employees of effects and personal property used in official work, can not be changed by a waiver or exception thereto, but only by an Executive modification of the old regulation, which makes a new regulation thereafter. (21 Comp. Dec., 482.)

Operating motor-driven vehicles.

The forest officers may be reimbursed for the actual cost of operating motor-driven vehicles, provided such allowances are not in excess of actual cost of operation to the owner. (Decision of Comptroller, dated June 13, 1914.)

A claim submitted by a forest officer for expenditures made by him for repairs to his own motor cycle, the rent of another machine while his own was being repaired, and the furnishing of gasoline, etc., can not be allowed where such officer had agreed to furnish a motor cycle and gasoline for his official use and nothing was said regarding repairs to the machine. (2 Sol. Op., 1061.)

The State of South Dakota is without authority to require a license for the operation of a motor cycle owned by the Government and used by a forest officer in his official capacity. (Sol. Op., dated May 16, 1914.)

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