

DECISIONS
OF THE
COMPTROLLER OF THE TREASURY.

DONATION OF LAND TO THE UNITED STATES.

The prohibition in section 3736, Revised Statutes, against the purchase of land on account of the United States, except under a law authorizing such purchase, does not extend to land donated to the United States where such donation does not involve an expenditure of the public money, but the use of a general appropriation or one for contingent expenses. In the absence of express authority of law, is not authorized to pay off liens against the property donated to the United States existing at the time of transfer.

Expenditures from the appropriation, "Contingent expenses, Department of Agriculture, 1912," can be made only upon the prior order of the head of the department under section 3683, Revised Statutes, and the waiver by the head of a department of a departmental regulation that requires prior formal authority to make such expenditures does not operate to waive the express requirements of the Revised Statutes as to such prior order.

Decision by Comptroller Tracewell, July 1, 1912:

The Auditor for the State and Other Departments reported for approval, disapproval, or modification his decision construing section 3736, Revised Statutes, in its application to the payment of two claims transmitted to him by the Department of Agriculture for direct settlement; one of the claims (\$20.39) being for taxes for the calendar year 1911, on 160 acres of land in South Dakota deeded by William H. Kilpatrick and wife to the United States by deed dated September 5, 1911, and the other claim (\$8.25) being a charge for an abstract of title to the land from said abstract having been procured April 2, 1912.

Section 3736, Revised Statutes, provides that—

"No land shall be purchased on account of the United States except under a law authorizing such purchase."

The auditor decides that:

"The word 'purchase' in section 3736 comprehends a conveyance by deed without consideration as well as with consideration—a donation as well as a sale."

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Expenditures from the appropriation. "Contingent expenses, Department of Agriculture, 1912," can be made only upon the prior order of the head of the department under section 3683, Revised Statutes, and the waiver by the head of a department of a departmental regulation that requires prior formal authority to make such expenditures does not operate to waive the express requirements of the Revised Statutes as to such prior order.

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"The word 'purchase' in section 3736 comprehends a conveyance by deed without consideration as well as with consideration—a donation as well as a sale."

Applying the decision to the claims before him the auditor held that both claims in question "are disallowable" as charges against (1) the appropriation for "Contingent expenses, Department of Agriculture, 1912," made by the act of March 4, 1911 (36 Stat., 1261), or (2) that made by the same act (36 Stat., 1243) "for the investigation and improvement of methods of crop production under semiarid or dry-land conditions."

The appropriation first named is as follows:

"Contingent expenses, Department of Agriculture: For stationery, blank books, twine, paper, gum, dry goods, soap, brushes, brooms, mats, oils, paints, glass, lumber, hardware, ice, fuel, water and gas pipes, heating apparatus, furniture, carpets, and matting; for lights, freight, express charges, advertising, telegraphing, telephoning, postage, washing towels, and necessary repairs and improvements to buildings and heating apparatus; for rent in the District of Columbia; for the purchase, subsistence, and care of horses and the purchase and repair of harness and vehicles, for official purposes only; for the payment of duties on imported articles, and the Department of Agriculture's proportionate share of the expense of the dispatch agent in New York; for official traveling expenses; and for other miscellaneous supplies and expenses not otherwise provided for, and necessary for the practical and efficient work of the department, one hundred and ten thousand dollars."

It appears from papers attached to the vouchers submitted that the land in question was donated to the United States and that the same was acquired in connection with the work done to carry out the purposes of the act of March 4, 1911 (36 Stat., 1243), "for investigation and improvement and methods of crop production," etc., first quoted above.

Attorney General Bonaparte, in an opinion to the Secretary of Agriculture relative to the proposed donation to the United States of certain lands for experiments in animal breeding (an appropriation very similar to that for experiments in dry-land farming, *supra*), said:

"Your letter does not in terms refer to any statutory provision authorizing the acceptance of the donation proposed by Mr. Battell. But I think its acceptance is *impliedly* authorized by the act of June 30, 1906, chap. 3913, providing 'for experiments in animal breeding and feeding in cooperation with State agricultural stations,' etc., in order to effectuate and carry out the purpose of that provision. Thus, as stated in your letter, the proposed donation under consideration is made under practically the same circumstances as are outlined in the opinion of this department hereinbefore mentioned." (MS. Op. Att. Gen., Mar. 1, 1907.)

Acting Attorney General Fowler, relative to the construction of certain temporary structures on land acquired for a nominal consideration (\$1) for mine-rescue work by the Bureau of Mines, said (28 Op. Att. Gen., 415):

"There is a preliminary question whether under section 3736 of the Revised Statutes the instruments in question can be accepted by the United States. This section provides that 'no land shall be purchased on account of the United States except under a law authorizing such purchase.' Neither the act creating the Bureau of Mines nor the act making appropriation for its maintenance authorizes the purchase of lands; and whether or not the lands, or interest in lands, designated in the above instruments, fall within the provisions of this statute depends upon the meaning of the word 'purchase' as used therein. There are many authorities which hold that this word in its most enlarged sense signifies the lawful acquisition of real estate by any means whatever except by descent; yet its meaning has often been restricted because the context of the statute or instrument in which it appears clearly indicated that it was intended to be used in a narrower sense.

"The section in question was taken from the act of May 1, 1820, ch. 352 (3 Stat., 568). And I think when Congress passed this act, as well as when it was introduced into the Revised Statutes, that body had in mind primarily the expenditure of the money of the United States and that it was not its purpose to prohibit the acquisition by the Government of real property otherwise than for a valuable consideration. This view is emphasized by the phrase 'on account of the United States,' which is the equivalent of saying 'at the expense of' or 'to be paid for by the United States;' and inasmuch as the acquisition of the land in question does not involve an expenditure of money upon the part of the United States Government, or at least of anything more than a mere nominal sum, it is my opinion that the acceptance of neither of these instruments is prohibited by this statute."

The opinion of the Acting Attorney General last quoted was cited by Attorney General Wickersham in 28 Op. Att. Gen., 463, a distinction being drawn between lands acquired without and those acquired for a consideration. As to the latter, he said (page 464):

"As was said in that opinion (28 Op., 413), in the passage of the act in question (R. S., 3736), Congress had primarily in mind the expenditure of the public money; and its purpose to prevent such expenditures, unless authorized by some act of Congress."

"When expenditure of public revenue has been involved, the tendency has been to give full effect to the terms of the act (4 Op. Att. Gen., 533; 11 Op., 201; 19 Op., 79), and I concur in the view that its scope should not be restricted by construction."

I concur in the conclusions reached by the Attorneys General as quoted, *supra*, and the auditor's construction of section 3736, Revised Statutes, is not approved.

It is not intended, however, to decide that liens against property donated to the United States, existing at the time of transfer, may be paid without express authority of law. If a general appropriation, or one for contingent expenses, could be used for such expendi-

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The other claim, that of the Fall River County Abstract Co., for \$6.25 has been approved by the Acting Secretary of Agriculture for payment from the contingent fund of said department.

Section 3683 of the Revised Statutes provides:

"No part of the contingent fund appropriated to any department, bureau, or office shall be applied to the purchase of any articles except such as the head of the department shall deem necessary and proper to carry on the business of the department, bureau, or office, and shall, by written order, direct to be procured."

The papers submitted show that this abstract was procured more than six months after the date of the deed to the United States and without prior authority from the head of the department. Payment therefor from the appropriation for "Contingent expenses, Department of Agriculture, 1912," *supra*, is prohibited by section 3683, Revised Statutes (18 Comp. Dec., 531, 554; 17 *id.*, 1016; 16 *id.*, 798; 5 *id.*, 7; 2 *id.*, 1, 42, 258; 1 *id.*, 370, 566; 60 MS. Comp. Dec., 1236, Mar. 16, 1912; 52 *id.*, 1420, Mar. 26, 1910; 51 *id.*, 855, Nov. 19, 1909; 51 *id.*, 180, Oct. 11, 1909; 7 *id.*, 1202, Dec. 27, 1898; 6 *id.*, 460, Mar. 15, 1898; 18 Op. Att. Gen., 424, 432).

It is noted that the Acting Secretary of Agriculture has waived "paragraph 22 of the fiscal regulations of the Department of Agriculture in its application to this account with regard to prior formal authority."

The waiver of departmental regulations by the head of a department does not operate to waive the express requirements of the Revised Statutes or to remove restrictions imposed by law.

In view of the statements, however, that have been made that it was necessary to incur this expense for an abstract of title and its approval by the head of the department, payment may be made from the appropriation for the work that made necessary the incurring of the expense; that is, the appropriation "for the investigation and improvement of methods of crop production," etc., made by the act of March 4, 1911 (36 Stat., 1243), *supra*. (8 Comp. Dec., 212.)

FEES OF CLERKS OF UNITED STATES CIRCUIT COURTS FOR ATTENDANCE AND MINUTE ENTRIES.

Where there is no opening or closing order entered upon the journal of a United States Circuit Court owing to an inadvertent omission by the clerk, but the court's blotter shows that the court was open and the Judge present,

and there is no affirmative evidence tending to show that the court was not open, such clerk is entitled to per diem fee for his attendance and not to fees for entering orders opening and closing court.

Where a case is called upon the convening of court in the morning and a minute entry of the calling made by the clerk and proceedings not calling for any minute entries were had, and after the noon recess the case was again called and another entry of calling made and no further entry made until the adjourning order for the day, the second calling of the case is a resumption of the morning session and the second entry of calling is a continuation of the morning record and should be counted as such.

Decision by Comptroller Tracewell, July 2, 1912:

The Attorney General appealed June 27, 1912, from the action of the Auditor for the State and Other Departments upon accounts of W. S. Hyams, clerk of the United States Circuit Court for the Western District of North Carolina, at Asheville, N. C., wherein the auditor allowed, per judicial certificates Nos. 19266 and 19805 (S. and C.), dated November 11, 1911, and January 15, 1912, respectively, certain items amounting to \$5.90, now recommended by an examiner of the Department of Justice for disallowance, as follows:

Certificate No. 19266.

Page 2. Per diem fee and fees for entering orders opening and closing court, Aug. 29, 1911..... \$5.30

No opening or closing order was, in fact, entered upon the journal, and the clerk concedes the disallowance of fees for entering these orders.

The examiner contends that because the minutes do not show that court was opened and the clerk present on this day the per diem also should be disallowed.

The clerk admits that the minutes do not show these facts, presumably because of accidental omission, but he also says that the blotter shows that the court was open and the judge present on this day, a fact which is also certified in the approval of the account. There is no affirmative evidence tending to show that the court was not open, nor that the judge was not present, nor that the clerk did not attend on the day, the recommendation for disallowance resting entirely upon the failure of the minutes to show these facts and the decision in Marvin's case. (6 Comp. Dec., 382.)

The facts in Marvin's case were materially different. There was no record evidence, on the minutes or elsewhere, showing affirmatively that court was open or that the clerk attended on any day except the first day of the term. The clerk made the alternative statement that he attended on all of the days charged *unless excused from attendance*. Under these conditions it was held that the essential facts of the opening and attendance not being established by any record evidence the clerk was not entitled to the per diems. The ruling was not intended to apply and does not apply to a mere inad-

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