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

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

CRICHTON *v.* SHELTON.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 4 of said act provides:

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

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

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

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

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

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

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

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

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

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

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

AS TO THE STATUS OF THE KLAMATH RIVER RESERVATION.

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

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

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

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

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

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

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

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

* * * * * * *

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

* * * * * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * * * *

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