the better plan to authorize and empower him, in such contingency, to designate some person or persons to act, conferring upon the party thus designated all the powers of the grantee association in the premises.

KLAMATH RIVER INDIAN RESERVATION—ALLOTMENT—ACT OF JUNE 17, 1892.

CRICHTON *v.* SHELTON.

The Klamath River Indian reservation was not abolished by or under the provisions of the act of April 8, 1864, but was recognized by the act of June 17, 1892, as an existing reservation, and the Indians thereon were by said act recognized as constituting a tribe.

Timbered lands are not necessarily excepted from allotment to Indians, but may be so alloted provided they contain sufficient arable area to support an Indian family and are on the whole, considering their location and the habits and subsistence of the Indians, suitable for a home for the allottee.

Allotments to Indians on the Klamath River reservation, under the provisions of the act of June 17, 1892, were made to the Indians as a tribe, under section 1 of the general allotment act of February 8, 1887, and not under the provisions of section 4 of said act.

Under the act of February 8, 1887, reservation Indians are not required to settle, improve, or maintain residence upon their allotments made from lands held for the tribe.

An Indian woman, recognized as a member of the Klamath tribe, is not by reason of her marriage to a white man, deprived of her right to an allotment in the tribal lands; and the children of such woman are likewise entitled to such an allotment.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *August 30, 1904.* (C. J. G.)

An appeal has been filed by John L. Crichton from the decision of your office of December 19, 1903, holding intact Klamath River Indian allotments Nos. 108 and 109, made to Mary Shelton and her minor daughter, Mary Shelton, jr., respectively, for lot 7 and the SE. ¼ of SW. ¼, Sec. 33, the SW. ¼ of the SW. ¼, Sec. 33, and the SE. ¼ of the SE. ¼, Sec. 32, T. 13 N., R. 2 E., H. M., Eureka, California.

The allotments were made in August, 1893, under the act of June 17, 1892 (27 Stat., 52), and first or trust patents issued thereon September 26, 1893. Crichton filed charges against said allotments May 9, 1902, and amended affidavit January 19, 1903, for the purpose of suggesting the death in the meantime of Mary Shelton, sr. He alleged substantially that the allotments were illegally made for the reason that the lands were timber lands subject to sale under the act of June 3, 1878; that said lands were not disposed of in accordance with the provisions of the act of June 17, 1892; that the lands are not suitable for or adapted to agriculture or grazing, being rough and covered with a dense and heavy growth of redwood and pine timber; that the allottees never made settlement upon said lands or resided

thereon, and have never improved or cultivated the same; that s[illegible] allotments do not belong to any Indian tribe; and that they were the [illegible]nd daughter, respectively, of a white man.

Your office, after receiving the report of a special agent who had investigated the matter, ordered a hearing in the case, at which both parties appeared and submitted testimony. The local officers rendered divided opinions, the register finding that the allotments should remain intact and the receiver that they should be canceled. Your office, in the meantime having procured the opinion of the Commissioner of Indian Affairs in the premises, concurred in the finding of the register and denied Crichton's application for the cancellation of the allotments.

The chief contentions made by appellant are that under the provisions of the act of April 8, 1864 (13 Stat., 39, 40), the Klamath River Reservation was abolished and became subject to subdivision and sale; that the lands covered by these allotments are timber lands and therefore not subject to allotment; and that the allottees not being members of a tribe and the lands no longer being in reservation, the allotments, under the provisions of the act of June 17, 1892, *supra*, could only be made under section 4 of the act of February 8, 1887 (24 Stat., 388), and not under section 1 of said act.

The act of June 17, 1892, is as follows:

> That all of the lands embraced in what was Klamath River Reservation, in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: *Provided*, That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof: *Provided*, That lands settled upon, improved, and now occupied by settlers in good faith by qualified persons under the land laws shall be exempt from such allotment unless one or more of said Indians have resided upon said tract in good faith for four months prior to the passage of this act. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing provisions and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty

acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within which to file in the proper land office his application therefor; and in case of conflicting claims between settlers the land shall be awarded to the settler first in order of time: *Provided*, That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands: *And provided further*, That the heirs of any deceased settler shall succeed to the rights of such settler under this act: *Provided further*, That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

Section 1 of the act of February 8, 1887, as amended by the act of February 28, 1891 (26 Stat., 794), is in part as follows:

That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot each Indian located thereon one-eighth of a section of land.

Section 4 of said act provides:

That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations, etc.

By act of March 3, 1853 (10 Stat., 226, 238), entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes," etc., it was provided:

That the President of the United States, if upon examination he shall approve of the plan hereinafter provided for the protection of the Indians, be and he is hereby authorized to make five military reservations from the public domain in the State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purposes: *Provided*, That such reservations shall not contain more than twenty-five thousand acres in each: *And provided further*, That said reservation shall not be made upon any lands inhabited by citizens of California, and the sum of two hundred and fifty thousand dollars is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to defray the expense of subsisting the Indians in California and removing them to said reservations for protection: *Provided further*, if the foregoing plan shall be adopted by the President, the three Indian agencies in California shall be thereupon abolished.

By act of March 3, 1855 (10 Stat., 686, 699), also an appropriation act of similar title to the above, it was provided:

For collecting, removing, and subsisting the Indians of California, (as provided by law,) on two additional military reservations, to be selected as heretofore, and not to contain exceeding twenty-five thousand acres each, in or near the State of California

th[illegible] of one hundred and fifty thousand dollars: *Provided*, That the President may enlarge the quantity of reservations heretofore selected, equal to those hereby provided for, and shall not expend the amount herein appropriated unless, in his opinion, the same shall be expedient; and the last proviso to the authority for five military reservations in California, per act of third of March, eighteen hundred and fifty-three, be, and the same is hereby, repealed.

By executive order of November 16, 1855 (Executive Orders relating to Indian Reserves, 1902, pp. 21, 22), in pursuance of the above legislation, a strip of territory commencing at the Pacific Ocean and extending one mile in width on each side of the Klamath River for a distance of twenty miles was set apart for Indian purposes. It was provided that upon a survey of the tract a sufficient quantity be cut off from the upper end thereof to bring it within the limit of 25,000 acres authorized by law. This reservation has since been known and referred to as the Klamath River Indian Reservation in California. In the year 1861 nearly all the arable lands of said reservation and the improvements thereon were destroyed by a freshet, in view of which, upon recommendation of the Indian agent, a new and temporary reservation, known as Smith River Reserve, was established May 3, 1862, to which it was proposed to remove the Klamath Indians. The indorsement of the Secretary of the Interior on the recommendation of the Commissioner of Indian Affairs relating to Smith River Reserve was: "The lands embraced in the proposed reservation may be withdrawn from sale for the present." (Ex. Orders, p. 33.) It appears that only a small portion of said Indians removed to the new reservation, by far the greater number preferring to remain on the old; and nearly all of those who did remove returned within a few years to Klamath River.

By act of April 8, 1864 (13 Stat., 39, 40), the State of California was constituted one Indian superintendency, and the President was authorized in section 2 of the act, to set apart—

not exceeding four tracts of land, within the limits of said State, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said State, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended: . . . . . *And provided, further*, That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said State, and that in case any such reservation is so included, the same may be enlarged to such an extent as in the opinion of the President may be necessary, in order to its complete adaptation to the purposes for which it is intended.

SEC. 3. *And be it further enacted*, That the several Indian reservations in California which shall not be retained for the purposes of Indian reservations under the provisions of the preceding section of this act, shall, by the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, be surveyed into lots or parcels of suitable size, and as far as practicable in conformity to the surveys of the public lands, which said lots shall, under his direction, be appraised by disinterested persons at their cash value, and shall thereupon, after due advertisement,

as now provided by law in case of other public lands, be offered for sale at public outcry, and thence afterward shall be held subject to sale at private entry, according to such regulations as the Secretary of the Interior may prescribe, etc.

AS TO THE STATUS OF THE KLAMATH RIVER RESERVATION.

At the date of the act of April 8, 1864, there were in existence in California the following reservations: Klamath River, Mendocino and Smith River (Ex. Orders, pp. 21, 22 and 33). In addition, the Secretary of the Interior had directed that Nome Cult Valley, or Round Valley, be set apart and reserved for Indian purposes (Ex. Orders, p. 29, and House Doc. 33, 50th Cong., 1 Sess.). The Mendocino and Smith River reservations were discontinued by act of Congress of July 27, 1868 (15 Stat., 221, 223). There was never such an act with reference to Klamath reservation. Under date of August 21, 1864, State superintendent Wiley, acting under instructions from the Department, notified settlers in Hoopa Valley not to make any further improvements upon their places, as he had located said valley as one of the four tracts authorized by the act of 1864, to be named the Hoopa Valley Reservation, the metes and bounds to be thereafter established subject to the approval of the President (Ex. Orders, p. 20). Notwithstanding there had been no executive orders setting apart the same, Congress recognized both the Round Valley and Hoopa Valley reservations by making appropriations for them as such (15 Stat., 221, and 16 Stat., 37). The President declared the exterior boundaries of the Hoopa Valley Indian Reservation June 23, 1876, and formally set apart the same for Indian purposes "as one of the Indian reservations authorized to be set apart in California by act of Congress approved April 8, 1864." (Ex. Orders, p. 20.) No order, executive or otherwise, appears to have issued setting apart or retaining the Round Valley reservation, under the act of 1864, as it was selected by the State superintendent in 1856 and established by order of the Secretary of the Interior in 1858 (Ex. Orders, p. 29, and House Ex. Doc., 33, 50th Cong., 1 Sess.). But by order of the President of March 30, 1870, said reservation was enlarged (Ex. Orders, p. 31). By act of March 3, 1873 (17 Stat., 633), the boundaries of said reservation were changed so as to add thereto thousands of acres, and by executive order of July 26, 1876, a tract of land was "withheld from public sale, and reserved for the use and occupancy of the Indians located on the Round Valley Reservation, as an extension thereof" (Ex. Orders, p. 33). By executive order of January 31, 1870, two tracts were set apart for the Mission Indians in California. This order was subsequently revoked and the lands restored to the public domain. But by order of December 27, 1875, the President set apart nine different non-contiguous tracts "as reservations for the permanent use and occupancy of the Missions Indians

in Lower California." May 15, 1876, eight other tracts were in the same way ordered set apart as reservations for said Indians, in addition to those reserved under Executive order of December 27, 1875. Other orders were from time to time made adding to, taking away from and changing the lines of the tract already reserved, until no less than nineteen different and non-contiguous tracts were reserved for the Mission Indians, and all these constituted one of the four reservations authorized by the act of April 8, 1864 (Executive orders, pp. 23, 24, 25, 26, 27 and 28). The Tule River Reserve was set apart for Indian purposes by Executive order of January 9, 1873, and by order of October 3, 1873, another tract, known as the "Tule River Indian Reservation," was set apart in lieu of that under the order of January 9, 1873; and by Executive order of August 3, 1878, a portion of the land described was taken out of reservation and restored to the public domain (Executive Orders, p. 34).

Under date of January 20, 1891, the Assistant Attorney General for this Department rendered an opinion upon certain questions propounded by the Commissioner of Indian Affairs, one of which was as to whether the Department was authorized to cause the removal of intruders from the Klamath River Indian Reservation in Californ a In the course of said opinion, after referring to the above orders withdrawing lands for Indian purposes, it was said:

> The foregoing matters are all contained in the reports of the officers of the Indian Office, annually communicated to and therefore within the knowledge of and it is to be presumed approved by Congress when the annual appropriations were subsequently and continuously made for these four reservations of Hoopa Valley, Round Valley, The Mission and Tule River.
>
> It is therefore fair to adopt this approval, by Congress, of the action of the officers, in the premises, as a legislative construction of the act of 1864. Three conclusions inevitably flow from such construction: 1, that no formal order of the President retaining an existing reservation was deemed necessary, but its actual retention by the officers of the Indian Bureau was sufficient to constitute it one of the four authorized reservations; 2, that contiguity was not an essential, but a reservation might be composed of several non-contiguous parcels of land; and 3, that the Executive authority, in that respect, was not exhausted when once exercised in the setting apart of "four tracts" or parcels of land, as reservations; but that discretion continued, and yet exists, to change, add to, diminish or abolish reservations and establish others, as may seem most promotive of the public interests.
>
> In relation to the Klamath River reservation, as in that of the Round Valley, no formal or written order appears to have been issued for its retention. In both of these instances the Indian Office retained possession and control of the former reservation, making no change in their condition, status or management, further than that they passed under the control of the one State superintendent as required by the act of 1864. The Indians remained in the occupation of both of these reservations, and yet so occupy them alone, except so far as that occupation may have been intruded upon by individual white men, under color of claims. Congress has made annual appropriations for support of the Indians on the Round Valley reservation, but none for those on Klamath, and for the all-sufficient reason that the latter are self-supporting and have never cost the government a dollar in this respect.

As showing further the status of the Klamath River reservation and the Indians thereon the following references are made:

The permanent settlement of the Indians residing upon said reservation, and the disposal of so much of the reservation as may not be needed for that purpose, are matters engaging the attention of the Department at this time. What the final result may be I am unable to say. The reservation is still in a state of Indian reservation, and must so remain, uninterfered with, until otherwise ordered by competent authority (Comr. Ind. Afs. to D. B. Hume, July 23, 1883—Ex. Doc., 140, p. 11).

The appeal raises the question of fact, namely, whether the said reservation, which was created by Executive order of November 16, 1855, has been regarded as a reservation since passage of the act of April 8, 1864 (13 Stat., 39), which limited the Indian reservations in California to four. It is sufficient for me to say that it has been so regarded, and that various allotments within its limits have recently been made. In my letter of March 26, 1883, to the Commissioner of Indian Affairs, I stated that when the selections within said reservation were all made, I would consider the question of restoring the remainder of the lands to the public domain (John McCarthy, 2 L.D., 460).

Now it appears that in carrying out the provisions of the act of April 8, 1864, the Hoopa Valley Reservation was established (Pamphlet, Ex. Orders, p. 301), the Round Valley already in existence was retained, and it was the declared purpose and intention of the superintendent of Indian affairs for California, who was charged with the selection of the four reservations to be retained, to extend the Hoopa Valley Reservation so as to include the Klamath River Reservation, or else keep it up as a separate reservation, and have a "station" or sub-agency there, to be under the control of the agent at the Hoopa Valley Reservation.

* * * * * * *

The Klamath River Reservation has certainly been regarded by this Department as in a state of Indian reservation.

* * * * * * *

I do not find that any steps were ever taken to sell the Klamath Reservation as an abandoned reservation, under section 3 of the act of April 8, 1864, nor that the General Land Office was ever formally advised of the relinquishment of the same. The reservation appears to have been kept intact with a view to holding it for the continued use of the Indians, who it appears never did wholly abandon it.

In 1879, in compliance with the wishes of this office, all trespassers known to be on the reservation were removed by the military under the direction of the War Department.

In 1883 the Secretary of the Interior directed that allotments of land be made to the Indians on the reservation, and the Indians were accordingly requested to make individual selections, but the work had to be suspended on account of the discovery of gross errors in the public surveys.

All this tends to show that the Department has regarded the lands as being in a state of reservation, and I may add that for a number of years the agent at the Hoopa Valley Agency has been required to exercise supervision over the affairs of the reservation (Comr. Ind. Affs. to Sec'y Int., April 4, 1888).

By the second section of the act of April 8, 1864 (13 Stat., 39), it is provided that the President, at his discretion, shall set apart not exceeding four tracts of land within the State of California to be retained by the United States for the purposes of Indian reservations, and that said tracts may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said State.

The third section of that act provides "that the several Indian reservations in

California which shall not be retained for the purposes of Indian reservations" shall be surveyed and offered for sale as therein directed. Indians have continued to reside on the Klamath River lands, and those lands have been and are treated as in state of reservation for Indian purposes, the jurisdiction is under the United States Indian agent for the Hoopa Valley Agency (An. Rept. Sec'y Int., 1888).

The following is a resolution of the Senate dated February 13, 1889:

Resolved, That the Secretary of the Interior be, and he hereby is, directed to inform the Senate what proceedings, if any, have been had in his Department relative to the survey and sale of the Klamath Indian Reservation in the State of California, in pursuance of the provisions of the act approved April 8, 1864, entitled "An act to provide for the better organization of Indian affairs in California."

In response to this resolution the Commissioner of Indian Affairs addressed a letter to the Secretary of the Interior, dated February 18, 1889, in part as follows:

In response to said resolution, I have to state that I am unable to discover from the records or correspondence of this office that any proceedings were ever had or contemplated by this Department for the survey and sale of said reservation under the provisions of the act aforesaid; on the contrary, it appears to have been the declared purpose and intention of the superintendent of Indian affairs for California, who was charged with the selection of the four reservations to be retained under said act, either to extend the Hoopa Valley Reservation (one of the reservations selected under the act), so as to include the Klamath River Reservation, or else keep it as a separate independent reservation, with a station or subagency there, to be under control of the agent at the Hoopa Valley Reservation, and the lands have been held in a state of reservation from that day to this (Ex. Doc. 140, pp. 1, 2).

In the opinion of the Assistant Attorney General for this Department hereinbefore referred to, it was said:

These facts show that the reservation in question has never been relinquished by formal act of the Indian Office, and no steps whatever have been taken looking to its release from Indian reservation and occupancy, and its survey, appraisement and sale under the act of 1864. On the contrary, it appears that it was always the purpose of the Indian Office to retain it as a reservation. . . . .

Pushing aside all technicalities of construction, can any one doubt that for all practical purposes the tract in question constitutes an Indian reservation? Surely, it has all the essential characteristics of such a reservation; was regularly established by the proper authority; has been for years and is so occupied by Indians now, and is regarded and treated as such reservation by the executive branch of the government, to which has been committed the management of Indian affairs and the administration of the public land system . . . . It is said, however, that the Klamath River reservation was abolished by section three of the act of 1864. Is this so?

* * * * * *

In the present instance, the Indians have lived upon the described tract and made it their home from time immemorial; and it was regularly set apart as such by the constituted authorities, and dedicated to that purpose with all the solemnities known to the law, thus adding official sanction to a right of occupation already in existence. It seems to me something more than a mere implication, arising from a rigid and technical construction of an act of Congress, is required to show that it was the intention of that body to deprive these Indians of their right of occupancy of said lands,

without consultation with them or their assent. And an implication to that effect is all, I think that can be made out of that portion of the third section of the act of 1864 which is supposed to be applicable.

It was therefore concluded that the Klamath River reservation might be legally considered a part of the Hoopa Valley reservation, one of the four Indian reservations authorized by the act of 1864, and consequently that the Department was clothed with authority to remove intruders therefrom, and that the Hoopa Valley reservation may be legally extended so as to cover the ground of the Klamath reservation.

From the foregoing it will be seen that the question raised by the appeal as to the status of the Klamath River Reservation in California is not a new one. Such reservation has all along been regarded and treated as retained for Indian purposes, and the Department has so held. The only Indians even remotely recognized as non-reservation Indians were those residing along the Klamath River between the boundaries of the Hoopa Valley and Klamath River reservations. In the case of Spalding *v.* Chandler (160 U. S., 394, 403–404) it is said:

> It is not necessary to determine how the reservation of the particular tract, subsequently known as the "Indian reserve," came to be made. It is clearly inferable from the evidence contained in the record that at the time of the making of the treaty of June 16, 1820, the Chippewa tribe of Indians were in the actual occupation and use of this Indian reserve as an encampment for the pursuit of fishing. . . . . But whether the Indians simply continued to encamp where they had been accustomed to prior to making the treaty of 1820, whether a selection of the tract, afterwards known as the Indian reserve, was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States Government, or whether the selection was made by the Government and acquiesced in by the Indians, is immaterial. . . . . If the reservation was free from objection by the Government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general or limited uses, and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer.

In the case of Minnesota *v.* Hitchcock (185 U. S., 373, 389–90), it was held:

> Now, in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.

And in the case of State of Minnesota (22 L. D., 388), it was said:

> It is not necessary in order to constitute a reservation that a treaty, or act of Congress, shall specifically mention the lands that are reserved, but it is sufficient if the lands occupied by the Indians are recognized by the officials of the government as reserved Indian lands.

The fact is that by Executive order of October 16, 1891 (Executive Orders 1902, p. 20), the Hoopa Valley Reservation was made to include the Klamath River Reservation, as follows:

> It is hereby ordered that the limits of the Hoopa Valley Reservation, in the State of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart in said State by act of Congress approved April 8, 1864 (13 Stat., 39), be, and the same are hereby, extended so as to include a tract of country 1 mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley Reservation to the Pacific Ocean: *Provided, however*, That any tract or tracts included within the above-described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.

This then was the status of the Klamath reservation upon the passage of the act of June 17, 1892, *supra*. Previously thereto numerous bills had been introduced in Congress providing for the disposition and sale of lands within said reservation. In his annual report for 1885 the Commissioner of Indian Affairs said:

> No less than three bills were introduced in the last Congress "to restore the reservation to the public domain," in each of which provision was made for allotting lands in severalty to the Indians (S. 813 and H. R. 112 and 7505). Neither of said bills was enacted, for the reason, it is presumed, that they were not reached in the regular course of business before djournment. It is my intention to ask at an early day for legislation suitable to the wants of these Indians.

In the committee reports upon House bills Nos. 113, Report 1176, 51 Cong., 1 Sess., and 38, Report 161, 52 Cong., 1 Sess., it was stated that as the Klamath River Reservation was not included within the limits of either of the four reservations authorized by the act of 1864, it became abandoned under the provisions of said act. It was further stated:

> As this land does not constitute an Indian reservation, and has not been used as such for twenty-eight years, there does not appear to be any reasonable objection to the passage of the present bill, the only object and effect of which will be to prescribe a mode for its disposition and sale different from that fixed by act of April 8, 1864 (House Rept. 161, 52 Cong., 1 Sess.).

In view of what is set forth herein the committee was apparently mistaken in concluding that the Klamath had not been used as an Indian reservation. However, none of the bills became law except that of June 17, 1892, which can be construed in no other light than a distinct recognition of the Indians' rights on said reservation. Both the reports of the committee and the act of 1892 preclude the idea that the lands within said reservation should have been disposed of under the provisions of the act of 1864, a different mode for their disposition being prescribed in the bill that became law as well as in the bills that did not.

In support of the appeal here reference is made to the case of United States *v.* Forty-eight Pounds of Rising Star Tea (35 Fed. Rep., 403),

decided in the United States district court of California, and also to the same case decided in the United States circuit court for the same State (38 Fed. Rep., 400). The first case was elaborately discussed by the Assistant Attorney General for this Department in his opinion of January 20, 1891, hereinbefore referred to, with the result that while conceding the probable correctness of the judgment rendered in said case, the Assistant Attorney General was not convinced that his own views were erroneous, and he could not assent to the reasoning of the court. That case arose upon a libel filed by the United States against certain packages of goods belonging to one R. D. Hume, seized because of an alleged violation of Sec. 2133 of the Revised Statutes, which provides:

> Any person other than an Indian who shall attempt to reside in the Indian country as a trader, or to introduce goods, or to trade therein without such license, shall forfeit all his merchandise offered for sale to the Indians, or found in his possession, and shall moreover be liable to a penalty of five hundred dollars.

The violation of law in this instance consisted in paying the Indians "in trade" for their services in fishing, by furnishing them with articles composing the cargo of a vessel owned by Hume, in the Klamath River, a navigable stream under the laws of the State of California. The court incidentally held that the Klamath River reservation was an abandoned reservation, to be disposed of as specifically provided in the act of 1864; that the Klamath lands are not such a reservation as brings them within the meaning of the terms "Indian country." The Assistant Attorney General held "there was and could be no question properly before the court as to the legal or actual status of that reservation; and the utterances of the Judge in relation thereto were *dicta* and not essential to the decision of the case before the court." The date of decision by the district court was June 7, 1888, which was the one discussed by the Assistant Attorney General, and that of the circuit court April 1, 1889. The case again has been considered in connection with the concurring decision therein on appeal to the circuit court. The Department is unable to find that it has any controlling bearing upon the case now under consideration. Besides, whatever persuasive force said cases may have had prior thereto, is minimized or destroyed by reason of the Executive order of October 16, 1891, extending the Hoopa Valley Reservation so as to include the Klamath, and the act of June 17, 1892, which specifically provides for a different mode of disposition for the lands in the latter reservation from that prescribed in the act of 1864.

As to the Character of the Lands in the Klamath River Reservation.

The directions given to the State superintendent August 15, 1855, were to select the reservation from such "tracts of land adapted as to soil, climate, water privileges, and timber, to the comfortable and permanent accommodation of the Indians."

The land on this river is peculiarly adapted to the growth of vegetables, and it is expected that potatoes and other vegetable food, which can be produced in any abundance, together with the salmon and other fish which abound plentifully in the Klamath river, shall constitute the principal food for these Indians (An. Rept. Comr. Ind. Affs. 1856, p. 238).

One great difficulty this reservation labors under is the small amount of land that can be brought under cultivation. The Klamath river runs through a canon the entire length, and the reservation being located upon each side of it, the only land suitable for cultivation is in the bottoms, ranging in size from one acre to seventy. . . . With these exceptions, the balance consists of mountains heavily timbered, through which the river appears to have cleft its way, interspersed with bottoms of from one to three acres (Id. 1858, p. 286).

This reservation is well located, and the improvements are suitable and of considerable value. There is an abundance of excellent timber for fencing and all other purposes, and at the mouth of the Klamath river there is a salmon fishery of great value to the Indians (Id. 1861, p. 147).

The Klamath river, from the mouth of the Salmon river down, runs mostly through a close canon, and is a very broken country, and had my predecessor allowed the Indians to care for themselves at the time of the great overflow, they would have taken to the mountains, and in a few days after the flood had subsided they would have returned to the river banks, and with fish have provided for their immediate wants, (as in fact two-thirds of them did and yet remain there), and would saved the government the heavy expense of their removal and subsistence at Smith's river. The great number of Indians inhabiting the Klamath and Humboldt countries, the dense redwood forests on the river bottoms, and the high, craggy, precipitous mountains back, would, to my mind, be a serious warning against any effort to remove them by military force, etc. (Id. 1864, p. 122).

The country along the Klamath river, especially where the non-reservation Indians were located, and the habits and homes of the people, are thus described in the report of a special agent under date of June 25, 1885 (An. Rept. Comr. Ind. Affs. 1885, p. 264):

Nature seems to have done her best here to fashion a perfect paradise for these Indians, and to repel the approach of the white man. She filled the mouth of the Klamath River with a sand-bar and huge rocks, rendering ordinary navigation impossible, and pitched the mountains on either side into such steeps and amazing confusion that the river has a hard struggle to drive its way through the wonderful gorges; it turns and twists and tumbles along the rocks and gulches in an incessant mad rush to the ocean, without one moment's rest and without touching the borders of one acre of meadow land. The banks and hills shoot up abruptly from the river in jaunty irregularity, as if formed solely for the capricious life and limited aspirations of the Indian. Tremendous bowlders and cragged points jut into the river and change its course, forming innumerable eddies and back currents, where salmon seek rest, to be taken in large numbers by means of Indian nets. . . . . .

This, then, is where these Indians dwell in their grotesque villages. They form a very respectable peasantry, supporting themselves without aid from the Government by fishing, hunting, raising a little stock, cultivating patches of soil, and by day's labor at the Arcata lumber-mills. There is a crude thrift among them that one can not help admiring. Their little villages are perched on the mountain side, with most picturesque attractiveness, their houses are all made of lumber, and look as if they had been tossed upon the hillsides and allowed to stand wherever they gained a foothold. The beauty of irregularity could have no finer effect with studied art or the taste of cultivated refinement. Often a latticed porch, a curtained window, or a high roof with overhanging eaves displays an attempt at civilization, crude as it may be . . . .

The old men keep the nets in order and fish steadily; the women dress and dry fish, gather acorns for meal, and fetch wood and water; middle-aged men go off to work awhile, look after the hogs and horses, and make gardens, with their wives to help them. It is common to find little gardens of potatoes, beans, and corn among them, fenced in, just out of town as it were. . . . . Indians have had general and actual, though unrecorded, possession and occupation of the whole river line here for years and years. Their dwellings are scattered and permanent. They wish to remain here; here they are self-supporting—actually self-sustaining. This is their old home, and home is very dear to them—treasured above everything else. No place can be found so well adapted to these Indians, and to which they themselves are so well adapted, as this very spot. No possessions of the Government can be better spared to them. No territory offers more to these Indians and very little territory offers less to the white man.

* * * * * * *

The few among these Indians who have turned their attention to farming show much thrift and enterprise. Though, owing to the fact that but a small portion of their territory is suitable for farming, a large majority of them depend upon wages for a living (Id. 1892, p. 230).

The only arable land occupied by Indians is found on the benches along the river in lots of a few acres in extent. These are generally cultivated as gardens. . . . . The land allotted can never be used for agriculture, but the allotment secures the Indians in the tenure of their homes. (Id. 1894, p. 117.)

If it should be thought wise to allot land in severalty to Indians in such a stage of civilization, still this tract is of a character which ought not to be devoted to such a purpose. It would be entirely useless to them, being alone valuable for lumbering, for mining, and stock raising—by far the greater part being heavily timbered, mountainous, and broken, as shown by the field notes of survey of said land (House Rept. 1176, 51 Cong., 1 Sess., April 1, 1890, and Id. 161, 52 Cong., 1 Sess., February 5, 1892).

The above extracts require very little comment. They perhaps show that a comparatively small portion of the lands within the Klamath Indian reservation is suitable for agricultural purposes, strictly speaking, and that said lands might fairly be classed as timber lands. But it is equally clear that the lands within this reservation are peculiarly adapted to the purposes for which it was set apart, reference being had to the location of said lands and the habits and necessities of the Indians. There is little question that the prevailing motive for setting apart the reservation was to secure to the Indians the fishing privileges of the Klamath river. At the same time there is undoubtedly sufficient arable lands for garden and grazing pur-

poses, and at some points on the river there are large quantities of farming lands. In the Instructions of February 21, 1903 (32 L. D., 17), it is said:

> The practice of forbidding allotments under section 4 of the general allotment act, of lands valuable for the timber thereon, is not based upon any decision of the Department laying down a well defined rule, and there is no good reason for such prohibition provided the allotment contains sufficient arable land to support an Indian family and is on the whole suitable for a home for the allottee and is applied for in good faith for that purpose.

This is certainly true of allotments of reservation lands under the act of 1887, and particularly so where allotments are authorized of specified tracts under special acts. But what is of more importance, the above extracts clearly show that Congress was fully aware of the status and character of these lands, the history of the Indians and their occupancy of said lands, at the date of the passage of the act of June 17, 1892. The act of June 17, 1892, provides, among other things:

> That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands.

The whole history of these Indians, the recommendations of the Indian Office, and the context of the act itself, show that the primary purpose of the legislation of 1892 was to preserve the rights of the Indians located on the Klamath reservation. Allotments were to be made to all applicants who should make their selections within one year. Even lands settled upon, improved, and occupied by settlers were not exempt from allotment if the same had been resided upon by one or more Indians for four months prior to the passage of the act. After the expiration of one year, if any person had settled upon a tract not allotted to or reserved for the Indians, he could enter it under the homestead law upon payment of a certain price therefor. But, under the proviso above quoted, the lands not allotted or reserved were to be entered under the laws usually applicable to their particular character.

As to the Tribal Status of the Klamath River Indians.

It may be stated generally that these Indians have always been recognized as a tribe by the government. Any effort to show that they are not a tribe must combat the reports of the government's agents, the correspondence between the Department and the Indian Office, the orders of the Executive and the appropriation acts of Congress wherein such recognition unmistakably appears. The preponderance of the evidence introduced at the hearing in this case is to the effect that the Klamaths constitute a tribe. Members of the tribe by blood, as well as white men who have intermarried with these Indians and who are familiar with their habits, customs and government, from long residence among them testify that they are a distinct tribe, that they

speak a different language from the neighboring Indians, have laws of their own; that there are men among them who are recognized as leaders or chiefs—the present chief being Peckwanish Colonel or Suregoin Jim—and that the members of this tribe are called "Polyacks." The records of the Indian Office show that on October 6, 1851, a treaty was made as follows:

A treaty of peace and friendship made and concluded at Camp Klamath, at the junction of the Klamath and Trinity rivers, between Redick McKee, one of the Indian Agents, specially appointed to make Treaties, with the various Indian Tribes in California, on the part of the United States, and the Chiefs, Captains, and Headmen of the Tribes or bands of Indians, now in council at this camp, representing the "Poh-lik," or lower "Klamath," The "Peh-tuck," or upper Klamath, and the "Hoo-pah" or Trinity river Indians—containing also stipulations, preliminary to future measures, to be recommended for adoption on the part of the United States.

The treaty provided for a cession, and the setting apart of a described tract 20 miles in length by 12 in width—"containing in all six or seven square miles of farming land"—as an Indian reservation for the tribes named and such other tribes as the United States might thereafter remove from other parts of the valleys of the Trinity and Klamath rivers, or the country adjacent. The treaty appears never to have been ratified or confirmed, but it effectively shows that the Indians had the capacity of making treaties; that they had a tribal organization capable of entering into a treaty with the United States. Being self-supporting and independent as they were, it may be their tribal relations were not so intimate and pronounced as other tribes who were dependent upon the government. But they were nevertheless looked after by agents of the government and were always regarded and treated as a tribe. Congress in the act of June 17, 1892, in effect recognized these Indians as a tribe, as well as their claims to the lands in the Klamath reservation, by providing that the proceeds arising from the sale of the remaining lands after allotments were made, should constitute a fund to be used for the maintenance and education of the Indians and their children.

In view of the provisions of the act of June 17, 1892, the above matters are given at length as subjects of historical interest and not because they are regarded as of necessarily controlling importance in determining the questions involved in this case. The act of 1892 was a special act authorizing allotments of specific lands, which alone precluded the idea that Congress intended they should be allotted under the fourth section of the act of 1887. The act of 1892 provided for allotment to "any Indian now located upon said reservation," which removes any question as to whether the lands constituted a reservation, or whether the Indian was a member of a recognized tribe or not. The question of tribal relation becomes of importance only in connection with that portion of the act of 1892 which provides that the allotments therein authorized are to be made to the Indians "under the

pro[illegible]ns of the act of February eighth, eighteen hundred and eighty-seven, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,' and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof." The act did not provide under which section of the act of 1887 the allotments should be made, but as said act of 1892 in terms recognized the Klamath as a reservation, there ought to be little or no question that it was contemplated that they should be made under the first section of the act of 1887, as the fourth section of said act refers exclusively to Indians not on reservations. Prior to the passage of the act of 1892 the Department had already held that the lands within the Klamath River reservation "should be allotted, if allotment be made, to the Indians thereon, under the first section of the allotment act of February 8, 1887 (Opinion Asst. Atty. Gen'l, January 20, 1891). The wording of the act of 1892 is "any Indian now located upon said reservation." It does not have to be shown under this act that the Indian was a member of a tribe or band, and this shows that all the provisions of the act of 1887 are not applicable, but rather the manner therein prescribed for making allotments. Whatever may have been the status of the lands or the Indians the act of 1892 took them out of the class subject to allotment under the fourth section of the act of 1887. The lands within the Klamath have never been such as could be regarded as "not otherwise appropriated."

At the time the allotments in question were made the husband of Mary Shelton, sr., William Shelton, a white man, was dead, and her daughter, Mary Shelton, jr., was about twelve years of age. The widow was then living with her son-in-law on a tract of land adjoining the present allotments, which tract had been allotted to the latter's daughter. The Sheltons have always been claimed by the Indians as members of the tribe. It seemed to be conceded that the country along the Klamath river is all of the same general character. The lands allotted the Sheltons are similar in all respects to many allotments where the Indians actually live and maintain their families. The fishing privileges are considered by the Indians as of more value in making a living than agricultural pursuits. They also utilize nuts, acorns and berries for food. The evidence tends to show that at time of these allotments there were no lands open more valuable for the purpose of making homes—all of the open lands having been allotted or settled upon by the whites. It appears that there are some good farm lands within six or eight miles of the ocean, but it also appears that the allotting agent commenced at the mouth of the river and worked up. So that when these allottees were reached all the so-called open lands were already claimed by other Indians, the result

being that many Indians had to take small pieces. Now, as herein shown, all these conditions were well known to Congress at date of passage of the act of June 17, 1892. That act provided for allotments to Indians located on the reservation. In the view suggested by the appeal here the act of 1892 would have been wholly inoperative at its passage for one reason alone, that is, that the lands to be allotted were timber lands. Being aware of this condition it must be assumed that Congress would not do a vain act, that is, would provide only for the allotment of agricultural lands knowing full well that the lands specified for allotment were not of that character.

Under the general allotment act of 1887 reservation Indians are not required to settle, improve, or maintain residence upon their allotments made from lands held for the tribe, so that it is unnecessary to consider the evidence bearing on those points in this case. Being a recognized member of the tribe, Mary Shelton, sr., was entitled to share in the tribal property regardless of her marriage to a white man. Her status in this respect was not affected by the act of August 9, 1888 (25 Stat., 392), or the act of June 17, 1892. Her daughter, Mary Shelton, jr., would also have been entitled to an allotment under the act of 1887, and her rights are preserved by the act of June 7, 1897 (30 Stat., 62, 90), which likewise was not affected by said act of 1892.

A supplemental brief has been filed here by appellant upon the scope of the act of April 23, 1904 (33 Stat., 297), with particular reference to the bearing of said act upon the authority of the Secretary of the Interior to cancel first or trust patents issued for Indian allotments. In view of the conclusion reached herein it will be unnecessary to discuss in this connection the question thus raised.

The decision of your office holding these allotments intact, is hereby affirmed.

DESERT-LAND APPLICATION—EXECUTION OUTSIDE OF LAND DISTRICT—ACT OF MARCH 4, 1904.

NATHANIEL L. WARD.

Under the act of March 4, 1904, an application to enter under the desert-land laws, although made outside the land district, is nevertheless, if made within the county in which the land is situated, properly executed.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 8, 1904.* (D. C. H.)

This case is before the Department on the appeal of Nathaniel L. Ward from your office decision of March 21, 1904, affirming the action of the local officers in rejecting his application to make entry under the desert land laws for the S. ½ of the SE. ¼ of Sec. 35, T. 5 N., R. 24 E., Walla Walla, Washington, land district.

The said application was rejected for the reason [illegible]