48TH CONGRESS, 1st Session. SENATE. Ex. Doc. No. 88.

LETTER

FROM

THE SECRETARY OF THE INTERIOR,

TRANSMITTING,

In compliance with Senate resolution, December 20, 1883, report of Commissioner of the General Land Office relative to lands certified or patented to railroad companies since December, 1875.

FEBRUARY 4, 1884.—Referred to the Committee on Public Lands and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, January 30, 1884.

SIR: In answer to Senate resolution of the 20th ultimo requesting me to inform the Senate concerning lands certified or patented for the benefit of railroad companies since December, 1875, in alleged contravention of a decision of the Supreme Court of the United States of said date, &c., I have the honor to inclose herewith copy of the report of the Commissioner of the General Land Office on the subject, under date of yesterday, with the accompanying papers.

Very respectfully,

H. M. TELLER,
Secretary.

The PRESIDENT OF THE SENATE PRO TEMPORE.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 29, 1884.

SIR: I have to acknowledge the receipt, by reference from you under date 27th ultimo, of a resolution of the Senate, on the 20th ultimo, herewith returned. I am directed to report to you the information called for.

Under date November 16, 1877, my predecessor addressed a letter (copy herewith, marked A) to the Department touching the right of railroad companies to indemnity for lands sold or reserved prior to the dates of the granting acts. To this Mr. Secretary Schurz replied, under date December 26, 1877. (Copy of letter herewith, marked B.)

With his letter of October 16, 1880 (copy herewith, marked C), Mr. Secretary Schurz transmitted a copy of an opinion of the hon. Attorney-General, dated June 5, 1880, upon the right to such indemnity (copy herewith, marked D).

From December 26, 1877, to October 16, 1880, the rule of this office was to allow indemnity only for lands sold, reserved, &c., between the date of the granting act and the date of definite location of the line of the road. During this period patents for indemnity lands were issued as follows:

Central Pacific Railroad Company, successors to the California and Oregon Railroad Company, act of July 25, 1866 (14 Stat., 239), 263,868.79 acres.

Saint Joseph and Denver City Railroad Company, 12,218.73 acres.

Since October 16, 1880, the rule has been to allow indemnity for lands sold or entered prior to the dates of definite location of the roads without regard to whether such sales or entries were made before or after the dates of the granting acts.

Under this rule indemnity for lands sold or entered prior to the dates of the granting acts has been allowed as follows:

State of Alabama for the Alabama and Chattanooga and other railroad companies under the act of June 3, 1856 (11 Stat., 17), 47,810.62 acres.

Central Pacific, successor to the California and Oregon Railroad Company, act of July 25, 1866 (14 Stat., 239), 1,267.92 acres.

Saint Paul, Minneapolis and Manitoba Railway Company, formerly Saint Paul and Pacific, Saint Vincent Extension Railroad Company, acts of March 3, 1857 (11 Stat., 195), March 3, 1865 (13 Stat., 526), and March 3, 1871 (16 Stat., 588), 81,938.96 acres.

Southern Pacific Railroad Company, main line, act of July 27, 1866, Sec. 18 (14 Stat., 299), 75,874.40 acres.

Southern Pacific Railroad Company, branch line, act of March 3, 1871, Sec. 23 (16 Stat., 579), 6,084.74 acres.

State of Minnesota for the Winona and Saint Peter Railroad Company, acts of March 3, 1857 (11 Stat., 195), and March 3, 1865 (13 Stat., 526), 400 acres.

Wisconsin Central Railroad Company, act of May 5, 1864 (13 Stat., 66), 23,483.57 acres.

State of Alabama for the South and North Alabama, formerly Tennessee and Alabama Central Railroad Company, act of June 3, 1856 (11 Stat., 17), 1,362.98 acres.

The above are approximate amounts, as in many cases the lists or patents contain lands allowed as indemnity for lands lost between the dates of the granting act and definite location of the road also; and, owing to the fact that many tracts are fractional parts of sections, for which tracts of the same area cannot always be found liable to be taken as indemnity therefor, there is usually a difference of a few acres between the total amount of indemnity allowed and the total area of the tracts designated by the selecting agents as lost to the grants.

The amount allowed the Saint Paul, Minneapolis and Manitoba Company, above stated, is in lieu of lands lost prior to the passage of the act of March 3, 1871, which authorized the construction of the road upon a different line from that provided for in the granting acts of 1857 and 1865.

In addition to the amount patented under the grant for the branch line of the Southern Pacific Railroad above stated, 10,529.66 acres of land have been patented as indemnity for said grant, but as the company was not required to designate the lands for which this indemnity was claimed, it is impossible to determine whether any part thereof was in lieu of lands lost prior to the date of the granting act.

It is still the rule in this office to allow indemnity for lands lost prior

to the date of the granting act, except in the case of a reservation subsisting at that date, as well as for lands lost between said date and that of the definite location of the road.

Very respectfully,

N. C. McFARLAND,
Commissioner.

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

A.

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 shows 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 aggregates 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 say: "* * * 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 lists 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 patented 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 fees prescribed 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.

B.

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, say:

"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., 56), 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 re-

quire 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.

C.

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 land in place as distinguished from grants in 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 seem 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.

D.

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 alteraate 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 foom 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 further 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 20 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 undoubtedly authority, and it must be held, therefore, that all lands reserved to the United States by any 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 or 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 pre-

vious 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 3 1865 section 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.