

[From the New York Times of Jan. 13th, 1882.]

THE LAW WHICH DETERMINES THE RIGHTS OF THE NORTHERN PACIFIC RAILROAD COMPANY TO ITS LAND GRANT.

I beg to submit to your readers the following statement in relation to the land grant of the Northern Pacific Railroad Company. This corporation was created and its land grant conferred by act of Congress (13 Statutes at Large, page 365), containing the following provisions of the charter:

"Sec. 3. And be it further enacted, That there be and hereby is, 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 lands, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and 10 alternate sections of land per mile on each side of said railroad whenever it passes through any State. . . ."

"Sec. 9. And be it further enacted, That the United States make the several conditional grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further conditions that if the said company make any breach of the conditions hereof, and allow the same to continue for upward 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 the said road."

The power or right reserved by Congress to alter, amend or repeal the charter is as follows:

"Sec. 20. And be it further enacted, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend or repeal this act."

This charter is a contract between the United States and the railroad company, and is to be treated and construed by the same rules that govern contracts between private persons, except only that with respect to the subject-matter of the grant—that is to say, in ascertaining what is granted and what is excepted—it will be construed in favor of the Government and against the company.

The grant to the Northern Pacific Railroad Company was an absolute grant *in presenti*.—The supreme power of disposing of the public lands vests solely in Congress, and its grants convey the highest title. In such cases the title does not depend on and is not conveyed by a patent, though for convenience in the Land Office and as a matter of record evidence a patent is usually provided for and issued.

That the language of this act operated as a present grant is no new doctrine, as some imagine. It was held by the Supreme Court of the United States in 1817, in the case of Rutherford against Green's heirs, in the unanimous decision of the court, delivered by Chief-Justice Marshall, and it has ever since been adhered to by that high tribunal in numerous cases and without any exceptions.

In a case decided in 1875 (92 United States

Supreme Court Reports, page 741) the court says: "There be and is hereby granted" are words of absolute donation, and import a grant *in presenti*. This Court has held that they can have no other meaning, and the land department, on this interpretation of them, has uniformly administered every previous similar grant." The Court was unanimous on this point; for, in the dissenting opinion (on another branch of the case) the non-concurring Judges say: "These words were sufficiently comprehensive to pass whatever interest the United States possessed in the lands."

It does not, in the slightest degree, militate against the force of the law that the same Court held in other cases that grants containing such language did not operate as present grants, because in those grants Congress expressly enacted that the title should not vest until the performance of certain conditions.

It is now a matter of no importance what was the time specified by Congress in various amendments of the charter for the construction and completion of the Northern Pacific Railroad, for it is admitted that that time has now expired. But it is important to consider what are the consequences of failure to complete the road within the time.

It follows from what has already been said, namely that the grant was a grant *in presenti* (and to the same effect are the decisions of the Supreme Court), that the construction and completion of the road are conditions subsequent.—And, notwithstanding a failure to perform the conditions within the time specified, the title to the lands remain unimpaired in the grantee until Congress sees fit to enforce a forfeiture on that ground. (21 Wallace, United States Supreme Court Reports, page 61.) Until then the right, title or estate granted remains in the grantee as completely as it ever existed before breach of the condition, without any impairment of its original qualities or incidents.

But in the grant to the Northern Pacific Railroad Company there is (not only no provision for a reversion to the United States, but there is) a clear declaration by Congress that the lands granted are absolutely appropriated to the completion of the road. Sections 9 and 20 of the charter, above quoted, show an express intention of Congress to make an irrevocable grant of the lands embraced within its limits for the purpose of the construction and completion of the road, and to pledge the good faith of the United States that the road shall be completed. It is a well-established principle of law that when the grantor manifests, in the grant, an intention not to enforce his right of entry upon condition broken, the lands do not revert. Nevertheless, Congress did not leave itself without remedy, for if the grantee prove faithless or incompetent, "the United States, by its Congress, may do any and all acts and things which may be necessary to insure a speedy completion of the road," but cannot divert the granted lands to any other purpose.

CONGRESSIONAL AND EXECUTIVE ACTS.

By the joint resolutions of Congress approved May 7, 1866, and July 1, 1868, the road was to be completed by the 4th of July, 1879, and a year was then to elapse before the company could be held in default. For the purpose of giving assurances to capitalists and others who might not have knowledge of the terms of the grant, the company applied to the last two Congresses for

an extension of the time specified for the completion of the road. The committees of each house reported favorably, and the bills passed the Senate, but for want of time were not reached on the calendar of the House of Representatives, the rules of that body requiring a two-thirds vote to take up the bill out of regular order. But in every instance when the attempt was made it had a majority in its favor.

In May, 1879, the company filed in the Department of the Interior a map of the amended line of general route of the branch in Washington Territory. This was referred by the Secretary, Mr. Schurz, to the Commissioner of the General Land Office for his views as to whether any reason existed against the proposed change. The Commissioner, Gen. Williamson, replied that the best interests of the public would be served by the change, but suggested the questions: First, Had the grant to the company lapsed by reason of the failure of the company to perform certain acts within the time specified? and, second, if it has so lapsed, can the department recognize any acts by the company looking to the initiation of new rights or the enlargement of old ones?

These questions were considered by the Secretary and the then Assistant Attorney-General for the department, who were about to decide both questions against the company, when the company, insisting on its legal rights, requested that the questions should be submitted to the Attorney-General. This was done, and General Devens, now on the bench of the Supreme Court of Massachusetts, decided that the time specified for the completion of the road would not expire until July 4th, 1879; and, further, that if such were not the true construction of the various provisions of the acts of Congress, it must be held that until Congress takes steps to declare a forfeiture of the grant it remains in full force and effect; and that in either event the grant to-day must be held to be the same as it existed on the day when it was made and accepted by the company. Had it not been for the adverse views of Secretary Schurz and Assistant Attorney-General Marble, the matter would not have been urged by the company to be submitted to the Attorney-General.

A similar question to the last was afterward considered by Gen. Devens in the case of the Atlantic and Pacific Railroad Company on its application to the Secretary of the Interior for the appointment of Commissioners by the President to examine a completed section of its road. In that case Secretary Schurz seems to have of his own motion requested the opinion of the Attorney-General as to the power and duty of the Executive in the premises. The Attorney-General held, in his opinion rendered Oct. 26, 1880, that the grant was a present grant; that the conditions were conditions subsequent; that the grant had not been forfeited by failure to build the road within the time specified, no action by reason of such failure having been taken by authority of Congress, and that even if it be treated as one liable to forfeiture, the company has still a right to proceed to construct the road, and it is the duty of the Executive Department to give it the benefit of the grant. (Opinions of Attorney-General, vol. 16, p. 576). The grant to the Atlantic and Pacific is almost identical in terms with that to the Northern Pacific Company. These decisions are not only in conformity to the common law, but are strictly in accordance with the unbroken series of decisions of the Supreme Court.

In the years 1873 and 1874, President Grant approved 530 miles of the Northern Pacific Railroad. In 1880 President Hayes approved 150 miles, and in November and December, 1881, President Arthur approved 325 miles. Before approving the report of the Commissioners who examined 100 miles of the road in Dakota and Montana Territories, President Arthur submitted the matter to the Acting Attorney-General, Mr. Phillips, who, on the 17th of November last, recommended the approval by the President of the report of the Commissioners and the issue of patents to the Company for the granted lands co-terminus with the completed sections of the road.

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