

LAWS
OF THE
UNITED
STATES

IMPROVEMENT
OF
RIVERS
AND
HARBORS

AUG. 11, 1790
TO
MARCH 1, 1913
VOL. 3
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HOUSE OF REPRESENTATIVES

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LAWS OF THE UNITED STATES
RELATING TO THE
IMPROVEMENT OF
RIVERS AND HARBORS

FROM AUGUST 11, 1790
TO MARCH 4, 1913

IN THREE VOLUMES

VOLUME 3

PREPARED IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL, U. S. ARMY

BY LEWIS W. CALL, D. C. L.
CHIEF CLERK AND SOLICITOR



WASHINGTON
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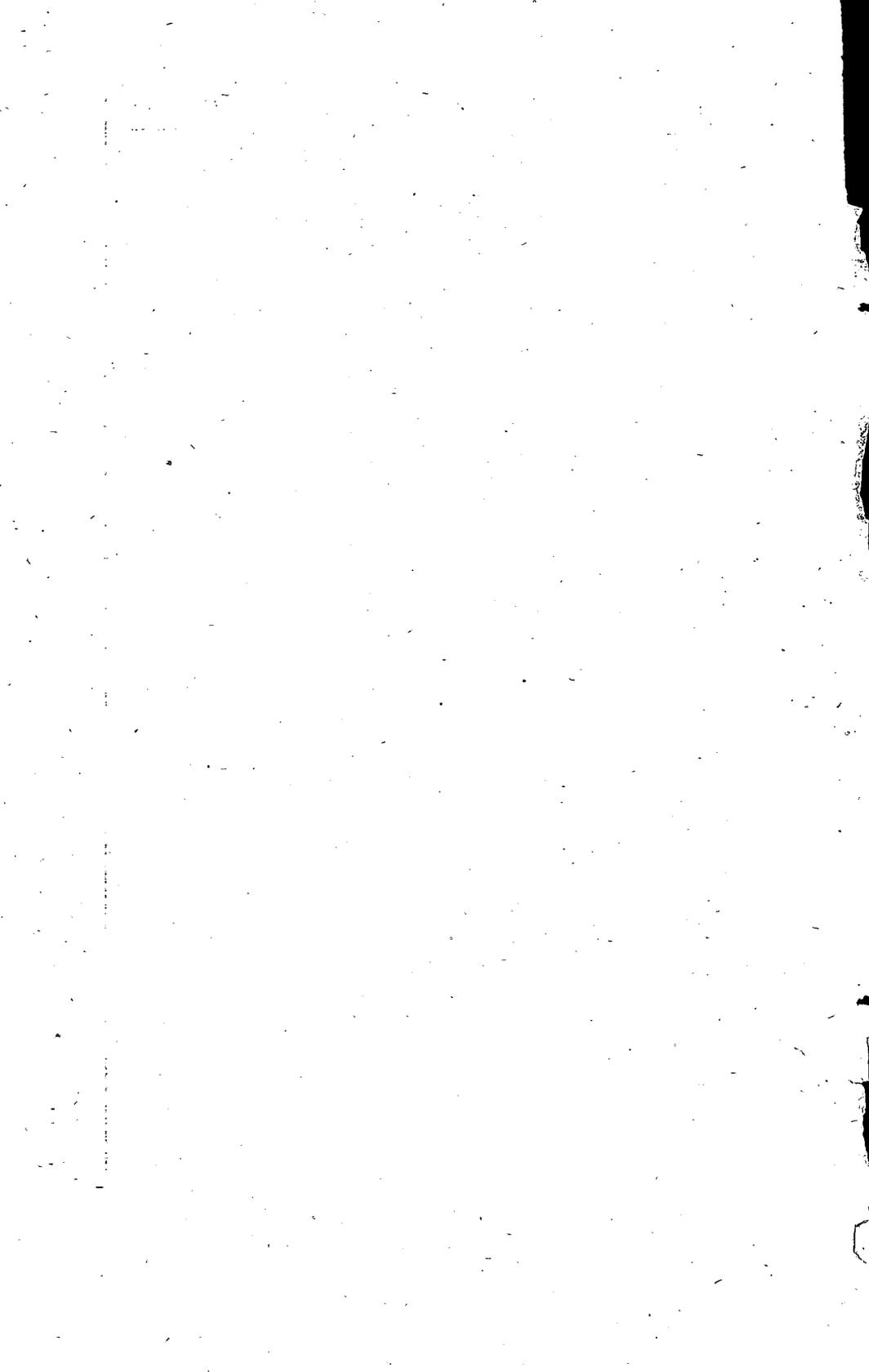


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PREFACE.

An attempt has been made in this volume to classify and annotate the statutory provisions having a general application, regulating the improvement, protection from obstructions to navigation, and the bridging, etc., of the rivers and other navigable waters of the United States.

The power of Congress to legislate, under the commerce clause of the Constitution, for the prevention and removal of physical obstructions to navigation was not exercised otherwise than by way of improvements carried on by the United States, and except for an occasional act of Congress authorizing the erection of a bridge across a navigable river, and except for the general legislation regarding bridges over the Ohio River (act of July 14, 1862, 12 Stat. 569, and act of Dec. 17, 1872, 17 Stat. 398, as amended Feb. 14, 1883, 22 Stat. 414), until the act of July 5, 1884 (23 Stat. 148), section 8 of which made it the duty of the Secretary of War, on satisfactory proof that any bridge then or thereafter constructed "over any navigable water of the United States, under authority of the United States or of any State or Territory, is an obstruction to the free navigation of such water, by reason of difficulty in passing the draw opening or raft span of said bridge," to require the company or persons owning or operating the bridge to provide the same with such aids to navigation as he may specify in the order. This was followed by more explicit legislation in the act of August 11, 1888 (25 Stat. 400), section 9 of which empowered the Secretary of War to give notice to the persons or corporations owning or controlling any obstructive bridge to "so alter the same as to render navigation through or under it free, easy, and unobstructed;" and section 10 made the failure to remove the bridge or to alter the same, after receiving such notice, punishable by a fine of \$500 per month. The jurisdiction of Congress was more fully exercised in the act of September 19, 1890 (26 Stat. 426). Sections 4 and 5 amended sections 9 and 10 of the act of 1888 so as to make them more definite, and increased the penalty for failure to comply with the notice of the Secretary of War—requiring, also, that the parties interested be given reasonable opportunity to be heard before the issue of the notice. Section 6 prohibited the deposit of refuse matter where it would tend to obstruct navigation. Section 7 (as amended by sec. 3 of the act of July 13, 1892) (27 Stat. 88) prohibited the erection of wharves, dams, breakwaters, or other structures or excavation or filling, in navigable waters of the United States, without the permission of the Secretary of War; precluded States from authorizing the construction of bridges over navigable waters which are not wholly within their territorial limits; and pro-

vided that it should not be lawful to commence the construction of a bridge over a navigable water of the United States, under an act of a State legislature, "until the location and plans of such bridge" have "been submitted to and approved by the Secretary of War." Section 8 authorized the removal of wrecks of vessels; section 9 prohibited injury to works for the improvement of navigation; section 10 forbade the location or continuance of obstructions to navigation; and section 12 authorized the establishment of harbor lines. The prior legislation on the subject was amended and consolidated by the act of March 3, 1899 (30 Stat. 1121); and forms sections 9 to 20, inclusive, of that act. Section 9 relates to bridges, dams, or causeways; section 10 relates to other structures and to excavating or filling; section 11 relates to the establishment of harbor lines; section 12 prescribes a penalty for violations of sections 9, 10, and 11; section 13 prohibits the deposit of refuse matter where it will injure navigation; section 14 forbids injury to works for the improvement of navigation; section 15 relates to obstructions caused by anchoring vessels or by sunken vessels, timber, etc.; section 16 provides a penalty for violations of sections 13, 14, and 15; section 17 provides for the enforcement of the provisions of sections 9 to 16, inclusive, by the Department of Justice; section 18 relates to the alteration of obstructive bridges; and sections 19 and 20 relate to the removal of sunken or grounded vessels, etc. By the act of March 23, 1906 (34 Stat. 84), general provisions were enacted to govern as to grants by Congress to "any persons to construct and maintain a bridge across or over any navigable water of the United States"—the act requiring, *inter alia*, the approval of the plans by the Chief of Engineers and the Secretary of War; and by the act of June 21, 1906 (34 Stat. 386), as amended June 23, 1910 (36 Stat. 593), similar legislation was enacted to govern in respect to dams which Congress might thereafter authorize over navigable waters.

During the period of over twenty years which has elapsed since the legislation for the protection, improvement, etc., of navigable waters, has been in force, many questions have arisen regarding the construction and application of the legislation. In the footnotes there are given citations to the decisions of the courts, opinions of the Attorney General, and to the Digest of Opinions of the Judge Advocate General, construing the legislation and defining the powers of the United States in respect to navigable waters. It is thought that these annotations will aid in the application of this legislation in future cases which may arise thereunder. The decisions of the courts are particularly clear in setting forth the authority of the United States, under the commerce clause of the Constitution, to improve and protect the navigable waters of the United States without liability to any State, corporation or individual who may claim title to the submerged lands in such waters or riparian rights in respect thereto. It is thought that the chapter of the Digest of Opinions of the Judge Advocate General, on the subject of "Navigable Waters" will be useful in the construction and application of these statutes; and the same is therefore included in the appendix to this volume.

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LAWS OF THE UNITED STATES
RELATING TO THE
IMPROVEMENT OF RIVERS AND HARBORS,

FROM AUGUST 11, 1790, TO MARCH 4, 1913.



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CHAPTER I.

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1. All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both.

Navigable
 rivers to be
 public high-
 ways.
 May 18,
 1796, c. 29, s.
 9, v. 1, p. 468;
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 Same.
 Mar. 3, 1811,
 c. 46, s. 12, v.
 2, p. 606.
 Sec. 5251,
 R. S.

2. All the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways.¹

¹ The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. The test by which to determine the navigability of waters in our rivers is found in their navigable capacity. Those rivers are navigable rivers in law which are navigable in fact. Rivers are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, on which trade and travel are, or may be conducted, in the customary modes of trade and travel on waters; and they constitute navigable waters of the United States, within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form, in their ordinary condition, by themselves, or by uniting with other waters, a continued highway over which commerce may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. (The Daniel Ball, 10 Wall., 557; The Montello, 11 Wall., 411; Ex parte Boyer, 109 U. S., 629; Chisholm v. Caines, 67 Fed. Rep., 285; St. Anthony Falls Water Power Co. v.

Water Com'rs, 168 U. S., 349; *Leovy v. U. S.*, 177 id., 621; Dig. Op. J. A. G., 1912, 753 A.) Statutes passed by the States for their own uses, declaring small streams navigable, do not make them so within the Constitution and laws of the United States. (*Duluth Lumber Co. v. St. Louis Boom & Improvement Co.*, 17 Fed. Rep., 419.)

If a river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, it is not a navigable water of the United States, but only a navigable water of a State. (*The Montello*, 11 Wall., 411; 20 Opin. Atty. Gen., 101; Dig. Opin. J. A. G., 1912, 754 A.)

The right to regulate commerce includes the right to regulate navigation, and hence to regulate and improve such highway by its connection with other waters. *So. Car. v. Ga.*, 93 U. S., 4; *Gilman v. Philadelphia*, 3 Wall., 713.

In the case of the *Willamette Bridge Co. v. Hatch* (125 U. S., 1), it was held that clauses similar to that contained in the ordinance of 1787 (1 Stat. L., 52, note) to the effect that "the navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between them, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty therefor" (see also act of February 14, 1859, 11 Stat. L., 383), do not refer to physical obstructions, but to political regulations which would hamper the freedom of commerce, * * * and can not be regarded as establishing the police power of the United States over such river, or as giving the Federal courts jurisdiction to hear and determine, according to Federal law, every complaint that may be made of an impediment in, or an encroachment upon, the navigation of these rivers. * * * Nor does the expenditure of money in improving navigation of such rivers import an assumption of police power.

When Congress, in the exercise of its exclusive power to direct how the public money shall be employed, has appropriated a certain sum to be devoted, without exceptions or provisos, to a certain specific internal improvement, it devolves upon the Executive Department of the Government, charged as it is with the execution of the laws enacted by the Legislature, to proceed with the work under the appropriation, without entertaining any question as to the expediency of the expenditure. Thus where Congress had made in general terms an appropriation of a specific amount for improving a certain river, advised that it was for the officer charged with the improvement simply to do the work, without delaying, to raise or consider questions or claims of title to the land, etc., to be affected by the improvement; such matters being quite beyond the province of an executive official under the circumstances. (*Dig. Op. J. A. G.*, 782, X A.)

OWNERSHIP OF SOIL.

The United States is not the owner of the soil of the beds of navigable waters [see the definition of the term "navigable waters of the United States," in *The Daniel Ball*, 10 Wall., 557; *Ex parte Boyer*, 109 U. S., 629], nor of the shores of tide waters below high-water mark, nor of the shores of waters not affected by the tide below the ordinary water line of the same, except as it may have become grantee of such soil from the State or from individuals. The property and jurisdiction in and over the beds and shores of navigable waters is in general in the State, or in the individual riparian owner [*Pollard v. Hagan*, 3 How., 212; *Barney v. Keokuk*, 94 U. S., 337; *Gilman v. Philad.*, 3 Wall., 713; *South Carolina v. Georgia*, 93 U. S., 4; 6 Opins. Atty. Gen., 172; 7 id., 314; 16 id., 479; *Illinois Cent. R. Co. v. Illinois*, 146 U. S., 387; *Shively v. Bowlby*, 152 id., 1; *Scranton v. Wheeler*, 57 Fed. Rep., 803; *Scranton v. Wheeler*, 179 U. S., 141; *West Chicago R. R. Co. v. Chicago*, 201 U. S., 506; *Union Bridge Co. v. U. S.*, 204 U. S., 364; *U. S. v. Chandler-Dunbar Co.*, 229 U. S., 53; *Lewis Blue Point Oyster Co. v. Briggs*, *ibid.*, 82]. But under the power to regulate commerce Congress may assume, as it has recently assumed, the power so to regulate navigation over navigable waters within the States as to prohibit its obstruction and to cause the removal of obstructions thereto, and such power when exercised is "conclusive of any right to the contrary asserted under State authority. [*Wisconsin v. Duluth*, 96 U. S., 379; *U. S. v. City of Moline*, 82 Fed. Rep., 592; *Leovy v. U. S.*, 92 id., 344; *Leovy v. U. S.*, 177 U. S., 621;

U. S. v. Chandler-Dunbar Co., *supra*; *Lewis Blue Point Oyster Co. v. Briggs*, *supra*]. In exercising this power it can not divest rights of title or occupation in a State or individuals, but these rights are left to be enjoyed as before, subject, however, to the paramount public right of freeing navigation from obstruction possessed and exercised by the United States through Congress. In the execution of the laws relating to obstructions to navigation the Secretary of War has no general authority, but only such as may have been vested in him by legislation of Congress, especially in the river and harbor appropriation acts. (Dig. Op. J. A. G., 756, A.)

As between the United States and a State, the soil of the bed of navigable waters and of the shores of tide waters below high-water mark, or—on rivers not reached by the tide—the soil of the shores below the ordinary water line (as not affected by freshet or unusual drought) belongs to the State. But natural accretions to land owned by private individuals belong to the owners of the land. Thus, *held*, that the accretions to Hog Island, in the mouth of the Missouri River, belonged, not to the United States or to the State of Missouri, but to the owner of the island. (Ibid., 920, D 1.)

Where the title to tide lands along the shores of a State is vested in such State by virtue of its sovereignty, and tide lands along the shores of any Territory are held in trust by the General Government for the future State, nevertheless the rule now is that, during the Territorial period, the United States holds the permanent title to tide lands and may make grants thereof. (*Carroll v. Prince*, 81 Fed. Rep., 138; *Shively v. Bowlby*, 152 U. S., 1; *Mann v. Land Co.*, 153, *ibid.*, 273.)

Held, that it was doubtful whether "floatable" streams, i. e., streams capable only of being used for floating saw logs, timber, etc., not being navigable in a general sense, were included in the term "navigable waters of the United States," as employed in statutes providing that dams shall not be constructed in such waters without the permission of the Secretary of War. But *held*, that it was clearly competent for Congress, under the commerce clause of the Constitution, to exercise legislation over such streams as highways of interstate commerce. (Dig. Opin. J. A. G., 755 A 2. See also *Martin v. Waddell*, 16 Pet., 367; *Pollard v. Hagan*, 3 How., 212; *Pennsylvania v. Wheeling Bridge Co.*, 13 How., 518; *Den v. Jersey Co.*, 15 How., 426.) *Held*, with respect to the authority of the Secretary of War to prevent the construction of a sewer outlet in the Hudson River, that the navigable waters of the United States are not brought within the exclusive control of Congress save in matters connected with interstate and foreign commerce; that in other respects all internal or riparian waters are fully subject to State control, as in the regulation of fisheries, the control of the shores, the ownership of submerged lands, etc., so that the control of waters for drinking and sanitary purposes, and the regulation of the flow and of the deposit of sewage, are matters fully within the control of the several States as an incident of their police power, except in so far as concerns structures which may obstruct navigation, which must be authorized by the Chief of Engineers and the Secretary of War under section 10 of the act of March 3, 1899. (Dig. Op. J. A. G., 756, B 1.)

It is generally held that the title to submerged lands under a navigable water of the United States and within the limits of a State is in the State and may be granted to individuals subject to the right of the United States to take the same without compensation for the improvement of navigation or for structures in aid of navigation. *Hawkins Point Lighthouse case*, 39 Fed. Rep., 77; *Gibson v. U. S.*, 166 U. S., 269, 276; *Scranton v. Wheeler*, 179 U. S., 141; *Chicago, Burlington & Quincy R. R. Co. v. Drainage Com'rs*, 200 U. S., 561; *West Chicago R. R. Co. v. Chicago*, 201 U. S., 506; *Union Bridge Co. v. U. S.*, 204 U. S., 364; *Lane v. Smith*, 71 Conn.—41 Atl., 18; *Lane v. Board of Harbor Commissioners* (Connecticut), 40 Atl., 1058. See also *Gilman v. Philadelphia* (3 Wall., 713, 725), where the court said, respecting the control of navigable waters for commerce: "For these purposes they are the *public property of the United States*, and subject to all the requisite legislation by Congress." And in *Pollard's Lessee v. Hagan* (3 How., 230), the court said: "The right of eminent domain over the shores and the soil under the navigable waters for all municipal purposes belongs exclusively to the States within their respective territorial jurisdictions * * * But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For although the territorial limits of Alabama have extended all her sovereign

power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States and the laws which shall have been made in pursuance thereof."

Any title which the grantee of the State acquired to the soil under water is subject to the same paramount right of the Government. *Gibson v. United States* (166 U. S., 272); *Scranton v. Wheeler* (179 U. S., 143); *Lewis Blue Point Oyster Co. v. Briggs* (198 N. Y., 297, and 229 U. S., 82); *Hawkins Point Lighthouse case* (39 Fed. Rep., 88); *Sage v. City of New York* (47 N. E., 1101); *Philadelphia Co. v. Stimson*, 223 U. S., 605; *U. S. v. Chandler-Dunbar Co.*, 229 U. S., 53.

Riparian rights.—The rights of riparian owners of land situated upon navigable rivers are to be measured by the rules and decisions of the courts of the State in which the land is situated, whether it be one of the original States or a State admitted after the adoption of the Constitution. (*St. Anthony Falls Water Power Co. v. St. Paul Water Commissioner*, 168 U. S., 349; *Martin v. Waddell*, 16 Peters, 367; *Pollard v. Hagan*, 3 Howard, 212; *Goodtitle v. Kibbe*, 9 Howard, 471; *Barney v. Keokuk*, 94 U. S., 324; *The Genesee Chief*, 12 Howard, 443; *St. Louis v. Myers*, 113 U. S., 566; *Packer v. Bird*, 137 U. S., 661; *Hardin v. Jordan*, 140 U. S., 371; *St. Louis v. Rutz*, 138 U. S., 226, 242; *Kaukauna Water Power Co. v. Green Bay and Mississippi Canal Co.*, 142 *ibid.*, 254; *City of Janesville v. Carpenter*, 77 Wisconsin, 288, 300; *Shively v. Bowlby*, 152 U. S., 1.)

The royal charters granted by the English Crown to the founders of the Atlantic colonies conveyed to the grantees both the territory described and the powers of government; and, under such charters, the dominion or property in the navigable waters and in the soil under them passed as a part of the prerogative rights annexed to the political powers conferred on the patentees, and in their hands were intended to be a trust for the common use and benefit of the new communities, and not as private property which could be parceled out and sold; and, on the Revolution, such rights became vested in the several States for like purposes, where such as were not surrendered by the Constitution to the Federal Government remain. (*Morris v. U. S.*, 174 U. S., 196.)

Taking of lands for public use.—When the Government, for the purpose of improving the navigation of a river, takes possession of submerged land which is in the use and possession of a citizen under a right derived from the State, it takes private property for a public use, and must compensate the owner therefor. (*Brown v. U. S.*, 81 Fed. Rep., 55.)

Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, although their consequences may impair its use, are not a taking within the meaning of the constitutional provision which forbids the taking of such property for public use without just compensation therefor. (*Transportation Co. v. Chicago*, 99 U. S., 635; XVIII Opin. Att. Gen., 64.) The United States may occupy and use soil within the bed of a river for the improvement of the navigation of such river, such occupation and use not giving rise to a question under the law of eminent domain, the soil being held by its owners subject to the higher right of the United States in respect to the navigation of the river. (XVIII Opin. Att. Gen., 64; *High Bridge Lumber Co. v. U. S.*, 9 Fed. Rep., 320; *Cooley*, Constitutional Limitations, pp. 541-543; *Railroad Co. v. Bingham*, 87 Tenn., 522; *Smith v. Washington*, 20 Howard, 135; *Transportation Co. v. Chicago*, 99 U. S., 635-641.)

POWER OF THE STATES.

Until the dormant power of the Constitution is awakened and made effective by appropriate legislation the reserved power of the State is plenary, and its exercise in good faith can not be made the subject of review by this court. (*Gilman v. Philadelphia*, 3 Wall., 713.) The power to construct work of rivers and harbor improvement in the navigable waters of the United States, as an incident of the power to regulate commerce "covering as it does a wide field, and embracing a great variety of subjects, some of which will call for uniform rules and national legislation, while others can best be regulated by rules suggested by the varying circumstances of differing places, and limited in their operation to such places respectively; and to the extent required by these last cases, the power to regulate commerce may be exercised by the States." (*Ibid.*) However, Congress may interpose whenever it shall be deemed necessary, by either general or special laws. It may regulate all bridges over navigable

3. The Des Moines River shall forever remain free from any toll, or other charge whatever, for any property of the United States, or persons in their service, passing along the same. The Des Moines River. Aug. 8, 1846, c. 103, s. 3, v. 9, p. 78; Jan. 20, 1870, c. 7, v. 16, p. 61. Sec. 5246, R. S.
4. The Tennessee, Coosa, Cahawba, and Black Warrior Rivers, within the State of Alabama, shall be forever free from toll for all property belonging to the United States, and for all persons in their service, and for all citizens of the United States, except as to such tolls as may be allowed by act of Congress.¹ Certain rivers in Alabama to be free from tolls. May 23, 1828, c. 75, s. 7, v. 4, p. 290. Sec. 5244, R. S.

waters, remove offending bridges, and punish those who shall thereafter erect them. (Ibid.) It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided. (U. S. v. New Bedford Bridge, 1 Woodbury and Minot, 420, 421; U. S. v. Cornet, 12 Pet., 72; N. Y. v. Milne, 11 Pet., 102, 155; The Wheeling Bridge Cases, 13 How., 518; 18 ibid., 521.)

A State has power to change the channels of rivers within the State for purposes of internal improvement. (Withers v. Buckley, 20 How., 84; So. Car. v. Ga., 93 U. S., 4.) In the absence of legislation by Congress, a State statute authorizing the erection of a dam across a navigable river which is wholly within its limits is not unconstitutional. (Wilson v. Blackbird Creek Marsh Co., 2 Pet., 245; Pound v. Turck, 95 U. S., 459.)

Acts of Congress merely making appropriations for the improvement of a river lying within a State do not operate as an inhibition against State legislation authorizing the construction of booms, dams, piers, etc., so as to make unlawful such structures when erected under State authority. (U. S. v. Bellingham Bay Boom Co., 81 Fed. Rep., 658.) To bring obstructions and nuisances in navigable waters lying within a State within the cognizance of the Federal courts there must be some statute of the United States directly applicable to such streams. (Ibid.; Wilson v. Marsh Co., 2 Peters, 245, 252; Gilman v. Philadelphia, 3 Wallace, 713; The Passaic Bridges, ibid., 782, 793; Pound v. Turck, 95 U. S., 459; Escanaba and L. M. Transp. Co. v. Chicago, 107 U. S., 678, 683; Cardwell v. Bridge Co., 113 U. S., 205, 208; Bridge Co. v. Hatch, 125 U. S., 8.) The act of September 19, 1890 (26 Stat. L., 426), which, in section 10, prohibits the creation of any obstruction not "affirmatively authorized by law" to the navigable capacity of waters over which the United States has jurisdiction, was not retroactive so as to make unlawful the continuance of a boom constructed prior to its passage, under the authority of a State law. (U. S. v. Bellingham Bay Boom Co., 81 Fed. Rep., 658; U. S. v. Burnis, 54 Fed. Rep., 351, 362.)

The authority conferred upon the Secretary of War by the act of June 29, 1888 (25 Stat. L., 209), does not extend to the waters of the Hudson River as far distant as Troy, Albany, and New Baltimore. The term "tributary waters," as used in that act, covers only such parts of the river as, in a broad sense, can be regarded as connected with that harbor. (XIX Opin. Att. Gen., 317.)

The waters of the East River comprise navigable waters of the United States lying wholly within the limits of a State. (XX Opin. Att. Gen., 479.)

The Chicago River is navigable and under control of Congress; but until that body acts the State of Illinois has authority, and may vest in the city of Chicago jurisdiction over the construction of a bridge within the city limits. (Escanaba Co. v. Chicago, 107 U. S., 678.) The State of Michigan authorized the improvement of a river wholly within that State, and the exaction of the tolls for the use of the river so improved. Held, that the statute did not impair the contract contained in the ordinance of 1787, giving the people the right to use the waters leading into the St. Lawrence free of duty, tax, or impost. (Sands v. Manistee River Imp. Co., 123 U. S., 288; Ruggles v. The same, ibid., 297.)

¹ *Tide lands.*—In this country waters to be navigable in law must be capable of navigation in fact as a highway for commerce. [Where evidence as to the character of a stream is conflicting, whether it is a navigable stream within the meaning of section 3 of the act of July 13, 1892 (27 Stat. L., 110), is a question of law and fact for the jury. Leovy v. U. S., 92 Fed. Rep., 344.] A bay or arm

The Iowa river.
July 13, 1868, Res. No. 55, v. 15, p. 257; May 6, 1870, c. 92, v. 16, p. 121.
Sec. 5248, R. S.

Cuivre River, Mo., declared not navigable.
Mar. 23, 1900, v. 31, p. 50.

Grand River, Mo., part of not navigable.
Feb. 15, 1905, v. 33, p. 715.

One hundred and Two River, part of not navigable.
Feb. 15, 1910, v. 36, p. 194.

Nodaway River, part of not navigable.
Ibid.

Big Tarkio River, part of.
Ibid.

5. So much of the Iowa River within the State of Iowa as lies north of the town of Wapello shall not be deemed a navigable river or public highway, but dams and bridges may be constructed across it.

6. Cuivre River, in the counties of Lincoln and Saint Charles, in the State of Missouri, being the dividing line, is hereby declared not to be a navigable stream, and shall be so treated by the Secretary of War and all other authorities. *Act of March 23, 1900 (31 Stat. L., 50).*

7. Grand River in the State of Missouri above the city of Brunswick, in the county of Chariton in said State, is hereby declared to be not a navigable stream and shall be so treated by the Secretary of War and by all other authorities. *Act of February 15, 1905 (33 Stats., 715).*

8. One Hundred and Two River south of the north boundary line of Andrew County, Missouri, as now located, be, and the same is hereby, declared to be not a navigable water of the United States within the meaning of the laws enacted by Congress for the preservation and protection of such waters. *Act of February 15, 1910 (36 Stats., 194).*

9. Nodaway River, in the counties of Andrew, Holt, and Nodaway, in the State of Missouri, be, and the same is hereby, declared to be not a navigable water of the United States within the meaning of the laws enacted by Congress for the preservation and protection of such waters. *Ibid.*

10. Big Tarkio River, in the counties of Holt and Atchison, in the State of Missouri, be, and the same is here-

of one of the Great Lakes, some 4,000 acres in extent, of the average depth of not more than 2 feet and rarely more than 3 feet, covered with grass and rushes in summer, and which was surveyed and patented to the State as swamp land is not navigable water, but merely a marsh, and subject to private ownership. (*Tokedo Liberal Shooting Club v. Erie Shooting Club Co.*, 90 Fed. Rep., 680; *Barney v. Keokuk*, 94 U. S., 324; *The Daniel Ball*, 10 Wallace, 557-563; *The Montello*, 20 Wallace, 430-441.)

The title to tide lands along the shores of a State is vested in such State by virtue of its sovereignty, and tide lands along the shores of any Territory are held in trust by the General Government for the future State; nevertheless, the rule now is that during the Territorial period the United States holds the permanent title to tide lands, and may make grants thereof. (*Carroll v. Price*, 81 Fed. Rep., 137; *Shively v. Bowlby*, 152 U. S., 1; *Mann v. Land Co.*, 153 U. S., 273.)

Marshes and mud shoals on the sides of harbors and streams within the influence of the tides may be granted by the State to private parties when this can be done without interfering with the public rights of navigation in the streams and harbors themselves, and in South Carolina marsh lands of this character have always been treated as subject to grant. But as to public navigable streams themselves, the sovereign holds them in trust for the public use, and can make no valid grant thereof, such as would hinder or impede the rights of the public therein. (*Chisholm v. Caines*, 7 Fed. Rep., 285; *Illinois Central R. R. Co. v. Illinois*, 146 U. S., 387; *Shively v. Bowlby*, 152 U. S., 548; *Lowndes v. Board*, 153 *ibid.*, 758; *Hardin v. Jordan*, 140 *ibid.*, 371; *City of Hoboken v. Pennsylvania R. Co.*, 124 *ibid.*, 56.)

Wharves come within admiralty jurisdiction. In England wharf property may extend to low-water mark; in this country to the point of navigability. (*Cliffords Case*, 34 Ct. Cls., 223.)

by, declared to be not a navigable water of the United States within the meaning of the laws enacted by Congress for the preservation and protection of such waters.

Ibid.

CHAPTER II.

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11. The creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited, and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.¹ *Sec. 10, act of March 3, 1899 (30 Stat. L., 1151).*

Obstructions to navigation; general prohibition; permits.
March 3, 1899, s. 10. v. 30, p. 1151.

¹This section replaces section 9 of the act of September 19, 1890 (26 Stat., 454), and section 3 of the act of July 13, 1892 (27 *ibid.*, 110), *in pari materia*. In the case of *Leovy v. U. S.* (92 Fed. Rep., 344) it was decided by the circuit court of appeals for the fifth circuit, in February, 1899, that the replaced section of the act of July 13, 1892, was constitutional, and that a State had no authority, under its police power, to close any navigable water of the United States, though located wholly within the limits of the State, for the purpose of reclamation of swamp lands, without the consent of the Federal Government. When Congress has assumed jurisdiction over a navigable river lying wholly within one State, Congress has power to order obstructions to navigation removed, even though their construction was authorized by the State. (*U. S. v. City of Moline*, 82 Fed. Rep., 592; *West Chicago R. R. Co. v. Chicago*, 201 U. S., 506; *Union Bridge Co. v. U. S.*, 204 U. S., 364; *U. S. v. Chandler-Dunbar Co.*, 229 U. S., 53; *Lewis Blue Point Oyster Co. v. Briggs*, *ibid.*, 82.) But the right of Congress to remove the obstruction does not, of itself, exempt the Government of the United States from the duty of making just compensation for such property rights as are taken. (*Monongahela Nav. Co. v. U. S.*, 148 U. S., 622.)

Held that as the withdrawal of water from the Rio Grande for the purpose of irrigation by means of pumps had reached such a stage as to seriously impair

its navigable capacity, the Secretary of War could legally prevent, not only the installation of new plants for the withdrawal of the waters of this river, but also the further withdrawal by existing plants; and *advised* that notice be published that the War Department regards further diversion of its waters as a violation of sections 10 and 12 of the act of March 3, 1899 (30 Stat., 1151); that the construction of any additional works for the purpose will not for the present be sanctioned; and that diversion by existing works be limited so as not to injuriously affect the navigable capacity of the river. *Held* further, with reference to the contention that the withdrawal of water by means of pumps involves no construction in the stream such as is forbidden by section 10 of said act, that the statute applies not only to structures which obstruct navigation but also to other changes which "modify the course, location, condition, or capacity of * * * the channel of any navigable water of the United States"; and that the withdrawal of sufficient water to affect the navigable capacity of a stream would be within the letter as well as the spirit of the prohibition. (Dig. J. A. G., 755 B.) *Held* further that the word "channel," sometimes used in a restricted sense and sometimes as comprising the entire bed of a river, including the flowing water, in view of the object and purpose of the statute and in the light of the decision of the Supreme Court in United States *v.* Rio Grande Irrigation Co. (174 U. S., 690, 708). should be regarded as here used in the enlarged sense. (Ibid.)

See U. S. *v.* Rio Grande Irrigation Co. (174 U. S., 690, 708), where the court, having under consideration sec. 10 of the act of Sept. 19, 1890 (26 Stat., 454), substantially identical, so far as respects this question, with the act of 1899, held that the withdrawal of water above the point of navigation by means of a dam so as to impair the navigability of the river was within the prohibition of the act, using the following language regarding the scope of the prohibition: "It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition."

Wharves are a peculiar kind of property, which, though standing on terra firma, are so far marine in their uses and purposes as to come within admiralty jurisdiction. In England it is generally held that they extend to the low-water mark. In this country, with the extending of admiralty jurisdiction to our inland seas and navigable rivers, it has been held that they may extend to the point of navigability. The owner has not an unlimited property in them. If the wharf be not reserved for his actual use, or of some one acquiring the right under him, it is open to the public, and any vessel may make fast to and use it. Neither can the owner charge an unreasonable price for wharfage. (Clifford *v.* U. S., 34 Court of Claims, 223, 230; The Genesee Chief, 12 Howard, 443; Dutton *v.* Strong, 1 Black, 1; Cannon *v.* New Orleans, 20 Wallace, 577; Ex parte Easton, 95 U. S., 8; Packet Co. *v.* Keokuk, *ibid.*, 80; Packet Co. *v.* St. Louis, 100 U. S., 423.)

Section 10 of the act of March 3, 1899 (30 Stat. 1151) makes it unlawful to construct any wharf, pier, etc., in any navigable water of the United States outside established harbor lines or where none have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War, etc. A permit under this statute confers on the grantee no right or franchise for the structure or interest in the shore or bed of the stream where it is to be built, but simply makes the authority required therein a condition precedent to the exercise of such right as the applicant may have with respect to its effect on commerce and navigation. (Cummings *v.* Chicago, 188 U. S. 410.) It can not in any sense be regarded as vesting in the grantee any power to avoid or contravene State and local laws or individual privileges and immunities held by other parties thereunder. The jurisdiction to approve plans for structures in navigable waters under this section is not vested in the Secretary of War alone but in the Secretary of War and the Chief of Engineers, each of whom is charged in the statute with an independent exercise of discretion. *Held*, therefore, that a permit can not lawfully issue until the Chief of Engineers has approved or recommended the proposed works. (Dig. J. A. G., 772, V.)

Section 10 of the act of March 3, 1899 (30 Stat. 1151), does not limit the discretion of the Secretary of War as to the character of the permit which he may

issue under the authority conferred therein; and therefore the permission may be formal as to piers, wharves, etc., or by way of letter, as to booms, ferry cables, pipe lines, etc., or by way of waiver of objections. Further *held*, as to the taking of water from the Rio Grande, that the permit may be revokable at will absolutely; may be limited either as to amount or by the condition of the river or the season of the year; and may be so worded as to impose notice, upon all subtakers or assignees, of the restrictions of the permit. *Held*, further, that the riparian owners' rights in regard to the use of the navigable stream whatever they may be under State law, are subject to the paramount authority of the United States to regulate the matter, so that any withdrawal may be prohibited which would injure the navigable capacity of the stream. (Ibid, VA.)

Held, with reference to the question of whether the Secretary of War may legally authorize the Chief of Engineers to permit the placing of log booms, fish weirs, and fish traps in navigable waters of the United States, that while it is well settled that discretionary duties are not a proper subject of delegation, the action proposed should not be regarded as a delegation of discretionary duties, but as the approval by the Secretary of War of such structures in advance, charging the Chief of Engineers with the duty of communicating to the applicants the fact that the Secretary of War has approved the placing of the structures in the navigable waters. Similarly *held*, with reference to the extension of the authority to include routine applications for permits for excavating approaches to wharves; dredging to obtain sand or gravel for commercial purposes, and to deposit dredged materials under the usual conditions for such deposits; placing of wires, cables, or pipe lines; removal of logs, etc. Where however, it was proposed to authorize the local engineer officer to permit the "driving of piles, or the establishment of other structures for mooring purposes, in Newport Harbor, in such manner and at such points as, in his opinion, will not seriously interfere with navigation," *held* that the duty imposed on the Secretary of War by the statute is discretionary, not ministerial, and can not legally be delegated. (Ibid., 773, B.) See *Birdsall v. Clark et al.* (73 N. Y., 76); *Metchem on Public Officers*, sec. 567; *Throop's Public Officers*, sec. 672.

On the protest against granting permission to the Union Oil Co. for a pipe line in the Pacific Ocean at Santa Barbara, Cal., on the ground that a certain amount of oil would be spilled in transfer to the pipe line and would later reach shore, resulting in injury to the bathing facilities for which Santa Barbara is famous, *held* that section 10 of the act of March 3, 1899 (30 Stat. 1151), under authority of which the permit would be given, does not give to any applicant the franchise for the proposed structure but presupposes that the applicant has a franchise for the same; and in order that the structure may not unreasonably obstruct navigation, forbids its erection except upon plans to be approved by the Chief of Engineers and the Secretary of War; and that the jurisdiction conferred on the Chief of Engineers and the Secretary of War should be exercised solely with reference to the interests committed to their charge, i. e., the protection of the navigable waters of the United States from unreasonable obstruction to commerce. (Dig. J. A. G., 773 C.)

This view was concurred in by the Attorney General in 27 Op. Atty. Gen. 284. See also *Montgomery v. Portland* (190 U. S., 89), where it was held that "under existing enactments the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a State is not complete and absolute without the concurrent or joint assent of both the Federal Government and the State government," citing *Cummings v. City of Chicago* (188 U. S., 410), and *Willamette Bridge Co. v. Hatch* (125 U. S., 1). (See also *North Shore Boom Co. v. Nicomen Boom Co.* (212 U. S., 406), and *Gring v. Ives* (222 U. S., 365).)

In the case of an application for permission to place an advertising sign off the coast at Atlantic City by an applicant who was not an owner of shore property, *held* that the Secretary of War might properly require, as a condition precedent to granting the permission, a showing that the applicant was authorized to construct the same. (Dig. J. A. G., 773 C.)

The construction, without the authority of the Secretary of War, of *wiers* in a harbor which is navigable water of the United States outside of established harbor lines (or where there are no harbor lines established) is unlawful when the same will be detrimental to navigation. And whether or not the

Penalty; removal of obstructions.
Sec. 12, *ibid.*

12. Every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And, further, the removal of any such structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States. *Sec. 12, ibid.*

Unauthorized deposits; permits.
Sec. 13, *ibid.*

13. It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of War, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application

persons who constructed such weirs had any license from the town is immaterial. (Dig. J. A. G., 774 D 2.)

A fish weir so constructed as in a measure to obstruct the navigation of navigable waters can not be legally placed in such waters without the authority of the Secretary of War, who, by section 7, act of September 19, 1890, is empowered to grant permission for the purpose. And so of a boom desired to be placed in a navigable river. (*Ibid.*, D 3.)

The United States may avail itself of the remedy by injunction to protect from injury improvements in navigable waters made under the authority of Congress. (XVII Opin. Att. Gen., 279; U. S. v. Duluth, 4 Dillon, 469.)

is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.¹ *Sec. 13, ibid.*

14. It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works: *Provided*, That the Secretary of War may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest.² *Sec. 14, ibid.*

Use, etc., of
Govt. works.
Sec. 14, ibid.

15. It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such

Anchoring
vessels, etc.
Sec. 15, ibid.

¹ This section replaces section 6 of the act of September 19, 1890 (26 Stat., 426), *in pari materia*.

² This section replaces section 3 of the act of August 14, 1876 (19 Stats., 132, 139), and section 9 of the act of September 19, 1890 (26 Stat. L., 426). Section 9 of the act of March 3, 1899, contained a provision directing the Secretary of War "to cause to be prepared and reported to Congress a list of all piers, wharves, and other structures or property pertaining to river and harbor works belonging to the Government of the United States now occupied by private corporations or persons, together with the terms upon which such piers, wharves, or other property are occupied, and the date of the agreement or permission to occupy the same, and shall make such recommendations as he may deem desirable in connection therewith."

craft, and subject the same to removal by the United States as hereinafter provided for. *Sec. 15, ibid.*

Penalty; liability of vessel.
Sec. 16, *ibid.*

16. Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections thirteen, fourteen, and fifteen of this act shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction. And any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section thirteen of this act to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of War, or who shall willfully injure or destroy any work of the United States contemplated in section fourteen of this act, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section fifteen of this act, shall be deemed guilty of a violation of this act, and shall upon conviction be punished as hereinbefore provided in this section, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections thirteen, fourteen, and fifteen of this act shall be liable for the pecuniary penalties specified in this section, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof.¹ *Sec. 16, ibid.*

Floating loose timber, logs, etc.
May 9, 1900,
v. 31, p. 172.

17. The prohibition contained in section fifteen² of the river and harbor act approved March third, eighteen hundred and ninety-nine, against floating loose timber and logs, or sack rafts, so called, of timber and logs in streams or channels actually navigated by steamboats, shall not apply to any navigable river or waterway of the United States or any part thereof whereon the floating of loose timber and logs and sack rafts of timber and

¹ This section replaces section 10 of the act of September 19, 1890 (26 Stat., 454).

² Paragraph 15, *ante*.

logs is the principal method of navigation. But such method of navigation on such river or waterway or part thereof shall be subject to the rules and regulations prescribed by the Secretary of War as hereinafter provided. *Act of May 9, 1900 (31 Stat. L., 172).*

18. The Secretary of War shall have power, and he is hereby authorized and directed, within the shortest practicable time after the passage hereof, to prescribe rules and regulations, which he may at any time modify, to govern and regulate the floating of loose timber and logs, and sack rafts (so called) of timber and logs and other methods of navigation on the streams and waterways, or any thereof, of the character, as to navigation, in section one hereof described. The said rules and regulations shall be so framed as to equitably adjust conflicting interests between the different methods or forms of navigation; and the said rules and regulations shall be published at least once in such newspaper or newspapers of general circulation as in the opinion of the Secretary of War shall be best adapted to give notice of said rules and regulations to persons affected thereby and locally interested therein. And all modifications of said rules and regulations shall be similarly published. And such rules and regulations, when so prescribed and published as to any such stream or waterway, shall have the force of law, and any violation thereof shall be a misdemeanor, and every person convicted of such violation shall be punished by a fine of not exceeding two thousand five hundred dollars nor less than five hundred dollars, or by imprisonment (in case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court: *Provided*, That the proper action to enforce the provisions of this section may be commenced before any commissioner, judge, or court of the United States, and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in the case of crimes or misdemeanors committed against the United States. *Sec. 2, ibid.*

Same; regulations, Sec. 2, *ibid.*

The right to alter, amend, or repeal this act at any time is hereby reserved. *Sec. 3, ibid.*

19. The Department of Justice shall conduct the legal proceedings necessary to enforce the foregoing provisions of sections nine to sixteen, inclusive, of this act; and it shall be the duty of district attorneys of the United States to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of War or by any of the officials hereinafter designated, and it shall furthermore be the duty of said district attorneys to report to the Attorney-General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of War by the Attorney-General; and for the better enforcement of the said provisions and to facilitate the

Legal proceedings under Department of Justice. Mar. 3, 1899, s. 17, v. 30, p. 1153.

detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of War, and the United States collectors of customs and other revenue officers, shall have power and authority to swear out process and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the aforesaid sections of this act, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further*, That whenever any arrest is made under the provisions of this act, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States. *Sec. 17, act of March 3, 1899 (30 Stat. L., 1153).*

Sunken ves-
sels, etc.
Mar. 3, 1899,
s. 19, v. 30, p.
1154.

20. Whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of War at his discretion, without liability for any damage to the owners of the same: *Provided*, That in his discretion, the Secretary of War may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "To whom it may concern," in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: *And provided also*, That the Secretary of War may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States:

Provided, That such bidder shall give satisfactory security to execute the work: *Provided further*, That any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph shall be covered into the Treasury of the United States.¹ *Sec. 19, act of March 3, 1899 (30 Stat. L., 1154).*

¹ Where a boat which had been left by its owner anchored or tied up was sunk by carelessness of the owner, on the question whether the burden of removal rests on the United States, upon the owner by whose carelessness it was sunk, or upon the city in the service of which it was held that, under the circumstances, the War Department should not remove the wreck, but that the burden of its removal rests on the owner. (Dig. J. A. G., 779, B 2.) See *U. S. v. Hall* (63 Fed. Rep. 472) where it was held that owners of a vessel who scuttle and sink her in a harbor while on fire, for the purpose of saving her rigging and spars, and abandoning her to the underwriters, may be compelled to remove the hull, as an obstruction to navigation, under section 10 of the act of September 19, 1890.

On the application of a transportation company for the removal of the wreck of a steamship belonging to said company, which sank near the wharves of the company, accompanied by evidence of the abandonment of the same by the company and by the underwriters, held, with reference to the question of whether the company or the underwriters could be required to remove the wreck, that the statute does not impose such a duty upon the owners or upon the underwriters of the vessel; that so long as it is not abandoned it makes it the duty of the owners to use due precaution to prevent its being a menace to navigation; but that it recognizes the right to abandon the wreck without further liability on account of the same; and that in the event of its abandonment, if it be such menace as the statute contemplates, it should be removed under the provisions of the statute. (Dig. J. A. G., 779, B 3.)

Section 19 of the river and harbor act of March 3, 1899 (30 Stat. 1154), provides that "whenever the navigation of any river, lake * * * shall be obstructed or endangered by any sunken vessel * * * or other similar obstruction, and such obstruction has existed for a longer period than thirty days * * * the sunken vessel * * * shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of War at his discretion without liability for any damage to the owners of the same." In carrying on the work of improving the Black River, Ark., in August, 1909, a steamer which had been sunk a year before was removed by the Government, subsequently the owner requested the return of the machinery in the steamer. *Recommended* that the owner be informed that the Secretary of War would direct the machinery to be turned over to the owner on payment of \$150, the cost of the removal. (Ibid. C 1.)

The river and harbor act of June 14, 1880 (21 Stat. 180), made it the duty of the Secretary of War, on being satisfied that a *sunken vessel* obstructs navigation, to give 30 days' notice, to all persons interested in the vessel or cargo, of his purpose to cause the same to be removed unless removed by the persons interested as soon thereafter as practicable, before himself proceeding to take measures for its removal under the act. If the removal be effected by the Secretary of War, the act requires that the vessel and cargo shall be sold at auction and the proceeds deposited in the Treasury. Under this legislation—especially in view of the fact that the act authorizes the taking possession of the property of private individuals and the disposing of it without compensation to the owners—held that the notice should be strictly given to all interested, the owners of the cargo as well as the vessel, unless indeed such notice were waived, in which case the waiver should be definite and express and joined in by all the interested parties. (Ibid. 777, VII.)

Where a contract was about to be made with a civilian for the removal, from a harbor channel, of certain wrecks, not known to be fully abandoned (and directed by act of Congress to be caused to be removed by the Secretary of War), and it was proposed by the engineer officer in charge to stipulate in the contract that the wrecks when removed should belong to the contractor, held that this could not properly be done, the United States having no property in

Removal of wrecks, etc.
Sec. 20, *ibid.*

21. Under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section nineteen, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of War, or any agent of the United States to whom the Secretary may delegate proper authority,¹ the Secretary of War or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent any unnecessary injury; and no one shall interfere with or prevent such removal or destruction: *Provided*, That the officer or agent charged with the removal or de-

such wrecks (the same not being Government vessels), but simply a right to remove them as constituting obstructions to commerce between the States. (*Ibid.* 779 C.)

Where derelict articles—wrecks for example—are encountered by officers of the Engineer Corps, as obstructions to the improvement of rivers, harbors, etc., required by Congress (in the exercise of its power to regulate commerce) to be cleared and improved, it will be legal and proper for such officers to remove such obstructions in the most effectual manner. If the property is not actually abandoned and is valuable it will in general be expedient first to give notice to the owners (personally if practicable, or, if not, through the newspapers) themselves to make the removal within a certain reasonable time. (*Dig. J. A. G.*, 778, B). See sec. 4 of act of June 14, 1880 (1 Sup. R. S., 296), which provides for the removal of sunken wrecks and prescribes the giving of such notice. Also, later acts of Aug. 2, 1882 (*id.*, 369); Sept. 19, 1890 (*id.*, 802); and sec. 15 of act of Mar. 3, 1899 (30 Stat. 1152.) In an opinion of the Attorney General of May 24, 1877 (15 Opins., 284), it is held that the Secretary of War, where authorized by an appropriation act to improve the navigation of a navigable stream, may cause to be removed wrecks, not yet abandoned but still private property, if he considers them obstructions to navigation. And see his later opinion of April 27, 1880 (16 Opins., 479), as to the authority of the United States to improve navigable rivers to the disregard of individual rights of property in the soil of the bed.

Held, with reference to the question of the authority of the War Department to permit the removal of sunken logs from the Neches River, Tex., under section 19 of the act of March 3, 1899, that this section is not understood to assert a property right in the United States to sunken wrecks, etc., except as such right may arise from the taking possession of abandoned property; that the statute recognizes the right of the owner of the obstruction to remove the same promptly; but that if he fails to do so it will be treated as abandoned and the property applied *pro tanto* to the payment of the cost of removal; and that there would be no legal objection to granting the permission applied for in respect to such logs as were abandoned, or to entering into a contract for their removal, upon the provision that the logs should become the property of the contractor. (*Dig. J. A. G.*, 778, B 1.)

¹ In view of the provisions of section 20 of the act of March 3, 1899 (30 Stat. 1154), relating to the removal of sunken or grounded craft and vesting authority in the "Secretary of War or any agent of the United States to whom the Secretary of War may delegate proper authority," *held* that under the authority to delegate thus expressly conferred on the Secretary of War he could legally delegate to the officers of the Corps of Engineers in local charge the authority to take the necessary steps to remove or destroy any sunken craft which obstructs the navigation of any Government canal, lock, or navigable waterway (*Dig. J. A. G.*, 778 A.).

struction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: *And provided further*, That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States. *Sec. 20, ibid.*

Such sum of money as may be necessary to execute this section and the preceding section of this act is hereby appropriated out of any money in the Treasury not otherwise appropriated, to be paid out on the requisition of the Secretary of War. Appropriation.
Sec. 20; *ibid.*

All laws or parts of laws inconsistent with the foregoing sections ten to twenty, inclusive, of this act are hereby repealed: *Provided*, That no action begun, or right of action accrued, prior to the passage of this act shall be affected by this repeal. *Sec. 20, ibid.*

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Bridges,
dams, etc.; au-
thorization
and approval
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s. 9, v. 30, p.
1150.

22. It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.¹ *Sec. 9, act of March 3, 1899 (30 Stat. L., 1150.)*

¹ Section 7 of the act of 1890, in leaving the matter of the authorization and construction of bridges over navigable waters wholly within States entirely to the jurisdiction of the State, except in so far as to require the approval by the Chief of Engineers and by the Secretary of War of the location and plan of the bridge, indicates that Congress did not desire to exercise any further control over the subject. So, upon an application for the approval by the Secretary of War of the plans of a bridge over the Harlem River which is wholly within the State of New York, *held* that the fact of the unusual importance of this stream, and of its immediate connections with great interstate waterways and the sea, did not except it from the jurisdiction of the State under the statute or make necessary any special or additional legislation by Congress for the authorization or control of its system of bridges. (Dig. J. A. G., 762 A.)

Section 9 of the act of March 3, 1899 (39 Stat. 1151), provides affirmatively that bridges, *inter alia*, "may be built under authority of the legislature of the State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided that the location and plans thereof are submitted to and approved by the Chief of Engineers and

GENERAL BRIDGE ACT.

23. When, hereafter, authority is granted by Congress to any person to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been

Approval of
plans.
Mar. 23,
1906, s. 1. v.
34, p. 84.

by the Secretary of War before construction is commenced." On the question raised with respect to the proposed construction by the Northern Pacific Railway of pile bridges across certain waterways of Puget Sound, as to whether the Chief of Engineers and the Secretary of War could legally decline to consider plans for these crossings, under authority of the State, *held*, that in view of provisions of said section the necessity of crossing the waterways is a matter for the consideration of the State, subject only to the authority of the Chief of Engineers and the Secretary of War to approve only such plans and locations as will prevent the structures from being an unreasonable obstruction to navigation. *Held*, however, that there would be no objection to the local engineer officers suggesting to the railway company the advisability of changing the location of the railway in order to avoid the expense of constructing and maintaining drawbridges across these waterways. (Ibid. 762, A1.)

Under section 7 of the act of September 19, 1890, as amended by section 3, act of July 13, 1892, and by section 9, act of March 3, 1899 (30 Stat. 1151), the authority of a State for the erection of a bridge over navigable water within the State should be shown as a condition precedent to the approval by the Secretary of War. (See *L. S. and M. S. R. Co. v. Ohio*, 165 U. S. 365; and 20 Opin. Atty. Gen. 438.) The fact that the title to the soil under the water is vested in a municipality of the State does not affect the power of the State to grant such authority, nor dispense with the necessity of its doing so. The title to the soil is distinct from the right of conservation. Though this title be vested in a town by the State, there remains in the latter by reason of its sovereignty, "*a jus publicum* of passage and repassage, with consequent power of conservation" (6 Op. Atty. Gen. 172, 178), under which power it may concede the authority required by the statute. (Ibid. 763, A2.)

On the application of the city of Boston for the approval of the plans of a bridge across Fort Point Channel, in Boston, a navigable waterway of the United States lying wholly within the State, said bridge to be erected under State authority, *held* that the jurisdiction of the Secretary of War and of the Chief of Engineers, under section 9 of the act of March 3, 1899 (30 Stat. 1151), relates to the situation and dimensions of the piers, the length of the spans, width of the draw openings, etc., but does not include the power of determining whether or not a bridge should be built across the waterway at or near the location of the proposed bridge, that being a matter for the State to determine under the statute. Ibid. 762, A1. See *Lake Shore & Michigan Southern Railway Co. v. Ohio* (165 U. S. 366, 368, 369); *Cummings v. Chicago* (188 U. S. 410); *Montgomery v. Portland* (190 U. S. 89).

submitted to and received the approval of the Chief of Engineers and of the Secretary of War.¹ *Sec. 1, Act of March 23, 1906 (34 Stats., 34).*

Post route.
etc.
Sec. 2, *ibid.*

24. Any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, upon which no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation over any railroad, street railway, or public highway leading to said bridge; and the United States shall have the right to construct, maintain, and repair, without any charge therefor, telegraph and telephone lines across and upon said bridge and its approaches; and equal privileges in the use of said bridge and its approaches shall be granted to all telegraph and telephone companies. *Sec. 2, ibid.*

Use by rail-
ways.
Sec. 3, *ibid.*

25. All railroad companies desiring the use of any railroad bridge built in accordance with the provisions of this Act shall be entitled to equal rights and privileges

¹ Where a special statute (act of Congress), authorizing the erection of a bridge over navigable water by a railroad corporation named, provided that the bridge should not be commenced till the company should submit for approval by the Secretary of War a certain plan and design with designated particulars and specifications, *held*, that the authority of the Secretary was thus restricted, and that he could not lawfully act and approve till the *data*, described were submitted. (Dig. J. A. G., 764, B 3.)

The application for the approval must be accompanied by the particulars specified in the act; otherwise the Secretary has no jurisdiction. Here the map and plan submitted failed to show the character of the structure, as also the full shore line and the direction and strength of the current, and gave only partial soundings. *Ibid.* In practice, however, the location and plans of bridges have been approved, although the map of location failed to show all the details specified in the statute, the provisions of the statute, in this respect, being treated as directory. Plans are insufficient as a basis for action where they do not show what the statute requires. Where the special act designates the kind of bridge authorized, details of the plan, etc., the Secretary of War is empowered to approve only such a bridge and such plans as comply with the statute. If he gives his approval to others, his action will be ineffectual in law, and the bridge if completed will not be a legal structure. [See *Hannibal & St. J. R. Co. v. Missouri River Packet Co.*, 125 U. S., 260, 263; *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 2 Fed. Rep., 285; *Gildersleeve v. New York, N. H. & H. R. Co.*, 82 id., 763; *Assante v. Charleston Bridge Co.*, 41 id., 365.] (*Ibid.*)

Where a special act authorizes the placing of a bridge across navigable water of the United States, by a railroad or other corporation, in addition to the plan of location and particulars required by the statute, a standing "rule" of the War Department of July 31, 1886, requires certain other evidence to be submitted to the Secretary of War, to establish the legal existence and authority of the corporation and its acceptance of the privileges and conditions granted and imposed by the act. In particular cases still other evidence may be essential; as in a case where there has been a consolidation of two companies, when copies of the agreement and of the enactment authorizing the consolidation, etc., should also be submitted. (*Ibid.* 765, a.)

Under the rule of July 31, 1886, it has been decided by the Secretary of War that the copy of the charter or articles of incorporation of the company shall be authenticated under the signature and official seal of the Secretary of State, or other proper State official, in whose office the original is on file. *Held* that a printed copy of a copy, under the certificate of the secretary of the company and its corporate seal, was not sufficient evidence. But the fact that the company has not furnished proper evidence of its incorporation does not affect the

relative to the passage of railway trains or cars over the same and over the approaches thereto upon payment of a reasonable compensation for such use; and in case of any disagreement between the parties in regard to the terms of such use or the sums to be paid all matters at issue shall be determined by the Secretary of War upon hearing the allegations and proofs submitted to him. *Sec. 3, ibid.*

26. No bridge erected or maintained under the provisions of this Act shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, and if any bridge erected in accordance with the provisions of this Act shall, in the opinion of the Secretary of War, at any time unreasonably obstruct such navigation, either on account of insufficient height, width of span, or otherwise, or if there be difficulty in passing the draw opening or the draw-span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the Secretary of War, after giving the parties interested reasonable opportunity to be heard, to notify

Alteration
and operation.
Sec. 4, ibid.

jurisdiction of the Secretary of War to approve plans of a bridge submitted and the objections may be waived. *Ibid.* a (1).

Where a specific act required a bridge to have at least three channel spans "of not less than" 500 feet each in length, and it was proposed to require one of the spans to be 700 feet in length, *held* that the Secretary of War, on the recommendation of a board of engineer officers, could require a greater length of span, within reasonable limits, but could not properly require such a length of span as would be unreasonable for the locality or as would require an impossible structure. (*Ibid.* 766, b.)

Where a special act of Congress authorized a "free wagon, foot and street railway bridge" across the Arkansas River at Little Rock, Ark., and the approved plans were changed during construction and the bridge thereby weakened so that it could not be safely used for street railway purposes, *held*, on the question of whether the Secretary of War could "insist upon the terms of the charter being carried out," so that a street railway could be built to the military post, that the act did not confer on the Secretary of War any authority to so insist; that his only authority to require the bridge to be altered would be under section 18 of the river and harbor act of March 3, 1899, but that as it did not appear that the bridge was an unreasonable obstruction to navigation, no action could be taken under this act; and that the only way the requirement could be enforced would be to submit the matter to Congress for its action under the reservation in the special act of the power to repeal it or require changes in the bridge at the expense of the owners. (*Ibid.*, c.)

It is well settled that an unrestricted grant of an authority to construct a railroad from one designated point to another includes by implication the authority to bridge navigable streams *en route*, where the road can not practically or reasonably be constructed without crossing them. (Gould on Waters, 3d ed., sec. 129; Fall River Iron Works Co. v. Old Colony & Fall River R. R. Co., 5 Allen, 221; U. P. R. R. Co. v. Hall, 91 U. S., 343.)

Thus, where, by an act of Congress of June 1, 1886, authority was given to a railway company to construct and operate a railway through the Indian Territory, from a point at or near Fort Smith to a point to be selected by the company on the northern boundary line of the Territory, *held* that the company would be authorized to bridge the Arkansas River. Similarly *held* as to bridging the same river by the Kansas City, Pittsburg & Gulf Railway Co. under the act of Congress approved February 17, 1893. (Dig. J. A. G., 766, B 4.)

An act of May 14, 1888, in authorizing the Tennessee Midland Railway Co. to bridge the Tennessee River, provided "that this act shall be null and void if the actual construction of the bridge herein authorized be not commenced within one year and completed within three years from the date of the approval of this act." In the absence of words making *time* an essential element of the

the persons owning or controlling such bridge to so alter the same as to render navigation through or under it reasonably free, easy, and unobstructed, stating in such notice the changes required to be made, and prescribing in each case a reasonable time in which to make such changes, and if at the end of the time so specified the changes so required have not been made, the persons owning or controlling such bridge shall be deemed guilty of a violation of this Act; and all such alterations shall be made and all such obstructions shall be removed at the expense of the persons owning or operating said bridge. The persons owning or operating any such bridge shall maintain, at their own expense, such lights and other signals thereon as the Secretary of Commerce and Labor¹ shall prescribe. If the bridge shall be constructed with a draw, then the draw shall be opened promptly by the

Lights and other signals.

performance, legislative acts of this character, although they may designate a period within which a certain thing is to be done, are construed to be directory only and not mandatory as to time. But *held* here that the statute was mandatory and that the time specified was made of the essence of the grant, and therefore that the company, in applying for the approval by the Secretary of War of the location and plan, required by the act to be approved by him, must show that the work had been commenced within the time fixed. (*Ibid.* B 5.)

Where the act of Congress authorizing the construction of a bridge fixes the time for the completion thereof, the Secretary of War can not grant an extension of the time. In such a case the bridge should be completed as soon as possible and application made to Congress for the necessary extension. (*Ibid.* 767, a.)

Authority granted by an act of Congress to a corporation or an individual to construct a bridge over navigable water of the United States is a franchise which can not be assigned without the permission of the grantor. (*Branch v. Jesup*, 106 U. S., 468; *Thomas v. Railroad Co.*, 101 U. S., 71.) And the Secretary of War can not in such a case lawfully entertain an application for the approval by him of the plans of a bridge made by a party or a corporation to which the right to build the bridge has been, without the authority of Congress, transferred. Where a specific grant to build a bridge for a specific purpose—*i. e.* to complete its line and to accommodate the public—is made to a railroad corporation by an act of Congress conferring no power of substitution, new legislation is requisite to authorize the transfer of the franchise, to another company. (*Ibid.* 767, C.)

Where the plans were submitted and the approval of the Secretary was applied for, not by the corporation to which the authority to build the bridge had been granted by an act of Congress, but by a construction company, which, by contract, was to erect all the bridges for such corporation and to own them when completed, *held*, that the Secretary of War could not legally approve the application, the substitution of the company not having been authorized by Congress. (*Ibid.* C. 1.)

Where the authority for the bridge is given in terms to the company, "its successors and assigns," it is held that these words, being the ordinary words of limitation of an estate granted in perpetuity to a corporation, confer no right of transfer. (18 Op. Atty. Gen., 512.) There must still be specific authority of statute for the purpose, or the transfer, if assumed to be made, will be ineffectual and void. (*Ibid.* C. 1 a.)

On the question whether plans for the reconstruction of a bridge submitted by the assignee of the company which received the franchise from Congress could be approved, *held* that after the plans had been approved and the bridge built the franchise should be regarded as passing with the title to the property, and that plans for the renewal, reconstruction, or repair of the bridge will be accepted from the person or corporation in actual possession or control of the property—the presumption being that the possession or control of the party in occupation is legal. (*Ibid.* C. 1 b. See 21 Op. Atty. Gen. 293.)

¹ Now Secretary of Commerce, Act of March 4, 1913 (37 Stats., 736.)

persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft. If tolls shall be charged for the transit over any bridge constructed under the provisions of this Act, of engines, cars, street cars, wagons, carriages, vehicles, animals, foot passengers, or other passengers, such tolls shall be reasonable and just, and the Secretary of War may, at any time, and from time to time, prescribe the reasonable rates of toll for such transit over such bridge, and the rates so prescribed shall be the legal rates and shall be the rates demanded and received for such transit. *Sec. 4, ibid.*

Secretary of War may prescribe tolls.

27. Any persons who shall fail or refuse to comply with the lawful order of the Secretary of War or the Chief of Engineers, made in accordance with the provisions of this Act, shall be deemed guilty of a violation of this Act, and any persons who shall be guilty of a violation of this Act shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished in any court of competent jurisdiction by a fine not exceeding five thousand dollars, and every month such persons shall remain in default shall be deemed a new offense and subject such persons to additional penalties therefor; and in addition to the penalties above described the Secretary of War and the Chief of Engineers may, upon refusal of the persons owning or controlling any such bridge and accessory works to comply with any lawful order issued by the Secretary of War or Chief of Engineers in regard thereto, cause the removal of such bridge and accessory works at the expense of the persons owning or controlling such bridge, and suit for such expense may be brought in the name of the United States against such persons, and recovery had for such expense in any court of competent jurisdiction; and the removal of any structures erected or maintained in violation of the provisions of this Act or the order or direction of the Secretary of War or Chief of Engineers made in pursuance thereof may be enforced by injunction, mandamus, or other summary process, upon application to the circuit court in the district in which such structure may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States at the request of the Secretary of War; and in case of any litigation arising from any obstruction or alleged obstruction to navigation created by the construction of any bridge under this Act, the cause or question arising may be tried before the circuit court of the United States in any district which any portion of such obstruction or bridge touches. *Sec. 5, Ibid.*

Same; penalty for failure to alter. *Sec. 5, ibid.*

Legal proceedings.

28. Whenever Congress shall hereafter by law authorize the construction of any bridge over or across any of the navigable waters of the United States, and no time for the commencement and completion of such bridge is

Commencement and completion. *Sec. 6, ibid.*

named in said Act, the authority thereby granted shall cease and be null and void unless the actual construction of the bridge authorized in such Act be commenced within one year and completed within three years from the date of the passage of such Act. *Sec. 6, Ibid.*

"Persons" defined.
Sec. 7, *Ibid.*

29. The word "persons" as used in this Act shall be construed to import both the singular and the plural, as the case demands, and shall include municipalities, quasi municipal corporations, corporations, companies, and associations. *Sec. 7, Ibid.*

Amendment or repeal.
Sec. 8, *Ibid.*

30. The right to alter, amend, or repeal this Act is hereby expressly reserved as to any and all bridges which may be built in accordance with the provisions of this Act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any bridge which shall have been constructed in accordance with its provisions. *Sec. 8, Ibid.*

BRIDGES OVER OHIO RIVER.

Bridges across Ohio River.
Dec. 17, 1872, v. 17, p. 398.

31. Any persons or corporations, having lawful authority therefor, may hereafter erect bridges across the Ohio river, for railroad or other uses, upon compliance with the provisions and requirements of this act. *Sec. 1, Act of December 17, 1872 (17 Stats., 398).*

Same; design, etc.
Ibid., sec. 2, as amended Feb. 14, 1883, v. 22, p. 414. Above and below mouth of Big Sandy.

32. Every bridge hereafter erected across the Ohio River shall have its axis at right angles to the current at all stages, and all of its spans shall be through spans. Every such bridge shall have at least one channel-span placed over that part of the river usually run by descending coal-fleets, said channel-span to give a clear water-way between the piers of five hundred feet, measured on the low-water line. Said channel-span shall be at least forty feet above local highest water, measured to the lowest part of the span, and shall be at least ninety feet above low water in bridges built above the mouth of the Big Sandy River, and at least one hundred feet above low water in bridges built below the mouth of the Big Sandy River, measured to the lowest part of the span: *Provided, however,* That all bridges over the Ohio River below the Covington and Cincinnati suspension bridge shall have, in addition to the channel-span prescribed above, a pivot-draw giving two clear openings of one hundred and sixty feet each, measured at right angles to the current at high stages, and located in a part of the bridge that can be safely and conveniently reached at such stages; that said draw shall be provided with suitable rest-piers above and below the pivot-pier, and suitable floats or crib-work connecting said rest-piers with the pivot-pier, to enable boats to pass through said draw with safety; that in case said draw span is near either shore, the bridge company, by purchase or otherwise, shall extinguish the right of mooring boats or other water

Below Covington and Cincinnati suspension bridge.
Draws.

craft to the adjacent shore for a distance of at least seven hundred feet above and seven hundred feet below the bridge; and that said draw shall be opened promptly, upon reasonable signal, for the passage of boats whose construction shall not be such as to admit of their passage under the stationary spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening said draw before or after the passage of a train: *Provided, further*, That in lieu of the high draw prescribed above, bridges over the Ohio River below the Covington and Cincinnati suspension bridge may be built as continuous bridges, with a clear height of fifty-three feet above local highest water, measured to the lowest part of the channel-span. *Sec. 2, Ibid., as amended by Act of Feb. 14, 1883 (22 Stat., 414).*

33. The piers of the high span and the piers of the draw shall be built parallel with the current at that stage of the river which is most important for navigation; and that no ripraps or other outside protection for imperfect foundation will be permitted in the channel-way of the high span, or of the draw openings. *Sec. 3, Act of Dec. 17, 1872 (17 Stat., 398).*

Piers; rip-
raps.
Dec. 17,
1872, v. 17, p.
398.

34. Any person, company, or corporation authorized to construct a bridge across the Ohio River shall give notice, by publication for one week in newspapers having a wide circulation, in not less than two newspapers in the cities of Pittsburgh, Cincinnati, and Louisville for bridges above the mouth of the Big Sandy, and in the cities of Pittsburgh, Cincinnati, Louisville, Saint Louis, Memphis, and New Orleans for bridges below the mouth of the Big Sandy, and shall submit to the Secretary of War, for his examination, a design and drawings of the bridge and piers, and a map of the location, giving, for the space of at least one mile above and one mile below the proposed location, the topography of the banks of the river and the shore lines at high and low water. This map shall be accompanied by others, drawn on the scale of one inch to two hundred feet, giving, for a space of one half a mile above the line of the proposed bridge and a quarter of a mile below, an accurate representation of the bottom of the river, by contour lines two feet apart, determined by accurate soundings, and also showing over the whole width of this part of the river the force and direction of the currents at low water, at high water, and at least one intermediate stage, by triangulated observations on suitable floats. The maps shall also show the locations of other bridges in the vicinity, and shall give such other information as the Secretary of War may require for a full and satisfactory understanding of the subject. Said maps and drawings shall be referred to a board of engineers for examination and report, which board shall personally examine the site of the proposed bridge, and shall

Ibid; sec. 4,
as amended
Feb. 14, 1883,
v. 22, p. 414.
Notice by
publication.

Maps and
plans.

Hearing be-
fore Board of
Engineers.

hold a public session at some convenient point to hear all objections thereto, of which public session due notice and invitation to be present shall be given to all interested parties; and if said board of engineers reports that the site is unfavorable, the Secretary of War shall be authorized, on the recommendation of said board; to order such changes in the bridge or its piers or such guiding dikes or other auxiliary works as may be necessary, at the expense of the proprietors or managers of such bridge or piers and other works for the security of navigation; and the proposed bridge shall only be a legal structure when built as approved by the Secretary of War." *Sec. 4, Ibid, as amended February 14, 1883 (22 Stat., 414).*

Approval by
Secretary of
War.

Lights on
bridges.
Dec. 17,
1872, v. 17, p.
398.

35. All parties owning, occupying, or operating bridges over the Ohio River shall maintain, at their own expense, from sunset to sunrise throughout the year, such lights on their bridges as may be required by the light-house board for the security of navigation; and all persons owning, occupying, or operating any bridge over the Ohio River shall, in any event, maintain all lights on their bridge that may be necessary for the security of navigation. *Sec. 5, Act of Dec. 17, 1872 (17 Stat., 398).*

Post routes,
etc.
Sec. 6, *ibid.*

36. Any bridge constructed under this act, and according to its limitations, shall be a lawful structure, and shall be recognized and known as a post-route, upon which, also, no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation over the railroads or public highways leading to said bridge; and the United States shall have the right of way for postal-telegraph purposes across any such bridge; and in case of any litigation arising from any obstruction or alleged obstruction to the navigation of said river, created by the construction of any bridge under this act, the cause or question arising may be tried before the district court of the United States of any State in which any portion of said obstruction or bridge touches. *Sec. 6, Ibid.*

Right to
amend act.
Sec. 7, *ibid.*

37. The right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the future construction of bridges, is hereby expressly reserved, without any liability of the government for damages on account of the alteration or amendment of this act, or on account of the prevention or requiring the removal of any such obstructions; and if any change be made in the plan of construction of any bridge constructed under this act, during the progress of the work thereon or before the completion of such bridge, such change shall be subject to the approval of the Secretary of War, and any change in the construction, or any alteration of any such bridge that may be directed at any time by Congress, shall be made at the cost and expense of the owners thereof. *Sec. 7, Ibid.*

BRIDGES OVER MUSKINGUM RIVER.

38. Any person or corporation having lawful authority to erect a bridge or bridges across the Muskingum River, Ohio, between its mouth and Dresden, may hereafter erect bridges across said river for railroad or other uses upon compliance with the provisions and requirements of this act, but no bridge shall be erected across said river which does not comply therewith. *Sec. 1, Act of April 2, 1888 (25 Stat., 74).*

Bridges
across Mus-
kingum River.
Apr. 2,
1888, v. 25, p.
74.

39. Every bridge hereafter erected across the Muskingum River, Ohio, shall have its axis at right angles to the current at medium and high stages, and its piers shall be parallel to this current. No riprap or other outside protection for insufficient foundations will be permitted around the channel piers, and all coffer-dams, piling, and other temporary works must be removed by the owners of the bridge before it is open to traffic. Every such bridge may be built either as a draw-bridge or as a continuous bridge; if built as a draw-bridge, the draw span shall give two clear openings, measured on the low water line, of eighty-feet, and smooth crib work or masonry shall be built at right angles to the bridge extending up stream from the pivot pier, a distance of at least one hundred feet, and down stream the same distance, and the height of this protection pier shall not be less than four feet above highest locking stage. The channel sides of the channel piers shall be smoothly cut; the corners of the draw piers shall be rounded to a radius of not less than six inches; there shall be no projecting cornices on the piers, nor projecting footway on the draw span; the apparatus for swinging the draw shall be sufficient to open it in not more than five minutes; and the draw shall be promptly opened on signal. The location of the draw span shall be subject to the approval of the Secretary of War. *Sec. 2, Ibid.*

Design and
specifications.
Sec. 2, ibid.

40. If the bridge be built as a continuous bridge it shall have at least one channel span, the center of which shall be in the middle of the channel usually run in high stages by steamboats descending the river with barges or rafts in tow; said channel span to have a clear opening of two hundred and fifty feet, measured at the low-water line, and the lowest part of the span to be forty feet above highest navigable water, as determined by a straight line connecting the tops of the lower lock gates at the head and foot of the pool in which the bridge is to be built. The other spans may have such grades as may be desired. *Sec. 3, Ibid.*

Same;
spans.
Sec. 3, ibid.

41. Whenever any duly authorized persons or corporations shall determine to apply to the Secretary of War for permission to build a bridge across the Muskingum River, they shall first give public notice of said intention by publication, once a week for four weeks, in news-

Notice and
approval.
Sec. 4, ibid.

papers having a wide circulation, in not less than two newspapers published in towns on the Muskingum River below Dresden, and in not less than two newspapers published in Pittsburgh. They shall also submit to the Secretary of War, for his examination and approval, a design and drawing of the bridge and piers, and a map of the locality, on the scale of one inch to one hundred feet, giving for the space of one-quarter of a mile above and one-quarter of a mile below the site of the proposed bridge, the topography of the banks of the river, the line of low and highest navigable water, an accurate representation of the bed of the river by contour lines, two feet apart, determined by accurate soundings; and shall also show over the whole width of this part of the river, the force and direction of the currents at low water, and at high navigable stages, by triangulated observations on suitable floats. The map shall also show the location of all bridges, locks, and dams, coal tipples, breakwaters, and other structures within the high-water lines in the designated area. Said map and drawings shall be referred to a board of engineer officers or to the engineer officer in charge of the Muskingum River for examination and report; and said board, or officer, shall visit the site of the proposed bridge and shall hold a public session at some convenient point, of which public session due notice and invitation to be present shall be given to all interested parties; and if said board, or officer, shall report the site as unfavorable, the Secretary of War, is authorized to require that such changes be made in the proposed bridge by lengthening the spans, or by the addition of guiding dikes or other auxiliary works, or by both, or by increasing the height, or by such other modifications as will make the bridge as safe for navigation as if built in a favorable part of the river; and no bridge shall be begun until the plans have been approved by the Secretary of War. *Sec. 4, Ibid.*

Canals.
Sec. 5, *ibid.*

42. In case the location of the proposed bridge crosses the river at the site of one of the lateral canals, and the main bridge is over a part of the river that is not navigable, the provisions of the foregoing sections are so far modified that the protection piers above and below the pivot pier of the draw may be replaced by piling, or similar approved construction, and in case of a continuous bridge, the span over the canal need not exceed the width of the canal measured between the tops of its banks. The current observation may also be omitted. *Sec. 5, Ibid.*

Lights.
Sec. 6, *ibid.*

43. All parties owning, occupying, or operating bridges over the Muskingum River shall maintain for the security of navigation, at their own expense, from sunset to sunrise, throughout the year, such lights on their bridges, as may be required by the Light-House Board, or the United States engineer officer in charge of said river and during the construction of any bridge under this act such lights and buoys shall be kept on coffer-dams, cribs,

piling, floating crafts, rafts, and so forth, used in the construction of the bridge, as may be necessary for the security of navigation. *Sec. 6, Ibid.*

44. The officers and crews of all vessels, boats, or rafts navigating the Muskingum River, shall be required to regulate the use of said vessels, and of any pipes or chimneys belonging thereto, so as not to interfere with the construction of any of the bridges authorized by the provisions of this act. *Sec. 7, Ibid.*

Navigating
crafts.
Sec. 7, Ibid.

45. Any bridge constructed under this act and according to its limitation, shall be a lawful structure, and shall be recognized and known as a post-route, upon which no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for transportation over the railroads or public highways leading to the said bridges; and the United States shall have the right of way for telegraph or telephone purposes across any such bridge; and in case of any litigation arising from any alleged obstruction to the navigation of said Muskingum River created by the construction of any bridge under this act the cause or question arising may be tried before the circuit or district court of the United States for the eastern division of the southern district of Ohio. *Sec. 8, Ibid.*

Post routes,
etc.
Sec. 8, Ibid.

Litigation.

46. The right to alter, amend, or repeal this act so as to prevent or remove all material obstructions to the navigation of said river by the future construction of bridges is hereby expressly reserved, without any liability of the Government for damages on account of the alterations or amendment of this act, or on account of the prevention, or requiring the removal of any such obstructions; and the entire removal of said bridge after its construction, or any change in the construction thereof or any alteration of any such bridge that may be directed, at any time by the Secretary of War, shall be made at the cost and expense of the owners thereof. *Sec. 9, Ibid.*

Right to
amend or re-
peal.
Sec. 9, Ibid.

BRIDGES OVER MAQUOKETA RIVER.

47. The assent of Congress is given to the construction of bridges across the Maquoketa River, within the State of Iowa, with or without draws, as may be provided by the laws of that State. *Sec. 5250 R. S.*

The Maquoketa River.
July 13,
1868. Res. No.
55, s. 1, v. 15,
c. 257.
*Sec. 5250,
R. S.*

ALTERATION OF BRIDGES.

48. Whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or

Alteration
of bridges,
etc.
Mar. 3, 1899.
s. 18, v. 30, p.
1153.

otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: *Provided*, That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants.¹ *Sec. 18, act of March 3, 1899 (30 Stat., 1153).*

¹This section replaces sections 4 and 5 of the act of September 19, 1890 (26 Stat. L., 453), *in pari materia*. In the case of the United States *v.* The City of Moline (82 Fed. Rep., 592), decided by the United States district court for the northern district of Illinois in 1897, it was held that section 4 of the act of September 19, 1890, was not unconstitutional. In *U. S. v. Rider*, 50 Fed. Rep. 406, it was held (by Sage, U. S. Dist. J.) that this section was unconstitutional in delegating to the Secretary of War "powers exclusively vested in Congress." See; however, *Rider v. U. S.*, 178 U. S., 251. At the trial of this case in the circuit court there was a division of opinion, but the presiding judge charged the jury that Congress had the constitutional power to confer upon the Secretary of War the authority to determine when a bridge, such as the one in question, was an unreasonable obstruction to navigation, and on writ of error to the Supreme Court the judgment was reversed, without deciding this question, on the ground that the municipal officers controlling the bridge did not have public moneys which could lawfully be applied to the purpose and could not obtain such moneys within the time specified in the notice. In an able and exhaustive opinion by Acting Attorney General Dickinson, dated Oct. 24, 1896, it was held that this act was not an unconstitutional delegation of legislative function; that Congress is not required to consider each case of alleged obstruction, but may generally define the offense and leave the facts to be determined by a court or special tribunal. (21 Opins. Atty. Gen., 430. and authorities cited. See, also, *Union Bridge Co. v. U. S.*, 204 U. S., 364. 385-388.)

49. It shall be the duty of all persons owning, operating, and tending the drawbridges now built, or which may hereafter be built across the navigable rivers and other waters of the United States, to open, or cause to be opened, the draws of such bridges under such rules and regulations as in the opinion of the Secretary of War the public interests require to govern the opening of drawbridges for the passage of vessels and other water-crafts, and such rules and regulations, when so made and published, shall have the force of law. Every such person who shall willfully fail or refuse to open, or cause to be

Drawbridges.
Regulations
for use.
Sec. 5, Aug.
18, 1894, v.
28, p. 362.

The power of Congress to regulate bridges over navigable waters is paramount, and where it comes into conflict with that of a State, the latter necessarily becomes ineffective. Yet, until Congress acts, and by appropriate legislation assumes control of the subject, the power of a State over bridges across navigable waters is plenary. (Case of Railroad Bridge at St. Paul, Minn., XVIII Opin. Atty. Gen., 164; *Wilson v. The Blackbird Marsh Co.*, 2 Peters, 250; *Gilman v. Philadelphia*, 3 Wallace, 713; *Pound v. Turck*, 95 U. S., 459; *Escanaba Co. v. Chicago*, 107 U. S., 678; *Bridge Co. v. U. S.*, 105 U. S., 470; *Miller v. The Mayor*, 109 U. S., 385; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S., 196; *Luxton v. North River Bridge Co.*, 153 U. S., 525.)

By the act of February 19, 1869 (15 Stat. L., 272), the construction of a drawbridge over the Connecticut River at Middletown, Conn., was authorized by Congress. The State statute authorizing the construction of the bridge, of which the act above referred to was in the nature of a confirmation and approval by Congress, required draws "not less than 130 feet in width in the clear," and the bridge was to be located and constructed in such manner and according to such plans as should be approved by a board of engineers to be appointed by the superior court. The bridge was built accordingly under the supervision and with the approval of a board of engineers of which two of the members were Generals McClellan and Gillmore. The draw space was 130 feet wide in the clear between the abutments down to the level of low water; below that, the riprap, sloping outward from the piers, diminished the clear space toward the bottom of the river. *Held*, that the contemporaneous construction of the act as requiring the full width down to the level of low water only, the projection of the riprap foundation below being approved by the board of engineers and confirmed by the court, was neither unreasonable nor so plainly contrary to the requirements of the act or the public needs as to render the bridge, approved as above, an unlawful structure. (*Gilderleeve et al. v. The New York, New Haven and Hartford R. R. Co.*, 82 Fed. Rep., 763; *St. Louis and St. Paul Packet Co. v. Keokuk and H. Bridge Co.*, 31 Fed. Rep., 755; *Hannibal and St. Joseph R. R. Co. v. Missouri River Packet Co.*, 125 U. S., 260.)

Under section 18 of the act of March 3, 1899 (30 Stat. 1151), the jurisdiction to determine whether a bridge is or is not an unreasonable obstruction to navigation is in the Secretary of War, but as that statute requires that in giving the notice "he shall specify the changes recommended by the Chief of Engineers that are required to be made," so that in respect of specific structural changes his duty is to require such modifications to be made as have been expressly recommended by the Chief of Engineers, and he has no authority to require other or additional structural changes than those so recommended. (*Dig. J. A. G.*, 769 A.)

The power expressly vested in the Secretary of War by section 4 of the act of September 19, 1890 (26 Stat. 426), to determine whether a bridge is an obstruction to navigation, is of a judicial nature, not ministerial merely. The law makes him the agent of the United States for the purpose and vests him with a specific discretion. *Held*, that the power devolved pertained to him alone and could not legally be exercised by the Assistant Secretary of War. (*Ibid.*, 768, IV.)

Where, however, the notice purports to be from the Secretary of War, it is sufficient although signed by the Assistant Secretary. (*Hannibal Bridge Co. v. U. S.*, 221 U. S., 194.)

opened, the draw of any such bridge for the passage of a boat or boats, or who shall unreasonably delay the opening of said draw after reasonable signal shall have been given, as provided in such regulations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than two thousand dollars nor less than one thousand dollars, or by imprisonment (in the case of a natural person) for not exceeding one year, or by both such fine and imprisonment, in the discretion of the court: *Provided*, That the proper action to enforce the provisions of this section may be commenced before any commissioner, judge, or court of the United States, and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States:¹ *Provided further*, That whenever, in the opinion of the Secretary of War, the public interests require it, he may make rules and regulations to govern the opening of draw-bridges for the passage of vessels and other water-crafts, and such rules and regulations, when so made and published, shall have the force of law, and any violation thereof shall be punished as hereinbefore provided.² *Sec. 5, act of August 18, 1894 (28 Stat. L., 362).*

GENERAL DAM ACT.

Approval of
plans of dams.
June 23,
1910, sec. 1,
v. 36, p. 593.

50. When authority has been or may hereafter be granted by Congress,³ either directly or indirectly or by any official or officials of the United States, to any persons, to construct and maintain a dam for water power or other purpose across or in any of the navigable waters of the United States, such dam shall not be built or commenced until the plans and specifications for such dam and all accessory works, together with such drawings of the proposed construction and such map of the proposed

¹ When a bridge over a navigable river is authorized by a State legislature, reserving a right to require a draw in the bridge on a certain contingency, Congress, on assuming control of the river, may require the construction of a draw in the bridge upon the happening of such a contingency, without providing for compensation to the bridge owners. *U. S. v. City of Moline*, 82 Fed. Rep., 592. As every bridge constructed over the navigable waters of the United States constitutes an obstruction to the free navigation thereof, and as the Congress is, by the Constitution, made the exclusive judge of the extent and amount of the obstruction that shall be authorized in any case, that body reserves to itself the right to authorize the construction of bridges over such waters. The nearest approach to general legislation on this subject will be found in the act of February 14, 1883 (22 Stat. L., 414), authorizing the construction of bridges across the Ohio River.

² As to enforcement of regulations, see sec. 6, Act of June 13, 1902 (32 Stats., 374), paragraph 76, *post*. The fact that States on either side of a navigable river have in force statutes prohibiting the doing of certain kinds of work on Sunday does not relieve the owner of a bridge spanning the river from the duty of opening the draw on Sunday to admit the passage of vessels engaged in commerce on the river. (*Boland v. Combination Bridge Co.*, 94 Fed. Rep., 888. See also note 1 to paragraph 48, *ante*.)

³ See paragraph 144 *post* as to provision of Act of July 25, 1912 (37 Stats., 233), regarding water power.

location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and the Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such dam and accessory works; and when the plans and specifications for any dam to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans or specifications either before or after completion of the structure unless the modification of such plans or specifications has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War. *Sec. 1, Act of June 23, 1910 (36 Stats., 593).*

51. In approving the plans, specifications, and location for any dam, such conditions and stipulations may be imposed as the Chief of Engineers and the Secretary of War may deem necessary to protect the present and future interests of the United States, which may include the condition that the persons constructing or maintaining such dam shall construct, maintain, and operate, without expense to the United States, in connection with any dam and accessory or appurtenant works, a lock or locks, booms, sluices, or any other structure or structures which the Secretary of War and the Chief of Engineers or Congress at any time may deem necessary in the interests of navigation, in accordance with such plans as they may approve, and also that whenever Congress shall authorize the construction of a lock or other structures for navigation purposes in connection with such dam, the persons owning such dam shall convey to the United States, free of cost, title to such land as may be required for such construction and approaches, and shall grant to the United States free water power or power generated from water power for building and operating such constructions. *Ibid.*

Accessory
works.
Ibid.

52. In acting upon said plans as aforesaid the Chief of Engineers and the Secretary of War shall consider the bearing of said structure upon a comprehensive plan for the improvement of the waterway over which it is to be constructed with a view to the promotion of its navigable quality and for the full development of water power; and, as a part of the conditions and stipulations imposed by them, shall provide for improving and developing navigation, and fix such charge or charges for the privilege granted as may be sufficient to restore conditions with respect to navigability as existing at the time such privilege be granted or reimburse the United States for doing the same, and for such additional or further expense as may be incurred by the United States with reference to such project, including the cost of any investigations necessary for approval of plans and of such

Charges for
investigation,
etc.
Ibid.

supervision of construction as may be necessary in the interests of the United States. *Ibid.*

Charges for benefit from storage reservoirs.
Ibid.

53. The Chief of Engineers and the Secretary of War are hereby authorized and directed to fix and collect just and proper charge or charges for the privilege granted to all dams authorized and constructed under the provisions of this Act which shall receive any direct benefit from the construction, operation, and maintenance by the United States of storage reservoirs at the headwaters of any navigable streams, or from the acquisition, holding, and maintenance of any forested watershed, or lands located by the United States at the headwaters of any navigable stream, wherever such shall be, for the development, improvement, or preservation of navigation in such streams in which such dams may be constructed. *Ibid.*

Locks, etc., for navigation.
Sec. 2, *ibid.*

54. The right is hereby reserved to the United States to construct, maintain, and operate, in connection with any dam built in accordance with the provisions of this Act, a suitable lock or locks, booms, sluices, or any other structures for navigation purposes, and at all times to control the said dam and the level of the pool caused by said dam to such an extent as may be necessary to provide proper facilities for navigation. *Sec. 2, ibid.*

Private rights, lights, signals, etc.
Sec. 3, *ibid.*

55. The persons constructing, maintaining, or operating any dam or appurtenant or accessory works, in accordance with the provisions of this Act, shall be liable for any damage that may be inflicted thereby upon private property, either by overflow or otherwise. The persons owning or operating any such dam, or accessory works, subject to the provisions of this Act, shall maintain, at their own expense, such lights and other signals thereon and such fishways as the Secretary of Commerce and Labor shall prescribe, and for failure so to do in any respect shall be deemed guilty of a misdemeanor and subject to a fine of not less than five hundred dollars, and each month of such failure shall constitute a separate offense and subject such persons to additional penalties therefor. *Sec. 3, ibid.*

Forfeiture of rights.
Sec. 4, *ibid.*

56. All rights acquired under this Act shall cease and be determined if the person, company, or corporation acquiring such rights shall, at any time, fail, after receiving reasonable notice thereof, to comply with any of the provisions and requirements of the Act, or with any of the stipulations and conditions that may be prescribed as aforesaid by the Chief of Engineers and the Secretary of War, including the payment into the Treasury of the United States of the charges provided for by section one of this Act. *Sec. 4, ibid.*

Revocation of rights; compensation.
Ibid.

57. Congress may revoke any rights conferred in pursuance of this Act whenever it is necessary for public use, and, in the event of any such revocation by Congress, the United States shall pay the owners of any dam and appurtenant works built under authority of this Act, as full

compensation, the reasonable value thereof, exclusive of the value of the authority or franchise granted, such reasonable value to be determined by mutual agreement between the Secretary of War and the said owners, and in case they can not agree, then by proceedings instituted in the United States circuit court for the condemnation of such properties. *Ibid.*

58. The authority granted under or in pursuance of the provisions of this Act shall terminate at the end of a period not to exceed fifty years from the date of the original approval of the project under this Act, unless sooner revoked as herein provided or Congress shall otherwise direct: *Provided, however,* That this limitation shall not apply to any corporation or individual heretofore authorized by the United States, or by any State, to construct a dam in or across a navigable waterway, upon which dam expenditures of money have heretofore been made in reliance upon such grant or grants. *Ibid.*

Limitation
to fifty years.
Ibid.

59. Any persons who shall fail or refuse to comply with the lawful order of the Secretary of War and the Chief of Engineers, made in accordance with the provisions of this Act, shall be deemed guilty of a violation of this Act, and any person who shall be guilty of a violation of this Act shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons shall remain in default shall be deemed a new offense and subject such persons to additional penalties therefor; and in addition to the penalties above described the Secretary of War and the Chief of Engineers may, upon refusal of the persons owning or controlling any such dam and accessory works to comply with any lawful order issued by the Secretary of War or Chief of Engineers in regard thereto, cause the removal of such dam and accessory works as an obstruction to navigation at the expense of the persons owning or controlling such dam, and suit for such expense may be brought in the name of the United States against such persons and recovery had for such expense in any court of competent jurisdiction. Said provision as to recovery of expense shall not apply wherever the United States has been previously reimbursed for such removal; and the removal or [of] any structures erected or maintained in violation of the provisions of this Act or the order or direction of the Secretary of War or the Chief of Engineers made in pursuance thereof may be enforced by injunction, mandamus, or other summary process, upon application to the circuit court in the district in which such structure may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States at the request of the Chief of Engineers or the Secretary of War; and in case of any litigation arising from any obstruction or alleged

Penalty, etc.
Sec. 5, *ibid.*

obstruction to navigation created by the construction of any dam under this Act the cause or question arising may be tried before the circuit court of the United States in any district in which any portion of said obstruction or dam touches. *Sec. 5, ibid.*

Commence-
ment and com-
pletion.
Sec. 6, ibid.

60. Whenever Congress shall hereafter by law authorize the construction of any dam across any of the navigable waters of the United States, and no time for the commencement and completion of such dam is named in said Act, the authority thereby granted shall cease and be null and void unless the actual construction of the dam authorized in such Act be commenced within one year and completed within three years from the date of the passage of such Act. *Sec. 6, ibid.*

Amendment
or repeal.
Sec. 7, ibid.

61. The right to alter, amend, or repeal this Act is hereby expressly reserved as to any and all dams which may be constructed in accordance with the provisions of this Act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any dam which shall have been constructed in accordance with its provisions. *Sec. 7, ibid.*

Definitions.
Sec. 8, ibid.

62. The word "persons" as used in this Act shall be construed to import both the singular and the plural, as the case demands, and shall include corporations, companies, and associations. The word "dam" as used in this Act shall be construed to import both the singular and the plural, as the case demands. *Sec. 8, ibid.*

DAM PROJECTS—SURVEYS.

Dams; sur-
veys of streams
affected.
June 25,
1910, sec. 3, v.
36, p. 669.

63. Whenever permission for the construction of dams in navigable streams is granted, or is under consideration by Congress, such surveys and investigations of the sections of the streams affected may be made as are necessary to secure conformity with rational plans for the improvement of the streams for navigation. *Sec. 3, Act of June 25, 1910 (36 Stats., 669).*

CHAPTER IV.

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ESTABLISHMENT OF HARBOR LINES.

64. Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation of and protection of harbors he may, and is hereby, authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him.¹ *Sec. 11, act of March 3, 1899 (30 Stats., 1151).*

¹ This section replaces section 12 of the act of September 19, 1890 (26 Stats., 455), *in pari materia*.

Held, under section 12 of the act of September 19, 1890 (26 Stat., 455), authorizing the Secretary of War to establish harbor lines, that, in establishing a harbor line in the harbor of Bridgeport, Conn., he was authorized to prescribe regulations under which the littoral owners (who, by the laws of Connecticut, have a right of property in the flats on their fronts, and may wharf or dock out to the navigable channel so as to avail themselves of the use of it) should have their vested rights recognized and protected; that while he might, for the protection of navigation, regulate their building out to the channel, he could not prohibit their doing so, or condemn, or deprive them of, their property. But *held*, that his authority for establishing a harbor line—which consists in locating an imaginary line beyond which wharves, etc., shall not be extended or deposits dumped—could be exercised only so far as necessary for the protection of the navigable channel as an interstate waterway, and not to protect mere local traffic. (Dig. J. A. G., 776, A.)

On the general question of the proper location of harbor lines, *held*, that they should be kept as near to the shore as the reasonable demands of navigation, present or prospective, may require, since when they are once established and reclamation work and structures have been started in rear of the same, it will be exceedingly difficult to afterwards move the lines farther toward the shore across the existing structures. (Ibid. 776, VI.)

With reference to the establishment of harbor lines in Sheepshead and Jamaica Bays, on question raised as to the legal authority of the United States to establish harbor lines in navigable waters below high-water mark at points where the same are not navigable in fact, *held*, that the authority of the United States to improve navigable waters is not limited to the parts of such waters which are navigable in fact, but extends to all parts of a navigable waterway, so that new channels may be dredged, or the erection of structures prevented which would interfere with the navigable waterway as a whole; and that any title of a State or of a private grantee to submerged areas or to tide lands below high-water mark would be held subordinate to the authority of the United States to take and use the same, without compensation to the owners, for any purpose in aid of navigation; and that therefore there could be no question of the authority to approve harbor lines as recommended, if regarded as reasonably necessary for the preservation and protection of the harbor. (Ibid. 777, A 1.) See *Philadelphia Co. v. Stimson* (223 U. S., 605), where the court held, with reference to the change by the Secretary of War in 1907 of the harbor lines in the back channel of the Ohio River at Brunot's Island so as to make the line coincide with the actual high-water mark, no improvements having been made since the line was originally established in 1895, that such change was within the authority of the Secretary of War; that the title to the soil under navigable waters was "subject to the authority of Congress under the Constitution of the United States"; and that "the exercise of this power could not be fettered by any grant made by the State of the soil which formed the bed of the river or by any authority conferred by the State for the creation of obstructions to its navigation." On the question whether the lines recommended were reasonably necessary for the protection of the harbor, *held* that the fact that the lines had been recommended by the United States Harbor Line Board, after extended inquiry, in connection with the application of the local dock commission for

Permits for structures, etc.
Compensation for tide water displaced.

65. Whenever the Secretary of War grants to any person or persons permission to extend piers, wharves, bulkheads, or other works, or to make deposits in any tidal harbor or river of the United States beyond any harbor lines established under authority of the United States, he shall cause to be ascertained the amount of tide water displaced by any such structure, or by any such deposits, and he shall, if he deem it necessary, require the parties to whom the permission is given to make compensation for such displacement either by excavating in some part of the harbor, including tide-water channels between high and low water mark, to such extent as to create a basin for as much tide water as may be displaced by such structure or by such deposits, or in any other mode that may be satisfactory to him.¹ *Ibid.*

Ibid.

Restriction on dredging.
July 13, 1892, s. 5, v. 27, p. 111.

66. No money appropriated for the improvement of rivers and harbors in this act or hereafter shall be expended for dredging inside of harbor lines duly established. *Sec. 5, act of July 13, 1892 (27 Stat., 111).*

Harbor lines in District of Columbia.
Mar. 3, 1899, s. 3, v. 30, p. 1378.

67. The harbor lines of the District of Columbia shall be determined by the Chief of Engineers, United States Army, and the Commissioners of the District of Columbia, subject to the approval of the Secretary of War. *Sec. 3, act of March 3, 1899 (30 Stat., 1378).*

Harbor lines at Kansas City. J. R. Feb. 16, 1909, v. 35, p. 1164.

68. The Secretary of War is hereby authorized to fix and establish pierhead and bulkhead lines, either or both, in the Kansas River at Kansas City, Kansas, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as shall be prescribed from time to time by the Secretary of War. *Joint Res., February 16, 1909 (35 Stats., 1164).*

their establishment on the lines proposed, might properly be regarded as establishing this point. (Dig. J. A. G. 777, A 1.)

The fact that harbor lines had been established in particular waters would not prevent the Secretary of War from reestablishing them along different lines, where such action is regarded as essential to the preservation and protection of the harbor. *Ibid.* A 2. See *Philadelphia Co. v. Stimson* (223 U. S., 605), referred to *ante*, in which the court said: "That officer (the Secretary of War) did not exhaust his authority in laying the lines first established in 1895, but was entitled to change them, as he did change them in 1907, in order more fully to preserve the river from obstruction."

Held that the river and harbor act of August 11, 1888, section 12, did not make the approval of the Secretary of War essential to the establishment by a State of harbor lines on its internal navigable waters, and therefore that, until the United States exercises control in the manner provided for by section 12 of said act, the State of Wisconsin was empowered, through the municipality of Duluth, to change and regulate the harbor lines of Duluth Harbor without such approval. (Dig. J. A. G. 777, B.) See *County of Mobile v. Kimball*, 102 U. S., 691; and *Gring v. Ives*, 222 U. S., 365.

¹ For penalty for violations of this section see section 12 of the act of March 3, 1899 (30 Stat. L., 1151), paragraph 12, *ante*. This section replaces section 9, act of August 17, 1894 (28 Stat. L., 364). Section 17 of the act of March 3, 1899 (30 *ibid.*, 1153), contains the requirement that the Department of Justice shall conduct the legal proceedings necessary to the enforcement of the provisions of sections 9 to 16, inclusive, of that enactment.

69. The Secretary of War is hereby authorized, in his discretion, to modify and extend harbor lines in front of the city of Chicago in such manner as to permit park extension work which may be desired by the municipal authorities, including the changing and widening of the southern entrance to the Chicago Harbor. *Sec. 5, Act of Aug. 26, 1912 (37 Stats., 626).*

Harbor lines
at Chicago.
Aug. 26,
1912, v. 37, p.
626.

HARBOR AREAS IN PORTO RICO.

70. The Secretary of War * * * is hereby, empowered, subject to the restrictions and under the conditions hereinafter mentioned, to authorize the construction, extension, and maintenance of any wharf, pier, dolphin, boom, weir, breakwater, sea wall, bulkhead, jetty, or other structure on any of the lands belonging to the United States which underlie the harbor areas and navigable streams and bodies of water in or surrounding Porto Rico and the islands adjacent thereto and the filling in and dredging of such lands. *Sec. 1, Act of June 11, 1906 (34 Stats., 234).*

Permits for
structures.
June 11,
1906, sec. 1, v.
34, p. 234.

The word "person" as used in this Act shall be construed to import either the singular or the plural, as the case demands, and shall include individuals, municipalities, quasi-municipal corporations, corporations, companies, and associations. *Sec. 2, ibid.*

"Person"
defined.
Sec. 2, *ibid.*

71. The powers granted in the foregoing sections shall be subject, however, to the following restrictions:

Restrictions.
Sec. 3, *ibid.*

(a) No authorization to any person to construct, extend, or maintain any such structure shall continue for a longer period than the period set forth in such authorization, and shall provide that the Government of the United States or with the approval of the Secretary of War the government of Porto Rico shall have the right at any time after the expiration of thirty years from the date of such authorization, and after three months' notice, to take any such structure from the owner thereof upon paying the value of the same at the time it shall be so taken, and the amount paid shall not exceed the original cost of the same as may be fixed under paragraph (f) hereof. In case the Government of the United States or the government of Porto Rico, exercising the right of purchase as aforesaid should claim that the value of the structure when seized and taken is less than its original cost, the extent of deterioration or diminution from the original value shall be determined by a board or commission of four members, two of whom shall be appointed by the Secretary of War for the Government of the United States or by the Governor of Porto Rico for the government of Porto Rico as the case may be and two by the owner of such structure. If the four members thus chosen and appointed shall not be able to agree, they shall choose by mutual agreement a referee, whose decision shall be final, but in no case shall the amount to be

paid exceed the original cost as fixed under the provisions of said paragraph (f). If the four members thus chosen and appointed are unable by mutual agreement to select a referee, then the Chief of Engineers of the United States Army shall be the referee, and his decision shall be final.

All authorizations granted by the Secretary of War for any such construction, extension, or maintenance

(b) Shall be subject to alteration, amendment, or repeal by Congress;

(c) Shall provide that the wharfage fees and charges for vessels, for passengers, and for goods loaded or discharged on, from, at, or over any such structure, and for approach and entry to any such structure, shall be no greater than are just, reasonable, and fairly remunerative, and for that purpose shall at all times be subject to regulation and revision by the said Secretary of War; that such fees and charges shall be the same for all persons, and all persons shall have equal right to approach, enter, and use the said structure, subject to such reasonable rules and regulations as the grantee thereof may establish, all of which rules and regulations shall be subject to revision by the Secretary of War;

(d) That all necessary dredging in or in connection with the said structure, or the use thereof, shall be made by the grantee of the authorization;

(e) That such authorization shall be null and void unless actual construction shall be commenced within one year from the date of such authorization by the Secretary of War, and completed within three years from the date of such authorization, or within such lesser periods as may be therein fixed: *Provided*, That the Secretary of War may for due cause shown extend the time for the completion of such construction for a reasonable period.

(f) That duly verified accounts of expenditure for the construction, extension, or improvement of such structure shall be exhibited to, and filed with, the United States army engineer at the city of San Juan, Porto Rico, who shall report to the Secretary of War the entire cost of such structure, extension, or improvement to be built under such authorization.

(g) That the said structure shall not be sublet, sold, transferred, or assigned, nor shall the authorization therefor be granted, sold, transferred, or assigned without the consent of the Secretary of War, nor in any case to a person engaged, directly or indirectly, in the same line of business, in the same harbor area, navigable stream, or body of water, and that any grant, subletting, sale, transfer, or assignment in violation hereof shall be null and void;

(h) That any and all vessels owned or chartered by the United States Government shall in case of any emergency, or in time of war, have prior right, free of charge, to the use of any such structure; and

(i) Shall contain such further restrictions as the Secretary of War may see fit to impose therein. *Sec. 3, ibid.*

72. No such authorization by the Secretary of War shall be granted to any person unless the applicant therefor shall first furnish to the Secretary of War satisfactory proof either that he (or it) is the owner or lessee of the approaches to the shore end of the proposed structure, with the right to use the same in connection therewith, or that he (or it) is the owner of a franchise granting the right to use said approaches in connection with such proposed structure. Every application to the Secretary of War for any such authorization shall be accompanied by plans and specifications for such structure, extension, or improvement, which said plans and specifications shall be submitted to, and approved by, the Chief of Engineers of the United States Army before the granting of any such authorization by the Secretary of War, and such plans and specifications shall not be deviated from in any such structure, extension, or improvement without the written consent, first obtained, of the said Chief of Engineers. *Sec. 4, ibid.*

Approaches:
plans.
Sec. 4, ibid.

73. Nothing herein contained shall be so construed as to affect legal or equitable rights, if any, existing at the date of the approval of this Act which were acquired by the government of Porto Rico or any other party under any contract, lease or license, for the construction, extension, improvement, or maintenance of any such structure, granted by the United States authorities prior to the approval of this Act. *Sec. 5, ibid.*

Private
rights.
Sec. 5, ibid.

CHAPTER V.

Operation of canals, etc.....	Par. 74-76
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74. No tolls or operating charges whatever shall be levied upon or collected from any vessel, dredge, or other water craft for passing through any lock, canal, canalized river, or other work for the use and benefit of navigation, now belonging to the United States or that may be hereafter acquired or constructed; and for the purpose of preserving and continuing the use and navigation of said canals and other public works without interruption, the Secretary of War, upon the recommendation of the Chief of Engineers, United States Army, is hereby authorized to draw his warrant or requisition, from time to time, upon the Secretary of the Treasury to pay the actual expenses of operating, maintaining, and keeping said works in repair, which warrants or requisitions shall be paid by the Secretary of the Treasury out of any money in the

Tolls not to
be collected;
*sec. 4, July 5,
1884, v. 23, p.
147; sec. 6,
Mar. 3, 1909,
v. 35, p. 818.*

Expense of operation.

Treasury not otherwise appropriated: *Provided*, That whenever, in the judgment of the Secretary of War, the condition of any of the aforesaid works is such that its entire reconstruction is absolutely essential to its efficient and economical maintenance and operation as herein provided for, the reconstruction thereof may include such modifications in plan and location as may be necessary to provide adequate facilities for existing navigation: *Provided further*, That the modifications are necessary to make the reconstruction work conform to similar works previously authorized by Congress and forming a part of the same improvement, and that such modifications shall be considered and approved by the Board of Engineers for Rivers and Harbors and be recommended by the Chief of Engineers before the work of reconstruction is commenced: *Provided further, also*, That an itemized statement of said expenses shall accompany the annual report of the Chief of Engineers:¹ *And provided further*, That nothing herein contained shall be held to apply to the Panama Canal. *Sec. 4, Act of July 5, 1884 (23 Stats., 147), as amended by sec. 6, Act of March 3, 1909 (35 Stats., 818).*

Use of canals, etc., regulated by Secretary of War.

Sec. 4, Aug. 13, 1894, v. 23, p. 362; sec. 11, June 13, 1902, v. 32, p. 374.

75. It shall be the duty of the Secretary of War to prescribe such rules and regulations for the use, administration, and navigation of any or all canals and similar works of navigation that now are, or that hereafter may be, owned, operated, or maintained by the United States as in his judgment the public necessity may require¹; and he is also authorized to prescribe regulations to govern the speed and movement of vessels and other water craft in any public navigable channel which has been improved under authority of Congress, whenever, in his judgment, such regulations are necessary to protect such improved channels from injury, or to prevent interference with the operations of the United States in improving navigable waters or injury to any plant that may be employed in such operations. Such rules and

¹ The indefinite appropriation made by section 4 of the act of July 5, 1884 (23 Stat. L., 147), is not applicable to river and harbor improvements generally, but only to a particular class of public works, such as canals, locks, etc., in the use of which both operating expenses and expenses for repairs are necessarily incurred. (XVIII Opin. Att. Gen., 188.)

The effect of this statute is to repeal so much of sections 5245, 5247, 5249, and 5255, Revised Statutes, as authorizes the imposition of tolls or other charges for the use of canals or other works of river and harbor improvement erected at the expense of the United States. Section 5255 vested the management of the Louisville and Portland Canal in the Secretary of the Treasury at reduced rates of toll. The tolls were still further reduced by the act of May 11, 1874 (13 Stat. L., 43), and the control of the canal transferred to the Secretary of War, who, by the act of July 5, 1884 (23 Stat. L., 148), was given authority to make, post, and enforce regulations for the use of the canal, and this legislation was repeated in the act of September 30, 1888 (25 Stat. L., 497). The acts of May 18, 1880 (21 Stat. L., 141), and August 2, 1882 (22 Stat. L., 209), contained a provision that no tolls or operating charges should be levied upon or collected from vessels, dredges, or other water craft passing through any canal or other improvement of navigation belonging to the United States.

regulations shall be posted, in conspicuous and appropriate places, for the information of the public; and every person and every corporation which shall violate such rules and regulations shall be deemed guilty of a misdemeanor and, on conviction thereof in any district court of the United States within whose territorial jurisdiction such offense may have been committed, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment (in the case of a natural person) not exceeding six months, in the discretion of the court.¹ *Sec. 4, Act of August 18, 1894 (28 Stats., 362), as amended by sec. 11, Act of June 13, 1902 (32 Stats., 374).*

76. Any regulations heretofore or hereafter prescribed by the Secretary of War in pursuance of the fourth and fifth sections of the river and harbor Act of August eighteenth, eighteen hundred and ninety-four, and any regulations hereafter prescribed in pursuance of the aforesaid section four as amended by section eleven of this Act, may be enforced as provided in section seven-

Enforcement
of regulations.
June 13,
1902, sec. 6,
v. 32, p. 374.

¹ Section 7 of the act of July 5, 1884 (23 Stat. L., 148), authorized the Secretary of War to prescribe rules and regulations for the use and administration of the Des Moines Rapids Canal, the Saint Marys Falls Canal, and the Louisville and Portland Canal. Section 14 of the act of September 19, 1890 (27 Stat. L., 455), provides that the dry dock constructed at the Des Moines Rapids Canal shall constitute an integral part of the said canal, and makes the provisions of section 7, above cited, applicable to the same. (See also Dig. Opin. J. A. G., 781, VIII.)

In view of the decision of the Supreme Court in the case of the United States *v. Eaton* (144 U. S., 677), it may be doubted whether regulations prepared in conformity to this statute can have the penal character which it undertakes to confer. It was held in that case that "regulations prescribed by the President and by heads of Departments, under authority of Congress, may be regulations prescribed by law so as to lawfully support acts done under them and in accordance with them; but it does not follow that a thing required by them is a thing so required by law as to make a neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense." (U. S. *v. Eaton*, 144 U. S., 688; *Caha v. U. S.*, 152 U. S., 212, 220.) It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act "committed or omitted in violation of a public law, either forbidding or commanding it." (U. S. *v. Eaton*, 144 U. S., 87; IV American and English Cyclopedic of Law, 642; IV Blackstone Com., 5.) In *Morrill v. Jones* (106 U. S., 466), it was held that the Secretary of the Treasury could not alter or amend a statute by executive regulation; "much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a Department." That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government. (*Field v. Clark*, 143 U. S., 649.) The enforcement of the law may be made to depend upon a condition to be ascertained by an executive officer, but such an exception to the uniform operation of the laws is not a grant of legislative power. (*Dunlap v. U. S.*, 33 C. Cls. R., 135.) For an opinion to the contrary of that above expressed, however, see *U. S. v. Ormsbee*, 74 Fed. Rep., 207. It may be noted, however, that the statute itself makes the violation of the regulations an offense and prescribes the punishment therefor. It becomes operative on the regulations, when made, and the violation of the regulation is a violation of the statute. Under this view the statute can not be regarded as a delegation of legislative authority. See 21 Op. Atty. Gen., 430, and *Union Bridge Co. v. U. S.*, 204, U. S. 364. See also *U. S. v. Grimaud* (220 U. S., 506), citing *Field v. Clark* (143 U. S., 692) and *Brodhine v. Revere*, 182 Mass., 598.

teen of the river and harbor Act of March third, eighteen hundred and ninety-nine, the provisions whereof are hereby made applicable to the said regulations. *Sec. 6, Act of June 13, 1902 (32 Stats., 374).*

CHAPTER VI.

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77. The placing, discharging, or depositing, by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredging, sludge, acid, or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound, within the limits which shall be prescribed by the supervisor of the harbor, is hereby strictly forbidden, and every such act is made a misdemeanor, and every person engaged in or who shall aid, abet, authorize, or instigate a violation of this section, shall, upon conviction, be punishable by a fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars nor more than two thousand five hundred dollars, and the imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide, one half of said fine to be paid to the person or persons giving information which shall lead to conviction of this misdemeanor.¹ *Sec. 1, act of June 29, 1888 (25 Stats., 209).*

¹The Erie and Atlantic basins, in New York Harbor, are private property, but they are also navigable waters of the United States, and the owners of the soil under the water hold the title subject to the rights of the public to navigate such waters, and are therefore not empowered to fill the basins and deprive

78. Any and every master and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel, who shall knowingly engage in towing any scow, boat, or vessel loaded with any such prohibited matter to any point or place of deposit, or discharge in the waters of the harbor of New York, or in its adjacent or tributary waters, or in those of Long Island Sound, or to any point or place elsewhere than within the limits defined and permitted by the supervisor of the harbor hereinafter mentioned, shall be deemed guilty of a violation of this act, and shall, upon conviction, be punishable as hereinbefore provided for offenses in violation of section one of this act, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted.¹ *Sec. 2, Ibid.*

Punishment
of officer of
vessel.
Sec. 2, *ibid.*

79. In all cases of receiving on board of any scows or boats such forbidden matter or substance as herein described, the owner or master, or person acting in such capacity on board of such scows or boats, before proceeding to take or tow the same to the place of deposit, shall apply for and obtain from the supervisor of the harbor appointed hereunder a permit defining the precise limits within which the discharge of such scow or boats may be made; and it shall not be lawful for the owner or master, or person acting in such capacity, of any tug or towboat to tow or move any scow or boat so loaded with such

Supervisor
to designate
place of de-
posit.
Sec. 3, June
29, 1888, v. 25,
p. 209; sec. 3,
Aug. 18, 1894,
v. 28, p. 360;
sec. 8, May 28,
1908, v. 35, p.
426.

the public of their use. Moreover they are waters over which the United States has expressly assumed jurisdiction, in prohibiting, by the act of June 29, 1888, the dumping of deposits "in the tidal waters of the harbor of New York, or its adjacent or tributary waters, within the limits which shall be prescribed by the supervisor of the harbor." *Held*, that the subsequent establishment, under section 12, of the act of August 11, 1888, of harbor lines in that harbor outside these basins did not oust this jurisdiction, but that the act of June 29, 1888, was still in force. (Dig. J. A. G., 754, a.)

Held, that the prohibition, by section 6, act of September 19, 1890, of the dumping of ballast, could not legally be enforced in New York Harbor beyond the three-mile limit. *Ibid.*, 775, E1. See also XX Opin. Att. Gen., 293.

On the question raised as to the authority of the Secretary of War, under the act of June 29, 1888 (25 Stat., 209), as amended by the act of August 18, 1894 (28 Stat., 338), which forbids deposits, except from sewers in liquid state, in the tidal waters of the harbor of New York or its adjacent or tributary waters elsewhere than as designated by the supervisor of the harbor under the direction of the Secretary of War, to prevent the dumping of garbage where it would be liable to be washed ashore along the New Jersey coast, *held* that while police jurisdiction is ordinarily confined within the 3-mile limit, many States assume a wider zone in defining offenses against their revenue laws, and it would seem that they might with equal propriety do so for the protection of their harbors; that by the above legislation Congress intended to conserve the sanitation of the harbor and of the adjacent coast; and that it would be competent for the supervisor of the harbor, with the approval of the Secretary of War, to designate a place of deposit beyond the 3-mile limit at a point sufficiently remote to insure not only the protection of the harbor against obstructions to navigation but also to conserve the sanitation of the adjacent coast. (Dig. J. A. G., 775, E. 3.)

¹The act of June 29, 1888 (25 Stat. L., 209), as amended by the act of August 18, 1894 (28 Stat. L., 360), prohibiting the deposit of refuse in New York Harbor without a permit from the supervisor of the harbor, is a valid exercise of the police powers of Congress over navigation and commerce. (*U. S. v. Romard*, 89 Fed. Rep., 156.)

forbidden matter until such permit shall have been obtained; and every person violating the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than one thousand nor less than five hundred dollars, and in addition thereto the master of any tug or towboat so offending shall have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. *Sec. 3, Act of Aug. 18, 1894 (28 Stats., 360), as amended by Sec. 8, Act of May 28, 1908 (35 Stats., 426).*

Penalty for
deposits else-
where.
Ibid.

80. And any deviation from such dumping or discharging place specified in such permit shall be a misdemeanor, and the owner and master, or person acting in the capacity of master, of any scows or boats dumping or discharging such forbidden matter in any place other than that specified in such permit shall be liable to punishment therefor, as provided in section one of the said act of June twenty-ninth, eighteen hundred and eighty-eight; and the owner and master, or person acting in the capacity of master, of any tug or towboat towing such scows or boats shall be liable to equal punishment with the owner and master, or person acting in the capacity of master, of the scows or boats; and, further, every scowman or other employee on board of both scows and towboats shall be deemed to have knowledge of the place of dumping specified in such permit, and the owners and masters, or persons acting in the capacity of masters, shall be liable to punishment, as aforesaid, for any unlawful dumping, within the meaning of this act or of the said act of June twenty-ninth, eighteen hundred and eighty-eight, which may be caused by the negligence or ignorance of such scowman or other employee; and, further, neither defect in machinery nor avoidable accidents to scows or towboats, nor unfavorable weather, nor improper handling or moving of scows or boats of any kind whatsoever, shall operate to release the owners and masters and employees of scows and towboats from the penalties hereinafter mentioned.
Ibid.

Boats to
have name,
etc., painted.
Ibid.

81. Every scow or boat engaged in the transportation of dredgings, earth, sand, mud, cellar dirt, garbage, or other offensive material of any description shall have its name or number and owner's name painted in letters and numbers at least fourteen inches long on both sides of the scow or boat; these names and numbers shall be kept distinctly legible at all times, and no scow or boat not so marked shall be used to transport or dump any such material. Each such scow or boat shall be equipped at all times with a life line or rope extending at least the length of and three feet above the deck thereof, such rope to be attached to the coaming thereof, also with a life-preserver and a life buoy for each person on board thereof, also

with anchor to weight not less than two hundred and seventy-five pounds, and at least one hundred feet of cable attached thereto; a list of the names of all men employed on any such scow or boat shall be kept by the owner or master thereof and the said list shall be open to the inspection of all parties. Failure to comply with any of the foregoing provisions shall render the owner of such scow or boat liable upon conviction thereof to a penalty of not more than five hundred dollars. *Ibid.*

82. The supervisor of the harbor of New York, designated as provided in section five of the said Act of June twenty-ninth, eighteen hundred and eighty-eight, is authorized and directed to appoint inspectors and deputy inspectors; and, for the purpose of enforcing the provisions of this Act and of the Act aforesaid, and of detecting and bringing to punishment offenders against the same, the said supervisor of the harbor, and the inspectors and deputy inspectors so appointed by him, shall have power and authority:

Inspectors;
duties.
Ibid.

First. To arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by this section and by the Act of June twenty-ninth, eighteen hundred and eighty-eight, aforesaid, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of the supervisor or his inspectors or deputy inspectors, or either of them: *And provided further*, That whenever any such arrest is made the person or persons so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States.

Arrests.

Second. To go on board of any scow or towboat engaged in unlawful dumping of prohibited material, or in moving the same without a permit, as required in this section of this Act, or otherwise violating any of the provisions of this section of this Act, and to seize and hold said boats until they are discharged by action of the commissioner, judge, or court of the United States before whom the offending persons are brought.

Seizure of
boats.

Third. To arrest and take into custody any witness or witnesses to such unlawful dumping of prohibited material, the said witnesses to be released under proper bonds.

Custody of
witnesses.

Fourth. To go on board of any towboat having in tow scows or boats loaded with such prohibited material, and accompany the same to the place of dumping, whenever such action appears to be necessary to secure compliance with the requirements of this Act and of the Act aforesaid.

Accompany-
ing towboats.

Inspecting
gas, etc.,
works.

Fifth. To enter gas and oil works and all other manufacturing works for the purpose of discovering the disposition made of sludge, acid, or other injurious material, whenever there is good reason to believe that such sludge, acid, or other injurious material is allowed to run into the tidal waters of the harbor in violation of section one of the aforesaid Act of June twenty-ninth, eighteen hundred and eighty-eight. *Ibid.*

Bribery;
penalty.
Ibid.

83. Every person who, directly or indirectly, gives any sum of money or other bribe, present, or reward, or makes any offer of the same to any inspector, deputy inspector, or other employee of the office of the supervisor of the harbor with intent to influence such inspector, deputy inspector, or other employee to permit or overlook any violation of the provisions of this section or of the said act of June twenty-ninth, eighteen hundred and eighty-eight, shall, on conviction thereof, be fined not less than five hundred dollars nor more than one thousand dollars, and be imprisoned not less than six months nor more than one year. *Ibid.*

Return of
permits.
Ibid.

84. Every permit issued in accordance with the provisions of this section of this Act, which may not be taken up by an inspector or deputy inspector, shall be returned within four days after issuance to the office of the supervisor of the harbor; such permit shall bear an indorsement by the master of the towboat, or the person acting in such capacity, stating whether the permit has been used, and, if so, the time and place of dumping. Any person violating the provisions of this section shall be liable to a fine of not more than five hundred dollars nor less than one hundred dollars. *Ibid.*

Penalty.

Disposal of
matter
dredged.
Sec. 4, June
29, 1888, v. 25,
p. 210.

85. All mud, dirt, sand, dredgings, and material of every kind and description whatever taken, dredged, or excavated from any slip, basin, or shoal in the harbor of New York, or the waters adjacent or tributary thereto, and placed on any boat, scow, or vessel for the purpose of being taken or towed upon the waters of the harbor of New York to a place of deposit, shall be deposited and discharged at such place or within such limits as shall be defined and specified by the supervisor of the harbor, as in the third section of this act prescribed, and not otherwise. Every person, firm, or corporation being the owner of any slip, basin, or shoal, from which such mud, dirt, sand, dredgings, and material shall be taken, dredged, or excavated, and every person, firm, or corporation in any manner engaged in the work of dredging or excavating any such slip, basin, or shoal, or of removing such mud, dirt, sand, or dredgings therefrom, shall severally be responsible for the deposit and discharge of all such mud, dirt, sand, or dredgings at such place or within such limits so defined and prescribed by said supervisor of the harbor; and for every violation of the provisions of this section the person offending

shall be guilty of an offense against this act, and shall be punished by a fine equal to the sum of five dollars for every cubic yard of mud, dirt, sand, dredgings, or material not deposited or discharged as required by this section. Any boat or vessel used or employed in violating any provision of this act shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof.¹ *Sec. 4, act of June 29, 1888, (25 Stats., 210).*

86. A line officer of the Navy shall be designated by the President of the United States as supervisor of the harbor, to act under the direction of the Secretary of War in enforcing the provisions of this act, and in detecting offenders against the same. This officer shall receive the sea pay of his grade, and shall have personal charge and supervision under the Secretary of War, and shall direct the patrol boats and other means to detect and bring to punishment offenders against the provisions of this act. *Sec. 5, ibid.*

87. It shall be unlawful for any person or persons to engage in fishing or dredging for shell fish in any of the channels leading to and from the harbor of New York, or to interfere in any way with the safe navigation of those channels by ocean steamships and ships of deep draft. *Sec. 2, Act of August 18, 1894 (28 Stats., 360).*

88. Any person or persons violating the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine or imprisonment, or both, such fine to be not more than two hundred and fifty dollars nor less than fifty dollars, and the imprisonment to be not more than six months nor less than thirty days, either or both united, as the judge before whom conviction is obtained shall decide. *Ibid.*

89. It shall be the duty of the United States supervisor of the harbor to enforce this act, and the deputy inspectors of the said supervisor shall have authority to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by this act: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of the supervisor or his inspector or deputy inspectors, or either of them: *And provided further*, That whenever any such arrest is made the person or persons so arrested shall be brought forthwith before

Supervisor
of the harbor;
designation.
Sec. 5, ibid.

Fishing, etc.,
in ship chan-
nels forbidden.
*Sec. 2, Aug.
18, 1894, v.
28, p. 360.*

Penalties.
Ibid.

Arrests.

Process.

Proceedings.

¹ Where ashes are dumped, in an unlawful place, from the deck of an ocean steamer by her firemen, presumably acting under orders from some superior officer of the steamer, the steamer at the time being engaged in performing a freighting voyage to sea, and the dumping of ashes accumulated at her furnace being a necessary incident of her navigation, the statute takes effect and renders the steamer liable as having herself violated the law. *The Bombay*, 46 Fed. Rep., 665. See also case of *The Anjer Head*, 46 Fed. Rep., 664. (See also *Dig. J. A. G.*, 775 E1; and *XX Opin. Att. Gen.*, 293.)

a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States. *Ibid.*

OBSTRUCTIONS TO NAVIGATION, NEW YORK CITY.

Obstructions
in certain wa-
ters in New
York City,
June 25,
1910, v. 36, p.
866.

90. The consent of Congress is hereby given to the city of New York, in the State of New York, to obstruct navigation of any river or other waterway which does not form a connecting link between other navigable waters of the United States, and lying wholly within the limits of said city, by closing all or any portion of the same or by building structures in or over the same when the said city shall be lawfully authorized to do so by the State of New York: *Provided, however,* That any such obstruction shall be unlawful unless the location and plans for the proposed work or works before the commencement thereof shall have been filed with and approved by the Secretary of War and Chief of Engineers; and when the plans for any such obstruction have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans either before or after the completion of such obstruction, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and the Secretary of War: *And provided further,* That the city of New York shall be liable for any damage that may be inflicted upon private property by reason of any of the provisions of this Act.

SEC. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the city of New York, or to the owner or owners, or any other persons interested in any obstruction which shall have been constructed under its provisions. *Secs. 1 and 2, Act of June 25, 1910 (36 Stats., 866).*

DEPOSITS IN LAKE MICHIGAN.

Deposits in
Lake Michi-
gan.
Act June
23, 1910, v.
36, v. 593.

91. It shall not be lawful to throw, discharge, dump, or deposit, or cause, suffer, or procure, to be thrown, discharged, dumped, or deposited, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state into Lake Michigan, at any point opposite or in front of the county of Cook, in the State of Illinois, or the county of Lake in the State of Indiana, within eight miles from the shore of said lake, unless said material shall be placed inside of a breakwater so arranged as not to permit the escape of such refuse material into the body of the lake and cause contamination thereof; and no officer of the Government shall dump or cause or authorize to be

dumped any material contrary to the provisions of this Act: *Provided, however,* That the provisions of this Act shall not apply to work in connection with the construction, repair, and protection of breakwaters and other structures built in aid of navigation, or for the purpose of obtaining water supply. Any person violating any provision of this Act shall be guilty of a misdemeanor, and on conviction thereof shall be fined for each offense not exceeding one thousand dollars. *Act of June 23, 1910 (36 Stats., 593).*

DEPOSITS IN POTOMAC RIVER IN DISTRICT OF COLUMBIA.

92. It shall be unlawful for any owner or occupant of any wharf or dock, any master or captain of any vessel, or any person or persons to cast, throw, drop, or deposit any ballast, dirt, oyster shells, or ashes in the water in any part of the Potomac River or its tributaries in the District of Columbia, or on the shores of said river below high-water mark, unless for the purpose of making a wharf, after permission has been obtained from the Commissioners of the District of Columbia for that purpose, which wharf shall be sufficiently inclosed and secured so as to prevent injury to navigation. *Act of May 19, 1896 (29 Stats., 126).*

General prohibition; permits. May 19, 1896, v. 29, p. 126.

93. It shall be unlawful for any owner or occupant of any wharf or dock, any captain or master of any vessel, or any other person or persons to cast, throw, deposit, or drop in any dock or in the waters of the Potomac River or its tributaries in the District of Columbia any dead fish, fish offal, dead animals of any kind, condemned oysters in the shell, watermelons, cantaloupes, vegetables, fruits, shavings, hay, straw, ice, snow, filth, or trash of any kind whatsoever. *Sec. 2, ibid.*

Certain deposits forbidden. Sec. 2, *ibid.*

94. Any person or persons violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and on conviction thereof in the police court of the District of Columbia shall be punished by a fine not exceeding one hundred dollars or by imprisonment not exceeding six months, or by both such punishments, in the discretion of the court. *Sec. 3, ibid.*

Penalty. Sec. 3, *ibid.*

95. Nothing in this act contained shall be construed to interfere with the work of improvement in or along the said river and harbor, under the supervision of the United States Government. *Sec. 4, ibid.*

Exception as to river improvement. Sec. 4, *ibid.*

CHAPTER VII.

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Diversion of water; prohibition.

Sec. 1, act, June 29, 1906, v. 34, p. 626.

96. The diversion of water from Niagara River¹ or its tributaries, in the State of New York, is hereby prohibited, except with the consent of the Secretary of War as hereinafter authorized in section two of this Act: *Provided*, That this prohibition shall not be interpreted as forbidding the diversion of the waters of the Great Lakes or of Niagara River for sanitary or domestic purposes, or for navigation, the amount of which may be fixed from time to time by the Congress of the United States or by the Secretary of War of the United States under its direction. *Sec. 1, Act of June 29, 1906 (34 Stats., 626)*.

Permits for diversion.

Sec. 2, *ibid.*

97. The Secretary of War is hereby authorized to grant permits for the diversion of water in the United States from said Niagara River or its tributaries for the creation of power to individuals, companies, or corporations which are now actually producing power from the waters of said river, or its tributaries, in the State of New York, or from the Erie Canal; also permits for the transmission of power from the Dominion of Canada into the United States, to companies legally authorized therefor, both for diversion and transmission, as hereinafter stated, but permits for diversion shall be issued only to the individuals, companies, or corporations as aforesaid, and only to the amount now actually in use or contracted to be used in factories the buildings for which are now in process of construction, not exceeding to any one individual, company or corporation as aforesaid, a maximum amount of eight thousand six hundred cubic feet per second, and not exceeding to all individuals, companies or corporations as aforesaid an aggre-

¹ The diversion of water from the Niagara River above the falls was regulated, prior to the ratification of the treaty of January 11, 1909 (36 Stat. pt. 2, p. 2448), by the act of June 29, 1906 (34 Stat. 626), which was extended in its operation by joint resolution of March 3, 1909 (35 Stat. 1169). The act, as extended, expired by its own limitation June 29, 1911. *Held* that the treaty of January 11, 1909 (*supra*), being of later date and of precisely equal obligatory force, replaces the provisions of the act of June 29, 1906, in all incidents in which it conflicts with said act; that the licenses given under said act will expire, each in accordance with its terms, on June 29, 1911, after which any action in respect to the issue of new licenses will have to be regulated by article 5 of said treaty of January 11, 1909; and in respect to the appointment of commissioners under the treaty that the requirements of said treaty were fully operative, and no further legislation would be necessary to warrant the appointments, provision having been made by the act of June 25, 1910 (36 Stat. 766), for the expenses of commission incurred under the treaty for the fiscal year ending June 30, 1911. (Dig. J. A. G., 775, H.)

Held, under the act of June 29, 1906 (34 Stat. 626), forbidding the diversion of water from the Niagara River except as authorized therein, that in respect to the withdrawal of water by the city of Lockport, N. Y., for domestic and sanitary purposes it was questionable whether the proviso of said act, that the prohibition should not apply to diversion for "sanitary or domestic purposes, or for navigation, the amount of which may be fixed from time to time by the Congress of the United States or by the Secretary of War under its direction," the Secretary of War could not authorize such diversion except in pursuance of appropriate enabling legislation. *Held*, however, that permission for the necessary intake could be given under the act of March 3, 1899, pending the obtaining of such legislation. *Ibid.*

gate amount of fifteen thousand six hundred cubic feet per second; but no revocable permits shall be issued by the said Secretary under the provisions hereafter set forth for the diversion of additional amounts of water from the said river or its tributaries until the approximate amount for which permits may be issued as above, to wit, fifteen thousand six hundred cubic feet per second, shall for a period of not less than six months have been diverted from the waters of said river or its tributaries, in the State of New York: *Provided*, That the said Secretary, subject to the provisions of section five of this Act, under the limitations relating to time above set forth is hereby authorized to grant revocable permits, from time to time, to such individuals, companies, or corporations, or their assigns, for the diversion of additional amounts of water from the said river or its tributaries to such amount, if any, as, in connection with the amount diverted on the Canadian side, shall not injure or interfere with the navigable capacity of said river, or its integrity and proper volume as a boundary stream, or the scenic grandeur of Niagara Falls; and that the quantity of electrical power which may by permit be allowed to be transmitted from the Dominion of Canada into the United States, shall be one hundred and sixty thousand horsepower: *Provided further*, That the said Secretary, subject to the provisions of section five of this Act, may issue revocable permits for the transmission of additional electrical power so generated in Canada, but in no event shall the amount included in such permits, together with the said one hundred and sixty thousand horsepower and the amount generated and used in Canada, exceed three hundred and fifty thousand horsepower: *Provided always*, That the provisions herein permitting diversions and fixing the aggregate horsepower herein permitted to be transmitted into the United States, as aforesaid, are intended as a limitation on the authority of the Secretary of War, and shall in no wise be construed as a direction to said Secretary to issue permits, and the Secretary of War shall make regulations preventing or limiting the diversion of water and the admission of electrical power as herein stated; and the permits for the transmission of electrical power issued by the Secretary of War may specify the persons, companies, or corporations by whom the same shall be transmitted, and the persons, companies, or corporations to whom the same shall be delivered. *Sec. 2, ibid.*

Permits to
introduce elec-
trical power
from Canada.

98. Any person, company, or corporation diverting water from the said Niagara River or its tributaries, or transmitting electrical power into the United States from Canada, except as herein stated, or violating any of the provisions of this Act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding two thousand five hundred dollars nor less than five hundred dollars, or by imprisonment (in

Penalty for
unauthorized
diversion, etc.
Sec. 3, ibid.

the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And, further, the removal of any structures or parts of structures erected in violation of this Act, or any construction incidental to or used for such diversion of water or transmission of power as is herein prohibited, as well as any diversion of water or transmission of power in violation hereof, may be enforced or enjoined at the suit of the United States by any circuit court having jurisdiction in any district in which the same may be located, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States. *Sec. 3, ibid.*

Limitation
of statute.
Sec. 5, ibid.

99. The provisions of this Act shall remain in force for three years from and after date of its passage, at the expiration of which time all permits granted hereunder by the Secretary of War shall terminate unless sooner revoked, and the Secretary of War is hereby authorized to revoke any or all permits granted by him by authority of this Act, and nothing herein contained shall be held to confirm, establish, or confer any rights heretofore claimed or exercised in the diversion of water or the transmission of power. *Sec. 5, ibid.*

Extension of
statute.
Joint Res.,
Mar. 3, 1909,
v. 35, p. 1169.

100. The provisions of the aforesaid Act be, and they are hereby, extended¹ for two years from June twenty-ninth, nineteen hundred and nine, being the date of the expiration of the operation of said Act, save in so far as any portion thereof may be found inapplicable or already complied with. *Joint Res., March 3, 1909 (35 Stats., 1169).*

CHAPTER VIII.

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¹ Further extensions were made by Joint Resolutions of Aug. 22, 1911 (37 Stats., 43) and April 5, 1912 (37 Stats., 631), to March 4, 1913.

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BOARD OF ENGINEERS.

101. There shall be organized in the Office of the Chief of Engineers, United States Army, by detail from time to time from the Corps of Engineers, a board of five engineer officers, whose duties shall be fixed by the Chief of Engineers, and to whom shall be referred for consideration and recommendation, in addition to any other duties assigned, so far as in the opinion of the Chief of Engineers may be necessary, all reports upon examinations and surveys provided for by Congress, and all projects or changes in projects for works of river and harbor improvement heretofore or hereafter provided for. And the board shall submit to the Chief of Engineers recommendations as to the desirability of commencing or continuing any and all improvements upon which reports are required. And in the consideration of such works and projects the board shall have in view the amount and character of commerce existing or reasonably prospective which will be benefited by the improvement, and the relation of the ultimate cost of such work, both as to cost of construction and maintenance, to the public commercial interests involved, and the public necessity for the work and propriety of its construction, continuance, or maintenance at the expense of

Duties, etc.,
of Board.
Sec. 3, act
June 13, 1902,
v. 32, p. 372.

the United States. And such consideration shall be given as time permits to such works as have heretofore been provided for by Congress, the same as in the case of new works proposed. The board shall, when it considers the same necessary, and with the sanction and under orders from the Chief of Engineers, make, as a board or through its members, personal examinations of localities. And all facts, information, and arguments which are presented to the board for its consideration in connection with any matter referred to it by the Chief of Engineers shall be reduced to and submitted in writing, and made a part of the records of the Office of the Chief of Engineers. It shall further be the duty of said board, upon a request transmitted to the Chief of Engineers by the Committee on River and Harbors of the House or Representatives, or the Committee on Commerce of the Senate, in the same manner to examine and report through the Chief of Engineers upon any projects heretofore adopted by the Government or upon which appropriations have been made, and report upon the desirability of continuing the same or upon any modifications thereof which may be deemed desirable.

The board shall have authority, with the approval of the Chief of Engineers, to rent quarters, if necessary, for the proper transaction of its business, and to employ such civil employees as may, in the opinion of the Chief of Engineers, be required for properly transacting the business assigned to it, and the necessary expenses of the board shall be paid from allotments made by the Chief of Engineers from any appropriations made by Congress for the work or works to which the duties of the board pertain. *Sec. 3, Act of June 13, 1902 (32 Stats., 372).*

Same; re-
view by of re-
ports and sur-
veys.
Sec. 4,
Mar. 4, 1913,
v. 37, p. 826.

102. That all reports on examinations and surveys authorized by law shall be reviewed by the Board of Engineers for Rivers and Harbors as provided for in section three of the river and harbor Act approved June thirteenth, nineteen hundred and two, and all special reports ordered by Congress shall, in the discretion of the Chief of Engineers, be reviewed in like manner by said board; and the said board shall also, on request by resolution of the Committee on Commerce of the Senate or the Committee on Rivers and Harbors of the House of Representatives, submitted to the Chief of Engineers, examine and review the report of any examination or survey made pursuant to any Act or resolution of Congress, and report thereon through the Chief of Engineers, United States Army, who shall submit his conclusions thereon as in other cases: *Provided*, That in no case shall the board, in its report thus called for by committee resolution, extend the scope of the project contemplated in the original report upon which its examination and review has been requested, or in the provision of law authorizing the original examination or survey: *Provided further*, That

said board shall consist of seven members, a majority of whom shall be of rank not less than lieutenant colonel. *Sec. 4, Act March 4, 1913 (37 Stats., 826).*

PROFESSIONAL AND OTHER ASSISTANTS.

103. The Chief of Engineers may, with the approval of the Secretary of War, employ in his office such professional and other assistants as, in his judgment, may be necessary to enable him to perform effectively and with advantage to the public service the various duties imposed upon his office by the laws enacted from time to time by Congress for the improvement, preservation, and protection of the navigable waters of the United States, the salaries of such employees to be paid by allotments from any appropriations made by Congress for examinations and surveys, or for the improvements of rivers and harbors: *Provided*, That expenditures hereunder shall not exceed twenty-five thousand dollars in any one year, and shall be in addition to those otherwise authorized by law: *And provided further*, That an itemized statement of all expenditures under this section, including the number of persons employed, their duties, and the amount paid to each, shall accompany the annual report of the Chief of Engineers. *Sec. 14, Act of March 3, 1909 (35 Stats., 836).*

Employment
and salaries.
Mar 3, 1909,
v. 35, p. 836.

ENGINEER OFFICERS.

104. The President may detail officers of the Engineer Corps of the United States Army for consultation or to superintend the construction or repair of any aid to navigation authorized by Congress. *Sec. 11, Act of June 17, 1910 (36 Stats., 539).*

Details for
consultation.
June 17,
1910, v. 36, p.
539.

105. Officers of the Corps of Engineers, when on duty under the Chief of Engineers, connected solely with the work of river and harbor improvements may, while so employed, be paid their pay and commutation of quarters from the appropriations for the work or works upon which they are employed. *Sec. 5, Act of February 27, 1911 (36 Stats., 957).*

Pay, etc., on
river and harbor
work.
Feb. 27,
1911, sec. 5, v.
36, p. 957.

106. In determining the mileage of officers of the Corps of Engineers traveling without troops on duty connected with works under their charge, no deduction shall be made for such travel as may be necessary on free or bond-aided or land-grant railways.¹ *Sec. 15, act of September 16, 1890 (26 Stats., 456).*

Mileage, etc.
Sept. 16,
1890, s. 15, v.
26, p. 456.

¹The mileage allowance of officers of the Corps of Engineers when traveling on duty connected with river and harbor improvements, being an expense necessarily incidental to and incurred on account of such work, is properly payable from the appropriations therefor and not from the appropriation "Pay of the Army," at the special rates prescribed by army acts for mileage payable from said appropriation. (3 Dig. 2d Compt. Dec., par. 290.)

Travel allowances for officers of the Corps of Engineers, or for those on engineer duty, traveling on service connected with works of public improvement

CIVIL ENGINEERS, DRAFTSMEN, ETC.

Employment
of civil en-
gineers.

Mar. 29,
1867, res. 27,
v. 15, p. 28.
Sec. 5253,
R. S.

107. The Chief of Engineers may, with the approval of the Secretary of War, employ such civil engineers, not exceeding five in number, for the purpose of executing the surveys and improvements of western and north-western rivers, ordered by Congress, as may be necessary to the proper and diligent prosecution of the same; and the persons so employed may be allowed a reasonable compensation for their services, not to exceed the sum of three thousand dollars a year. *Sec. 5253, R. S.*

Names, etc.,
to be reported
to Congress.

Aug. 5, 1886,
s. 8, v. 24, p.
335.

108. The Secretary of War shall report to Congress, at its next and each succeeding session thereof, the name and place of residence of each civilian engineer employed in the work of improving rivers and harbors by means and as the result of appropriations made in this and succeeding river and harbor appropriation bills, the time so employed, the compensation paid, and the place at and work on which employed. *Sec. 8, act of August 5, 1886 (24 Stats., 335).*

Employment
of retired off-
cers.

June 3,
1896, v. 28, p.
235.

109. Section 2 of the act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes,¹ approved July thirty-first, eighteen hundred and ninety-four, shall not be so construed as to prevent the employment of any retired officer of the Army or Navy to do work under the direction of the Chief of Engineers of the United States Army in connection with the improvement of rivers and harbors of the United States, or the payment by the proper officer of the Treasury of any amount agreed upon as compensation for such employment. *Sec. 7, Act of June 3, 1896 (28 Stats., 235).*

which are not of a military character, will be paid from the special appropriation for the work. When changing station or traveling on duty connected with fortifications, or on any other military duty, the mileage will be paid by the Quartermaster Corps from the appropriation for mileage of the Army, except in cases where some other appropriation specifically provides that the travel allowance shall be paid therefrom. (Par. 1507, A. R., 1913.)

The provision in the act of Mar. 15, 1898 (30 Stat. L., 321), that "the maximum sum to be allowed and paid to any officer of the Army shall be seven cents per mile," applies to all officers of the Army, including officers of the Corps of Engineers. (4 Compt. Dec., 711.) An officer of the Army traveling under orders and using a conveyance upon which transportation and subsistence are furnished or paid for by the Government is not entitled to mileage. (*Ibid.*, 429.)

The movements of an army officer assigned to duty requiring him to move from place to place within the area of the district where his duties lie, for which he is furnished Government transportation, do not constitute "travel," within the meaning of the law allowing mileage for travel under orders. (*Ibid.*, 86.)

The expense for transportation to a point not located on a railroad, incurred by an officer of the Inspector General's Department in inspecting unseviceable river and harbor material, is properly payable from the appropriation for the river and harbor work. (3 Compt. Dec., 3.)

¹ Sec. 2, act of July 31, 1894 (28 Stat., 205).

110. And (for) the services of skilled draftsmen, civil engineers, and such other services as the Secretary of War may deem necessary may be employed only in the office of the Chief of Engineers to carry into effect the various appropriations for rivers and harbors, fortifications, and surveys to be paid from such appropriations: *Provided*, That * * * the Secretary of War shall each year, in the annual estimates, report to Congress the number of persons so employed and the amount paid to each. *Act of May 28, 1896 (29 Stats., 163)*.

Draftsmen,
etc.
May 28,
1896; v. 29, p.
163.

111. Whenever it shall be necessary, in order to properly prosecute works of river and harbor improvement, the Chief of Engineers is authorized to detail for duty in charge of river and harbor districts or as members of boards of engineers any assistant engineers in the employ of the Engineer Bureau of the War Department. *Sec. 5, Act of February 27, 1911 (36 Stats., 957)*.

Detail of
assistant en-
gineers.
Feb. 27,
1911, sec. 5,
v. 36, p. 957.

PROJECTS OF IMPROVEMENT.

112. In every case where surveys are made, the report thereon shall embrace such information concerning the commercial importance, present and prospective, of the improvement contemplated thereby, and such general commercial statistics as the Secretary of War may be able to procure.¹ *Act of August 2, 1882 (22 Stats., 213)*.

Surveys; re-
ports.
Aug. 2, 1882,
v. 22, p. 213.

113. The Secretary of War shall cause to be prepared and submitted to Congress, in connection with the reports of examinations and surveys of rivers and harbors hereafter made by order of Congress, full statements of all existing facts tending to show to what extent the general commerce of the country will be promoted by the several works of improvements contemplated by such examinations and surveys, to the end that public moneys shall not be applied excepting where such improvements shall tend to subserve the general commercial and navigation interests of the United States.

Same; con-
tents of re-
ports.
July 27,
1868, Res. No.
76, v. 15, p.
262.
Sec. 231,
R. S.

¹ This provision was repeated in the acts of July 5, 1884 (23 Stats., 153), August 5, 1886 (24 *ibid.*, 335), August 11, 1888 (25 *ibid.*, 433), and September 19, 1890 (26 *ibid.*, 464).

Under section 6 of the act of June 3, 1896 (29 Stats., 235), the Chief of Engineers submitted, May 13, 1898, a report giving a complete list of all the preliminary examinations that had theretofore been made, etc., which report is printed as House Document No. 482, Fifty-fifth Congress, second session. A similar report was furnished under act of June 13, 1902 (32 Stat., 331), and printed in House Document 421, Fifty-seventh Congress, second session. By section 5 of the act of July 25, 1912, as amended by section 5 of the act of March 4, 1913 (37 Stats., 827), a revision of this report is required.

Under section 2 of said act of June 3, 1896 (29 Stats., 234), a compilation of all general laws, then in force, that had been enacted from time to time by Congress for the maintenance, protection, and preservation of the navigable waters of the United States, was prepared and submitted to Congress. Under act of June 13, 1902 (32 Stats., 331), joint resolution of February 1, 1905 (33 Stats., 1280), and act of March 2, 1907 (34 Stats., 1058), the compilation was brought down to include the acts of the session ending March 4, 1907. By section 6 of the act of July 25, 1912, as amended by section 6 of the act of March 4, 1913 (37 Stats., 826), a revised edition of this compilation is required.

Same; channel depths.
 Sec. 9,
 Mar. 4, 1913,
 v. 37, p. 827.

114. That in the preparation of projects under this and subsequent river and harbor acts; unless otherwise expressed, the channel depths referred to shall be understood to signify the depth at mean lower low water in tidal waters, and the mean depth during the month of lowest water in the navigation season in rivers and non-tidal channels, and the channel dimensions specified shall be understood to admit of such increase at the entrances, bends, sidings, and turning places as may be necessary to allow of the free movement of boats. *Sec. 9, Act March 4, 1913 (37 Stats., 827).*

Stream-flow measurements.
 Sec. 3, June
 25, 1910, v.
 36, p. 669.

115. The surveys of navigable streams herein or hereafter authorized shall include such stream-flow measurements and other investigations of the watersheds as may be necessary for preparation of plans of improvement and a proper consideration of all uses of the stream affecting navigation, and whenever necessary similar investigations may be made in connection with all navigable streams under improvement. *Sec. 3, Act of June 25, 1910 (36 Stats., 669).*

Survey of tributary waters.
 July 25,
 1912, v. 37, p.
 222.

116. The Chief of Engineers, in his discretion, and after approval by the Secretary of War, is hereby authorized to make preliminary examinations and minor surveys and to remove snags and other temporary or readily removable obstructions from tributaries of waterways already under Federal improvement or in general use by navigation, to be paid from the appropriations for the adjoining waterways: *Provided*, That the cost of such work in any single year shall not exceed five hundred dollars per tributary. *Act of July 25, 1912 (37 Stats., 222).*

Restriction on surveys, etc.
 Mar. 3, 1899,
 s. 2, v. 30, p.
 1149.

117. No preliminary examination,¹ survey, project, or estimate for new works other than those designated in this or some prior act or joint resolution shall be made.² *Sec. 2, act of March 3, 1899 (30 Stats., 1149).*

¹ The acts of July 13, 1892 (27 Stats., 115), and August 7, 1894 (28 *ibid.*, 369), contained the requirement that "The preliminary examinations ordered in this act shall be made by the local engineer in charge of the district, or an engineer detailed for the purpose; and such local or detailed engineer and the division engineer of the locality shall report to the Chief of Engineers, first, whether, in their opinion, the harbor or river under examination is worthy of improvement by the General Government, and shall state in such report fully and particularly the facts and reasons on which they base such opinions, including the present and prospective demands of commerce; and, second, if worthy of improvement by the General Government, what it will cost to survey the same, with a view of submitting plan and estimate for its improvement; and the Chief Engineer shall submit to the Secretary of War the reports of the local and division engineers, with his views thereon and his opinion of the public necessity or convenience to be subserved by the proposed improvement; and all such reports of preliminary examinations, with such recommendations as he may see proper to make, shall be transmitted by the Secretary of War to the House of Representatives, and are hereby ordered to be printed when so made." The acts of August 2, 1882 (22 Stats., 213), July 5, 1884 (23 *ibid.*, 153), August 5, 1886 (25 *ibid.*, 433), September 19, 1890 (26 *ibid.*, 464), August 17, 1894 (28 *ibid.*, 372), and June 3, 1896 (29 *ibid.*, 234), contained similar requirements.

² This has been repeated in subsequent acts. See sec. 2, act of March 4, 1913 (37 Stats., 821).

118. After the regular or formal report on any examination, survey, project, or work under way or proposed is submitted, no supplemental or additional report or estimate for the same fiscal year shall be made unless ordered by a concurrent resolution of Congress.¹ *Ibid.*

Supplemental reports.
Ibid.

119. The Government shall not be deemed to have entered upon any project for the improvement of any waterway or harbor mentioned in this act until funds for the commencement of the proposed work shall have been actually appropriated by law.² *Ibid.*

Project authorized by appropriation.
Ibid.

120. That where separate works or items are consolidated in this or subsequent river and harbor Acts and an aggregate amount is appropriated therefor the amounts appropriated shall, unless otherwise expressed, be expended in securing maintenance and improvement according to the respective projects adopted by Congress, after giving due regard to the respective needs of traffic. The allotments to the respective works consolidated shall be made by the Secretary of War upon recommendations by the Chief of Engineers. In case such works or items are consolidated and separate amounts are given with each project, the amounts so named shall be expended upon such separate projects unless, in the discretion of the Secretary of War, another allotment or division should be made of the same. Any balances remaining to the credit of the consolidated items shall be carried to the credit of the respective aggregate amounts appropriated for the consolidated items. *Sec. 7, Act March 4, 1913 (37 Stats., 827).*

Allotments to projects.
Sec. 7, Mar. 4, 1913, v. 37, p. 827.

121. Hereafter the Secretary of War shall annually submit estimates in detail for river and harbor improvements required for the ensuing fiscal year to the Secretary of the Treasury, to be included in, and carried into the sum total of, the Book of Estimates.³ *Act of June 4, 1897 (30 Stats., 48).*

Estimates.
June 4,
1897, v. 30,
p. 48.

ANNUAL REPORT OF CHIEF OF ENGINEERS.

122. The Secretary of War shall cause the manuscript of the annual report of the Chief of Engineers and subordinate engineers, relating to the improvement of rivers and harbors, and the report of the Mississippi and Missouri River commissions to be placed in the hands of the Public Printer on or before the fifteenth day of October in each year, and the Public Printer shall cause said reports to be printed, with an accurate and comprehensive index thereof, on or before the first Monday in December

Annual report of Chief of Engineers.
Sec. 8, Aug. 11, 1888, v. 25, p. 424.

¹ This has been repeated in subsequent acts. See sec. 21, act of July 25, 1912 (37 Stats., 821).

² This has been repeated in subsequent acts. See act of March 4, 1913 (37 Stats., 821). For a similar provision see section 14, act of August 1, 1888 (25 Stats., 433), and section 13, act of August 17, 1894 (28 *ibid.*, 371).

³ The act of March 3, 1893 (27 Stats., 603), contained a similar requirement.

in each year, for the use of Congress. *Sec. 8, act of August 11, 1888 (25 Stats., 424).*

Reports of
deterioration.
Mar. 3, 1899,
s. 7, v. 30, p.
1150.

123. The Secretary of War shall cause the Chief of Engineers of the United States Army, in submitting his annual reports to Congress with regard to works of river and harbor improvement under his charge, to state what deterioration, if any, has taken place by destruction, decay, obstructions, or otherwise, in connection with any of such works, together with an estimate of the cost of rebuilding or repairing such works or removing such obstructions; and he shall also cause the said Chief of Engineers to recommend, with his reasons therefor, the discontinuance of appropriations for any river and harbor work which he may deem unworthy of further improvement.¹ *Sec. 7, act of March 3, 1899 (30 Stats., 1150).*

IMPROVEMENT BY PRIVATE PARTIES.

June 13,
1902, v. 32, p.
371.

124. Any person or persons, corporations, municipal or private, who desire to improve any navigable river, or any part thereof, at their or its own expense and risk may do so upon the approval of the plans and specifications of said proposed improvement by the Secretary of War and Chief of Engineers of the Army. The plan of said improvement must conform with the general plan of the Government improvements, must not impede navigation, and no toll shall be imposed on account thereof, and said improvement shall at all times be under the control and supervision of the Secretary of War and Chief of Engineers. *Sec. 1, Act of June 13, 1902 (32 Stats., 371).*

Permit to
improve Du-
wamish River.
Mar. 3,
1909, sec. 10,
v. 35, p. 820.

125. The Secretary of War is also authorized, in his discretion, to permit any corporation or association of persons in King County, Washington, at their own expense, and without cost to the United States Government, to widen, deepen, and straighten the Duwamish River in said King County: *Provided*, That the work so done shall be in accordance with plans approved by the Chief of Engineers of the War Department. *Sec. 10, Act of March 3, 1909 (35 Stats., 820).*

Permit to
improve White,
Stuck, and
Puyallup riv-
ers.

126. In connection with any works which may be undertaken affecting the waters of the White, Stuck, and Puyallup rivers, in King and Pierce counties, State of Washington, under authority of the laws of said State,

¹ The act of March 3, 1899 (30 Stats., 1149), contains the requirement that "appropriations made for the respective works herein named, or so much thereof as may be necessary, may, in the discretion of the Secretary of War, be used for the repair and restoration of said works whenever from any cause they have become seriously impaired, as well as for the further improvement of said works."

Section 5 of the act of July 13, 1892 (27 Stats., 88), contained the requirement that no money thereafter appropriated for works of river and harbor improvement should be expended for dredging inside harbor lines duly established under the authority conferred by the statutes above set forth.

the Secretary of War is in his discretion hereby authorized to consent to the permanent diversion of the waters of the White River into the Stuck and Puyallup rivers upon the approval by him and the Chief of Engineers of the location and plans for such diversion. *Sec. 10, Act of March 3, 1909 (35 Stats., 820).*

Mar. 3,
1909, sec. 10,
v. 35, p. 820.

127. That the Secretary of War is hereby authorized to receive from private parties such funds as may be contributed by them to be expended in connection with funds appropriated by the United States for any authorized work of public improvement of rivers and harbors, whenever such work and expenditure may be considered by the Chief of Engineers as advantageous to the interests of navigation. *Sec. 8, Act March 4, 1913 (37 Stats., 827).*

Private con-
tributions.
Mar. 4,
1913, sec. 8, v.
37, p. 827.

CONTRACTS AND PURCHASES.

128. It shall be the duty of the Secretary of War to apply the money herein and hereafter appropriated for improvements of rivers and harbors, other than surveys, estimates, and gaugings, in carrying on the various works, by contract or otherwise, as may be most economical and advantageous to the Government.¹ Where said works are done by contract, such contract shall be made after sufficient public advertisement for proposals, in such manner and form as the Secretary of War shall prescribe; and such contracts shall be made with the lowest responsible bidders, accompanied by such securities as the Secretary of War shall require, conditioned for the faithful prosecution and completion of the work according to such contract.² *Sec. 3, act of August 11, 1888 (25 Stats., 423).*

Work by
contract or
otherwise.
Sec. 3, Aug.
11, 1888, v.
25, p. 423.

Contracts.

¹ Section 3 of the river and harbor act of August 11, 1888 (25 Stats., 423), made it the duty of the Secretary of War to apply the money appropriated by the act "in carrying on the various works by contract or otherwise as may be most economical and advantageous to the Government." *Held* that he was thus empowered to authorize the engineer officer in charge of the work for the protection of the levees at New Orleans to hire without formal contract, a steamboat for transporting material, and for other uses in connection with such work. (Dig. J. A. G., 785, C.)

A contractor engaged upon river and harbor work for the Government may obstruct navigation to the extent necessary to do his work, if such obstruction can not reasonably be avoided. He is, however, liable both civilly and criminally for an unauthorized obstruction, and the Secretary of War is without authority to relieve him from such liability. (Ibid., C. 1.)

² The appropriation of money for the improvement of a harbor or a navigable river confers discretionary power upon the Secretary of War as to the means by which such improvement shall be effected. (So. Car. v. Ga., 93 U. S., 4.) The operations of the Government in this regard have been conducted by the Bureau of Engineering, as part of the War Department, to which Congress has confided the execution of its wishes in all those matters. * * * It can not be necessary to say that when a public work of this character has been inaugurated or adopted by Congress and its management placed in control of its officers, there exists no right in any other branch of the Government to forbid the work or to require the undoing of what has been done or to prescribe the manner in which it shall be conducted. (Wisconsin v. Duluth, 96 U. S., 379.) For these

Same.
July 25,
1912, v. 37, p.
222.

129. All works of improvement herein or hereafter authorized to be prosecuted or completed under contracts may, in the discretion of the Secretary of War, be carried on by contract or otherwise, as may be most economical or advantageous to the United States. *Act of July 25, 1912 (37 Stats., 222)*.

Two or more
works in one
contract.

130. Whenever the appropriations made by Congress for river and harbor works can be more advantageously expended by combining in one contract two or more

purposes Congress possesses all the powers which existed in the States before the adoption of the Constitution, and which have always existed in the Parliament of England. (*Gilman v. Philadelphia*, 3 Wall., 713.)

Where an officer or agent, charged under the Secretary of War and the Chief of Engineers with the duty of making purchases out of the appropriations for river and harbor improvements, certifies that the prices paid were the lowest market rates and the mode of expenditure adopted the most economical and advantageous to the Government, and the Chief of Engineers approves his account so far as relates to the necessity and expediency of the expenditures and the prices paid, it is not within the province of the accounting officers to call in question the degree of wisdom or skill which may have accompanied the exercise of administrative discretion. (3 Compt., Dec. 22.) It is the duty of the proper officers of the War Department to determine when such an emergency exists requiring immediate delivery of property necessary for river and harbor improvements as will authorize its purchase in open market without advertisement. Discretionary power in this respect is vested by law in the War Department, and the exercise of such discretion is not properly reviewable by the accounting officers. (3 Dig. 2nd Compt., Dec., par. 1116.)

When Congress, in the exercise of its exclusive power to direct how the public money shall be employed, has appropriated a certain sum, to be devoted, without exceptions or provisos, to a certain specific internal improvement, it devolves upon the executive department of the Government, charged as it is with the execution of the laws enacted by the legislative, to proceed with the work under the appropriation, without entertaining any question as to the expediency of the expenditure. Thus where Congress had made in general terms an appropriation of a specific amount for improving a certain river, *advised* that it was for the officer charged with the improvement simply to do the work, without delaying to raise or consider questions or claims of title to the land, etc., to be affected by the improvement; such matters being quite beyond the province of an executive official under the circumstances. (Dig., J. A. G., 782, A.)

Held, that the permissive words in the river and harbor act of June 13, 1902 (32 Stats., 342), viz, that the "Secretary of War *is authorized* to cause to be built a suitable dredge for use in the improvement of the harbors upon Lake Erie," like the corresponding expressions "it shall be lawful" or "is authorized and empowered," should be regarded as equivalent to the word "may," and as mandatory in character, and that the authority so conferred should be carried into effect. Similarly *held*, with respect to the proviso in the appropriation made by the act of March 2, 1907 (34 Stats., 1087), for the improvement of Mobile Harbor, "that so much as may be necessary *may* be expended in the construction of a dredge for said harbor," that it is a peculiarity of river and harbor legislation that the duties are imposed by the use of the word "may" which, in the majority of such enactments, has a mandatory signification. Similarly *held*, with respect to the provision in the amendatory act of May 28, 1908 (35 Stats., 430), that the sum so set apart, except the amount expended for the plans of the dredge, "may" be used in the work of dredging. *Held*, however, that in the last clause of the act of 1908, "that the Secretary of War *may, in his discretion*, enter into contracts for the work," the context clearly deprives the word "may" of the obligatory character. (*Ibid.*, 733, A 1.)

works,¹ such combination shall be made; and whenever the appropriations made, or authorized to be made, for the completion of any such work shall prove insufficient therefor, the Secretary of War may, in his discretion, on the recommendation of the Chief of Engineers, apply the funds so appropriated, or authorized, to the prosecution of such work. *Sec. 2, Act of Sept. 19, 1890 (26 Stats., 452), as amended by Act of June 25, 1910 (36 Stats., 668).*

Sec. 2, Sept.
19, 1890, v.
26, p. 452;
sec. 2, June
25, 1910, v.
36, p. 668.

131. The requirements of section thirty-seven hundred and forty-four of the Revised Statutes shall not apply to the lease of lands, or easements therein, or of buildings, rooms, wharves; or rights of wharfage or dockage, or to the hire of vessels, boats, and other floating craft, for use in connection with river and harbor improvements, where the period of any such lease or hire is not to exceed three months. *Sec. 5, Act of June 25, 1910 (36 Stats., 676).*

Exceptions
to sec. 3744,
R. S.
June 25,
1910, v. 36, p.
676.

¹ For instructions of the Comptroller of the Treasury respecting the rendition of accounts of disbursing officers of the Corps of Engineers, see Vol. IV, Compt. Dec., 727.

Appropriations for continuing the improvement of rivers and harbors, not being limited to a particular fiscal year and being made, by section 5 of the act of June 20, 1874 (18 Stats., 110), available until otherwise ordered by Congress, may be used for the payment of expenses properly incurred at any time after the work for which they are made was authorized. (II Compt. Dec., 496.)

An appropriation made for the improvement of a river by dredging can not be used to build a training wall as part of the improvement. (III Compt. Dec., 32; see also II Compt. Dec., 256.)

Contractors making rock excavations on Government property for river improvements are to be considered, so far as regards their duty to avoid injuring third persons, as owners of the premises, and are not required to use extraordinary care, such as covering their blasts, but only ordinary care. Passengers on river steamboats, which are permitted to land near the place where such blasting is carried on with the express understanding that the boat owner must assume all responsibility, are to be regarded as there by mere permission or sufferance and at their own peril, if ordinary care is used. (Smith v. Day, 86 Fed. Rep., 62; Morgan v. Penn. R. R. Co., 7 Fed. Rep., 78; Eisenberg v. Railway Co., 33 Missouri Appeals, 91; Transit Co. v. Rourke, 10 Illinois Appeals, 478; Railroad Co. v. Griffin, 100 Indiana, 223.) One who goes voluntarily, in the prosecution of his own business, on public lands where improvements are going on or are being made by contractors, knowing that blasting is going on there, assumes the risks incident to the prosecution of the work with ordinary care, though he is there by the sufferance or permission of the contractors. (Smith v. Day et al., 86 Fed. Rep., 62.)

The surgical and hospital expenses of a civil employe injured in the course of his service upon a Government work are not a proper charge against the Government in the absence of express statutory provision therefor. (1 Compt. Dec., 2; *ibid.*, 181; *ibid.*, 271.)

The continuous-contract system.—By the act of June 3, 1896 (29 Stats., 207), the construction of works of river and harbor improvement by the continuous-contract system was authorized by Congress. The practice has been followed in subsequent acts of appropriation. The application of this system to a particular work involves the establishment of a limit of cost in the act authorizing it to be undertaken, and the authorization of the execution of contracts for the whole or a part of the work of construction, subject to the restriction that the amount expended in any fiscal year shall not exceed the sum specifically appropriated by Congress, such sum being in general a certain per cent of the entire estimated cost of construction.

Construction of dredges; restriction.
April 28, 1904, sec. 4, v. 33, p. 452.

132. No appropriations heretofore or hereafter made for improving harbors and deepening channels shall be used for the construction of Government dredges for use on the Great Lakes or on the Atlantic coast north of Cape Henry unless there shall be a specific appropriation for that purpose: *Provided, however,* That this provision shall not apply to any dredge the construction of which has heretofore been authorized by the Secretary of War. *Sec. 4, Act of April 28, 1904 (33 Stats., 452).*

Disbursements; total available balance.
March 3, 1911, v. 36, p. 1056.

133. Hereafter whenever pressing obligations are required to be paid by a disbursing officer of the Engineer Department and there is an insufficient balance to his official credit under the proper appropriation or appropriations for the purpose, he is authorized to make payment from the total available balance to his official credit, provided sufficient funds under the proper appropriation or appropriations have been allotted by the Chief of Engineers for the expenditure. When such disbursements are made the accounts of the disbursing officer shall show the charging of the proper appropriations, the balances under which will be adjusted by the disbursing officer on receipt of funds or by the accounting officers of the Treasury. *Act of March 3, 1911 (36 Stats., 1056).*

Restoration of channels.
March 3, 1909, sec. 2, v. 35, p. 815.

134. For emergencies, to provide for the restoration of channels, or river and harbor improvements, heretofore established or improved by the Government where, by reason of emergency, the usual depth of such channel or customary use of such improvement can not be maintained, and there is no sufficient fund available for such restoration, the sum of five hundred thousand dollars is hereby appropriated to be immediately available. The amount herein provided shall be allotted by the Secretary of War: *Provided,* That in no case shall such allotment be made unless recommended by the local engineer having such channel or improvement in charge and by the Chief of Engineers, respectively: *Provided further,* That no single channel or improvement shall be allotted a sum greater than fifty thousand dollars, nor any portion of the said appropriation, unless the same is necessary in the interest of navigation or to protect and preserve existing government work in the interest of navigation. *Sec. 2, Act of March 3, 1909 (35 Stats., 815).*

PURCHASE, SALE, OR LEASE OF LANDS.

Acquisition of lands.
Apr. 24, 1888, v. 25, p. 94.

135. The Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the requirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the

laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided, however,* That when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase the same at such price without further delay: *And provided further,* That the Secretary of War is hereby authorized to accept donations of lands or materials required for the maintenance or prosecution of such works.¹ *Act of April 24, 1888 (25 Stat., 94).*

¹ For general provisions in respect to the acquisition of land by the United States, see the act of August 1, 1888 (25 Stats., 357). The acts of June 14, 1880 (21 Stats., 193), and March 3, 1881 (*ibid.*, 482), authorized the expenditure of funds in the acquisition of sites for river and harbor improvements, by voluntary purchase or condemnation, under the direction of the Secretary of War, with the proviso "that if the owners of such lands shall refuse to sell them at reasonable prices, then the prices to be paid shall be determined and the title and jurisdiction procured in the manner prescribed by the laws of the State in which such lands or sites are situated."

In a suit brought in a United States court to condemn land for use in connection with the work of improving a river, the expenses of taking the jury to view the land are payable from the appropriation of the Department of Justice made for the expenses of the United States courts, and not from the War Department appropriation for the improvement in connection with which the land is needed. (II Compt. Dec., 201.)

Section 3736, R. S., provides that "no land shall be purchased on account of the United States, except under a law authorizing such purpose." By the act of April 24, 1888 (25 Stats., 94), the Secretary of War was authorized to "cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors for which provision has been made by law." Further provision as to the method of condemning lands for public use was made by the act of August 1, 1888 (25 Stats., 357). The act of April 24, 1888, *supra*, provided "that when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase the same at such price without further delay; and provided further that the Secretary of War is hereby authorized to accept donations of lands or materials required for the maintenance or prosecution of such works." The authority to condemn, purchase, or "accept donations" applies only to works "for which provision has been made by law." *Held*, therefore, that in the absence of an appropriation for the works or express authority from Congress, the Secretary of War is precluded by section 3736, R. S., from acquiring lands for river and harbor improvements; the word "purchase" in this statute having been construed in its legal sense as including every mode of acquiring land other than by descent. (Dig. J. A. G. 785, D. See 7 Ops. Atty. Gen., 114, 121; *Ex parte* Hebard, 4 Dillon, 384. A conveyance of lands to the United States is, under this statute, void and inoperative unless the purchase is authorized by Congress. *U. S. v. Tichenor*, 12 Fed. Rep., 415; VI Comp. Dec., 791.)

The owner of lands flooded by dams constructed in improving navigation is entitled to compensation for damages sustained by such flooding (Gould on Waters, 2d edition, sec. 243, and authorities cited; *Hackstack v. Keshena Imp. Co.*, 66 Wis. 439; *Am. & Eng. Ency. of Law* (1st edition), vol. 16, p. 265, note 1). *Held*, that the Secretary of War has authority under the act of April 24, 1888 (25 Stats., 94), to purchase lands flooded by dams constructed in river and harbor improvements, or the right to flood the same, and where springs are located on such lands this fact may properly be considered in determining the amount to be paid. *Ibid.*, D 1.

Where the State of Washington, by act of February 8, 1901 (Laws of Washington, 1901, p. 7), granted to the United States the right to raise the level of

Condemnation at private expense and donation to U. S.
Act June 29, 1906, v. 34, p. 632.

136. Whenever any person, company, or corporation, municipal or private, shall undertake to secure any land or easement therein, needed in connection with a work of river and harbor improvement duly authorized by Congress, for the purpose of conveying the same to the United States free of cost, or for the purpose of constructing, maintaining, and operating locks, dry docks, or other works to be conveyed to the United States free of cost, and of constructing, maintaining and operating dams for use in connection therewith, and shall be unable for any reason to obtain the same by purchase and acquire a valid title thereto, the Secretary of War may, in his discretion, cause proceedings to be instituted in the name of the United States for the acquirement by condemnation of said land or easement, and it shall be the duty of the Attorney-General of the United States to institute and conduct such proceedings upon the request of the Secretary of War: *Provided*, That all expenses of said proceedings and any award that may be made thereunder shall be paid by the said person, company, or corporation, to secure which payment the Secretary of War may require the said person, company, or corporation to execute a proper bond in such amount as he may deem necessary before said proceedings are commenced. *Act of June 29, 1906 (34 Stats., 632).*

Salmon Bay, *inter alia*, and subsequently disposed of the shore lands to the riparian owners, who served notices of the revocation of the grant and requested their acknowledgment, upon the theory that it amounted merely to a revocable license, *held*, that under the grant the Government acquired a perpetual easement or servitude for the purposes specified therein, and that the subsequent grant of the shore lands to the present owners would be subject to the same, but that there could be no objection to acknowledging the receipt of the notices as requested. (Dig. J. A. G. 786, 12.)

The Secretary of War is authorized to acquire, by purchase or condemnation, land, right of way, or material, needed to maintain, operate, or prosecute works for the improvement of rivers and harbors, when provision for the same has been made by law. But he can not lease land unless appropriation has been made to pay the rental thereof. (*Ibid.*, 2.)

Held, that it was not within the constitutional power of Congress to enact that the United States should not be liable for damages caused by the prosecution of a public work, and therefore that the Government could not, through a provision of law to that effect, escape liability for losses incurred by third parties from flottage caused by a harbor improvement. If it would be liable to them in the absence of such law, a statute providing that it should not be liable would be unconstitutional as being an attempt to deprive them of a property right by legislation. (*Ibid.*, 3.)

The owner of land occupied by a canal, constructed as an improvement under a river and harbor act, may, by the authority of the ruling of the Supreme Court in the leading case of *United States v. Lee*, maintain an action of ejectment or trespass against the official representative of the United States in charge of the improvement. (*Ibid.*, 4. See 106 U. S., 196. And see the case of *Stanley v. Schwalby*, 147 U. S., 508; 162 *id.*, 255.)

Held, that the work of constructing a levee near the mouth of the Mississippi River might legally be proceeded with under the appropriation available therefor, upon obtaining licenses from the owners of the land upon which the levee would rest, and that the provisions of section 355, R. S., have not been regarded as forbidding such improvements without acquiring title to the lands underlying the same. (*Ibid.* E.)

137. When any land or other property which has been heretofore or may be hereafter purchased or acquired for the improvement of rivers and harbors is no longer needed, or is no longer serviceable, it may be sold in such manner as the Secretary of War may direct, and the proceeds credited to the appropriation for the work for which it was purchased or acquired; and the Secretary of War may direct the transfer of any property employed in river and harbor works; and in such event the property so transferred shall be valued and credited to the project upon which it was theretofore used and charged to the project to which it shall be transferred. The Secretary may also direct a temporary transfer of any property employed in the improvement of rivers and harbors whenever, in his judgment, such transfer would secure efficient or economical results, and such adjustment in the way of charges and credits shall be made between the projects affected as may be equitable.¹ *Sec. 5, Act of June 13, 1902 (32 Stats., 373).*

Sale or transfer of lands, etc.
Sec. 5, June 13, 1902, v. 32, p. 373.

¹ Section 5 of the river and harbor act of June 13, 1902 (32 Stats., 373), provides: "That when any land * * * acquired for the improvement of rivers and harbors is no longer needed, * * * it may be sold in such manner as the Secretary of War may direct, and the proceeds credited to the appropriation for the work for which it was *purchased or acquired*; * * *." *Held*, with reference to the question of whether this statute could be regarded as authorizing the sale of land which had not been purchased or acquired through any appropriation for river and harbor improvements, but had been reserved from the public domain, for such purpose, that while the word "purchase" includes, in its legal sense, every method of acquisition other than by descent, it should, as here used, receive a more restricted construction as designating acquisition by voluntary sale, while the word "acquire" was intended to cover acquisition by donation or condemnation; that the intent of Congress was to provide for the elimination of property which had become useless for the purpose for which procured, without diminishing the provision for a particular improvement; but that as to lands which had simply been segregated from the public domain, they should be returned to the Department of the Interior; and that a different construction from that above would place it in the power of the Executive indirectly to provide for a particular improvement by reservation and sale of public lands therefor. (Dig. J. A. G., 787, F.)

Section 5 of the river and harbor act of June 13, 1902 (32 Stats., 373) provides: "That when any land * * * acquired for the improvement of rivers and harbors is no longer needed * * * it may be sold in such manner as the Secretary of War may direct." *Held* that under this authority certain lands at Dam No. 5, Ohio River, not needed, might legally be sold. Similarly held as to land acquired for Yuba River settling basin. Also held, in regard to the sale of certain land condemned for a cut-off in Mantua Creek, N. J., that under the broad authority conferred by this act the Secretary of War could legally convey the same by warranty deed—the former owner claiming that the title of the United States was limited to the use for which condemned; and advised that such a deed be tendered to the highest bidder, and that should he refuse to complete the purchase the deposit be forfeited. (Ibid., F 1.)

The Attorney General, by opinion dated Apr. 26, 1911, held that this statute gives authority "to adopt a form of deed best suited to the particular transaction being carried on;" that the United States acquired a fee simple title to the property in question; and that the Secretary of War had authority to execute the form of warranty deed submitted.

In view of the authority conferred on the Secretary of War by section 3 of the act of August 11, 1888 (25 Stats., 423), to apply the moneys appropriated for river and harbor improvements "by contract or otherwise as may be most economical and advantageous to the Government;" and of the authority con-

Leasing of public property.

July 28, 1892, v. 27, p. 321.

Mineral, etc. lands excepted.

Muskingum River. Lease of land and water power. Aug. 11, 1888, v. 25, p. 417.

138. That authority be, and is hereby, given to the Secretary of War, when in his discretion it will be for the public good, to lease, for a period not exceeding five years and revocable at any time, such property of the United States under his control as may not for the time be required for public use and for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress: *Provided*, That nothing in this act contained shall be held to apply to mineral or phosphate lands.¹ *Act of July 28, 1892 (27 Stats., 321).*

139. The Secretary of War is hereby authorized and empowered to grant leases or licenses for the use of the water powers on the Muskingum River at such rate and on such conditions and for such periods of time as may seem to him just, equitable, and expedient:² *Provided*, That the leases or licenses shall be limited to the use of

ferred by section 5 of the act of June 13, 1902 (32 Stats., 373), to direct the transfer of river and harbor property from one project to another upon proper credits and debits, *held* that there would be no legal objection to authorizing the Chief of Engineers to permit the temporary transfer between projects upon such equitable adjustment of charges and credits as may be agreed upon by the local engineer officers concerned. Similarly *held*, with reference to authorizing the Chief of Engineers to permit the sale of unserviceable river and harbor property, under section 5 of the said act of June 13, 1902, where the amount does not exceed \$500 and where there is no doubt as to the propriety of the sale, so that the exercise of the authority may be regarded as routine in its nature. (Dig. J. A. G., 788, F 2.)

Section 5 of the river and harbor act of June 13, 1902 (32 Stats., 373), provided that "when any land or other property which has been heretofore or may be hereafter purchased or acquired for the improvement of rivers and harbors is no longer needed, or is no longer serviceable, it may be sold in such manner as the Secretary of War may direct, and proceeds credited to the appropriation for the work for which it was purchased or acquired." In carrying on the work of improving the harbor at Mobile various sticks of timber and a number of sawed logs which had escaped from booms and rafts were recovered from the stream and many of them had been there for more than thirty days and were without marks that enabled their ownership to be determined. *Held*, that the material might properly be treated as abandoned and as belonging to the one recovering it; i. e., the United States, and as the material was acquired in prosecuting the work of improving the harbor, it might legally be used for that purpose, and if it was found not to be needed or serviceable for such use it might be sold as provided by the statute. (Ibid., F 4.)

¹The Secretary of War may permit the use of land under his control by revocable license or by lease under the act of July 28, 1892 (27 Stats., 321). On the question raised as to the authority of the Secretary of War to lease a frontage on the tidal canal in Oakland Harbor, Cal., to a bridge company owning the abutting property, and on protest against such lease as imposing a burden on commerce, *held*, that the protest was without merit, as it claimed a right in the abutting owner to appropriate a particular portion of the property of the United States for its own private business and to use the same without charge to the exclusion of others; that if the lands *are not now* required for public use they may be leased under the act of July 28, 1892 (27 Stats., 321); and that if they are *no longer needed* they may be sold under section 5 of the act of June 13, 1902 (32 Stats., 373). (Dig. J. A. G., 789, G.)

²By the river and harbor act of August 5, 1886, the United States formally accepted from the State of Ohio the Muskingum River Improvement, with all its franchises, appurtenances, water rights, &c., subject to any existing leases of water rights under leases granted by the State. The State, by its official representative, had made a lease to certain individuals which contained a clause providing for a forfeiture of the lease in case of an assignment without

the surplus water not required for navigation. And he is also empowered to grant leases or licenses for the occupation of such lands belonging to the United States on said Muskingum River as may be required for mill-sites or for other purposes not inconsistent with the requirements of navigation; and all moneys received under such leases or licenses shall be turned into the Treasury of the United States, and the itemized statement thereof shall accompany the annual report of the Chief of Engineers. *Act of August 11, 1888 (25 Stats., 417).*

140. The Secretary of War is hereby authorized and empowered to grant leases or licenses for the use of the water-powers on the Green and Barren Rivers at such a rate and on such conditions and for such periods of time as may seem to him just, equitable, and expedient; said leases not to exceed the period of twenty years: *Provided*, That the leases or licenses shall be limited to the use of the surplus water not required for navigation. And he is also empowered to grant leases or licenses for the occupation of such lands belonging to the United States on said Green and Barren Rivers as may be required for mill-sites or for other purposes not inconsistent with the requirements of navigation; said leases or licenses not to extend beyond the period of twenty years; and all moneys received under such leases or licenses shall be turned into the Treasury of the United States, and the itemized statement thereof shall accompany the annual report of the Chief of Engineers. But nothing in this act shall be construed to affect any vested right, if such there be, of any lessee of water-power on said river. *Act of Sept. 19, 1890 (26 Stats., 426).*

Green and
Barren Rivers.
Lease of land
and water
power.
Sept. 19,
1890, v. 26, p.
426.

141. The Secretary of War is hereby authorized, in his discretion, to grant leases or licenses to the highest responsible bidder for the use of the water power created by said dam, at such a rate and on such conditions and for such periods of time as may seem to him expedient;

Lock and
Dam No. 1,
Cumberland
River, Tenn.
Lease of water
power.

the sanction of the lessor. The lease was assigned to a third party without any formal sanction or concurrence on the part of the lessor, but the lessor, subsequently to the assignment, accepted rents from the assignee. *Held* that such acceptance amounted to an absolute waiver of the forfeiture clause, and made the lease valid in the hands of the assignee, investing him with all the rights of the original lessees, and was therefore binding upon the United States under the reservation of the act. (Dig. J. A. G., 948, 1 a.)

The act of Congress approved August 11, 1888 (25 Stats., 417), authorized the Secretary of War "to grant leases or licenses for the use of the water powers on the Muskingum River at such rate and on such conditions and for such periods of time as may seem to him just, equitable, and expedient * * * and * * * to grant leases or licenses for the occupation of such lands belonging to the United States on said Muskingum River as may be required for mill sites or for other purposes not inconsistent with the requirements of navigation." Under this statute two leases for periods of 20 years each were granted, but neither provided for a forfeiture of the term for nonpayment of rent. *Held*, therefore, that the Secretary of War could not terminate them on account of nonpayment of rent; and *advised* that the proper way to terminate them would be to have the lessees execute instruments surrendering their terms. *Ibid.* 1 b. See Taylor's Landlord and Tenant, 8th ed., sec. 489, and Am. & Eng. Ency. of Law (1st ed.), vol. 25, p. 758 k.

and he is also authorized, in his discretion, to issue permits for the construction, maintenance, and operation of inlet and outlet canals and other structures, on such plans as he may approve, for the diversion of the water aforesaid: *Provided*, That any lease or license so granted shall be limited to the use of the surplus water not required for navigation, and no structures shall be built and no operation be conducted which shall in any manner injure navigation, interfere with the operations of the Government, or impair the usefulness of any improvement made by the Government for the benefit of navigation; and the right of Congress to alter, amend, or repeal the provisions of this paragraph is hereby expressly reserved: *Provided further*, That before leasing or licensing such water privileges, or issuing permits for the construction and operation of such canals, or otherwise disposing of any water power or privilege, the Secretary of War shall first advertise the same in one or more daily papers at Nashville, for sixty days immediately preceding, stating specifically the right or privilege proposed to be leased or conveyed, with its exact limitation, inviting bids for the same, and he may, in his discretion, then lease the same for a specific term of years at so much per year, to be paid semiannually in cash into the Treasury, and the Secretary of War shall reserve the right to reject any or all bids. *Act of June 13, 1902 (32 Stats., 331, 358), as amended by the Act of June 28, 1902 (32 Stats., 408).*

Wabash River. Leases of land and water power. March 3, 1909, sec. 9, v. 35, p. 819.

142. The Secretary of War is hereby authorized and empowered to grant leases or licenses for the use of the water power created by the government dam on the Wabash River at Mount Carmel, Illinois, at such a rate, and on such conditions, and for such periods of time, as may seem to him just, equitable, and expedient; the said leases or licenses to be limited to the use of the surplus water not required for navigation, and to a period not exceeding twenty years; and he is also empowered to grant leases or licenses, not exceeding twenty years, for the occupation of such land belonging to the United States on said river as may be required for mill sites or other industrial purposes not inconsistent with the requirements of navigation: *Provided*, That all moneys received under such leases or licenses shall be deposited in the Treasury of the United States, and an itemized statement thereof shall accompany the annual report of the Chief of Engineers. *Sec. 9, Act of March 3, 1909 (35 Stats., 819).*

MISCELLANEOUS PROVISIONS.

Fishways. Sec. 11, Aug. 11, 1888, v. 25, p. 425.

143. Whenever the improvements provided for by this act, or those which have heretofore been prosecuted by the United States, or may hereafter be undertaken, shall be found to operate (whether by lock and dam or otherwise) as obstructions to the passage of fish, the Secretary

of War may, in his discretion, direct and cause to be constructed practical and sufficient fishways, to be paid for out of the general appropriations for the streams on which such fishways may be constructed.¹ *Sec. 11, Act of August 11, 1888 (25 Stat. L., 425).*

144. In order to make possible the economical future development of water power the Secretary of War, upon recommendation of the Chief of Engineers, is hereby authorized, in his discretion, to provide in the permanent parts of any dam authorized at any time by Congress for the improvement of navigation such foundations, sluices, and other works, as may be considered desirable for the future development of its water power. *Sec. 12, Act of July 25, 1912 (37 Stats., 233).*

Dams; provision for water power. July 25, 1912, v. 37, p. 233.

145. Owners, agents, masters, and clerks of vessels arriving at or departing from localities where works of river and harbor improvement are carried on shall furnish, on application of the persons in local charge of the works, a comprehensive statement of vessels, passengers, freight, and tonnage. Sec. 2. Every person or persons offending against the provisions of this act shall, for each and every offense, be liable to a fine of one hundred dollars, or imprisonment not exceeding two months, to be enforced in any district court in the United States within whose territorial jurisdiction such offense may have been committed. *Act of February 21, 1891 (26 Stats., 766).*

Commercial statistics. Feb. 21, 1891, v. 26, p. 766.

In the collection of statistics relating to traffic, the Corps of Engineers is directed to adopt a uniform system of classification for freight, and upon rivers or inland waterways to collate ton-milage statistics as far as practicable. *Act of July 25, 1912 (37 Stats., 223).*

Classification. July 25, 1912, v. 37, p. 223.

146. 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

National forests; purchase for regulation of streams. March 1, 1911, v. 36, p. 962.

¹ *Held* (April, 1887), that under the acts appropriating money for the improvement of the Columbia River, to be expended under the direction of the Secretary of War, the Secretary, while authorized to make regulations for the prosecution and protection of the works of improvement, was not empowered to require, by such regulations, the removal of fish-traps and pound nets as obstructions to navigation; that it was not within the province of the Secretary of War to determine what is or what may become an obstruction to navigation, and cause to be removed the one or prohibited the other by a mere order or regulation, in the absence of authority given by specific legislation of Congress. (Dig. J. A. G., 782, c.)

A fish weir, so constructed as in a measure to obstruct the navigation of navigable waters, can not legally be placed in such waters without the authority of the Secretary of War, who, by section 7, act of September 19, 1890, is empowered to grant permission for the purpose. And so of a boom desired to be placed in a navigable river. (Ibid., 774, D 3.)

or protect the navigation of streams on whose watersheds they lie. *Sec. 6, Act of March 1, 1911 (36 Stats., 962).*

INJURIES BY GOVERNMENT VESSELS.

Claims for collision with river and harbor vessels.
June 25,
1910, sec. 4.
v. 36, p. 676.

147. Whenever any vessel belonging to or employed by the United States engaged upon river and harbor work collides with and damages another vessel, pier, or other legal structure belonging to any person or corporation, the Chief of Engineers shall cause an immediate and thorough examination to be made, and, if in his judgment, the facts and circumstances of the collision are such as to make the whole or any part of the damage inflicted a proper charge against the United States, the Chief of Engineers, subject to the approval of the Secretary of War, shall have authority to adjust and settle all claims for damages caused by such collision in cases where the claim for damage does not exceed five hundred dollars, and report the same to Congress for consideration.¹ *Sec. 4, Act of June 25, 1910 (36 Stats., 676).*

CHAPTER IX.

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Establishment.
June 28,
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Composition; compensation.
Sec. 2, *ibid.*

148. A commission is hereby created, to be called "The Mississippi River Commission," to consist of seven members. *Act of June 28, 1879 (21 Stats., 37).*

149. The President of the United States shall, by and with the advice and consent of the Senate, appoint seven commissioners, three of whom shall be selected from the Engineer Corps of the Army, one from the Coast and Geodetic Survey, and three from civil life, two of whom shall be civil engineers. And any vacancy which may

¹ This statute gives limited authority to adjust and settle claims for torts in the prosecution of river and harbor work. In other cases there is no authority to settle claims against the United States founded on tort. See Dig. J. A. G., 242, IV, and authorities cited in note.

occur in the commission shall in like manner be filled by the President of the United States; and he shall designate one of the commissioners appointed from the Engineer Corps of the Army to be president of the commission. The commissioners appointed from the Engineer Corps of the Army and the Coast and Geodetic Survey shall receive no other pay or compensation than is now allowed them by law, and the other three commissioners shall receive as pay and compensation for their services each the sum of three thousand dollars per annum; and the commissioners appointed under this act shall remain in office subject to removal by the President of the United States. *Sec. 2, ibid.*

150. From and after the date of the approval of this Act the member of said commission appointed from the Coast and Geodetic Survey shall receive the same annual compensation as other civilian members of said commission, and the excess of said compensation over and above the compensation he receives from the Coast and Geodetic Survey shall be paid from the funds of said commission. *Sec. 1, Act of June 25, 1910 (36 Stats., 658).*

Same.
June 25,
1910, sec. 1, v.
36, p. 658.

151. The headquarters and general offices of said commission shall be located at some city or town on the Mississippi River, to be designated by the Secretary of War, and the meetings of the commission, except such as are held on Government boats during the time of the semi-annual inspection trips of the commission, shall be held at said headquarters and general offices, the times of said meetings to be fixed by the president of the commission, who shall cause due notice of such meetings to be given members of the commission and the public. *Act of February 18, 1901 (31 Stats., 792).*

Location of
headquarters.
Feb. 18,
1901, v. 31, p.
792.

152. It shall be the duty of said commission to direct and complete such surveys of said river, between the Head of the Passes near its mouth to its head waters, as may be in progress, and to make such additional surveys, examinations, and investigations, topographical, hydrographical, and hydrometrical, of said river, and its tributaries, as may be deemed necessary by said commission to carry out the objects of this act. And to enable said commission to complete such surveys, examinations, and investigations, the Secretary of War shall, when requested by said commission, detail from the Engineer Corps of the Army such officers and men as may be necessary, and shall place in the charge and for the use of said commission such vessel or vessels and such machinery and instruments as may be under his control and may be deemed necessary. And the Secretary of the Treasury shall, when requested by said commission, in like manner detail from the Coast and Geodetic Survey such officers and men as may be necessary, and shall place in the charge and for the use of said commission such vessel or vessels and such machinery and instruments as may be under his control and may be

Duties; sur-
veys.
June 28,
1879, v. 21, p.
37.

deemed necessary. And the said commission may, with the approval of the Secretary of War, employ such additional force and assistants, and provide, by purchase or otherwise, such vessels or boats and such instruments and means as may be deemed necessary. *Sec. 3, Act of June 28, 1879 (21 Stats., 37).*

Same; plans, estimates.

Sec. 4, *ibid.*

Report.

153. It shall be the duty of said commission¹ to take into consideration and mature such plan or plans and estimates as will correct, permanently locate, and deepen the channel and protect the banks of the Mississippi River; improve and give safety and ease to the navigation thereof; prevent destructive floods; promote and facilitate commerce, trade, and the postal service; and when so prepared and matured, to submit to the Secretary of War a full and detailed report of their proceedings and actions, and of such plans, with estimates of the cost thereof, for the purposes aforesaid, to be by him transmitted to Congress: *Provided*, That the commission shall report in full upon the practicability, feasibility, and probable cost of the various plans known as the jetty system, the levee system, and the outlet system, as well as upon such others as they may deem necessary.² *Sec. 4, ibid.*

¹ By act of July 5, 1884 (23 Stats. 144) the Missouri River Commission was established; but said act was repealed by act of June 13, 1902 (32 Stats. 367). *Held*, that the duties of said Commission, composed partly of civilians, related exclusively to certain work quite other than the establishing of harbor lines; that it was not therefore, as a body, subject to the directions of the Secretary of War in the matter of establishing harbor lines, nor were the civilian members subject individually to his orders; and that while they might consent to establish such lines, it was preferable for the Secretary to cause such work to be done through engineer officers of the Army. (Dig. J. A. G., 789 B.)

² The Mississippi River Commission derived no authority, from the statutes relating to its functions, to make allotments of the moneys appropriated by Congress for the improvements proposed. Its province is to indicate to Congress what improvements are needed and how much should be appropriated therefor. It has no authority to disburse money appropriated. An allotment made by it is to be treated by the Secretary of War as a recommendation only. The Secretary may adopt the recommendation, but in the disbursement should not omit any of the works specially designated by Congress in the appropriation act. (Dig. J. A. G., 789, A.)

Held, that the maps prepared by the Mississippi Commission, under appropriations by Congress, may legally be disposed of at the discretion of the commission, it being evidently intended by Congress that the information therein contained should be made public and circulated for the public use and benefit. (Ibid., 789, A1.)

Held (January, 1891), that the allowances for the traveling expenses of the civilian members of the Mississippi and Missouri River commissions were not regulated by any order of the War Department regulating the allowances of civil employees of the military establishment, but were such as are fixed by statute. They are not thus necessarily \$4 per diem, since the statute law provides for the reimbursement of their actual necessary outlay, which may be more or less than this allowance. (Ibid., 789, C.)

The salaries and traveling expenses of the members of the Mississippi River Commission who are appointed from civil life (Congress having failed to make a specific appropriation therefor) can not lawfully be defrayed out of the fund for the Mississippi River improvement. The application of such fund to that object would be inconsistent with section 3678, Revised Statutes. (XVIII Opin. Att. Gen. 463.)

The traveling expenses of the three civilian members of the Mississippi River Commission and of the member appointed from the Coast and Geodetic Survey

154. The said commission may, prior to the completion of all the surveys and examinations contemplated by this act, prepare and submit to the Secretary of War plans, specifications, and estimates of cost for such immediate works as, in the judgment of said commission, may constitute a part of the general system of works herein contemplated, to be by him transmitted to Congress. *Sec. 5, ibid.*

Immediate works.
Sec. 5, *ibid.*

155. The Secretary of War may detail from the Engineer Corps of the Army of the United States an officer to act as secretary of said commission.¹ *Sec. 6, ibid.*

Detail of Engineer officer as secretary.
Sec. 6, *ibid.*

156. The Secretary of War shall cause the manuscript of the * * * reports of the Mississippi * * * River commissions to be placed in the hands of the Public Printer on or before the fifteenth day of October in each year. * * * *Sec. 8, act of August 11, 1888 (25 Stats., 424).*

Annual report.
Aug. 11, 1888, s. 8, v. 25, p. 424.

include their actual traveling expenses only for all authorized travel on public duty. (3 Dig. Dec. 2d Compt., par. 842.)

In making appropriations for the improvement of the Mississippi River, Congress evidently contemplates that there shall be provided at public expense, on the vessel transporting the members of the Mississippi River Commission on their trips of inspection, such table comforts only as are generally provided by steamboat companies for the traveling public. (*Ibid.*, par. 841.)

When an appropriation is available for the payment of accounts for "salaries and traveling expenses of the Mississippi River Commission, and for salaries and traveling expenses of assistant engineers, and for office expenses and contingencies," the following expenses are properly payable therefrom under existing laws: (1) The salaries of the three members of the commission appointed from civil life, at the rate of \$3,000 each per annum, and of those only, the salaries of the other members being otherwise provided for; (2) the salaries of all civilian assistant engineers employed under the commission, but not that of the secretary of the commission or of any other assistant engineer detailed from the Corps of Engineers; (3) the actual traveling expenses only, for all authorized travel on public duty, of the three civilian members of the commission and of the member appointed from the Coast and Geodetic Survey; (4) the actual traveling expenses only, for all authorized travel on public duty, of all civilian assistant engineers employed under the commission; (5) the mileage of the three members of the commission appointed from the Engineer Corps of the Army, at the rate of 8 cents per mile, only under circumstances when mileage is authorized by law, for all travel required of them by the commission pertinent to the objects for which it was constituted, travel so required being travel under orders within the meaning of section 2 of the act of July 24, 1876, chapter 226; (6) the mileage of the secretary of the commission and of any other assistant engineer detailed from the Corps of Engineers and employed under the commission, at the rate of 8 cents per mile, only when mileage is authorized by law, for all travel required of them by the commission pertinent to the objects for which it was constituted; (7) the office expenses of the commission; (8) the contingent expenses of the commission. (*Ibid.*, par. 838.)

The salaries accruing to the civilian members of the Mississippi River Commission, during a period when the regular appropriation for their payment is not available, can not legally be paid from funds appropriated for the improvement of the Mississippi River, unless provision is specifically made therefor in the act appropriating such funds. (*Ibid.*, par. 839. See, also, XVIII Opin. Att. Gen., p. 463.)

¹ Vouchers in support of payments of mileage to officers of the Army belonging to or employed by the Mississippi River Commission should be accompanied by orders for the journeys performed or by other evidence that they were required by the commission and were pertinent to the objects for which it was constituted. (3 Dig. Dec. 2d Compt., par. 838.)

MISCELLANEOUS PROVISIONS RESPECTING THE MISSISSIPPI RIVER.

Material for improvements.
 Sec. 6, July 5, 1884, v. 23, p. 148.

157. Whenever in the prosecution and maintenance of the improvement of the Mississippi River and other rivers, harbors, and public works for which appropriations are herein made it becomes necessary or proper, in the judgment of the Secretary of War, to take possession of material found on bars and islands within the river banks, or other material lying adjacent or near to the line of any of said works and needful for their prosecution or maintenance, the officers in charge of said works may, when they can not agree as to the price with the owners thereof, in the name of the United States take possession of and use the same after first having paid or secured to be paid the value thereof, which may have been ascertained in the mode provided by the laws of the State wherein such property or material lies: *Provided, however,* That when the owner of such property or material shall fix a price for the same which in the opinion of said officer in charge, shall be reasonable, he may take the same at such price without further delay. The Department of Justice shall represent the interests of the United States in the legal proceedings under this act. *Sec. 6, act of July 5, 1884 (23 Stats., 148).*

Water gauges.
 Feb. 21, 1871, Res. 40, v. 16, p. 598.
 Sec. 5252, R. S.

158. The Secretary of War is hereby authorized and directed to have water gauges established, and daily observations made of the rise and fall of the Lower Mississippi River and its chief tributaries, at or in the vicinity of Saint Louis, Cairo, Memphis, Helena, Napoleon; Providence, Vicksburgh, Red River Landing, Baton Rouge, and Carrollton, on the Mississippi, between the mouth of the Missouri and the Gulf of Mexico; and at or in the vicinity of Fort Leavenworth, on the Missouri; Rock Island, on the Upper Mississippi; Louisville, on the Ohio; Florence, on the Tennessee; Jacksonport, on the White River; Little Rock, on the Arkansas, and Alexandria, on the Red River, and at such other places as the Secretary of War may deem advisable. The expenditure for the same shall be made from the appropriation for the improvement of rivers and harbors, but the annual cost of the observations shall not exceed the sum of five thousand dollars. *Sec. 5252, R. S.*

Piers and cribs.
 Mar. 3, 1873, c. 278, v. 17, p. 606; May 1, 1882, v. 22, p. 52.
 Sec. 5254, R. S.

159. The owners of sawmills on the Mississippi River and the Saint Croix River in the States of Wisconsin and Minnesota are authorized and empowered, under the direction of the Secretary of War, to construct piers or cribs in front of their mill property on the banks of the river, for the protection of their mills and rafts against damage by floods and ice: *Provided, however,* That the piers or cribs so constructed shall not interfere with or obstruct the navigation of the river. And in case any pier or crib constructed under authority of this section

shall at any time and for any cause be found to obstruct the navigation of the river the Government expressly reserves the right to remove or direct the removal of it at the cost and expense of the owners thereof. *Sec. 5254, R. S., as amended May 1, 1882 (22 Stats., 52)*.

160. For the purpose of securing the uninterrupted examinations and surveys at the South Pass of the Mississippi River, as provided for in the act of March third, eighteen hundred and seventy-five,¹ the Secretary of War, upon the application of the Chief of Engineers, is hereby authorized to draw his warrant or requisition from time to time upon the Secretary of the Treasury for such sums as may be necessary to do such work, not to exceed in the aggregate for each year the amount appropriated in this act for such purpose: *Provided, however, That an itemized statement of said expenditures shall accompany the Annual Report of the Chief of Engineers.*² *Sec. 4, act of August 11, 1888 (25 Stats., 424)*.

Surveys at South Pass. Sec. 4, Aug. 11, 1888, v. 25, p. 424. Appropriation made permanent.

161. The Secretary of War be, and is hereby, authorized to make such rules and regulations for the navigation of the South and Southwest passes of the Mississippi River as to him shall seem necessary or expedient for the purpose of preventing any obstruction to the channels through said South and Southwest passes and any injury to the works therein constructed. *Sec. 5, act of August 11, 1888 (25 Stats., 424) as amended by Sec. 5, act of March 3, 1909 (35 Stats., 818)*.

Regulations for navigation of South and Southwest passes. Sec. 5, Aug. 11, 1888, v. 25, p. 424. Sec. 3, Sept. 19, 1890, v. 26, p. 452. Sec. 5, Mar. 3, 1909, v. 35, p. 818.

162. The term "South and Southwest passes," as herein employed, shall be construed as embracing the entire extent of channel between the upper ends of the works at the head of the pass and the outer or sea ends of the jetties at the entrance from the Gulf of Mexico; and any willful violation of any rule or regulation made by the Secretary of War in pursuance of this act shall be deemed a misdemeanor, for which the owner or owners, agent or agents, master or pilot of the vessel so offending shall be separately or collectively responsible, and on conviction thereof shall be punished by a fine of not less than one hundred dollars nor exceeding five hundred dollars or by imprisonment not exceeding three months, or by both fine and imprisonment, at the discretion of the court.³ *Ibid.*

South and Southwest passes defined. Penalty for violation of regulations. *Ibid.*

163. Any funds which have been, or may hereafter be, appropriated by Congress for improving the Mississippi River between the Head of the Passes and the mouth of the Ohio River, and which may be allotted to levees, may be expended, under the direction of the Secretary of War, in accordance with the plans, specifications, and

Head of Passes and Ohio River. June 4, 1906, v. 34, p. 208.

¹ 18 Stats., 464.

² Statutory provision for the termination of the agreement with the late James B. Eads for the maintenance of a channel through the South Pass was made in section 3 of the act of June 6, 1900 (31 Stats., 584).

³ See also section 3, act of September 19, 1890 (26 Stats., 452).

Levees.

recommendations of the Mississippi River Commission, as approved by the Chief of Engineers, for levees upon any part of said river between the Head of the Passes and Cape Girardeau, Missouri. *Act of June 4, 1906 (34 Stats., 208).*

Snag boats,
Upper Missis-
sippi River.
Sec. 7, Aug.
11, 1888, v.
25, p. 421.
Appropriation for, made permanent.

164. For the purpose of securing the uninterrupted work of operating snag boats on the Upper Mississippi River, and of removing snags, wrecks, and other obstructions in the Mississippi River, the Secretary of War, upon the application of the Chief of Engineers, is hereby authorized to draw his warrant or requisition from time to time upon the Secretary of the Treasury for such sums as may be necessary to do such work, not to exceed in the aggregate for each year the amounts appropriated in this act for such purposes: *Provided, however, That an itemized statement of said expenses shall accompany the Annual Report of the Chief of Engineers. Sec. 7, act of August 11, 1888 (25 Stats., 424).*

Project.
Saint Paul to
Minneapolis.
June 25,
1910, v. 36, c.
659.

165. The modified project recommended by the Chief of Engineers in his report dated March third, nineteen hundred and ten, printed in House Document Numbered Seven hundred and forty-one, Sixty-first Congress, second session, is hereby adopted, and all future work on said improvement shall be prosecuted in accordance therewith: *Provided, That in the making of leases for water power a reasonable compensation shall be secured to the United States, and the rates as fixed shall be subject to revision by Congress. Sec. 1, act of June 25, 1910 (36 Stats., 659).*

CHAPTER X.

	Par.
International Waterways Commission.....	166, 167
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Establishment and duties.
June 13,
1902, v. 32, p.
373.

166. That the President of the United States is hereby requested to invite the Government of Great Britain to join in the formation of an international commission, to be composed of three members from the United States and three who shall represent the interests of the Dominion of Canada, whose duty it shall be to investigate and report upon the conditions and uses of the waters adjacent to the boundary lines between the United States and Canada, including all of the waters of the lakes and rivers whose natural outlet is by the River Saint Lawrence to the Atlantic Ocean; also upon the maintenance and regulation of suitable levels; and also upon the effect upon the shores of these waters and the structures thereon, and upon the interests of navigation, by reason of the diversion of these waters from or change in their natural flow; and, further, to report upon the necessary measures to regulate such diversion, and to make such

recommendations for improvements and regulations as shall best subserve the interests of navigation in said waters. The said commissioners shall report upon the advisability of locating a dam at the outlet of Lake Erie, with a view to determining whether such dam will benefit navigation, and if such structure is deemed advisable, shall make recommendations to their respective Governments looking to an agreement or treaty which shall provide for the construction of the same, and they shall make an estimate of the probable cost thereof. The President, in selecting the three members of said Commission who shall represent the United States, is authorized to appoint one officer of the Corps of Engineers of the United States Army, one civil engineer well versed in the hydraulics of the Great Lakes, and one lawyer of experience in questions of international and riparian law, and said Commission shall be authorized to employ such persons as it may deem needful in the performance of the duties hereby imposed; and for the purpose of paying the expenses and salaries of said Commission the Secretary of War is authorized to expend from the amounts heretofore appropriated for the Saint Marys River at the Falls, the sum of twenty thousand dollars, or so much thereof as may be necessary to pay that portion of the expenses of said Commission chargeable to the United States. *Sec. 4, Act of June 13, 1902 (32 Stats., 373).*

167. And retired officers of the Corps of Engineers of the United States Army shall be eligible for service on said commission. *Act of June 30, 1906 (34 Stats., 697).* Retired officers eligible. June 30, 1906, v. 34, p. 697.

CHAPTER XI.

International Joint Commission.....	Par. 168, 169
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Powers and duties.....	169

168. The High Contracting Parties agree to establish and maintain an International Joint Commission of the United States and Canada composed of six commissioners, three on the part of the United States appointed by the President thereof, and three on the part of the United Kingdom appointed by His Majesty on the recommendation of the Governor in Council of the Dominion of Canada. *Article VII of the Treaty with Great Britain "relating to boundary waters between the United States and Canada", of January 11, 1909, proclaimed May 13, 1910 (36 Stats., 2448).* Establishment; composition. Article VII, Treaty with Great Britain, v. 36, p. 2448.

169. This International Joint Commission shall have jurisdiction¹ over and shall pass upon all cases involving duties. *Ibid., Article VIII.*

¹ Under Articles IX and X of the Treaty the Commission has jurisdiction over any other questions or matters of difference arising between the parties involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other along the common frontier between the United States and the Dominion of Canada.

ing the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rules or principles which are adopted by the High Contracting Parties for this purpose:

The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters.

The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence.

- (1) Uses for domestic and sanitary purposes;
- (2) Uses for navigation, including the service of canals for the purposes of navigation;
- (3) Uses for power and for irrigation purposes.

The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary.

The requirement for an equal division may in the discretion of the Commission be suspended in cases of temporary diversions along boundary waters at points where such equal division can not be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side.

The Commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provision, approved by the Commission, be made for the protection and indemnity against injury of any interests on either side of the boundary.

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

The majority of the Commissioners shall have power to render a decision. In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The High

Contracting Parties shall thereupon endeavor to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them, it shall be reduced to writing in the form of a protocol, and shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement. *Ibid*, Article VIII.

CHAPTER XII.

Congress of Navigation.....	Par. 170
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170. The sum of three thousand dollars a year is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the support and maintenance of the permanent international commission of the congresses of navigation and for the payment of the actual expenses of the properly accredited national delegates of the United States to the meetings of the congresses and of the commission; and that the Secretary of War be, and is hereby, authorized to draw his warrant each year upon the Secretary of the Treasury for such sum, not to exceed three thousand dollars, as may in his opinion be proper to apply to the purposes above mentioned, and that the said sum shall be disbursed under such regulations as may be prescribed by the Secretary of War.

Support and maintenance.
June 28,
1902, v. 32, p.
485.

The national delegates aforesaid from the United States shall serve without compensation, but shall be reimbursed for their actual expenses incurred while traveling to and from the meetings, and while in attendance thereon, from the funds herein appropriated and authorized to be expended. *Act of June 28, 1902 (32 Stats., 485)*.

CHAPTER XIII.

California Débris Commission.....	Par. 171-203
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Establishment; composition.
Mar. 1, 1892,
v. 27, p. 507.

171. A commission is hereby created, to be known as the California Débris Commission, consisting of three members. The President of the United States shall, by and with the advice and consent of the Senate, appoint the commission from officers of the Corps of Engineers, United States Army. Vacancies occurring therein shall be filled in like manner. It shall have the authority and exercise the powers hereinafter set forth, under the supervision of the Chief of Engineers and direction of the Secretary of War.¹ *Act of March 1, 1892 (27 Stats., 507).*

Organization; compensation.
Sec. 2, *ibid.*

172. Said commission shall organize within thirty days after its appointment by the selection of such officers as may be required in the performance of its duties, the same to be selected from the members thereof. The members of said commission shall receive no greater compensation than is now allowed by law to each, respectively, as an officer of said Corps of Engineers. It shall also adopt rules and regulations, not inconsistent with law, to govern its deliberations and prescribe the method of procedure under the provisions of this act. *Sec. 2, ibid.*

Regulations.

Jurisdiction.

173. The jurisdiction of said commission, in so far as the same affects mining carried on by the hydraulic process, shall extend to all such mining in the territory drained by the Sacramento and San Joaquin river systems in the State of California. Hydraulic mining, as defined in section eight hereof, directly or indirectly injuring the navigability of said river systems, carried on in said territory other than as permitted under the provisions of this act is hereby prohibited and declared unlawful. *Sec. 3, ibid.*

Injurious hydraulic mining prohibited.
Sec. 3, *ibid.*

¹ The act of June 14, 1880 (21 Stats., 196), required the Secretary of War to cause such surveys, etc., to be made as would enable a scheme to be devised to prevent further injury to the navigable waters of California, due to the deposit in the same of débris from the mines.

The members of the California Débris Commission do not hold civil office within the meaning of section 1222 of the Revised Statutes, nor does section 1224 of the Revised Statutes necessitate their withdrawal from the Engineer Corps. (XX Opin. Att. Gen., 604.)

174. It shall be the duty of said commission to mature and adopt such plan or plans, from examinations and surveys already made and from such additional examinations and surveys as it may deem necessary, as will improve the navigability of all the rivers comprising said systems, deepen their channels, and protect their banks. Such plan or plans shall be matured with a view of making the same effective as against the encroachment of and damage from débris resulting from mining operations, natural erosion, or other causes, with a view of restoring, as near as practicable and the necessities of commerce and navigation demand, the navigability of said rivers to the condition existing in eighteen hundred and sixty, and permitting mining by the hydraulic process, as the term is understood in said State, to be carried on, provided the same can be accomplished without injury to the navigability of said rivers or the lands adjacent thereto. *Sec. 4, ibid.*

Duties.
Sec. 4, *ibid.*

175. It shall further examine, survey, and determine the utility and practicability, for the purposes hereinafter indicated, of storage sites in the tributaries of said rivers and in the respective branches of said tributaries, or in the plains, basins, sloughs, and tule and swamp lands adjacent to or along the course of said rivers, for the storage of débris or water or as settling reservoirs, with the object of using the same by either or all of these methods to aid in the improvement and protection of said navigable rivers by preventing deposits therein of débris resulting from mining operations, natural erosion, or other causes, or for affording relief thereto in flood time and providing sufficient water to maintain scouring force therein in the summer season; and in connection therewith to investigate such hydraulic and other mines as are now or may have been worked by methods intended to restrain the débris and material moved in operating such mines by impounding dams, settling reservoirs, or otherwise, and in general to make such study of and researches in the hydraulic mining industry as science, experience, and engineering skill may suggest as practicable and useful in devising a method or methods whereby such mining may be carried on as aforesaid. *Sec. 5, ibid.*

Surveys, inspections, etc.
Sec. 5, *ibid.*

176. The said commission shall from time to time note the conditions of the navigable channels of said river systems, by cross-section surveys or otherwise, in order to ascertain the effect therein of such hydraulic mining operations as may be permitted by its orders and such as is caused by erosion, natural or otherwise. *Sec. 6, ibid.*

Condition of navigable channels.
Sec. 6, *ibid.*

177. Said commission shall submit to the Chief of Engineers, for the information of the Secretary of War, on or before the fifteenth day of November of each year, a report of its labors and transactions, with plans for the construction, completion, and preservation of the public works outlined in this act, together with estimates of the cost thereof, stating what amounts can be profitably ex-

Annual report.
Sec. 7, *ibid.*

pended thereon each year. The Secretary of War shall thereupon submit same to Congress on or before the meeting thereof. *Sec. 7, ibid.*

"Hydraulic mining" defined.
Sec. 8, ibid.

178. For the purposes of this act "hydraulic mining" and "mining by the hydraulic process," are hereby declared to have the meaning and application given to said terms in said State. *Sec. 8, ibid.*

Petition to mine.
Sec. 9, ibid.

179. The individual proprietor or proprietors, or in case of a corporation its manager or agent appointed for that purpose, owning mining ground in the territory in the State of California mentioned in section three hereof, which it is desired to work by the hydraulic process, must file with said commission a verified petition, setting forth such facts as will comply with law and the rules prescribed by said commission. *Sec. 9, ibid.*

Contents of petition.
Sec. 10, ibid.

180. Each petition shall be accompanied by an instrument duly executed and acknowledged, as required by the law of the said State, whereby the owner or owners of such mine or mines surrender to the United States the right and privilege to regulate by law, as provided in this act, or any law that may hereafter be enacted, or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the débris resulting from the working of said mine or mines shall be restrained, and what amount shall be produced therefrom; it being understood that the surrender aforesaid shall not be construed as in any way affecting the right of such owner or owners to operate said mine or mines by any other process or method now in use in said State: *Provided*, That they shall not interfere with the navigability of the aforesaid rivers. *Sec. 10, ibid.*

Joint petition where claims require a common dumping ground.
Sec. 11, ibid.

181. The owners of several mining claims situated so as to require a common dumping ground or dam or other restraining works for the débris issuing therefrom in one or more sites may file a joint petition setting forth such facts in addition to the requirements of section nine hereof; and where the owner of a hydraulic mine or owners of several such mines have and use common dumping sites for impounding débris or as settling reservoirs, which sites are located below the mine of an applicant not entitled to use same, such fact shall also be stated in said petition. Thereupon the same proceedings shall be had as provided for herein. *Sec. 11, ibid.*

Notice; publication; hearings.
Sec. 12, ibid.

182. A notice, specifying briefly the contents of said petition and fixing a time, previous to which all proofs are to be submitted, shall be published by said commission in some newspaper or newspapers of general circulation in the communities interested in the matter set forth therein. If published in a daily paper such publication shall continue for at least ten days; if in a weekly paper, in at least three issues of the same. Pending publication thereof said commission or a committee thereof shall examine the mine and premises described in such petition. On or before the time so fixed all

parties interested, either as petitioners or contestants, whether miners or agriculturists, may file affidavits, plans, and maps in support of their respective claims. Further hearings, upon notice to all parties of record, may be granted by the commission when necessary. *Sec. 12, ibid.*

183. In case a majority of the members of said Commission, within thirty days after the time so fixed, concur in the decision in favor of the petitioner or petitioners, the said commission shall thereupon make an order directing the methods and specifying in detail the manner in which operations shall proceed in such mine or mines; what restraining or impounding works, if any, if facilities therefore can be found, shall be built and maintained; how and of what material; where to be located; and in general set forth such further requirements and safeguards as will protect the public interests and prevent injury to the said navigable rivers and the lands adjacent thereto, with such further conditions and limitations as will observe all the provisions of this Act in relation to the working thereof and the payment of taxes on the gross proceeds of the same: *Provided*, That all expense incurred in complying with said order shall be borne by the owner or owners of such mine or mines; *And provided further*, That where it shall appear to said commission that hydraulic mining may be carried on without injury to the navigation of said navigable rivers and the lands adjacent thereto, an order may be made authorizing such mining to be carried on without requiring the construction of any restraining or impounding works or any settling reservoirs: *And provided also*, That where such an order is made a license to mine, no taxes provided for herein on the gross proceeds of such mining operations shall be collected. *Sec. 13, ibid., as amended February 27, 1907 (34 Stats., 1002).*

Favorable decisions within thirty days.
Sec. 13, ibid. Feb. 27, 1907, v. 34, p. 1002.

184. Such petitioner or petitioners must, within a reasonable time, present plans and specifications of all works required to be built in pursuance of said order for examination, correction, and approval by said commission; and thereupon work may immediately commence thereon under the supervision of said commission or representative thereof attached thereto from said Corps of Engineers, who shall inspect same from time to time. Upon completion thereof, if found in every respect to meet the requirements of the said order and said approved plans and specifications, permission shall thereupon be granted to the owner or owners of such mine or mines to commence mining operations, subject to the conditions of said order and the provisions of this act. *Sec. 14, ibid.*

Plans of work.
Sec. 14, ibid.

Commencement of works.
 Supervision.

Completion.

Permission to commence mining.

185. No permission granted to a mine owner or owners under this act shall take effect, so far as regards the working of a mine, until all impounding dams or other restraining works, if any are prescribed by the order granting such permission, have been completed, and until the

Opening of work; conditions.
Sec. 15, ibid.

impounding dams or other restraining works or settling reservoirs provided by said commission have reached such a stage as, in the opinion of said commission, it is safe to use the same: *Provided, however,* That if said commission shall be of the opinion that the restraining and other works already constructed at the mine or mines shall be sufficient to protect the navigable rivers of said systems and the work of said commission, then the owner or owners of such mine or mines may be permitted to commence operations.¹ *Sec. 16, ibid.*

Apportionment of expenses for constructing common dumps, etc.

Ante, par. 181. Sec. 16, ibid.

186. In case the joint petition referred to in section eleven hereof is granted, the commission shall fix the respective amounts to be paid by each owner of such mines toward providing and building necessary impounding dams or other restraining works. In the event of a petition being filed after the entry of such order, or in case the impounding dam or dams or other restraining works have already been constructed and accepted by said commission, the commission shall fix such amount as may be reasonable for the privilege of dumping therein, which amount shall be divided between the original owners of such impounding dams or other restraining works in proportion to the amount respectively paid by each party owning same. The expense of maintaining and protecting such joint dams or works shall be divided among mine owners using the same in such proportion as the commission shall determine. In all cases where it is practicable, restraining and impounding works are to be provided, constructed, and maintained by mine owners near or below the mine or mines before reaching the main tributaries of said navigable waters. *Sec. 16, ibid.*

Limit of debris washed away.

Sec. 17, ibid.

187. At no time shall any more debris be permitted to be washed away from any hydraulic mine or mines situated on the tributaries of said rivers and the respective branches of each, worked under the provisions of this act, than can be impounded within the restraining works erected. *Sec. 17, ibid.*

Modifications, etc., of orders.

Sec. 18, ibid.

188. The said commission may at any time, when the condition of the navigable rivers or when the capacities of all impounding and settling facilities erected by mine owners or such as may be provided by Government authority require same, modify the order granting the privilege to mine by the hydraulic mining process so as to reduce amount thereof to meet the capacities of the facilities then in use, or if actually required in order to protect the navigable rivers from damage, may revoke same until the further notice of the commission. *Sec. 18, ibid.*

¹ The act of March 1, 1893 (27 Stats., 507), requiring certain conditions precedent to be performed by persons desiring to engage in hydraulic mining in the territory comprised in the Sacramento and San Joaquin river systems, is to be construed as entirely prohibiting hydraulic mining in said territory until application has been made and permission given in accordance with the terms of the act. (*U. S. v. North Bloomfield Gravel Mining Co.*, 81 Fed. Rep., 243.)

189. An intentional violation on the part of a mine owner or owners, company or corporation, or the agents or employees of either, of the conditions of the order granted pursuant to section thirteen, or such modifications thereof as may have been made by said commission, shall work a forfeiture of the privileges thereby conferred, and upon notice being served by the order of said commission upon such owner or owners, company or corporation, or agent in charge, work shall immediately cease. Said commission shall take necessary steps to enforce its orders in case of the failure, neglect, or refusal of such owner or owners, company or corporation, or agents thereof, to comply therewith, or in the event of any person or persons, company or corporation working by said process in said territory contrary to law. *Sec. 19, ibid.*

Forfeiture
for violating
conditions.
Sec. 19, ibid.

Enforcement
of orders, etc.

190. Said commission, or a committee therefrom, or officer of said corps assigned to duty under its orders, shall, whenever deemed necessary, visit said territory and all mines operating under the provisions of this act. A report of such examination shall be placed on file. *Sec. 20, ibid.*

Inspection of
mines.
Sec. 20, ibid.

191. The said commission is hereby granted the right to use any of the public lands of the United States, or any rock, stone, timber, trees, brush, or material thereon or therein for any of the purposes of this act; and the Secretary of the Interior is hereby authorized and requested, after notice has been filed with the Commissioner of the General Land Office by said commission, setting forth what public lands are required by it under the authority of this section, that such land or lands shall be withdrawn from sale and entry under the laws of the United States. *Sec. 21, ibid.*

Use of pub-
lic lands and
material.
Sec. 21, ibid.

192. Any person or persons who willfully or maliciously injure, damage, or destroy, or attempt to injure, damage, or destroy any dam or other work erected under the provisions of this act for restraining, impounding, or settling purposes, or for use in connection therewith, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not to exceed the sum of five thousand dollars or be imprisoned not to exceed five years, or by both such fine and imprisonment in the discretion of the court. *Sec. 22, ibid.*

Willful in-
jury to works;
penalty.
Sec. 22, ibid.

193. And any person or persons, company or corporation, their agents or employees, who shall mine by the hydraulic process directly or indirectly injuring the navigable waters of the United States, in violation of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both such fine and imprisonment in the discretion of the court: *Provided*, That this section shall take effect on the first day of May, eighteen hundred and ninety-three. *Ibid.*

Mining in
violation of
act; penalty.
Ibid.

Tax on gross
proceeds of
hydraulic
mines.
Sec. 23, *ibid.*

194. Upon the construction by the said commission of dams or other works for the detention of débris from hydraulic mines and the issuing of the order provided for by this act to any individual, company, or corporation to work any mine or mines by hydraulic process, the individual, company, or corporation operating thereunder working any mine or mines by hydraulic process, the débris from which flows into or is in whole or in part restrained by such dams or other works erected by said commission, shall pay a tax of three per centum on the gross proceeds of his, their, or its mine so worked; which tax of three per centum shall be ascertained and paid in accordance with regulations to be adopted by the Secretary of the Treasury, and the Treasurer of the United States is hereby authorized to receive the same. *Sec. 23, ibid.*

"Débris
fund" created.
Expendi-
tures from
same.
Ibid.

195. All sums of money paid into the Treasury under this section shall be set apart and credited to a fund to be known as the "Débris fund," and shall be expended by said commission under the supervision of the Chief of Engineers and direction of the Secretary of War, in addition to the appropriations made by law, in the construction and maintenance of such restraining works and settling reservoirs as may be proper and necessary: *Provided*, That said commission is hereby authorized to receive and pay into the Treasury from the owner or owners of mines worked by the hydraulic process, to whom permission may have been granted so to work under the provisions hereof, such money advances as may be offered to aid in the construction of such impounding dams or other restraining works, or settling reservoirs, or sites therefor, as may be deemed necessary by said commission to protect the navigable channels of said river systems, on condition that all moneys so advanced shall be refunded as the said tax is paid into the said débris fund: *And provided further*, That in no event shall the Government of the United States be held liable to refund same except as directed by this section. *Ibid.*

Consultation
with State
commission.
Sec. 24, *ibid.*

196. For the purpose of securing harmony of action and economy in expenditures in the work to be done by the United States and the State of California, respectively, the former in its plans for the improvement and protection of the navigable streams and to prevent the depositing of mining débris or other materials within the same, and the latter in its plans authorized by law for the reclamation, drainage, and protection of its lands, or relating to the working of hydraulic mines, the said commission is empowered to consult thereon with a commission of engineers of said State, if authorized by said State for said purpose, the result of such conference to be reported to the Chief of Engineers of the United States Army, and if by him approved shall be followed by said commission. *Sec. 24, ibid.*

197. Said commission, in order that such material as is now or may hereafter be lodged in the tributaries of the Sacramento and San Joaquin river systems, resulting from mining operations, natural erosion, or other causes, shall be prevented from injuring the said navigable rivers or such of the tributaries of either as may be navigable and the land adjacent thereto, is hereby directed and empowered, when appropriations are made therefor by law, or sufficient money is deposited for that purpose in said débris fund, to build at such points above the head of navigation in said rivers and on the main tributaries thereof, or branches of such tributaries, or at any place adjacent to the same which, in the judgment of said commission will effect said object (the same to be of such material as will insure safety and permanency), such restraining or impounding dams and settling reservoirs, with such canals, locks, or other works adapted and required to complete same. *Sec. 25, ibid.*

Expenditures
for restrain-
ing works,
etc.
Sec. 25, *ibid.*

198. The recommendations contained in Executive Document Numbered Two hundred and sixty-seven, Fifty-first Congress, second session, and Executive Document Numbered Ninety-eight, Forty-seventh Congress, first session, as far as they refer to impounding dams, or other restraining works, are hereby adopted, and the same are directed to be made the basis of operations. The sum of fifteen thousand dollars is hereby appropriated, from moneys in the Treasury not otherwise appropriated, to be immediately available, to defray the expenses of said commission. *Ibid.*

Recommendations adopted
and made the
basis of opera-
tions.
Impounding
dams, etc.
Ibid.

199. The Treasurer of the United States is hereby authorized to receive from the State of California, through the débris commission of said State, or other officer thereunto duly authorized, any and all sums of money that have been, or may hereafter be, appropriated by said State for the purposes herein set forth. And said sums when so received are hereby appropriated for the purposes above named, to be expended in the manner above provided. *Act of June 3, 1896 (29 Stats., 232).*

Treasury to
receive funds
appropriated
by State,
June 3, 1896.
v. 29, p. 232.

200. For the purpose of carrying out the following provision of the river and harbor act of eighteen hundred and ninety-six: "For the construction of restraining barriers for the protection of the Sacramento and Feather rivers in California, two hundred and fifty thousand dollars, such restraining barriers to be constructed under the direction of the Secretary of War in accordance with the recommendations of the California Débris Commission, pursuant to the provisions of and for the purposes set forth in section twenty-five of the act of the Congress of the United States entitled, 'An act to create the California Débris Commission and regulate hydraulic mining in the State of California,' approved March first, eighteen hundred and ninety-three: *Provided*, That the Treasurer of the United States be, and he is hereby, authorized to receive from the State of California, through the débris

Use of State
appropriations.
July 1, 1898.
v. 30, p. 631.

commission of said State, or other officer thereunto duly authorized, any and all sums of money that have been or may hereafter be appropriated by said State for the purposes herein set forth. And said sums when so received and hereby appropriated for the purposes above named, to be expended in the manner above provided," and for the further purpose of making available to the United States the appropriation, or any part thereof, made by the provisions of an act of the legislature of the State of California, approved March seventeenth, eighteen hundred and ninety-seven, entitled "An act to amend an act entitled 'An act to provide for the appointment, duties, and compensation of a debris commissioner, and to make appropriation to be expended under his directions in the discharge of his duties as such commissioner, approved March twenty-fourth, eighteen hundred and ninety-three,'" and of said amended act, the Secretary of War is hereby authorized, in the preparation for and construction of the proposed works authorized and appropriated for by the aforesaid provisions, to enter into an agreement that the contractor shall look solely to the State of California for one-half of such expense, to be paid out of said State appropriation, and the United States shall in no manner be liable for said one-half. *Act of July 1, 1898 (30 Stats., 631).*

Agreement that contractor shall look solely to State for half expenses, etc.

Same; contract. Mar. 3, 1899, v. 30, p. 1148.

201. The provisions of an act of Congress entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-nine, and for other purposes," approved July first, eighteen hundred and ninety-eight, authorizing the Secretary of War, in expending certain specified appropriations in the preparation for and construction of certain works for the restraining or impounding of mining debris in the State of California, to enter into a contract or contracts wherein the contractor or contractors shall look solely to that State for one-half of such expense, and that the United States shall in no wise be liable for said one-half, are hereby extended to any appropriations, when made, that may hereafter be made for said purposes. *Act of March 3, 1899 (30 Stats., 1148).*

Work may be done by hired labor. *Ibid.*

202. The Secretary of War, in carrying out the provisions of any act of Congress providing for the restraining or impounding of mining debris in California, may, in his discretion, when in his judgment the aggregate of appropriations already made by said State and Congress and available therefor are sufficient to complete the same, undertake the works necessary thereto by hired labor and by purchase of supplies and materials therefor, and may accept payments on account thereof as the work progresses under and according to the provisions of the acts of the legislature of said State for such purposes. *Ibid.*

203. Officers of the commission traveling on duty in connection with the commission's work shall receive the mileage allowed by law. *Ibid.*, as amended by act of June 6, 1900 (31 Stats., 631). Mileage of commissioners. *Ibid.*; June 6, 1900, v. 31, p. 631.

CHAPTER XIV.

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THE ISTHMIAN CANAL—INVESTIGATION OF ROUTES.

204. The President of the United States of America be, and he is hereby, authorized and empowered to make full and complete investigation of the Isthmus of Panama with a view to the construction of a canal by the United States across the same to connect the Atlantic and Pacific oceans; that the President is authorized to make investigation of any and all practicable routes for a canal across said Isthmus of Panama, and particularly to investigate the two routes known respectively as the Nicaraguan route and the Panama route, with a view to determining the most practicable and feasible route for such canal, together with the proximate and probable cost of constructing a canal at each of two or more of said routes. And the President is further authorized to investigate and ascertain what rights, privileges and franchises, if any, may be held and owned by any corporations, associations, or individuals, and what work, if any, has been Commission; duties. Mar. 3, 1899, s. 3, v. 30, p. 1150.

done by such corporations, associations, or individuals in the construction of a canal at either or any of said routes, and particularly at the so-called Nicaraguan and Panama routes, respectively; and likewise to ascertain the cost of purchasing all of the rights, privileges, and franchises held and owned by any such corporations, associations, and individuals in any and all of such routes, particularly the said Nicaraguan route and the said Panama route; and likewise to ascertain the probable or proximate cost of constructing a suitable harbor at each of the termini of said canal, with the probable annual cost of maintenance of said harbors, respectively. And generally the President is authorized to make such full and complete investigation as to determine the most feasible and practicable route across said Isthmus for a canal, together with the cost of constructing the same and placing the same under the control, management, and ownership of the United States. *Sec. 3, act of March 3, 1899 (30 Stats., 1150).*

Employment
of engineers,
etc.
Sec. 4, ibid.

205. To enable the President to make the investigations and ascertainment herein provided for he is hereby authorized to employ in said service any of the engineers of the United States Army, at his discretion, and, likewise, to employ any engineer in civil life, at his discretion, and any other persons necessary to make such investigation, and to fix the compensation of any and all of such engineers and other persons. *Sec. 4, ibid.*

Appropriation for
expenses.
Sec. 5, ibid.

206. For the purpose of defraying the expenses necessary to be incurred in making the investigations herein provided for there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one million dollars, or so much thereof as may be necessary, to be disbursed by order of the President. *Sec. 5, ibid.*

Report to
Congress.
Sec. 6, ibid.

207. The President is hereby requested to report to Congress the results of such investigations, together with his recommendations in the premises. *Sec. 6, ibid.*

ISTHMIAN CANAL COMMISSION.

Composition,
etc., of com-
mission.
June 28,
1902, v 32, p.
483.

208. To enable the President to construct the canal and works appurtenant thereto as provided in this Act, there is hereby created the Isthmian Canal Commission, the same to be composed of seven members, who shall be nominated and appointed by the President, by and with the advice and consent of the Senate, and who shall serve until the completion of said canal unless sooner removed by the President, and one of whom shall be named as the chairman of said Commission. Of the seven members of said Commission at least four of them shall be persons learned and skilled in the science of engineering, and of the four at least one shall be an officer of the United States Army, and at least one other shall be an officer of the United States Navy, the said officers respectively be-

ing either upon the active or the retired list of the Army or of the Navy. Said commissioners shall each receive such compensation as the President shall prescribe until the same shall have been otherwise fixed by the Congress. In addition to the members of said Isthmian Canal Commission, the President is hereby authorized through said Commission to employ in said service any of the engineers of the United States Army at his discretion, and likewise to employ any engineers in civil life, at his discretion, and any other persons necessary for the proper and expeditious prosecution of said work. The compensation of all such engineers and other persons employed under this Act shall be fixed by said Commission, subject to the approval of the President. The official salary of any officer appointed or employed under this Act shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of this Act. Said Commission shall in all matters be subject to the direction and control of the President, and shall make to the President annually and at such other periods as may be required, either by law or by the order of the President, full and complete reports of all their actings and doings and of all moneys received and expended in the construction of said work and in the performance of their duties in connection therewith, which said reports shall be by the President transmitted to Congress. And the said Commission shall furthermore give to Congress, or either House of Congress, such information as may at any time be required either by Act of Congress or by the order of either House of Congress. The President shall cause to be provided and assigned for the use of the Commission such offices as may, with the suitable equipment of the same, be necessary and proper, in his discretion, for the proper discharge of the duties thereof. *Sec. 7, Act of June 28, 1902 (32 Stats., 483).*

209. The President shall annually, and at such other periods as may be provided, either by law or by his order, require full and complete reports to be made to him by the persons appointed or employed by him in charge of the government of the Canal Zone, the construction of the Isthmian Canal, and the operation of the Panama Railroad, including an itemized account of all moneys received and expended, which said reports shall be by the President transmitted to Congress. The President shall annually cause to be made, by the persons appointed and employed by him in charge of the government of said Canal Zone and the construction of said canal, estimates of expenditures and appropriations, in detail as far as practicable, which estimates shall cover all annual salaries paid to persons employed on said work, excepting laborers and skilled laborers, and shall be submitted to Congress in the manner provided in section five of the Act entitled "An Act making appro-

Reports and
estimates.
Dec. 21,
1905, v. 34, p.
5.

priations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes." And no money shall be expended for any of the purposes of constructing and maintaining said Isthmian Canal, or for any expenses incident thereto, except in accordance with appropriations made by Congress. *Sec. 3, Act of December 21, 1905 (34 Stats., 5).*

Audit of ac-
counts.
Feb. 3, 1905,
v. 33, p. 647.

210. Hereinafter the accounts for the Isthmian Canal Commission shall be audited by the Auditor for the War Department. *Act of February 3, 1905 (33 Stats., 647).*

GOVERNMENT OF CANAL ZONE.

Government
of Canal Zone.
Apr. 28,
1904, v. 33, p.
429.

211. The President is hereby authorized, upon the acquisition of the property of the New Panama Canal Company and the payment to the Republic of Panama of the ten millions of dollars provided by article fourteen of the treaty between the United States and the Republic of Panama, the ratifications of which were exchanged on the twenty-sixth day of February, nineteen hundred and four, to be paid to the latter Government, to take possession of and occupy on behalf of the United States the zone of land and land under water of the width of ten miles, extending to the distance of five miles on each side of the center line of the route of the canal to be constructed thereon, which said zone begins in the Caribbean sea three marine miles from mean low-water mark and extends to and across the Isthmus of Panama into the Pacific Ocean to the distance of three marine miles from mean low-water mark, and also of all islands within said zone, and in addition thereto the group of islands in the Bay of Panama named Perico, Naos, Culebra, and Flamenco, and, from time to time, of any lands and waters outside of said zone which may be necessary and convenient for the construction, maintenance, operation, sanitation, and protection of the said canal, or of any auxiliary canals or other works necessary and convenient for the construction, maintenance, operation, sanitation, and protection of said enterprise, the use, occupation, and control whereof were granted to the United States by article two of said treaty. The said zone is hereinafter referred to as "the Canal Zone." The payment of the ten millions of dollars provided by article fourteen of said treaty shall be made in lieu of the indefinite appropriation made in the third section of the Act of June twenty-eighth, nineteen hundred and two, and is hereby appropriated for said purpose.

SEC. 2. That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the government of the Canal Zone and all the rights,

powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion. *Secs. 1 and 2, Act of April 28, 1904 (33 Stats., 429).*

ISSUE OF BONDS.

212. The Secretary of the Treasury is hereby authorized to borrow on the credit of the United States from time to time, as the proceeds may be required to defray expenditures on account of the Panama Canal and to reimburse the Treasury for such expenditures already made and not covered by previous issues of bonds, the sum of two hundred and ninety million five hundred and sixty-nine thousand dollars (which sum together with the eighty-four million six hundred and thirty-one thousand nine hundred dollars already borrowed upon issues of two per cent bonds under section eight of the Act of June twenty-eighth, nineteen hundred and two, equals the estimate of the Isthmian Canal Commission to cover the entire cost of the Canal from its inception to its completion), and to prepare and issue therefor coupon or registered bonds of the United States in such form as he may prescribe, and in denominations of one hundred dollars, five hundred dollars, and one thousand dollars, payable fifty years from the date of issue, and bearing interest payable quarterly in gold coin at a rate not exceeding three per centum per annum; and the bonds herein authorized shall be exempt from all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority: *Provided*, That said bonds may be disposed of by the Secretary of the Treasury at not less than par, under such regulations as he may prescribe, giving to all citizens of the United States an equal opportunity to subscribe therefor, but no commissions shall be allowed or paid thereon; and a sum not exceeding one-tenth of one per centum of the amount of the bonds herein authorized is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to pay the expenses of preparing, advertising, and issuing the same; and the authority contained in section eight of the Act of June twenty-eighth, nineteen hundred and two, for the issue of bonds bearing interest at two per centum per annum, is hereby repealed. *Sec. 39, Act of August 5, 1909 (36 Stats., 117).*

213. All expenditures from the appropriation herein made for the Isthmian Canal shall be paid from, or reimbursed to the Treasury of the United States out of, the proceeds of the sale of bonds authorized in section eight of the said Act approved June twenty-eighth, nine-

Issue of
bonds.
Aug. 5, 1909,
v. 36, p. 117,
sec. 39.

Same.
Mar. 4, 1907,
v. 34, p. 1369.

teen hundred and two.¹ *Sec. 1, Act of March 4, 1907 (34 Stats., 1369).*

Same.
Dec. 21,
1905, v. 34, p.
5.

214. That the two per cent bonds of the United States authorized by section eight of the Act entitled "An Act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans," approved June twenty-eighth, nineteen hundred and two, shall have all the rights and privileges accorded by law to other two per cent bonds of the United States, and every national banking association having on deposit, as provided by law, such bonds issued under the provisions of said section eight of said Act approved June twenty-eighth, nineteen hundred and two, to secure its circulating notes, shall pay to the Treasurer of the United States, in the months of January and July, a tax of one-fourth of one per cent each half year upon the average amount of such of its notes in circulation as are based upon the deposit of said two per cent bonds; and such taxes shall be in lieu of existing taxes on its notes in circulation imposed by section fifty-two hundred and fourteen of the Revised Statutes. *Sec. 1, Act of December 21, 1905 (34 Stats., 5).*

CONTRACTS AND PURCHASES.

Contracts
authorized.
Aug. 5, 1909,
v. 36, p. 130.

215. The President is hereby authorized to cause to be entered into such contract or contracts, not to exceed the amount of the bond issue authorized in the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," enacted during the first session of the Sixty-first Congress, and Acts supplementary thereto, as may be deemed necessary for the proper excavation, construction, and completion of such canal and harbors, to be paid for as appropriations may from time to time be made by law. *Act of August 5, 1909 (36 Stats., 130).*

Same.
Mar. 4, 1907,
v. 34, p. 1370.

216. Nothing contained in section five of the Act of June twenty-eighth, nineteen hundred and two, entitled "An Act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans," shall prevent the President from entering into such contract or contracts as may be deemed expedient by him for the completion of the construction of the Panama Canal. *Sec. 6, Act of March 4, 1907 (34 Stats., 1370).*

Domestic
material, etc.
J. R. June
25, 1906, v.
34, p. 835.

217. Purchases of material and equipment for use in the construction of the Panama Canal shall be restricted to articles of domestic production and manufacture, from the lowest responsible bidder, unless the President shall, in any case, deem the bids or tenders therefor to be extortionate or unreasonable. *Joint Res. of June 25, 1906 (34 Stats., 835).*

¹ Section 8 of the act of June 23, 1902, referred to above, is expressly repealed by section 39 of the act of August 5, 1909, which takes its place. For section 39, act of August 5, 1909, see paragraph 212.)

OFFICERS AND EMPLOYEES.

218. The appropriations for the pay of officers and employees of the several departments on the Isthmus under the Act of June thirtieth, nineteen hundred and six, shall apply to the pay of such officers and employees when necessarily temporarily detailed upon duty away from the Isthmus. *Sec. 7, Act of March 4, 1907 (34 Stats. 1370).*

Details away from Isthmus pay.
Mar. 4, 1907.
v. 34, p. 1370.

219. The provisions of the Act entitled "An Act relating to the limitations of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," approved August first, eighteen hundred and ninety-two, shall not apply to alien laborers employed in the construction of the Isthmian Canal within the Canal Zone. *Act of February 27, 1906 (34 Stats., 33).*

Hours of labor.
Feb. 27,
1906, v. 34, p.
33.

220. The provisions of an Act entitled "An Act relating to the limitations of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," approved August first, eighteen hundred and ninety-two, and of an Act entitled "An Act making appropriations to supply urgent deficiencies in the appropriations for the fiscal year ending June thirtieth, nineteen hundred and six, and for prior years, and for other purposes," approved February twenty-seventh, nineteen hundred and six, shall not apply to unskilled alien laborers and to the foremen and superintendents of such laborers employed in the construction of the isthmian canal within the Canal Zone. *Sec. 4, Act of June 30, 1906 (34 Stats., 669).*

Same.
June 30,
1906, v. 34, p.
669.

221. Nothing contained in 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 prevent the Isthmian Canal Commission, under rules to be fixed by the commission, from granting to its injured employees, whether engaged in a hazardous employment or otherwise, leave of absence with pay for time necessarily lost as a result of injuries received in the course of employment, not exceeding in the aggregate thirty days per annum: *Provided, however,* That compensation paid to such injured employees under such regulations shall be deducted from any compensation which such employees may be entitled to receive under the terms of the said Act. *Act of February 24, 1909 (35 Stats., 645).*

Compensation for injuries.
Feb. 24,
1909, v. 35, p.
645.

222. Hereafter the 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 apply to all employees under the Isthmian Canal Commission, when injured in the course of their employment; and claims for compensation on account of

Same.
Mar. 4, 1911,
v. 36, p. 1452.

injury or death resulting from an accident occurring hereafter shall be settled by the chairman of the Isthmian Canal Commission, who shall, as to such claims and under such regulations as he may prescribe, perform all the duties now devolving upon the Secretary of Commerce and Labor: *Provided*, That when an injury results in death, claim for compensation on account thereof shall be filed within one year after such death.¹ *Sec. 5, Act of March 4, 1911 (36 Stats., 1452).*

LEASE OF PUBLIC LANDS.

Lease of
lands.
Feb. 27,
1909, v. 35, p.
658.

223. The President is hereby authorized to grant leases of the public lands in the Canal Zone, Isthmus of Panama, for such period, not exceeding twenty-five years, and upon such terms and conditions as he may deem advisable. No lease, however, shall be granted for a tract of land in excess of fifty hectares, nor to any person who shall not have first established, by affidavit and by such other proof as may be required, that such person is the head of a family or over the age of twenty-one years, and that the application for a lease is made in good faith for the purposes of actual settlement and cultivation, and not for the benefit of any other person whatsoever, and that such person will faithfully comply with all the requirements of law as to settlement, residence, and cultivation. In granting such leases preference shall be accorded to actual occupants of lands in good faith. *Sec. 1, Act of February 27, 1909 (35 Stats., 658).*

Same; re-
strictions.
Sec. 2, *ibid.*

224. No portion of the lands of the United States within the Canal Zone shall be leased hereunder unless it shall first be made to appear, by a statement or plat filed by the Isthmian Canal Commission with the collector of revenues for the Canal Zone, that it is not contemplated to use such lands in the work of canal construction or to set the same aside as a town site; and all leases shall be made subject to the provision that if at any time it shall become necessary, notwithstanding, for the United States to occupy or use any portion of the leased lands, it shall have the right to so do without further compensation to the lessee than for the reasonable value of the necessary improvements made upon said tracts by the lessee, the same to be determined by the courts of the Canal Zone. *Sec. 2, Act of February 27, 1909 (35 Stats., 658).*

Same; min-
eral rights
reserved.
Sec. 3, *ibid.*

225. All leases of lands hereunder shall reserve to the United States all mineral, oil, and gas rights in the lands leased. *Sec. 3, ibid.*

¹ This paragraph refers to the Act of May 30, 1908 (35 Stats., 556). The effect of its provisions is to extend the time in which death claims may be filed, so far as relates to the Panama Canal Zone; and to transfer to the Chairman, of the Isthmian Canal Commission, so far as the law applies to the employees under that commission, the duties which have heretofore devolved upon the Secretary of Commerce and Labor.

226. The President may, in his discretion, require a land survey to be made of the Canal Zone. *Sec. 4, ibid.*

Survey of lands.
Sec. 4, ibid.
 Same; delegation of authority of commission.
Sec. 5, ibid.

227. The powers conferred upon the President under this Act may be exercised by him through the Isthmian Canal Commission or in such other manner as he may designate. *Sec. 5, ibid.*

PANAMA RAILROAD COMPANY.

228. Hereafter the Panama Railroad Company shall carry no insurance to cover marine or fire losses, nor make any further payment on the principal or interest on notes heretofore given by it to the United States for moneys appropriated for its use. *Sec. 2, Act of March 4, 1911 (36 Stats., 1451).*

Insurance.
 Mar. 4, 1911.
 v. 36, p. 1451.

229. Hereafter the Panama Railroad Company shall not be required to give bond, either with or without surety, in contracts which it may make to furnish services, materials, or supplies to the Army, Navy, Marine Corps, or other departments of the Government, and such contracts may be made for periods less than one year, as may be agreed on, and formal contracts in writing shall not be required unless agreed on. *Sec. 6, ibid.*

Same; contracts, etc.
Sec. 6, ibid.

IMPORTS FROM CANAL ZONE.

230. All laws affecting imports of articles, goods, wares, and merchandise and entry of persons into the United States from foreign countries shall apply to articles, goods, wares, and merchandise and persons coming from the Canal Zone, Isthmus of Panama, and seeking entry into any State or Territory of the United States or the District of Columbia. *Act of March 2, 1905 (33 Stats., 843).*

Imports.
 Mar. 2, 1905.
 v. 33, p. 843.



APPENDIX.

*Extract from the Digest of Opinions of the Judge Advocates General,
edition of 1912, covering the subject, "Navigable Waters."*

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¹ Prepared by Mr. Lewis W. Call, Chief Clerk and Solicitor, Office of the Judge Advocate General, U. S. A.

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I. The power of Congress to legislate, under the commerce clause of the Constitution, for the prevention and removal of physical obstructions to navigation was not exercised otherwise than by way of improvements carried on by the United States, and except for an occasional act of Congress authorizing the erection of a bridge across a navigable river, and except for the general legislation regarding bridges over the Ohio River (act of Dec. 17, 1872; 17 Stat. 398, as amended Feb. 14, 1883, 22 Stat. 414), until the act of July 5, 1884 (23 Stat. 148), section 8 of which made it the duty of the Secretary of War, on satisfactory proof that any bridge then or thereafter constructed "over any navigable water of the United States, under authority of the United States or of any State or Territory, is an obstruction to the free navigation of such water, by reason of difficulty in passing the draw opening or raft span of said bridge," to require the company or persons owning or operating the bridge to provide the same with such aids to navigation as he may specify in the order. This was followed by more explicit legislation in the act of August 11, 1888 (25 Stat. 400), section 9 of which empowered the Secretary of War to give notice to the persons or corporations owning or controlling any obstructive bridge to "so alter the same as to render navigation through or under it free, easy, and unobstructed;" and section 10 made the failure to remove the bridge or to alter the same, after receiving such notice, punishable by a fine of \$500 per month. The jurisdiction of Congress was more fully exercised in the act of September 19, 1890 (26 Stat. 426). Sections 4 and 5 amended sections 9 and 10 of the act of 1888 so as to make them more definite, and increased the penalty for failure to comply with the notice of the Secretary of War—requiring, also, that the parties interested be given reasonable opportunity to be heard before the issue of the notice. Section 6 prohibited the deposit of refuse matter where it would tend to obstruct navigation. Section 7 (as amended by sec. 3 of the act of July 13, 1892) (27 Stat. 88) prohibited the erection of wharves, dams, breakwaters, or other structures or excavation or filling, in navigable waters of the United States, without the permission of the Secretary of War; precluded States from authorizing the construction of bridges over navigable waters which are not wholly within their territorial limits; and provided that it should not be lawful to commence the construction of a bridge over a navigable water of the United States, under an act of a State legislature, "until the location and plans of such bridge" have "been submitted to and approved by the Secretary of War." Section 8 authorized the removal of wrecks of vessels; section 9 prohibited injury to works for the improvement of navigation; section 10 forbade the location or continuance of obstructions to navigation; and section 12 authorized the establishment of harbor lines. The prior legislation on the subject was amended and consolidated by the act of March 3, 1899 (30 Stat. 1121); and forms sections 9 to 20, inclusive, of that act. Section 9 relates to bridges, dams, or causeways; section 10 relates to other structures and to excavating or filling; section 11 relates to the establishment of harbor lines; section 12 prescribes a penalty for violations of sections 9, 10, and 11; section 13 prohibits the deposit of refuse matter where it will injure navigation; section 14 forbids injury to works for the improvement of navigation; section 15 relates to

obstructions caused by anchoring vessels or by sunken vessels, timber, etc.; section 16 provides a penalty for violations of sections 13, 14, and 15; section 17 provides for the enforcement of the provisions of sections 9 to 16, inclusive, by the Department of Justice; section 18 relates to the alteration of obstructive bridges; and sections 19 and 20 relate to the removal of sunken or grounded vessels, etc. By the act of March 23, 1906 (34 Stat. 84), general provisions were enacted to govern as to grants by Congress to "any persons to construct and maintain a bridge across or over any navigable water of the United States"—the act requiring, *inter alia*, the approval of the plans by the Chief of Engineers and the Secretary of War; and by the act of June 21, 1906 (34 Stat. 386), as amended June 23, 1910 (36 Stat. 593), similar legislation was enacted to govern in respect to dams which Congress might thereafter authorize over navigable waters.

I A. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves or by uniting with other waters a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary mode in which such commerce is conducted by water.¹ The true test of the navigability of a stream does not depend on the mode by which commerce is or may be conducted, nor the difficulties attending navigation. It would be a narrow rule to hold that in this country unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent or manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes in law a public river or highway.² Applying these tests to a tributary of the Mississippi River in Tennessee, it was *held* that the same was a navigable water of the United States; that the fact that all acts of the State legislature declaring a certain part of the river navigable had been repealed did not affect the question of the navigability of that part so far as the laws of the United States were concerned. For example, the duty of the Secretary of War, under section 4, act of 1890, with respect to unreasonable obstructions to navigation over the part referred to, would be unaffected by the repeal of the State laws. *C. 1511, July, 1895; 1709, Sept., 1895; 15029, July 30, 1903; 17989, May 6, 1905.*

¹ See the definition of the term, "navigable waters of the United States," in the *Daniel Ball*, 10 Wall., 557; *Ex parte Boyer*, 109 U. S., 629. See also *Chisholm v. Caines*, 67 Fed. Rep., 285; *St. Anthony Falls Water Power Co. v. Water Commissioners*, 168 U. S., 349; *Leovy v. U. S.*, 177, *id.*, 621. Statutes passed by the States for their own uses, declaring small streams navigable, do not make them so within the Constitution and laws of the United States. *Duluth Lumber Co. v. St. Louis Boom & Improvement Co.*, 17 Fed. Rep., 419.

² *The Montello*, 20 Wall., 430.

I A 1. A river is a navigable water of the United States when it forms by itself or by its connection with other waters a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. If a river is not itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State; then it is not a navigable water of the United States but only a navigable water of the State.¹ So held, that Devil's Lake being wholly within the State of North Dakota and having no visible outlet was not a navigable water of the United States and therefore not subject to the laws of Congress relating to such waters. A bridge may be built across this waterway under the laws of the State without reference to the Federal Government unless the bridge is to be located on Federal property. *C. 7750, Mar., 1900; 11394, Oct. 18, 1901; 18947, Dec. 21, 1905.*

Held, also, that the French Broad River, which has two navigable stretches, one in North Carolina and the other in Tennessee, separated by a long stretch of river not navigable within the accepted definition of that term, could not be regarded as a navigable water of the United States; and that to make it such there must be a *continuity of navigation or of navigable capacity.* *C. 24811, Apr. 23, 1909.*

I A 1 a. The engineer officers of the Army, in opening a channel in a navigable river, for the improvement of which appropriation had been made by Congress, were assisted and cooperated with by a local transportation company which owned the land adjoining the channel which it was using for its own boats. Upon the completion of the improvement this company proceeded to levy a toll on other vessels passing through the channel. *Held* that such toll was an obstruction to navigation and could not legally be enforced, the fact that the company owned the land giving it no exclusive right to the free use of navigable waters of the United States. *R. 50, 538, July, 1886.*

I A 1 a (1). The Erie and Atlantic Basins, in New York Harbor, are private property, but they are also navigable waters of the United States; and the owners of the soil under the water hold the title subject to the rights of the public to navigate such waters, and are therefore not empowered to fill in the basins and deprive the public of their use. Moreover, they are waters over which the United States has expressly assumed jurisdiction in prohibiting, by the act of June 29, 1888, the dumping of deposits "in the tidal waters of the harbor of New York, or its adjacent or tributary waters, within the limits which shall be prescribed by the supervisor of the harbor." *Held*, that the subsequent establishment, under the act of August 11, 1888, s. 12, of harbor lines in that harbor outside these basins did not oust this jurisdiction, but that the act of June 29, 1888, was still in force. *P. 50, 366, Nov., 1891; C. 21290, Mar. 14, 1907.*

I A 1 a (2). *Held*, that the Bayonne Canal, in Hudson County, N. J., was navigable water of the United States subject to the admiralty jurisdiction of the United States district court and to the laws of Congress for the enrollment and licensing of vessels and otherwise regu-

¹ The Montello, 11 Wall., 411; 20 Op. Atty. Gen., 101.

lating commerce, and could not therefore legally be obstructed by filling up or damming, by a railroad company, without the permission of the Secretary of War under the act of September 19, 1890. *P. 44, 152, Dec., 1890; C. 16231, May 4, 1904; 18728, Oct. 16, 1905.*

I A 1 b. On the question of whether the Bayou St. John at New Orleans, La., is a navigable water of the United States under the control of the Secretary of War, *held*, that as the bayou was improved by the Carondelet Canal & Navigation Co. and its privies in title, under contract with the State, there could be no question that the corporation had a valid right to charge tolls as authorized by its contract; that such right could not be divested without compensation to the company for the franchise as well as for such property as it might have acquired incident to the improvement;¹ that a river does not become a canal from having had its navigation improved by artificial means;² and that the bayou, as improved, was a navigable water of the United States, subject to the powers of Congress to regulate commerce and to the general legislation of Congress for the protection of navigable waters from obstructions. *C. 18982, Dec. 23, 1905.*

I A 2. *Held*, that it was doubtful whether "floatable" streams, i. e., streams capable only of being used for floating sawlogs, timber, etc., not being navigable in a general sense, were included in the term "navigable waters of the United States," as employed in statutes providing that dams shall not be constructed in such waters without the permission of the Secretary of War. But *held* that it was clearly competent for Congress, under the commerce clause of the Constitution, to exercise control over such streams as highways of interstate commerce. *P. 63, 375, Feb., 1894; C. 12905, Sept. 29, 1902; 21290, Mar. 14, 1907 (p. 15).*

I B. *Held* that as the withdrawal of water from the Rio Grande for the purpose of irrigation by means of pumps had reached such a stage as to seriously impair its navigable capacity, the Secretary of War could legally prevent, not only the installation of new plants for the withdrawal of the waters of this river, but also the further withdrawal by existing plants; and *advised* that notice be published that the War Department regards further diversion of its waters as a violation of sections 10 and 12 of the act of March 3, 1899 (30 Stat. 1151); that the construction of any additional works for the purpose will not for the present be sanctioned; and that diversion by existing works be limited so as not to injuriously affect the navigable capacity of the river. *C. 27899, Nov. 21, 1911.* *Held* further, with reference to the contention that the withdrawal of water by means of pumps involves no construction in the stream such as is forbidden by section 10 of said act, that the statute applies not only to structures which obstruct navigation but also to other changes which "modify the course, location, condition, or capacity of * * * the channel of any navigable water of the United States"; and that the withdrawal of sufficient water to affect the navigable capacity of a stream would be within the letter

¹ *Huse v. Glover* (119 U. S., 543); *Sands v. Manistee River Improvement Co.* (123 U. S., 288); *Monongahela Navigation Co. v. United States* (148 U. S., 312).

² *People v. Improvement Co.* (103 Ill., 491).

as well as the spirit of the prohibition.¹ *C. 27899, June 27, 1911.* Held further that the word "channel," sometimes used in a restricted sense and sometimes as comprising the entire bed of a river, including the flowing water, in view of the object and purpose of the statute and in the light of the decision of the Supreme Court in *United States v. Rio Grande Irrigation Co.* (174 U. S., 690, 708), should be regarded as here used in the enlarged sense. *C. 27899, June 27, 1911.*

I B 1. Held, with respect to the authority of the Secretary of War to prevent the construction of a sewer outlet in the Hudson River, that the navigable waters of the United States are not brought within the exclusive control of Congress save in matters connected with interstate and foreign commerce; that in other respects all internal or riparian waters are fully subject to State control,² as in the regulation of fisheries, the control of the shores, the ownership of submerged lands, etc., so that the control of waters for drinking and sanitary purposes, and the regulation of the flow and of the deposit of sewage, are matters fully within the control of the several States as an incident of their police power, except in so far as concerns structures which may obstruct navigation, which must be authorized by the Chief of Engineers and the Secretary of War under section 10 of the act of March 3, 1899. *C. 21290, Mar. 14, 1907.*

II A. The United States is not the owner of the soil of the beds of navigable waters, nor of the shores of tide-waters below high-water mark, nor of the shores of waters not affected by the tide below the ordinary water line of the same, except as it may have become grantee of such soil from the State or from individuals. The property in and over the beds and shores of navigable waters is in general in the State, or in the individual riparian owner.³ But under the power to regulate commerce, Congress may assume, as it has recently assumed, the power so to regulate navigation over navigable waters within the States as to prohibit its obstruction and to cause the removal of obstructions thereto, and such power when exercised is "conclusive of any right to the contrary asserted under State authority."⁴ In

¹ See *U. S. v. Rio Grande Irrigation Co.* (174 U. S., 690, 708), where the court, having under consideration sec. 10 of the act of Sept. 19, 1890 (26 Stat. 454), substantially identical, so far as respects this question, with the act of 1899, held that the withdrawal of water above the point of navigation by means of a dam so as to impair the navigability of the river was within the prohibition of the act, using the following language regarding the scope of the prohibition: "It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition."

² *McCready v. Virginia* (94 U. S., 391, 396); *Escanaba v. Chicago* (107 id., 678); *Lake Shore & Michigan Southern Ry. Co. v. Ohio* (165 id., 365); *Cardwell v. American Bridge Co.* (113 id., 205); *Huse v. Glover* (119 id., 543); *Cummings v. Chicago* (188 id., 410, 430).

³ *Pollard v. Hagan*, 3 Howard, 212; *Barney v. Keokuk*, 94 U. S., 337; *Gilman v. Philad.*, 3 Wallace, 713; *South Carolina v. Georgia*, 93 U. S., 4, 6 Opins. Atty. Gen., 172; 7 id., 314; 16 id., 479; *Illinois Cent. R. Co. v. Illinois*, 146 U. S., 387; *Shively v. Bowlby*, 152 id., 1; *Scranton v. Wheeler*, 57 Fed. Rep., 803; *Scranton v. Wheeler*, 179 U. S., 141; *West Chicago R. R. Co. v. Chicago*, 201 U. S., 506; *Union Bridge Co. v. U. S.*, 204 U. S., 364.

⁴ *Wisconsin v. Duluth*, 96 U. S., 379; *U. S. v. City of Moline*, 82 Fed. Rep., 592; *Leovy v. U. S.*, 92 id., 344; *Leovy v. U. S.*, 177 U. S., 621.

exercising this power, it can not divest rights of title or occupation in a State or individuals, but these rights are left to be enjoyed as before, subject, however, to the paramount public right of freeing navigation from obstruction possessed and exercised by the United States through Congress. In the execution of the laws relating to obstructions to navigation the Secretary of War has no general authority, but only such as may have been vested in him by legislation of Congress, especially in the river and harbor appropriation acts.¹ *P. 15, 272, and 16, 244, Mar. and Apr., 1887; 31, 42, B, 386, and 35, 234, Apr. to Sept., 1889; 42, 85, July, 1890; 51, 196, 55, 140, and 56, 483, Jan. to Dec., 1892; 58, 450, Mar., 1893; 63, 365, Feb., 1894; C. 2138, Mar., 1896; 7658, Feb. 7, 1900; 8360, June 4, 1900; 11019, Aug. 10, 1901; 11111, Aug. 29, 1901; 11827, Dec. 30, 1901; 16691, Sept. 10, 1901; 12081, Feb. 25, 1902; 16213, Apr. 25, 1904; 16231, May 4, 1904; 17329, Jan. 6, 1905; 25947, Dec. 15, 1909.*

II A 1. All islands in the Missouri River and in the State of Missouri, which were formed and in existence prior to the admission of the State into the Union, belonged either to the United States or to the parties to whom the United States or Spain had granted them. Upon the admission of the State into the Union the National Government relinquished to the State ownership of the bed of the river² therein, and since admission of the State islands formed on the bed have belonged to the State,³ or may belong for school purposes to the counties in which they are situated under an act of the Missouri Legislature approved April 8, 1895. The matter of purchasing for river improvement purposes for the United States willow brush and other material, products of these islands, would thus depend upon the question of title to the islands and control thereof at the time the purchases are made. *C. 3186, May, 1897.*

II A 2. On the question raised as to the authority to reserve two islands formed by the deposits of material from the new canal, at the St. Clair Flats, Mich., *held*, that if the St. Clair Flats belong to the system of lakes, under the law of Michigan the title to land below low-water mark would be in the State, otherwise in the riparian owners⁴ and that the United States would not acquire title by filling in the submerged land. *C. 20170, Aug. 9, 1906.*

II B. *Held*, with respect to the claim that all the property required for a right of way for the canal connecting Lake Washington with Puget Sound had not been acquired because there were outstanding leases to certain submerged lands in Salmon Bay, a navigable waterway of the United States, which would be required for the canal and lock sites, that the title of the State or its grantee thereto is subject to the right of the United States to take and use the lands for any construction in aid of navigation, or for any channel for navigation,

¹ See the subsequent opinion of the Attorney General in 20 Op., 101.

² See *Pollard v. Hagan*, 3 Howard, 212; *Goodtitle v. Kibbe*, 9 id., 471; *Doe v. Beebe*, 13 id., 25; *Withers v. Buckley*, 20 id., 84.

³ *Cooly v. Golden*, 23 S. W. Reporter, 100.

⁴ *Gould on Waters*, 3d edition, sec. 75, and authorities cited, especially *Backus v. Detroit* (49 Mich., 110); and *Lincoln v. Davis* (53 id., 375).

without compensation to the State or its grantee,¹ so that it would not be necessary to acquire such submerged lands. *C. 20959, June 29, 1911.*

II B 1. *Held*, with respect to the right of the United States to maintain a wharf projecting from the military reservation of Fort Mason, Cal., on submerged land held by private parties under grant from the State, through the city of San Francisco, and to dredge channels through such lands for access thereto, that the title to submerged land under navigable waters of the United States, whether in the State or a private grantee, was subject to the servitude or easement in favor of navigation, and to the power of the United States, under the commerce clause of the Constitution to occupy the same for any purpose in aid of navigation, without compensation, and also to the regulation by the United States of the use of the same so far as necessary to prevent the obstruction of navigation; and that the wharf, being an aid to navigation, could be lawfully maintained thereon without compensation to the owners.² *C. 16630, Nov. 27, 1907, and Mar. 2, 1908.*

II B 2. On the question of whether the adoption of a resolution by Congress, declaring the tunnels under the Chicago River to be obstructions to navigation and directing their modification in accordance with its terms, would involve the United States in any pecuniary liability, *held* that as the tunnels were constructed without authority of Congress the builders were presumed to know that in placing them under a navigable water of the United States they could be maintained only so long as they afforded no obstruction to the navigation of such water; that their alteration could be required in the interests of navigation, without compensation; and that the ownership of the soil under the river was immaterial, since such ownership, whether in the State, municipality, or in a private individual, is subject to the paramount right of navigation and to the authority of Congress to remove obstructions to navigation. *C. 7798, Jan. 12, 1903.*

Held also with respect to the question of whether, in carrying out a project authorized by Congress for the improvement of Tuckerton Creek, N. J., by dredging a channel at the mouth of the same through oyster beds occupied under lease from the State of the submerged lands for oyster culture, it would be necessary to extinguish the leasehold interests of the lessees, that such action would not be necessary, since the title to submerged lands, whether in the State or a grantee or a lessee of the same, is a qualified one subject to the easement or servitude in favor of public navigation and to the right of the Govern-

¹ *Hawkins Point Light House case*, 39 Fed. Rep., 77; *Lewis Bluepoint Oyster Cultivation Co. v. Briggs*, 198 N. Y., 297—91 N. E., 846. In the latter case it was held that the lessee of land under navigable waters, for use in the cultivation of oysters, had no right in the land which was not subject to the power of the United States to construct improvements in aid of commerce and navigation; that in planting oysters he ran the risk that the crop might be interfered with whenever Congress decided to improve navigation; and that "The rule rests upon the principle of implied reservation, and that in every grant of lands bounded by navigable waters where the tide ebbs and flows, made by the crown or the State as trustees for the public, there is reserved by implication the right to so improve the water front to aid navigation for the benefit of the general public without compensation to the riparian owner."

² So held by the Acting Attorney General in an unpublished opinion, dated May 8, 1906.

ment to take the lands without compensation for the improvement of the waterway to make it subserve the purposes of commerce.¹ *C. 21814, July 23, 1907.*

II B 3. With reference to the proposed dredging of a channel in Sabine Lake, Tex., near the shore, the effect of which would be to throw up an embankment on the lake alongside of the proposed cut and thus prevent riparian owners from constructing docks out beyond the channel to the deep water of the lake, *held* that the riparian owners could have no legal claim against the United States on this ground, regardless of whether or not they owned the title to the soil in front of their uplands, since any title which they might have would be subject in their hands to the same paramount right or servitude of the Government as it would be in the hands of the State.² *C. 17329, Jan. 6, 1905; 11827, Dec. 30, 1901.* Similar *held*, with respect to the lowering of the level of Lake Washington, in the project for a ship canal connecting Lakes Union and Washington with Puget Sound; and that the State would have the same power in respect to its navigable waters, so that even if the lake be regarded as a navigable water of the State, the release of the United States, by the act of February 8, 1901 (Laws of Washington, 1901, p. 7), from all liability to the State, its successors or assigns which would result from the proposed improvement, would be sufficient, as such release would bind subsequent grantees of the State.³ *C. 20959, Mar. 2, May 17, and June 2, 1911.*

II B 3 a. With referencé to the claim of the property owner of submerged lands in Chesapeake Bay under grant from the State of Maryland for compensation for the occupation of a portion of the same by a sea wall in front of the Fort Armistead Military Reserva-

¹ It is generally held that the title to submerged lands under a navigable water of the United States and within the limits of a State is in the State and may be granted to individuals subject to the right of the United States to take the same without compensation for the improvement of navigation or for structures in aid of navigation. *Hawkins Point Lighthouse case*, 39 Fed. Rep., 77; *Gibson v. U. S.*, 166 U. S., 269, 276; *Scranton v. Wheeler*, 179 U. S., 141; *Chicago, Burlington & Quincy R. R. Co. v. Drainage Com'rs*, 200 U. S., 561; *West Chicago R. R. Co. v. Chicago*, 201 U. S., 506; *Union Bridge Co. v. U. S.*, 204 U. S., 364; *Lane v. Smith*, 71 Conn.—41 Atl., 18; *Lane v. Board of Harbor Commissioners (Connecticut)*, 40 Atl., 1058. See also *Gilman v. Philadelphia* (3 Wall., 713, 725), where the court said, respecting the control of navigable waters for commerce: "For these purposes they are the *public property of the United States*, and subject to all the requisite legislation by Congress." And in *Pollard's Lessee v. Hagan* (3 How., 230), the court said: "The right of eminent domain over the shores and the soil under the navigable waters for all *municipal purposes belongs exclusively to the States* within their respective territorial jurisdictions * * * But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States and the laws which shall have been made in pursuance thereof."

² *Gibson v. United States* (166 U. S., 272); *Scranton v. Wheeler* (179 U. S., 143); *Lewis Bluepoint Oyster Cultivation Co. v. Briggs* (193 N. Y., 297); *Hawkins Point Lighthouse case* (39 Fed. Rep., 88); *Sage v. City of New York* (47 N. E., 1101); *Philadelphia Co. v. Stimson*, 223 U. S., 605, Mar. 4, 1912.

³ *Bilger et al. v. State et al.* (116 Pac., 19). See also *Van Siclén v. Muir* (46 Wash., 41—89 Pac., 188), where it was held that an "Upland owner has no riparian or littoral rights in the navigable waters of a lake. These belong to the owners of the shore lands, and if they belong to the State it only can claim that an obstruction placed in the waters is an interference with the riparian and littoral rights."

tion, *held* that the United States, as riparian owner, had the right to construct the sea wall as a right of necessity¹ to protect the bank without obstructing navigation. *C. 12081, Feb. 25, and Aug. 22, 1902.*

II C. Where claim was made for the use by the Government of a wharf on submerged land in front of Fort Mason, Cal., under grant from the State, through the city of San Francisco, *held* that the Government would appear to have acquired title by prescription.² *C. 16630, Aug. 3, 1904.* *Held* further that the reservation having been declared prior to the grant from the State, the submerged lands in front of the same should be regarded as subject to a servitude in the United States for defensive purposes, so that no use could be made by the grantee of the submerged land which would interfere with such purposes; and that there was strong analogy between this power and that of commerce. *C. 16630, Feb. 12, 1906.* Similarly *held* with respect to the authority of the United States to lay and maintain water mains under navigable waters between the States of New Jersey and New York, for the purpose of supplying water from the State of New Jersey to Fort Wadsworth, N. Y.—the statutes of New Jersey forbidding the transportation of water from the State, and also the use of the submerged land of the State for the purpose—that while the title to the soil under the water was in the State, this ownership, under the decisions, was not an absolute one, but qualified by the servitudes in favor of navigation; that similar reasons justify the view that the title of the State to such submerged lands is subject also to the right of the United States to use the same for other constitutional purposes, such as the laying of mines for harbor defenses, the laying of conduits and mains for electrical communication between fortifications, and for supplying water for the use of the garrisons of the fortifications. *Held* further that the statutes of the State could not be regarded as including the United States, since the State could not control the operations of the General Government within the sphere of its activities. *C. 26142, June 7, 1910.*

II D. Under the power to improve navigation, Congress may appropriate for, and the Secretary of War may cause to be erected, a pier in Lake Michigan, and after its erection the United States has the authority of *conservation* of the same. *P. 54, 477, Aug., 1892.* And see *R. 51, 609, Mar., 1887.* Its exercise may be discontinued or abandoned when the work—such as a pier, dam, breakwater, etc.—is no longer needed for the improvement of navigation. *P. 32, 375, May, 1889; 39, 99, and 42, 210, Feb. and July, 1890; C. 13630, Nov. 25, 1902.*

II D 1. *Held* that the building of a dyke, under an appropriation for the improvement of the navigation of the Hudson River, did not of itself vest in the United States a property in the soil or give it any title thereto;³ that the property in the river frontage was affected by the rights of the United States only so far as concerned the navigation of the river and the maintenance and conservation of the work of improvement, and that the owner might legally make any use of his property that he might see fit provided it did not obstruct naviga-

¹ *Diedrich v. Northern Union Ry. Co.*, 42 Wis., 262; *Gould on Waters*, sec. 160.

² So held by the Attorney General in an unpublished opinion dated May 6, 1906.

³ 6 Op. Atty. Gen., 172; 7 id., 314; *Hawkins Point Lighthouse Case*, 39 Fed. Rep., 77; *Scranton v. Wheeler*, 179 U. S., 141.

tion or interfere with the improvement.¹ *R. 51, 609, Mar., 1887; P. 54, 477, Aug., 1892; C. 13680, Nov. 25, 1902.*

II D 1 a. Where a railroad company, which, as riparian proprietor, owned the land upon which was located a revetment of the bank of a navigable stream (constructed by the United-States in the improvement of the navigation of the same), was authorized to rebuild the revetment, subject to the condition that the work should be so done and maintained as to fully subserve its purpose as a safe and secure revetment and protection to the channel of the stream—held that the company, as riparian owner, was legally entitled to use the revetment so long as such use did not impair its serviceableness or involve such an exclusive possession as would be in violation of the provisions of section 9 of the act of September 19, 1890 (26 Stat. 426), and that a failure on its part to perform the condition would not, *per se*, divest it of such right of use, or empower the Secretary of War to enforce such performance by revoking the authority to rebuild the revetment. *P. 64, 11, Feb., 1894; C. 3931, Mar. 14, 1908.*

III. There is no general legislation of Congress authorizing the construction of bridges over streams or waterways, the navigable portions of which are not wholly within the limits of a single State, except as to bridges over the Ohio River.² Such authority has hitherto been given, with the exception stated, by special acts, which have uniformly contained provisions requiring that the plans of the bridges be submitted to the Secretary of War for approval before construction is commenced. But in the case of a stream or waterway whose navigable extent is wholly within the limits of a single State, Congress has provided by section 7 of the river and harbor act of September 19, 1890, as amended by section 3 of the corresponding act of July 13, 1892 (27 Stat. 88), by a negative pregnant with an affirmative, and by section 9 of the act of March 3, 1899, directly, that a bridge may be built thereover under authority of an act of the State legislature, provided the plans and location thereof are approved by the Secretary of War.³ *C. 307, Sept., 1894; 1375, May, 1895; 1943, Jan.,*

¹ 16 Op. Atty. Gen., 486. See, however, act of Congress of Mar. 3, 1899 (30 Stat. 1152), and *Scranton v. Wheeler, supra*.

² See act of Congress approved Dec. 17, 1872 (17 Stat. 398), as amended by act approved Feb. 14, 1883 (22 Stat. 414). See also acts of Mar. 23, 1906 (34 Stat. 84), prescribing requirements to govern as to grants thereafter by Congress of authority for bridges; and act of June 21, 1906 (34 Stat. 386, as amended by 36 Stat. 593) for similar legislation as to dams.

³ See 20 Op. Atty. Gen., 488, and *Lake Shore & Michigan Southern Ry. Co. v. Ohio, 165 U. S., 365*. The intention of Congress is more clearly expressed in section 9 of the river and harbor act approved Mar. 3, 1899 (30 Stat. 1151), which, after making it unlawful to construct any "bridge, dam, dike, or causeway," over any navigable water of the United States until the consent of Congress thereto shall have been obtained, etc., specifically provides: "That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced."

Under date of Sept. 25, 1899, the Secretary of War held that this section does not authorize the Secretary of War or the Chief of Engineers to approve the plans for a bridge or other structure which would be an obstruction to navigation liable to be proceeded against under the other sections of the act or of the statutes theretofore existing; that the intent of the section appears to be to commit to the States the determination of the question whether or not there should be a bridge at any particular place over navigable waters wholly within the State, and to commit to the Secretary of War the protection of navigation against obstructions by such a bridge.

1896; 2448, 2470, July, 1896; 2596, Sept., 1896; 2677, Oct., 1896; 3047, Mar., 1897; 3428, Aug., 1897. In the latter case the plans of the bridge should be accompanied by proper evidence that the State has authorized its construction. *C. 1389, May, 1895; 12022, Feb. 6, 1902; 12905, Sept. 29, 1902; 13652, Nov. 19, 1902.*

III A. Section 7 of the act of 1890 (26 Stat. 426), in leaving the matter of the authorization and construction of bridges over navigable waters wholly within States entirely to the jurisdiction of the State, except in so far as to require the approval by the Secretary of War of the location and plan of the bridge, indicates that Congress did not desire to exercise any further control over the subject. So, upon an application for the approval by the Secretary of War of the plans of a bridge over the Harlem River, which is wholly within the State of New York, *held* that the fact of the unusual importance of this stream, and of its immediate connections with great interstate waterways and the sea, did not except it from the jurisdiction of the State under the statute or make necessary any special or additional legislation by Congress for the authorization or control of its system of bridges. *P. 53, 354, May, 1892; C. 13652, Nov. 19, 1902.*

III A 1. Section 9 of the act of March 3, 1899 (30 Stat. 1151) provides affirmatively that bridges, inter alia, "may be built under authority of the legislature of the State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided that the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced." On the question raised with respect to the proposed construction by the Northern Pacific Railway of pile bridges across certain waterways of Puget Sound, as to whether the Chief of Engineers and the Secretary of War could legally decline to consider plans for these crossings, under authority of the State, *held*, that in view of the provisions of said section the necessity of crossing the waterways is a matter for the consideration of the State, subject only to the authority of the Chief of Engineers and the Secretary of War to approve only such plans and locations as will prevent the structures from being an unreasonable obstruction to navigation. *C. 25442, Aug. 30, 1909. Held*, however, that there would be no objection to the local engineer officers suggesting to the railway company the advisability of changing the location of the railway in order to avoid the expense of constructing and maintaining drawbridges across these waterways. *C. 25442, Sept. 1, 1909.*

On the application of the city of Boston for the approval of the plans of a bridge across Fort Point Channel, in Boston, a navigable waterway of the United States lying wholly within the State, said bridge to be erected under State authority, *held* that the jurisdiction of the Secretary of War and of the Chief of Engineers, under section 9 of the act of March 3, 1899 (30 Stat. 1151), relates to the situation and dimensions of the piers, the length of the spans, width of the draw openings, etc., but does not include the power of determining whether or not a bridge should be built across the waterway at or near the location of the proposed bridge, that being a matter for the State to determine under the statute.¹ *C. 17600, Feb. 27, 1905.*

¹ See *Lake Shore & Michigan Southern Railway Co. v. Ohio* (165 U. S. 366, 368, 369); *Cummings v. Chicago* (188 U. S. 410); *Montgomery v. Portland* (190 U. S. 89).

III A 2. *Held*, under section 7 of the act of September 19, 1890, as amended by section 3, act of July 13, 1892, and by section 9, act of March 3, 1899 (30 Stat. 1151), that the authority of a State for the erection of a bridge over navigable water within the State should be shown as a condition precedent to the approval by the Secretary of War.¹ *P. 55, 61, and 140, Aug., 1892; 62, 94, Oct., 1893; C. 7774, Mar. 8, 1900; 12022, Feb. 9, 1902; 13652, Nov. 13, 1902; 18947, Dec. 13, 1905.* The fact that the title to the soil under the water is vested in a municipality of the State does not affect the power of the State to grant such authority, nor dispense with the necessity of its doing so. The title to the soil is distinct from the right of conservation. Though this title be vested in a town by the State, there remains in the latter by reason of its sovereignty, "*a jus publicum* of passage and repassage, with consequent power of conservation,"² under which power it may concede the authority required by the statute. *P. 62, 94, supra; C. 12081, Feb. 19, 1902; 16213, Apr. 25, 1904; 17329, Jan. 6, 1905.*

III A 2 a. Where the act of a State legislature required a *draw*, and the plan of the bridge submitted did not provide for one, *held*, that there being no State authority for the construction of the bridge as proposed, the Secretary of War was without jurisdiction to approve the plans presented. *C. 1443, June, 1895.*

Similarly *held*, where plans were submitted for the construction of a dam or dams without locks, while the statutory authority relied on required "a lock or system of locks." *C. 26797, June 1, 1910.*

III A 2 b. As the object of this legislation is to protect the navigable waters of the United States from unreasonable obstructions, *held*, that it should not be construed to authorize the location and plan of a bridge which would have the effect of stopping navigation at the point where it is to be constructed. *C. 5863, Feb., 1899.*

With reference, however, to the construction by the city of New York of an embankment or causeway to hold a sewer outlet across a navigable creek in that city with a view to filling solid above the same, *held*, that the city having authority from the State for the purpose, the location and plans could be approved. *C. 25047, June 5, 1909.*

III A 2 c. On the question of whether the Secretary of War had authority to approve the plans for a power dam across St. Joseph River, Ind., the navigable portion of said river being in Michigan, *held*, that as the portion of the river to be affected by the structure is not navigable, no approval of the plans by the department was required. *C. 11394, Oct. 18, 1901.* Similarly *held*, with reference to power dams across the Missouri River in the section known as "The Rapids," near Great Falls, Mont. *C. 25647, Dec. 21, 1909.*

III A 3. With reference to the question of the authority of the Chief of Engineers and the Secretary of War to approve plans for rebuilding a bridge over the Taunton River, a stream lying wholly within the limits of the State of Massachusetts, under State authority given in 1864, *held* that the right originally given to construct the bridge included the right to maintain it, i. e., to repair or rebuild it;³

¹ See *L. S. & M. S. R. Co. v. Ohio*, 165 U. S., 365, and 20 Op. Atty. Gen., 488.

² 6 Op. Atty. Gen., 172, 178.

³ *Rogers Sand Co. v. Pittsburgh, Fort Wayne & Chicago R. R. Co.* (139 Fed. Rep., 7); *Hamilton v. Pittsburgh, etc., Ry. Co.* (119 U. S., 281); *Central Trust Co. v. Wabash, St. Louis & Pacific R. R. Co.* (32 Fed. Rep., 566).

and that as the act provided for a draw of "not less" that 60 feet in width, implying that in case of future reconstruction a greater width might be required, the Secretary of War and the Chief of Engineers, in the exercise of the powers conferred on them, in passing upon the plans could require such changes in the location and structural relations of the bridge as might seem to them best calculated to secure the free and unobstructed navigation of the river. *C. 18947, Dec. 21, 1905.*

III B 1. Where the special act does not require that a plan of the bridge shall be approved by the Secretary of War, he will preferably not give his approval to any plan, since if he did so he might perhaps commit the Government to the sanction of a bridge which might prove to be an obstruction to navigation. *P. 25, 96, June, 1888.* Where, however, it was proposed to rebuild a bridge, originally constructed over the Missouri River under a special act of Congress which did not require approval of the plans, *held*, that as the later legislation in section 9 of the act of March 3, 1899 (30 Stat. 1150), requires the approval of the plans by the Chief of Engineers and the Secretary of War, as well as the consent of Congress, approval of the plans for the rebuilding of the bridge would be required. *C. 11500, Nov. 2, 1901.*

III B 2. Where a special act of Congress authorized the construction of a bridge across the Mississippi River, upon obtaining approval by the Chief of Engineers and the Secretary of War of the location and plans of the same, and the applicant, after the piers had been completed and the grade fixed, applied for the approval of the location and plans, the approval was withheld on account of the objectionable location of the bridge; and thereafter an act was passed authorizing the applicant "to maintain and operate a bridge and approaches thereto now constructed," upon the proviso, *inter alia*, that the plans and specifications should be approved by the Secretary of War and the Chief of Engineers, otherwise the act to be null and void. On the question raised as to whether it was intended that the bridge should be allowed to stand as built, except for such minor changes as could readily be made, or to make the legalization of the bridge depend upon the judgment of the War Department that the location and plans would afford reasonable facilities for navigation, *held*, that the latter view would defeat the operation of the statute; and therefore that the approval contemplated by the act was of the plans and location of the existing bridge, with such aids to navigation and minor changes as might be deemed necessary in the interests of navigation. *C. 26773, June 3, 1910.*

III B 3. Where a special statute (act of Congress), authorizing the erection of a bridge over navigable water by a railroad corporation named, provided that the bridge should not be commenced till the company should submit for approval by the Secretary of War a certain plan and design with designated particulars and specifications, *held*, that the authority of the Secretary was thus restricted, and that he could not lawfully act and approve till the *data* described were submitted. *P. 30, 29, Jan., 1889; C. 163, May, 1890.*

The application for the approval must be accompanied by the particulars specified in the act; otherwise the Secretary has no jurisdiction. Here the map and plan submitted failed to show the character of the structure, as also the full shore line and the direction and

strength of the current, and gave only partial soundings. *P. 43, 259, Oct., 1890; C. 205, 208, and 209, Oct., 1890.* Plans are insufficient as a basis for action where they do not show what the statute requires.¹ *C. 9950, Mar. 7, 1901.* Where the special act designates the kind of bridge authorized, details of the plan, etc., the Secretary of War is empowered to approve only such a bridge and such plans as comply with the statute. If he gives his approval to others, his action will be ineffectual in law, and the bridge if completed will not be a legal structure.² *C. 229, Nov., 1890; 1477, June, 1895; 1532, July, 1895; 8892, Sept. and Nov., 1900; 9950, Mar. 7, 1901; 11678, Dec. 2, 1901.*

III B 3 a. Where a special act authorizes the placing of a bridge across navigable water of the United States, by a railroad or other corporation, in addition to the plan of location and particulars required by the statute, a standing "rule" of the War Department of July 31, 1886, requires certain other evidence to be submitted to the Secretary of War, to establish the legal existence and authority of the corporation and its acceptance of the privileges and conditions granted and imposed by the act.³ *R. 53, 379, Apr., 1887; 56, 574, Sept., 1888.* In particular cases still other evidence may be essential; as in a case where there has been a consolidation of two companies, when copies of the agreement and of the enactment authorizing the consolidation, etc., should also be submitted. *R. 52, 199, May, 1887.*

III B 3 a (1). Under the rule of July 31, 1886, it has been decided by the Secretary of War that the copy of the charter or articles of incorporation of the company should be authenticated under the signature and official seal of the Secretary of State, or other proper State official, in whose office the original is on file. *Held* that a printed copy of a copy, under the certificate of the secretary of the company and its corporate seal, was not sufficient evidence. *R. 53, 32, 37, Sept. 1886.* But the fact that the company has not furnished proper evidence of its incorporation does not affect the jurisdiction of the Secretary of

¹ In practice, however, the location and plans of bridges have been approved, although the map of location failed to show all the details specified in the statute, the provisions of the statute, in this respect, being treated as directory.

² See *Hannibal & St. J. R. Co. v. Missouri River Packet Co.*, 125 U. S., 260, 263; *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 2 Fed. Rep., 285; *Gildersleeve v. New York, N. H. & H. R. Co.*, 82 id., 763; *Assante v. Charleston Bridge Co.*, 41 id., 365.

³ This rule is as follows:

Rule to be observed when application is made, pursuant to an act of Congress, for the approval by the Secretary of War of plans for a bridge, or a right of way, or other privilege.

When an act of Congress granting a privilege to an individual or a corporation contains a clause requiring the approval of the Secretary of War to certain matters of detail, the grantee will be required to establish his identity; if the grant is to a corporation, there will be required a copy of its charter or articles of incorporation, and of the minutes of the organization of the company; also extracts from the company minutes showing the names of the present officers of the company and the acceptance by the company of the provisions of the act of Congress, all properly authenticated.

The identity of the grantee having been established, and the provisions of the law having been complied with, the terms, conditions, requirements, etc., will be reduced to writing. This paper will be signed by the grantee in token of his acceptance of the conditions imposed, and will be approved by the Secretary of War, one copy thereof to be filed in the War Department and the other given the grantee.

WM. C. ENDICOTT,
Secretary of War.

War to approve plans of a bridge submitted, and the objection may be waived. *C. 447, Oct., 1894.*

III B 3 a (2). *Held* that the statement of the secretary of the company that it had accepted the provisions of the special act (or of the general act of July 5, 1884) (23 Stat. 133), was not proper evidence under the rule, but that there should be furnished a duly authenticated extract from the minutes of the company exhibiting the fact of acceptance. It should similarly be shown that the map of location and plan of bridge submitted have the approval and sanction of the company. *R. 53, 12, 163, Sept. and Oct., 1886.*

III B 3 b. Where a specific act required a bridge to have at least three channel spans "of not less than" 500 feet each in length, and it was proposed to require one of the spans to be 700 feet in length, *held* that the Secretary of War, on the recommendation of a board of engineer officers, could require a greater length of span, within reasonable limits, but could not properly require such a length of span as would be unreasonable for the locality or as would require an impossible structure. *C. 5662, Jan. 14, 1899.*

III B 3 c. Where a special act of Congress authorized a "free wagon, foot and street railway bridge" across the Arkansas River at Little Rock, Ark., and the approved plans were changed during construction and the bridge thereby weakened so that it could not be safely used for street railway purposes, *held*, on the question of whether the Secretary of War could "insist upon the terms of the charter being carried out," so that a street railway could be built to the military post, that the act did not confer on the Secretary of War any authority to so insist; that his only authority to require the bridge to be altered would be under section 18 of the river and harbor act of March 3, 1899, but that as it did not appear that the bridge was an unreasonable obstruction to navigation, no action could be taken under this act; and that the only way the requirement could be enforced would be to submit the matter to Congress for its action under the reservation in the special act of the power to repeal it or require changes in the bridge at the expense of the owners. *C. 2354, Aug. 5 and 18, 1903.*

III B 4. It is well settled that an unrestricted grant of an authority to construct a railroad from one designated point to another includes by implication the authority to bridge navigable streams *en route*, where the road can not practicably or reasonably be constructed without crossing them.¹ Thus, where, by an act of Congress of June 1, 1886, authority was given to a railway company to construct and operate a railway through the Indian Territory, from a point at or near Fort Smith to a point to be selected by the company on the northern boundary line of the Territory, *held* that the company would be authorized to bridge the Arkansas River. *P. 25, 92, June, 1888.* Similarly *held* as to bridging the same river by the Kansas City, Pittsburg & Gulf Railway Co. under the act of Congress approved February 17, 1893. *C. 1510, July, 1895; 7774, June 16, 1900.*

III B 5. An act of May 14, 1888, in authorizing the Tennessee Midland Railway Co. to bridge the Tennessee River, provided "that this act shall be null and void if the actual construction of the bridge

¹ Gould on Waters, 3d ed., sec. 129; Fall River Iron Works Co. v. Old Colony & Fall River R. R. Co., 5 Allen, 221; U. P. R. R. Co. v. Hall, 91 U. S., 343.

herein authorized be not commenced within one year and completed within three years from the date of the approval of this act." In the absence of words making *time* an essential element of the performance, legislative acts of this character, although they may designate a period within which a certain thing is to be done, are construed to be directory only and not mandatory as to time. But *held* here that the statute was mandatory and that the time specified was made of the essence of the grant, and therefore that the company, in applying for the approval by the Secretary of War of the location and plan, required by the act to be approved by him, must show that the work had been commenced within the time fixed. *P. 33, 409, July, 1889; 47, 99, May, 1891; C. 8736, Aug., 1900.*

III B 5 a. Where the act of Congress authorizing the construction of a bridge fixes the time for the completion thereof, the Secretary of War cannot grant an extension of the time. In such a case the bridge should be completed as soon as possible and application made to Congress for the necessary extension. *C. 250, Nov., 1894.*

III C. Authority granted by an act of Congress to a corporation or an individual to construct a bridge over navigable water of the United States is a franchise which can not be assigned without the permission of the grantor.¹ And the Secretary of War can not in such a case lawfully entertain an application for the approval by him of the plans of a bridge made by a party or a corporation to which the right to build the bridge has been, without the authority of Congress, transferred. *R. 49, 618, Dec., 1885; P. 31, 378, Apr., 1889; 32, 469, June, 1889; C. 17979, Sept. 1, 1905; 18990, Dec. 29, 1905.* Where a specific grant to build a bridge for a specific purpose—*i. e.* to complete its line and to accommodate the public—is made to a railroad corporation by an act of Congress conferring no power of substitution, new legislation is requisite to authorize the transfer of the franchise to another company. *R. 49, 618, supra; 630, Jan., 1886; C. 1660, Aug., 1895.*

III C 1. Where the plans were submitted and the approval of the Secretary was applied for, not by the corporation to which the authority to build the bridge had been granted by an act of Congress, but by a construction company, which, by contract, was to erect all the bridges for such corporation and to own them when completed, *held*, that the Secretary of War could not legally approve the application, the substitution of the company not having been authorized by Congress. *P. 31, 378, Apr., 1889.*

III C 1 a. Where the authority for the bridge is given in terms to the company, "its successors and assigns," it is *held* that these words, being the ordinary words of limitation of an estate granted in perpetuity to a corporation, confer no right of transfer.² There must still be specific authority of statute for the purpose, or the transfer, if assumed to be made, will be ineffectual and void. *P. 31, 378, Apr., 1889; 34, 276, Aug., 1889; C. 17979, Sept. 1, 1905; 18890, Dec. 5, 1905.*

III C 1 b. On the question whether plans for the reconstruction of a bridge submitted by the assignee of the company which received

¹ *Branch v. Jesup*, 106 U. S., 468; *Thomas v. Railroad Co.*, 101 U. S., 71.

² 18 Op. Atty. Gen., 512.

the franchise from Congress could be approved, *held* that after the plans had been approved and the bridge built the franchise should be regarded as passing with the title to the property, and that plans for the renewal, reconstruction, or repair of the bridge will be accepted from the person or corporation in actual possession or control of the property—the presumption being that the possession or control of the party in occupation is legal.¹ *C. 24818, May 20, 1909.*

III D. The bridge across the Mississippi River connecting the cities of Rock Island, Ill., and Davenport, Iowa, belongs to the United States, which has complete control of the same, subject to the right of way of the Chicago, Rock Island & Pacific Railroad Co. (under the acts of June 27, 1866, and March 2, 1867.) The bridge is both a wagon and a railroad bridge. The railroad company has no interest in or authority over the wagon way or right to dictate what use shall be made of it. The wagon way is established for the use of the United States, not for that of the public, but has been opened to the public for passage and transportation subject to conditions, one of which is that certain railroad freights shall not be conveyed over it. *Held*, that neither the railroad company nor the commanding officer of the arsenal was authorized to prevent the American Express Co. from hauling across between the two cities express matter not of the character precluded by such conditions. *P. 34, 213, July, 1889.*

III E. The "Merchants' Bridge" over the Mississippi River at St. Louis, Mo., was constructed under an act of Congress which provided for the forfeiture of all rights to maintain the bridge and of all property therein in the event of a violation of the provisions against consolidation or pooling of earnings, and that the Secretary of War "shall take possession of the same in the name and for the use of the United States" (act of Sept. 10, 1888, 25 Stat. 474), *held*, on petition for such action, that although the statute requires the Secretary of War to act in an administrative way and "without legal proceedings," the procedure should resemble that of a court of equity where remedy by mandamus or injunction is sought, and that the owners of the bridge should be called upon to show cause why the bridge should not be taken possession of as directed by the statute.² *C. 15025, July 23, 1903.*

III F. The street railway companies of Duluth, Minn., and Superior, Wis., applied for permission to construct a temporary structure of piles and pontoons across the St. Louis River between Minnesota and Wisconsin, the structure to be put on and through the ice after navigation had entirely closed and to be removed before the opening of navigation in the spring. *Held*, that the structure was not a bridge within the meaning of the legislation on the subject and that the Secretary of War had authority to grant the permission requested. *C. 705, Dec., 1894; Nov., 1895, and Nov., 1896.*

IV. The power expressly vested in the Secretary of War by section 4 of the act of September 19, 1890 (26 Stat. 426), to determine whether a bridge is an obstruction to navigation, is of a judicial nature, not

¹ See 21 Op. Atty. Gen., 293.

² After a hearing the Secretary of War decided, June 5, 1905, that no occasion had arisen for the action of the Secretary of War under the statute.

ministerial merely.¹ The law makes him the agent of the United States for the purpose and vests him with a specific discretion.² *Held*, that the power devolved pertained to him alone and could not legally be exercised by the Assistant Secretary of War.³ *C. 135, May, 1890; 14832, June 24, 1903.*

IV A. Under the act of August 11, 1888 (25 Stat. 400), it was *advised*—though the statute did not require it—that the Secretary of War, being constituted judge in the first instance, would properly give the corporation, etc., owning or controlling a bridge an opportunity to be heard, and not decide the question of obstruction or alteration upon the report of the engineer officer alone. *P. 35, 166, Sept., 1889.* But it was also *held* that the notice was sufficiently specific under the law, though it did not indicate how the proposed alteration was to be made; that the Secretary of War, indeed, was not empowered to prescribe *how* the bridge should be altered, but that the responsibility for the proper alteration was wholly upon the corporation. *P. 28, 14, Nov., 1888; 35, 265, Sept., 1889.* The act of September 19, 1890, section 4, however, amended the provision as to *notice* in the act of August 11, 1888, section 9, by requiring that the notice to be given to the person or corporation owning or controlling a bridge which obstructs navigation to so alter it as to do away with the obstruction “shall specify the changes required to be made,” such party being first given a “reasonable opportunity to be heard.” *P. 49, 72, Sept., 1891; C. 14832, June 24, 1902.*

Held, that under section 18 of the act of March 3, 1899 (30 Stat. 1151), the jurisdiction to determine whether a bridge is or is not an unreasonable obstruction to navigation is in the Secretary of War, but that the statute requires that in giving the notice “he shall specify the changes recommended by the Chief of Engineers that are required to be made,” so that in respect of specific structural changes his duty is to require such modifications to be made as have been expressly recommended by the Chief of Engineers, and he has no authority to require other or additional structural changes than those so recommended. *C. 22317, Apr. 15, 1909.*

¹ In *U. S. v. Rider*, 50 Fed. Rep., 406, it was held (by Sage, U. S. Dist. J.) that this section was unconstitutional in delegating to the Secretary of War “powers exclusively vested in Congress.” See, however, *Rider v. U. S.*, 178 U. S., 251. At the trial of this case in the circuit court there was a division of opinion, but the presiding judge charged the jury that Congress had the constitutional power to confer upon the Secretary of War the authority to determine when a bridge, such as the one in question, was an unreasonable obstruction to navigation, and on writ of error to the Supreme Court the judgment was reversed, without deciding this question, on the ground that the municipal officers controlling the bridge did not have public moneys which could lawfully be applied to the purpose and could not obtain such moneys within the time specified in the notice. In an able and exhaustive opinion by Acting Attorney General Dickenson, dated Oct. 24, 1896, it was held that this act was not an unconstitutional delegation of legislative function; that Congress is not required to consider each case of alleged obstruction, but may generally define the offense and leave the facts to be determined by a court or special tribunal. 21 Opins. Atty. Gen., 430, and authorities cited.

² *Miller v. Mayor of New York*, 109 U. S., 385, 393.

³ See XII Comp. Dec., 483; *ibid.*, 484. Where the notice purports to be from the Secretary of War it is sufficient although signed by the Assistant Secretary. *Hannibal Bridge Co. v. U. S.*, 221 U. S., 194.

IV A 1. Before the notice to alter a bridge is given, the party owning or controlling the same is entitled, under the act of 1890, section 4, to be heard *on the changes* specified in the notice as well as on the time in which they are to be made; and unless an opportunity for such hearing has been given, the party will not be liable to the penalties specified in section 5 of the said act. *C. 798, Dec., 1894; 1511, Nov., 1895; 14832, June 24, 1903.*

IV A 2. *Held*, under section 18 of the act of March 3, 1899, on the question of whether proceedings to alter a bridge could be begun prior to the time the bridge becomes an unreasonable obstruction to navigation, that under the statute this notice is to be given when the bridge "*is*" an unreasonable obstruction. *C. 14752, June 25, 1903.* Where, therefore, a bridge is not an unreasonable obstruction to navigation, the Secretary of War can not initiate proceedings for its alteration on the ground that it will obstruct navigation at some future time, whether definite or indefinite. *C. 22317, Aug. 28, 1908, and Apr. 15, 1909.*

IV A 3. With respect to the alteration of a railway bridge across Pablc Creek, Fla., it appeared that the construction, under authority of the State of Florida, of a proposed canal to connect the waters of the creek with those of the St. Johns River, would have the effect of largely increasing commerce on the creek; *held*, with regard to the question of whether, in determining the character of the alterations, this increase of commerce on the creek could properly be considered; that such increase is to be treated as a part of the public commerce in respect to the right of public navigation on this creek; that any changes required to be made in the bridge should have in view this increase as well as the commerce now existing on the creek; and that in authorizing bridges it is usual to take into consideration, not only existing commerce on the stream, but also the probable future requirements of the same. *C. 22317, Aug. 28, 1908.*

IV B. Especially in view of the fact that the giving of the notice to alter, under the act of 1890, section 4, is a proceeding preliminary and necessary to the fixing of criminal liability upon a failure to make the alteration, such notice should be strict and precise.¹ It should set forth the situation and character of the bridge so as clearly to identify it, stating the name of the owner, etc., and specify fully the change or changes "required to be made" as to height, width of span or draw opening, etc.; and it should appear from the notice, or in connection therewith, that the party has had a "reasonable opportunity to be heard." *P. 43, 431, Nov., 1890; C. 14832, June 24, 1903.*

IV C. *Held*, that the provision of the act of August 11, 1888 (25 Stat. 400), as to the proceedings to be taken against a corporation refusing after due notice under that act to alter a bridge, was repealed by that of the act of September 19, 1890, and that such corporation could not be prosecuted without a new notice under the existing statute, followed by a failure to comply. An offender can not be punished under a penal act which has expired or been repealed prior to conviction.² So, *advised* that proceedings initiated under the act of 1888 be commenced *de novo*. *P. 43, 431, Nov., 1890; 49, 72, Sept.,*

¹ "A purely statutory authority or right must be pursued in strict compliance with the terms of the statute." Bishop, Written Laws, sec. 119.

² Endlich, Interpretation of Statutes, 435.

1891. Under the act of 1890, section 4, it is made the duty of the Secretary of War to initiate proceedings (by notifying the proper district attorney) only in case of alterations, not made, of *completed bridges*; as to other obstructions, the duty to enforce the provisions of the act is devolved upon the "officers and agents" specified in section 11. *P. 52, 343, Mar., 1892.*

IV D. Where, after notice to alter a bridge, as constituting an obstruction to navigation, the bridge company owning the same has failed, and the property has passed into the hands of a *receiver*, the proper method of procuring the alteration to be made is by motion in the proper court for an order requiring the receiver to make it. *P. 37, 404, Jan., 1890.* In such a case neither the owner nor the receiver can be made personally amenable for failure to alter. *P. 60, 118, June, 1893.* A similar proceeding is to be pursued where a receiver has been appointed before notice or before the obstruction was developed. Thus where a bridge, on the line of a railroad, which had been placed under receivers, was discovered to be an obstruction to navigation because of having no draw, *advised* that the Secretary of War apply to the Attorney General to have the case brought by the proper motion to the attention of the court by which the receivers were appointed, whose duty it then would be to order the receivers to make the alteration out of the income accruing from the operation of the road.¹ And *held* that it would not be necessary to notify the receiver as such, since without the order of the court he could not legally incur the requisite expense for the purpose.² *P. 60, 118, supra; 62, 55, Oct., 1893; 64, 399, Apr., 1894.*

IV E. Where the plans of a bridge had been approved, under section 7 of the act of September 19, 1890 (26 Stat. 454), without reserving the right to require changes, and as it was proposed, in view of the widening of the river under authority of Congress, to serve notice on the bridge owner to alter the same, *held* that sections 4 and 5 of the same act vested the Secretary of War with jurisdiction in the matter of requiring changes in any bridge "now constructed or which may be hereafter constructed over any navigable waterway of the United States," so that such bridge, when altered, may not be "an unreasonable obstruction to the free navigation of such waters," and that under the combined operation of the two provisions the approval, although not reserving the right, was, nevertheless, subject to such future alterations in the bridge as might be required to render navigation through it reasonably free, easy, and unobstructed.³ *C. 27747, Feb. 13, 1911.*

IV F. Where a bridge has been reported an unreasonable obstruction to navigation the Secretary of War may proceed under section 4 of the act of September 19, 1890, to give the owners thereof a hearing with a view to notifying them to make the necessary alterations. But if in the meantime the owners waive hearing and notice and submit plans of alterations, the Secretary may approve the same; and his approval will in effect prescribe that the bridge be altered as indicated by the plans. This procedure has been followed in a number of cases. *C. 1157, Mar., 1895; 24, 818, May 7, 1909.*

¹ See *U. S. v. St. Louis, A. & T. R. Co.*, 43 Fed. Rep., 414.

² *Cowdrey v. Galveston, etc.*, R. Co., 93 U. S., 352.

³ See opinion of the Attorney General dated June 9, 1911 (29 Op., 139, 149).

IV G. The acts of July 5, 1884, chapter 229, section 8, and August 11, 1888, chapter 860, section 9, in providing for the removal of obstructions to navigation caused by *bridges*, by requiring their alteration, etc., do not empower the Secretary of War to resort to military force to effect the purpose. They leave the execution of their provisions to the law officers and the courts. They make it the duty of the Secretary of War, whenever the owners or responsible parties, after having been notified to do so, neglect to so alter a bridge as to abate the obstruction, to apprise the Attorney General, who is thereupon required to initiate the proceedings specified in the statute. *P. 42 85, July, 1890.*

IV H. The department of public works of the city of New York requested that the necessary steps be taken to permit that department to close the drawbridge across Harlem River at Madison Avenue for not to exceed two weeks to make needed repairs. *Remarkd* that there is no statute of the United States which in terms empowers the Secretary of War to authorize the closing of a drawbridge during its repair, but recommended that the applicant be advised that no steps would be taken by the War Department in regard to the bridge as an obstruction to navigation during the time necessary for its repair. *C. 3299, June, 1897.*

V. Section 10 of the act of March 3, 1899 (30 Stat. 1151) makes it unlawful to construct any wharf, pier, etc., in any navigable water of the United States outside established harbor lines or where none have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War, etc. A permit under this statute confers on the grantee no right or franchise for the structure or interest in the shore or bed of the stream where it is to be built, but simply makes the authority required therein a condition precedent to the exercise of such right as the applicant may have with respect to its effect on commerce and navigation.¹ It can not in any sense be regarded as vesting in the grantee any power to avoid or contravene State and local laws or individual privileges and immunities held by other parties thereunder. *C. 8360, June, 1900; 28869, Aug. 23, 1911; 29359, Jan. 9, 1912.* The jurisdiction to approve plans for structures in navigable waters under this section is not vested in the Secretary of War alone but in the Secretary of War and the Chief of Engineers, each of whom is charged in the statute with an independent exercise of discretion. *Held*, therefore, that a permit can not lawfully issue until the Chief of Engineers has approved or recommended the proposed works. *C. 21193, Feb. 12, 1907.*

V A. *Held* that section 10 of the act of March 3, 1899 (30 Stat. 1151), does not limit the discretion of the Secretary of War as to the character of the permit which he may issue under the authority conferred therein; and therefore the permission may be formal as to piers, wharves, etc., or by way of letter, as to booms, ferry cables, pipe lines, etc. (*C. 14890, June 30, 1903*), or by way of waiver of objections. *C. 27899, Nov. 7, 1911.* Further *held*, as to the taking of water from the Rio Grande, that the permit may be revocable at will absolutely; may be limited either as to amount or by the condition of the river or the season of the year; and may be so worded as to impose notice, upon all subtakers or assignees, of the restrictions of

¹ *Cummings v. Chicago*, 188 U. S. 410.

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the permit. *C. 27899, Nov. 7 and 8, 1911.* Held, further, that the riparian owners' rights in regard to the use of the navigable stream whatever they may be under State law, are subject to the paramount authority of the United States to regulate the matter, so that any withdrawal may be prohibited which would injure the navigable capacity of the stream. *C. 27899, Nov. 7 and 8, 1911.*

V B. Held, with reference to the question of whether the Secretary of War may legally authorize the Chief of Engineers to permit the placing of log booms, fish weirs, and fish traps in navigable waters of the United States, that while it is well settled that discretionary duties are not a proper subject of delegation, the action proposed should not be regarded as a delegation of discretionary duties, but as the approval by the Secretary of War of such structures in advance, charging the Chief of Engineers with the duty of communicating to the applicants the fact that the Secretary of War has approved the placing of the structures in the navigable waters. *C. 16336, May 13, 1904.* Similarly held, with reference to the extension of the authority to include routine applications for permits for excavating approaches to wharves; dredging to obtain sand or gravel for commercial purposes, and to deposit dredged materials under the usual conditions for such deposits; placing of wires, cables, or pipe lines; removal of logs, etc. *C. 16336, Nov. 19, 1910, and Feb. 18, 1911; 25049, July 5, 1910.* Where, however, it was proposed to authorize the local engineer officer to permit the "driving of piles, or the establishment of other structures for mooring purposes, in Newport Harbor, in such manner and at such points as, in his opinion, will not seriously interfere with navigation," held that the duty imposed on the Secretary of War by the statute is discretionary, not ministerial, and can not legally be delegated.¹ *C. 7767, Mar. 7 and 15, 1900.*

V C. On the protest against granting permission to the Union Oil Co. for a pipe line in the Pacific Ocean at Santa Barbara, Cal., on the ground that a certain amount of oil would be spilled in transfer to the pipe line and would later reach shore, resulting in injury to the bathing facilities for which Santa Barbara is famous, held that section 10 of the act of March 3, 1899 (30 Stat. 1151), under authority of which the permit would be given, does not give to any applicant the franchise for the proposed structure but presupposes that the applicant has a franchise for the same; and in order that the structure may not unreasonably obstruct navigation, forbids its erection except upon plans to be approved by the Chief of Engineers and the Secretary of War; and that the jurisdiction conferred on the Chief of Engineers and the Secretary of War should be exercised solely with reference to the interests committed to their charge, i. e., the protection of the navigable waters of the United States from unreasonable obstruction to commerce.² *C. 24527, Feb. 25, 1909.* Held, how-

¹ *Birdsall v. Clark et al.* (73 N. Y., 76); *Metchem on Public Officers*, sec. 567; *Throop's Public Officers*, sec. 672.

² This view was concurred in by the Attorney General in 27 Op. Atty. Gen., 284. See also *Montgomery v. Portland* (190 U. S., 89), where it was held that "under existing enactments the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a State is not complete and absolute without the concurrent or joint assent of both the Federal Government and the State government," citing *Cummings v. City of Chicago* (188 U. S., 410), and *Willamette Bridge Co. v. Hatch* (125 U. S., 1). See also *North Shore Boom Co. v. Nicomen Boom Co.* (212 U. S., 406), and *Gring v. Ives* (222 U. S., 365).

ever; in the case of an application for permission to place an advertising sign off the coast at Atlantic City by an applicant who was not an owner of shore property, that the Secretary of War might properly require, as a condition precedent to granting the permission, a showing that the applicant was authorized to construct the same. *C. 26678, May 9, 1910.*

V C 1. With reference to the question of the jurisdiction of the Commissioners of the District of Columbia under the wharf act of March 3, 1899 (30 Stat. 1377), *held* that this jurisdiction is to be exercised subject to the authority conferred on the Secretary of War and the Chief of Engineers by the general legislation of the act of March 3, 1899, *supra*, so that all applications which contemplate work outside the harbor lines should be submitted for the recommendation of the Chief of Engineers and the authorization of the Secretary of War. *C. 13900, May, 27, 1903.*

V D. *Held* that under section 3 of the river and harbor appropriation act of July 13, 1892 (27 Stat. 88), the Secretary of War was empowered to authorize the laying of a water main across the bed of the channel of any navigable water of the United States. *P. 65, 352, June, 1894.*

V D 1. Upon an application by the City of Boston to the Secretary of War for a license to construct and maintain siphons for water pipes at Warren Bridge in the waters of Charles River, *held* that under the authority given him by the river and harbor act of 1888 to require the removal of obstructions to free navigation, at bridges, the Secretary might properly grant such a license as a form of assent to the construction as not likely to interfere with navigation. *P. 29, 343, Jan., 1889.*

V D 2. The construction, without the authority of the Secretary of War, of *wiers* in a harbor which is navigable water of the United States outside of established harbor lines (or where there are no harbor lines established) is, under section 7, act of September 19, 1890 (26 Stat. 454), unlawful when the same will be detrimental to navigation. And whether or not the persons who constructed such weirs had any license from the town is immaterial. *P. 53, 45, Apr., 1892.*

V D 3. A fish weir so constructed as in a measure to obstruct the navigation of navigable waters can not be legally placed in such waters without the authority of the Secretary of War, who, by section 7, act of September 19, 1890, is empowered to grant permission for the purpose. And so of a boom desired to be placed in a navigable river. *P. 58, 347, Mar., 1893.*

V E. The act of August 17, 1894 (28 Stat. 338), provides (sec. 6) that "it shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, * * * or any other matter of any kind other than that flowing from streets, sewers; and passing therefrom in a liquid state, in the waters of any harbor or river of the United States for the improvement of which money has been appropriated by Congress elsewhere than within the limits defined and permitted by the Secretary of War." And any and every such act is made a misdemeanor punishable by fine and imprisonment, etc. This statute prohibits the discharging or depositing of matter "in the waters of any harbor or river for the improvement of which money has been appropriated by Congress." As the statute is

a penal one, and therefore subject to the rule of strict construction, this prohibition should not be construed to extend to the tributaries of such waters, notwithstanding the pollution of the tributaries would result in injury to said waters. *C. 581, Oct., 1894; 21290, Nov. 14, 1907.*

V E 1. *Held* that the prohibition, by section 6, act of September 19, 1890 (26 Stat. 453), of the dumping of ballast could not legally be enforced in New York Harbor beyond the 3-mile limit.¹ *P. 51, 154, Dec., 1891; C. 21290, Mar. 14, 1907.*

V E 2. *Held*, under section 3 of the act of July 13, 1892 (27 Stat. 88), that the dumping, in Lake Michigan opposite Chicago, of material from the Chicago Drainage Canal so as to cause shoaling, would be a violation of the section, the locality being regarded as a "roadstead" within the meaning of the statute; and that the Secretary of War could legally designate limits outside which dredgings might be deposited in the waters of the lake. *C. 1537, July 24, 1895.*

V E 3. On the question raised as to the authority of the Secretary of War, under the act of June 29, 1888 (25 Stat. 209), as amended by the act of August 18, 1894 (28 Stat. 338), which forbids deposits, except from sewers in liquid state, in the tidal waters of the harbor of New York or its adjacent or tributary waters elsewhere than as designated by the supervisor of the harbor under the direction of the Secretary of War, to prevent the dumping of garbage where it would be liable to be washed ashore along the New Jersey coast, *held* that while police jurisdiction is ordinarily confined within the 3-mile limit, many States assume a wider zone in defining offenses against their revenue laws, and it would seem that they might with equal propriety do so for the protection of their harbors; that by the above legislation Congress intended to conserve the sanitation of the harbor and of the adjacent coast; and that it would be competent for the supervisor of the harbor, with the approval of the Secretary of War, to designate a place of deposit beyond the 3-mile limit at a point sufficiently remote to insure not only the protection of the harbor against obstructions to navigation but also to conserve the sanitation of the adjacent coast. *C. 20031, July 11, 1906.*

V F. No executive department of the Government can give private parties the exclusive privilege of harvesting ice from any part of a navigable river of the United States. *C. 1817, Nov., 1895.*

V G. With reference to the threatened removal, under the authority of the State of Illinois, of certain State dams the removal of which would modify the capacity of the Illinois River, a navigable water of the United States, *held*, on the question whether such threatened removal could be prevented, that under section 10 of the act of March 3, 1899 (30 Stat. 1151), such removal would be unlawful without the proper authorization of the Secretary of War, upon the favorable recommendation of the Chief of Engineers. *C. 14235, Mar. 25, 1903.*

V H. The diversion of water from the Niagara River above the falls was regulated, prior to the ratification of the treaty of January 11, 1909 (36 Stat. pt. 2, p. 2448), by the act of June 29, 1906 (34 Stat. 626), which was extended in its operation by joint resolution of March 3, 1909 (35 Stat. 1169). The act, as extended, expired by

¹ Compare the concurring opinion of the Attorney General in 20 Op. 293.

its own limitation June 29, 1911.¹ *Held* that the treaty of January 11, 1909 (*supra*), being of later date and of precisely equal obligatory force, replaces the provisions of the act of June 29, 1906, in all incidents in which it conflicts with said act; that the licenses given under said act will expire, each in accordance with its terms, on June 29, 1911, after which any action in respect to the issue of new licenses will have to be regulated by article 5 of said treaty of January 11, 1909; and in respect to the appointment of commissioners under the treaty that the requirements of said treaty were fully operative, and no further legislation would be necessary to warrant the appointments, provision having been made by the act of June 25, 1910 (36 Stat. 766), for the expenses of commission incurred under the treaty for the fiscal year ending June 30, 1911. *C. 19094, Jan. 11, 1911.*

Held, under the act of June 29, 1906 (34 Stat. 626), forbidding the diversion of water from the Niagara River except as authorized therein, that in respect to the withdrawal of water by the city of Lockport, N. Y., for domestic and sanitary purposes it was questionable whether the proviso of said act, that the prohibition should not apply to diversion for "sanitary or domestic purposes, or for navigation, the amount of which may be fixed from time to time by the Congress of the United States or by the Secretary of War under its direction," the Secretary of War could not authorize such diversion except in pursuance of appropriate enabling legislation.² *Held*, however, that permission for the necessary intake could be given under the act of March 3, 1899, pending the obtaining of such legislation. *C. 20607, Oct. 25, 1906.*

VI. On the general question of the proper location of harbor lines, *held*; that they should be kept as near to the shore as the reasonable demands of navigation, present or prospective, may require, since when they are once established and reclamation work and structures have been started in rear of the same, it will be exceedingly difficult to afterwards move the lines farther toward the shore across the existing structures. *C. 28243, Apr. 29, 1911.*

VI A. *Held*, under section 12 of the act of September 19, 1890 (26 Stat. 455), authorizing the Secretary of War to establish harbor lines, that, in establishing a harbor line in the harbor of Bridgeport, Conn., he was authorized to prescribe regulations under which the littoral owners (who, by the laws of Connecticut, have a right of property in the flats on their fronts, and may wharf or dock out to the navigable channel so as to avail themselves of the use of it) should have their vested rights recognized and protected; that while he might, for the protection of navigation, regulate their building out to the channel, he could not prohibit their doing so, or condemn, or deprive them of, their property. But *held*, that his authority for establishing a harbor line—which consists in locating an imaginary line beyond which wharves, etc., shall not be extended or deposits dumped—could be exercised only so far as necessary for the protection of the navigable channel as an interstate waterway, and not to protect mere local traffic. *P. 52, 211, Feb., 1892; 51, 132, Dec., 1891.*

¹ Provisions of act of June 29, 1906, reenacted and extended to Mar. 1, 1912 (37 Stat. 43).

² The Secretary of War held that the exception in the said act of June 29, 1906, referred "as well to authority previously as to that which may be conferred by subsequent statute," and directed that the necessary permit be issued.

VI A 1. With reference to the establishment of harbor lines in Sheepshead and Jamaica Bays, on question raised as to the legal authority of the United States to establish harbor lines in navigable waters below high-water mark at points where the same are not navigable in fact, *held*, that the authority of the United States to improve navigable waters is not limited to the parts of such waters which are navigable in fact, but extends to all parts of a navigable waterway, so that new channels may be dredged, or the erection of structures prevented which would interfere with the navigable waterway as a whole; and that any title of a State or of a private grantee to submerged areas or to tide lands below high-water mark would be held subordinate to the authority of the United States to take and use the same, without compensation to the owners, for any purpose in aid of navigation; and that therefore there could be no question of the authority to approve harbor lines as recommended, if regarded as reasonably necessary for the preservation and protection of the harbor.¹ *C. 28243, Apr. 29, 1911.* *Held*, further, on the question whether the lines recommended were reasonably necessary for the protection of the harbor, that the fact that the lines had been recommended by the United States Harbor Line Board, after extended inquiry, in connection with the application of the local dock commission for their establishment on the lines proposed, might properly be regarded as establishing this point. *C. 28243, Apr. 29, 1911.*

VI A 2. *Held*, that the fact that harbor lines had been established in particular waters would not prevent the Secretary of War from re-establishing them along different lines, where such action is regarded as essential to the preservation and protection of the harbor.² *C. 4557, July 9, 1898; 5097, Oct. 8, 1898; 5238, Nov. 3, 1898.*

VI B. *Held* that the river and harbor act of August 11, 1888, section 12, did not make the approval of the Secretary of War essential to the establishment by a State of harbor lines on its internal navigable waters, and therefore that, until the United States exercises control in the manner provided for by section 12 of said act, the State of Wisconsin was empowered, through the municipality of Duluth, to change and regulate the harbor lines of Duluth Harbor without such approval.³ *P. 33, 308, July, 1889.*

VII. The river and harbor act of June 14, 1880 (21 Stat. 180), makes it the duty of the Secretary of War, on being satisfied that a *sunken vessel* obstructs navigation, to give 30 days' notice, to all persons interested in the vessel or cargo, of his purpose to cause the same to

¹ See *Philadelphia Co. v. Stimson* (223 U. S., 605), where the court held, with reference to the change by the Secretary of War in 1907 of the harbor lines in the back channel of the Ohio River at Brunot's Island so as to make the line coincide with the actual high-water mark, no improvements having been made since the line was originally established in 1895, that such change was within the authority of the Secretary of War; that the title to the soil under navigable waters was "subject to the authority of Congress under the Constitution of the United States"; and that "the exercise of this power could not be fettered by any grant made by the State of the soil which formed the bed of the river or by any authority conferred by the State for the creation of obstructions to its navigation."

² See *Philadelphia Co. v. Stimson* (223 U. S., 605), referred to in note to VI A 1, *ante*, in which the court said: "That officer (the Secretary of War) did not exhaust his authority in laying the lines first established in 1895, but was entitled to change them, as he did change them in 1907, in order more fully to preserve the river from obstruction."

³ See *County of Mobile v. Kimball*, 102 U. S., 691; and *Gring v. Ives*, 222 U. S., 365.

be removed unless removed by the persons interested as soon thereafter as practicable, before himself proceeding to take measures for its removal under the act. If the removal be effected by the Secretary of War, the act requires that the vessel and cargo shall be sold at auction and the proceeds deposited in the Treasury. Under this legislation—especially in view of the fact that the act authorizes the taking possession of the property of private individuals and the disposing of it without compensation to the owners—held that the notice should be strictly given to all interested, the owners of the cargo as well as the vessel, unless indeed such notice were waived, in which case the waiver should be definite and express and joined in by all the interested parties. *P. 35, 466, Oct., 1889; C. 13444, Oct. 29, 1902.*

VII A. In view of the provisions of section 20 of the act of March 3, 1899 (30 Stat. 1154), relating to the removal of sunken or grounded craft and vesting authority in the "Secretary of War or any agent of the United States to whom the Secretary of War may delegate proper authority," held that under the authority to delegate thus expressly conferred on the Secretary of War he could legally delegate to the officers of the Corps of Engineers in local charge the authority to take the necessary steps to remove or destroy any sunken craft which obstructs the navigation of any Government canal, lock, or navigable waterway. *C. 17418, Jan. 20, 1905, Apr. 26, 1910.*

VII B. Where derelict articles—wrecks for example—are encountered by officers of the Engineer Corps, as obstructions to the improvement of rivers, harbors, etc., required by Congress (in the exercise of its power to regulate commerce) to be cleared and improved, it will be legal and proper for such officers to remove such obstructions in the most effectual manner. If the property is not actually abandoned and is valuable, it will in general be expedient first to give notice to the owners (personally if practicable, or, if not, through the newspapers) themselves to make the removal within a certain reasonable time.¹ *R. 36, 569, July 1875; C. 10628, June 10, 1901.*

VII B 1. Held, with reference to the question of the authority of the War Department to permit the removal of sunken logs from the Neches River, Tex., under section 19 of the act of March 3, 1899, that this section is not understood to assert a property right in the United States to sunken wrecks, etc., except as such right may arise from the taking possession of abandoned property; that the statute recognizes the right of the owner of the obstruction to remove the same promptly; but that if he fails to do so it will be treated as abandoned and the property applied *pro tanto* to the payment of the cost of removal; and that there would be no legal objection to granting the permission applied for in respect to such logs as were abandoned, or to entering into a contract for their removal, upon the provision that the logs

¹ See sec. 4 of act of June 14, 1880 (1 Sup. R. S., 296), which provides for the removal of sunken wrecks and prescribes the giving of such notice. Also, later acts of Aug. 2, 1882 (*id.*, 369); Sept. 19, 1890 (*id.*, 802); and sec. 15 of act of Mar. 3, 1899 (30 Stat. 1152).

In an opinion of the Attorney General of May 24, 1877 (15 Opins., 284), it is held that the Secretary of War, where authorized by an appropriation act to improve the navigation of a navigable stream, may cause to be removed wrecks, not yet abandoned but still private property, if he considers them obstructions to navigation. And see his later opinion of April 27, 1880 (16 Opins., 479) (*C. 12081, Oct. 1, 1902, 17329, July 6, 1905*), as to the authority of the United States to improve navigable rivers to the disregard of individual rights of property in the soil of the bed.

should become the property of the contractor. *C. 14259, June 12, 1906.*

VII B 2. Where a boat which had been left by its owner anchored or tied up was sunk by carelessness of the owner, on the question whether the burden of removal rests on the United States, upon the owner by whose carelessness it was sunk, or upon the city in the service of which it was *held* that, under the circumstances, the War Department should not remove the wreck, but that the burden of its removal rests on the owner. *C. 10878, July 22, 1901.*

VII B 3. On the application of a transportation company for the removal of the wreck of a steamship belonging to said company, which sank near the wharves of the company, accompanied by evidence of the abandonment of the same by the company and by the underwriters, *held*, with reference to the question of whether the company or the underwriters could be required to remove the wreck, that the statute does not impose such a duty upon the owners or upon the underwriters of the vessel; that so long as it is not abandoned it makes it the duty of the owners to use due precaution to prevent its being a menace to navigation; but that it recognizes the right to abandon the wreck without further liability on account of the same; and that in the event of its abandonment, if it be such menace as the statute contemplates, it should be removed under the provisions of the statute. *C. 18824, Nov. 14, 1905.*

VII C. Where a contract was about to be made with a civilian for the removal, from a harbor channel, of certain wrecks, not known to be fully abandoned (and directed by act of Congress to be caused to be removed by the Secretary of War), and it was proposed by the engineer officer in charge to stipulate in the contract that the wrecks when removed should belong to the contractor, *held* that this could not properly be done, the United States having no property in such wrecks (the same not being Government vessels), but simply a right to remove them as constituting obstructions to commerce between the States. *R. 43, 284, Apr., 1880.*

VII C 1. Section 19 of the river and harbor act of March 3, 1899 (30 Stat. 1154), provides that "whenever the navigation of any river, lake * * * shall be obstructed or endangered by any sunken vessel * * * or other similar obstruction, and such obstruction has existed for a longer period than thirty days * * * the sunken vessel * * * shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of War at his discretion without liability for any damage to the owners of the same." In carrying on the work of improving the Black River, Ark., in August, 1909, a steamer which had been sunk a year before was removed by the Government, subsequently the owner requested the return of the machinery in the steamer. *Recommended* that the owner be informed that the Secretary of War would direct the machinery to be turned over to the owner on payment of \$150, the cost of the removal. *C. 7077, Sept. 22, 1899.*

VII C 2. Under the provisions of section 20 of the act of March 3, 1899 (30 Stat. 1154), an agreement was made for the removal from the channel between Lakes Superior and Huron of the steamer *John B. Ketcham, 2d*, which sank in the channel completely obstructing navigation, the contract calling for the swinging of the vessel free

from the channel. Upon the completion of this work the wrecking company raised the vessel for the owners and took it to Port Huron, Mich., for the stipulated consideration, and certain expenses were incurred for repairs to the vessel. Upon the demand of the wrecking company for the payment of the agreed price for services rendered in clearing the channel, it was advised that payment would be made if the vessel was turned over to the Engineer Department to be proceeded against under the statute. *Held* that as the services in raising the vessel and the expenses of the necessary repairs were incurred in saving the vessel for the benefit of all interests, they should be regarded as having the priority over the claim of the Government under the statute for swinging her free from the channel, by analogy to the rule that "bottomry bonds take priority in the inverse order of their execution,"¹ and that as the summary remedy given by the statute requires the entire proceeds to be turned over to the Government, instead of resorting to this remedy proceedings in admiralty should be taken to enforce the lien of the Government, in which proceedings the priority of the respective liens could be determined; and *advised* that payment be not made until the vessel shall have been returned to the United States and suit instituted by the Department of Justice.² *C. 28032, Jan. 10 and Mar. 23, 1911.* *Held*, also, in regard to the contention that the statute was unconstitutional because it requires the entire proceeds to be turned over to the Government regardless of whether they exceed the amount expended by the Government, that this procedure is to be resorted to only if the owners decline to take the vessel, upon satisfying the lien of the Government, and that by so declining the owners should be regarded as electing to abandon the vessel to the United States rather than pay the charges against her. *C. 28032, Jan. 10, 1911.* *Held*, further, after the vessel had been sold in admiralty proceedings in Canada, on notice to the United States, without bringing sufficient to satisfy the claim of the Government after the payment of liens entitled to priority that the further retention of the contract price for swinging the vessel free from the channel would not be justified, but that interest thereon should not be paid.³ *C. 28032, Oct. 30, 1911.*

VII D. On the application of a transportation company for the removal of the wreck of a steamship of said company, under the act of March 3, 1899 (30 Stat. 1154), and it appearing that the wreck was not located where it was a menace to general navigation, but was simply an obstruction to the approach to the wharves of said company, requiring greater care in approaching the same, *held* that the Secretary of War might properly decide that the wreck was not such a one as it was incumbent upon the department to remove under the statute in question, so that if its removal was required in the inter-

¹ 36 Cyc., 201.

² These views were concurred in by the Attorney General in his opinion dated Feb. 28, 1911.

³ In an opinion of the Attorney General, dated Nov. 22, 1911, it was held that under the facts, as they then appeared, it was no longer proper to require the wrecking company, as a condition precedent to the payment of the contract price, to bring the vessel within the jurisdiction of the United States, and that the contract price should be paid, but that the statute under which the claim arose made no provision for the payment of interest.

ests of the applicant the expense should be borne by it. *C. 18824, Nov. 14, 1905.*

VIII. The river and harbor act of Aug. 18, 1894 (28 Stat. 338), section 4, makes it the duty of the Secretary of War to prescribe rules and regulations for the use and navigation of all "canals and similar works of navigation," owned, operated, or maintained by the United States, etc., and also makes the violation of any of these regulations a misdemeanor punishable in the proper United States court. *Held* that this section does not apply in general to natural waterways, though their navigability has been improved and is being maintained by the Government. *C. 424, Oct., 1894; 1047, Mar., 1895; 2919, Feb., 1897; 3449, Aug., 1897; 12683, June 3, 1902.*

IX. By legislation prior to 1890, Congress had exercised some control over the subject of obstructions to navigation, principally with reference to bridges over navigable streams. But by the river and harbor appropriation act of September 19, 1890 (26 Stat. 454), a general authority over the subject was assumed,¹ and it was enacted, in section 10, as follows: "That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction is hereby prohibited." The act does not make it the duty of the Secretary of War to enforce this provision in all cases, but, in sections 4, 6, 7, 8, and 12, it invests him with specific authority with regard to certain kinds of obstructions, as, to take precautions against obstruction by bridges and to approve the location of bridges, etc.; to give permits for making deposits of substances or materials in navigable waters; to permit the erection of wharves, dams, breakwaters, and the like; to break up and remove wrecks, etc.; and to cause the establishing of harbor lines under regulations prescribed by him. But the prosecution and punishment of individuals creating obstructions without proper permit or authority of law is left by the act to the law officers and the courts. *P. 63, 365, Feb., 1894.*

IX A. There is no law authorizing the Secretary of War to cause obstructions to be removed from navigable waters, except as he may direct his subordinates, charged with river or harbor improvement, etc., to remove them where appropriations exist for the purpose. The act of September 19, 1890 (26 Stat. 454), makes it unlawful to place obstructions in navigable waters without the permission of the Secretary of War, but when the law is violated it is not for the Secretary to initiate proceedings but for the legal and judicial authorities under sections 10 and 11 of the act, to take action by prosecution and injunction. *P. 52, 343, Mar., 1892; 63, 365, Feb., 1894.*

IX A 1. Under the provisions of section 10 of the act of September 19, 1890, it becomes not only unlawful but a criminal act to obstruct the navigation of navigable waters of the United States. Thus, where a railroad company, under color of authority from certain State officials, proceeded to close for a month, pending the repairing of one of its bridges, the passage up and down an interstate navigable stream, so that in fact the United States was prevented from transporting upon the same a gun carriage manufactured within the State for the

¹ See sections 9 to 20, inclusive, of the river and harbor act of Mar. 3, 1899 (30 Stat. 1151), for existing statutes on the subject.

Government, *held* that the assumption of jurisdiction over such waters by the United States through the legislation of Congress had displaced the jurisdiction previously exercised by the State to authorize such obstructions; and that under this legislation the river was a public highway, open, not only to the United States for public purposes, but to all private individuals whatsoever, and could not lawfully be closed or interrupted; and *advised* that the proper United States district attorney be communicated with, with a view to the initiation of proceedings under section 11 of the act. *P. 64, 210, Mar., 1894.*

IX A 2. The act of June 23, 1910 (36 Stat. 593), makes it unlawful to dump refuse material in Lake Michigan opposite Cook County at any point within 8 miles of the shore, except under certain conditions; but imposes no duty on the Engineer Department with respect to marking the 8-mile limit nor with respect to the enforcement of the statute. On the question as to whether the expense of marking; placing, and maintaining buoys, including patrolling, could properly be charged to river and harbor appropriations, *held* that the act being penal in its nature, its provisions are supposed to be enforced, like those of other penal statutes of the United States, by the matter being brought to the attention of the proper United States attorney and the offender brought to trial for violation of the statute; and that no appropriation under the control of the Engineer Department could be applied to the purposes in question. *C. 27101, Aug. 3, 1910.*

IX B. With reference to the question of the right of the Secretary of War to confer on certain officers of the Charlestown Navy Yard the authority to make arrests, etc., under section 17 of the river and harbor act of March 3, 1899 (30 Stat. 1152), for violations of sections 14 and 15 of that act, *held* that the statute confers on certain officers the authority to swear out processes and make arrests but does not empower the Secretary of War to authorize arrests by other officials; and that the general duty of enforcing the law is in the Department of Justice—the statute expressly making it the duty of United States attorneys to vigorously prosecute all offenders against the law whenever requested to do so by the Secretary of War or by any of the officials authorized to make arrests. *C. 15182, Aug. 29, 1903.*

IX C. *Held*; that under the acts appropriating money for the improvement of the Columbia River, to be expended under the direction of the Secretary of War, the Secretary, while authorized to make regulations for the prosecution and protection of the works of improvement, was not empowered to require, by such regulations, the removal of fish traps and pound nets as obstructions to navigation; that it was not within the province of the Secretary of War to determine what is or what may become an obstruction to navigation, and cause to be removed the one or prohibited the other by a mere order or regulation, in the absence of authority given by specific legislation of Congress. *R. 53, 257, Apr., 1887.*

X A. When Congress, in the exercise of its exclusive power to direct how the public money shall be employed, has appropriated a certain sum, to be devoted, without exceptions or provisos, to a certain specific internal improvement, it devolves upon the executive department of the Government, charged as it is with the execution of the laws enacted by the legislative, to proceed with the work

under the appropriation, without entertaining any question as to the expediency of the expenditure. Thus where Congress had made in general terms an appropriation of a specific amount for improving a certain river, *advised* that it was for the officer charged with the improvement simply to do the work, without delaying to raise or consider questions or claims of title to the land, etc., to be affected by the improvement; such matters being quite beyond the province of an executive official under the circumstances.¹ *R. 43, 101, Nov., 1879; C. 21814, July 23, 1907; 22703, Feb. 5, 1908.*

X A 1. *Held*, that the permissive words in the river and harbor act of June 13, 1902 (32 Stat. 342), viz, that the "Secretary of War is authorized to cause to be built a suitable dredge for use in the improvement of the harbors upon Lake Erie," like the corresponding expressions "it shall be lawful" or "is authorized and empowered," should be regarded as equivalent to the word "may," and as mandatory in character, and that the authority so conferred should be carried into effect.² *C. 2473, Jan. 2, 1903.* Similarly *held*, with respect to the proviso in the appropriation made by the act of March 2, 1907 (34 Stat. 1087), for the improvement of Mobile Harbor, "that so much as may be necessary may be expended in the construction of a dredge for said harbor," that it is a peculiarity of river and harbor legislation that the duties are imposed by the use of the word "may" which, in the majority of such enactments, has a mandatory signification. *C. 24027, Oct. 30, 1908.* Similarly *held*, with respect to the provision in the amendatory act of May 28, 1908 (35 Stat. 430), that the sum so set apart, except the amount expended for the plans of the dredge, "may" be used in the work of dredging. *C. 24027, Oct. 30, 1908.* *Held*, however, that in the last clause of the act of 1908, "that the Secretary of War may, in his discretion, enter into contracts for the work," the context clearly deprives the word "may" of the obligatory character. *C. 24027, Oct. 30, 1908.*

X A 2. Section 13 of the river and harbor act of August 18, 1894 (28 Stat. 338), provides "that after the regular or formal report on any examination, survey, project, or work under way or proposed is submitted, no supplemental or additional report or estimate for the same fiscal year shall be made unless ordered by a resolution of Congress." To construe this language strictly would lead to two conclusions which it is improbable Congress intended, to wit: (1) Additional estimates for work which has become necessary in order to preserve that already done or being done during the fiscal year, can not be made. (2) The Senate and House of Representatives, acting separately, can not call for information on this subject. *Held*, therefore, that the section should be liberally construed as follows: That it prohibits additional estimates (unless ordered by resolution of Congress), *extending* the work already estimated for; and that the "resolution of Congress" referred to includes separate resolutions of either House. *C. 2148, Mar., 1896.*

X A 3. Where authority was given, by a proviso in the appropriation for a channel through Sabine Lake, to select a longer route near the west shore and to connect the same with the Port Arthur Canal,

¹ See 24 Op. Atty. Gen., 594.

² This view was concurred in by the Attorney General in his opinion dated Feb. 28, 1903 (24 Op. Atty. Gen., 594.)

upon a further proviso for the free navigation of said canal, *held*, that as the office of a proviso is not to enlarge or extend the act of which it is a part but rather to limit or restrict the language employed,¹ the route in question could not be selected in the event of the refusal of the owners of said canal to allow the free navigation thereof. *C. 13394, Oct. 7, 1902.*

X B 1. Work done by the United States upon rivers and harbors is civil work. The fact that military officers are assigned to duty on it does not make it a branch of the military service. The work itself does not relate to military matters or in any way affect the military establishment of the Government. It is paid for, not out of any appropriation for the military establishment, but out of a separate civil appropriation for the improvement of rivers and harbors. *Held*, therefore, that paragraph 808, Army Regulations of 1889, was not applicable to civilians employed in the improvements of rivers and harbors, said civilians not being "in the employ of any branch of the military service." *C. 147, Aug., 1894.* It was the intention, however, to have paragraph 569, Army Regulations of 1895 (see 648 of 1901), apply to river and harbor work; but whether it applies or not the Secretary of War has discretionary power to require with reference thereto the reports mentioned in the regulations. *C. 3418, Aug., 1897.*

X B 1 a. *Held* with reference to the item in the river and harbor act of February 27, 1911 (36 Stat. 957), increasing the Corps of Engineers and providing that "officers of the Corps of Engineers, when on duty under the Chief of Engineers, connected solely with the work of river and harbor improvements, *may*, while so employed, be paid their pay and commutation of quarters from the appropriation for the work or works upon which employed"; that the proviso in question, being connected with permanent legislation increasing the Corps of Engineers, should be regarded as of like permanent character; and that the use of the permissive word "*may*" in legislation of this character should be considered as mandatory, so that where an officer is so engaged he not only *may* but *must* be paid from the appropriation for the work on which he is employed.² *C. 28632, June 27, 1911.*

X B 2. On the question of whether the appropriation in the river and harbor act of June 3, 1896, for the investigation of the rights of the United States in connection with the improvement of the Fox and Wisconsin Rivers to be made under the direction of the Secretary of War, should be disbursed by the Chief of Engineers, *held* that as the item occurs along with other appropriations in the same act the expenditure of which is under the direction of the Chief of Engineers, although it makes no provision on the subject, it should be disbursed by the Engineer Department under the general provision, applying to other appropriations made by the same act; and further, that it was clearly competent for the Secretary of War to direct that the appropriation be disbursed by the Engineer Department. *C. 3900, Feb. 25, 1898.*

¹ Sutherland on Statutory Construction, p. 299.

² This view was concurred in by the comptroller in his decision dated July 24, 1911 (XVIII Comp. Dec. 45).

X C. Section 3 of the river and harbor act of August 11, 1888 (25 Stat. 423), made it the duty of the Secretary of War to apply the money appropriated by the act "in carrying on the various works by contract or otherwise as may be most economical and advantageous to the Government." *Held* that he was thus empowered to authorize the engineer officer in charge of the work for the protection of the levees at New Orleans to hire without formal contract, a steamboat for transporting material, and for other uses in connection with such work. *P. 40, 95, Mar., 1890; C. 15488, Nov. 9, 1903.*

X C 1. A contractor engaged upon river and harbor work for the Government may obstruct navigation to the extent necessary to do his work, if such obstruction can not reasonably be avoided. He is, however, liable both civilly and criminally for an unauthorized obstruction, and the Secretary of War is without authority to relieve him from such liability. *C. 3839, Feb., 1898.*

X D. Section 3736, R. S., provides that "no land shall be purchased on account of the United States, except under a law authorizing such purchase." By the act of April 24, 1888 (25 Stat. 94), the Secretary of War was authorized to "cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors for which provision has been made by law." Further provision as to the method of condemning lands for public use was made by the act of August 1, 1888 (25 Stat. 357). The act of April 24, 1888, *supra*, provided "that when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase the same at such price without further delay; and provided further that the Secretary of War is hereby authorized to accept donations of lands, or materials required for the maintenance or prosecution of such works." The authority to condemn, purchase, or "accept donations" applies only to works "for which provision has been made by law." *Held*, therefore, that in the absence of an appropriation for the works or express authority from Congress, the Secretary of War is precluded by section 3736, R. S., from acquiring lands for river and harbor improvements; the word "purchase" in this statute having been construed in its legal sense as including every mode of acquiring land other than by descent.¹ *C. 3896, Feb., 1898; 2111, Mar. 12, 1896; 11024, Aug. 10, 1901; 13586, Nov. 20, 24, 25, 1902.*

X D 1. The owner of lands flooded by dams constructed in improving navigation is entitled to compensation for damages sustained by such flooding.² *Held*, that the Secretary of War has authority under the act of April 24, 1888 (25 Stat. 94), to purchase lands flooded by dams constructed in river and harbor improvements, or the right to flood the same, and where springs are located on such lands this

¹ See 7 Ops. Atty. Gen., 114, 121; *Ex parte Hebard*, 4 Dillon, 384. A conveyance of lands to the United States is, under this statute, void and inoperative unless the purchase is authorized by Congress. *U. S. v. Tichehor*, 12 Fed. Rep., 415; VI Comp. Dec., 791.

² Gould on Waters, 2d edition, sec. 243, and authorities cited; *Hackstack v. Keshena Imp. Co.*, 66 Wis. 439; Am. & Eng. Ency. of Law (1st edition), vol. 16, p. 265, note 1.

fact may properly be considered in determining the amount to be paid. *C. 1074, Mar., 1895.*

X D 1 a. Where the State of Washington, by act of February 8, 1901 (Laws of Washington, 1901, p. 7), granted to the United States the right to raise the level of Salmon Bay, *inter alia*, and subsequently disposed of the shore lands to the riparian owners, who served notices of the revocation of the grant and requested their acknowledgment, upon the theory that it amounted merely to a revocable license, *held*, that under the grant the Government acquired a perpetual easement or servitude for the purposes specified therein, and that the subsequent grant of the shore lands to the present owners would be subject to the same, but that there could be no objection to acknowledging the receipt of the notices as requested. *C. 26425, Mar. 26, 1910; 20959, Mar. 2 and May 17, 1911.*

X D 2. The Secretary of War is authorized to acquire, by purchase or condemnation, land, right of way, or material, needed to maintain, operate, or prosecute works for the improvement of rivers and harbors, when provision for the same has been made by law. *C. 301, Sept., 1894.* But he can not lease land unless appropriation has been made to pay the rental thereof. *C. 195, Aug., 1894.*

X D 3. *Held*, that it was not within the constitutional power of Congress to enact that the United States should not be liable for damages caused by the prosecution of a public work, and therefore that the Government could not, through a provision of law to that effect, escape liability for losses incurred by third parties from flowage caused by a harbor improvement. If it would be liable to them in the absence of such law, a statute providing that it should not be liable would be unconstitutional as being an attempt to deprive them of a property right by legislation. *P. 56, 478 and 485, Dec., 1892.*

X D 4. The owner of land occupied by a canal, constructed as an improvement under a river and harbor act, may, by the authority of the ruling of the Supreme Court in the leading case of *United States v. Lee*,¹ maintain an action of ejection or trespass against the official representative of the United States in charge of the improvement. *P. 35, 191, Sept., 1889.*

X E. *Held*, that the work of constructing a levee near the mouth of the Mississippi River might legally be proceeded with under the appropriation available therefor, upon obtaining licenses from the owners of the land upon which the levee would rest, and that the provisions of section 355, R. S., have not been regarded as forbidding such improvements without acquiring title to the lands underlying the same. *C. 13680, Nov. 25, 1902.*

X E 1. With reference to the appropriation for the improvement of the Hudson River, under the act of June 25, 1910 (36 Stat. 635), which was conditioned upon the extinguishment by the State of New York of all power rights and privileges to be affected by the improvement, the State canal board passed a resolution formally abandoning the State lock and dam and authorizing their destruction, this action including the extinguishment of the power rights and privileges in question. Thereupon the Engineer Department incurred expenses and entered into a contract for dredging and rock excavation in the execution of the project authorized by Congress. After such action

¹ 106 U. S., 196. And see the case of *Stanley v. Schwalby*, 147 U. S., 508; 162 *id.*, 255.

the State canal board rescinded its former resolution, and the State authorities requested the amendment of the project accordingly. *Held* that the project was to be treated as an entirety and that unless the conditions of the appropriation were satisfied the War Department could not proceed with any part of the work of improvement; but *questioned* whether, the United States having once entered upon the work of improvement upon the faith of the former action of the canal board, it was competent for the State authorities to rescind such action.¹ *C. 28390, May 22, 1911.*

X F. Section 5 of the river and harbor act of June 13, 1902 (32 Stat. 373), provides: "That when any land * * * acquired for the improvement of rivers and harbors is no longer needed, * * * it may be sold in such manner as the Secretary of War may direct, and the proceeds credited to the appropriation for the work for which it was *purchased or acquired*; * * * ." *Held*, with reference to the question of whether this statute could be regarded as authorizing the sale of land which had not been purchased or acquired through any appropriation for river and harbor improvements, but had been reserved from the public domain for such purpose, that while the word "purchase" includes, in its legal sense, every method of acquisition other than by descent, it should, as here used, receive a more restricted construction as designating acquisition by voluntary sale, while the word "acquire" was intended to cover acquisition by donation or condemnation; that the intent of Congress was to provide for the elimination of property which had become useless for the purpose for which procured, without diminishing the provision for a particular improvement; but that as to lands which had simply been segregated from the public domain, they should be returned to the Department of the Interior; and that a different construction from that above would place it in the power of the Executive indirectly to provide for a particular improvement by reservation and sale of public lands therefor. *C. 12479, Mar. 1, 1905.*

X F 1. Section 5 of the river and harbor act of June 13, 1902 (32 Stat. 373) provides: "That when any land * * * acquired for the improvement of rivers and harbors is no longer needed * * * it may be sold *in such manner as the Secretary of War may direct.*" *Held* that under this authority certain lands at Dam No. 5, Ohio River, not needed, might legally be sold. *C. 13432, Oct. 21, 1902.* Similarly *held* as to land acquired for Yuba River settling basin. *C. 28349, May 9, 1911.* Also *held*, in regard to the sale of certain land condemned for a cut-off in Mantua Creek, N. J., that under the broad authority conferred by this act the Secretary of War could legally convey the same by warranty deed²—the former owner claiming that

¹ In his opinion dated July 3, 1911, the Attorney General held that the earlier resolution of the canal board might be regarded as "an extinguishment of the existing leases and a resumption of the surplus water created by the State lock and dam, although not as an abandonment of those structures; that this action was a substantial compliance with the conditions of the appropriation; that under the paramount control of the United States over the Hudson River the State lock and dam could be removed as an obstruction to navigation; and that the attempted rescinding of the earlier action, after it had been accepted and acted upon by the Federal Government, was inoperative to defeat the execution of the work authorized by Congress."

² The Attorney General, by opinion dated Apr. 26, 1911, held that this statute gives authority "to adopt a form of deed best suited to the particular transaction being carried on;" that the United States acquired a fee simple title to the property in question; and that the Secretary of War had authority to execute the form of warranty deed submitted.

the title of the United States was limited to the use for which condemned; and *advised* that such a deed be tendered to the highest bidder, and that should he refuse to complete the purchase the deposit be forfeited. *C. 26472, Mar., 1911; Apr. 21, 1911.*

X F 2. In view of the authority conferred on the Secretary of War by section 3 of the act of August 11, 1888 (25 Stat. 423), to apply the moneys appropriated for river and harbor improvements "by contract or otherwise as may be, most economical and advantageous to the Government;" and of the authority conferred by section 5 of the act of June 13, 1902 (32 Stat. 373), to direct the transfer of river and harbor property from one project to another upon proper credits and debits, *held* that there would be no legal objection to authorizing the Chief of Engineers to permit the temporary transfer between projects upon such equitable adjustment of charges and credits as may be agreed upon by the local engineer officers concerned. *C. 16202, Apr. 20, 1904.* Similarly *held*, with reference to authorizing the Chief of Engineers to permit the sale of unserviceable river and harbor property, under section 5 of the said act of June 13, 1902, where the amount does not exceed \$500 and where there is no doubt as to the propriety of the sale, so that the exercise of the authority may be regarded as routine in its nature. *C. 16336, Feb. 18, 1911.*

X F 3. Section 1241, R. S., prescribes that the President may cause to be sold any military stores which, upon proper inspection or survey, appear to be damaged or unsuitable for the public service. *Held* that the term "military stores" does not include public property purchased in carrying out the civil works of river and harbor improvements. The regulations, however, with reference to property accountability, as contained in the Army Regulations of 1895, were intended to cover all public property under the control of the Secretary of War, whether military stores or not. The regulations (and orders) relating to the inspection of unserviceable property with a view to its condemnation apply, therefore, to public property used in river and harbor improvements. There is, however, no existing law which would prevent such modification of these regulations as would authorize the proper engineer officer to drop property, other than military stores, from his returns on his own certificate that its condition resulted from wear and tear in the service, that it was worthless and had been destroyed in his presence. *C. 3419, Aug., 1897.*

X F 4. Section 5 of the river and harbor act of June 13, 1902 (32 Stat. 373), provided that "when any land or other property which has been heretofore or may be hereafter purchased or acquired for the improvement of rivers and harbors is no longer needed, or is no longer serviceable, it may be sold in such manner as the Secretary of War may direct, and proceeds credited to the appropriation for the work for which it was purchased or acquired." In carrying on the work of improving the harbor at Mobile various sticks of timber and a number of sawed logs which had escaped from booms and rafts were recovered from the stream and many of them had been there for more than thirty days and were without marks that enabled their ownership to be determined. *Held* that the material might properly be treated as abandoned and as belonging to the one recovering it; i. e., the United States, and as the material was acquired in prosecuting the work of improving the harbor, it might legally be used for that purpose, and

if it was found not to be needed or serviceable for such use it might be sold as provided by the statute. *C. 15651, Dec. 18, 1903.*

X G. The Secretary of War may permit the use of land under his control by revocable license or by lease under the act of July 28, 1892 (27 Stat. 321). *C. 241, Aug., 1849.* On the question raised as to the authority of the Secretary of War to lease a frontage on the tidal canal in Oakland Harbor, Cal., to a bridge company owning the abutting property, and on protest against such lease as imposing a burden on commerce, *held*, that the protest was without merit, as it claimed a right in the abutting owner to appropriate a particular portion of the property of the United States for its own private business and to use the same without charge to the exclusion of others; that if the lands *are not now* required for public use they may be leased under the act of July 28, 1892 (27 Stat. 321); and that if they are *no longer needed* they may be sold under section 5 of the act of June 13, 1902 (32 Stat. 373). *C. 19015, Jan. 4, 1906.*

XI A. *Held*, that the Mississippi River Commission derived no authority from the statutes relating to its functions to make allotments of the moneys appropriated by Congress for the improvements proposed. Its province is to indicate to Congress what improvements are needed and how much should be appropriated therefor. It has no authority to disburse money appropriated. An allotment made by it is to be treated by the Secretary of War as a recommendation only. The Secretary may adopt the recommendation, but in the disbursement should not omit any of the works specially designated by Congress in the appropriation act. *P. 43, 187, Oct., 1890.*

XI A 1. *Held*, that the maps prepared by the Mississippi commission, under appropriations by Congress, may legally be disposed of at the discretion of the commission; it being evidently intended by Congress that the information therein contained should be made public and circulated for the public use and benefit. *P. 33, 326, July, 1889.*

XI B. The duties, under the law, of the Missouri River Commission, composed partly of civilians, relate exclusively to certain work quite other than the establishing of *harbor lines*. It is therefore not, as a body, subject to the directions of the Secretary of War in the matter of establishing harbor lines, nor are the civilian members subject individually to his orders. Thus, while they may consent to establish such lines, it is preferable for the Secretary to cause such work to be done through engineer officers of the Army. *P. 56, 218, Oct., 1892.*

XI C. *Held*, that the allowances for the traveling expenses of the civilian members of the Mississippi and Missouri River Commissions were not regulated by any order of the War Department regulating the allowances of civil employees of the military establishment, but were such as are fixed by statute. They are not thus necessarily \$4 *per diem*, since the statute law provides for the reimbursement of their actual necessary outlay, which may be more or less than this allowance.¹ *P. 44 477, Jan., 1891; C. 17890, Apr. 29, 1905.*

XI D. On the question raised as to the subsistence of the wives and guests of the members, etc., of the Mississippi River Commission, under the provision of the act of April 28, 1904 (33 Stat. 495), for "traveling and miscellaneous expenses of the Mississippi River Com-

¹ See Dig. Second Comp. Dec., vol. 3, pars. 838 and 841.

mission," etc., *held*, that the right to subsistence is one which accrues only to the members of the commission and their authorized assistants and employees; and that in the absence of legislation for the subsistence of the wives or guests of the members, the same would not be legal. *C. 17890, Apr. 29, 1905.*

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INDEX.

NOTE.—This index covers the statutes and footnotes thereto, but not the appendix. The footnotes, however, bear frequent references to that part of the Digest of Opinions of the Judge Advocates General which forms the appendix, and for convenience the page number of the Digest is repeated at the bottom of the corresponding page of the appendix.

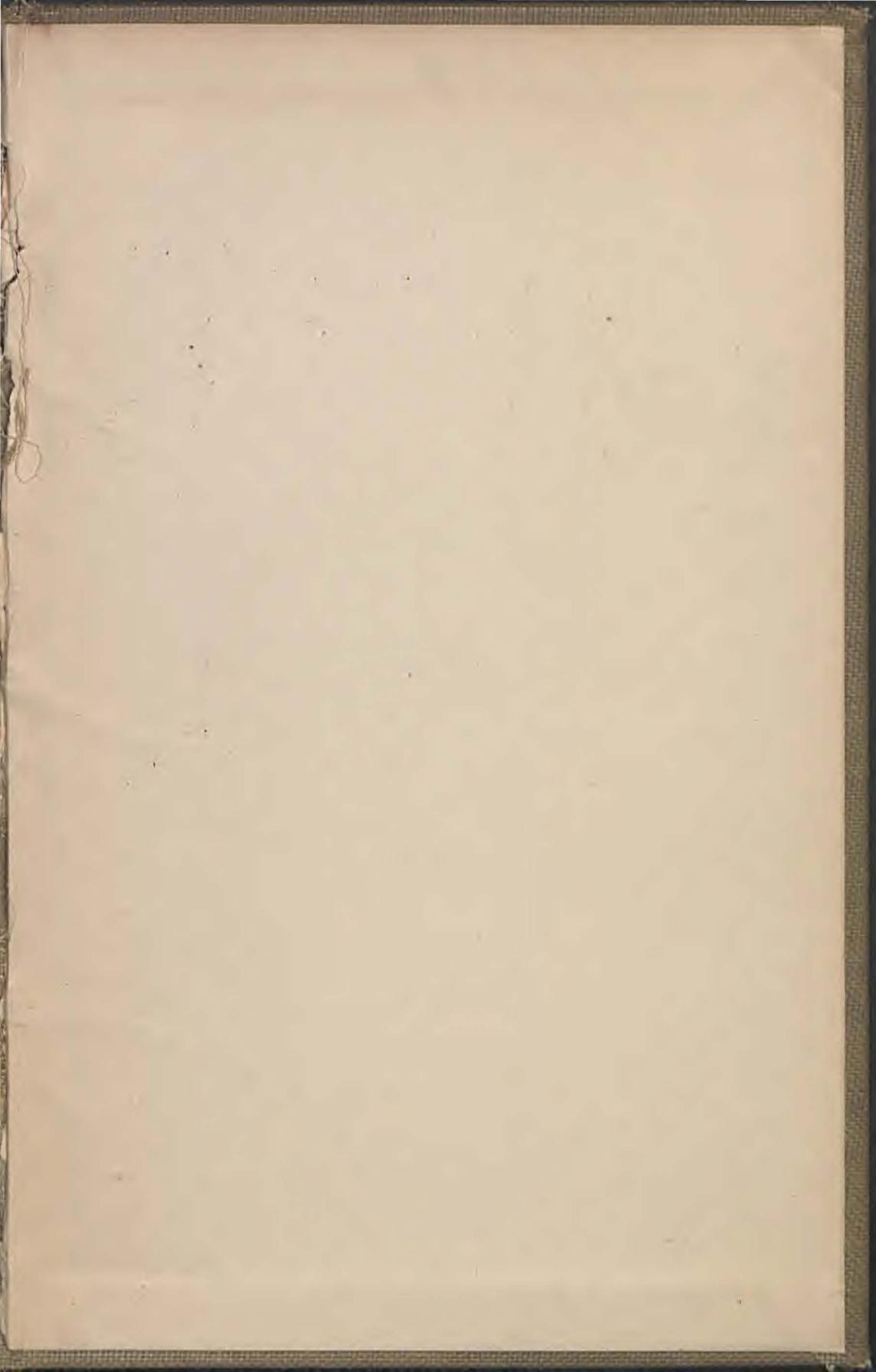
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