47TH CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { Ex. Doc. No. 29.

LAND PATENTS TO CERTAIN RAILROAD COMPANIES.

LETTER

FROM

THE SECRETARY OF THE INTERIOR,

IN RESPONSE TO

A resolution of the House of Representatives in relation to land patents to certain railroad companies.

JANUARY 2, 1883.—Referred to the Committee on Public Lands and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, December 29, 1882.

SIR: In answer to House resolution of the 14th instant, calling on me for information as to lands patented to railroad companies after the time fixed by law for their completion and copies of decisions and opinions on this subject, I have the honor to transmit herewith copy of the report of the Commissioner of the General Land Office on the resolution of this date, with the accompanying papers; also copy of the opinion of the Attorney-General of the 13th June last, in relation to lands claimed by the New Orleans Pacific Railway Company, in answer to questions submitted to him by my immediate predecessor. On this opinion no action has been taken by this department.

Very respectfully,

H. M. TELLER,
Secretary.

The Hon. the SPEAKER
of the House of Representatives.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 29, 1882.

SIR: I have the honor to acknowledge the receipt on the 16th instant, by reference from you for report, of a resolution of the House of Representatives, passed the 14th instant, as follows:

Resolved, That the Secretary of the Interior be, and he is hereby, directed to inform the House, at the earliest practicable period, whether any of the lands heretofore granted by Congress to any railroad company to aid in the construction of its railroad,

and to which such company was not entitled to patents at the time when the period expired within which, by the terms of the law making such grant, such railroad was required to be completed, have been patented to such company since the expiration of the period within which such railroad was required by law to be completed; and if any such patents have been issued to any such companies that he inform the House how much land has been patented to each of the land-grant railroad companies for land to which they were not entitled to patents when the period within which their respective railroads were required to be completed expired, and the date of such patents; and that he also inform the House by and under what authority such patents were issued, and furnish to the House copies of all decisions made by the Secretary of the Interior in relation to the issuing of patents to any of such land-grant railroad companies for lands for which they were not entitled to patents at the expiration of the period above named; and also copies of all opinions and decisions made by any officer of the government in relation thereto and filed in the Department of the Interior.

The railroads for the benefit of which patents or certificates (as the case may be) have been issued for lands lying opposite portions of such roads not completed within the period required by the law making the grant, and for which the patents or certificates have been issued *since* the expiration of said period, are as follows:

RAILROADS IN MINNESOTA.

Saint Vincent extension of Saint Paul and Pacific, formerly branch line of Saint Paul and Pacific, now Saint Paul, Minneapolis and Manitoba Railroad.

The grant for this road was made by act of March 3, 1857, and amendments thereto of July 12, 1862, March 3, 1865, March 3, 1871, and March 3, 1873. The road should have been completed December 3, 1873. On that date only 140 miles had been completed, leaving 174 miles unfinished, and which was not completed until December 23, 1879. The following described patents issued to the State of Minnesota for the benefit of said road conveyed the amount of land specified, which lies opposite portions of the road not constructed December 3, 1873:

	Acres.
Patent No. 1, January 14, 1875	157,731.45
Patent No. 2, July 12, 1880	355,746.67
Patent No. 3, February 19, 1881	33,524.14
Patent No. 4, June 23, 1881	517.70
Total	547,519.96

Said patents were issued under the provisions of the sixth section of the act of March 3, 1865. Patent No. 1 embraces 155,345.92 acres of indemnity land which, under the provisions of section 4 of the act of July 13, 1866, the State might dispose of, although it was not coterminous to a completed portion of the road. This would leave 2,385.53 acres of granted land included in said patent lying opposite a section of the road not completed in time. No specific authority appears for the patenting of said 2,385.53 acres. Said lands appear, however, to have been embraced in lists *certified* in April and July, 1874, to the State under the act of July 13, 1866, (14 Stats., 97). It will be observed that the third section of said act provides—

That all lands heretofore granted to the Territory and State of Minnesota to aid in the construction of railroads shall be certified to said State by the Secretary of the Interior, from time to time, whenever any of said roads shall be definitely located, and shall be disposed of by said State in the manner and upon the conditions provided in the particular act granting the same as modified by the provisions of this act. * * *

Certification was therefore made without regard to construction. Up to September 29, 1874, it was held by this office and department that

the title to lands granted to Minnesota for railroad purposes passed by certification, and that no further conveyance was required. On said date (September 29, 1874), Acting Secretary Cowen decided (copy of decision herewith, marked A) that as the sixth section of the act of March 3, 1865, expressly provides for the issue of patents, and as such provision is not repealed in express terms by the act of July 13, 1866, patents must necessarily issue in order to convey title. Following this decision, or on January 14, 1875, all the lands that had previously been certified to the State for the benefit of this road were patented to the State. Among the lands so patented are the 2,385.53 acres before mentioned.

Patents numbered 2, 3, and 4 were issued after the completion of the road, and under decision of Secretary Schurz, dated June 10, 1880, a copy of which, marked B, is herewith submitted.

WESTERN RAILROAD, FORMERLY BRANCH OF SAINT PAUL AND PACIFIC RAILROAD.

(Acts of March 3, 1857, March 3, 1865, July 13, 1866, March 3, 1871, and March 3, 1873.)

No portion of this road was completed in time. Only one patent has been issued to the State for its benefit. Said patent issued April 21, 1879, and conveyed 121,462.31 acres. Of this amount 12,346.24 acres were subsequently relinquished by the State, and also by the company, leaving 109,116.07 acres chargeable to the road. Said patent was issued after completion of the road and under instructions contained in a decision made by Secretary Schurz on February 18, 1879. (Copy of said decision herewith, marked C; also copy of letter of this office, dated January 27, 1879, referred to in said decision marked C^1; copy of letter of this office, dated November 7, 1879, marked C^2, and copy of decision, marked D, of Secretary Schurz, made October 16, 1880, together with opinion of Attorney-General Devens, of June 5, 1880, relative to this road.)

SOUTHERN MINNESOTA RAILWAY EXTENSION.

(Acts of July 4, 1866, and July 13, 1866.)

This road was not completed until December 8, 1879. It should have been completed February 25, 1877, but on that date only $149\frac{184}{520}$ miles had been constructed, leaving $130\frac{336}{520}$ miles uncompleted. No patents have been issued to the State for its benefit. The company appears to have been satisfied with a conveyance by certification, under act of July 13, 1866. On April 27, 1880, two lists of land, aggregating 169,553.13 acres, lying opposite sections of the road not completed February 25, 1877, were certified to the State of Minnesota for the benefit of this road. Said certification was made in accordance with instructions of Secretary Schurz, issued December 5, 1879, and accompanied by an opinion of Attorney-General Devens, dated November 29, 1879. (Copy of said instructions and opinion herewith, marked E.)

HASTINGS AND DAKOTA RAILROAD.

(Acts of July 4, 1866, and July 13, 1866.)

This road should have been completed March 7, 1877, but at that time only 74 miles were completed, leaving 128.1 miles uncompleted. The en-

tire road was completed December 15, 1879. No patents have been issued to the State for the benefit of this road, all the land approved for the road having been certified to the State under the act of July 13, 1866. On May 4, 1880, and October 16, 1880, two lists aggregating 144.816.20 acres, lying opposite sections of the road not completed March 7, 1877, were certified to the State of Minnesota for the benefit of this road. Said lists were prepared under instructions contained in decision of Secretary Schurz, made April 17, 1880. (Copy herewith, marked F.)

LAKE SUPERIOR AND MISSISSIPPI RAILROAD.

(Acts of May 5, 1864, and July 13, 1866.)

This road should have been completed May 5, 1872. On that date, so far as the records of this office show, but 30 miles were completed, leaving 124.42 miles uncompleted, which were finished, according to certificate of governor of Minnesota, on February 28, 1873. Since the report of March 27, 1882, relating to railroads not completed within the time required by law was made to you, I have been unofficially informed that this road was completed in August, 1870, but the proper certificates to that effect have never been filed in this office or department, hence I include said road in this report. No patents have been issued to the State of Minnesota for the benefit of this road, all the land approved to the State for same having been certified under the act of July 13, 1866. (14 Stats., 97.) On June 7, 1873, May 17, 1875, and September 28, 1875, after completion of the road, three lists, aggregating 193,215.51 acres, lying opposite sections of the road not completed (per certificates) May 5, 1872, were certified to the State of Minnesota for the benefit of this road.

RAILROADS IN WISCONSIN.—WISCONSIN CENTRAL, FORMERLY PORTAGE, WINNEBAGO AND SUPERIOR RAILROAD.

(Acts of May 5, 1864, June 21, 1866, and April 9, 1874.)

This road as located is 341 miles long, and should have been completed December 31, 1876. At that time only 231 miles of the 257 miles between Portage City and Ashland had been constructed, leaving a gap of 26 miles commencing at Fifield and running north in the direction of Ashland. Said 26 miles were completed August 22, 1877, or about eight months after the proper time, and made a continuous road between Portage City and Ashland. Eighty-four miles of the located road are still uncompleted. The following is a summary of the lands lying opposite sections of the road not constructed December 31, 1876, which have been patented to the State of Wisconsin for the benefit of said road since said date.

	Acres.
In patent No. 8, January 9, 1878	12,387.69
Patent No. 9, August 10, 1878	29,398.51
In patent No. 11, November 23, 1882	40,679.91
Total	82,466.11

The first patent named (No. 8) was issued after the approval of a list (No. 8) of selections by the State and company, submitted to Secretary Schurz, with letter of this office dated November 16, 1877 (copy herewith inclosed, marked G), and returned by him approved, with letter of

December 26, 1877 (copy herewith, marked H). It is proper to say that the statement made in said letter of November 16, 1877, to the effect that there was but 1,377,383.93 acres in the limits of the grant for this road, evidently relates only to that part of the road between Portage City and Ashland, and does not include the land within the limits of the road as located beyond Ashland. Patent No. 9 was issued after the approval by Secretary Schurz of a list (No. 9) of selections submitted to him, with letter of this office dated July 29, 1878 (copy herewith, marked L, also copies of its inclosures marked L_1, L_2, L_3), and returned by him approved with letter of July 30, 1878 (copy herewith, marked K). It will be observed that the Secretary directs in effect in this (said) letter, that no more patents shall issue for the benefit of this road, "until otherwise instructed by this department." Mention is made in said correspondence of requiring a relinquishment of 41,800 acres of indemnity land held to have been erroneously patented to the State, in view of the decision of the Supreme Court in the case of the Leavenworth, Lawrence and Galveston Railroad Company *vs.* The United States (2 Otto, 733), which seems to hold that indemnity can only be taken for lands lost between the dates of the granting act and of the definite location of the road. Grants were adjusted upon that theory until the receipt by this office of the decision (hereinbefore referred to in connection with Western Railroad of Minnesota, and herewith marked D), by Secretary Schurz, October 16, 1880, and opinion of Attorney-General Devens, of June 5, 1880, in which it was held that indemnity might be selected for losses on account of sales, pre-emptions, and other appropriations (excepting reservations) under the land laws, made *before* or *after* the date of the granting acts. This change in the rule rendered it unnecessary for the Wisconsin Central or the State to relinquish the 41,800 acres referred to, as they would under the new rule be entitled to more indemnity than they had received prior to October 16, 1880. On the 20th of February, 1882, the Wisconsin Central Railroad Company, through its attorney, applied to your predecessor (Secretary Kirkwood), by letter of that date, for patents for lands within their granted and indemnity limits, and stated that they had filed a list of indemnity land selections in this office, which was ready for submission to your department for approval preparatory to issue of patent; also that "the selections embrace lands due for road constructed within the limitation of the law." (See copy herewith, marked L_4.) Secretary Kirkwood referred said letter to this office with the following indorsement:

> Has the entire line of the road been completed; if so, was it all done within the time prescribed by the law making the grant?

On March 30, 1882, by letter of that date (copy inclosed, marked M), I informed Secretary Kirkwood that the road had not been completed in time, and that 110 miles remained uncompleted December 31, 1876, since which date only 26 miles had been built. I also said (in effect) that if it were fully determined that the company was entitled to the full complement of lands for 231 miles of road constructed in time, it would be entitled to much more land than had theretofore been patented for its benefit, but I suggested, in view of the fact that "the whole question concerning grants which have lapsed by failure to complete the road within the statutory period is now before Congress," that no further steps should be taken at present looking to the patenting of more lands for the benefit of the grant named. Previous to said date (March 30, 1882), during the early part of the last session of Congress, Secretary

Kirkwood verbally instructed me to take no action looking to the certification or patenting of lands to or for any grant where the road had not been wholly completed in time, involved in the Congressional inquiry then pending, and I verbally instructed the clerks in charge of such matters accordingly. All action relative to listing lands for this road was accordingly suspended. On September 18, 1882, the company, by letter of that date (copy herewith, marked N), again applied (to you) for the issue of patents for lands earned by the construction of sections of road in time. On October 2, 1882, by letter of that date (copy herewith inclosed, marked N_1), you directed me to submit to you for approval the list of indemnity selections in question. You approved said list (No. 10) on October 13, 1882, and patent (No. 10) was issued for the land (all of which lies opposite sections of the road constructed in time) on October 21, 1882. On the 13th ultimo, with letter of that date (copy herewith, marked N_2), I submitted to you for approval a list of granted lands aggregating 43,280.99 acres. In said letter, through the carelessness of the clerk or clerks in charge of the matter, it is incorrectly stated (in effect) that said lands lie opposite portions of the road constructed in time, whereas 40,679.19 acres of the same lie opposite the 26 miles mentioned not reported to this office as constructed until eight months after the expiration of the time limited for completion. It is absolutely impossible for me to examine personally details of this character, but I have taken measures to fix the responsibility of this erroneous statement where it belongs, and will report the same to you for proper action. Said certified list, however, when correctly stated, is in accord with your recommendations and instructions in the case of the Atlantic and Pacific Railroad hereinafter referred to, and also with the case of the Northern Pacific Railroad, referred to in your letter of September 18, 1882, not yet reached in the due course of business, in both of which I am directed to issue patents for lands lying opposite portions of the roads recently constructed out of time.

Nevertheless had I been truly advised of the situation I would not have forwarded said list to you without previous consultation. You approved said list on the 15th ultimo, and on the 23d ultimo a patent (No. 11) was issued for the lands embraced in said list.

CORPORATIONS.—ATLANTIC AND PACIFIC RAILROAD.

Act of July 27, 1866 (14 Stats., 292).

The main line of this road was required to be completed by July 4, 1878. No time was fixed for the completion of the branch. The length of the main line is estimated at 2,126 miles and the branch at 300 miles, making in all 2,426 miles. Prior to July 4, 1878, the road had been completed and accepted from Springfield, Mo., to Vinita, Indian Territory, a distance of 125 miles; that portion between Springfield and Pierce, City Mo., having been constructed by the Pacific and Southwestern Branch Railroad Company. It appears from the records of this department that Secretary Schurz, on October 15, 1880, requested the opinion of the Attorney-General, (Devens) on the application of the Atlantic and Pacific Railroad Company for the appointment of three commissioners to examine a section of 25 miles of its road constructed west from Albuquerque, N. Mex.

On October 26, 1880, Attorney General Devens rendered an opinion (copy herewith, marked P) on the matter, to the effect that the grant had not been forfeited by a breach of the condition named in the granting

act, and until some action should be taken by Congress in the nature of a declaration of forfeiture of the grant it would be the duty of the executive department to give the company the benefit of its grant. On December 15, 1880, with letter of that date (copy herewith inclosed, marked R), Secretary Schurz submitted to the President of the United States a report of the commissioners appointed by him to examine that section of road beginning at a point in township 8 north, range 2 east, near Isleta, N. Mex., and running westwardly 50 miles, constructed by the Atlantic and Pacific Railroad Company. Secretary Schurz recommended that said section be accepted, and "that patents for lands earned by the construction thereof be issued to said company pursuant to the fourth section of the act approved July 27, 1866 (14 Stats., 295)." On December 17, 1880, President Hayes approved the recommendations of Secretary Schurz, who notified this office accordingly by letter of same date (copy herewith inclosed, marked S). On January 3, 1881, my immediate predecessor, with letter of that date (copy herewith inclosed, marked T), submitted to Secretary Schurz a list (No. 1) embracing 23,037.36 acres of land lying opposite the section of road accepted December 17, 1880, above mentioned. On January 7, 1881, he approved said list, and on January 10, 1881, a patent was issued for said 23,037.36 acres. On April 18, 1881, 50 miles of this road was accepted, upon the recommendation of your predecessor, Secretary Kirkwood. On January 5, 1882, 100 miles, and on December 14, 1882, 250 miles of this road, all constructed since July 4, 1878, were accepted by the President of the United States, but no patents have yet been issued for lands opposite said sections of road.

Very respectfully,

N. C. McFARLAND,
Commissioner.

Hon. H. M. TELLER,
Secretary of the Interior.

A.

DEPARTMENT OF THE INTERIOR,
Washington, September 29, 1874.

SIR: I have examined the appeal of the Saint Paul and Pacific Railroad, Saint Vincent Extension, from your decision of August 13, 1874, rejecting its application for patents under the act of March 3, 1865, instead of certified transcripts. You founded your ruling upon the third section of the act of July 13, 1866, and the practice that has grown up in your office under it.

The sixth section of the act of March 3, 1865, expressly provides that patents shall issue for the lands granted when the governor shall certify that any section of 10 consecutive miles is completed in a good, substantial, and workmanlike manner, and the Secretary of the Interior shall be satisfied that the State has complied in good faith with the requirements of law. It further provides that said lands "shall not in any manner be disposed of except as the same are patented under the provisions of this act." This language is clear, plain, and explicit. It requires the issuing of patents, and forbids any sale until after patent. Has this requirement been repealed? There is no express repeal. If repealed at all, it is by implication. Repeals by implication are not favored. It is presumed that Congress, if it intends to repeal one of its acts, or any part thereof, will use apt words to express that intent.

You held that it had repealed this provision by the third section of the act of July 13, 1866. I cannot agree with you. That section provides "that all the lands heretofore granted to the Territory and State of Minnesota to aid in the construction of railroads shall be certified to said State by the Secretary of the Interior from time to time, whenever any of said roads shall be *definitely located*, and shall be disposed of by said State in the manner and upon the conditions provided in the particular act granting the same, as modified by the provision of this act." We have already seen that one

of the conditions upon which the lands may be disposed of, as "provided in the particular act granting the same," is that patents shall issue before sale. The section under consideration provides that the lands shall be certified to the State by the Secretary of the Interior whenever the line shall be definitely located; that is, before construction and before the State has done anything to earn the lands. If certification is equivalent to a conveyance, the State becomes the owner without complying with the law in constructing its road.

I prefer to construe the certification referred to as intended to inform the State in advance what lands it will be entitled to have patents for when its road is built in accordance with law. This construction gives force to the provisions of both acts, and allows both to stand. It also leaves in force the provision of the act of August 3, 1854, cited in your decision. That act authorizes the Commissioner of the General Land Office to make a certified list of lands which shall operate as a conveyance in fee-simple, when the law making the grant "does not convey the fee-simple title of such lands, or require patents to be issued therefor." In the case under consideration the law making the grant does require "patents to be issued," and therefore it is not one where a certificate can be substituted for a patent.

To hold otherwise is to say that the act of August 3, 1854, is also repealed by implication by the third section of the act of July 13, 1866.

I am of opinion that there is no such repeal. I reverse your decision, and herewith return the papers transmitted with your letter of the 26th instant.

Very respectfully,

B. R. COWAN,
Acting Secretary.

The COMMISSIONER GENERAL LAND OFFICE.

B.

DEPARTMENT OF THE INTERIOR,
Washington, June 10, 1880.

SIR: I am in receipt of your report of the 27th of May last upon the status of the grant of lands made to the State of Minnesota to aid in the construction of a railroad from Saint Cloud to Saint Vincent in that State.

The report and accompanying map show that a road has been constructed between the above-named points by a company recognized by the State authorities as being entitled to the benefits of the grant; that the road was not completed within the time directed by the statutes of the United States; that no forfeiture of the grant has been declared, and that the line of the road as constructed deviates in some places from the line of definite location indicated by the map filed in this department in 1871, upon which the withdrawal for the benefit of the grant was made, the largest deflections being between Glyndon and Saint Vincent.

Upon these facts you submit two questions for my consideration, and request to be instructed in the premises.

1st. Whether, considering the failure to complete the road within the time directed by the statute, the State is entitled to patents for the benefit of the Saint Paul, Minneapolis and Manitoba Railway Company, the present owner of said road.

2d. Whether, in view of the deviations in the line of construction from the line of definite location, the State is entitled to patents under the grant for the benefit of said company.

Upon the first point you express the opinion, in effect, that notwithstanding the road was not completed within the time mentioned in the act of March 3, 1873 (17 Statutes, p. 631), the State is entitled to patents under the grant. I fully agree with you upon this point, the act of June 22, 1874 (18 Statutes, p. 203), the conditions of which have not been accepted by the company, being held as neither enforcing nor declaring a forfeiture of the grant. (Kemper *vs.* Saint Paul and Pacific Railroad Company, Copp's L. O., vol. 3, p. 170.) The law controlling this question is well settled. (Schulenberg *vs.* Harriman, 21 Wall., 44.)

Upon the second point you express no opinion. The only question for determination, however, is whether the deflections in the line of the constructed road are of such character as to make it a different road from that contemplated by the granting acts, and for which the withdrawal was intended. If the constructed road is not the one contemplated by the grant and withdrawal then the State has no right to patents for the lands claimed. But it is the road so contemplated if the deflections became necessary in order to avoid engineering obstacles which could not be otherwise overcome without exaggerated expense, or to remedy defects in the original location. In other words, if the road as constructed is a substantial compliance with the granting acts, the State is entitled to the benefits of the grant. (Opinion of the Attorney-General of February 2, 1880, Copp's L. O., vol. 7, 12; case of McGregor and Western Rail-

road Company, *id.*, 27; case of Hastings and Dakota Railroad Company, decided April 14, 1880.)

Since your report was received the said company has filed in this department affidavits showing why the road between Glyndon and Saint Vincent was not constructed on the line as located in 1871. The affidavits were made by the following parties respectively: Charles A. F. Morris, who was chief engineer of the Saint Paul and Pacific Railroad Company in the years 1871 and 1872, and who surveyed and located the line in 1871, and re-examined it preparatory to constructing the road between Glyndon and Saint Vincent, in 1872; Charles J. A. Morris, civil engineer, who was employed by said company, in 1871 and 1872, in the location and construction of said road between the points aforesaid; Andrew De Graff, railroad constructor for said company, under whose personal supervision a large part of the Saint Vincent extension road was built; Norman W. Kittson, whose business for many years required him to make journeys yearly from Saint Paul to Manitoba, via the Red River Valley, and who is well acquainted with the country through which said road is built; James J. Hill, who was engaged from 1868 to 1879 in the transportation business on the Red River of the North, between Saint Paul and Winnipeg, in Manitoba, and who has passed through the Red River Valley at all seasons of the year, and is well qualified to depose as to the facts alleged by him; and William P. Payte, a civil engineer, well acquainted with the topography of the country through which the said road passes.

The affidavits of these witnesses show that there are extensive swamps and marshes in townships 143, 144, 145, 146, 147, and 154, ranges 47 and 48, and in townships 156, 157, and 158, in ranges 49 and 50; that the season during which the location of 1871 was surveyed was very dry in the section of country through which the road was so located; that at that time the said swamps and marshes were comparatively dry, and the surveyors walked over them without difficulty; that the line was located over said swamps in the belief that it was a feasible route, and upon which the necessary material could be easily obtained for grading and ballasting; that in the winter of 1871–'72 there were heavy falls of snow in that vicinity, and the weather of the spring and summer of 1872 was very wet; that upon a re-examination of said line in 1872, preparatory to commencing the construction of said road, it was found that the country for a great distance in the above-named townships, and over which the line of 1871 was located, was under water to the depth of several feet; that earth in sufficient quantities to raise the road-bed above water could not be obtained except by hauling it for a long distance at great expense; that the largest of said swamps was in township 147, ranges 47 and 48, and was twelve miles wide; that said swamps were under water at certain seasons almost every year, and presented engineering difficulties in the way of building said road of such a character as to make it necessary to locate the line of construction far enough to the east to avoid the same; that the point of crossing the margin of the large swamp above mentioned governed the location of the road for many miles north and south thereof; that upon careful examination it was found that no ground over which it was practicable to build the road could be found nearer to the definitely located line than to the east of said swamps and marshes where the road is constructed; that the point of crossing of Red Lake River at Crookston was the most feasible one and the best adapted for bridging that could be found for many miles in either direction; that no lands in that vicinity were settled upon or entered with reference to the line of definite location prior to the establishment of the line of actual construction; that the progress of settlement kept pace with the construction of the road, and that the road as built is the shortest and best practicable one that could be had between Glyndon and Saint Vincent.

From the foregoing it is apparent that the deflections from the line located in 1871, between the points last above mentioned, were necessary to the proper construction of the road.

It is clear that the road as now constructed is of immeasurably more value to the inhabitants of the Red River Valley along its line, and better adapted to the purposes for which the road was intended than it would have been had it been built through said swamps and marshes, to say nothing of the extra expense of building and keeping it in repair over the latter route.

One of the principal objections to varying from the line of definite location in constructing a land-grant road does not exist in this case, viz, that settlers locate and purchase lands at the advanced rates in view of the definite location and for convenience to the road.

The deflections south of Glyndon do not appear to be material.

I am therefore of opinion that the said road was built in substantial compliance with the requirements of the granting acts, and that the State is entitled to patents for the granted lands; and you will proceed in the work of the adjustment of the grant accordingly, having due regard to all conflicting claims to the lands.

The affidavits aforesaid are herewith transmitted for filing in your office.

Very respectfully,

C. SCHURZ, *Secretary.*

The COMMISSIONER OF THE GENERAL LAND OFFICE.

C.

DEPARTMENT OF THE INTERIOR,
Washington, February 18, 1879.

SIR: I have received your communication of the 27th ultimo in relation to the lands relinquished to the United States by the governor of the State of Minnesota, and also by the Western Railroad Company of Minnesota, said lands being the same formerly included in the grant to the Saint Paul and Pacific Railroad Company, Brainerd Branch.

On the receipt of your letter above mentioned, the deeds of relinquishment were transmitted to the governor of said State for correction in the particulars referred to by you. Said deeds have been returned corrected. This removes every objection now known to this department to the approval of the lands to the latter named company. You will therefore proceed, upon the proper application by the governor of the State of Minnesota, to prepare the lists of lands inuring to the grant, not already approved and patented for the approval of this department.

The deeds and accompanying papers are herewith transmitted.

Very respectfully,

C. SCHURZ, *Secretary.*

The COMMISSIONER OF THE GENERAL LAND OFFICE.

C[1].

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 27, 1879.

SIR: I have the honor to acknowledge the receipt, through reference by you for report, of a letter from the Hon. J. S. Pillsbury, dated Saint Paul, November 21, 1878, transmitting a deed, executed by him as governor of Minnesota, relinquishing to the United States certain lands within the limits of the grant by act of Congress approved March 3, 1857, and the acts amendatory thereof to said State, to aid in the construction of the so-called Brainerd Branch of the Saint Paul and Pacific Railroad. Accompanying the letter and deed are various papers, more particularly referred to hereinafter.

I have the honor to submit the following in reply:

By an act of Congress, approved March 3, 1857, there was granted to the then Territory, now State, of Minnesota, to aid in the construction of certain railroads, among which was a road "from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via Saint Cloud and Crow Wing, to the navigable waters of the Red River of the North, * * * every alternate section of land, designated by odd numbers, for six sections in width on each side of said roads and branches," and indemnity was provided for within limits of 15 miles on each side.

By an act of the legislature, approved May 19, of the same year, the grant of March 3 was accepted on the terms, conditions, and restrictions therein contained, and an act passed on the 22d of May, granted to the Minnesota and Pacific Railroad Company, to aid in the construction of several lines and branches of roads, including the branch from Saint Cloud to Crow Wing and the navigable waters of the Red River, all the interest, present and prospective, of the Territory and future State of Minnesota on said lines and branches, to any and all lands granted to the Territory by said act of March 3, together with all the rights, privileges, and immunities conferred, or intended by said act. A map of the definite location of the branch from Saint Anthony to Crow Wing, was filed in this office December 5, 1857, and in 1860, 1861, and 1864 the lands inuring to the grant were certified and approved to the State.

In 1862 (March 10) the legislature of the State, on account of the failure of the Minnesota and Pacific Railroad Company aforesaid to build and complete the road in accordance with the terms of the grant of May 22, 1857, aforesaid, created the Saint Paul and Pacific Railroad Company, and granted to it all the rights, benefits, and privileges, property, and franchises of the first-named company, including the lands.

By joint resolution, approved July 12, 1862, Congress provided that in lieu of the branch via Saint Cloud and Crow Wing to the navigable waters of the Red River there might be constructed a new branch line, having its southwestern terminus at any point on the existing line between the Falls of Saint Anthony and Crow Wing, and extending in a northeasterly direction to the waters of Lake Superior; and in its aid a grant like the one of 1857 was made.

By an act, approved March 3, 1865, Congress extended the time for the completion of the road, and increased the grant to ten sections per mile, with the right to select indemnity within 20 miles.

By an act, approved March 3, 1871, Congress provided, upon certain conditions, that the Saint Paul and Pacific Railroad Company "may so alter and amend its branch lines that instead of constructing a road from Crow Wing to Saint Vincent, and from Saint Cloud to the waters of Lake Superior, it may locate and construct in lieu thereof, a line from Crow Wing to Brainerd to intersect with the Northern Pacific, * * * with the same proportional grant of lands to be taken in the same manner along said altered lines as is provided for the present lines by existing laws."

By act of March 3, 1873, the time for the completion of the road from Saint Anthony to Brainerd was extended to December 3, 1873.

By act of June 22, 1874, the time for the completion of said branch (among others) was extended until March 3, 1876, and no longer, upon the following conditions: "That all rights of actual settlers and their grantees who have heretofore, in good faith, entered upon and actually resided on any of said lands prior to the passage of this act, or who otherwise have legal rights in any of such lands shall be saved and secured to such settlers or such other persons in all respects the same as if said lands had never been granted to aid in the construction of the said lines of railroads." The second section provided "that the company taking the benefit of this act shall, before acquiring any rights under it, by a certificate made and signed by the president and a majority at least of the directors, and sealed with the corporate seal, accept the conditions in this act, and file such acceptance with the Secretary of the Interior for record and preservation."

Under that act many persons who had, prior to its passage, settled upon lands within the limits of the grant to said Brainerd Branch line presented their claims, which, with few exceptions, were admitted or recognized, subject to appeal by the company to the Secretary. In a few instances patents issued, but in most cases their claims never reached the status of entries.

When the question was brought to the attention of your predecessor, the Hon. Z. Chandler (in a case, by appeal from the decision of this office in favor of the settler), he decided that the company not having accepted the conditions of the act it was inoperative for any purpose, and that the right of settlers were not saved by the first section thereof.

Further action by Congress has not been taken; and the grant has been, for three years past, subject to forfeiture for non-fulfillment of the terms of the granting act.

The legislature of the State of Minnesota, by an act approved March 1, 1877, resumed the grant theretofore held by the Saint Paul and Pacific Company, appertaining to the uncompleted portion—between Watab and Brainerd—and conferred it upon a railroad company to be organized of at least five persons, who were to be the holders of a majority of the $15,000,000 bonds, commonly known as the "extension line bonds," upon certain conditions. In the event of a failure by those persons to do and perform certain things within a specified period, then any company or corporation then organized or to be thereafter organized, might "succeed to and acquire the right to complete, own, maintain, and operate the uncompleted portions of said line of railroad mentioned * * * by filing with the governor a written notice of its desire and intention, under and subject to the provisions of this act, to complete, equip, maintain, and operate the then uncompleted portions of said line of railroad."

The company, to be composed of the bondholders aforesaid, did not perform the acts required; but the Western Railroad Company of Minnesota, a corporation duly qualified, has completed and equipped the said line of road between Watab and Brainerd aforesaid.

The tenth section of the act of the State legislature provides that "The Saint Paul and Pacific Railroad Company, or any other company or corporation taking the benefits of this act, shall not in any manner, directly or indirectly, acquire or become seized of any right, title, interest, claim, or demand in or to any piece or parcel of land lying or being within the granted or indemnity limits of said branch lines of road to which legal and full title has not been perfected in said Saint Paul and Pacific Railroad Company or their successors or assigns upon which any person or persons have in good faith settled and made or acquired valuable improvements thereon on or before the passage of this act, or upon any of said lands upon which has been filed any valid pre-emption or homestead filing or entry not to exceed 160 acres to any one actual settler; and the governor of this State shall deed and relinquish to the United States all pieces or parcels of said lands so settled upon by any and all actual settlers, as aforesaid, to the end that all such actual settlers may acquire title to the lands upon which they actually reside from the United States as homesteads or otherwise; and upon the acceptance of the provisions of this act by said company it shall be deemed by the governor of this State as a relinquishment by said company of all such lands so occupied by such actual settlers; and in deeding to the United States such lands the governor shall receive, as *prima facie* evidence of actual settlement on

said lands, the testimony and evidence, or copies thereof heretofore, or which may be hereafter, taken in cases before the local United States land offices, and decided in favor of such settlers."

Under and by authority contained in that act the governor has deeded and relinquished unto the United States certain lands for the use and benefit of the settlers named in the deed. Accompanying the deed is a certificate by the governor, bearing even date therewith, that the relinquishment executed by him in behalf of the State of Minnesota to the United States "embraces a description of all lands within the limits of the grant pertaining to the line of railroad constructed by the 'Western Railroad Company of Minnesota,' upon which any person or persons have in good faith settled and made or acquired valuable improvements, or upon which there had been filed any valid pre-emption or homestead filing or entry prior to March 1, 1877," &c.

A deed of relinquishment by the Western Railroad Company of Minnesota to the United States of the same lands, and in favor of the same settlers described and named in the deed from the State, dated December 6, 1878, accompanies the papers.

The resolution of the board of directors authorizing the president of the company to execute the relinquishment, and under which authority it was executed, contains, however, the following reservation: "That in the event that any of such settlers shall fail, or, for any cause, be unable to acquire title to said lands from the United States upon settlement and improvements made prior to March 1, 1877, that the president make application to the Interior Department to have such lands again certified to the State for the benefit of this corporation."

The deeds from the State and the company have been carefully compared, and are found to agree in the description of the lands released, but in the names of the settlers in whose favor the relinquishments are made some few discrepancies are found, and note thereof have been made, in pencil, upon the deed from the company. An examination of the tract-books of this office shows that none of the lands have been clouded by erroneous conveyances.

In many instances the proofs of settlement, as presented under the act of June 22, 1874, are before me, and show satisfactorily the good faith of the claimants, but only in cases where entries were permitted have proofs of the qualifications of the claimants been filed; and I am, therefore, unable to state whether or not all of the persons named in the relinquishments can acquire title to the lands released.

In many instances entries have been made; in other, applications to enter only been received, while many of the parties named have never, so far as I can find, presented any proofs or claims. Several entries admitted under the act of June 22, 1874, have been canceled in accordance with decisions by the department denying the rights of the claimants. In a few instances I find that the party in whose favor a tract is released has no claim of record, while declaratory statements were filed under the act of 1874 by persons not included in the list In one case—viz, that of Rasmus Hanson—the party has a homestead entry of record for 160 acres, while the deed releases but one-half that quantity in his favor. No reason therefor is given, and I cannot understand why the whole tract embraced in his entry was not included in the relinquishment.

I find some few claims before this office which are not included in the deeds, but as the governor certifies that the relinquishment embraces all tracts upon which any person had in good faith settled, it is presumed that the persons referred to have abandoned the lands and do not assert claims thereto.

And I desire to state that no complaints have, thus far, reached me from any source to the effect that any claims have been overlooked or omitted. As stated, it is not known whether all of the persons named in the deeds are qualified to enter, and without specific proof in each case that point cannot, of course, be determined. But, after a careful consideration of the whole subject, I can see no reason why the relinquishments should not be accepted. If it should appear, in carrying out the details of executing the intention and wish of the State that any of the persons named in the deeds are not properly qualified, through any cause, to acquire titles to the lands relinquished in their favor, no wrong could be done either the State or the company, for the remedy was intended for those only who had settled upon the lands prior to the 1st of March, 1877, and does not extend to persons who may hereafter seek to enter any of the tracts relinquished.

In the certificate of the governor hereinbefore referred to is the following, in addition to the language quoted:

"And I do further certify and return that the following described pieces and parcels of lands lying within the said granted or indemnity limits of the line of railroad above mentioned are not included in the accompanying deed of relinquishment, for the reason that the same had been patented by the United States to the persons whose names are set opposite the descriptions, respectively, prior to the passage of said act of March 1, 1877."

Then follows a description of the lands so patented with the names of the patentees.

In his letter the governor gives very fully the reasons why those tracts were not embraced in the deeds.

Accompanying the papers referred by you, I find a protest and argument by William Lochren, esq., of Minneapolis, attorney for some of the claimants under the patented entries, against the action of the governor in omitting from the relinquishment the tracts embraced in their claims; but as the facts are clearly stated and the question is entirely a legal one I deem it unnecessary to submit any remarks thereon, but leave it for your consideration.

The papers received with the governor's letter are herewith returned.

Very respectfully, your obedient servant,

J. A. WILLIAMSON,
Commissioner.

Hon. C. SCHURZ,
Secretary of the Interior:

C.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 7, 1879.

SIR: I have the honor to acknowledge receipt, by reference from the department on the 4th instant, of an application by W. P. Clough, esq., attorney for the State of Minnesota, for the patenting to said State of "lands granted by the United States to aid in the construction of that certain line of railroad therein situated, which extends from Watab northwardly to Brainerd."

The application sets forth the legislation by Congress and the State in the premises, and concludes by presenting as the claim of the grantee the following:

1. That patents should issue for every alternate section of land not sold, reserved, or otherwise appropriated, lying within a strip of territory bounded on either side by a line running parallel with the line of the road, and six miles distant therefrom; and

2. That patents should also issue for enough lands in alternate sections, not otherwise appropriated, to be selected from two other strips of territory lying on either side of the line of road, each bounded laterally by lines running parallel with the line of road, and respectively 6 and 20 miles distant therefrom.

It was referred for report upon the matters therein stated, and the reasons, if any exist, why the request, as therein made, should not be granted.

I have the honor to submit the following in reply:

By an act of Congress approved March 3, 1857 (11 Stat., 195), there was granted to the then Territory of Minnesota, to aid in the construction of certain railroads, among which was a road "from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via Saint Cloud and Crow Wing to the navigable waters of the Red River of the North, * * * every alternate section of land, designated by odd numbers, for six sections in width on each side of said roads and branches." It provided that "in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said Territory or future State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached, as aforesaid: * * * *Provided*, That the land to be so located shall in no case be further than 15 miles from the lines of said roads or branches, and selected for and on account of each of said roads or branches." Any and all lands theretofore reserved to the United States for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, were reserved from the operation of the said grant.

Section 4 declared "that the lands hereby granted to said Territory or future State shall be disposed of by said Territory or future State only in the manner following: That is to say, that a quantity of land not exceeding 120 sections for each of said roads and branches, and included within a continuous length of 20 miles of each of said roads and branches, may be sold; and when the governor of said Territory or future State shall certify to the Secretary of the Interior that any 20 continuous miles of any of said roads or branches is completed, then another quantity of land hereby granted, not to exceed 120 sections for each of said roads and branches having

20 continuous miles completed as aforesaid, and included within a continuous length of 20 miles of each of such roads or branches, may be sold; and so from time to time until said roads and branches are completed; and if any of said roads or branches is not completed within ten years no further sale shall be made and the lands unsold shall revert to the United States."

By an act of the legislature approved May 19, of the same year, the grant of March 3 was accepted on the terms, conditions, and restrictions therein contained; and an act passed May 22, granted to the Minnesota and Pacific Railroad Company, to aid in the construction of several lines and branches of roads, including the branch from Saint Cloud to Crow Wing and the navigable waters of the Red River of the North, all the interest, present and prospective, of the Territory and future State of Minnesota, on said lines and branches to any and all lands granted to the Territory by said act of March 3, together with all the rights, privileges, and immunities conferred or intended, by said act. A map of the definite location of the branch from Saint Anthony to Crow Wing was filed in this office December 5, 1857.

In 1862 (March 10) the legislature of the State, on account of the failure of the said Minnesota and Pacific Railroad Company to build and complete the road in accordance with the terms of the grant of May 22, 1857, aforesaid, created the Saint Paul and Pacific Railroad Company and granted to it all the rights, benefits, and privileges, property, and franchises of the first-named company, including the lands.

By joint resolution, approved July 12, 1862 (12 Stat., 624), Congress provided that in lieu of the branch via Saint Cloud and Crow Wing to the navigable waters of the Red River, there might be constructed a new branch line having its southwestern terminus at any point on the existing line between the Falls of Saint Anthony and Crow Wing, and extending in a northeasterly direction to the waters of Lake Superior; and in its aid there were granted "the alternate sections within 6 mile limits of such new branch line of route, * * * with a right of indemnity between the 15 mile limits thereof."

By an act approved March 3, 1865 (13 Stats., 526), Congress extended the time for the completion of certain railroads, among which was the one under consideration, and declared "that the quantity of lands granted to the State of Minnesota to aid in the construction of certain railroads in said State, as indicated in the first section of an act entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads, in said Territory,' * * * approved March 3, 1857, shall be increased to ten sections per mile for each of said railroads and branches, subject to any and all limitations contained in said act and subsequent acts, and as hereinafter provided."

Section 2 provided that the first proviso in the first section of the act aforesaid should be so amended as to read as follows, to wit: "*Provided*, That the land to be so located shall in no case be further than 20 miles from the lines of said roads and branches, to aid in the construction of which said grant is made."

By section 3, similar exception to that contained in the grant of 1857, was made of lands reserved to the United States, for purposes of internal improvement; but it was provided "that any lands which may have been granted to the Territory or State of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from the full quantity of lands hereby granted," &c.

The sixth section of the act provided for the disposal of the lands; the certification by the governor to the Secretary of the Interior upon the completion of any section of 10 consecutive miles, and the patenting of lands granted, not exceeding ten sections per mile.

By an act of March 3, 1871 (16 Stats., 588), Congress provided that upon certain conditions the Saint Paul and Pacific Railroad Company "may so alter and amend its branch lines that instead of constructing a road from Crow Wing to Saint Vincent, and from Saint Cloud to the waters of Lake Superior, it may locate and construct in lieu thereof a line from Crow Wing to Brainerd, to intersect with the Northern Pacific, * * * with the same proportional grant of lands, to be taken in the same manner, along said altered line as is provided for the present lines by existing laws."

By act of March 3, 1873 (17 Stats., 631), the time for the completion of the road from Saint Anthony to Brainerd was extended to December 3, 1873.

By act of June 22, 1874 (18 Stats., 203), the time for the completion of said branch (among others) was extended, upon certain conditions, until March 3, 1876. The company did not accept the condition of that act, and upon that ground it has since been declared by the department inoperative.

Further legislation by Congress has not been taken; but the State, by an act approved March 1, 1877, resumed the grant theretofore held by the said Saint Paul and Pacific Railroad Company appertaining to the uncompleted portion between Watab and Brainerd, and conferred it upon a company to be organized in manner provided. In the event of a failure by said company to do and perform certain things within a

specified time, then any company or corporation then organized, or to be thereafter organized, upon the performance of certain requirements was to succeed the rights intended to be conferred by the act, &c.

Under this legislation the Western Railroad Company of Minnesota, a corporation duly qualified, succeeded to those rights, and completed and equipped the said line of road between Watab and Brainerd aforesaid, as appears from satisfactory evidence presented to this department.

In a letter to this office, of 18th February last, you stated that every objection known to the department to the approval of the lands due to the company was removed, and directed the preparation of lists of lands inuring to the grant to be submitted for your approval.

Accordingly, on the 8th of April last a list containing 121.502.31 acres of lands, found to be vacant, and lying within 10 miles of the road, was submitted. It received your approval April 11, and on April 21 patent was regularly executed. A request was then made by the company for patent on the lands embraced in the indemnity selection, covering 153,089.34 acres, but it became necessary under the rule announced by the Supreme Court in Leavenworth, Lawrence and Galveston *vs.* United States (2 Otto, 733), and adopted by the department December 26, 1877, in the case of the Wisconsin Central grant, and followed in several others, to know the quantity of lands the State was entitled to receive before complying with the request. To this end a careful examination of the records was made, and it was thereby disclosed that the disposals contemplated by the said rule were very limited, scarcely exceeding 2,000 acres, along this road. This fact (and that in consequence thereof patent as desired could not issue) was verbally communicated to the company; and further action by this office in the premises has not been taken.

The State, through her agent, Mr. Clough, has, as before stated, presented an application to have patents issued, and in an elaborate and exhaustive argument seeks to show that the rule aforesaid and upon which the examination of the records was made, does not in any manner affect this grant.

The principle referred to, and which was adopted by the department as aforesaid, is, that in railroad grants not of specific quantity indemnity was not given for land within the granted limits disposed of prior thereto, but only for such lands as might have been disposed of subsequent to the date of the granting act and prior to the time when the grant vested by definite location.

The reason of the rule, as I understand it, is, that Congress could only grant what it possessed, and not owning lands theretofore disposed of, it did not intend to give equivalent therefor by the employment of words authorizing indemnity for any of the lands "hereby granted" which might have been sold, pre-empted, or otherwise disposed of.

An examination of the original grant of 1857 shows clearly that so far as the language there used is concerned the decision cited would apply with like force as to that of the grant to the Leavenworth, Lawrence and Galveston Railroad by act of March 3, 1863; but as respects the act of 1865 it is, in my opinion, different. That act in very plain language declares that the grant made by the act of 1857 shall be increased to *ten sections* per mile; and to the end that that quantity may be secured enlarged the territory within which the selections can be made to lateral limits of 20 miles, and in so doing Congress undoubtedly, from its language, recognized the former grant as having been one of quantity, and the change was not made by substituting in the latter grant words of larger import for those used in the former but by express declaration. It is true that the enlarged quantity was granted "subject to any and all limitations contained in said act and subsequent acts," but those words do not affect the extent of the grant so much as the conditions thereof. So far as I am able to see no words of limitation save those contained in the third section of the act of 1865 are used.

If my construction be correct, the question then arises is the State entitled to *ten* full sections per mile for each mile of constructed road? The road as built by the said Western Railroad Company is from Watab to Brainerd, yet the company has never located the line north of Crow Wing, some 8 miles distant from Brainerd, at least no map of such location has ever been filed. Notwithstanding, therefore, the construction of the road between Crow Wing and Brainerd, I do not think it can be considered as entitled to the lands within the grant "in place" or "indemnity" for such as may have been disposed of. Nor do I believe the company entitled to indemnity for lands relinquished on the 6th of December last in favor of certain settlers under the tenth section of the act of the State legislature of March 1, 1877, aforesaid, nor for lands reserved from the grant by the third section of the act of 1865.

The application of Mr. Clough is herewith returned.

Very respectfully, your obedient servant,

J. M. ARMSTRONG,
Acting Commissioner.

Hon. C. SCHURZ,
Secretary of the Interior.

D.

DEPARTMENT OF THE INTERIOR,
Washington, October 16, 1880.

SIR: Referring to your report of November 7, 1879, in the matter of the right of the State of Minnesota to receive from the United States, under the acts of March 3, 1857 (11 Stat., 195), and March 3, 1865 (13 Stat., 526), embracing, among others, what is known as the Western Railroad, the full quantity of ten sections per mile of public lands along the line of constructed road, I have to state that the subject was, on the 4th of June last, submitted to the Hon. Attorney-General for an authoritative expression of his views; and a copy of his opinion, rendered June 5, 1880, is transmitted herewith for your information and guidance, the same having been fully examined and concurred in by this department.

The opinion holds, in effect, that the grants made by these and similar acts for railroad purposes, where the language employed is descriptive of "every alternate section for six or ten sections in width," as the case may be, are grants of lands in place as distinguished from grants of quantity, such as are made by descriptive words, "to the amount of any designated number of sections per mile," &c.

The Minnesota grants, and all others governed by the same limitations, are therefore to be treated as grants in place, conveying only such amount of lands as fall within the lines of every alternate section for the prescribed distance in width on each side of the respective lines of road.

The opinion further holds that these grants embrace all lands contained in such sections not sold, pre-empted, nor reserved at the date when said grants attach, and indemnity for such sections or parts of sections as may have been sold or pre-empted prior to such date, whether before or after the date of the granting acts. Such indemnity grant does not, however, apply to lands lost by reservation, made by competent authority, prior to the date of the respective acts. Such lands are held to have been absolutely reserved, by express provision, from the operation of the grants, and consequently cannot be considered within them nor affected by them for any purpose.

Entertaining these views of the law, the Attorney-General advises a return to the practice in vogue before the promulgation of the Supreme Court decisions in the cases of the Leavenworth, Lawrence and Galveston Railroad Company *vs.* The United States (2 Otto, 733), and United States *vs.* Burlington and Missouri River Railroad Company (8 Otto, 334), which seems to hold that indemnity can only be taken for lands lost between the dates of the granting act and of the definite location of the road.

Upon consideration and comparison of these with other decisions of the courts he arrives at the conclusion that the weight of authority is in favor of the doctrine that reservations alone are altogether excepted from the operation of the grants, while indemnity may be selected for losses on account of sales, pre-emptions, and other appropriations under the land laws, and that this doctrine is not inconsistent with the real import of the decisions in the cases cited.

The foregoing suggestions are believed to be sufficiently explicit to enable your office to adjust the indemnity rights of the various grantees, care being necessary in determining the exact status of lands alleged to be lost in place, keeping well in mind the distinction between reservations and other appropriations as defined in the opinion of the Attorney-General.

The papers accompanying the case are forwarded herewith.

Very respectfully,

C. SCHURZ, *Secretary.*

The COMMISSIONER OF THE GENERAL LAND OFFICE.

DEPARTMENT OF JUSTICE,
Washington, June 5, 1880.

SIR: The letter of the Acting Commissioner of the General Land Office, accompanying your communication of the 4th instant, submits the following facts:

By an act of Congress approved March 3, 1857 (11 Stat., 195), there was granted to the then Territory of Minnesota, to aid in the construction of certain railroads, among which was a road from "Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via Saint Cloud and Crow Wing to the navigable waters of the Red River of the North, * * * every alternate section of land designated by odd numbers, for six sections in width on each side of said roads and branches."

It provided that "in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections or

any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said Territory or future State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid. * * * Provided, that the land to be so located shall in no case be further than fifteen miles from the lines of said roads or branches, and selected for and on account of each of said roads or branches." Any and all lands theretofore reserved to the United States for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, were reserved from the operation of the said grant.

Section 4 declared "that the lands hereby granted to said Territory or future State shall be disposed of by said Territory or future State only in the manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections, for each of said roads and branches, and included within a continuous length of twenty miles of each of said roads and branches, may be sold; and when the governor of said Territory or future State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads or branches is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads and branches having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads or branches, may be sold; and so from time to time until said roads and branches are completed; and if any of said roads or branches is not completed within ten years, no further sale shall be made and the lands unsold shall revert to the United States."

By an act of the legislature, approved May 19 of the same year, the grant of March 3 was accepted on the terms, conditions, and restrictions therein contained; and an act passed May 22 granted to the Minnesota and Pacific Railroad Company, to aid in the construction of several lines and branches of roads, including the branch from Saint Cloud to Crow Wing and the navigable waters of the Red River of the North, all the interest, present and prospective, of the Territory and future State of Minnesota, on said lines and branches to any and all lands granted to the Territory by said act of March 3, together with all the rights, privileges, and immunities conferred or intended by said act. A map of the definite location of the branch from Saint Anthony to Crow Wing was filed in the General Land Office December 5, 1857.

In 1862 (March 10) the legislature of the State, on account of the failure of the said Minnesota and Pacific Railroad Company to build and complete the road in accordance with the terms of the grant of May 22, 1857, aforesaid, created the Saint Paul and Pacific Railroad Company, and granted to it all the rights, benefits, and privileges, property, and franchises of the first-named company, including the lands.

By joint resolution approved July 12, 1862 (12 Stat., 624), Congress provided that in lieu of the branch via Saint Cloud and Crow Wing to the navigable waters of the Red River there might be constructed a new branch line having its southwestern terminus at any point on the existing line between the Falls of Saint Anthony and Crow Wing, and extending in a northeasterly direction to the waters of Lake Superior; and in its aid there were granted "the alternate sections within six mile limits of such new branch line of route * * * with a right of indemnity between the fifteen mile limits thereof."

By an act approved March 3, 1865, (13 Stat. 526), Congress extended the time for the completion of certain railroads, among which was the one under consideration, and declared: "That the quantity of lands granted to the State of Minnesota, to aid in the construction of certain railroads in said State, as indicated in the first section of an act entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory * * * approved March 3, eighteen hundred and fifty-seven,' shall be increased to ten sections per mile for each of said railroads and branches, subject to any and all limitations contained in said act and subsequent acts, and as hereinafter provided."

Section 2 provided that the first proviso in the first section of the act aforesaid should be so amended as to read as follows, to wit: "*Provided*, That the land to be so located shall in no case be further than twenty miles from the lines of said roads and branches, to aid in the construction of which said grant is made."

By section 3 similar exception to that contained in the grant of 1857 was made, of lands reserved to the United States for purposes of internal improvement; but that it was provided "that any lands which may have been granted to the Territory or State of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from the full quantity of lands hereby granted," &c.

The fourth section provided "that the sections and parts of sections of land, which by said acts and this grant shall remain to the United States, within ten miles on each side of said roads and branches, shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder at or above the minimum price as aforesaid."

The sixth section of the act provided for the disposal of the lands, the certification by the governor to the Secretary of the Interior upon the completion of any section of ten consecutive miles, and the patenting of lands granted not exceeding ten sections per mile.

By an act of March 3, 1871 (16 Stat., 588), Congress provided that, upon certain conditions, the Saint Paul and Pacific Railroad Company "may so alter and amend its branch lines that instead of constructing a road from Crow Wing to Saint Vincent, and from Saint Cloud to the waters of Lake Superior, it may locate and construct in lieu thereof a line from Crow Wing to Brainerd, to intersect with the Northern Pacific, * * * with the same proportional grant of lands, to be taken in the same manner along said altered line as is provided for the present lines by existing laws."

By act of March 3, 1873 (17 Stat., 631), the time for the completion of the road from Saint Anthony to Brainerd was extended to December 3, 1873.

By act of June 22, 1874 (18 Stat., 203), the time for the completion of said branch (among others) was extended upon certain conditions, until March 3, 1876. The company did not accept the conditions of that act, and upon that ground it has since been declared by the Interior Department inoperative.

Further legislative action by Congress has not been taken, but the State, by an act approved March 1, 1877, resumed the grant theretofore held by the said Saint Paul and Pacific Railroad Company, appertaining to the uncompleted portion between Watab and Brainerd, and conferred it upon a company to be organized in manner provided. In the event of a failure by said company to do and perform certain things within a specified time, then any company or corporation then organized, or to be thereafter organized, upon the performance of certain requirements was to succeed to the rights intended to be conferred by the act, &c.

Under this legislation the Western Railroad Company of Minnesota, a corporation duly qualified, succeeded to those rights, and completed and equipped the said line of road between Watab and Brainerd aforesaid, as appears from satisfactory evidence presented to your department.

All objections known to the Interior Department to the approval of the lands due to the company having been removed, on February 18, 1879, you directed the General Land Office to prepare lists of lands inuring to the grant and submit them for your approval. Accordingly, on April 8 of that year, a list containing 121,502.31 acres of land, found to be vacant, and lying within ten miles of the road, was submitted to you and received your approval on the 11th of the same month, and on the 21st patent was regularly executed.

A request is now made by the company for patent of the lands embraced in the indemnity selection, covering 153,089.34 acres; and in order to properly decide upon this request, you submit to me two inquiries:

1. Is the grant of March 3, 1857, as altered or amended by the act of March 3, 1865, to be treated as a grant of quantity in the sense that the railroad is to be entitled to receive ten sections of land for each and every mile of road constructed by it?

2. Whether this be so or not, is the railroad company entitled to indemnity for the sections of land which may have been sold by the United States, or pre-empted, previous to the original grant of March 3, 1857?

1. The grant of March 3, 1857, was a grant of "every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads and branches." This grant was therefore a grant of lands in place. It was a grant of *particular parcels* (sections) of land lying within prescribed lateral limits to the road, each of which was definitely marked out and numbered by the public surveys, and to each of which the grant attached by distinct terms of description. The indemnity which was provided for by the grant of lands in lieu of such of the lands thereby granted as might be found, upon the definite location of the road, to have been pre-empted or sold, was equally precise, as such lieu lands were to be selected "from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached, as aforesaid." Such indemnity lands so located were to be in no case farther than fifteen miles from the lines of said roads or branches.

The fourth section of the act provided for a disposition by the Territory or future State of the lands granted, and contemplated that the road itself was to be built in divisions of a continuous length of twenty miles each, the Territory or future State being entitled to sell a quantity of land not exceeding 120 sections for each division of twenty miles.

Upon consideration of this act, I am of opinion that no grant was intended which should be considered one of quantity as distinguished from a grant of lands in place. The location of the lands granted, and of the indemnity lands, is definitely stated. Both the granted lands and the indemnity lands together are in point of quantity not to exceed 120 sections for every twenty miles of road. The quantity might obviously be less than 120 sections; as under the grant (which is limited to the odd numbered sections lying within the width of six sections on each side of the road, and does not call for an amount of land equal to the one-half of six sections in width on each side of the road) a claim to six sections for every linear mile of the road and its branches, including all sinuosities and deflections from a straight line, would not be tenable; and this according to what is deemed by me to be well-settled law. (5 Opin., 518.)

If this was not a grant of quantity, but a grant of lands in place, did it become a grant of quantity by the operation of the statute of 1865?

The word "quantity" is undoubtedly used as a convenient mode of designating the possible amount of lands granted, and the first section of the act of 1865 increased the quantity of lands granted to the State of Minnesota, by the act of 1857, "to ten sections per mile for each of said railroads and branches, subject to any and all limitations contained in said act and subsequent acts, and as hereinafter provided." The effect of this is to amend the act of 1857 by substituting for the word "six" the word "ten," and, if the rest of the act be taken into consideration, it will be satisfactorily seen that this is the full scope of the first section. An attempt is made to give to the word "limitations" in the clause above quoted the narrow and peculiar sense which it bears in the real estate law; but this seems to me to be unwarranted. The meaning to be attributed to this clause is not different from that which it would have if it read "subject to all the terms and conditions in the act of March 3, 1857."

The second section of the act of 1865, provides that the location of the land "shall in no case be further than twenty miles from the lines of said roads and branches, to aid in the construction of each of which said grant is made." The granted limits having been extended from six to ten, the indemnity limits are thus extended from fifteen to twenty.

The fourth section of the same act renews the provision in the original act, that the lands which "shall remain to the United States, within ten miles on each side of said roads and branches, shall not be sold for less than double the minimum price of public lands when sold," contemplating that the United States is under this act, as under the act of 1857, to own the even sections.

The sixth section provides for the construction of the road in divisions of ten miles in length each, and the lands granted and selected, not exceeding ten sections per mile, are to be selected opposite to and within a limit of twenty miles of the line of the completed division, extending along the whole length thereof. The use of the phrase "not exceeding ten sections per mile" indicates that, owing to the sinuosities of the road, less than ten sections per mile may actually become due to the State for the construction of a mile of road. By this section it is also contemplated that it may be that the indemnity lands within particular divisions of ten miles, may not be sufficient to compensate the loss in the granted lands appertaining to such divisions, and provision is made for such deficiency by a clause which may, perhaps, better be considered in connection with the second branch of your inquiry.

This case is readily distinguishable from the case of the United States *vs.* The Burlington and Missouri River Railroad Company, in Nebraska, where the grant was held to be one of quantity as distinguished from a grant of lands in place. From the language used in that case, the grant was distinctly a grant to the amount of ten alternate sections; there were no lateral limits to the grant, and there was no indemnity provision. It was thus well held to be a grant of an amount of land by way of compensation for the public service of constructing the railroad.

In the view of the applicant it would seem that this grant is at first a grant of lands in place, and that afterwards it becomes a grant of lands by the quantity. It can hardly bear this double character. Were this so, the indemnity would be used, not to compensate the applicant for that which it had lost alone, but, further, to give it the benefit of an additional grant.

In direct answer to your first inquiry, I am, then, of opinion that the grant is to be treated as a grant of lands in place, as distinguished from a grant of an amount or quantity of land.

2. The second inquiry proposed, in view of the remarks that have been made in opinions of the learned judges of the Supreme Court, undoubtedly presents a question of considerable difficulty.

It is understood that up to the time of the decision of the case of the Leavenworth, Lawrence and Galveston Railroad Company *vs.* The United States (2 Otto, 733), the rule of the department had been to indemnify the railroad, not only for lands which had been sold or pre-empted after the date of the passage of the granting act, but

previous thereto, and that in consequence of the remarks made in that case the rule has been changed.

The case referred to involved the title to the Osage Indian lands in the State of Kansas; the question being whether said lands were reserved to the United States under the provisions of the Indian treaty, and also under the last proviso of the first section of the act of March 3, 1863, or were granted to the State of Kansas, under the act of 1863, to aid in the construction of railroads. It was held that those lands never passed by the grant to the State of Kansas or the railroad companies; that they were reserved and excepted out of it, and, therefore, that the patents which had issued therefor had improvidently issued. To that extent the decision is undoubted authority, and it must be held, therefore, that all lands reserved to the United States by an act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, under the last proviso of the first section of the act of March 3, 1857, do not pass to the railroad companies, nor are said companies entitled to indemnity therefor. In commenting, *arguendo*, upon the indemnity clause, Mr. Justice Davis remarks: "The words employed show clearly that its only purpose is to give sections beyond that limit" (the original ten mile limit), "for those lost within it by the action of the government, between the date of the grant and the location of the road." But it is to be observed that he does not rest his decision upon this point, but upon the fact heretofore adverted to, that the lands in question (whose ownership he was then discussing) were excepted from the grant made. His remark, therefore, is a dictum entitled only to the weight which is given to the dicta of eminent judges.

In the case of The United States *vs.* The Burlington and Missouri River Railroad (8 Otto, 334), the main question under discussion was whether the grant was or was not a grant of a specific amount of quantity of land. It was held to be one of quantity, and the selection of the land was subject, in the opinion of Mr. Justice Field, to certain limitations, the fourth of which was that it must not have been sold, reserved, or otherwise disposed of by the United States, and a pre-emption or homestead claim must not have attached to it at the time the line of the road was definitely located. In this case, however, there was no question of indemnity. Upon this part of the case, the grant being held to be one of quantity, the only inquiry was where the lands were to be selected which were to make up the quantity to which the road was entitled. The mere fact that in considering this question Mr. Justice Field, speaking of many other grants, incidentally remarks that they are intended to provide "for the selection of land elsewhere, to make up any deficiency arising from the disposition of a portion of it within such limit, between the date of the act and the location of the road," cannot be considered as a distinct expression of opinion by that learned judge that in a case like this only deficiencies were to be compensated when land had been disposed of by sale or pre-emption after the date of the act.

On the other hand, Mr. Justice Harlan, in an opinion (concurred in by the circuit and district judges) in the case of the Madison and Portage Railroad Company *vs.* The Treasurer of the State of Wisconsin, &c. (circuit court of the United States for the western district of Wisconsin), in commenting upon the mode in which deficiencies of lands *in place* were to be made up from indemnity limit, says:

"In supplying deficiencies, it must be by sections, whether full or fractional, and by legal subdivisions. Deficiencies *in place*, limits caused by sales or pre-emption previous to the location of routes, whether before or after the passage of the acts, may be supplied from the indemnity limits."

In view of these conflicting expressions, it would seem to me that the safer course for the department would be to return to its original construction; and, while it holds that all lands reserved to the United States by any act of Congress, or in other manner by competent authority, do not pass to the railroad company, and that there can be no indemnity therefor, also to hold that, when lands have been sold or pre-empted along the line of the road within its granted limits, there should be indemnity for the lands thus lost, even if such sale or pre-emption took place previous to the date of the grant. This construction is in no wise in conflict with the decision made in the case of the Leavenworth, Lawrence and Galveston Railroad. It gives the company no title to indemnity for lands reserved from and excepted out of the grant, but does entitle it to indemnity when within the granted limits there are found lands which have been sold by the United States, or pre-empted, whether such sale or pre-emption took place prior or subsequently to the passage of the act of 1857, and prior or subsequently to the definite location of the road. But this indemnity can be carried no further than to compensate the railroad for the lands which it has thus lost. It cannot be extended so far as to indemnify the road for lands which were never included within its grant. Where, therefore (act of March 6, 1865, sec. 6), a division of ten consecutive miles of road has been completed, the railroad is entitled to lands, not exceeding ten sections a mile, situated opposite to and within the limits of 20 miles of the line of said road, and within the lateral limits of the division. If such lands are not found within the granted limits of ten miles on each side of the road, then they

may be obtained by the road within the corresponding indemnity limits. Until the road is finally completed, this is to be the arrangement as division after division is finished. As it may happen, however, that on certain divisions there may be neither within the granted limits, nor within the indemnity limits, sufficient public lands to satisfy the grant for such divisions, while on other divisions there may have been no deficiency, or there may have been more than enough within the indemnity limits to satisfy the deficiency, provision is made by which, at the completion of the railroad, the Secretary of the Interior "shall issue to the said State patents to all the remaining lands granted for and on account of said completed road and branches in this act, situate within the said limits of 20 miles from the line thereof throughout the entire length of said road and branches." This language must be construed as intending that when the road is fully completed, as required by law, the company so completing is entitled to lands in any or all divisions of its entire length to make up the losses sustained in any one division. But the scheme of the act distinctly shows that these selections are confined to such alternate odd-numbered sections as remain undisposed of in the respective divisions. It was only these sections which were included within either the granted or the indemnity limits. And the indemnity is not made in order that the road shall have necessarily a hundred sections of land for each ten miles in length of its road, but only so far as it is required to make the grant good. If there were, therefore, reservations within the granted limits to the United States, or if the road was not entitled to one hundred sections of land for any ten miles constructed by it in consequence of the curvature or sinuosities of the road in that division, there can be no indemnity for a deficiency thus arising. The indemnity is limited strictly by the sections lost *in place*, which were granted by the United States, but were previously or subsequently sold or pre-empted.

In direct answer to your second inquiry, I am, therefore, of opinion that the road is entitled to indemnity, provided the lands can be found within the proper limits, for the lands which it may have lost by reason of the fact that lands within the granted limits were sold or pre-empted previously or subsequently to the date of the grant.

In view of the interest manifested in the questions submitted by you, on account of their relation to other railroads as well as the one immediately concerned, I have felt it my duty fully to hear arguments of all other parties who have deemed that rights might be affected by any opinion which should be given in the present case.

Very respectfully, your obedient servant,

CHAS. DEVENS,
Attorney-General.

Hon. CARL SCHURZ,
Secretary of the Interior.

E.

DEPARTMENT OF THE INTERIOR,
Washington, December 5, 1879.

SIR: I transmit herewith a copy of the opinion of the Attorney-General, dated the 29th ultimo, in reply to certain inquiries submitted by me February 19 last, in connection with the application of the governor of Minnesota to have certain lands certified for the benefit of the Southern Minnesota Railway Extension Company.

It will be observed that the Attorney-General is of the opinion that the lands opposite the four sections of 10 miles each constructed since February 25, 1877, the date when the grant became subject to forfeiture, should be certified to the State, in view of the fact that no act, legislative or judicial, has been taken to revest the title of the United States.

I concur in this opinion, and your office will be governed accordingly in the adjustment of the grant. The papers and maps submitted to the Attorney-General are herewith returned to your office.

Very respectfully,

C. SCHURZ,
Secretary.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

DEPARTMENT OF JUSTICE,
Washington, November 29, 1879.

SIR: Your letter of February 19, 1879, informs me that by an act of Congress approved July 4, 1866 (14 Statutes, 87), there was granted to the State of Minnesota certain lands to aid in the construction of a line of railroad from Houston, through the counties of Fillmore, Mower, Freeborn, and Faribault, to the western boundary of the State. This grant was accepted by the legislature of the State of Minnesota February 25, 1867, and the lands in question granted to the Southern Minnesota Railroad Company.

Maps of the definite location of this road were approved by the board of directors of the company, and filed in the General Land Office, as follows: From a point in township 104, range 8 west, to a point in township 103, range 18 west, adopted by resolution of the board of directors of the company January 1, 1867, received at the General Land Office February 11, 1867. From a point in township 103, range 18 west, to a point in township 104, range 37 west, adopted by resolution of the board of directors November 29, 1866, and received at the General Land Office December 10, 1866. From a point in township 104, range 37 west, to a point in township 104, range 39 west, adopted by resolution of the board of directors October 24, 1866, received at the General Land Office December 10, 1866. From a point in township 104, range 39 west, to the western boundary of the State. Survey ordered by resolution of the board of directors December 2, 1869, and the map received at the General Land Office May 4, 1871.

The company constructed the road from Houston to Winnebago City, in township 104, range 28 west, prior to February 25, 1877, at which date, in the event of a failure to complete the road, it was provided that the lands granted and not patented should revert to the United States. (See the proviso to the fourth section of the act of July 4, 1866, above mentioned.)

By an act of the legislature of the State of Minnesota, approved March 6, 1878, all the lands, rights, powers, and privileges granted to and conferred upon the State of Minnesota by the act of Congress approved July 4, 1866, appertaining to the uncompleted line of road of the Southern Minnesota Railroad Company (viz, the line from Winnebago City to the western boundary of the State), were granted, transferred, and vested in the Southern Minnesota Railway Extension Company, under certain conditions, among others that the road should be constructed to the village of Jackson, in Jackson County, before the end of the year 1879, and to the west line of the State before the end of the year 1880.

The Department of the Interior is in receipt of a map, and accompanying evidence, establishing the fact that the Southern Minnesota Railway Extension Company, between April 16, 1878, and December 2, 1878, constructed a line of railroad from Winnebago City (the western terminus of the road constructed prior to February 25, 1877) to a point in township 102, range 35 west, in Jackson County, a distance of forty-three continuous miles of road. From Jackson to the western boundary of the State is a distance of nearly one hundred miles; and under the act of the Minnesota legislature, approved March 6, 1878, the road must be completed to the west line of the State before the end of the year 1880. It appears by your letter that the governor of Minnesota has filed with the department a request for a patent to the State of the lands granted opposite the four sections of constructed road, of ten consecutive miles each, between Winnebago City and the village of Jackson, in Jackson County, as provided in the fourth section of the granting act.

You state that you have hesitated to comply with this request, as the time provided in the granting act for the completion of the road expired February 25, 1877, ten years from the date of the acceptance of the grant by the State of Minnesota.

The line of road constructed in the year 1878 by the Southern Minnesota Railway Extension Company deviates from the line of definite location of the road adopted by the board of directors of the Southern Minnesota Railroad Company November 29, 1866. At Jackson, the western terminus of the road, the variation is ten miles. East of that point, and between the same and Winnebago City, the variation is from one to six or eight miles from the line as located in 1866.

It will be observed that the granting act only designated through what counties the road shall pass east of and including Faribault County.

In view of these facts you submit to me the following questions:

"1. Is this department authorized, under the law, to issue patents to the State of Minnesota for the lands opposite that portion of the road constructed in sections of ten consecutive miles each since February 25, 1877, the date at which, according to the was not completed, that the lands not patented should revert to the United States? fourth section of the act of July 4, 1866, it was provided, in the event that the road

"2. Should the department accept proof of the construction of the road on a line different from the one originally adopted and approved, if constructed within the limits of the grant as first located?"

1. *As to the effect of the proviso to the fourth section of the act of July* 4, 1866:

While the part of the road to which your inquiries relate was not completed within the time limited by law, no attempt has been made to enforce any forfeiture of the lands granted to the State of Minnesota, or by any means, legislative or other, to revest the title in the United States. The question whether the State of Minnesota may still claim, under the act of Congress, lands which have been earned by the construction of the road since the expiration of the period is determined by the case of Schulenberg *v.* Harriman (21 Wall., 44). This was the case of a grant of lands to the State of Wisconsin, to aid in the construction of a certain railroad within that State, by an act of June 3, 1856. The language there used in reference to the condition upon which

the grant might be defeated by non-completion of the road within ten years was as follows: "No further sales shall be made, and the lands unsold shall revert to the United States." The road had not been completed within the time required for its construction, which had not been extended, and Congress had passed no act, nor taken any judicial proceeding to enforce any forfeiture of the grant for failure to construct the road within the period prescribed. Upon this state of facts it was held that a present interest was passed by the grant to the State of Wisconsin; that the proviso was in the nature of a condition subsequent; that the prohibition against further sales if the road were not completed added nothing to the force of the proviso, because a cessation of sales was necessarily implied in the condition that the lands should revert, but that if the condition were not enforced the power to sell continued as before its breach, limited only by the objects of the grant and the manner of sale prescribed by the act; and that, as no action had been taken either by legislation or judicial proceedings, to enforce a forfeiture or revest the title in the United States, that title remained in the State as completely as it existed on the day that the title by location of the line of the railroad acquired precision and became attached to the adjoining alternate sections. In direct answer to your inquiry upon this point, I therefore reply that the department is authorized by law to issue patents to the State of Minnesota opposite that portion of the road constructed in sections of ten consecutive miles February 25, 1877, the date at which, according to the fourth section of the act of July 4, 1866, it was provided, in the event that the road was not completed, that the lands not patented should revert to the United States, and this for the reason above stated, that no act, legislative or judicial, has been taken to revest the title of the United States.

Supplementary to this inquiry, I perhaps should add that, on examination of the relations between the Southern Minnesota Railway Extension Company and the Southern Minnesota Railroad Company, it appears that the title granted to the old company was forfeited to the State of Minnesota by reason of the fact that the conditions annexed to it were not performed; and that this forfeiture was impliedly asserted in the act making a grant to another company. (Farnsworth *vs.* Minnesota and Pacific Railroad Company, 2 Otto, 50.)

2. *As to the effect of change of line:*

So far as the lands now in question are concerned, it is not important whether the road was completed on the location of 1866 or whether it is completed on the present constructed line, since, under the terms of the grant, precisely the same lands will be found in place within the ten-mile limit in either case. They are alike within ten miles of the location of 1866 and ten miles of the constructed road. The fact that if the constructed line had been the line of original location other lands in addition to these now sought would have been withdrawn from the market, cannot affect the question of the right to these lands which actually were withdrawn from the market.

How far a railroad is authorized, after having made and filed a map of its location, to change such location and build upon a new and different line, does not seem necessary to be considered in the present case.

The facts in the present case, as they appear from your statement and an examination of the legislative act, indicate that there was no proper location by which the road, or any other parties interested, could be bound until after the act of the State legislature of February 25, 1867. A location was made in 1866, after the act of Congress had been passed granting the lands to the State of Minnesota, but before the legislature had accepted the trust connected with the land grant. That location is what is termed the old line or location of 1866. The maps of this location were transmitted by the governor to the Secretary of the Interior December 4, 1866. When, however, the legislature of the State accepted the grant—which was on February 25, 1867—the act by which they accepted it (referred to in your letter) required the line as constructed to run to Fremont and thence to Jackson.

This was a legislative modification of the line which constituted a statutory direction to its own officers, and to the company, and appears to have been fully understood at the General Land Office. The road cannot be considered to have received an official definite location until after the acceptance by the legislature, which acceptance contemplated this modification. The present constructed road appears to deviate only from the original survey to such an extent as was necessary to cause it to conform to the requirements of the legislative act. Waiving, therefore, as before indicated, any discussion of the question how far railroads which have filed locations are generally authorized in construction to deviate therefrom, I answer your inquiry by saying that the department should accept proof of the construction of the road, although on a line different from the one originally approved, and certify the lands in question.

Very respectfully, your obedient servant,

CHAS. DEVENS,
Attorney-General.

Hon. CARL SCHURZ,
Secretary of the Interior.

F.

DEPARTMENT OF THE INTERIOR,
Washington, April 17, 1880.

SIR: By act of July 4, 1866 (14 Statutes, p. 87), a grant was made to the State of Minnesota in aid of a railroad from Hastings, through the counties of Dakota, Scott, Carver, and McLeod, to such point on the western boundary of the State as the legislature might determine.

This grant was accepted by the State March 7, 1867. Prior to that time, viz, on the 4th of January, 1867, the governor had approved a map of definite location, which was, at some time prior to the 4th day of April, 1867, placed on file in this department.

Certain modifications and adjustments were made to carry the construction of the road through several towns named in the act of acceptance, and all questions relating to the location of the road as far west as Glencoe, in the county of McLeod, are considered as settled. I think the action of the State authorities and of the company grantee in allowing the line to remain unchanged from Glencoe westward and to rest in the department files unchallenged, the lands along the route having been also withdrawn within the lateral limits of such line to satisfy the grant, must be treated as a clear recognition of the same as a line of definite location from which the grant cannot now be floated.

January 10, 1879, the governor forwarded a certified map of construction running from Glencoe to Montevideo, a distance of eighty miles, and on the 12th of January last he supplemented the same by a map from the latter point westward to Ortonville on the boundary of the State, a distance of forty-five miles; and request is now pending for certification of the granted lands in favor of the Hastings and Dakota Railroad Company, upon whom the grant has been conferred by the State. An inspection of the maps filed shows a departure in construction from the line of definite location, the variation in distance amounting at some points to six or seven miles on the portion east of Montevideo, and from a few rods to about three or four miles to the westward of that station. The road from a point in range 38 runs north of the Minnesota River, while the original line crossed at that point and followed the south bank. Notwithstanding these deviations it is claimed by the grantee that the road has been completed in substantial compliance with law, and whatever deviation is shown has been caused by material difficulties and obstructions, which rendered the old route impracticable, and fully explain and justify the modification and correction of the line.

To establish these allegations certain letters and statements of engineers of the company were filed, which, not being upon oath, were not recognized as sufficient.

I am now in receipt of corroborative affidavits from the following parties: Gates A. Johnson, who, as engineer of the company, made the original survey and located the line as filed in 1867; A. B. Rogers, the present chief engineer, who has had charge of the location and construction of the completed road; D. C. Shepard, a civil engineer of thirty years' experience; and R. H. L. Jewett, civil engineer and surveyor, who executed in the field the United States surveys of the townships for fifty miles along the route, and who has acted, by appointment from the governor, as State inspector of construction and equipment of newly-built railroads in Minnesota.

These all speak from personal examination and knowledge of the locality and lines. From their statements it appears that the line as originally run crossed a very rough country of deep gorges and ravines, called "Coolies," which would have rendered very difficult and expensive the construction of the road; that the Minnesota bottoms are composed almost entirely of granite, rendering earthwork impossible, and compelling the use of trestle-work and bridging; that a bridge across the river must have been a mile or more in length, costing from one-half million to one million dollars; that the tributary known as Hawk Creek is an immense gorge lying along and nearly parallel to the river, and that it could not be crossed successfully below the present line near its head; that to cross lower down would necessitate a steep grade to reach the summit and again descend to the river, the distance being so short as to render the attempt impracticable; that to cross the river at the point fixed would also require a bridge across the Yellow Medicine, and the bridging of numerous creeks, also requiring miles of embankments across river bottoms subject to overflow, where embaukments would be liable to wash out; that these and other difficulties and expenses, recited in detail, have been avoided by the present location, which is on a direct and practicable route, and accommodates thriving and well-populated settlements, while the lands south of the river and on the Sioux Reserve are comparatively unsettled and unproductive. Without further discussion of these papers, which are transmitted with the other papers before me for your files, I conclude that the deviations in question cannot justly be objected to or held to destroy the identity of the road, and, following the principles indicated in my communication of the 9th instant in the case of the McGregor road, I have to direct that the lands be certified in satisfaction of the grant.

Very respectfully,

C. SCHURZ, *Secretary*.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

G.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 16, 1877.

SIR: I have the honor to submit herewith for approval list No. 8 of selections by the Wisconsin Central Railroad Company, containing 102,732.49 acres, granted in the Eau Claire, Wausau, and Bayfield districts, Wisconsin, by the act of Congress approved May 5, 1864.

In this connection I desire to state that an examination of the records of this office show that the number of acres in odd numbered sections within the granted or ten-mile limits of said road is 1,377,383.93.

The number of acres disposed of by the government prior to the passage of the granting act is 789,622.00, the number of acres disposed of subsequent to said date, but prior to the definite location of the line of the road is 161,659.53. The quantity patented to the company within the granted limits aggregated 240,363.54 acres, and the quantity patented within the *indemnity* limits amounts to 203,459.62 acres.

It has been the practice of this office and department, since the inauguration of the railroad land-grant system, to allow indemnity for all lands lost to the grant by reason of sale, reservation, &c., prior to the definite location of the road, but by the decision of the Supreme Court of the United States in the case of the Leavenworth, Lawrence and Galveston Railroad Company *vs.* United States (2 Otto), it would appear that that practice was erroneous; that indemnity could only be allowed for lands sold or disposed of after the passage of the granting act.

On this subject the court says: "* * * the only purpose of that clause [indemnity] is to give lands outside of the ten-mile limits for those lost inside by the action of the government in keeping the land offices open between the date of the granting act and the location of the road."

Applying this rule to the grant under consideration the company has received patents for 41,820.09 acres in excess of the indemnity authorized by the granting act.

The tracts embraced in the list herewith, together with those heretofore selected and patented, aggregate 343,096.03 acres, leaving yet unselected 83,006.37 acres in the granted limits.

It is proposed by Mr. W. K. Mendenhall, resident attorney for the company, that the government issue patents for the tracts embraced in the list now submitted, and authorize the selection of the 83,006.37 acres, aforesaid, but that the last amount shall be withheld from patent until arrangements can be made by which the excess indemnity patetned can be reconveyed to the United States.

I would recommend that this proposition be acceded to.

The company has selected and paid fees upon 167,072.14 acres of *indemnity lands*, which have not, as yet, been patented. It is desired that the fees thus paid may be applied to the tracts in the granted limits yet to be selected. I would recommend that this request be denied. The selections were made under a supposed correct construction of the grant, and the fees paid thereon were for services performed by the local officers. I do not believe that because the selections were erroneously made that the additional labor of examining and certifying a second list should be imposed upon the local officers.

Under the first section of the act of July 1, 1864, it is held that the registers and receivers are each entitled to receive a fee $1 for each selection of 160 acres, and I am of opinion that the company should be required to pay the prescribed fees thereby, should the selection of the tracts in the granted limits be authorized.

I inclose herewith two letters from Mr. Mendenhall upon the subject of this communication dated October 4 and 18, 1877.

Very respectfully, your obedient servant,

J. A. WILLIAMSON,
Commissioner.

Hon. C. SCHURZ,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
Washington, December 26, 1877.

SIR: Referring to your letter of the 16th ultimo, transmitting for approval list No. 8 of selections by the Wisconsin Central Railroad Company, containing 102,732.49 acres, granted in the Eau Claire, Wausau, and Bayfield districts, Wisconsin, by the act of Congress approved May 5, 1864, I have to state that I have this day approved the same, and it is herewith returned.

In your communication you state that the records show that there are 1,377,383.93 acres within the granted or 10-mile limits of said company's road; that the number of acres disposed of by the government prior to the granting act was 789,622 acres; and that the number of acres disposed of between the date of the granting act and the definite location of the road was 161,659.53 acres; and that the quantity patented to the company within the indemnity limits amounts to 203,459.62 acres.

The Supreme Court of the United States, in its elaborate decision in the case of the Leavenworth, Lawrence and Galveston Railroad Company *vs.* The United States, reaffirmed the doctrine formerly announced, "that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it or to operate upon it, although no exception be made of it."

It follows that land *lawfully sold or disposed of* by the United States prior to the passage of the act granting lands to the State of Wisconsin was excepted from the operation of said grant, and, if so, no indemnity can be obtained for the land thus lost.

On this point the court, in the case before cited, says:

"The indemnity clause has been insisted upon. We have before said that the grant itself was *in præsenti*, and covered all the odd sections which should appear, on the location of the road, to have been within the grant when it was made. The right to them did not, however, depend on such location, but attached at once on the making of the grant. It is true they could not be identified until the line of the road was marked out on the ground; but, as soon as this was done, it was easy to find them. If the company did not obtain all of them within the original limit, by reason of the power of sale or reservation retained by the United States, it was to be compensated by an equal amount of substituted lands. The latter could not, on any contingency, be selected within that limit; and the attempt to give this effect to the clause receives no support, either in the scheme of the act or in anything that has been urged by counsel. It would be strange, indeed, if the clause had been intended to perform the office of making a new grant within the ten-mile limit, or enlarging the one already made. Instead of this, the words employed show clearly that its only purpose is to give sections beyond that limit for those lost within it by the action of the government between the date of the grant and the location of the road. This construction gives effect to the whole statute, and makes each part consistent with the other. But, even if the clause were susceptible of a more extended meaning, it is still subject to and limited by the proviso, which excludes all lands reserved at the date of the grant, and not simply those found to be reserved when the line of the road shall be definitely fixed. The latter contingency had been provided for in the clause; and, if the proviso did not take effect until that time, it would be wholly unnecessary. And these lands being within the terms of the proviso, as we construe it, it follows that they are absolutely and unconditionally excepted from the grant; and it makes no difference whether or not they subsequently became a part of the public lands of the country."

The indemnity clause in the act of May 5, 1864 (13 Stat., 66), is in substance the same as the indemnity clause in the act of March 3, 1863 (12 Stat., 772). Applying this rule to the grant now under consideration, it will be seen that there has been patented to the Wisconsin Central Railroad Company 41,800.09 acres in excess of what it is entitled to.

You are therefore instructed to call upon the company to relinquish its claim to the said quantity of land, in order that the same may be restored to the public domain.

It appears from the statement of Mr. Mendenhall, attorney for the company, that it has caused to be selected 167,072.14 acres as indemnity land, and paid the fees thereon, amounting to $2,087.13.

Under the rule announced by the court, above cited, these lands cannot be patented to the company, and the request is made that credit be given for the fees thus paid, to apply on the lands to be selected in place.

The fees thus received by the local officers were paid as compensation under the provision of section 2238 of the Revised Statutes, for labor actually performed at the request of the company; and there is no law which authorizes this department to require the local officers to perform the additional labor of making new selections without compensation. Your recommendation that the request be denied is approved.

The company also request that in view of the changed practice in the adjustment of indemnity lands, it be permitted to relinquish its claim to the lands already patented and select others within its indemnity limits, where most convenient and desirable. The basis of this request is that, under the rule of this department in force prior to the decision of the Supreme Court above cited, the company would have received all the vacant lands in the indemnity limits; hence its selections were made in a body, taking all the vacant lands in the several sections along the line of the road; but under the rule now in force in the department, the selections would be differently made.

The lands for which patents have issued were voluntarily selected by the company. The government and the public have been influenced in their action by this adjustment, and I see no sufficient reason why it should be set aside and the additional labor and expense incident to the adjustment of new selections incurred.

The request is therefore denied.

The papers in the case are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary.*

The COMMISSIONER OF THE GENERAL LAND OFFICE.

K.

DEPARTMENT OF THE INTERIOR,
Washington, July 30, 1878.

SIR: I herewith return with my approval, list No. 9, containing 29,398.51 acres of land in place inuring to the Wisconsin Central Railroad Company, under the act of Congress approved May 5, 1864, submitted by you on the 29th instant.

I also return the stipulation, dated May 20, 1878, and signed by the company, to the effect that said company will ask for no further certificates or patents for lands within the limits of its grant, "until the question as to the excess of indemnity, which it is alleged has heretofore been patened to the company to the amount of 41,800 acres, shall be settled by a relinquishment of the same or by a decision of a proper tribunal."

You will be governed by the terms of this agreement, until otherwise instructed by this department.

Very respectfully,

C. SCHURZ,
Secretary.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

L.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 29, 1878.

SIR: I have received selections by the Wisconsin Central Railroad Company, under act of Congress approved May 5, 1864, of lands within the 10-mile limits of the grant, amounting, as shown by the accompanying clear list (No. 9) to 29,398.51 acres.

In connection therewith I have also received a letter from the president of the company inclosing an agreement on behalf of the company, conditioned upon approval and patenting of these selections, "not to ask for any further certificates or patents of lands within the limits of its grant, until the question as to the excess of indemnity, which it is alleged has heretofore been patented to the company to the amount of 41,800 acres, shall be settled by a relinquishment of the same, or by a decision of a proper tribunal."

From the tenor of the communication accompanying this agreement, and of one of the 20th instant, referred to this office by you, both of which, and the agreement, are herewith transmitted, I infer that the selection of these lands is the result of an understanding, between the department and the company in the matter.

I have therefore examined and certified to the selections in the usual manner, and lay the list of the same before you for your action.

I have the honor to be, sir, very respertfully, your obedient servant,

J. A. WILLIAMSON,
Commissioner.

Hon. C. SCHURZ,
Secretary of the Interior.

L1.

WISCONSIN CENTRAL RAILROAD COMPANY,
Milwaukee, Wis., May 20, 1878.

DEAR SIR: I inclose herewith an agreement as required by the Secretary of the Interior, which will entitle this company to an approval of the lists for 30,000 acres of its grant recently filed in the Wausau, Eau Claire, and Bayfield offices.

I request that the rule of the department which requires that lists for approval shall remain on file five months before patent shall issue may be set aside in this case.

I understand that the rule was adopted in order to give parties having adverse claims an opportunity to present proof of their claims and have them acted upon by the department.

As the lands embraced in our lists were withdrawn from sale in 1869, all claims adverse to the title of this company must have been disposed of, and therefore the necessity for the rule no longer exists. It is of the utmost importance that the company should receive patents for the lands embraced in these lists immediately, and I hope the usual five months' delay may be avoided.

I have sent you by express a map properly certified by the governor of Wisconsin and the chief engineer of the company, showing the completion of the seventh section—26 miles—north from Stevens Point. This map, with those previously filed in the General Land Office, completes the line of route of the railroad from Portage to Stevens Point and from Stevens Point to Ashland.

Very respectfully,

CHAS. L. COLBY,
President.

Hon. J. A. WILLIAMSON,
Commissioner of General Land Office, Washington, D. C.

Mr. Marble, solicitor of the Interior Department, drew up the agreement inclosed.

L$_2$.

[Wisconsin Central Railroad Company. Charles L. Colby, president.]

MILWAUKEE, WIS., *July* 20, 1878.

DEAR SIR: A few months ago I had the pleasure of an introduction to you through Gov. William E. Smith, and you favored me with one or two personal interviews in regard to our land grant, which you doubtless remember.

The following are some of the points alluded to: I explained—

1st. That we had invested many millions of dollars in the construction of our road, the principal inducement for which was our *land grant*, which we were informed was large and valuable, and which the United States Land Commissioner in an official letter informed us amounted to 1,357,000 acres. The printed circulars issued by the department states the amount of the grant to our company to be 1,800,000 acres.

2d. It now appears that the official statements are fearfully incorrect, and that there are only about 800,000 acres unsold in the whole limits of our grant south of Bayfield, including the indemnity.

3d. Under recent decisions of the Supreme Court you have deemed it necessary to cut down even this amount about 25 per cent. more.

4th. We are very anxious to receive our patents for all the lands to which we are entitled, and the cutting down of our grant is ruinous to our company.

5th. A short time ago you declined to give us further patents, even for lands in place, on the ground that if you should give us all we are entitled to in place, you would then have patented to us 41,800 acres more than under the decision referred to you would consider us entitled to.

At our personal interview, to which I refer, I asked that patents be issued to us for 30,000 acres more, and the balance (some 57,000 acres) to be withheld until we should either relinquish 41,800 acres from lands already patented us for indemnity, or until the question of excess of indemnity be definitely settled by some competent tribunal.

On May 9 I had my last interview with your solicitor, Mr. Marble, to whom the matter was referred. He then advised me to apply for 30,000 acres in 10-mile limits, and with this list file an agreement not to ask for more patents until the question at issue should be settled. He also very kindly worded for me the form in which the agreement should be expressed.

Probably this statement will remind you and Mr. Marble of all the circumstances of our interviews. And I desire here to express my appreciation of the courtesy and kindness with which you listened to all my explanations.

In accordance with Mr. Marble's advice, the necessary lists were prepared and filed in the department. The agreement, as proposed by him, was forwarded to the Commissioner of the General Land Office at Washington on May 20, 1878, with my letter of explanation.

The summer is fast slipping away, and with it my opportunities to sell the land applied for and bring in new settlers. You know how important time is to us, and that a few weeks more or less in the right season makes a difference of thousands of dollars.

Am I trespassing too much upon your kindness in asking you to instruct the Commissioner of the General Land Office to make this a special case, and to make and deliver the patents to us immediately? This is a matter of great importance to us. Thanking you again for your several courtesies,

I am, yours, very truly,

CHAS. L. COLBY,
President Wisconsin Central Railroad Company.

Hon. CARL SCHURZ,
Secretary of the Interior, Washington, D. C.

L3.

[Wisconsin Central Railroad Company. Charles L. Colby, president.]

MILWAUKEE, WIS., *May* 20, 1878.

SIR: In applying for approval of list for 30,000 acres, in Wausau, Eau Claire, and Bayfield districts, filed in May, 1878, and for patent for lands therein described, the Wisconsin Central Railroad Company hereby agrees not to ask for any further certificates or patents of lands within the limits of its grant until the question as to the excess of indemnity, which it is alleged has heretofore been patented to the company to the amount of 41,800 acres, shall be settled by a relinquishment of the same or by a decision of a proper tribunal.

WISCONSIN CENTRAL RAILROAD COMPANY,
By CHAS. L. COLBY, *President.*

L4.

WASHINGTON, D. C., *February* 20, 1882.

SIR: The Wisconsin Central Railroad Company is an applicant for patents for lands within their granted and indemnity limits for which selections have been made, and to the extent of the indemnity tracts are ready for submission to your department for approval preparatory to issue of patent, but I learn informally from the Commissioner of the General Land Office that for the present it is not your desire that lists of railroad selections shall be submitted for approval, this because of the several resolutions and bills before Congress relative to railroad land grants.

While these resolutions are broad in their scope, yet we know of none that reach to or are intended to reach to or affect in any way lands earned by the companies by construction of road *within* the statutory limitation. This is the status of the Wisconsin Central Railroad Company upon its present applications.

The selections embrace lands due for road constructed within the limitation of the law.

The files of the General Land Office will, we are confident, show that the company had constructed within the legal time not less than 200 miles of its road, which would entitle it to about 1,200,000 acres of land; and that all the lands patented to it to date, together with those which we have selected and for which we desire patents, will not near satisfy this lien. The company has received patents for only 575,000 acres. Hence to approve these lands and give the company patents therefor will in no way be against the spirit or letter of these legislative resolutions or present your department as showing a disregard for their possible effect. We therefore ask that you will direct that our lists may be submitted for and that will receive your approval for patent.

Very respectfully,

W. K. MENDENHALL,
Attorney Wisconsin Central Railroad Company.

Hon. S. J. KIRKWOOD,
Secretary of the Interior.

[Indorsement.]

DEPARTMENT OF THE INTERIOR.

Commissioner MCFARLAND:

Has the entire line of the road been completed; if so, was it all done within the time prescribed by the law making the grant?

S. J. K.

M.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 30, 1882.

SIR: I am in receipt of a letter from W. K. Mendenhall, esq., addressed to you and referred by you to this office for a report, in which he requests that you will direct that certain lists of selections, made by the Wisconsin Central Railroad Company, be submitted by this office for your approval, and that the same may be approved for patent.

You ask, "Has the entire line of road been completed; if so, was it all done within the time prescribed by the law making the grant?"

The grant for this railroad was made by act of May 5, 1864 (13 Stat., 64), and is for every alternate section, designated by odd numbers, for ten sections in width on each side of the road, with indemnity limits of 20 miles, or 10 miles additional, upon each side of the line of route.

Indemnity may be had for all lands found to have been reserved or otherwise disposed of, or to which pre-emption or homestead rights had attached, prior to the date of definite location of the road.

The granting act was amended by act of June 21, 1866 (14 Stat., 360), to authorize the location of the line of route as specified in said amendatory act.

The act of April 9, 1874 (18 Stat., 28), extended the time for completion of the road until December 31, 1876.

The act of March 3, 1875 (18 Stat., 511), allowed the company to straighten the line of road between Portage City and Stevens Point, taking, however only, such lands, falling *within* the 10-mile limits of the amended line, as were included in the original withdrawal; those falling outside the said 10-mile limits of the amended line reverted to the United States.

The length of the line as finally located from Portage City to Superior is 341 miles, of which 231 miles were constructed prior to December 31, 1876, the date of expiration of the time limited, and 26 miles have been constructed since said date, making a total of 257 miles of constructed road, leaving uncompleted at expiration of the time limited 110 miles, and now remaining uncompleted 84 miles.

The grant, at ten sections per mile for 341 miles, would give an aggregate of 2,182,400 acres, but as the line is located along the lake from Ashland to Superior the area of the grant is lessened thereby, and the total area is estimated at about 1,800,000 acres, or the entire line.

The records of this office show that 575,844.56 acres have been patented for said railroad.

The list, now ready for submission for approval for patent, and referred to by Mr. Mendenhall, contains 23,578.08 acres.

Were it fully determined that the company is entitled to the full complement of lands granted for that portion of the road constructed before the expiration of the time named for the completion of the entire road, there would be, in my opinion, no valid objection to the approval of the list in question, as it is apparent from the above statement that the company has earned, by the construction of the 231 miles built prior to December 31, 1876, much more than the aggregate of the lands heretofore patented, plus those in the list under consideration. As, however, the whole question concerning grants which have "lapsed" by failure to complete the roads within the statutory period is now before Congress, it is my judgment that no steps should be taken, at present, looking to the patenting of further lands for the benefit of the grant in question.

Mr. Mendenhall's letter is herewith returned.

Very respectfully,

N. C. MCFARLAND,
Commissioner.

Hon. S. J. KIRKWOOD,
Secretary of the Interior.

N.

WASHINGTON, D. C., *September* 18, 1882.

SIR: On the 20th February last I had the honor to address your department, on behalf of the Wisconsin Central Railroad Company, upon the subject of receiving patents for lands earned by the construction of road prior to the expiration of the grant.

This communication was referred by your predecessor to the Commissioner of the General Land Office for a report as to the construction of the road. That report shows that the company had constructed within the limitation of the statute 231 miles of road, which entitled it to 1,400,000 acres of land; that only 575,844 acres have been

patented, and that the list of selections for which we ask approval and patent cover but 230,578 acres, leaving nearly 600,000 acres yet due the company for the road constructed in time, but which we cannot obtain because of the want of lands to satisfy it. The Commissioner adds to his report as follow: "Were it fully determined that the company is to have the full complement of lands granted for that portion of road constructed before the expiration of time there would be no valid objection to the approval of the list;" but he suggests that as the whole question concerning grants which have lapsed by failure to complete the road within the statutory period is now before Congress, no steps should be taken at present looking to the patenting of further lands for the benefit of the grant in question.

No action has been taken as yet by your department upon our application and said report, and we beg to again call your attention to the subject and to the following remarks:

As to our right to the lands earned by construction within the limitation we cannot believe you entertain a doubt. There is no room for argument on the subject. The grant itself decides it so and the courts have so held. The seventh section of the act (May 5, 1864) provides that as each 20 miles of road is constructed patents shall issue for the lands earned on said 20 miles, and so far as the road is completed. In section 9 it provides that if the road is not completed within 10 years "no further patents shall be issued to said company;" that is, no patents further than the company may have earned by construction—no further patents than are authorized to be issued by section 7, to wit, for the number of miles of road constructed within the time imposed. This is the strictest construction which can be given to the statute. Assume that the company is now before you for the first time asking for patents for lands earned by construction of road before expiration of grant, will it be held that because none had issued, none could issue because of such expiration, and thus that we must lose the whole? Yet the argument applies to the whole as to a part. Such reasoning makes the grant a mere matter of diligence in procuring patents and is too fallacious to stand.

That this is a grant *in presenti* needs not to be argued; that question is *stare decisis*. The title became perfect and indefeasible when the conditions subsequent were performed; and the department is directed to issue the patents upon the performance of such conditions.

To the extent of our present request the company has done its part. Every requirement of the statute has been fulfilled—we have located our line, built our road, and it has been accepted by the State; the title has become complete; the absolute fee to any and every concession or grant made by the act has vested; the Supreme Court of the United States has so decided in Schulenberg *vs.* Harriman, (24 Wall., 44); the court there goes even further and says, relative to the prohibition against further sales (patents in our case), "If the condition be not enforced *the power to sell continues as before the breach*, limited only by the objects of the grant and the manner of sale prescribed by the act." So in the matter of the Atlantic and Pacific Railroad Company the Attorney General expressed the opinion that the company is entitled to patents for lands earned by construction of the road *subsequent* to the expiration of the grant, and your department issued patents to it accordingly. Much stronger, then, is our present claim for patents for lands earned by construction prior to such expiration; clearly and indubitably earned before any forfeiture could attach; earned by a full compliance with every condition imposed by the government; so fully earned that our right cannot be taken away by any "Be it enacted" of Congress.

There is, then, no legal question for consideration; all conditions of the law have been complied with, and the only duty remaining to the department is purely ministerial, to wit, the issue of the patents.

We therefore ask that our patents be given us for these lands. The questions before Congress do not involve us in this respect, because it would be futile to so consider us. The questions there bear upon and are considered only as bearing upon that portion of grants not earned by construction prior to their expiration; and that body certainly does not desire or expect the department to withhold (because of the legislation they are considering) patents for lands completely earned and over which they have, and can have, no jurisdiction; lands, the title to which has, beyond peradventure, vested in the company.

We are urgently in need of the patents asked for and the delay in their issue is embarrassing to the compauy.

We therefore ask your attention to this matter at the earliest moment, and that you will authorize the issue of patents to us for all lands earned by construction of road prior to the date of expiration of the grant, December 31, 1876.

Very respectfully,

W. K. MENDENHALL,
Attorney for Wisconsin Central Railroad Company.

Hon. H. M. TELLER,
Secretary of the Interior.

N1.

DEPARTMENT OF THE INTERIOR,
Washington, October 2, 1882.

SIR: I herewith inclose letters from W. K. Mendenhall, esq., dated, respectively, February 20 and September 18, 1882, on behalf of the Wisconsin Central Railroad Company, in which a request is made for the patenting of lands earned by the construction of that railroad prior to the expiration of the grant.

By your letter of the 30th of March ultimo it appears that the road has received 575,844.56 acres, and that the lists ready for submission for approval contain 23,578.08 acres, and that these two amounts will fall short of the number of acres earned by the construction of 231 miles of road completed prior to December 31, 1876.

In the matter of the grant to the Wisconsin Central Railroad there is no question that the road was entitled to alternate sections so soon as progressive sections of the road should be completed. That being the case, I see no reason why the list mentioned in your letter should not be submitted to me for approval, and you are directed accordingly.

Very respectfully,

H. M. TELLER,
Secretary.

Hon. N. C. MCFARLAND,
Commissioner of the General Land Office.

N2.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 13, 1882.

SIR: Referring to your communication of the 2d ultimo, authorizing the submission to you for approval of lists of lands inuring to the grant for the Wisconsin Central Railroad, to the extent that said lands were earned by construction of road prior to the expiration of the grant, I submit herewith list No. 11, containing 43,280.99 acres within the granted ten-mile limits in the Eau Claire, Bayfield, and Wausau districts, Wisconsin.

Very respectfully, your obedient servant,

N. C. MCFARLAND,
Commissioner.

Hon. H. H. TELLER,
Secretary of the Interior.

P.

DEPARTMENT OF JUSTICE,
Washington, October 26, 1880.

SIR: Your letter of the 15th instant presents for my consideration the application of the Atlantic and Pacific Railroad Company for the appointment of three commissioners to examine a section of 25 miles of its road west from Albuquerque, N. Mex., under section 4 of the act of Congress of July 27, 1866.

The Atlantic and Pacific Railroad Company was created by and organized under the act of Congress above mentioned, and was granted the right of way and the public lands of the United States within certain defined limits from Springfield, Mo., through the Indian Territory and New Mexico, to the Pacific coast.

Before 1871, it appears that the company constructed its road from Springfield to the western boundary line of the State of Missouri, and this portion of the road was duly accepted by the President, and patents for the land issued. This action was in accordance with the provision of section 4 of the granting act, which provides that when the company shall have 25 consecutive miles of any portion of said railroad ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same; and if it shall appear that 25 consecutive miles of road have been completed in all respects required by the act, the commissioners shall so report to the President of the United States, and patents to lands, as provided for by the third section of the act, shall be issued to the company.

The company next completed 34 miles in the Indian Territory prior to 1871; but because the United States had not extinguished the Indian title, no steps were taken for the issuance of patents along the road in that Territory.

From the early part of the year 1871 down to August or September of the present year, no section or portion of the road was constructed by the company; in fact no work of any kind or description was done by the company on the road.

Section 8 of the act makes it a condition of each and every grant, right, and privilege given to the company, that the 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 main line of the whole road by July 4, 1878."

The company has not conformed to this condition, as it appears that for six years prior to July 4, 1878, no road was constructed; and, in addition, that for two years subsequent to that date no portion of the road was constructed.

The ninth section of the act recites that the conditional grants were made and accepted upon the further condition that "if the company make any breach of the conditions and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

By section 20 Congress has retained the right to add to, alter, amend, or repeal this act, having due regard for the rights of said railroad company.

Having in view the provisions and conditions of the granting act, and the failure on the part of the railroad company to perform the conditions prescribed in the manner recited, you request my opinion upon the following question:

"Is it within the power and the duty of the Executive to appoint commissioners to examine the section of road submitted by the Atlantic and Pacific Railroad Company, to accept the same if completed in all respects required by the act of July 27, 1866, and to cause patents to be issued to said company for lands situated opposite to and co-terminus with the section of road, if completed?"

As I think the grant to this railroad must be treated as a present grant, to be made afterwards definite, as from time to time the various portions of the road are completed, the only inquiry would seem to be whether or not the conditions upon which the company received the grant are in their nature conditions precedent or subsequent. If conditions precedent, the failure to perform such conditions would deprive the road of its right to make application for the benefits of the act, if, after such conditions were violated, it proceeded to build portions of the road. If conditions subsequent, then it would be necessary for the United States to take advantage of such conditions by acting under the ninth section of the act, and proceeding itself to do acts and things which might be safe or necessary to insure a speedy completion of the road, or by declaring a forfeiture of the grant by legislative action or by providing for enforcing the same by a judicial proceeding. If the United States were disposed to revest in itself or to enforce a forfeiture of the lands granted, it would be necessary to take some action indicative of that intention.

The case of Schulenberg *vs.* Harriman is apparently decisive of the present inquiry. That was the case of a grant of lands to the State of Wisconsin, to aid in the construction of a certain railroad within that State, by the act of June 3, 1856. The language of the first section of that act was, "That there be, and hereby is, granted to the State of Wisconsin," the lands specified. Similar language is found in the third section of the act of July 27, 1866, "That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company," &c. In that case the grant was made upon a condition that if the road be not completed within ten years "no further sale shall be made, and the lands unsold shall revert to the United States." The road had not been completed within the time required for its construction, which had not been extended, and Congress had passed no act nor provided for any judicial proceedings to enforce any forfeiture of the grant for failure to construct the road within the period prescribed. Upon this state of facts it was held that the grants to the State of Wisconsin were grants *in præsenti*, which acquired precision, as the route of the road became fixed by its location, and that the lands had not reverted to the United States, although the road was not constructed within the period prescribed, no action having been taken either by legislation or judicial proceedings to enforce a forfeiture of the grants.

The conditions in the present case must be held in view of this authority to be conditions subsequent. Apparently they are much more strongly so than in the case referred to. The section nine, in which they are found, distinctly contemplates that the United States will do some act and may do certain acts upon the breach of the conditions.

I am, therefore, of opinion that the grant to the railroad has not been forfeited by its failure to build its road within the time named in the act, no action by reason of its failure to perform the conditions having been taken by authority of Congress. It having then a present grant, even if it be treated as one liable to forfeiture, it has still a right to proceed to construct the road, and until in some form advantage shall

be taken of the breach of the conditions it would be the duty of the executive department to give it the benefit of the grant.

I am also of opinion, therefore, that it would be within the power and duty of the Executive to appoint commissioners to examine the section of road submitted by the Atlantic and Pacific Railroad Company, to accept the same if completed in all respects required by the act of July 27, 1866, and to cause patents to be issued to said company for lands situated opposite to and coterminus with the section of road if completed.

I have the honor in this connection to refer to the opinion delivered to your department by me, of the date of November 29, 1879 (upon which I understand the department has acted), in which the case of Schulenberg *vs.* Harriman, *supra*, was considered.

Very respectfully, your obedient servant,

CHAS. DEVENS,
Attorney-General.

Hon. CARL SCHURZ,
Secretary of the Interior.

R.

DEPARTMENT OF THE INTERIOR,
Washington, December 15, 1880.

SIR: I have the honor to submit herewith, for your consideration, the report of Messrs. Hoyt Sherman, J. E. Bloom, and A. B. Nichols, who were appointed by you commissioners to examine the sixth section of the railroad and telegraph line constructed by the Atlantic and Pacific Railroad Company. Said section begins at a point in township 8 north, range 2 east, near Isleta, at the junction with the New Mexico and Southern Pacific Railroad, runs westwardly, and ends at a point 50 miles from the place of beginning, all in the Territory of New Mexico.

The commissioners report said section to be built in "a workmanlike and creditable manner," and in substantial conformity with law and the instructions of this department. I therefore recommend that said section be accepted by you, and that patents for lands earned by the construction thereof be issued to said company, pursuant to the fourth section of the act approved July 27, 1866. (14 Stat., 295.)

Very respectfully,

C. SCHURZ,
Secretary.

The PRESIDENT.

S.

DEPARTMENT OF THE INTERIOR,
Washington, December 17, 1880.

SIR: I inclose herewith copy of letter addressed to the President by me, on the 15th instant, transmitting report of commissioners appointed by him to examine 50 miles of the Atlantic and Pacific Railroad, lying immediately westward of the Rio Grande, at Isleta, N. Mex., and recommending that the section (sixth) be accepted, and that the lands earned by the construction thereof be issued to the Atlantic and Pacific Railroad Company, together with copy of the President's indorsement thereon, approving the recommendations.

I also transmit herewith the map and profile of said section, which accompanied the report of the commissioners, that you may carry out the President's order.

Very respectfully,

C. SCHURZ,
Secretary.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

T.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 3, 1881.

SIR: By act of Congress approved July 27, 1866, certain lands were granted to aid in the construction of a railroad and telegraph line from the States of Missouri and

Arkansas to the Pacific coast, and the Atlantic and Pacific Railroad Company was incorporated and made the beneficiary. Section 8 of the said act provided that the company should commence work on the road within two years from its approval, build not less than 50 miles per year after the second year, and complete the whole line by July 4, 1878.

Section 9 enacted that if any of the conditions of the grant were broken, and continued so one year, "the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

The road has not been completed, but there has been no further action by Congress concerning the grant.

There is no provision in the granting act for a forfeiture of the same. In the case of Schulenberg *et al. vs.* Harriman (21 Wallace, 44) the Supreme Court of the United States decided, concerning a grant for railroad purposes, which provided in case of a breach of its conditions that the lands should revert to the United States, that there could be no reversion or forfeiture without judicial proceedings or legislative action, and that in the absence of such proceedings or action the title remained unimpaired in the grantee.

It is clear that the same principle will apply with greater force to the grant to the Atlantic and Pacific Railroad Company, which does not provide for any reversion of the lands nor for a forfeiture of the grant. With your letter of December 18, 1880, you transmitted a map and profile of the road as constructed from a point in township 8 north, range 2 east, near Isleta, westwardly, a distance of 50 miles, all in the Territory of New Mexico.

Your letter also transmitted a copy of the letter addressed by you to the President on the 15th ultimo, transmitting the report of commissioners appointed to examine said section of road, recommending its acceptance, and that the lands earned by the construction aforesaid be patented to the company. The copy of your letter to the President bears a copy of his indorsement, dated the 17th ultimo, approving your recommendation. Thus the grant is fully recognized by the courts and the Executive as being in full force and effect. By letter of December 8, 1880, the register at Santa Fé transmitted a list of selections by the company, duly executed, of lands within its "granted" limits. The list was received in this office the 14th ultimo.

It is the rule to hold lists of selections by railroad companies five months before submitting lists for approval upon which to issue patents, in order that full protection may be given to valid adverse claims.

It has been represented to me that it is very desirable that the company shall receive patent at an early day for the lands in question, to show the recognition of the grant.

Under the circumstances I think the request a reasonable one, and have concluded to waive the stated rule, inasmuch as the lands in question have been long surveyed.

I submit herewith, for your approval, list No. 1 of lands in the Santa Fé district, New Mexico, containing 23,037.36 acres.

The records and returns, so far as received, have been carefully examined, and the lands included in the list are found free from any conflict or adverse claim.

Very respectfully, your obedient servant,

J. A. WILLIAMSON,
Commissioner.

Hon. C. SCHURZ,
Secretary of the Interior.

DEPARTMENT OF JUSTICE,
Washington, D. C., June 15, 1882.

SIR: By a letter dated the 5th of January last, your predecessor submitted to me a number of questions arising upon an application of the New Orleans Pacific Railway Company for certain lands claimed under the land grant made to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act of Congress of March 3, 1871, chapter 122.

The land grant mentioned is contained in the twenty-second section of that act, which provides:

"That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have the right to connect, by the most eligible route to be selected by said company, with the said Texas Pacific Railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with the said Texas Pacific Railroad Company at its eastern termi-

nus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this act granted in the State of California to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor, and opened for settlement and pre-emption, upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company, within said State of California: *Provided*, That said company shall complete the whole of said road within five years from the passage of this act."

The eastern terminus of the Texas Pacific Railroad, as fixed by the same act, was a point at or near Marshall, Tex.

The New Orleans, Baton Rouge and Vicksburg Railroad Company was incorporated by an act of the legislature of Louisiana passed December 30, 1869, which authorized it to construct and operate a railroad "from any point on the line of the New Orleans, Jackson and Great Northern Railroad, within the parish of Livingston, running from thence to any point on the boundary line dividing the States of Louisiana and Mississippi," the route here indicated lying east of the Mississippi River. It was also authorized to construct and operate a branch railroad from its main line (above described) to the city of Baton Rouge; and for the purpose of connecting its railroad with the railroads of other companies, &c., it was furthermore authorized "to construct, maintain, and use, by running thereon its engines and cars, such branch railroads and tracks as it may find necessary and expedient to own and use;" and such branch railroads were, for all the purposes of the act, to be deemed and taken to constitute a part of the main line of its railroad within the State of Louisiana.

On November 11, 1871, that company filed in the General Land Office a map designating the general route of a road projected thereby from Shreveport, by way of Alexandria, to Baton Rouge, and thereupon a withdrawal of the public lands along the same was ordered, which became effective in December following.

Subsequently by an act of the legislature of Louisiana, passed December 11, 1872, the same company was given "full power and authority to commence the construction of their road in the city of New Orleans or Shreveport, or at any intermediate point on their line of road, as may best suit the convenience of said company and facilitate the speedy construction of a continuous line from the city of New Orleans to the city of Shreveport, or perfect railroad communication with the Texas Pacific Railroad, or any other railroad in Northwestern Louisiana, at or near the Louisiana State line: *Provided, however*, That the said company shall construct the line of its road between the city of New Orleans and the city of Baton Rouge on the east side of the Mississippi River, to the corporate limits of the said city of Baton Rouge, or adjacent thereto."

In the mean time, by the act of Congress of May 2, 1872, chapter 132, the Texas and Pacific Railway Company (formerly styled the Texas Pacific Railroad Company) was "authorized and required to construct, maintain, control, and operate a road between Marshall, Texas, and Shreveport, Louisiana, or control and operate any existing road between said points, of the same gauge as the Texas and Pacific Railroad." The same act further provided that "all roads terminating at Shreveport shall have the right to make the same running connections, and shall be entitled to the same privileges, for the transaction of business in connection with the said Texas and Pacific Railway, as are granted to roads intersecting therewith."

On February 13, 1873, a second map was filed in the General Land Office by the New Orleans, Baton Rouge and Vicksburg Railroad Company, designating the general route of a road projected thereby from New Orleans to Baton Rouge, and a withdrawal of the public lands along the same was ordered, which took effect in April, 1873. The route between those places, those designated, lies on the east side of the Mississippi River. That company has not constructed any part of its road, either on the route between New Orleans and Baton Rouge or on the route between the latter place and Shreveport; nor, indeed, has there been a *definite location* of its road anywhere between the points mentioned. Nothing beyond the designation of the general route thereof appears.

Pursuant to a resolution of its board of directors, adopted December 29, 1880, all the right, title, and interest of that company in and to the aforesaid grant of public lands made by the act of March 3, 1871, were deeded by it to the New Orleans Pacific Railway Company. This action of the board of directors and officers of the former company was afterwards approved and ratified by the stockholders thereof at a meeting held in December, 1881.

The New Orleans Pacific Railway Company was originally incorporated under the general laws of the State of Louisiana in June, 1875. Its charter was subsequently amended by acts of the Louisiana legislature, passed February 19, 1876, and February 5, 1878. It is thereby authorized to construct a railroad "beginning at a point on the Mississippi River, at New Orleans or between New Orleans and the parish of Iberville, on the right bank of the Mississippi, and Baton Rouge, on the left bank, &c.,

or from any point within the limits of this State, and running thence toward and to the city of Shreveport," which is made its northwestern terminus.

The route of this company as projected is understood to extend from New Orleans to Baton Rouge, and thence by way of Alexandria to Shreveport. Between New Orleans and Baton Rouge it lies on the west side of the Mississippi River; while the designated route of the New Orleans, Baton Rouge and Vicksburg Railroad Company, between the same points, lies on the east side of that river. Between Baton Rouge and Shreveport its general course and direction correspond, in the main, with the route designated by the last-named company. It is throughout its entire length from New Orleans to Shreveport within the limits of the before-mentioned withdrawals of public lands.

In October, 1881, the president of the New Orleans Pacific Railway Company made affidavit that three sections of its road were then completed and ready for examination by the government; whereupon a commissioner was appointed to examine the same, the result of whose examination appears in a report made by him to the Secretary of the Interior, under date of the 26th of that month. One of the sections embraces 68 miles of road, beginning on the west bank of the Mississippi River, opposite New Orleans, and ending near the town of Donaldsonville; another embraces 20 miles of road near Alexandria; and the third embraces 50 miles of road terminating at Shreveport. For each of these sections lands are claimed by that company under the aforesaid land grant, as assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company.

No map of definite location of any portion of its road has been filed, other than those of constructed portions.

It appears that in February, 1881, the New Orleans Pacific Railway Company purchased from Morgan's Louisiana and Texas Railroad and Steamship Company, the road constructed on the west bank of the Mississippi River by the New Orleans, Mobile and Texas Railroad Company, from Westmego to White Castle, a distance of 68 miles, and that the same has become a part of the main line of the road of the New Orleans Pacific Railway Company.

The following are the questions submitted:

"1. Was the grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company, a grant *in præsenti?*

"2 Had the New Orleans, Baton Rouge and Vicksburg Railroad Company, at the date of its alleged transfer of lands to the New Orleans Pacific Railway Company, such an interest in the lands, under said act, as was assignable?

"3. Is the New Orleans Pacific Railway Company, such a successor to or assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company as is contemplated by said act?

"4. Should it appear that the 68 miles of the New Orleans, Mobile and Texas Railroad was constructed *prior* to the act of March 3, 1871, granting lands to *aid in the construction* of the New Orleans, Baton Rouge and Vicksburg Railroad, can the New Orleans Pacific Company (its assignee) claim any benefit from the grant? Or in case of such prior construction, and the nonconstruction of any portion of the New Orleans, Baton Rouge and Vicksburg Road, has the purpose for which the grant was made failed, and the grant consequently lapsed?

"5. If the New Orleans, Mobile and Texas Road was constructed, subsequently to the date of said act, is so much of its road as is now owned by the New Orleans Pacific Company such a road as is contemplated for acceptance by the President within the meaning of said act, and may patents issue to the latter for lands opposite to and co-terminous with such constructed portion of road?"

These questions are accompanied by a request for an opinion upon such other questions of law as may suggest themselves touching the transfer of said land grant, to which reference is above made.

Of the above-stated questions the first three may be considered together in connection with the following inquiry, which presents itself at the outset, whether the *assent of Congress* to the transfer made by the New Orleans, Baton Rouge and Vicksburg Railroad Company of all its interest in said land grant to the New Orleans Pacific Railway Company is necessary (by reason of anything in the provisions of the grant itself) to entitle the latter company to the benefit of said grant in aid of the construction of the road projected by it.

The act of March 3, 1871, passed to the New Orleans, Baton Rouge and Vicksburg Railroad Company a *present interest* in a certain number of alternate sections of public lands per mile within the limits there prescribed. Its language is "there is hereby granted to the said company" the number of alternate sections mentioned; words which import a grant *in præsenti*, and not one *in futuro*, or the promise of a grant. (97 U. S. Rep., 496.) But the grant thus made is in the nature of a float. It is of sections to be afterward located, their location depending upon the establishment of the line of the road. Until this is definitely fixed the grant does not attach to any specific tracts of land. Upon the line of the road being definitely located the grant then

first acquires precision, and the company becomes invested with an inchoate title to the particular lands covered thereby, which can ripen into a perfect title only as the construction of each section of 20 miles of road is completed and approved, when the right to patents for the lands opposite to and coterminous with such constructed section accrues.

The *proviso* in the grant that the company shall complete the whole of its road within five years from the date of the act is a condition subsequent, the failure to perform which does not *ipso facto* work a forfeiture of the grant, but only gives rise to a right in the government to enforce a forfeiture thereof. Yet in order to enforce a forfeiture such right must be asserted by a judicial proceeding, authorized by law, or by some legislative action amounting to a resumption of the grant. (Schulenberg *vs.* Harriman, 21 Wall., 44.) Hence, until advantage is taken of the non-performance of the condition, under legislative authority, the interest of the grantee in the grant remains unimpaired thereby.

Such being the nature and effect of the grant and its accompanying condition, and no action having been taken either by legislation or judicial proceedings to enforce a forfeiture thereof, it follows that at the period of said transfer by the New Orleans, Baton Rouge and Vicksburg Railroad Company this company was invested with a present interest in the number of alternate sections of public lands per mile granted by the act of 1871, notwithstanding it was already in default in the performance of the condition referred to, and that it still retained a right to proceed with the construction of the road in aid of which the grant was made until advantage should be taken of the default. But as it had not then definitely fixed the line of its road, although a map designating the general route thereof was duly filed, that interest did not attach to any specific tracts of land, but remained afloat, as it were, needing a definite location of the road before it could become thus attached. Was the interest here described assignable to another company, so as to entitle the latter to the benefit of the grant in aid of the construction of *its* road between the places named therein, without the assent of Congress?

Doubt has perhaps arisen on this point in view of the fact that in one or two instances it has been thought expedient to obtain legislation by Congress confirming or authorizing a similar assignment (see section 2 of the act of March 3, 1865, chapter 88, and section 1 of the act of March 3, 1869, chapter 127), and also in view of the adverse ruling of this department in the case of the Oregon Central Railroad Company. (13 Opin., 382.) However, a similar assignment made in 1866 by the Hannibal and Saint Joseph Railroad Company to the Pike's Peak Railroad Company, afterward known as the Central Branch Company, was held to be valid by Attorney-General Stanbury in an opinion given to the Secretary of the Treasury under date of July 25, 1866.

In the latter case the Hannibal and Saint Joseph Company, which was incorporated by the State of Missouri, with authority to construct a railroad between Hannibal and Saint Joseph, within that State, was, by the Pacific Railroad act of July 1, 1862 (section 13), authorized to "extend its road from Saint Joseph, via Atchison, to connect and unite with the road through Kansas, * * * and may for this purpose use any railroad charter which has been or may be granted by the legislature of Kansas," &c., and by the fifteenth section of the same act it was provided that "wherever the word company is used in this act it shall be construed to embrace the words their associates, successors, and assigns the same as if the words had been properly added thereto." Subsequently, in 1863, an assignment was made by that company of all its rights under said act (which included an interest in both a land and a bond subsidy) to the Atchison and Pike's Peak Railroad Company, a company previously organized under a charter granted by the legislature of Kansas. The latter company having constructed a section of 20 miles of the proposed road west from Atchison claimed the benefit of the grant made to the Hannibal and Saint Joseph Company, as its assignee, and this claim was recognized and allowed, in accordance with the opinion of the Attorney-General. It will be observed, however, that the Hannibal and Saint Joseph Company was authorized to "use any railroad charter which has been or may be granted by the legislature of Kansas," and this, together with the provision in the fifteenth section quoted above, may have been regarded as sufficient to sustain the assignment.

In the case of the Oregon Central Railroad Company, mentioned above, a grant of a right of way through the public lands, and also of alternate sections thereof, was made to that company, "and to their successors and assigns," by the act of May 4, 1870, chapter 69, for the purpose of aiding in the construction of a railroad and telegraph line between certain places in Oregon. In August following an instrument was executed by the company assigning all its interest in the grant to the Willamette Valley Railroad Company, and thereupon the question arose whether the grant was susceptible of being thus transferred. The Attorney-General (Mr. Akerman), to whom the question was submitted, after reviewing the various provisions of the act, some of which (see section 5) imposed certain duties and required certain important acts to be performed by the company, decided in the negative, holding that, upon considera-

tion of those provisions, the Oregon Central Company was alone within the contemplation of Congress in respect of the donation made and duties imposed by that act. The words "their successors and assigns," as used in the act, were regarded as words of limitation merely.

But the grounds upon which that decision appears to have been based are not found to exist in the case now under consideration. Here a grant of a certain number of alternate sections of public lands per mile is made to the New Orleans, Baton Rouge and Vicksburg Railroad Company, its successors and assigns, in and of the construction of a road from New Orleans, by the route indicated, to connect with the eastern terminus of the Texas and Pacific Railroad, which lands are required to be "withdrawn from the market, selected, and patents issued therefor, and opened for settlement and pre-emption upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company." The grant is coupled with no special duties or trusts, for the performance of which there is reason to believe the particular company named therein was more acceptable to Congress than any other. Its purpose is to secure the construction of a railroad between the points designated, and whether this purpose be fulfilled by that company or by another company must be deemed unimportant in the absence of any provision indicative of the contrary. The interest derived by the grantee, though it remain only afloat, is a vested interest, and it is held under the same limitations which apply after it develops into an estate in particular lands until extinguished by forfeiture for non-performance of the condition annexed to the grant. I perceive no legal obstacle arising out of the grant itself to a transfer of such interest by the grantee to another company, and should the latter construct the road contemplated agreeably to the requirements of the grant, and thus accomplish the end which Congress had in view, I submit that it would clearly be entitled to the benefits thereof.

The question of the assignability of the interest of the grantee would be more difficult if, after definitely locating the line of its road, and thus attaching the grant to particular lands along the same it was proposed to transfer that interest to another company for the benefit of a road to be constructed by the latter on a different line, though following the general course of the other road. But in the present case the facts give rise to no such difficulty. The grant had not previous to the transfer become thus identified with a particular line of road, and was thereafter susceptible of location upon the line of the road projected by the assignee (the New Orleans Pacific Company), provided this road met the requirements of the grant in other respects, as to which no doubt is suggested.

My conclusion is that the assent of Congress to the assignment made by the New Orleans, Baton Rouge and Vicksburg Railroad Company, as above, is not necessary in order to entitle the assignee to the benefit of the land grant in question.

The remaining questions relate to the 68 miles of railroad formerly belonging to the New Orleans, Mobile and Texas Railroad Company, but now owned by the New Orleans Pacific Company, and made a part of its main line between New Orleans and Baton Rouge.

The land grant in question was, as its language imports, made in *aid of the construction* of a railroad between certain termini, contemplating a road to be constructed, not one already constructed. It has not been the policy of Congress thus to aid constructed roads. Had a constructed road existed at the date of the grant, which extended from one terminus to the other, and afterward the New Orleans, Baton Rouge and Vicksburg Railroad Company, instead of entering upon and completing the construction of a road, had purchased the road already constructed, this, it seems to me, would not have satisfied the purposes of the grant so as to entitle the company to the benefit thereof. The same objection would apply where the constructed road extended over only a part of the route contemplated by the grant. So far as I am advised, the action of the government hitherto has accorded with this view. On the other hand, if such road was constructed subsequently to the date of the grant, and is owned by the grantee or the assignee of the latter, I see no ground for excluding it from the benefit of the grant should it otherwise fulfill the requirements thereof.

Agreeably to the foregoing views, and in direct response to the several questions submitted, I have the honor to reply as follows: The first, second, and third questions I answer in the affirmative. The fourth question (including the alternative added thereto) I answer in the negative. The fifth question I answer in the affirmative—assuming, as I do, the company named therein to be an assignee of the grantee in the act referred to.

I have the honor to be, very respectfully,

BENJAMIN HARRIS BREWSTER,
Attorney-General.

Hon. H. M. TELLER,
Secretary of the Interior.

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