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# Forfeiture lands Northern Pacific Railroad Company.

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50TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 1498.

# FORFEITURE LANDS NORTHERN PACIFIC RAILROAD COMPANY.

APRIL 3, 1888.—Recommitted to the Committee on Public Lands and ordered to be printed.

Mr. MCRAE, from the Committee on Public Lands, submitted the following

## REPORT:

[To accompany bill H. R. 9151.]

The Committee on the Public Lands, to whom were referred H. R. 1303, 2000, and 4432, for the forfeiture of lands granted to the Northern Pacific Railroad Company, report the same back, with the recommendation that they be laid on the table and that the accompanying bill be passed by the House. The bill is as follows:

A BILL to forfeit certain lands granted to the Northern Pacific Railroad Company, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all the lands granted to the Northern Pacific Railroad Company by an act approved July 2, A. D. 1864, except such as are adjacent to and coterminous with road constructed prior to July 4, A. D. 1879, with the right of way through the remainder of the route, including all necessary grounds for station buildings, shops, depots, switches, side-tracks, turn-tables, and, excepting also all lands included within the limits of any village, town, or city, be, and the same are hereby, declared forfeited and restored to the public domain, because of the failure of the said company to perform the conditions on which the grant was made.

SEC. 2. That the forfeiture herein declared shall not extend to lands adjacent to and coterminous with completed road sold by said company prior to January 1, 1888, to bona fide purchasers for value, but the title to such lands are hereby confirmed to such purchasers, their heirs, or assigns, upon condition that all persons claiming the benefit of this section, shall, within one year after the passage of this act, make and file before the register and receiver of the proper land office, subject to an appeal to the Commissioner of the General Land Office, proof of the good faith, consideration, date, and extent of his or her purchase; and after hearing such proofs and investigating each case the register and receiver shall determine whether any alleged purchase was in fact made in good faith, for a good and valuable consideration, prior to January 1, 1888, and shall note the finding in each case on the records of the local land office, and shall thereafter certify the same to the Commissioner of the General Land Office.

SEC. 3. That all settlers upon any of the lands forfeited by this act are hereby permitted and authorized to acquire title to not exceeding 160 acres in each case, as a homestead, under and pursuant to the laws relating thereto, and in making final proof of such homestead, the settler shall be allowed for the time he has already resided upon and cultivated the same.

The act making the grant to the said company was approved July 2, 1864 (13 Stat. L., 365), and the grant was the largest of all the grants made to aid in the construction of railroads. It extended from Lake Superior to Puget Sound, a distance of over 2,000 miles, and embraced all the odd-numbered sections for 20 miles along the entire line in the States and 30 miles in the Territories through which the road was located, with indemnity within 10 additional miles. The in-

demnity limits were enlarged to 20 miles (16 Stat. L., 278). So the belt of lands actually affected was 40 miles in width in the States and 80 miles in the Territories.

The committee think the grant was one *in præsenti* upon conditions subsequent, and that for the failure to perform the conditions a forfeiture should be declared except as to such lands as are adjacent to and coterminous with road constructed prior to July 4, 1879, with proper protection to town sites, bona-fide purchasers without limit, and actual settlers to the extent of 160 acres in each case.

The third section of the said act, which declared the purpose and fixed the limit of the grant to the said company, is as follows:

SEC. 3. *And be it further enacted*, That there be and is hereby granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States and ten alternate sections of land per mile, on each side of said railroad, whenever it passes through any State, and whenever, on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said term, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections.

The fifth section declared how the road should be constructed, and protected the Government as to rates of transportation and telegraph service:

SEC. 5. That the said Northern Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line of the most substantial and approved description, to be operated along the entire line: *Provided*, That said company shall not charge the Government higher rates than they do individuals for like transportation and telegraph service. And it shall be the duty of the Northern Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States or by the legislature of any Territory or State in which the same may be situated, to form running connections with it, on fair and equitable terms.

The first and most important condition of the grant is in section 8 of the said act. It is as follows:

SEC. 8. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to and accepted by said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than 50 miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the 4th day of July, A. D. 1876.

A further condition was imposed by section 9:

SEC. 9. *And be it further enacted*, That the United States make the several conditioned grants herein and that the said Northern Pacific Railroad Company accept the same upon the further condition that if the company make any breach of the conditions hereof and allow the same to continue for upwards of one year, then in such case, at any time hereafter, the United States, by its Congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of said road.

By the joint resolution of May 7, 1866 (14 Stat., 355), the time for the completion of the whole road was extended two years, and afterwards section 8 was amended so as to read July 4, 1877 (15 Stat., 255). The Secretary of the Interior, on the 11th day of June, 1879 (pp. 109–111), decided that the time was extended to July 4, 1879. This decision appears to be correct, and so the committee has adopted that date as the expiration of the period of limitation.

Work was not commenced by said company in two years from the approval of the granting act. Nothing was done, and no line located for six years; not until authority was given to mortgage and issue bonds by the resolutions approved March 1, 1869 (15 Stat., 346), and May 31, 1870 (16 Stat., 378). After these resolutions mortgages were issued, according to the showing of the company, covering the lands, as follows:

(1) The mortgage of July 1, 1870, now represented by the preferred stock of the company.
(2) The Missouri Division mortgage of March 1, 1879.
(3) The Pend d'Oreille mortgage on that portion of the line of September 1, 1879.
(4) The general mortgage of June 1, 1881, at the rate of $25,000 per mile, now the first mortgage on the greater portion of the main line.
(5) The second mortgage of November 20, 1883, for $20,000,000.

The outstanding mortgage bonds of the company were as follows, by July 30, 1885, the close of last financial year:

| | |
|---|---|
| General first mortgage bonds | $43,403,000 |
| General second mortgage bonds | 18,857,000 |
| Missouri Division mortgage bonds | 2,233,500 |
| Pend d'Oreille Division mortgage bonds | 3,240,000 |
| | 67,833,500 |

In addition to this there was issued preferred stock to the amount of $38,610,584. In violation of the tenth section of the act, which declared "that all the people of the United States shall have the right to subscribe to the stock," it appears that J. Gregory Smith and other associates entered into an agreement with the following provisions:

Witnesseth—

First. That each subscriber or party of the second part shall pay, on demand of said Smith, the sum of $8,500 for each one-twelfth part or share in said enterprise, and in that proportion for any lesser part so by himself subscribed for; and upon payment of said amount each subscriber aforesaid shall, and he does thereby, become jointly interested with said Smith and his associates, according to the number of shares or parts of shares so subscribed for by him, in the charter and franchise of the Northern Pacific Railroad, with all its rights, powers, privileges, and immunities.

Second. It is mutually agreed by and between the parties that the best efforts of each and all shall be given to obtain from Congress the passage of a bill granting aid to the said company for the construction of said road and telegraph, and for such further legislation as may be needed; and that each party shall contribute according to the interest that he holds, the necessary funds for that purpose; said moneys and expenses to be paid and incurred under the direction of a committee to be appointed for that purpose.

Third. It is further agreed that each share in the enterprise shall be entitled to one director in the company, to be elected at the next annual election of the board, and that in the mean time the vacancies that can now be obtained by the resignation of present members may be filled from such parties from among the subscribers hereto as may be by them designated.

Fourth. That as soon as the necessary legislation from Congress can be obtained a meeting of the subscribers shall be held at an early day to make such further organization as may be advisable, with a view to the commencement of the work of construction of said road and securing the land granted by the charter.

Fifth. Each party hereto may subdivide his interest according to his own choice, the subdivision and addition of new parties, however, not to change the mode and manner of representation in the management as set forth above.

The Hon. Charles S. Voorhees, the Delegate from Washington Territory, in discussing this wicked agreement and the general purpose of the incorporators to defeat the object and purposes of the act that gave

the company being, stated, in an able and well-considered speech delivered in the House of Representatives July 26, A. D. 1886, that—

On the 10th day of January, 1867, the above agreement was executed, which told the story of the corruption which presided at the birth of this "benevolent monopoly."

From this agreement it will be seen that the first steps taken by this corporation were steeped in fraud and infamy. From the very outset it developed into a combination for the purposes of individual aggrandizement, by most questionable methods, and each succeeding management has religiously adhered to this cardinal principle of the organization.

Until the 20th day of May, 1869, the records show that the holders of these proprietary interests faithfully and zealously waited for something to turn up. On that date an agreement was executed with Jay Cooke & Co. looking to some substantial result.

Five years had elapsed since the granting of the charter by Congress, during which time the projectors of this enterprise had been so busily occupied in an effort to purchase the Congress of the United States that they had no time to even attempt a compliance with the terms of the act of 1864, nor is there any evidence that they ever contemplated doing so until it became certain that such compliance would result in their individual advancement.

An enterprise which is founded as the records show this to have been can, at no stage of its existence, be said to be characterized by any degree of honesty or good faith.

In addition to the corrupt tendencies of this corporation thus evidenced, there has never been that degree of good faith in the construction of the road which would entitle it to the special consideration of Congress. The work of construction was not even begun until 1870, six years after the granting by Congress of this magnificent charter. Congress originally intended that the road should be constructed as the result of the sale of the stock of the corporation. This intention is made manifest by the provisions of section 10 of the act of 1864, that "no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage or lien made in any way except by the consent of the Congress of the United States."

It is evident, however, that there never existed a purpose on the part of the managers of this "gift enterprise" to construct the road within the scope of this well-defined intention of Congress.

On the 31st day of May, 1870, they procured from Congress permission to mortgage their franchise and other property interests, and then, and then only, was any substantial step taken toward the accomplishment of the result foreshadowed in the act of July 2, 1864. Every mile of this long line of road has been constructed with the proceeds of the sale of the mortgage bonds contemplated in the act of May 31, 1870. The individual capital of not one of the projectors of the enterprise has ever been for an instant jeopardized or endangered.

* * * * * * *

The policy of this company has always been of such a character, however, as to lead to the conclusion that corporation construction has been wholly unable to distinguish between the "public interest and welfare" and the pecuniary advancement of the individual members of the corporation by whatever methods. Manifold illustrations of this policy might be given. In a single illustration, however, to which I shall direct attention, will be found all the *indicia* of highway robbery and piracy on the high seas, sufficiently marked to emphasize the company's entire policy.

More than twenty years ago, when the suggestion of transcontinental railroad communication was regarded as the offspring of the theorist and the dreamer, a few hardy spirits, who had picketed the outposts of civilization, planted a pioneer town in the Yakima Valley in central Washington Territory, and called it Yakima City. Year by year they zealously guarded their isolated offspring until they saw it develop into a thriving, beautiful town, the commercial center of an exceedingly rich agricultural region. Under their progressive touch it became the largest town within a radius of 100 miles, and assumed sufficient importance to justify the Territorial legislature in clothing it with all the functions of a city by an act of incorporation.

From the beginning the Northern Pacific Railroad Company had given the inhabitants of this little city every assurance that the coming of the road meant permanent prosperity for them. The clouds of frontier deprivation were to be rolled back, and the sunshine of an assured and permanent growth was to envelop the results of more than twenty years of frugal industry and toil. Many made modest investments, from scant means, in the town, with the purpose of realizing the legitimate profits certain to attend the arrival of railroad facilities. In this instance, as in every other, however, they who placed any reliance in the promises of this corporation found themselves the victims of Punic faith.

Up to the time of the completion of the road to Yakima City it was supposed that the Northern Pacific Railroad Company had sounded all the depths and shoals of cor-

porate infamy and rapacity. It remained for it, however, to emphasize, in its conduct, the most heartless, ruthless, and damnable transaction ever known to the full history of corporate speculation. To deliberately set on foot and push forward a speculation in ruined homes, shattered fortunes, and broken hearts requires such colossal and gigantic scoundrelism that the mind instinctively shrinks from its contemplation. And yet this is just what the Northern Pacific Railroad Company did in dealing with Yakima City.

When the time came for striking the blow, they pushed their road through the corporate limits of the old pioneer town of Yakima City to a point about 4 miles beyond and there located a town upon one of the odd sections embraced within the limits of the grant so long since forfeited by the company, and called it North Yakima. Certainly no one will seriously contend that Congress in its wildest flights of imagination ever contemplated that its bounty should become such an engine of oppression and destruction as it thus developed under the skillful manipulation of this company. The fact that this move carried consternation into many a hard-earned home was not sufficient to turn them from their nefarious purpose.

The fact that in pursuing such a course they advertised themselves as the monumental liars of the century was insufficient to deter them from the infamy. The fact that bankruptcy and ruin hovered over many a household as the result of the success of the assault upon the old town seemed to urge them to renewed effort. It mattered not to them that the old town had been made sacred by the associations of nearly a generation; that within its precincts children had grown to manhood and womanhood; that within its quiet churchyard "the rude forefathers of the hamlet sleep;" and in short, that all the tender and beautiful memories of home, both joyous and sad, were rudely trampled upon and uprooted.

Seemingly fearful lest, with any encouragement whatever, the feeling of devotion to the home of nearly a generation might induce a resistance to this scheme of pillage and plunder, the order was issued to afford the old town no railroad facilities whatever. Every passenger residing in Yakima City who was forced to ride over the road was compelled to go to North Yakima to take the train, notwithstanding the fact that every train passed directly through the center of the old town.

People walked about as in the shadow of a great bereavement and cursed the evil hour in which Congress chartered so villainous a combination. A more daring, shameless outrage has no place in the wide range of corporate villainy.

It is marvelous that in the face of such an exhibit as this any one can be found to insist that this corporation is entitled to any consideration save that which belongs to the common marauder upon the property of others. It is entitled to no consideration at the hands of honest people.

This is a strong arraignment, but it appears to be sustained by the facts.

The following official table shows the dates of the location, extent of withdrawal, the length of road, amount completed in time, and amount yet uncompleted:

| Date of definite location. | Date and extent of withdrawal. |
|---|---|
| General route: | |
| Mouth of Montreal River, Wisconsin, to Red River of the North, Minnesota, Aug. 13, 1870. | Sept. 15, 1870. |
| Eastern boundary of Washington Territory, via valley of Columbia River, to international boundary, Aug. 13, 1870. | Sept. 20, 1870; Nov. 21, 1870; Feb. 10, 1872; Feb. 14, 1872; Sept. 20, 1870; Feb. 9, 1872, and Feb. 14, 1872. |
| Through Minnesota, Oct. 2, 1870 | Nov. 7, 1870. |
| Red River of the North to the mouth of the Walla Walla River, Washington, Feb. 21, 1872. | Mar. 30, 1872; Apr. 22, 1872; Apr. 15, 1872; Oct. 28, 1876; Mar. 30, 1872, and Apr. 15, 1872. |
| Lake Pend d'Oreille, Idaho, to Tacoma, Wash. (branch), Aug. 20, 1873. | Oct. 6, 1873, and Nov. 1, 1873. |
| Mouth of Snake River to Tacoma, Nov. 24, 1876 | None. |
| Twin Wells to Tacoma, June 11, 1879 | July 3, 1879. |
| Definite location: | |
| Junction with Lake Superior and Mississippi Railroad to Red River of the North at Fargo, Dak., Nov. 20, 1871. | Dec. 12, 1871. |
| Fargo to Bismarck, Dak., May 26, 1873 | June 11, 1873. |
| Kalama to Tenino, Sept. 13, 1873 | Jan. 21, 1874. |
| Tenino to Tacoma, May 14, 1874 | Nov. 12, 1874, and June 30, 1875. |
| Bismarck to Little Missouri River, July 20, 1880 | Aug. 23, 1880. |
| Little Missouri River to mouth of Glendive Creek, Oct. 25, 1880 | Nov. 29, 1880, and Sept. 29, 1883. |
| Wallula to Spokane Falls, Oct. 4, 1880 | Nov. 13, 1880; Nov. 17, 1880; Nov. 18, 1880; Aug. 16, 1881, and Nov. 29, 1880. |

| Date of definite location. | Date and extent of withdrawal |
|---|---|
| Definite location—Continued. | |
| Glendive Creek to Tongue River, June 25, 1881 | Sept. 29, 1883. |
| Tongue River to eastern boundary of Crow Reserve, June 25, 1881 | Oct. 8, 1883. |
| Through Crow Reserve, June 27, 1881 | Nov. 14, 1883; June 8, 1883, and June 9, 1883. |
| Spokane Falls, Wash., to Lake Pend d'Oreille, Idaho, Aug. 30, 1881 | June 9, 1884, and Jan. 7, 1888. |
| Last crossing of Yellowstone River (western boundary of Crow Reserve) to Little Blackfoot River, July 6, 1882. | June 8, 1883, and June 9, 1883. |
| Little Blackfoot River to southern boundary of Flathead Reserve, July 6, 1882. | July 30, 1883, and July 31, 1883. |
| Junction with Lake Superior and Mississippi Railroad in Minnesota to T. 47 N., R. 2 W., Wisconsin, July 6, 1882. | Jan. 5, 1883; June 18, 1883; Oct. 11, 1883; Jan. 5, 1883; June 22, 1883, and Oct. 20, 1883. |
| Portland, Oregon, to Kalama, Wash., Sept. 22, 1882 | Jan. 30, 1888. |
| Lake Pend d'Oreille, Idaho, to mouth of Missouri River, Montana, Dec., 12, 1882. | Sept. 1, 1884; Feb. 20, 1885, and Jan. 7, 1888. |
| Through Flathead Reserve to mouth of Missouri River, June 8, 1883 | Sept. 25, 1884, and Jan. 7, 1888. |
| Initial point at Ashland, Wis., west 50 miles, Nov. 24, 1884 | Feb. 3, 1887. |
| Yakima to Ainsworth, June 29, 1883 | Jan. 6, 1885; Jan. 8, 1885, and Jan. 8, 1885. |
| Yakima to Swank Creek, May 24, 1884 | Jan. 6, 1885; Jan. 8, 1885, and Jan. 8, 1885. |
| Tacoma to South Prairie, Mar. 26, 1884 | Nov. 28, 1884, and Dec. 1, 1884. |
| South Prairie to Eagle Gorge, Sept. 3, 1884 | Nov. 28, 1884, and Dec. 1, 1884. |
| Swank Creek to Eagle Gorge, Dec. 8, 1884 | Jan. 7, 1888. |

| | Length. | Completed within time prescribed. | Completed after time prescribed. | Uncompleted at date entire road should have been completed. | Now uncompleted. |
|---|---|---|---|---|---|
| Main line: | *Miles.* | *Miles.* | *Miles.* | *Miles.* | *Miles.* |
| Wisconsin | 78.50 | ..... | 78.50 | 78.50 | ..... |
| Minnesota | 237 | 228 | 9 | 9 | ..... |
| Dakota | 375.98 | 196.4 | 179.58 | 179.58 | ..... |
| Montana | 780 | ..... | 780 | 780 | ..... |
| Idaho | 90 | ..... | 90 | 90 | ..... |
| Washington | 511.10 | 106.1 | 180 | 405 | 225 |
| Oregon | 36.30 | ..... | 36.30 | 36.30 | ..... |
| | 2,108.88 | 530.5 | 1,353.38 | 1,578.38 | 225 |
| Cascade Branch, Washington | 153.93 | ..... | 151.50 | 153.93 | .43 |

Main line as finally located and constructed extends from Ashland, Wis., to Wallula Junction, Wash., 1,741.48 miles, and from Portland, Oregon, to Tacoma, Wash., 142.40 miles. Completed from Northern Pacific Junction, Minn., to Bismarck, Dak., 424.4 miles, and from Kalama to Tacoma, Wash., 106.1 miles.

Road still uncompleted between Wallula Junction, Wash., and Portland, Oregon. Company uses road of Oregon Railway and Navigation Company between said points.

The portion of the Cascade Branch remaining uncompleted (2.43 miles) consists of tunnel through Cascade Mountains.

By order of the Secretary of the Interior, August 15, 1887, the indemnity lands were restored and none of such withdrawals are now in force. The grant has not been completely adjusted, but 1,031,031.78 acres have been patented. The company has sold 6,329,140.61 for the aggregate sum of $22,614,405. The average price per acre for all sales to date is $3.47.

A bill substantially like this was reported from the Committee on the Public Lands in the Forty-ninth Congress, and the legal principles involved were so clearly presented by Hon. Barclay Henley, of California, in the report he made for the committee, that the argument is adopted by the present committee:

The consideration of the case involves two general and leading questions: First, the power of Congress to declare a grant of public lands forfeited for breach of condition subsequent; second, whether, this power being established, there are any features in this particular case excepting the grant from the general rule.

The power of Congress to declare forfeited a grant of the public lands, made to either a corporation or a State, by an act containing a clause providing that the lands should revert upon failure to build the road within a specified time, is established beyond all controversy by repeated decisions of the Supreme Court.

It is specifically so held in United States *vs.* Repentigny (5 Wall., 211) and Schulenburg *vs.* Harriman (21 Wall., 44).

Following these cases is another, which even more unequivocally defines the power of Congress in this regard. In Farnsworth *vs.* Minnesota and Pacific Railroad Company (92 U. S., 66), the court, considering the question, said:

"A forfeiture by the State of an interest in lands and connected franchises, granted for the construction of a public work, may be declared for non-compliance with the conditions annexed to their grant or their possession, when forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions."

Following these authoritative expositions of the law, as well as the reasons and sense of the principle involved, your committee have uniformly held that jurisdiction existed in Congress to declare these grants forfeited and have reported several bills to accomplish that purpose, some of which have already passed the House. We adhere to this position in the case under consideration.

Your committee are also clearly of the opinion that there is nothing in the provisions of the Northern Pacific act which takes it out of the category of grants upon condition subsequent, liable to forfeiture for breach of condition.

The question turns upon a consideration of sections 3, 5, 8, and 9, hereinbefore quoted. The company claim that they constitute an absolute dedication of the lands to the purpose of constructing the road; that there is no condition subsequent whatever, and that the only power in the United States is the power through Congress to adopt such measures as may be necessary to insure the completion of the road, in case the company does not build it.

On the other hand, your committee regard this construction as utterly untenable, and are clearly of the opinion—

1. That section 8 of the act declares a condition subsequent, viz, that the road shall be completed within a certain time, upon breach of which the grantor may declare a forfeiture.

2. That section 9 is in no way repugnant to section 8, but while embracing all that is included therein, and to that extent perhaps cumulative, is also, in connection with section 5, a declaration of further and additional conditions subsequent, for breach of which Congress may interfere to protect the rights of the United States.

3. That under either of said sections, or both together, the United States, by Congress, has the right to declare the grant forfeited for failure to build the road within the limitation.

## I.

Section 8 is perfectly plain in the language used and the purpose contemplated. It declares in so many words that the grant made is given by the United States and accepted by the company "subject to the following conditions, namely, that the said company * * * shall construct, equip, furnish, and complete the whole road," etc. This is too plain for any construction Congress intended to provide, and did provide, that the road should be completed within a certain time, and that that should be a condition of the grant. If a condition, the grant is determinable upon its breach, at the option of the grantor.

The argument of the company rests upon the absence of express words declaring a reversion in case of the breach. That, in the judgment of your committee, was entirely unnecessary in order to create an estate upon condition subsequent. The estate, so conditioned, is created by declaring the condition, not by declaring the result of its breach. The latter, re-entry or its equivalent, follows as a matter of legal effect. Every lawyer knows the result of a breach of condition subsequent, and the statement of that result in any grant adds nothing to the previous description of the estate created. The land does "revert" by operation of law upon the breach being enforced by re-entry or its equivalent; but the right to that re-entry depends upon no express provisions that the land shall revert. It stands upon the condition declared and its breach. Upon this point we quote from the report of the Public Lands Committee, made at this session of Congress upon the bill forfeiting the Texas Pacific land grant, reported to the House by Judge Payson:

"In other words, generally stated, the distinguished counsel for the company declares that in law the power to declare a forfeiture of a grant made on condition subsequent for breach of the condition must be reserved to the grantor by express terms in the act of making the grant, or it does not exist.

"No authority was produced to the committee except the statement of the attorneys asserting this extraordinary doctrine in support of it; but the interest being so

great, we have examined the books on the question, and are not able to find a single authority in support of the proposition, and we believe none can be found.

"On the contrary, Washburn on Real Property (vol. 2, 3d ed., p. 15) asserts the rule to be: 'Where the condition of a grant is express there is no need of reserving a right of entry of a breach thereof in order to enable the grantor to avail himself of it.' See also Jackson *vs.* Allen, 3 Cowan, 220; Gray *vs.* Blanchard, 8 Pick., 284; Littleton, sec. 331.

"Indeed, all the decided cases we can find, as well as the text-books, are in harmony and to the same effect; so we do not present argument upon it here."

The estate is created by proper words of description declaring the condition, and the legal effect of what follows the breach is exactly the same whether it be described in the grant or not. Thus in the case under consideration the estate upon condition is created by the specific language used. The legal effect of reversion follows the breach and declaration of forfeiture. No provision that the land should revert was necessary, and if added would simply have described the legal result of what preceded it.

The Touchstone, page 122, thus describes the operative words creating an estate on condition:

"Conditions annexed to estates are sometimes so placed and confounded among covenants, sometimes so ambiguously drawn, and at all times have in their drawing so much affinity with limitations, that it is hard to discern and distinguish them. Know, therefore, for the most part, conditions have conditional words in their frontispiece, and do begin therewith, and that among these words there are three words that are most proper, which in their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as proviso, *ita quod* and *sub conditione.*"

Washburn, in his work on Real Property, marginal page 42, says:

"Among the forms of expression which imply a condition in a grant the writers give the following: 'On condition,' 'provided always,' 'if it shall so happen,' or 'so that the grantee pay, etc., within a specified time,' and grants made upon any of these terms vest a conditional estate in the grantee."

When the condition of a grant is express, there is no necessity of reserving a right of entry for breach of the condition, in order to enable the grantor to take advantage of it. (Jackson *vs.* Allen, 3 Cow., 220; Gray *vs.* Blanchard, 8 Pick., 284.)

That the words "upon condition," and even words less specifically expressing the intent, are construed as establishing an estate upon condition subsequent, without further description, is shown by many authorities. (Littleton, pp. 228, 329, 330, Com. Dig. Condition A 2; 2 Wood, Com. Powell's ed., 505, 512, *et seq.*; Wheeler *vs.* Walker, 2 Conn., 201; Thomas *vs.* Record, 477 Me., 500; Sharon Iron Co. *vs.* Brin, 41 Penn. St., 341; Taylor *vs.* Cedar Rapids R. R. Co., 25 Iowa, 371; Attorney-General *vs.* Merrimack Co., 14 Gray, 612; Hadley *vs.* Hadley, 4 Gray, 145; Rawson *vs.* School District, 7 Allen, 128; Caw. *vs.* Robertson, 1 Selden, 125; Pickle *vs.* McKissick, 21 Penn. St., 232; Hooper *vs.* Cummings, 45 Me., 359; Chapin *vs.* School, 35 N. H., 450; Wiggin *vs.* Berry, 2 Foster, 114; Hayden *vs.* Stoughton, 5 Pick., 534; Wright *vs.* Tuttle, 4 Day, 326.)

Authorities upon this point might be multiplied. It is the construction of principle and authority, and your committee have been referred to no case which in their judgment militates at all against the position here assumed. The Touchstone, at page 122, immediately following the quotation which we have made, is suggested as modifying the authority of the citation in its applicability to the case under consideration. But no such effect can possibly be given the language used. After stating the broad proposition quoted, the writer proceeds to say that although the words mentioned are "the most proper words to make conditions," yet that they are sometimes used for other purposes. He then points out instances where the word "proviso" in certain particular relations may be given a different meaning. But the entire discussion is limited to that particular word—does not once mention the words "*sub conditione*" or name a single instance where they are used in a sense contrary to the general rule, and even in respect to the word "proviso" the exception could not apply to the case under consideration, for it is expressly limited to a use of the word where it does not stand "originally, by and of itself."

The other authorities to which we have been referred are not in any sense repugnant to the view of the law we adopt. They are few in numbers, and at the best simply hold that these apt words may, in certain instances, be restricted by immediate reference to other portions of the deed clearly expressing a different intent in the grantor. That this is true is not denied; but it does not change the general rule, and its applicability to the case under consideration will more properly be noticed hereafter.

We are, therefore, clearly of the opinion that section 8 of the act, by the express language used, created an estate upon condition subsequent, forfeitable upon breach of the condition.

II.

Section 9 of the act, while perhaps embracing the preceding section within its provisions, and possibly to that extent cumulative, is also a provision prescribing certain other and additional conditions subsequent.

It will be noticed at the outset that by its specific language it embraces more than one grant, the exact words being "the several conditioned grants herein," and that it relates to a "further" condition. The "further" condition was that if the company should make any breach of "the conditions hereof" and the same should continue for a year, then the United States might, etc. Now, it is obvious upon the mere reading that this language does not primarily relate to section 8, for that section only appertains to one grant, needs no "further" condition, and the provision that the default should continue for a year or upwards would have no pertinence. This section evidently relates to some other condition than that mentioned in section 8.

These other conditions or requirements are found in section 5, which provides that six separate and distinct things should be done by the company, viz: 1st, that the road should be constructed in a substantial and workmanlike manner, equal in all respects to first-class railroad; 2d, that it should be made of rails of the best quality, manufactured from American iron; 3d, that a uniform gauge should be established throughout the entire line; 4th, that the company should construct a telegraph line of the most approved and substantial description; 5th, that it should not charge the Government higher rates than individuals; and, 6th, that it should permit other railroads to make running connections on fair and reasonable terms. These are the other and further conditions mentioned by section 9, in default of any of which, continuing for a year, Congress should have the right to "do any and all acts and things" to secure the "speedy completion of the said road," as contemplated and provided.

The intent of Congress, expressed with abundant precision in the act itself, and as every one knows as a matter of history, was to insure the construction within the time prescribed of a substantial, first-class, and thoroughly-equipped railroad from Lake Superior to the Pacific, suitable and available in all emergencies for use by the United States—in peace for the transmission of its mails; in war for the carrying of troops and supplies. Congress did not donate 48,000,000 acres of the public domain to this company without expecting and requiring some equivalent. Among the things it did require was the construction of a first-class road for the purposes and in the manner indicated. It accordingly prescribed the various requirements above recited, and to insure obedience to its mandates it provided by section 9 that in default of any of the same Congress might do anything necessary to complete the road in the manner contemplated and prescribed. The enactment of these provisions would have been futile had no reservation been made of a right to enforce them. Without such a reservation the Government, upon default of the company, would have had nothing left except a claim against the company for breach of contract or of covenant. To prevent such a condition of affairs the right was reserved to further legislate to compel obedience to its mandates. These requirements then became additional conditions subsequent which Congress could enforce by forfeiture or by any other remedy deemed appropriate and adequate. That was the object, scope, and intent of section 9, and it is expressed in unambiguous phrase.

It is no answer to this proposition to say that these requirements might be enforced by the general forfeiture provided by section 8.

The road might have been built within the time limited, and yet every one of these conditions been broken. The grant could not then have been forfeited at all under section 8. A road would have been completed, and though built in absolute disregard of all the requirements of section 5, the Government would have been powerless either to resume the grant or compel the company to perform the condition. That section 9 relates to other conditions than that mentioned in section 8 is also apparent from the use of the words "and allow the same to continue for upwards of one year." These words, if applied to the conditions mentioned in section 5, mean something. If applied to section 8 they are nonsensical. If Congress had intended to extend the period mentioned in section 8 one year, it would have said July 4, 1877; not July 4, 1876, and another year thereafter.

It is thus apparent that section 9 of the act has a scope and effect far beyond anything embraced by section 8; that it legislated upon further and additional subjects; has a separate and distinct function of its own, and that instead of limiting or controlling the preceding section it creates additional obligations and liability on the part of the company.

The only answer to this position advanced by the company is the suggestion that if this be true, then the two sections are utterly inconsistent with each other. It is difficult to understand how this can be seriously urged. We have already shown a different legal scope and operation for each under the construction we have adopted. They are not repugnant or inconsistent in the slightest degree. Each stands for its own particular purpose. On the other hand, the construction contended for by the

company would violate well-established rules of construction simply to disregard the plainly expressed intent of Congress. They claim that the two sections should be taken together, and that so taken all that Congress could do upon failure of the company to build the road would be to take all necessary steps to compel its completion, without power to forfeit the grant.

This position is untenable under the rules of construction because, first, it assumes an ambiguity, and then to reconcile it rejects the usual and ordinary signification of terms and phrases; twice reads as singular a word in the plural, and construes "further condition" as if the word "further" was omitted; second, with reference to a simple time condition, viz, that the road should be built by July 4, 1876, it adds the senseless expression, "provided the same shall continue unbuilt one year;" third, it excludes all of section 3 from its relations and connections with section 9, and either rejects it entirely or makes it practically inoperative; fourth, it violates the manifest general intent of the entire act and the general policy of Congress prevailing at the time in respect to these grants.

Another consideration is to be noticed. The provision of section 3 is permissive or directory only. Congress may do all necessary things, etc. It is not mandatory, as it would have been if intended as the sole remedy for the breach of the condition of section 8. So, too, it is not exclusive of other remedies for the breach. Congress may in that way enforce the forfeiture or may do it otherwise.

We have been referred to some authorities which are supposed to sustain the forced construction of the act contended for, but after the most careful examination of them we are unable to recognize any doctrine contrary to that we have adopted for our guidance. The strongest cited are undoubtedly the cases of the Episcopal Mission *vs.* Appleton *et al.* (17 Mass., 326) and Stanley *vs.* Colt (5 Wall., 119). They do not establish any new doctrine or any principle repugnant to the authority of the long line of cases we have cited.

In the former, the supreme court of Massachusetts, speaking of a voluntary deed for charitable purposes, say:

"Although the words 'upon condition' in a conveyance of real estate are apt words to create a condition, any breach of which will forfeit the estate, yet they are not to be allowed that effect when the intention of the grantor, as manifested by the whole deed, is otherwise."

And in the latter, the Supreme Court of the United States, speaking of a devise for certain charitable purposes, say:

"It is true the word 'proviso' is an appropriate one to constitute a common-law condition in a deed or will; but this is not the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, it gives way to the intent of the parties as gathered from an examination of the whole instrument, etc."

The principle announced by these decisions is simply the universal rule of construction giving effect to the real intent of the parties to an instrument when the same can be fairly ascertained from the language used; in other words, that technical expressions and phrases ordinarily yield to a contrary plainly expressed intent. But the principle has no applicability to the case under consideration, for there is no intent, either expressed or to be reasonably implied, contrary to the technical meaning of the words "upon condition." On the contrary, the act from beginning to end displays in every line a most deliberate, well considered, and matured intention not to bestow this princely gift without so circumscribing and limiting the company by these conditions as to secure the object, and every object, which Congress had in view. It shows the clearest intention in the mind of Congress to create a condition subsequent forfeiting the grant for failure to build the road within the prescribed period; and also other conditions subsequent, putting it in the power of Congress, even after the road had been built, to enforce the requirements of the act touching the manner of its construction. In the judgment of your committee there is not a word in the act indicative of an intent to limit or curtail the technical words of condition used.

And aside from the language of the act itself, it is incredible that Congress could have intended in this, probably the largest and most valuable grant of lands ever made to a railroad company or a State, to depart from the uniform and uninterrupted policy of legislation for years, and allow the company to appropriate this vast belt of the public domain without restriction, reservation, or control. Your committee can not subscribe to such a doctrine, and can find no argument, even plausible, to support it. We are clearly of opinion that Congress intended to provide for a forfeiture upon failure to build the road within the prescribed period, and that the language used was abundantly sufficient in law to accomplish that intent.

## III.

Your committee are also well satisfied that even under section 9 of the act, in the sense in which it is construed by the company, Congress had and has the power to declare a forfeiture. It is conceded that under it Congress can do any and all acts

and things needful and necessary to insure a speedy completion of the road. Congress is the sole and exclusive judge of whether the road has at any time, in point of fact, been completed; and if not, what remedy should be applied. The remedy of forfeiture is included within the general power reserved. The road is in fact uncompleted to this day. Congress can now, by virtue of that very reservation, so strenuously insisted upon by the company as protecting the grant, declare the same forfeited and restored to the public domain. Might not the forfeiture of the grant in the hands of this company and the consequent creation of an open field for equal competition best conduce to the speedy, ultimate completion of the entire line? If Congress so view the matter, there can be no doubt of its power to declare the forfeiture under the very clause of the act relied upon by the company for its protection.

OTHER OBJECTIONS AGAINST THE FORFEITURE CONSIDERED.

Certain other considerations have been presented to your committee, as objections to declaring a forfeiture, which we deem it proper to notice.

First. It is argued that Congress having, by the joint resolution of May 31, 1870 (16 Stat., 378), authorized the company to issue bonds and execute a mortgage upon its property and franchises, can not now do an act by which the interests of the bondholders, or others claiming under the mortgage, will be injuriously affected.

The argument is plausible, but not sound. It is correct in theory, but fallacious as applied to the facts of the case under consideration. It rests upon the false assumption that Congress authorized a mortgage of the unconditional fee, whereas it did nothing of the kind. It permitted a mortgage of "the property and rights of property of all kinds and descriptions" of the company.

The property and rights of property belonging to the company, so far as its lands were concerned, was not the absolute, unconditional fee. It was the fee charged with the condition subsequent. That was the estate, and the only estate, which the company owned, or which it was authorized to mortgage. The mortgagee took the estate, as it was, charged with the condition. If no breach occurred the estate became absolute; upon breach the forfeiture could be enforced against the mortgagee as well as the mortgager. Congress, by the joint resolution, did not enlarge the grant; it simply gave its assent to a mortgage of the grant as it stood.

The mortgagee took with his eyes open; received a defeasible estate, the character of which he is presumed to have known; and he simply stands in his grantor's shoes as respects the question of forfeiture. This is well settled.

In Touchstone, at page 120, it is thus tersely stated:

"And if he that hath the estate grant or charge it, it will be subject to the condition still; for the condition doth always attend and wait upon the estate or thing whereunto it is annexed; so that although the same do pass through the hands of an hundred men, yet it is subject to the condition still."

And again, at page 154:

"It is generally true that he that doth enter for a condition broken doth make the estate void *ab initio*, and that he shall be in of his first estate in the same course and manner as it was when he departed with the possession and at the time of the making of the condition. And hence it is that, if there be any charge or incumbrance on the lands, as if the lessee of land upon condition grant a rent charge out of the land or enter into a statute or recognizance and the conusee has the land in execution and this charge is after the condition is made, in this case when the condition is broken and the party doth re-enter he shall by relation avoid the rent, statute, and recognizance and hold the land freed from them all."

Greenleaf's Cruise on Real Property (vol. 2, pp. 44, 52) thus refers to the question:

"Where a person enters for a condition broken the estate becomes void *ab initio;* the person who enters is again seized of his original estate in the same manner as if he had never conveyed it away. And as the entry of the feoffer on the feoffee for a condition broken defeats the estate to which the condition was annexed, so it defeats all rights and incidents annexed to that estate, together with all charges and incumbrances created by the feoffee during his possession; for upon the entry of the feoffer he becomes seized of an estate paramount to that which was subject to these charges."

Washburn on Real Property (vol. 2, p. 11, marginal page 451) says:

"When such entry had been made the effect was to reduce the estate to the same plight, and to cause it to be held in the same terms as if the estate to which the condition was annexed had not been granted."

And Kent thus states the same principle (vol. 4, p. 125):

"Persons who have an estate or freehold subject to a condition are seized and may convey, though the estate will continue defeasible until the condition be performed or release, or is barred by the statute of limitation or by estoppel."

In Foxcroft *vs.* Mallet (4 How., 377) the Supreme Court of the United States, speaking directly upon this very question, arising upon a mortgage of an estate upon condition subsequent, say:

"The condition, or charge, was on the land as an incumbrance by the very terms of the deed to him, and he could not, if he tried, convey a title to the land which

should be free from it. Such a condition attaches to the land wherever it goes, although the same should pass through a hundred hands. In our view, it operates like a covenant which runs with the land, and all assignees are bound by covenants real that run with the land."

So, in the case under consideration, the mortgagee took only the title of the mortgagor, charged with its defeasible quality. In the language of the Supreme Court, the mortgagor could not, if he tried, convey a title to the land which would be free from the charge.

The bondholders and others claiming under the mortgage simply stand in the shoes of the company. They could not and did not take any greater or better estate than their grantor held, and that was an estate subject to forfeiture for condition broken.

We have been furnished with no authorities containing a contrary view of this question, and we believe that none exist. In fact, the whole argument of the counsel for the company upon this point rests, as before stated, upon the erroneous assumption that Congress in some way, by the joint resolution referred to, enlarged the estate of the company, or authorized them to mortgage a greater estate than they theretofore possessed. As no foundation for such an assumption can be found, either expressed or implied, in the joint resolution in question, it follows that the parties are relegated to their rights as defined by the authorities we have cited, which are absolutely conclusive of the whole controversy.

Second. It is said that Congress should not now declare a forfeiture because the United States, as is alleged, did not seasonably comply with what is deemed a requirement of section 2 of the granting act relative to the extinguishment of Indian titles.

The pertinent portion of that section is in the following words:

"The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act and acquired in the donation to the road named in this bill."

The Indian lands in respect to which this complaint against the Government is raised are a tract lying between the Red River of the North and the James River in Dakota; the Sioux Reservation in Dakota; the Crow Reservation in Montana; the Cœur d'Alene Reservation in Idaho; and the Yakima and Puyallup Reservations in Washington Territory.

It is claimed that the provision of section 2, above quoted, required the United States to extinguish the Indian title to these tracts, and that because this, as is alleged, was not seasonably done, the company is released from the condition subsequent. To support this claim is cited the well-recognized rule that if the performance of a condition subsequent is rendered impossible by act of the grantor it becomes void.

It will be observed that the provision of law quoted applies only to lands "falling under the operation of the act and acquired in the donation to the road named in this bill." None of the tracts named were acquired in the donation unless perhaps it be the first one mentioned. By section 3 there are excepted from the grant all lands "reserved, sold, granted, or otherwise appropriated" at the time the line of the road was definitely fixed and a plat thereof filed in the General Land Office. The earliest definite location of any portion of the road was in November, 1871 (Report of Commissioner of the General Land Office, 1873, p. 301). This was for that portion of the road lying in Minnesota. The balance of the line has been definitely located since at different dates.

With reference to the first tract mentioned, viz, the land lying between the Red River of the North and the James River in Dakota, it is admitted by the company and the records show that the road was completed through these lands within the time prescribed. The proposed forfeiture does not affect them, and it is of course obvious that, if they fell within the terms of the granting act, the Indian title was one which did not embarrass the company or call for any action on the part of the United States.

With reference to other tracts mentioned, none of them were lands to which the provisions referred to applied, for they were "*reservations*" and "*appropriated*" as such at the date of the definite location of the road and were not therefore "acquired in the donation" by the company. They were expressly excepted from the donation by the third section of the act, and were not, therefore, lands to which the provision under consideration, in any event, applied.

The Sioux Reservation in Dakota existed by virtue of various treaties, from an early day to that of April 29, 1868 (15 Stat., 635); the Crow Reservation in Montana was made by treaty of May 7, 1868 (15 Stat., 650; see also Executive orders, October 29, 1875, and May 8, 1876); the Cœur d'Alene Reservation in Idaho was made by Executive order of June 14, 1876; the Yakima by treaty of June 9, 1855 (12 Stat., p. 951), and the Puyallup by treaty of March 3, 1855 (10 Stat., 1132). They were all reserved lands at the date of the definite location of the road, and excepted from the grant and the undertaking of the United States to extinguish the title. They were also "appropriated" and therefore excepted. (See Willcox *vs.* Jackson, 13 Pet., 498.)

It thus appears that with reference to one of these tracts the road was completed without any necessity for aid from the United States within the time required; and that with reference to all the others, the United States has never been under any obligation to extinguish the Indian title at all.

But even if such an obligation existed, it is too clear for argument that it was the sole province of the United States to determine when and under what circumstances it should be discharged, consistently with public policy and the welfare of the Indians. Whatever may be individual views as to the policy of extinguishing these titles and the incidental effect upon the welfare of the Indians, it is entirely clear that Congress, by unequivocal language, reserved to the United States exclusively the right to determine that question in relation to these lands. If she has not determined that these titles can now be extinguished consistently with public policy and the welfare of the Indians, that ends the controversy. Neither the company nor any one else can complain.

The position of the company upon this question amounts practically to a claim that they were entitled to the assistance of the treaty and war-making power of the United States whenever, in building their road, they encountered opposition from tribes or roving bands of Indians. In other words, that Congress not only donated them 38,000,000 acres of the public lands, without limitation, restriction, or condition, but also gave them the use of the treaty-making power and the Army whenever a roving band of Indians interfered with their work. Your committee decline to adopt this view of the case, and, on the contrary, are clearly of the opinion that Congress had no such intent in the passage of the granting act, and that no justification for such a claim can be found in its terms.

Third. It is further claimed that the United States has not caused the lands along the line of the road to be surveyed as required by the act, for want of which surveys "settlement is hindered and retarded, and the company is thereby prevented from selling or realizing any benefit from its unsurveyed lands."

Your committee are unable to see, even if all this be true, how it in any way touches the question of the duty of the company to construct its line within the required time. But it is not true that the United States is in default in the matter. The provision of the act referred to is as follows:

"That the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said road." (Sec. 6.)

The question as to when the surveys should be made, with reference to the construction of the road, was left entirely to the discretion of the President. If he at any time decided that further surveys were not required by the construction of the road, or that the surveys were prosecuted as fast as was necessary, then no right to further surveys existed in the company. The lands, as your committee are advised, were surveyed up to the time of the default in 1879 as fast as, in any reasonable judgment, was required, and we are satisfied that no inconvenience, from any delay in the surveys, retarded or prevented the completion of the road.

Fourth. It is further contended that the grant is not now forfeitable because of the action of Congress in the passage of the act approved July 10, 1882 (22 R. Stat., 157).

The granting act contained two donations affecting the public lands: first, a grant of "a right of way" through "public lands" (sec. 21); second, the grant of lands contained in section 3. The two grants are entirely separate and distinct, made by two different sections, and of two different estates. The former applied to all lands legally described as "public," the latter only to certain odd sections of such lands not within named exceptions. Under the former, the company had a right to build its road across any of such public lands, and for that purpose had the use of an easement in 200 feet on each side of its track. Under the latter, it took in fee the designated sections. June 25, 1881, the road was located over the Crow Indian Reservation, already shown not to have been included in the granted lands.

Thereupon, August 22, 1881, a treaty or agreement was entered into between certain special agents designated by the Secretary of the Interior on the one part and the Crow Indians upon the other, which agreement, so far as pertinent to the present inquiry, is as follows:

"When as by section one of an act of Congress approved July second, eighteen hundred and sixty-four, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route (thirteen Statutes at Large, page three hundred and sixty-five), the Northern Pacific Railroad Company was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United

States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound; and

"Whereas by section two of said act of Congress granted to said company the *right of way* for the construction of said railroad and telegraph line to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side-tracks, turn-tables, and water stations; and

"Whereas, by said section two, Congress provided that the United States should extinguish as rapidly as may be consistent with public policy and the welfare of the Indians the Indian titles to all lands falling under the operation of this act and acquired in the donation to the road named in the act; and

"Whereas by treaty between the United States and the Crow Indians, concluded at Fort Laramie May seventh, eighteen hundred and sixty-eight, and duly ratified and proclaimed (fifteenth Statutes at Large, page six hundred and forty-nine), a district of country in the Territory of Montana was set apart as a reservation for the absolute and undisturbed use and occupation of the said Indians; and

"Whereas there is no provision or stipulation in said treaty authorizing said company or recognizing its right to construct its road through said reservation; and

"Whereas the said company did, on the twenty-fifth day of June, eighteen hundred and eighty-one, file in the Department of the Interior a map showing the definite location of its line of railroad from the one hundred and seventh degree of longitude west from Greenwich westwardly through said reservation and adjacent territory to the western boundary to the said reserve, as provided by said act of eighteen hundred and sixty-four, the company having first obtained the permission of the Secretary of the Interior to survey its line in said reservation; and

"Whereas the said company desires to construct its line of railroad upon such designated route, and claims the right by virtue of said act so to do:

"Now, therefore, in order to fulfill the obligations of the Government in the premises, this agreement * * * witnesseth:

"That for the consideration hereinafter mentioned the Crow tribe of Indians do hereby surrender and relinquish to the United States all their right, title, and interest in and to all that part of the Crow Reservation situate in the Territory of Montana and described as follows, namely:

"A strip of land not exceeding 400 feet in width, that is to say, 200 feet on each side of the line laid down on the map of definite location hereinbefore mentioned, wherever said line runs through said reservation between the one hundred and seventh degree of longitude west of Greenwich on the east, and the mid-channel of the Big Boulder River on the west, containing five thousand three hundred and eighty-four acres, more or less. * * *

"It is further stipulated and agreed that the United States will not permit the said railroad company, its employés, or agents to trespass upon any part of the lands of the Crow Indian Reservation not hereby relinquished, nor permit said company, its employés, or agents to cut any timber, wood, or hay from the lands embraced in said reservation."

July 10, 1882 (22 Stat., 157), Congress passed an act ratifying and confirming this agreement.

The act first recited the agreement *in extenso*, and then provided as follows:

"SEC 3. That the right of way over the land relinquished by said agreement to the United States for the construction of said Northern Pacific Railroad, and the use of the several parcels of land so relinquished intended to be used for depots, stations, sidings, and so forth, for said railroad, are hereby granted to said Northern Pacific Railroad Company, its successors, and assigns, for the uses and purposes in said agreement set forth."

It is claimed that by these proceedings the United States waived the breach of condition.

As hereinbefore stated relative to another branch of the case, this argument is plausible but not sound. It ignores entirely the fact to which we have adverted, viz, that the act contained two grants, one for the right of way and another in fee of the odd sections, and overlooks the fact that these proceedings related solely to the former.

The Crow treaty and act ratifying it are specifically limited to and operate only upon the right of way. This is shown beyond all question by a bare inspection of the statute. Neither the agreement nor the act contains a single word or expression that could be tortured into a recognition of the continued existence of the land grant or as a waiver of the forfeiture thereof.

Their only scope and operation is to extinguish the Indian title for the purpose of making the right of way available. In this there is nothing whatever inconsistent with the idea of a forfeiture of the land grant and its declaration at any time by Congress.

The situation was anomalous. This munificent donation was then subject to forfeiture for breach of the condition. A due regard for the rights of the Government and its announced policy of dedicating the public lands for all time to come to actual settlers under general laws, demanded an enforcement of the forfeiture. But the company, pushing its line toward the Pacific, encountered difficulties at this point in respect to its right of way, not as to its grant of land, for, as already shown, it had no grant of land on the reservation. No reasons of public policy demanded a forfeiture of its right of way, granted by the act as a separate and distinct concession; but, on the other hand, the most enlightened policy dictated its recognition. Hence Congress and the executive branch of the Government extinguished the Indian title as to the right of way, carefully limiting all that was done to that one grant. In this, as before stated, there was nothing, in the judgment of your committee, inconsistent with a clear and well-defined intent to insist upon the breach of condition as to the grant of the odd sections in fee.

The Indian title was the mere right of occupancy; protected by treaty or reservation it remains the same; in either event the lands were public lands of the United States. The United States did not grant these to the company, but expressly reserved and exempted them from its donation. It could, and did, however, give the company a right of way through them. Such right it would always give in a proper case. That the recognition of a former grant of that kind or even a new grant thereof can be considered as a waiver of breach of another grant, of a separate and distinct estate, is, in the judgment of your committee, an untenable position. It would violate the obvious intent of Congress, as shown in all its legislation affecting the grant, and leave this immense area of the public domain irrevocably consecrated to this corporation, without restriction or control even to accomplish the simplest object of its creation. That Congress, by the act of 1882, intended any such result as that is beyond the credence of your committee. We think it was intended merely to confirm the right of way, and that nothing in the proceedings taken for that purpose legally operated as a waiver of the reserved rights of the United States as to the grant of lands.

The doctrine of implied waiver invoked by the company has its foundation in principles analogous to those of estoppel *in pais*. The grantor, by virtue of something he has said or done, is, according to the justice or right of the matter, prohibited from asserting anything to the contrary. As between individuals, occupying the position of grantor and grantee, in a deed upon condition subsequent, it is estoppel, pure and simple, that enforces an implied waiver of the breach; and, although estoppel can not be pleaded against the Government, for the sake of the argument we may admit that the United States, speaking and acting by its proper agents, might be placed in a position where in justice and equity it should not deny what it has before asserted to be true. In every such case, however, the underlying principle is that of estoppel between individuals. If the circumstances would not, between individuals, amount to an equitable estoppel or estoppel *in pais*, then *a fortiori* the Government is not bound.

Applying these criteria to the question now under consideration and it is entirely clear that there was no waiver of the breach.

"An estoppel by matter *in pais* may be defined as an indisputable admission, arising from the circumstance that the party claiming the benefit of it has, while acting in good faith, been induced, by the voluntary intelligent action of the party against whom it is alleged, to change his position." (Bigelow on Estoppel, 2 ed., p. 345.)

It is founded in the doctrine of equity that if a representation be made to another, who deals upon the faith of it, the former shall make the representation good if he knew it to be false. (Bigelow on Estoppel, p. 431; Evans *vs.* Bicknall, 6 Ves., 174, 182; Slim *vs.* Coucher, 1 De G., F. & J.,518; Lee *vs.* Monroe, 7 Ch., 366.)

To establish it, it is necessary to show not only the fact of a misrepresentation or concealment, but also that it was material to the interests of the party and actually misled him. (Bigelow on Estoppel, p. 431, 1 Story, Eq. Jur., par. 191.)

All the following elements must be present in any transaction in order to create an estoppel by conduct:

1. Misrepresentation or concealment of material facts.
2. The representation must have been made with knowledge of the facts.
3. The party claiming the estoppel must have been ignorant of the fact.
4. The misrepresentation must have been made with intent that the other party should act upon it.
5. The party claiming must have been induced to act upon it. (Bigelow on Estoppel, p. 437.)

Hence, as a general rule, fraud is necessary to the existence of an estoppel by conduct. (Bigelow on Estoppel, p. 467.)

In general, where there is nothing to show that a representation was intended to be acted upon as a statement of the truth or that it was tantamount to a promise or agreement, amounting to an undertaking to respond in case of its falsity, the party is not

estopped. (Bigelow on Estoppel, p. 486; Danforth *vs.* Adams, 29 Conn., 107; Farist's appeal, 39 Conn., 150; McAdams *vs.* Hawes, 9 Bush, 15; Zuchtmann *vs.* Roberts, 109 Mass., 53; Kerhl *vs.* Jersey City, 8 C. E. Green, 84; Muller *vs.* Pondir, 55 N. Y., 325; Davis *vs.* Smith, 43 Vt., 269.)

And unless such a misrepresentation is in fact exclusively acted upon so that the position of the party is changed as to his material interests, there can be no estoppel. (Bigelow on Estoppel, pp. 492, 493; Howard *vs.* Hudson, 2 El. & B., 1; McCance *vs.* L. & N. W. R. R. Co., 7 Hurl. & N., 477; Schmaltz *vs.* Avery, 16 Q. B., 655; Boker *vs.* Johnston, 21 Mich., 319-345.)

Now, there was absolutely no misrepresentation whatever of any fact, material or immaterial, on the part of the United States; there was no intention to have the company do or omit to do anything whatever on account of any representations, false or true; there was no action whatever by the company induced by or founded upon any such representation; and the company has never in any respect changed its position to its prejudice.

Not one of the prerequisites of an estoppel by conduct is to be found in the entire transaction.

What was there in the transaction amounting to a fraud upon the company, or a promise amounting to an undertaking to make good any representation? What has the company done to change its position? How has it been prejudiced?

One general rule can be deduced from all the authorities, viz, that unless one party to the transaction intends to make some representation or extend some assurance and the other party to the transaction so understands, accepts, and acts, to his prejudice, then there is no estoppel. Your committee are entirely satisfied that in this transaction no such intention as waiving the breach of condition existed in the mind of Congress; that no such understanding of the position of Congress was entertained by the company; and, that instead of doing anything to their prejudice in consequence of such proceedings, the company obtained new privileges and rights of great value. Under the very act which they now say estops the United States they lost nothing; did no act in consequence that prejudiced them in the least; and, on the other hand, secured the right of way across the reservation. It is thus clear that, treated even from the standpoint of an estoppel, there was no waiver of the breach of condition.

To conclude, we refer to the following principles and authorities showing that mere indulgence or silence can not be construed into a waiver of a breach of condition. (Gray *vs.* Blanchard, 8 Pickering, 284, 292; Washburn, section 19.) Laches can not be imputed to the Government or its officers (7 Otto, 584), and especially "in a representative Government where the people do not and can not act in a body, where their power is delegated to others, and must be exercised, if at all." (8 Otto, 489; to same effect see 9 Wheaton, 720; 11 Wheaton, 184; 4 McLean, 567; 5 McLean, 133; 1 Peters, 318; 8 Wallace, 269–274; 5 Otto, 316.)

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