

of the selection of section 21, under the act of 1864, by the secretary of the interior in April, 1871, gave the road company a perfect title thereto. The subsequent passage of the act of 1874, authorizing patents to issue in such cases, did not affect the title already vested. The effect of a patent, when issued under that act, is not to pass the title, but to give the patentee record evidence of an already existing one. *Langdeau v. Hanes*, 21 Wall. 529. Wherefore it is of no moment that it does not appear that a patent has issued to the state or its grantee for the premises. The title of the latter was complete on the approval by the secretary in 1874 of the selection of section 21 under the act of 1864.

As has been shown by the terms of the swamp-land act, the fee of any tract of land does not pass to the state until the secretary has ascertained that it comes within its operation, and causes a patent to issue therefor. The official certificate that the land is swamp only gives the state an equity or right to a patent. Such an interest cannot be set up as a defense in this action against the *prima facie* legal title of the plaintiff. But admitting that the listing of the land as swamp vests the fee in the state, and that the patent thereon is a mere formal matter, which follows of course, the listing of section 21 as swamp land in 1882, more than three years after the same was certified to the state under the wagon-road grant, did not change or affect the rights of the parties. Such listing, even if it had been deliberate and intentional, in the face of the fact that the land had already been duly listed to the state under the wagon-road grant, was simply void. *Smith v. Ewing*, 23 Fed. Rep. 741. But the truth is, it was a mere mistake,—probably a clerical misprision,—which the department corrected as soon as attention was called to it by the register and receiver of the proper land-office. The power to correct such a mistake is necessarily implied from the power to approve the selection, and is supported by authority. *Carroll v. Safford*, 3 How. 460; *LeRoy v. Clayton*, 2 Sawy. 493; *Bell v. Hearne*, 19 How. 252. And as the act which constituted the mistake was void, and the right to the land had already been duly ascertained and set forth, the result would be the same if it never had been corrected.

The authority to determine to which of the two grants to the state this section 21 properly belonged was vested in the secretary of the interior, generally, by section 441 of the Revised Statutes, which gave him supervision—final control—of the public business relating to the public lands, and specially and particularly as to the grant of swamp land, by the act making the same. In awarding this section to the wagon-road grant, or rather approving of its selection thereunder, the secretary must, in legal contemplation, have decided that it was not swamp. The decision, so far as it appears, was duly made, in the regular course of business, in the administration of the law relating to the subject, and with the evidence contained in the public surveys as to the character of the land before him or within his official reach. The decision that the land belonged to the wagon-road grant was, in legal effect, also a decision that it did not belong to the swamp-land grant. The latter conclusion, under the circumstances, is a necessary element of the former. Nor can this con-

clusion be impeached or contradicted in this action by oral evidence as to the character of the land. Subject to the power of a court of equity in certain cases to correct or set aside the final action of the department for fraud or mistake, not a mere error of judgment, in disposing of the public lands, its decisions on questions of fact cannot be reviewed or called in question elsewhere. *Johnson v. Towsley*, 13 Wall. 72; *Sharp v. Stephens*, 6 Sawy. 48. Therefore the oral evidence offered by the defendant, concerning the swampy character of this land, is incompetent, and cannot be considered.

The state was the grantee in both these grants. It accepted the land as part of the wagon-road grant, or allowed its grantee or agent to do so. At least there is no evidence that it ever selected this section under the swamp-land grant, and presented it for certification as part thereof. And while this may have been done, it is morally certain that it was not done until after the premises were certified to the grantee of the state under the wagon-road grant, nor until the grant had lapsed, for want of selection, within the time prescribed. The non-action of the state in this matter probably arose from the fact that it was thought best that the land should go to the construction of the wagon road, which was then regarded as a meritorious enterprise. For long after this swamp-land grant was made no interest was taken in it, nor was it generally understood that there was any considerable quantity of land in the state to which it was at all applicable. For 10 years the state took no steps to secure any land under it, preferring, as it appears, to make its selections under the grants for the benefit of roads and schools. The fact that some portions of these selections were damp enough to be called swamp was no objection to them, but often a recommendation; and in my judgment, it would have been well if that policy had been continued. But, be that as it may, in the meantime this land was formally selected and certified to the state as wagon-road land, with its acquiescence, if not active concurrence, and it is now estopped, as against the plaintiff, to deny that the premises are included in such grant, or to assert that it acquired them under the swamp-land grant. And if the state is so estopped, so is its grantee, the defendant.

The defendant defends for the whole of the W. $\frac{1}{4}$ of section 21, but it does not appear, from his own showing, that he has any claim to the N. $\frac{1}{4}$ thereof. His purchase from the state only includes the E. $\frac{1}{4}$ and the S. W. $\frac{1}{4}$ of the section. But the claim of the defendant to be the owner of any part of the premises on the facts proven must fail on either of the following grounds: (1) At and before the defendant's purchase from the state under the swamp-land grant, the right of the state thereunder had lapsed and become of no effect. (2) The land was already certified to the grantee of the state under the wagon-road grant by the secretary of the interior, which certification is a final decision of the question as to the character of the land, and the grant under which it properly belonged, by a tribunal having exclusive jurisdiction of the same. (3) The defendant, as the grantee of the state, against the plaintiff, is estopped to assert or maintain that the premises inured to the state under the