

officer and not to the old navy pay of the grade in the line to which he was transferred by the navy personnel act.

The pay of a line officer of his present grade in the Navy according to old navy rates is not his pay according to then existing law, but is a rate of pay to which he would never have been entitled while holding his old rank and grade but for the navy personnel act. His pay has not been reduced by the operation of that act, and I have therefore to advise you that he is entitled only to pay at the rate of \$2,142 per annum for shore service in the United States.

PAY OF A SOLDIER AFTER APPREHENSION AS A DESERTER.

A soldier who was apprehended as a deserter after having been absent in desertion from October 12, 1902, to December 29, 1902, and who was discharged February 3, 1903, is entitled to pay from the date of his apprehension until his discharge.

(Assistant Comptroller Mitchell to the Secretary of War, April 20, 1903.)

By your authority, I am in receipt of a communication from the Paymaster-General of the Army, dated the 14th instant, as follows:

"Respectfully forwarded to the Comptroller of the Treasury, requesting decision on the point raised by Lieutenant-Colonel Comegys, to wit, 'Is the soldier entitled to pay from date of apprehension to date of discharge?' It has been the custom from time immemorial to view an apprehended deserter as entitled to pay and allowances from date when he is again within the control of the military authorities, and as far as known to this office no objection thereto has ever been raised by the accounting officers of the Treasury.

"By authority of the Secretary of War."

The soldier in this case is reported enlisted June 2, 1902, to serve three years; is reported absent in desertion from October 12, 1902, to December 29, 1902, and discharged without honor by reason of desertion February 3, 1903.

Upon the facts presented in this case, the specific question of the Paymaster-General is answered in the affirmative. This view is not inconsistent with my decision in this case of the 30th ultimo with reference to the soldier's right to travel pay.

EXPENSE OF PROCURING OPTIONS AND ABSTRACTS OF TITLE IN THE RECLAMATION OF ARID LANDS.

The provision in the act of June 17, 1902, for the reclamation of arid lands, does not authorize the expense of procuring options for rights of way, water rights, or lands.

The expense of procuring abstracts of title to land or rights to be acquired under the act of June 17, 1902, which provides for the reclamation of arid lands, is payable from the appropriation known as the "Reclamation Fund," provided the land or rights are to be purchased and not condemned.

(Assistant Comptroller Mitchell to the Secretary of the Interior, April 22, 1903.)

I have received your communication of the 7th instant, as follows:

"I inclose a copy of a letter of the 1st instant from the Acting Director of the Geological Survey in which he has requested that the opinion of the Comptroller of the Treasury be procured in connection with the administration of the reclamation service under the act of June 17, 1902 (32 Stat., 388), on these points:

"First. Whether the payment of a sum of money for an option for a right of way, water right, or land needed for the reclamation work, would be a proper expenditure from the reclamation fund.

"Second. Whether the payment for services for the preparation of an abstract of title of lands or rights to be acquired for the reclamation work would be a proper expenditure.

"In compliance with this request I have the honor to ask that I be supplied with an opinion on the points specified by the Acting Director."

The act of June 17, 1902 (32 Stat., 388), provides:

"That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the 'reclamation fund' to be used

in the examination and survey for, and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act."

* * * * *

"SEC. 7. That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States, upon the application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for the condemnation within thirty days from the receipt of the application at the Department of Justice."

* * * * *

"SEC. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect."

Section 3648 of the Revised Statutes provides:

"No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. It shall, however, be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfilment of the public engagements. The President may also direct such advances as he may deem necessary and proper, to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled can not be regularly effected."

By section 7 of the act of June 17, 1902, *supra*, Congress gave the Secretary of the Interior authority where it became necessary in carrying out the provisions of that act—

"to acquire any right or property * * * for the United States by purchase or by condemnation under judicial process and to pay from the reclamation fund the sums which may be needed for that purpose,"

and made it the duty of the Attorney-General, on the application of the Secretary of the Interior, to prosecute said proceedings.

Technically the words "by purchase" might be construed as including the power to acquire by condemnation under judicial process, for, technically, purchase includes all modes of acquisition other than that of descent. But in the above act it is evident the words "by purchase" are used in a sense not technical, but as meaning the acquisition by contract between the parties as distinguished from acquisition by condemnation proceedings.

The act confers upon the Secretary of the Interior power to acquire any rights or property needed to carry out the provisions of the act either by condemnation proceedings or by private purchase, at his discretion. See *Kohl et al. v. United States* (91 U. S., 367).

The Secretary of the Interior would have the right to purchase whatever rights or property that is necessary in his judgment to carry out the provisions of the act, and this would include the right to purchase "a right of way, water right, or land needed for the reclamation work," and to pay for the same from the reclamation fund, but by section 3648 *supra*, before he can legally pay for such rights or property, the ownership of such rights or property must vest in the United States. I do not think he would be authorized to contract and pay money for a mere option to purchase such rights or property. (3 Comp. Dec., 221; *id.*, 188; 4 *id.*, 446; *id.*, 544; *id.*, 687; 6 *id.*, 949; 7 *id.*, 62.)

The act of June 17, 1902, *supra*, makes no specific provision as to how abstracts of title that may be required in the prosecution of the work provided for therein shall be paid for.

The Secretary of the Interior may, however, under the authority conferred on him in section 10, *supra*, make such rules and regulations and perform such acts as are necessary to carry out the provisions of the act, and if in doing so it should be found necessary to make expenditures for abstracts of title to lands it is proposed to acquire by purchase, such expenses could properly be paid from the reclamation fund. (3 Comp. Dec., 216, 218.)

If any of the abstracts referred to by you are for use by the district attorneys in condemnation proceeding, you would

not be authorized to pay the expenses of procuring such abstracts from the "reclamation fund." (3 Comp. Dec., 216, 218.)

The act of June 17, 1902, *supra*, creating the "reclamation fund," provides that it may—

"be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the said States and Territories, and for the payment of all other expenditures provided for in this act."

The act further provides that—

"the Secretary of the Interior is hereby authorized to acquire the same [meaning lands and rights] for the United States by purchase or by condemnation under judicial process and to pay from the reclamation fund the sums which may be needed for that purpose."

It was clearly the intention of the provisions of this act to provide for all expenses that were incurred in connection with the execution of the act not otherwise provided for. "When," however, "a suit for condemnation is brought the expenses of such suit, like all other suits in which the United States are a party, are payable from the appropriations made for the Department of Justice." (3 Comp. Dec., 216, 217; see also 1 Comp. Dec., 317; 2 Comp. Dec., 201.)

Your first question is answered in the negative and your second one in the affirmative, subject to the limitation above set forth.

RETIREMENT OF AN OFFICER OF THE NAVY UNDER A SPECIAL ACT.

An officer of the Navy who was on the retired list at the date of the passage of the navy personnel act of March 3, 1899, and who subsequent thereto, by authority of the act of January 30, 1903, was appointed to a higher grade on the retired list "as of the date he was entitled to examination for promotion," which was prior to the passage of the navy personnel act, will be considered as having been appointed on that date, and he is therefore not to be regarded as having been retired under the provisions of section 11 of the navy personnel act.

(Decision by Assistant Comptroller Mitchell, April 22, 1903.)

The Auditor for the Navy Department submits for approval, disapproval, or modification his decision making an original

construction of an act approved January 30, 1903 (Private—No. 298), as follows:

"Julius A. Kaiser, passed assistant engineer, U. S. Navy, has presented to this office a claim for the difference between active-duty pay as assistant engineer and passed assistant engineer from October 13, 1868, to July 8, 1873; and difference between the two grades on the retired list from July 9, 1873, to May 1, 1898; and difference of pay in same grades on active duty from May 2, 1898, to October 15, 1898; and same difference on the retired list from October 15, 1898, to the present time. Also that he lacked two months and six days of completing his first five years' active service required in order to entitle him to pay in his second five years, and being on active duty during the Spanish war, he claims that the period of such active service should be credited to him; and that he should be paid as passed assistant engineer in his second five years of service.

"Under the act for his relief approved January 30, 1903, as follows:

"(Private—No. 298), entitled 'An act for the relief of Julius A. Kaiser.'

"That the President of the United States be, and he is hereby, authorized to nominate and, by and with the advice and consent of the Senate, to appoint Julius A. Kaiser upon the retired list of the Navy, in the grade of passed assistant engineer, as of the date he was entitled by law or Navy Regulations to examination for promotion from assistant engineer to said grade."

"The Navy Department on February 21, 1903, informed Mr. Kaiser, that the President, with advice and consent of the Senate, had appointed him a passed assistant engineer in the Navy, with the rank of lieutenant, on the retired list, from the 13th of October, 1868, in conformity with the provision of an act of Congress approved January 30, 1903. The Department also advised this office that Mr. Kaiser had been appointed a passed assistant engineer on the retired list from October 13, 1868. The Navy Register of 1864 shows that he was appointed a third assistant engineer in the Navy September 8, 1863.

"He was placed upon the retired list July 8, 1873, as second assistant engineer.

"Under the terms of the act for his relief, *supra*, he was placed upon the retired list as passed assistant engineer from the date he became entitled to examination to that position, October 13, 1868.

"Prior to 1874 assistant engineers in the Navy were designated as first, second, and third assistants. By the act of February 24, 1874, Supplement to the Revised Statutes, page 4, their titles were changed, as follows: