SPECIAL MESSAGE

OF THE

GOVERNOR OF IOWA,

TRANSMITTING

REPORT OF JOSIAH A. HARVEY,

COMMISSIONER UNDER CHAPTER SEVENTY-NINE, ACTS OF THE ELEVENTH GENERAL ASSEMBLY, TO ADJUST CLAIMS AGAINST THE GENERAL GOVERNMENT, ARISING UNDER VARIOUS LAND GRANTS.

LAID BEFORE THE FOURTEENTH GENERAL ASSEMBLY, MARCH 21, 1872.

DES MOINES:
G. W. EDWARDS, STATE PRINTER.
1872.

MESSAGE.

STATE OF IOWA,
EXECUTIVE DEPARTMENT,
March 21, 1872.

Gentlemen of the Senate and House of Representatives:

I submit herewith the report of Hon. Josiah A. Harvey, Commissioner, appointed by chapter 79 of the acts of the Eleventh General Assembly, "on behalf of the State, to adjust with the "general government the matters and claims arising under sundry "land-grants." I have carefully read this report, and feel no hesitancy in saying that it presents many important facts and much useful information upon questions connected with our unadjusted land-claims. I am pleased to be able to announce to you that, after faithful effort in behalf of the State, the Commissioner seems now to have brought these land matters to a point which promises success. His time, while in Washington, has of late been mostly devoted specially to pushing the swamp-land claims.

I am aware that many believe these claims never to have been founded upon very wise theories, and have but little sympathy with any effort to push them to a final issue. But this would seem to me to be a little unfair to the newer portions of the State. Before there was any question raised in regard to the expediency of the swamp-land grant, the older settled counties had acquired title to large quantities of this class of lands; but, as will be recollected by those who have been conversant with land matters, about the time a large number of the newer counties were being organized, and had proceeded with the selection of their swamp-lands—as the older counties had done before them—the Commissioner of the General Land Office decided that the original grant was intended to apply only to lands subject to overflow along navigable rivers. Under this construction of the law, the Surveyor-General

at Dubuque, through whose hands the reports of the county agents must necessarily pass, refused to examine or send up the lists of selections made by these counties, until the time for filing these reports had expired; and thus they were entirely cut off (by no fault of their own) from the enjoyment of a benefaction, of which all the older counties had obtained the avails accruing to them.

It has, therefore, always seemed to me proper to continue efforts looking to a reversal of these decisions, so adverse to the interests of the newer counties, until every county in the State is in this regard placed upon an equality with every other. And I am gratified that the steps which have been taken now promise a fair measure of success.

In my judgment, these newer counties, which have been subjected to this long delay in respect to their swamp-land claims, will never receive an equal advantage from this grant with the earlier settled portions of the State. Large quantities of the lands which would have proved of such swampy character as to be adjudged within the grant, if these lists of selections had been examined by the Government at the proper time, have now passed into the hands of third parties, whose titles the late act of Congress (a copy of which appears in the accompanying report,) provides shall not be disturbed, and which it would not have been policy to disturb even if this provision had not been made.

But, as all the facts in reference to this business are fully and ably set forth in Mr. Harvey's report, it is unnecessary for me to say more at present than to ask your attention thereto. The documents accompanying this report being somewhat voluminous, they have not been copied, but are transmitted herewith to the Senate.

C. C. CARPENTER.

REPORT.

His Excellency, C. C. Carpenter, Governor of Iowa:

SIR:—When I reported to your predecessor in March, 1868, the condition of the claims of the State against the general government, under the swamp-land grant, I thought that within two or three years all these matters might be adjusted. Confident of the legal rights of the State, I was only mistaken in supposing that the Interior Department could so easily be induced to execute the law.

The great difficulty was to get a recognition of the "*suspended "lists*," or "*new selections*," as they are sometimes called, as swamp selections.

It was agreed between the State and the Department, soon after the passage of the grant, that the State should select by agents appointed for that purpose the lands claimed as swamp and overflowed, and report them to the Surveyor-General. That officer was directed to examine all such lists of selections, and all evidence furnished by the State touching the character of the land, in connection with the field-notes of the government survey, plats, &c., in his office, and report to the General Land Office, as *swamp selections*, such as in his judgment, from such examination, came within the meaning of the grant. Such as he thus reported were then recorded on the tract-books in the swamp division of the General Land Office and held as legitimate selections. In pursuance of this arrangement the State was still making and reporting her selections, and the Department receiving them, till July 13th, 1860, when the Commissioner changed the construction up to that time given to the grant, and issued his instructions to the Surveyors-General, limiting the application of the grant to "*lands contiguous to navigable rivers*," and directing them not to return as selections any other lands.

Some of our selections were at that time in the Surveyor-General's

office not acted on, and a number of our counties had not completed their selections, but did afterwards, and sent them to the Surveyor-General.

All such (unless contiguous to the Mississippi or Missouri river,) were by these instructions prevented from being reported to the General Land Office, but were retained in the Surveyor-General's office, at Dubuque. In September, 1860,—two months only after the instructions were issued,—on application of Senator Green, of Missouri, in a case from that State, it appears that the Secretary of the Interior overruled the Commissioner's construction of the grant, and held that any land so wet as to be unfit for cultivation, either by reason of being *swampy or overflowed*, whether contiguous to rivers or elsewhere, came within the meaning of the grant.

The Commissioner from oversight, or *design*, (I think the latter) failed to modify his instructions to the Surveyor-General of Iowa so as to accord with the views of the Secretary, but left him still acting under them as issued July 13, 1860.

The State, it seems, also remained ignorant of the decision of the Secretary, but continued to send her selections to the Surveyor-General; and, when notified by him of his instructions from the Land Office, requested him to retain them until a modification of the ruling could be procured. I find that the Surveyor-General called the attention of the Commissioner to these instructions, which prevented his acting on these selections, and to the lists accumulating and on file in his office, in each of his annual reports of 1863, 1864, and 1865, which were printed in the reports of the General Land Office for those years. Hence, I feel warranted in saying it must have been by *design*, rather than oversight.

The result was that in Iowa the grant was limited to lands along the Mississippi and Missouri rivers, while in other States it was applied to any lands too wet for successful cultivation. And this was done by a Commissioner hailing from a State that had already received over two million acres of land under this grant.

Thus our selections remained in the office at Dubuque till 1866, when that office was discontinued. They were then transferred to the General Land Office, simply as a part of the archives from the discontinued office. Prior to my connection with the matter as agent

of the State, an effort was made, to have one of these lists (that of Dickinson county) taken up for adjustment, by Hon. A. W. Hubbard, (as appears from the decision,) but the Commissioner refused to recognize the selections because they had not been reported by the Surveyor-General in the usual way.

When I made my report to your predecessor, in 1868, I was confident that the State was entitled to have these lists received as legitimate selections, as it was by no fault or laches on her part that they were not regularly reported by the Surveyor-General, but such failure to report was caused entirely by the error of the Commissioner of the General Land Office. I had too much confidence in the integrity of the Government to believe, that, in a case fairly and fully presented, high public officers would persistently and willfully refuse to discharge a legal duty; and that, if they should, the case being so palpably just, it would not be difficult to secure relief by an act of Congress.

I have made repeated efforts to reach the desired end, but found it much more difficult than I expected. Selecting the list of selections of Buena Vista county as a test case, I applied to the Commissioner to take it up for adjustment. Failing in this, I succeeded in getting the case referred to the Secretary on the 29th of April, 1869. (See copy of Commissioner's letter "A," attached.) I followed it up with several written arguments and personal interviews, until I was personally informed by the Assistant Secretary, to whom the case was submitted by the Secretary, that, if I pressed it to a decision, he would sustain the action of the Commissioner, and gave as his reason that the State had swindled the Government under the Des Moines River grant; had taken *indemnity* under the act of 1862, and then, taking advantage of a decision of the Supreme Court, held the *lands in place*, thus duplicating the quantity granted; and he expressed his determination to allow none of these swamp-land claims. (I mention this simply to show the feeling of the Department, and what subterfuges were resorted to to prevent a settlement of these claim.)

I thought best to let the case rest for the present, and await the decision of the Supreme Court, which I felt confident would sustain our claim.

These decisions were rendered at the December term, 1869. (*Railroad* v. *Fremont Co.*, and *Railroad* v. *Smith*, 9 Wallace, 89 and 95, published also with the late report of the Register of the State Land Office.)*

In these cases the Supreme Court of the United States declares the rights of the State to depend upon the *grant*, and not on the act of the Secretary, and that they cannot be defeated by his failure to do his duty; thus settling the construction of the act of 1850, establishing what I had been contending for on behalf of the State, and clearly indicating the duty of the department in these cases. Soon after, a change was made in the department. Secretary Cox gave place to Secretary Delano; Assistant Secretary Otto was removed; and finally Commissioner Wilson was compelled by force of circumstances to give way for Major Drummond in the Land Office.

When these very desirable changes were effected, and relying on the law as expounded by the Supreme Court, I renewed my efforts in the Buena Vista county case, and, besides previous communications and interviews, I presented, on the 24th of March, 1871, a written argument covering the whole ground in dispute, which seemed to me conclusive. (Copy attached, "B.") Senator Wright also filed a written argument in addition. (Copy attached, "C.") Both Senators Wright and Harlan aided in personal interviews with the Secretary, urging the recognition of the list.

Leaving the case in this condition, I returned home the first of April, with the promise of the Assistant Attorney-General (just installed as solicitor of the Interior Department) that the matter would be decided within a few days.

*The Missouri case was submitted at the spring term. Not knowing that such a case was on the calendar, I happened in the Supreme Court on the day the case was being argued, and heard Senator Drake make his argument in support of Smith's claim under the swamp grant. He was evidently unprepared for the argument—called, as he said, from his senatorial duties to engage in the discussion without time for preparation. The result was, that notwithstanding Mr. Drake's distinguished legal ability, his case was submitted with an argument of fifteen or twenty minutes in length, leaving, as I thought, the most important points untouched. It was really considered as a backing down on the part of the swamp claim. An adverse decision appeared almost certain. And fearing its consequence, as a precedent, and with Mr. Drake's approbation, I asked the court to withhold their decision till our Iowa cases could be argued

No action being taken in the case, however, I returned in September, and insisted on final action in the case, and on the 23d of October, the Secretary rendered his decision. (Copy attached, "D.") This decision being adverse—which I did not expect—in clear violation of the law and rights of the State, I was discouraged, and sought the interview with yourself and the Census Board at Des Moines on the 23d November last, to counsel as to the better course to pursue.

In pursuance of our conclusion at that consultation, I returned to Washington and applied to the Secretary for a modification of his decision, so as to allow us to furnish the proof he found wanting. (Copy attached, "E.")

I also applied to the Commissioner to take up a list of selections of Carroll county, which had the endorsement of the chief clerk on it, showing when it was deposited in the Surveyor-General's office. This the Commissioner refused on grounds which appear to me utterly untenable, (see his letter "F,") and I appealed to the Secretary in this case also, and sustained the appeal with another written argument, reviewing the grounds of the Commissioner's decision, and the course of the department in these matters. (Copy attached, "G.")

Both the motion for a modification in the Buena Vista county case and the application to take up the Carroll county list, were refused by the Secretary, without attempting to sustain his action by argument or reason. (See copies attached, "H" and "I.")

Sustained by our Senators and Representatives in Congress, (all uniting with me, except Mr. McCrary, who was absent,) I appealed to the President for a review of these cases, and succeeded in getting them referred to the Attorney-General of the United States, Hon. Geo. H. Williams, in whose ability and integrity we all have the utmost confidence When I left Washington a few days since, he

or give me a hearing in that case. They declined to withhold the decision, but permitted me to file my arguments in the Fremont county case, for their consideration in the Missouri case. The result was, the decision *was withheld till the Fremont county case was argued and submitted at the next term.* And the decision in the latter case appears first in the report. I feel justified in claiming these decisions as the result of my labors. I deem it to due to myself to make this statement, because my name does not appear in connection with the decisions as published in the Register's Report, although no one else ever, from its inception to its termination, appeared as attorney in the case for said county, nor assisted me in any respect therein. H.

had not found time to examine the cases, but expected to do so within two or three weeks.

After directing our written arguments (as well as the papers in the cases,) to be submitted to him, I left, with the understanding that Senators Wright and Harlan should look after the matter and secure an early decision.

Confident that the Attorney-General will render an opinion in harmony with the decisions of the Supreme Court, and knowing that to do so, he must overrule the decisions of the Secretary in these cases, I was anxious to have his opinion, regardless of the action of Congress, in regard to these suspended lists, and, therefore, requested our Senators to insist on it, although Congress should pass the bill for relief.

An appeal to the President from the head of a Department is very rarely resorted to. But few precedents can be found. In fact it cannot be claimed as a matter of right. There is no statutory provision authorizing it. It is only granted in cases of very great importance, when asked by those wielding official and political influence. In these cases, it was granted at the request of our Congressional delegation as before stated. In a matter of so much importance, I felt justified in carrying it to the very utmost extent, to secure the rights of the State. As soon as the decision of the Attorney-General is rendered, I will notify you of the result, which I feel confident will be favorable.

While thus prosecuting the matter before the Department, we have also endeavored to secure relief by Congressional action. Occasionally the public press and the people, justly indignant at the extravagance of Congress in granting away the public domain, raise such a clamor, that Congress settles back to the other extreme, and becomes *extremely economical*. At such times it is useless to ask such legislation. Every thing relating to land is conceived to mean a *steal* of some kind, *express* or *implied*, and is introduced only to be smothered in committee, or fall between the two Houses.

At every session, when there was any prospect of success we have made the effort. At one session the bill passed the House, and failed in the Senate, ostensibly for want of time for the committee

to consider it. At a previous session a similar bill passed the Senate, and failed in the House for the same reason.

Early in the present session we had introduced, simultaneously in both branches of Congress, a bill requiring the Commissioner to take up and adjust all these suspended lists. I endeavored to draw it sufficiently explicit and imperative to prevent dodging, and at the same time as favorable for the State as we had reason to believe could be passed.

Our Senators soon passed it through their branch, but it was more difficult to get it through the House. It did however pass that body also on the 28th of February. (Copy of the bill attached. "K.")

For reasons stated in my argument ("G") to the Secretary in the Carroll county case, it seemed to me hardly necessary or proper to insert the provision concerning rights of settlers. I would not abridge the rights of a *bona-fide* settler in any respect. But every lawyer knows that when any of these cases get into court, (as some of them may,) the rights of the settler will depend on the legality of prior acts. *Subsequent* legislation cannot avail him, as against prior rights of others legally acquired. It would however have been very difficult, if not impossible to procure the passage of this act without this provision.

Under this provision a claim can hardly be considered *bonafide* if the land is *actually swampy or overflowed*, for the simple reason that the entry was illegal. If the Department rejects the swamp claim, the courts can review the act. Our lists being now recognized as legitimate swamp selections, the greatest difficulty in the way of getting into court with these cases is removed.

While pressing these matters before the Department recently, the Secretary gave me to understand that he would order the lists taken up for adjustment, if I could release the claim of the State to all lands claimed as homesteads or pre-emptions, and also release all claim for idemnity therefor. I declined to do so, first because I had no *power* to do it, and *secondly*, I had no *inclination*, if I had the power.

If the land is in fact swamp land it belongs to the State, and the Department had no right to allow it to be entered or to dispose of it in any way. If it did the State then should have indemnity for it. We

are entitled to the land or the indemnity. If they want to sustain their sales let them give us the purchase-money.

I considered the proposition of the Secretary a virtual acknowledgment of the legality of our claim. If not valid it is his duty to reject it without hesitation, otherwise he should award the State her due, without asking her to compromise away her rights under grant.

The counties having swamp selections, among these suspended lists, and which will be benefited by the act, are: Adams, Audubon, Benton, Black Hawk, Bremer, Buena Vista, Carroll, Calhoun, Cass, Cerro Gordo, Crawford, Dickinson, Dubuque, Emmet, Franklin, Greene, Grundy, Lucas, Monona, Monroe, Montgomery, O'Brien, Page, Pocahontas, Ringgold, Shelby, Taylor, Warren, Wayne, and Worth. (As to their several claims, see my report of 1868.) In some of them all the selections made, in others only small lists are new selections.

In the aggregate, I think these lists embrace half a million acres, many of which are not swamp, doubtless, and should not have been selected. But, swamp or dry, they have nearly all been disposed of by the Government, under railroad grants and otherwise. It seemed to be the policy of the Department to hold the matter in suspense until they could all be disposed of.

Finding lists in process of preparation for approval of lands to the McGregor Western Railroad, I filed in the General Land Office, on the 19th day of March, 1871, a protest against certifying any lands embraced in these suspended selections, until the claim thereto under the swamp grant should be finally disposed of, and succeeded in preventing the approval and certification.

The Department will allow indemnity only for lands disposed of between Sept. 28, 1850, and March 3d, 1857. The great bulk of these lands have been disposed of since 1857, and while these lists have been held suspended in the General Land Office. Under the law as now construed there is no indemnity provided for them. In many instances non-resident speculators have entered whole sections in a body, and paid the government in money therefor. In all such cases, my advice to the counties is to hold the land, if it is such as the grant contemplated, for, if it is actually swamp or overflowed, there is nothing clearer than that the title given to those purchasers

and locators is invalid. And if some of them are set aside, Congress will be awakened to the necessity of legalizing them, which can be done only by granting indemnity, or in some other way securing a relinquishment of the claim under the swamp grant.

The Department by its own arbitrary rulings and practice, and not from any provision in the law, restricts the location of indemnity scrip to the State. This is unjust to this State, for, while they have held our lists and forbid us a settlement of our claims, they have disposed of the land, so as to leave us none on which to locate the scrip. As other States are interested in this same question, it is probable that some provision will be made allowing such locations outside the State.

It may be thought that a due regard for the interest of the several counties should have prompted a more vigorous prosecution of these indemnity claims, at least so far as the selections had been reported and recognized, so as to have had more of the scrip located in the State. In fact, as you well know, some very serious charges were made against me at the last session of the legislature in reference to these matters. Charges, which if not made from sinister motives, certainly came from some one most profoundly ignorant concerning the matters referred to.

In the first place, it was the duty of the several counties to prepare and forward their indemnity proof. It was not expected that I should do it. I have aided them by giving information, forms, etc., whenever asked. And all the proof sent to me or with which I had anything to do, or control over as agent of the State, has long since been passed upon by the General Land Office, and allowed or rejected, except the proof for Howard county, filed in the General Land Office in March, 1871, and which is now being "*worked up.*" And in the second place, it would have been very unwise indeed, if the proof had been on file, to have had it examined and passed on within the last four years (previous to this winter), for reasons that will presently appear. It would have been equivalent to surrendering about nine-tenths of the claims.

On the 19th of March, 1866, while Mr. Harlan was Secretary of the Interior, he adopted the rule that in the adjustment of these

indemnity claims, where the proof furnished came up to the requirements of the office, it should be considered sufficient except when the field-notes of the Government survey in some way contradicted the swampy or wet character of the land. In such cases, the matter was suspended for future action.

To illustrate: The State claims indemnity for a certain tract, and presents affidavits, in due form of two witnesses, proving the swampy character of the land. Then an examination of the field-notes is made, and, if, in running the nearest lines, the surveyor, in indicating the character, designates it as *high*, *dry*, *rolling*, or *good*, or uses any term inconsistent with the swampy character, then the claim is not allowed, but is held in suspense. (How long they will be suspended, no one knows.) But if the description is consistent with the swamp claim, as *low*, *wet*, *level*, etc., or if there is *no indication given*, as is the case in many instances, then the claim is allowed.

By this rule the office has been governed in the allowance of all our indemnity, so far as settlements have been made. Under this ruling, the indemnity proof of Greene county was "worked up" about the time, or soon after, Mr. Harlan retired from the Secretary's office, and the indemnity allowed by the Commissioner was $4,691.28 cash, and over 10,000 acres scrip. This award was submitted to the Secretary, Mr. Browning, for approval. He neglected, or rather refused to approve it, and held it in suspense. After Secretary Cox came in, the case was repeatedly pressed upon his attention, until on the 21st of June, 1870, he rejected the award or allowance of the Commissioner, overruled the ruling laid down by Mr. Harlan, and decided that before any indemnity could be allowed, the proof of the State *must be sustained by the field-notes:* that is, we must not only prove by two or more witnesses that the land is swamp, but the field-notes *must show the same thing affirmatively*. And he returned the case to the Land Office with instructions to re-examine it in accordance with this ruling, which would deprive us of nearly all that was awarded under the previous ruling.

I used what influence I could exert, aided by Senator Harlan, and the American Emigrant Company, (claiming an interest in the Greene county swamp lands,) brought all the influence to bear

which they could control, to hold the Department to the Harlan ruling, but without effect.

After Secretary Cox had retired, and Mr. Delano came in, efforts were renewed for a review of the Greene county case, and a modification of the Cox ruling, which eventually proved successful, and on the 24th of November last, scrip for 10,658.22 acres was sent to the Governor, and the cash—$4,691.28—also allowed; the Department thus overruling the Cox decision, and settling back on the Harlan ruling of March 19, 1866.

Now, if any indemnity claims had been crowded through after the Greene county case was "worked up" by the Commissioner they would have been governed by the Cox decision, which would have given us a very small percentage of the claims.

I thought it best to let these claims rest till the ruling could be changed, which I was confident must be done sooner or later.

That change having now been effected, these claims can be urged to settlement under the old ruling as rapidly as the counties will furnish the proof.

On the 10th of February I called the Commissioner's attention to the claims of Howard county, and asked him to take them up for adjustment. The indemnity proof was filed, March 16, 1871, and is now being examined. I think there is no other proof on file there which has not been called up and passed on or suspended.

The claims of Woodbury county have also been examined, and an approved list transmitted to the State on the 27th ultimo, embracing 1,046.89 acres. The selections in that county were reported prior to the 3d of March, 1857, and might have been adjusted at any time so far as "lands in place" are concerned, but, as no disposition of these lands was permitted, there is no loss by the delay. There is no indemnity proof yet taken in that county.

No one regrets more than myself that I have been unable to bring this matter to a successful issue long since, but, with the adverse feelings and *rulings* of the Department, it has been impossible. I might have put in more time, but it would only have increased the expenses. I have spent all the time that I thought serviceable to the cause, and no more. I have endeavored to make the expenses as light as possible, economizing in every reasonable way.

I was particularly anxious on this point, because the final issue was doubtful; at any rate, the result of my labors was not yet seen. My expenses have been principally railroad fare in the numerous and necessary trips to Washington. Pecuniarily it has not been to me a profitable business, as you will see from the amount of per diem received. Whenever special inducements were offered, (which was the case sometimes,) for me to look particularly after certain claims for the purpose of hastening their settlement, I have declined, deeming it improper to do so, while charged, as the general agent of the State, with looking equally after the interest of all the counties and parties interested; and feeling it my duty to labor equally for the advantage of all, and to open up the way as speedily as possible for the final settlement of all the claims.

I have done the best I could, and would at any time have gladly given place to any one who could take charge of the business with better prospect of success.

Having at length followed the questions involved through all departments of the government,—established my construction of, and vindicated the rights of the State under, the swamp grant, in the two decisions of the Supreme Court of the United States, before referred to,—contested the adverse decisions and illegal rulings of the Commissioner of the General Land Office, and Secretary of the Interior, and carried them to the highest and last resort, the President himself,—and procured an act of Congress, mandatory in its terms, requiring the Commissioner to take up, and adjust these claims and allow the indemnity provided,—in short, having got the obstructions removed, and the way opened for the prosecution of all these claims to final settlement, without any further delay than is necessary to give time to work up the proof, I am ready to give up the work and place in the hands of any one designated to take charge of it, all papers and matters in my hands connected with the business proper to be turned over; and I will in a few days place in your hands my resignation.

It will be more necessary to keep an agent at Washington constantly now, than heretofore, for the reason that these claims will be taken up, one after another, as fast as they can be disposed of, if urged to do so, and some one should be there to call them up as fast

as the office is ready to consider them, and to correspond with and assist the counties, about their proof, inform them of the status of their claims, &c., that they may have them ready for submission.

John Cleghorn, Esq., of Sioux City, is now at Washington, as the accredited agent of the State for Woodbury county. He has assisted me considerably during this session of Congress in looking after and urging up the passage of the bill; and I can say the same of Robert Coles, of Chariton, interested in the matters of Lucas county.

Mr. Cleghorn, having been Register of the Land Office at Sioux City, and now agent for Woodbury county, and having acquired a sufficient knowledge of the business and interest in its success, I felt warranted in asking him to look after it there, and keep me advised, until some one is appointed to take my place.

I will willingly give to any one your excellency may see fit to appoint, all information in my possession in regard to these matters.

Thanking you for the interest you have manifested for my success in this mission, and for the kindness which you have ever extended to me personally, I am,

Very respectfully yours,

J. A. HARVEY.

March 14, 1872.

ACCOMPANYING DOCUMENTS.

"A."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
April 29, 1869.

HON. J. D. COX, *Secretary of the Interior:*

Sir:—I have the honor to submit, herewith, two letters from Hon. J. A. Harvey, agent of the State of Iowa, of dates April 1st and 5th, respectively, relating to certain lands in Buena Vista county, Iowa, claimed by the State to be swamp-lands, but which have never been regularly reported to this office as such.

In order to a full understanding of the case I will state that in the State of Iowa the swamp selections under the grant of 1850 were by agreement made by agents appointed by the State, who, from examination in the field, made the selection of lands shown to be swamp.

These selections were required to be filed with the Surveyor-General of that district, to be by him revised. All tracts which, in the judgment of that officer, came within the intent and meaning of the grant, were then placed in list form by the Surveyor-General, and after appending his official certificate touching their swampy character, the lists were forwarded to this office.

The practice has been to recognize only such tracts as were thus reported through the Surveyor-General. In the case submitted the State agents made selections in the county of Buena Vista, and filed them with the Surveyor-General. None of the tracts contained in the list have been reported to this office by that officer.

In 1866 the office of Surveyor-General at Dubuque was closed, and a part of the archives was sent to the General Land Office. This list of selections made by the State agents, was, among others, received here, and is the only documentary evidence we have of the claim of the State to the lands in question.

There is no correspondence connected with it, so far as this office is aware; and the only light thrown on the subject is a pencil note on the cover, as follows: "*Rejected for want of conformity to Com-*" *missioner's instructions of 13 July, '60.*"

A copy of those instructions is herewith inclosed, from which it will be seen that the Surveyor-General was instructed to report as swamp, those tracts only which were to be found in the vicinity of navigable rivers. As these lands did not come within this classification, they were, as the pencil note indicated, rejected by the Surveyor-General.

The instructions of 13th July, 1860, were, however, overruled by the Department in the Secretary's letter of September 15th, 1860, and it is now claimed by Mr. Harvey that these lands, so far as they remain undisposed of, should be received as legitimate swamp selections, and be certified to the State accordingly.

This question has been acted upon heretofore by this office, in the case of Dickinson county, involving the same point. In that case it was held that the established method of making swamp selections was through the Surveyor-General, and that the list in question was never reported by him, but came before this office by the removal of the archives of the Surveyor-General's office—that to receive them now would be in the nature of *new selections*, from which we are barred by the limitations of the act of 12th March, 1860. (U. S. Stat. Vol. 12, p. 3.)

At the suggestion of the State agent, the question is respectfully referred to the honorable Secretary, with the foregoing statement of facts, and previous rulings of this office.

Accompanying this will be found—

1. Letters of Hon. J. A. Harvey of 1st and 5th April, 1869.
2. Original list, found in the archives of the Surveyor-General's office.
3. Copy of instructions of 13th July, 1860.
4. Secretary's letter of Sept. 15th, 1860.
5. Commissioner's letter to Hon. A. W. Hubbard, in the case of Dickinson county.

I have the honor to be, very respectfully, your obedient servant,

JOS. S. WILSON, *Commissioner.*

"B."

HON. C. DELANO, *Secretary of the Interior:*

Sir:—In the matter of the application to have taken up for adjustment, the list of swamp land selections of Buena Vista county, Iowa, submitted for your consideration, by the letter of the Commissioner of the General Land Office, of April 29, 1869, I wish to add a few considerations to what I have already said in my letters of April 1 and 5, 1869, to the Commissioner, in favor of taking up said list.

Since this application was made, some controverted points have been settled. It is now settled by the highest judicial tribunal of the nation, that the act of September 28, 1850, known as the "Swamp Grant," was a *present grant*, granting to the States all the lands that by reason of being swampy or overflowed, were rendered unfit for cultivation; and that while it is made the duty of the Secretary to furnish the State with the evidence of title, still the right of the State depends not upon his action, but upon the grant, and cannot be defeated by his failure to discharge his duty. See *R. R.* vs. *Fremont county*, and *R. R.* vs. *Smith*, 9 Wallace, 89 and 95.

These decisions, I say, have been made since I asked to examine and adjust this list, and, as it seems to me, leave no room to doubt as to the duty of the Department in the premises. If there are any *swamp lands* in this list, the State is entitled to them; and it is the duty of the department to approve and patent them. The right to all such land is secured to us by the grant, and we demand it; the *duty* is by law enjoined upon the Department, and we insist on its performance.

To ascertain the rights of the State as to these lands, and the consequent duty of the Department, or, in other words, to ascertain what tracts in this list come within the meaning of the grant, that they may be approved to the State, it becomes necessary to make this examination, and I am unable to find a *reasonable* objection.

If it be suggested, that the State has not complied with the requirements so as to entitle her to have her lists received and examined, I answer *she has complied strictly*—she has not left a single duty unperformed. The selections were made by a competent

surveyor, acting under oath, according to express statute of the State; and also in pursuance of instructions from the General Land Office; and were returned to the Surveyor-General in the form and manner required by the Commissioner. I repeat that the State made these selections in strict compliance with the "*agreement*," which, the Commissioner, in his letter of April 29, 1869, submitting this case, admits, authorized the selections in the State of Iowa to be thus made, and made too in like form, and returned in the same manner, as the other selections in said State, which the General Land Office has received and acted on. However, as this objection is not raised by the Commissioner, I need say no more in regard to it.

The General Assembly of the State of Iowa at its next session after the act of Congress of March 12, 1860, adjourned on the 8th of April, 1862. The time for making swamp selections in Iowa, terminated by that act, therefore, April 8, 1864.

This list was returned to the Surveyor-General on the 11th of June, 1862. It was therefore done in time.

Do you ask me, where is the evidence? I answer, (without having under my control the communication of the Secretary of State accompanying the list,) by referring to the affidavit and official certificate attached to the list, which fix the date of the completion of the selection. It is the *selection*—the picking out and designating the tracts from the other lands—that is mentioned in the act of 1860. It says nothing about the *return of the list*, or its reception by the Surveyor-General, or at the general land office.

The act has reference to the "*selection*" to be made by "*agents* "*of the State*," according to the "*agreement*," as stated by the Commissioner in his letter in this case.

Again: we find this list on file in the Surveyor-General's office, and the presumption arises that it was there legally and in due time, which is strengthened by the annotation thereon, showing it to be there while he understood the Commissioner's instructions of 13th of July, 1860, to be in force.

He rejected the list, and noted thereon the fact. He made no other objection. The lands, not lying contiguous to a navigable river, the list was, as directed by said instructions, *rejected*.

From these facts, we are bound to conclude that the selection

was made in time, and also reported in time, if that be necessary. I insist, however, that the limitation in the act of 1860 only affects the time of making the selection by the State agent, and has no reference whatever to any act on the part of the government. There is, therefore, no excuse on this ground ; nor does the Commissioner make any such objection. But if it is deemed material to have *positive proof* as to the time this list was placed in the hands of the Surveyor-General by the State, then give us an opportunity, and we will furnish it.

The *only objection* urged by the Commissioner (as will be seen by his letter in this case) is this: "that to receive them now, would "be in the nature of *new selections*, from which we are barred by the "act of 12th March, 1860." This phraseology is peculiar, and it seems to me ambiguous. I am not certain of its meaning.

Does the Commissioner mean that the reception of this list now would in any respect change its "*nature*," and make it different from what it is ? It could not. Or, does he mean that to receive and act on this list now would be, in effect, permitting the State to make selections after the expiration of the time allowed by said act ? Then his position is untenable. The State has not made *new* selections, nor any selections since the expiration of the time allowed ; nor does she ask any such thing. The State simply asks to have the selections she made in *due time* and proper manner examined and passed upon.

This she *was* and *is* entitled to, and would long since have had, but for the act of the Commissioner forbidding it.

We have a right to complain of this act of the Commissioner. He was doubly at fault. His instructions of July 13, 1860, were in palpable violation of rights under the grant—conceived in his antipathy to the swamp-land interests—and clearly erroneous, as the Secretary soon after decided. And when his instructions were overruled, he neglected to notify the Surveyor-General, or issue new instructions, thus refusing to carry out the views of the Secretary, but leaving his own erroneous rulings to work their damage to the swamp land interests. Thus time passed, the State supposing her lists were in process of adjustment. But, the Commissioner having, by his sai1 instructions of July 13, 1860, expressly directed the

Surveyor-General not to report as swamp selections any lands not lying "*contiguous to navigable rivers*," that officer could not report upon this list, but marked it, "Rejected," under said instructions. These instructions had, prior to this time, been overruled by the Secretary, but the Surveyor-General was not aware of it. The Commissioner had not notified him of it, but left him to act under them still.

Notwithstanding these facts, when we ask the Commissioner to take up the selections, he answers, "that they cannot be received "because the Surveyor-General failed to report them." "Too late!" "It would be making *new* selections!"

Who caused the delay? Who made it too late?

Was it from any laches on the part of the State? The facts in the case are sufficient answer.

Now I ask, *can the Commissioner plead the result of his own error to excuse him from the performance of a legal duty?* Can rights granted by Congress be thus frittered away, and utterly defeated by the error of a public officer ? No *lawyer* will so contend.

In the case of *R. R.* v. *Smith*, 9 Wallace, 99–100, above referred to, the Supreme Court say, in regard to this grant, "that the right of the State depends upon the *grant*, and not upon the act of the department; and cannot be defeated by the failure of the officer to do his duty."

I do not see how the department can act consistently with this decision and refuse to take up this list: to refuse to indorse the erroneous and unwarrantable action of the Land Office, and to carry into final effect the Commissioner's refusal to discharge his official duty.

It is no answer to say, "that the courts will give us the land," and that we may resort to them. That is admitting the duty of the Department to do it. This branch of the government, as well as the courts, is organized for the purpose of executing the law, and it has no right to refuse for the reason that the courts can correct the injury. It is a consolation to know that we have *judicial tribunals*, competent and incorruptible, to which even the humblest may resort for the protection of his rights, whether refused or assailed by legislative or executive power. Still it is not desirable to be handed over *needlessly* to expensive and vexatious litigation.

But to return to the Commissioner's letter. It may be that he meant that by making out and approving a list from among these selections *he* would in effect be making *new* selections for the State, after the time allowed by the act of March 12, 1860; or to express it otherwise, that he understands the word "*selection*," in the second section of said act of March 12, 1860, to mean the same thing as the term "*list and plats*," in the second section of the act of Sept. 28, 1850. If that be so, he has a very erroneous idea of said act of 1860, as I will proceed to show.

The language in the second section of the Act of March 12, 1860, is "*that the selection to be made from lands already surveyed* * "* * *shall be made within two years from the adjourment of* "*legislature of each State at the next session after the date of this* "*act.*" * * * * (These lands had all been surveyed.)

Now, if *selection* in this act means the *list and plats* which the second section of the act of 1850 requires the Secretary to make out and transmit to the State, we have the act of 1850 making a *present* and *absolute* grant to the State of all the swamp lands, and requiring the Secretary to furnish the State with the evidence of her right in the shape of these "*lists and plats;*" and then the act of 1860 following without any provision modifying or repealing the grant, and directing the Secretary, that if he does not discharge the duty enjoined upon him by the act of 1850, by a certain time, he shall not do it all! Such a construction is unreasonable and imputes to Congress inexcusable folly. It would place it in the power of a single officer to defeat the object of the grant, and render nugatory the rights of the State, in violation of the principle of *vested rights*, and in opposition to the decision of the Supreme Court above referred to. (9 Wallace, 99–100.)

Again: the language of the act itself forbids such a construction. If the word *selection* in this act means the same as *list and plats* in the act of 1850, or (which is the same thing) refers to the *action of the Department*, why is any allusion made to the legislature? What connection is there between this Department and the State legislature, that the Secretary in the performance of his official duty should be in any manner governed or restricted by the act of that body? The legislature had nothing to do with the survey of

the public lands, nor any control over the Secretary, and if it was the intention of Congress by this act to limit the time for the performance of this duty by the Department, they would have fixed a *certain time*, or given a certain time after the completion of the government survey, and would not have made it depend on the adjourment of the legislature.

Having seen that this limitation in the act of 1860 has no reference to the action of the Department, let us see what it does apply to. We have no difficulty in coming to a correct conclusion, if we take into consideration the action of the States and the practice of the Department up to that time in regard to swamp lands.

In order to determine what lands should be approved and patented under the swamp grant, the Department permitted the State to adopt either of two methods submitted, to-wit: to take the *field-notes* of the Government survey, or if not satisfied to adopt *them* as the basis, then to make its *selections* by examination in the field by agents appointed for that purpose under the authority of the State. Prior to that time, little attention had been paid by surveyors of the public lands, to the true character of the lands, as to whether wet or dry. It was not deemed necessary. Nothing was thought to depend on it, and, therefore, the *field-notes* were known not to be reliable on this point.

Hence only two or three of the States agreed to accept them as the test of examination. Iowa, with the other States, chose the other method, and agreed to make its selections by examination in the field, and accordingly the "*agreement*" referred to in the Commissioner's letter in this case, was made, and the State, by legislative enactments, proceeded to carry out this agreement, and made provision for making the selections.

In the Commissioner's instructions of Nov. 21, 1850, we have the origin of the term "selection," as applied to swamp lands. (See Lester's L. L. 544.) It does not occur in the act of 1850, nor in the act of March 2, 1855, but the act of March, 3, 1857, confirming the swamp selections, adopts the term, and with the same meaning that the Commissioner gave it in his said instructions.

In said act of March 3, 1857, the words "*selection of swamp and* "*overflowed lands* * * * *heretofore made and reported to the*

"*General Land Office*," could hardly mean lists made out by the Commissioner, nor can they consistently refer to any act on the part of the Department. But they refer to and mean the *selections* which the Department *agreed* the State should make by its agents, —the selections which the State had thus made and reported to the General Land Office for examination and final action. In the act of March, 12, 1860, Congress again used the word in the same sense.

Congress knew the States were making selections by their own agents by agreement, or in pursuance of instructions of the Land Office, and evidently meant the selections being thus made. And, by the term *selections* and *swamp selections* we are bound to understand the lists of land picked out and designated as the tracts claimed by the State under the swamp grant. And when we remember, also, that the States, Iowa, Missouri, and several others, had granted the swamp lands to the counties, and authorized them to make the selections by agents appointed under the law of the State; that in some cases counties were still unorganized, (as were some in Iowa,) and not in a condition to make their selections, and that some were so new and sparsely settled as to occasion great delay, and consequently the selections were being returned so slowly as to indicate that a long time would elapse in closing up the grant, we see the object of Congress in this second section of the act of March 12, 1860.

To hurry up selections and bring the administration of the grant to a reasonably speedy conclusion, a time must be fixed beyond which selections cannnot be made, but to make any necessary provision on the part of the States, the legislatures must have time to act in the matter. Hence, this section limits the time to two years after the adjournment of the next session of the legislature, giving opportunity for any necessary legislative provision, and then two years more to examine the land and make the selections.

In view of this act, Iowa did make the necessary legislative provision for selections in her unorganized counties, and they were all completed and reported to the Surveyor-General within the time allowed in this act of March 12, 1860.

From these considerations, I insist that in this act, Congress, by *selections*, meant the selections to be made by the State agents, that the restriction has no reference to any act on the part of the Government, that

it does not relate to, nor restrict, the Secretary or Commissioner in listing or approving these lands, nor limit them in the performance of any official duty; and that, while the States cannot continue to make selections, still the Department must continue to examine and and adjust selections already made, till the work is completed.

If I am right in this, (and I see no room for doubt,) then the Commissioner was in error, and we are entitled to have this list examined, and the remaining undisposed-of swamp and overflowed lands therein approved to the State.

There is but one other thing that has ever (so far as I am aware,) been suggested as affording any excuse for refusing to take up this list; that is, "the previous practice of the Department." On this point, I have to say :—

1st. If it was the "established method" to make selections through the Surveyor-General, it cannot be done in this case now. The Commissioner himself prevented these selections from appearing here in accordance with that *established method*. Had it not been for the express order of the Commissioner forbidding it, these selections would have been reported by the Surveyor-General, and the State would have been spared this vexatious delay of nearly nine years, during which time nine-tenths of the land embraced in the list have been disposed of, and, so far as the government can do it, placed beyond the reach of the State.

If the Commissioner had notified the Surveyor-General of the overruling of his instructions of July 13th, 1860, as he should have done, there was ample time for him to report on this list. But he did not, and now I say, under the facts of this case, to interpose this objection, is, on principle, to justify a man in pleading his own wrong, and to defeat great public and private rights by interposing the laches of a single ministerial officer, either of which would not be tolerated for a moment, by any respectable *judicial tribunal* in the country.

2d. The office of Surveyor-General is under the control of the Commissioner of the General Land Office. In fact, by law, where there is no Surveyor-General the Commissioner is *ex-officio* himself Surveyor-General; and every Surveyor-General is at all times subordinate to the Commissioner, under his supervision, and subject to

his order. Now, bearing this in mind, and also the fact that the acts of Congress, relative to the swamp grant, make no allusion to the Surveyor-General; that the requirement to report swamp selections to *him* is no part of the law, but simply an order of the Commissioner with a view to relieve him of some of the burdens imposed in the administration of the grant; it must be conceded, that whenever the selections were deposited in the Surveyor-General's office, *they were in contemplation of law reported to the Commissioner* of the *General Land Office.* They were placed in the hands of *his subordinate*—the one by him designated, and were thenceforward under the control of the Commissioner to be examined, reported on, &c., as he might direct. But the State had no further control over them; she had done all she could.

Now I submit, with all candor and due respect, whether it is not unreasonable in this case to raise such objection? The obligation rested on the Commissisner to see that the selections of the State were acted on, and the transfer of the duty to the Surveyor-General did not relieve him from the obligation; he was bound to see the duty performed. If errors were committed, he should see them corrected as far as possible, and if any duty is left undone he should order it done, and has the right to step in over the Surveyor-General and do it himself, and more especially where the duty is one that the law, as in this case, imposed upon him. Hence, if the Surveyor-General failed to report the list, it does not release the Commissioner from the duty of examining it. If the Surveyor-General neglected to examine the list and report the lands falling to the State under the grant, the Commissioner is *legally bound to do it*, and there is no legal restriction as to when he shall perform that duty.

On this point I say, finally, that the Department has no right to make "requirements," or have "established methods," or establish a "practice" that can be used to defeat the administration of the law; and certainly an officer has no right to set up his own arbitrary ruling, however well established by official practice, to evade the discharge of a legal duty, and thereby defeat rights granted by positive statute.

The Supreme Court, in speaking of the rights of the State under this same grant (9 Wallace 99–100) says: "The right of the State

did not depend on his (the Secretary's) action, but on the act of Congress, and though the States may be embarrassed in the assertion of this right, by the delay or failure of the Secretary to make out lists of these lands, the right of the States to them could not be defeated by this delay." In the decision from which the above is quoted, and the one immediately preceding it, the Supreme Court has, as before stated, settled the controlling points in this case. Whatever doubt there may have been before, there can be none now, as to the duty of the Department.

It always should be, and doubtless generally is, the aim of public officers, so to discharge their official duties as to secure, to all interested, their legal rights; but for a number of years the general land office has presented an exception to this rule. The action of the Commissioner has been most unfriendly in the administration of this grant. His object has not been to facilitate the adjustment, but to throw every conceivable obstacle in the way; and thus, in this case, as well as in others, the matter has been deferred till nearly all the land has been disposed of.

But *now* I indulge a hope, that we have seen an end to such quibling; and that instead of quarreling with acts of Congress, and seeking to modify or defeat them by arbitrary rulings and "established methods" of practice, the design will be, with reasonable dispatch, to execute the laws in their *true intent and meaning*, thus securing to all interested (so far as it can now be done) their legal rights in the administration of the grants. With such a spirit in the land office the swamp grant would long since have been closed up.

It has been delayed for years by the unjustifiable course pursued by the land office, and great loss and damage has thereby occurred to the State and her grantees, that cannot now be remedied; but we insist on being spared the result of further delay; and I am quite certain no good reason can be given for not proceeding with the examination demanded.

The claim of the State to the lands is not admitted by taking up this list. What I ask is, that it be examined by any test the Department may see fit to apply, (only let it be one that will with reasonable certainty find the true character of the land,) and that whatever lands are thus found to be of the character contemplated by the

swamp grant and remaining undisposed of be approved to the State. These will comprise a very small part—not more than one-tenth of the list.

As to lands disposed of, I admit the *Department* has no further control—the remedy is in the courts. But as to these undisposed of, spare us furthes complications, resulting in expensive and vexatious litigation, and the ruinous consequences of further delay.

Trusting that you will find it consistent with your official duty to instruct the Commissioner to place in process of adjustment the list referred to,

I have the honor to be, most respectfully,

Your obedient servant,

J. A. HARVEY,

Commissioner for Iowa.

WASHINGTON, D. C., March 24, 1871.

"C."

UNITED STATES SENATE CHAMBER,
WASHINGTON, 28 March, 1871.

To the Hon. Secretary of the Interior:

In relation to the claim to swamp-lands in Buena Vista county, Iowa, in addition to what is said by Hon. J. A. Harvey, I beg leave to add a few suggestions.

His argument I have examined with great care, and from its conclusions it seems to me there is no just escape. And I may be allowed to say that his intimate knowledge of the subject, and long-time official connection with these lands, leading him to examine the law in all its parts and bearings, give additional force and weight to his argument.

If his conclusions, however, are to be doubted or questioned, it would seem that the decisions of the Supreme Court to which he refers, strip the case of all doubt and leave the claim of the State or county clear beyond all controversy. I therefore fully indorse

and concur in what he says, only adding the following considerations:

1st. That the list or selections were never affirmed by the Surveyor-General.—This is certainly of the least possible importance. Why were they not affirmed? Simply because he was acting under what this Department has recognized and settled *as erroneous and unwarranted instructions.* Or, if we give to these *instructions* the dignity of *law*, then he was acting under an incorrect view of the law. In other words, if the *law or instructions*, finally settled and given for the guidance of the officers, had been given him when he made the "*pencil indorsement*," these selections would have been approved. Now, let me ask, was it ever held or intended that the action of the Surveyor-General was to be *conclusive*, against either the State or the Government? Certainly this would not do. There must be somewhere a revisory power. It *must be* that his action could be reviewed. Suppose, therefore, he had rejected these lands because of these erroneous instructions, would not the State have the right to insist before the Department that he mistook the law, and that though the selections were not "*contiguous to a river*" they were nevertheless *swampy*, within the meaning of the grant? If not, then it would follow that the *error of the Department* would defeat the just rights of the State. Will any one so claim? Certainly no lawyer will maintain a proposition so monstrous. And as this case is submitted to a lawyer of known and acknowledged ability, I need not do more than briefly suggest the point.

2d. What is just and right in the premises?—If the fault was with the agent of the government, (Surveyor-General or the Department in giving the instructions,) shall the State or the Government, if either, suffer therefrom? What was the meaning of the law? I answer, its *spirit and substance* was to give to the States lands falling within the description named. The *object* was their reclamation, which it was believed could be better done by the State than the Federal Government. In their unimproved and unreclaimed state, they were esteemed next to valueless. Now is it the policy of the Government, is it in accord with the spirit and policy of the statute, to give to it a technical construction, to insist upon a rule

founded upon error and so admitted, which shall defeat the State, when the State is without fault? The great object of all rules of interpretation of statutes and agreements or contracts, is to arrive at the intention of the law-maker, or the parties. This *intention* should always, if at all practicable, be carried out. Therefore if the State acted in *time*, acted in *good faith*, selected such lands as the law—*ex vitermini*—granted to her, why shall she not get them?

It is the fact that is to be determined, not the technical, and as I humbly conceive, unimportant question, whether this is a *new selection;* and this fact should be determined from a sensible and reasonable stand-point. The doctrine that a grant is to be construed favorably the granting power, and that no presumptions are to be indulged against the Government, has no application. For, by the *law*—by the *evidence*—by the decisions of the highest court of the land—by the instructions from this department, these lands are swampy, and the title vested at once, by the law, in the State. The act of the Surveyor-General was a mere *link* in the chain of evidence. If not given or furnished, it could be supplied by evidence *aliunde*.

Thus, I repeat, the question is *one of fact*. Are these lands *swampy?* And if so, has the State *by any act of its own*, or that of any agent over which it had control, forfeited its right to said lands? It seems to me clearly not, and that there should be no hesitation whatever in adjusting this claim as asked by the State.

Most respectfully,

GEO. G. WRIGHT.

"D."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 23d Oct., 1871.

SIR:—I have considered the appeal of the county of Buena Vista, State of Iowa, from the decision of the Commissioner of the General Land Office relating to swamp-lands claimed by that county.

The first session of the legislature of the State of Iowa, after the passage of the act of March 12, 1860, adjourned on the 8th day of April, 1862. There is no proof that the list of selections made by said county, was filed in the office of the Surveyor-General within two years from the time of the said adjournment, and for that reason I affirm the decision made by the Commissioner.

Very respectfully, your ob't servant,

C. DELANO, *Secretary.*

HON. WILLIS DRUMMOND, *Commissioner General Land Office.*

"E."

HON. C. DELANO, *Secretary of the Interior:*

Sir:—I have to call your attention to the subject of your decision of October 23, 1871,—to-wit: the list of swamp selections of Buena Vista county, Iowa, again—and to ask that you so modify your decision as to return said list to the Commissioner with instructions to place it in process of adjustment, upon the State's furnishing satisfactory evidence that said list was placed in the office of the Surveyor-General prior to the expiration of the time for making such selections as indicated in your letter of October 23, 1871, in said case, to the Commissioner.

And in support of this motion I beg leave to say, that the truth is, (as stated in my argument previously presented), that this list was in the Surveyor-General's office for nearly *two years* before the expiration of the time for making swamp selections in Iowa, and the Commissioner himself was fully advised and satisfied of that fact. The Surveyor in his annual report to the General Land Office, dated October 1, 1863, shows that lists of such selections were accumulating in his office, which could not be acted on under existing instructions (Land Office Rep. 1863, p. 59). And the same fact is referred to in his report of 1864 (L. O. Rep. 1864, p. 57). And again in 1865, he shows that such lists are still in his office, and the

State agents frequently writing to know why they are not acted on (L. O. Rep. 1866, p. 71). Again, in 1866, the Commissioner went to Dubuque for the purpose of closing the office, and saw the Surveyor-General, and directed what documents and papers should, under the law, be turned over to the State, and what should be transmitted to the General Land Office.

This list, with others, was by his direction, transmitted to his office, and remained under his control.

Under these circumstances, and with his knowledge of the facts, the Commissioner did not base his action on the ground that the list was not returned by the State agent in time, but on the ground that the Surveyor-General had not reported them to his office in the ordinary way. If he had based his decision on the same ground as did the Hon. Secretary, we would have been permitted to supply the proof found wanting, although it would be requiring the State to furnish, by parol testimony, what ought to appear officially in the Surveyor-General's office.

When the list was reported as required, the State could do no more with it, and had a right to expect the officers of the Government to do their duty. They should have made the time of its reception, and their action thereon, a matter of record.

Whatever may be our opinion as to the propriety of requiring us to furnish this proof under the facts in this case, and after such a lapse of time, we do, in view of the decision of the Hon. Secretary, ask permission to do so. When the application to take up this list was made to the Commissioner, we had no reason to suppose that we would be required to furnish this proof, and the Commissioner did not require it. In view of this fact, and the further fact, that in my argument submitted on the 24th of March, 1871, I *did ask* that we be permitted to furnish the proof, if positive testimony should be found necessary.

I say, in view of these facts, this application certainly will not be denied.

The State authorities of Iowa, (State officers composing the Census Board,) after full consultation and consideration, construe your decision as expressed in your letter of October 23, 1871, to the Commissioner, to be an overruling of the objections raised by the

Commissioner, (which could not be sustained under the recent decisions of the Supreme Court, to which your attention has already been called,) and that if the proof we now ask permission to furnish, had been in, the application would have been granted.

Believing that this is the correct construction of your letter, and acting under their direction, as well as by *legislative* authority of the State, I submit this motion, and ask that it may be considered and passed upon as soon as possible.

Very respectfully, your obedient servant,

J. A. HARVEY,
Agent for Iowa.

Washington, D. C., January 6, 1872.

"F."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C., Jan. 18, 1872.

HON. J. A. HARVEY, *Washington, D. C.:*

Sir:—Referring to your letters of 16th ult. and 13th inst., asking that the list of selections of swamp lands in Carroll county, Iowa, may be placed in process of adjustment, I have to state that the list named seems to have been filed in the Surveyor-General's office, but not reported by that officer to the General Land Office.

My predecessor decided many years ago, and reiterated the decision from time to time, that this office would recognize only such selections as were reported by the Surveyor-General, with his certificate as to their correctness attached.

As the decision of my predecessor before referred to has long been understood to be the settled policy of the General Land Office, so long that most of the lands have been disposed of, and the greater part which remain unsold have been settled upon by pre-emption and homestead claimants, I do not feel disposed to disturb the ruling heretofore made. I must, therefore, in view of these facts, and the

recent decision of the Secretary of the Interior, in the matter of swamp-lands in Buena Vista county, Iowa, decline to comply with your request.

Very respectfully, your obedient servant,

WILLIS DRUMMOND,
Commissioner.

"G."

In the matter of appeal from the Commissioner's decision relative to the swamp-land selections of Carroll county, Iowa.

As the Hon. Commissioner bases his decision on the previous rulings of his office, and the recent decision of the Secretary in the case of Buena Vista county, Iowa, I attach hereto the following:

1. Copy of Commissioner's decision in the case;
2. Copy of the letter of his predecessor submitting to the Secretary the case of Buena Vista county (which shows the only action of the office on this question that I am able to find;)
3. A copy of the decision of the Secretary in that case;

And against the decision of the Commissioner, and in support of this appeal, proceed briefly to state my points.

I insist:

1st. That the decision of the Commissioner, as well as the previous rulings of his office, is contrary to law, and in palpable violation of the rights of the State under the grant.

I argued this point so fully in the case of Buena Vista county that it seems useless to say much now.

The argument in that case is equally applicable in this, and the reasons there assigned against the action of the office can no more be refuted than the exposition of the grant by the Supreme Court can be legally disregarded by this Department in the execution of the law.

As I argued *then*, I insist *now*, that the decisions of the Supreme

Court of the United States, in the case of *Railroad* v. *Fremont County*, and *Railroad* v. *Smith*, (9 Wallace 89 and 95,) establish the right of the State to every forty-acre tract of these lands, the greater part of which, by reason of being swampy or overflowed, was at the time of the passage of the grant unfit for cultivation, and at that time undisposed of by the United States. And these decisions give no *doubtful indication* of the duty of the Department in the premises.

In the case of *Railroad* v. *Smith*, (9 W. 99–100,) the court say: "By the second section of the act of 1850, it was made the duty of the Secretary of the Interior to ascertain the fact and furnish the State with the evidence of it." Now, the *fact* which it was thus made the duty of the Secretary to ascertain and furnish the State with the evidence of, is the swampy character of the land, which fixes its status under the grant.

How does the *action* of the Department comport with its *duty*, as declared by the Supreme Court and enjoined by the law? The present incumbents will pardon me when I say that, instead of endeavoring to discharge this duty—to ascertain and approve to the State the lands she is entitled to under the grant, the Department has, in the main, maintained towards these claims a hostile attitude, reluctantly yielding what could no longer be withheld, and sometimes resorting to "rulings," and interpretations of the law, which, with due regard to truth, can hardly be called anything more than mere subterfuges to evade the discharge of a legal duty; and in this way the "*rulings*" referred to became the "*settled policy*" of the Land Office, by which our claims are to be judged, and our legal rights rejected.

Immediately following the sentence above quoted, in which they declare the duty of the Secretary, the Supreme Court says: "Must the State lose the lands, though clearly swamp-land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the act of Congress, and though the State might be embarrassed in the assertion of this right, by the failure of the Secretary to ascertain and make out lists of these lands, the right of the State to them could not be defeated by that delay."

In the case from the decision in which the above is quoted, the department was not to blame. The land in controversy had not

been reported by the State, nor the department notified that it was claimed under the swamp grant.

But that is not this case. Here there is no such excuse. The department issued instructions directing how these lands should be selected by the State agents, and designating where they should be reported when selected, *and would receive selections from the State in no other way.*

The selections in this case, as well as that of Buena Vista county, were made in strict conformity to the instructions thus given, and within the time allowed by law.

On the list in this case is indorsed by the chief clerk the time when it was deposited in the office of the Surveyor-General.

How, in view o the decisions above referred to, can the rejection of this list be justified ?

We are told that the Surveyor-General failed to report them. Suppose he did. Can the right of the State be defeated thereby ?

Again : How came the Surveyor-General to neglect to report them? Did not the State make the selections in the manner and time required ? Yes. Did she not deposit them with the Surveyor-General as directed by this department ? *She did.* Was there any other way by which she could bring her selections here and have them recognized ? *No.* The office has persistently refused to recognize selections brought here in any other way. *Then it was by no fault of the State.* She did all she could to have them reported, and all that could be required of her.

The Commissioner, in his letter submitting the Buena Vista county case, shows why these selections were not reported. It was because of his instructions of July 13, 1860, limiting the application of the grant to lands contiguous to navigable rivers, and directing the Surveyor-General to report *only such*, as swamp selections. This construction was so unreasonable that it was overruled in September, 1860, by the Secretary; but the Surveyor-General and the State, were allowed to remain ignorant of the fact, till the expiration of the time allowed for making selections, under act of March 12, 1860.

First, then, the Commissioner put an erroneous construction on the grant, and directed the Surveyor-General *not to report these lists;* and *secondly*, when his construction of the grant was overruled, he

refused to modify his instructions to the Surveyor-General, but left him still acting under those of July 13, 1860. We are justified in saying, it was not the result of oversight in the Commissioner. He knew he had given the instructions, and could hardly fail to remember the fact when notified that his superior officer had overruled his construction of the law. In addition to this, his attention was called to the fact, three times, in the official reports of the Surveyor-General, to-wit : in 1863, 1864, and 1865, (to all of which I have referred the Secretary, in my letter of 6th inst., in regard to the Buena Vista county case,) and he is therein notified that the State agents, are importunate about the matter, and urgent to know why the lists are not acted on.

In view of these facts, we repeat: How can the action of the Department be justified, and what, under the decisions of the Supreme Court above referred to, becomes of the *settled policy* of the office, *established* by such means, and under such a state of facts ? And in what light does it place the Department, to still insist on the exploded theory of the Land Office, and its arbitrary rulings, in opposition to the decisions of the Supreme Court? I insist, that by no logic known to human reason, can the action of the Department in these cases be brought into harmony with, or justified under, these decisions. Still, the Land Office insists on doing exactly what the Supreme Court declares it cannot do, and refusing to do what, under the law, is clearly its duty. When the Department in the face of these decisions assumes thus to act, it arrays itself against the Supreme Court, and stands before the country as *arbitrarily refusing to do its legal duty.* Is there any escape from this conclusion?

There is no reason why this conflict should continue. It will not avail to say that its present attitude is forced upon the Department by *previous rulings* and *mistaken views of the law.* As I said in the Buena Vista county case, I say again: that the Department has no right to make "*requirements*," or have a "*settled policy*," or "*established methods*," that can be used to defeat the execution of the law.

The idea that a branch of the Government charged with the execution of the law can so tie itself up with its own rules as to render it unable to discharge the duties for which it was designed, is too absurd to require serious argument. And yet such is the lamentable

condition of the Land Office, if the Commissioner's decision is sustained. It is conceded that the "*previous rulings*" which prevent this list from being taken up, are in violation of the law; still the office is so cramped and tied up by them that it cannot now do what is clearly its duty, and what it should have done long since. I have been for several years endeavoring to procure for the State a settlement of these claims, and have always been met with this objection of "*previous rulings*," "*settled policy*," and "*established method*," without a legal reason to sustain it, which, to say the least, is unsatisfactory. A party denied his legal rights, ought to be allowed the poor consolation of a *plausible excuse*, at least, for his rejection.

None have been given, and I conclude that the man who will attempt, by argument, to justify the acts of which we complain, must be more than ordinarily reckless of his legal reputation.

The fact is, the construction given this grant by the Supreme Court, *must* and *will prevail*. It is useless for any branch of the Government to oppose it, and the sooner this Department adopts it, and harmonizes its action with it, the better for all concerned. This it will do by granting this application, and taking up these lists, and not otherwise.

Let us, however, further examine the objection given by the Commissioner. As an additional reason for his decision, he says "that most of the lands have been disposed of, and the greater part which remains unsold have been settled upon by pre-emption and homestead claimants."

Here we discover, perhaps, the real difficulty that now embarrasses the office, but, on examination, we find that it not only fails to justify the decision, but furnishes an unanswerable argument against it, and in favor of our claim. "The lands are mostly disposed of." How can the Commissioner make that statement without an examination? An examination is what we demand—the first step we ask may be taken, and he refuses to have it made; yet he cannot speak from the records without it!

This examination is necessary to see whether the lands are disposed of, and how.

It is not claimed that *all* the land is disposed of, and I admit that most of it is. Is that any reason against giving us this examination?

The State has a right to it: 1st, To ascertain what lands remain undisposed of, that can yet be approved under the grant; and: 2d, To ascertain what lands were disposed of between Sept. 28, 1850, and March 3, 1857, for which she is entitled to indemnity under acts of March 2, 1855, and March 3, 1857. I claim only the recognition of this list to the extent of these two classes of land. I do not ask the Department to interfere with land already disposed of. I admit it has no such power. *But it has the power to approve the undisposed-of swamp and overflowed lands, and to allow the indemnity provided for by the acts of March 2, 1855, and March 3, 1857,—not a large quantity.*

The action of the Land Office denies us both the land and the indemnity. We could not, of course, get the land for which indemnity is provided, and we are cut off from any chance to get the indemnity by the refusal to receive the selections, *selections, too, made in strict conformity with the instructions of the Office, and against which the only irregularity brought is that of the Office itself.* Where lands are disposed of since March 3, 1857, (if actually swamp,) parties claiming under the swamp grant can enforce their rights in the courts, and in those cases the action of the Department cannot make a particle of difference.

We cannot thus go into court for indemnity. We can get it only through this Department, and yet we are denied the privilege of coming before it to claim this right by refusing our selections. Thus the Department denies us a hearing, and effectually closes against us the door to the benefits to which we are by law entitled. Again, I say, how can such a course be justified?

Let us go a step farther: It may be that the design in refusing us this examination, is to protect *homestead and pre-emption settlers*, There are very few of *them*; the land is disposed of mostly to *railroads* and *speculators*, as the tract-books show.

But how is the *settler* to be affected? If he has already entered the land he cannot be affected at all. *As to him the Department will take no action.* It has no power to change his rights or status in any way. His rights depend upon the legality of acts already done. This being the case, it is not only unnecessary, but *wrong*, to let sympathy for him influence in any degree the action of the

Department. We therefore dismiss from our consideration *this* class of settlers and take up the other, to-wit: The settler who has not entered the land, but is simply a *claimant.*

He cannot be deprived of the land unless it is shown to be swamp, or overflowed, and he has an opportunity to contest that fact. And when we remember the sympathy that always exists in the neighborhood, (the very place from which the proof must come,) and the consequent difficulty in establishing the swampy character, as against an actual settler, the probabilities of his being disturbed are hardly strong enough to warrant the selection of him as a special object of official sympathy. I doubt whether a single *bona-fide* settler will be interfered with by this adjustment. It is a mistake to suppose that the counties will permit their citizens to be oppressed. And it is equally erroneous to suppose that *public opinion*, that both makes and executes laws in every vicinity according to emergency, cannot exercise its discriminations with more accuracy than a public office at a remote distance, receiving its information only through certain restricted channels.

But there is another class of *actual settlers*, and claimants of these lands: those who bought of the counties under the swamp grant, some of them living on and improving the land. I apprehend these are more numerous than the others, and what can be said of the policy that, while sedulously guarding the one class, will ruthlessly trample under foot the rights of the other, equally meritorious! while carefully protecting the interest of the settler under a *Land Office entry*, wrests the land from *bona-fide settlers and claimants* under a *Congressional grant*, and gives it to speculators and land-sharks!

It may be thought that the action of the Department will reach farther and affect the case when it gets into court. If that be the idea, it is a mistaken one. It cannot affect the matter one way or the other in the courts. The refusal to receive this list cannot do the settler a particle of good. The State has done all that she could to secure her rights and perfect her title under the grant. Not a thing has been omitted that she could do,—and proof of that fact, together with evidence establishing the swampy character of the land, is all that will be required in a *judicial* tribunal to establish

the claim under this grant. Now these facts can be proven just as well if this application is refused as if it is allowed, for (as the court held in the case from Missouri above referred to,) the right of the State depends not on the action of this department, but on the act of Congress, and cannot be defeated by the failure of the officer to do his duty. But were it possible, after driving a party into court for the vindication of his rights, thus to place him at a disadvantage, it would be a very unworthy motive to prompt a public officer to the disregard of a legal duty. What considerations could justify such an attempt to interfere with the full and equal administration of justice in the judicial tribunals?

It is not likely that there are any *bona-fide* settlers on lands *actually swamp*, under Government entries, or as pre-emption or homestead claimants, but if there are they are there in violation of law, and of rights under the grant, equally, at least, entitled to respect, And we ask, by what right can the Department say to us, "True. this land was granted to the State by the act of 1850, and you have been claiming it ever since; but the action of *this office has nullified the act of Congress, and, therefore*, we will not let you have what Congress granted, and what the Supreme Court say you are entitled to under the law." *This is the position, let him escape it who can.*

Finally—As to the last reason assigned for the Commissioner's decision:

The Buena Vista county case was decided by Commissioner Wilson on the ground that the list had not been reported by the Surveyor-General, and *on that ground only.* As a matter of fact he knew, personally, that the list was filed in time, and *he* never raised that question, but put forward the other *solely* as the basis of his decision. This he did in both the Buena Vista and Dickinson county cases.

When the case came before the Secretary, finding (as I concluded) the position of the Commissioner untenable, in view of the decisions of the Supreme Court, he decided the case on the other point.

If the objections of the Commissioner in that case were well taken, what difference did it make as to the time of filing the list in the Surveyor-General's office? It was not necessary to consider that

point at all if his position was correct, and the Secretary would not have considered it and made it the basis of his decision.

While he affirms the Commissioner's decision in that case, he does it on *totally different grounds*, and while his decision *affirms* the action of the Commissioner in its *effect*, it is, nevertheless, in fact an *overruling* of the objections of the Commissioner. It cannot reasonably be considered in any other light.

Instead, therefore, of sustaining the Commissioner in rejecting *this list*, it abundantly authorized him to take it up for examination.

Satisfied that the action of the Commissioner in this case is erroneous, and does great injustice to the State, and individual interests under the grant, we ask a review of it at the hands of the Secretary.

Very respectfully,

J. A. HARVEY,
Agent for the State of Iowa.

Washington, D. C., Jan. 23, 1872.

HON. C. DELANO, *Secretary of the Interior.*

"H."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 31st of January, 1872.

SIR: — I have carefully considered the appeal of Hon. J. A. Harvey, from your decision of the 18th inst., in relation to swamp lands in Carroll county, Iowa.

You decline to disturb the long-settled practice of your office in recognizing only such swamp selections as were reported by the Surveyor-General of that State, with his certificate as to their correctness attached. These selections were never so reported, and you therefore decline to act upon them. This consideration is strengthened by others of policy and equity, which in your judgment should prevent you from acceding to Mr. Harvey's request.

I fully concur in these views. Your decision is therefore approved, and the papers are herewith returned.

I am, sir, very respectfully, your obedient servant,

C. DELANO, *Secretary.*

HON. WILLIS DRUMMOND, *Com. Gen'l Land Office.*

"I."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 2d, Feb. 1872.

SIR: I transmit herewith a communication addressed to the Department on the 6th ulto., by J. A. Harvey, agent, for a modification of my decision of the 23d of October last, in the matter of the swamp-lands of Buena Vista county, in said State; also another from him under date of yesterday, calling attention to the first named letter.

I must decline acceding to Mr. Harvey's request, and you will please to so inform him.

Very respectfully,

C. DELANO,
Secretary.

HON. WILLIS DRUMMOND,
Commissioner General Land Office.

"K."

A BILL

For the relief of Lucas, O'Brien, Dickinson, and other counties in the State of Iowa.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of the General Land Office is hereby authorized and

required to receive and examine the selections of swamp-lands in Lucas, O'Brien, Dickinson, and such other counties in the State of Iowa as formerly presented their selections to the Surveyor-General of the district including that State, and allow or disallow said selections, and indemnity provided for according to the acts of Congress in force touching the same at the time such selections were made, without prejudice to legal entries and rights of *bona-fide* settlers, *under the homestead or pre-emption laws of the United States at the date of this act.**

* The last clause, was added as an amendment by the Senate Committee, at the suggestion of the Commissioner of the General Land Office. H.