48TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 1663.

# FORFEITED GRANTS ATLANTIC AND PACIFIC RAILROAD COMPANY.

MAY 28, 1884.—Referred to the House Calendar and ordered to be printed.

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

## REPORT:

[To accompany bill H. R. 7162.]

*The Committee on the Public Lands, to whom were referred sundry bills for the forfeiture of the land grant to the Atlantic and Pacific Railroad Company, submit the following report:*

The grant made to the Atlantic and Pacific Railroad Company is, according to the estimate made by the company, the largest land-grant ever made to any corporation in this country, the estimated number of acres being 49,244,803—an empire in extent.

The act making this great grant was approved July 27, 1866. (14 Stat. at Large, 292.) By this act the Atlantic and Pacific Railroad Company was authorized and empowered to lay out and construct a continuous railroad and telegraph line, beginning at the town of Springfield, in the State of Missouri; thence to the western boundary-line of said State, and thence, by the most eligible railroad route as should be determined by said company, to a point on the Canadian River; thence to the town of Albuquerque, on the river Del Norte, and thence, by way of the Agua Frio, to the headwaters of the Colorado Chiquita; thence, along the thirty-fifth parallel, to the Colorado River, and thence to the Pacific Ocean, with a branch diverging at a point where the main line strikes the Canadian River, running eastwardly to a point on the western boundary-line of the State of Arkansas, at the town of Van Buren; thus the main line passing through the Indian Territory, Texas, New Mexico, Arizona, and California, a distance of more than 2,000 miles.

The second section of said act grants to said company the right of way over the public lands to the extent of 100 feet on each side of said road, and an additional amount of land for depots, &c.

The third section provides "that there be and hereby is granted" to said company, for the purpose of aiding in the construction of its road and telegraph line, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line through the Territories of the United States, and ten alternate sections per mile on each side of said railroad whenever it passes through any State. And in case any lands within this limit were disposed of by the Government, the company was to have the right to select other lands in lieu thereof in alternate odd-numbered sections, not more than 10 miles beyond the limits of said alternate sections, and not including the reserved numbers.

The fourth section of said act provides that whenever said company shall have 25 consecutive miles of any portion of said railroad and telegraph line 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 the same has been completed in a good, substantial, and workmanlike manner the commissioners shall so report, under oath, to the President of the United States, and patents of lands shall be issued to said railroad company confirming to said company the right and title to said lands situate opposite to and coterminous with said completed section of said road. And the same shall be done as often as any 25 consecutive miles are completed.

The sixth section provides that the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, after the *general route* shall be fixed, and as fast as may be required by the construction of said railroad; and that the odd sections of land granted shall not be liable to sale or entry or pre-emption *before* or *after* they are surveyed, except by said company, as provided by said act.

The eighth and ninth sections set forth the principal conditions on which said grant is made.

The twelfth section provides that the company shall accept the terms and conditions of the grant within two years after the passage of the act by depositing in the office of the Secretary of the Interior such acceptance in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained.

These are the only sections of the act which need be referred to at this time for the purposes of this report. Congress passed an act April 20, 1870, to enable the company to mortgage its road which will be considered further on.

The material facts are as follows:

The company accepted the grant by depositing in the Interior Department its acceptance in writing on the 27th day of November, 1866.

By the sixth section of said act, as has already been observed, it is provided that the company shall fix the general route of its road, and when this was done the President of the United States was to cause the lands to be withdrawn, &c.

A map of the general route of said road was filed in the Interior Department December 17, 1866, from Springfield, in the State of Missouri, to the west line of said State, and the public lands embraced within the limits of said grant were withdrawn to the extent or coterminous with this part of the located route.

It is a fact that should be observed, that no further map of the general route was filed until December 2, 1871, more than five years after the passage of the granting act. And the first map of definite location was not filed in the Interior Department until December 10, 1870, and that extended only from Springfield to Neosho, in the State of Missouri, and was filed more than four years after the date of the granting act, and more than two years after the construction of said road was to have been commenced, and after two years of the time had elapsed during which it was required by the granting act to complete not less than 50 miles of its road each year. It is claimed by the company that the construction of the road was commenced July 4, 1868. But the affidavits of the chief engineer, on file in the Interior Department, show that the first 25 miles of the road was not completed until September 27, 1870, being that portion of the road running west from Spring-

field, in the State of Missouri. And only 125 miles of the road was completed within the time fixed for the completion of the whole of the main line, leaving unfinished more than 2,000 miles; thus showing that if the construction of the road was commenced on July 4, 1868, it was only done for the purpose of a technical compliance with that condition, as no substantial part of the road, as we have already shown, was completed until about September, 1870, thereby proving that the company was guilty at the very beginning of two flagrant violations of the conditions of its contract with the Government, in not completing at least 50 miles each two years after the date when the work was to commence and not having completed the main line within the time fixed. The 125 miles was not completed until October 14, 1871. In November, 1870, this company purchased from the Saint Louis and San Francisco Railway Company the latter's railroad running from a point near Saint Louis to Springfield, in the State of Missouri. This was done under the pretext of securing an eastern outlet. The price agreed to be paid was $10,000,000, which was secured by mortgage on the property so purchased, and that part of the grantee's road together with the land grant lying in the State of Missouri. A year after this purchase the company became so much embarrassed financially that it stopped the further construction of its road and afterwards made default in the payment of interest on its said mortgage indebtedness. And the said mortgage was foreclosed, and afterwards, on September 14, 1876, the entire mortgaged property was sold to William F. Buckley, and by him conveyed, November 2, 1876, to the Saint Louis and San Francisco Railway Company. Thus this latter company again became the owner of the property it had sold and also that part of the road and land grant belonging to the Atlantic and Pacific Company lying in the State of Missouri, leaving the latter company the owner of but 34 miles of completed road at the date of said sale. And this is the only portion of said road the company built west of the western line of the State of Missouri. And this is operated and controlled by the Saint Louis and San Francisco Railway Company. This latter company built during the last year 65 miles of road over the line of the Atlantic and Pacific west from Vinita and and is now operating the same. As has been stated the Atlantic and Pacific company stopped the construction of its road in the year 1871 and no more of its road was completed until November, 1882, more than eleven years after it had suspended work and more than four years after the time when the main line should have been completed by the terms of the granting act. And said company was utterly powerless to complete any further portion of its road when the Atchison, Topeka and Santa Fé and the Saint Louis and San Francisco Railroad companies for the purpose of being able to completely control the Atlantic and Pacific Company and its imperial land grant, and to ultimately become the owner of all its property, entered into a contract with the latter company for the completion of that part of said road from Albuquerque, N. Mex., to the Atlantic Ocean, known and designated as the western division. This tripartite agreement was entered into January 31, 1880, and provided for the immediate completion of the said western division.

To provide the money necessary for this construction, early in 1880, a first mortgage, to secure an issue of bonds not exceeding $25,000 per mile, was placed upon the entire railroad, franchise, and land grant of the Western Division; and an income mortgage to secure an issue of income bonds, not exceeding $18,750 per mile upon this division, was also executed. Should the net earnings of the Western Division prove insufficient to meet the interest upon those first-mortgage bonds, the

Saint Louis and San Francisco Railway Company and the Atchison, Topeka, and Santa Fé Railroad Company have guaranteed the same to the extent of 25 per cent. of their gross earnings upon all business interchanged by them respectively with the said Western Division.

In April, 1880, $10,000,000 of the first-mortgage bonds and $7,500,000 of the income bonds of this division were sold by subscription at par for the first-mortgage bonds to parties holding rights under the agreement. A second subscription of $15,000,000 firsts and $11,250,000 incomes of the Western Division was offered the same parties by circular dated January 20, 1882, and promptly subscribed in full; but before allotment all subscriptions were reduced by the board of directors February 28, 1882, to 40 per cent. of the original amount—that is, to $6,000,000 firsts and $4,500,000 incomes, in accordance with the right reserved by the terms of the subscription.

Should the net proceeds of these subscriptions prove to be insufficient to complete the road, and pay the interest upon the first-mortgage bonds during construction, arrangements have been made with the Atchison, Topeka and Santa Fé Railroad Company and the Saint Louis and San Francisco Railway Company, which own nearly all the capital stock of this company, to advance any deficit, share and share alike, in the form of a loan, to be repaid hereafter.

And a first mortgage was also executed on the 1st day of March, 1882, on that portion of the road between the west line of the State of Missouri, near Seneca, to the town of Albuquerque on the Rio Grande River, in the Territory of New Mexico, called the Central Division, to secure the payment of bonds to the amount of $25,000 per mile for that part of the road.

These bonds were all taken, and are now owned by the parties interested in the Atchison, Topeka and Santa Fé and the Saint Louis and San Francisco companies, and the capital stock is now owned by these two companies; and the Atlantic and Pacific Road, and all the property, rights, and franchises of the company, are virtually owned and controlled by these two corporations. They hold the mortgage interests complete, all of the road which is completed, and operate it after it is so completed. We believe that the tripartite agreement above referred to was entered into with a full understanding by all the parties that the Atlantic and Pacific was to maintain a nominal existence merely so as to enable these two corporations to secure the benefit of the land grant to the extent they desire under the act passed by Congress April 21, 1871, to enable the Atlantic and Pacific Company to mortgage its road. They caused the mortgages named to be executed, and the bonds to be issued, for the individuals composing these two companies owned the capital stock of the Atlantic and Pacific Company, thus giving them complete control of the latter company. They bought the bonds so issued, and now own them, and these corporations guaranteed their payment. They are, therefore, both debtor and creditor in this transaction. And they are now only completing such parts of said road as suits their selfish desires, in securing such parts of the land grant as may be coterminous therewith at the date of the declaration of forfeiture by the Government. Since entering into this tripartite agreement they have completed 559 miles of the Western Division, extending west from Isleta Junction on the Atchison, Topeka and Santa Fé Railroad to the Colorado River, near the Needles. At this latter point connection is formed with the Southern Pacific Railroad, and running arrangements have been entered into with the latter road, extending to the city of San Francisco. Whether the road will ever be completed west of its present

terminus we do not know. But we do know that the lands have been withdrawn for more than fourteen years from homestead pre-emption and entry the whole length of the road, and even beyond what was contemplated by the granting act. The act required the company to construct its road on the most practicable and eligible route along the thirty-fifth parallel of north latitude to the Pacific Ocean. This fixed the western terminus of the road, as we believe, at or near the point where the thirty-fifth parallel intersects the Pacific Ocean. But instead of filing its map of definite location, in accord with this, when it crossed the east line of the State of California, it left the thirty-fifth parallel and passed up the Pacific coast, and terminated the location near the thirty-eighth parallel of north latitude at the city of San Francisco; and strange as it may seem to some, the Assistant Attorney-General of the United States, W. H. Smith, sustained the right of the company to do so in a written opinion delivered March 16, 1874, which was confirmed by the then Secretary of the Interior, C. Delano. Secretary Cox, a former Secretary, denied the company this right in a written opinion to the Commissioner of the General Land Office, delivered on November 11, 1869. He said:

> I cannot recognize the claim of the Atlantic and Pacific Railroad Company to a reservation of lands upon the route in question. The act already cited (July 27, 1866), upon which they rely, does not, as I construe it, make them a grant of lands from the point at which the road shall strike the Colorado River to San Francisco.

We concur in the opinion of Secretary Cox. He is a gentleman of high legal attainments, and was an honest and faithful officer. But his opinion was overruled, as we have shown, and a vast area of public land was added to this already magnificent grant. The amount of land withdrawn in the State of California on account of this grant amounts to 6,855,040 acres, embracing some of the most valuable lands in the State.

And a summary of these facts shows:

1st. That the Atlantic and Pacific Company never completed but 34 miles of the road which it now claims to own.

2d. That at the time when the main line should have been. completed (July 4, 1878), there was uncompleted 2,267 miles of that line.

3d. That said company at no time since its creation has been, and is not now, able to complete the road.

4th. That the stockholders of the Atchison, Topeka and Santa Fé and the Saint Louis and San Francisco Railroad companies own most of its capital stock.

5th. That these corporations caused the mortgages to be executed on the franchises, rights, and property, including the land grant, and caused the bonds to be issued and guaranteed their payment, and took the bonds when so issued and now hold them.

6th. That they virtually own and control the Atlantic and Pacific Company and all its property, together with its mortgage and bonded indebtedness; and are holding them and allowing the company to maintain a mere nominal existence.

We have now given a brief history of the facts connected with this grant from its beginning to the present time, passing over a period of nearly eighteen years and extending nearly eight years beyond the time when the main line should have been completed to enable them to control the land grant at pleasure under their construction of the law.

The rules of law governing this grant are similar to those governing other grants heretofore reported by your committee.

The granting act in its main features is almost an exact copy of the act making the grant to the Northern Pacific Company, and what we said in that case is also applicable in this.

The third section of the act contains the following language:

That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company * * * every alternate section of public lands not mineral designated by odd numbers, &c.

The eighth and ninth sections read as follows:

SEC. 8. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-eight.

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

Whatever may have been the earlier rulings upon the subject, it is clear that under the third, eighth, and ninth sections just quoted the Atlantic and Pacific Company took at the date of the act an estate *in presenti* upon conditions subsequent. (Rutherford *vs.* Green's heirs, 2 Wheat; Louissen *vs.* Price, 12 Howard, 59; Schulenberg *vs.* Harriman, 21 Wall., 149; Van Wyck *vs.* Knevals, 16 Otto; Opinion of Attorney-General Devens, 16; Opinion Attorney-General Brewster, Ex. Doc. 31, 1st sess. 48th Congress; Leavenworth, &c., R. R. Co. *vs.* U. S., 92 U. S. Reports, 741.)

This being a grant *in presenti*, vesting the title of the lands described in the grant in the company as we have shown, the question arises how that title can be divested. In the case of Schulenberg *vs.* Harriman, above cited, it is held that it requires an act of Congress declaring a forfeiture in order to divest the company of the title. As the law now stands Congress must take the initiative by either declaring a forfeiture by direct enactment to that effect, or it must pass a law conferring jurisdiction on the courts. In other words, it seems that under the opinion in the case of Schulenberg *vs.* Harriman, that Congress has the exclusive jurisdiction to declare a forfeiture. It is held in the case of Farnsworth *vs.* Minnesota and Pacific Railroad Company, 92 U. S., page 66, that—

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

Confirming the rule laid down in the above-cited cases.

Your committee have uniformly held that Congress possesses the power to declare these grants forfeited, and have reported several bills for that purpose, two of which have already passed the House. And we may state, also, that of all the learned counsel who have appeared before us none of them have taken issue with the law as we have just stated it. They all agree that Congress has jurisdiction to declare a forfeiture in all such cases.

The question rests upon a construction of sections 3, 8, and 9. The attorneys for the company claim that they constitute an absolute dedication of the lands to the purpose of construction and maintenance of the road. They contend that there is no condition subsequent whatever, and that the only power in the United States is the power through

Congress to adopt such measures as may be necessary to insure a speedy completion of the road in case the company fails to build it.

The third, fifth, eighth, and ninth sections of the act we are here considering are in substance the same as the like numbered sections in the Northern Pacific grant; and what your committee said in the report made by Judge Henley to the House at the present session in that case is equally applicable in this, therefore we adopt it, as follows:

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

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

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

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

I.

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

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

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

"No authority was produced to the committee except the statement of the attorneys asserting this extraordinary doctrine in support of it; but the interests being so great, we have examined the books on the question, and are not able to find a single authority in support of the proposition, and we believe none can be found.

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

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

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

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

"Conditions annexed to estates are sometimes so placed and confounded among covenants, sometimes so ambiguously drawn, and at all times have in their drawing

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

Washburn in his work on Real Property, marginal page 445, says:

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

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

That the words "upon condition," and even words less specifically expressing the intent, are construed as establishing an estate upon condition subsequent, without further description, is shown by many authorities. (Littleton, pp. 328, 329, 330, Com. Dig. Condition A 2; 2 Wood, Com. Powell's ed., 505, 512, *et seq.*; Wheeler *vs.* Walker, 2 Conn., 201; Thomas *vs.* Record, 477 Me., 500; Sharon Iron Co. *vs.* Erin, 41 Penn. St., 341; Taylor *vs.* Cedar Rapid R. R. Co., 25 Iowa, 371; Attorney-General *vs.* Merrimack Co., 14 Gray, 612; Hadley *vs.* Hadley, 4 Gray, 145; Rawson *vs.* School District, 7 Allen, 128; Caw *vs.* Robertson, 1 Selden, 125; Pickle *vs.* McKissick, 21 Penn. St., 232; Hooper *vs.* Cummings, 45 Me., 359; Chapin *vs.* School, 35 N. H., 450; Wiggin *vs.* Berry, 2 Foster, 114; Hayden *vs.* Stoughton, 5 Pick., 534; Wright *vs.* Tuttle, 4 Day, 326.)

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

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

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

II.

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

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

These other conditions or requirements are found in section 5, which provides that six separate and distinct things should be done by the company, viz: 1st, that the road should be constructed in a substantial and workmanlike manner, equal in all respects to first-class railroad; 2d, that it should be made of rails of the best quality, manufactured from American iron; 3d, that a uniform gauge should be established

throughout the entire line; 4th, that the company should construct a telegraph line of the most approved and substantial description; 5th, that it should not charge the Government higher rates than individuals; and 6th, that it should permit other railroads to make running connections on fair and reasonable terms. These are the other and further conditions mentioned by section 9, in default of any of which, continuing for a year, Congress should have the right to "do any and all acts and things" to secure the "speedy *completion* of the said road," as contemplated and provided.

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

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

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

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

The only answer to this position advanced by the company is the suggestion that if this be true then the two sections are utterly inconsistent with each other. It is difficult to understand how this can be seriously urged. We have already shown a different legal scope and operation for each under the construction we have adopted. They are not repugnant or inconsistent in the slightest degree. Each stands for its own particular purpose. On the other hand, the construction contended for by the company would violate well-established rules of construction simply to disregard the plainly expressed intent of Congress. They claim that the two sections should be taken together, and that so taken all that Congress could do upon failure of the company to build the road would be to take all necessary steps to compel its completion without power to forfeit the grant.

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

Another consideration is to be noticed. The provision of section 9 is permissive or directory only. Congress may do all necessary things, &c. It is not mandatory as it would have been if intended as the sole remedy for the breach of the condition

of section 8. So too it is not exclusive of other remedies for the breach. Congress may in that way enforce the forfeiture or may do it otherwise.

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

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

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

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

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

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

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

III.

Your committee are also well satisfied that even under section 9 of the act, in the sense in which it is construed by the company, Congress had and has the power to declare a forfeiture. It is conceded that under it Congress can do any and all acts and things needful and necessary to insure a speedy completion of the road. Congress is the sole and exclusive judge of whether the road has at any time, in point of fact, been completed; and if not, what remedy should be applied. The remedy of forfeiture is included within the general power reserved. The road is in fact uncompleted to this day. Congress can now, by virtue of that very reservation, so strenuously insisted upon by the company as protecting the grant, declare the same forfeited and restored to the public domain. Might not the forfeiture of the grant in the hands of this company and the consequent creation of an open field for equal competition best conduce to the speedy ultimate completion of the entire line? If Congress so view the matter, there can be no doubt of its power to declare the forfeiture under the very clause of the act relied upon by the company for its protection.

OTHER OBJECTIONS URGED AGAINST THE FORFEITURE CONSIDERED.

The granting act was silent upon the authority of the company to mortgage its grant. And it is insisted that doubts were entertained among capitalists as to whether the company could make a mortgage

without this authority was expressed by Congress, and this greatly embarrassed and prevented the utilization of the grant to raise money for the construction of the road. Hence, the company urged Congress to pass an act on April 20, 1871 (Stat., vol. 17, p. 19) granting express authority to the company to so mortgage. And after asking and getting this act passed, which was said to be so necessary to aid the company in raising money to build the road, it is now insisted that it presents an additional reason that it was intended by Congress to create a trust fund to build this road with conditions that if the company did not apply the fund to the prescribed use within a specified time, or if the mortgagees of the said company did not so apply the same within another specified time that then the Government might take any and all steps to secure its intended application, so far as it had not previously been applied.

This is a strange construction to be placed upon the act. Not a single authority is cited by the able counsel for the company in support of it; and we venture to assert none can be found in any respectable law book in the land. No trust is created, either express or implied, in the act; no trustee is named or provided for, for none exists, and we will not, therefore, waste time in producing argument and citing authorities against this misconstruction.

After giving the express right to mortgage, the act of April 20, 1871, above referred to, contains the following proviso:

> *Provided*, That if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed *at the time of the foreclosure of said mortgage.*

The attorneys for the trustees of the bondholders under the first mortgage made by the Atlantic and Pacific Railroad Company assume: 1st. That this proviso is equivalent to a declaration that on default made by the company in complying with any of the conditions of the grant, the mortgagees should have the right to all the lands embraced in the grant which were coterminous with the completed road at the time of *foreclosure.*

If this construction is the correct one, and, as we have shown, the mortgageors and mortgagees are the Saint Louis and San Francisco and the Atchison, Topeka and Santa Fé Railroad Companies, and that these two companies have constructed and are operating and controlling all the road which has been completed (except the 34 miles), then they have complete control of the grant. They can hold it for a hundred years without completing another mile of the road, and the Government can do nothing, no matter how many breaches of the contract may be committed.

We do not agree with the learned counsel in this construction of the proviso. If they are correct why should Congress say "that if the company suffer any *breach* of the conditions of the act" under which it was organized the rights of those claiming under any mortgage made by the company should extend only to the lands coterminous with completed road? Why not have said that the right of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as is coterminous with the completed road at the time of the foreclosure of said mortgage?

If this language had been used and none other the construction con-

tended for would be correct. But this language was substantially used and also the other language set forth in the proviso, which destroys the construction placed upon it by the attorneys of the mortgagees; and which, in the opinion of your committee, clearly shows that it was the legislative *intent to limit the rights* of the mortgagees to the lands coterminous with the completed road at the *date of the breach of conditions* set forth in the original act, and not at the date of the foreclosure of the mortgage. This we think is the clear legal expression of the act. Any other construction would destroy the effect of one-half of the language in the proviso by treating it as surplusage. This cannot be done here without violating the rules of construction and thereby doing great injustice to the Government.

If the construction thus placed upon this proviso be correct Congress has the right to forfeit all the lands granted without regard to the mortgage, for it was executed after breach of the conditions subsequent had occurred. The mortgagees acquired no rights under the mortgage which could prevent Congress from declaring a forfeiture. They knew of the breach and took their chances.

But it is further insisted that this act of Congress last referred to authorized the company to execute a mortgage on its property and franchises, and issue bonds, and is therefore in the nature of a waiver or bar to the power of Congress to do any act by which the interests of the mortgagees may be affected detrimentally.

This position is not tenable. Congress, by the passage of said act, did not authorize the company to mortgage the unconditional fee; but, upon the contrary, *expressly reserved all the conditions expressed in the original act.* The company did not own the unconditional fee in the lands granted. It owned the fee charged with the conditions subsequent, and it could mortgage and the mortgagees could only take under the mortgage such estate as the company owned at the time the mortgage was executed.

The mortgagees must be held to have known that they were taking an estate which was defeasible upon condition broken. They stand in the place of the mortgageor. There being a breach of the conditions subsequent by the failure of the company to complete its road within the time fixed by the grant the mortgagees must take whatever consequences a forfeiture imposes, which is the loss of the defeasible estate in so much of the lands granted by the third section of the granting act as the bill accompanying this report provides for. They will still retain if the bill passes their lien on the right of way, &c., granted by the second section of said act.

That we are right in these conclusions we think the authorities abundantly show. In Kent (vol. 4, p. 125) the rule is laid down as follows:

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

Greenleaf's Cruise on Real Property (vol. 2, pp. 44, 52) thus lays down the doctrine:

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

Washburn on Real Property is to the same effect (vol. 2, p. 11, [marginal page 45]):

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

QUESTION OF TIME MORE FULLY CONSIDERED.

The time within which a condition subsequent is to be performed is, in this case, as much the essence of the contract as any other part or requirement of the condition. Not even equity will relieve against failure to perform within the time allowed a condition subsequent. Especially is this so when the time for the performance of the condition is fixed by statute, as in this case. (In Farnesworth *vs.* M. and P. R. R. Co., 2 Otto, 49; 2 Story, Equity Juris., 103; 26 Willard's Equity Juris., 1324; 3 Washburn on Real Property, 17, m. p. 455.) Nor where parties have fixed the time of performing the contract, unless sometimes in case of sale of land for money and damages for delay is mere matter of computation of interest. (Boardman *vs.* Imrick, 10 Cal., 96; 2 White & Tudor's Leading Cases in Eq., 1105; 2 Jones on Mortgages, 1185; 2 Washburn on Real Property, 17.) The grant being one in *presenti* with condition subsequent, on failure to perform the condition within the *time* stipulated the right to declare a forfeiture became perfect. A condition not performed within the specified time when time is a part of the condition can never be performed.

A railroad to be built by the 4th day of July, 1878, cannot after that date be built within that time.

Time in this case was of the *essence* of the condition:

(1.) Because it was expressly stipulated;

(2.) Because it was fixed by statute;

(3.) Because the value of the land would increase by lapse of time; and,

(4.) Because the object of the grant was to promote the early development of an unsettled portion of the country. Any one of these is sufficient to make time the essence of the conditions subsequent. (See Pumroy on Contracts, secs. 383, 384, 385, 386.)

The withdrawal of a large body of land, amounting to many millions of acres, from market and settlement without the building of the road, retards, instead of promotes, the development of the country, and therefore defeats the very object of the grant. Congress does not make grants to aid in the construction of a road in portions of the country already well settled, nor does it authorize lands to be withdrawn from market and held in reservation or in trust to be given as a reward for the construction of a road after the country is well settled, for in thickly settled regions railroads will be built without Government aid.

We have already shown by authorities cited that when time of performance is fixed in the instrument, or by statute, or is of the essence of the condition, or compensation for breach cannot be made—and all these elements are contained in this condition—it must be strictly performed, whether it is a condition precedent or subsequent.

(1. Broom and Hadley's Com., 602 (Waits's ed.), Note 277; 2. Redfield on Wills, 286, note; Taylor's Landlord and Tenant, p. 240, sec. 282; 1. Bouvier's Institutes, 759, 760; Tyler on Ejectments, 179.)

A forfeiture for breach of condition may be waived. But a waiver cannot be implied by silence. (B. and M. R. R. Co. *vs.* Boestler, 15 Iowa, 125; Jackson *vs.* Brock, 1 Johnson's Cases, 125; Lawrence *vs.* Gifford, 17 Pick., 366; Pike *vs.* Butler, 4 N. Y., 360.)

Nor is a forfeiture waived by delay in enforcing it. (Gray *vs.* Blanchard, 8 Pick., 284; Pery *vs.* Davis, 3 C. B. (N. S.), 769; Doe *vs.* Allen, 3 Taunt, 78; Calderwood *vs.* Brooks, 28 Cal., 151.)

It must be remembered that the will or intent of Congress can never be implied from silence. It must always be ascertained from enactments and resolutions. No waiver of forfeiture can be presumed by Congress, unless such waiver is made by statute or resolution, either expressly, or by fair implication from the provisions expressed.

In construing public grants, all doubts which exist are to be resolved in favor of the Government and against the grantee.

OBLIGATION OF THE GOVERNMENT IN REGARD TO INDIAN TITLE.

It is asserted by the attorneys of the company that the Government obligated itself, by the granting act, to extinguish the Indian title and survey the lands in the Indian Territory; and they claim that both were indispensable to the complete utilization of the grant by its beneficiary. The realization of aid from the grants pledged by Congress to secure the construction of the road, and the possibility of reimbursement by profitable carrying-trade in the operation of a constructed road, were necessarily dependent upon the promised change in the legal conditions of the land titles along the prescribed route of the proposed road. They insist that the United States has not even *attempted* to fulfill its promise to extinguish the Indian titles.

All this is insisted upon with a pretended belief that it is based upon a fair construction of the granting act. The general route of the road, as prescribed by this act, runs from the west line of the State of Missouri for three hundred and fifty miles through the Indian Territory, which was prior to said grant set apart by the Government for the benefit of the Indians. The ultimate fee is vested in the United States, but which, by treaty stipulations, statutory enactments, and executive acts thereunder, have been set apart and reserved for the sole use and occupancy of certain Indian nations and tribes so long as their national or tribal organizations are preserved. The boundaries of this section of country are defined by various treaties with these nations and tribes, and by legislative acts which prescribe the limits of the contiguous States and Territories of the Union. The public-land system has never been extended over it. Congress has never taken any action to have it surveyed as public land. Much of it is held by four nations, the Choctaw, Chickasaw, Cherokee, and Creek, who have patents in accordance with treaties and laws, and all attempts to induce Congress to organize it into a Territory of the United States have, up to this time, failed.

This is enough to show that the company has no grant of land in this Territory, neither present nor prospective, in our opinion. None was intended to be conferred by the act, except as such grant might be acquired from the Indians by said company. Let us examine the granting act for a moment.

The pretended claim of the company for the survey of the lands in this Territory is based upon the fourth and sixth sections of the act. If these sections stood alone and could be considered by themselves, or in connection with only the last clause of the second section; if there were no limitations to the grant as made by the third section, and if the seventeenth section was no part of the law, there might be some plausibility in the claim that the fourth and sixth sections required that the lands be surveyed as fast as the road was completed. But if we consider the law as a whole, as enacted, the claim is without foundation.

Under the third section the land to pass under the grant must be public land, situated in a Territory or State, the title of which is in the United States, and which has not been sold or otherwise appropriated at the time the map of location of the route of its road is filed in the General Land Office.

The lands in the Indian Territory are not public lands in the usual meaning of that term, and are not situated in a State or Territory of the United States. Certainly the United States so far as the lands within the boundaries of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Nations are concerned, does not possess full title to them; for they were, prior to the year 1866, the date of the granting act, set apart and reserved by the United States for the sole use and occupancy of various Indian nations and tribes. Therefore the claim that these lands were included in the grant under the third section cannot be maintained.

Your committee is of the opinion, after a careful examination of the whole act, that no land was granted to the company in the Indian Territory except such as might be acquired by the company from the Indians by virtue of the seventeenth section. This section authorized the company to accept any grant from an Indian tribe or nation through whose reservation its road might pass, subject to the approval of the President of the United States. This is the privilege conferred by the act, and we believe that the last clause of the second section only becomes applicable when this is done:

> And "the United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act."

The company at the beginning acted upon this construction of the law. This is fully shown by the files of the Interior Department.

It asked permission of the Interior Department, and leave was granted, to open negotiations with some of the Indian tribes to effect a grant of lands, but was not successful in its efforts with the Indians. Thus the company by its acts admitted that there were no lands granted to it other than the right of way which was provided for in the treaties between the Government and the Indians.

The company never set up any claim that it received any land by the grant in the Indian Territory until in the year 1877—eleven years after the act was passed.

The Interior Department holds that no lands were granted to this company in the Indian Territory. This has been the uniform ruling of that Department on the subject. It was the ruling of the Hon. J. A. Williamson while he was Commissioner of the General Land Office, who is now attorney for the company.

Your committee therefore finds that there is nothing in the claim of the attorneys of the company that the Government has failed in extinguishing the Indian titles and surveying the lands in the Indian Territory, as no grant of land was made to the company in said Territory.

We therefore, in view of the law and facts set forth in this report, recommend the passage of the accompanying bill as a substitute for all bills introduced in the House for the forfeiture of the land grant made to the Atlantic and Pacific Railroad Company.

A BILL to forfeit the unearned lands granted to the Atlantic and Pacific Railroad Company "to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," and to restore the same to settlement, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all the lands, excepting the right of way and lands for stations, heretofore granted to the Atlantic and Pacific Railroad Company by an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July twenty-seventh, eighteen hundred and sixty-six, and subsequent acts and joint resolutions of Congress, which are adjacent to and coterminous with the uncompleted poortions of the main line of said road, embraced within both the granted and indemnity limits, as contemplated to be constructed under and by the provisions of the said act of July twenty-seventh, eighteen hundred and sixty-six, and acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph, be, and the same are hereby, declared forfeited and restored to the public domain, and made subject to disposal under the general laws of the United States, as though said grant had never been made: *Provided*, That the price of the lands so forfeited and restored shall be the same as heretofore fixed for the even-numbered section within said grant.

SEC. 2. That the act of March third, eighteen hundred and seventy-five, entitled "An act for the relief of settlers within railroad limits," is hereby repealed.

O