48TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 1256.

FORFEITED GRANTS NORTHERN PACIFIC RAILROAD.

APRIL 11, 1884.—Referred to the House Calendar and ordered to be printed.

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

REPORT:

[To accompany bill H. R. 6534.]

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

Your committee have given the subject-matter of this grant patient, careful, and thorough consideration. They are satisfied that the grant was one *in præsenti* upon condition subsequent; that by breach of such condition the grant, along the entire line so far as it was uncompleted on the 4th day of July, 1879, is, and has been since said date, subject to forfeiture, and that justice to the United States and her citizens now require that a forfeiture and restoration of the lands to the public domain should be declared by act of Congress. To accomplish that result and at the same time protect purchasers of the company's title prior to January 1, 1884, and actual settlers and owners of valuable improvements on the odd sections adjacent to the uncompleted portion of said road who settled or made said improvements with *bona fide* intent to secure title through the company, your committee have prepared a substitute for said bills, and herewith report the same to the House and recommend its passage.

In view of the fact that the conclusion to which your committee have arrived was earnestly combated by learned counsel in elaborate argument and briefs, we deem it proper to refer somewhat minutely and in detail to what we consider the most material points of the case, especially as it was urged that the grant to this company was in certain features an exception from the otherwise unbroken line of forfeitable grants, an isolated example of unparalleled generosity on the part of the United States in giving away millions of acres of the public domain without any provision for resuming its title even upon absolute failure of the company to fulfill its part of the contract. That such a construction in effect of the granting act was not only seriously but earnestly and forcibly urged by learned and distinguished counsel for the company, is the apology of your committee for what might otherwise be deemed an unnecessary elaboration of the subject under consideration.

The act of Congress containing the grant to this company was approved July 2d, 1864 (13 Statutes, 365), and the grant itself was in extent the most munificent of all the princely donations made in the era of liberality to aid in the construction of railroads, being for 20 miles along the entire line in all the States and 40 miles in all the Territories

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

through which the line might be located, with the right of indemnity selection within ten additional miles, afterwards by subsequent act (16 Stat., 278) enlarged to 20 miles, for all lands lost in the grant in place.

The land affected by the grant and subject to its operation was in fact all odd-numbered sections in a belt of the public domain extending over 2,000 miles from Lake Superior to Puget Sound, 40 miles in width in all the States and 80 miles in width in all the Territories through which the line should be located.

The consideration of this munificent grant, as specifically declared by the act itself, was "to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores" over said railway (sec. 3), "to promote the public interest and welfare by the construction of said railroad and telegraph line," to keep "the same in working order," and "to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes." (Section 20.)

Section 3 of the act, embracing the grant of lands, was in the following words:

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

Section 5 of the act was in the following words:

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

Section 8 of said act was in the following words:

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

Section 9 of the act was in the following words:

SEC. 9. *And be it further enacted,* That the United States make the several *conditioned* grants herein and that the said Northern Pacific Railroad Company accept the

same, upon the *further* condition, that if the company make *any* breach of the *conditions* hereof and allow the same to continue for upwards of one year, then in such case, at any time hereafter, the United States, by its Congress, may do any and all acts and things, which may be needful and necessary to insure a speedy completion of said road.

The period fixed by the eighth section of the granting act above quoted within which the road was required to be completed was subsequently extended to the 4th day of July, 1879, as appears from the following facts: The joint resolution of May 7, 1866 (14 Stat., 355), extended the time two years, and the joint resolution of July 1, 1868 (15 Stat., 255), amended section 8, the original granting act, so as to read July 4, 1877. On June 11, 1879 (General Land Office Report, 1879, pp. 109–111), the Secretary of the Interior held that the effect of these two joint resolutions was to extend the time to July 4, 1879. In this view your committee concurs, and we adopt that date as the expiration of the period of limitation.

The total length of the line as located and proposed, including the Washington Territory Branch, was 2,270 miles. Prior to July 4, 1879, there has been completed 531 miles of road, leaving 1,739 miles uncompleted at the expiration of the time limited. (See report of Secretary of the Interior to Forty-seventh Congress, Ex. Doc. No. 144, p. 41.) In round numbers and estimated, 10,675,200 acres are by the bill reported conceded to the company, and 27,539,840 acres subjected to forfeiture.

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

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

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

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

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

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

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

The question turns upon a consideration of sections three, five, eight, and nine, hereinbefore quoted. The company claim that they constitute an absolute dedication of the lands to the purpose of constructing the

road; that there is no condition subsequent whatever, and that the only power in the United States is the power through Congress to adopt such measures as may be necessary to insure the completion of the road, in case the company does not build it.

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

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

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

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

I.

Section 8 is perfectly plain in the language used and the purpose contemplated. It declares in so many words that the grant made is given by the United States and accepted by the company "*subject to the following conditions*, namely, that the said company * * * shall construct, equip, furnish, and complete the whole road," &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 words declaring a reversion in case of the breach. That, in the judgment of your committee, was entirely unnecessary in order to create an estate upon condition subsequent. The estate, so conditioned, is created by declaring the condition, not by declaring the result of its breach. The latter, re-entry or its equivalent, follows as 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 ac-

cordingly 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 AGAINST THE FORFEITURE CONSIDERED.

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

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

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

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

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

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

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

And again, at page 154:

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

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

Where a person enters for a condition broken the estate becomes void, *ab initio; the person who enters is again seized of his original estate in the same manner as if he had never conveyed it away.* And as the entry of the feoffer on the feoffee for a condition broken defeats the estate to which the condition was annexed, so *it defeats all rights and incidents annexed to that estate, together with all charges and 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 (vol. 2, p. 11, marginal page 451) says:

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

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

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

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

The condition, or charge, was on the land as an encumbrance by the very terms of the deed to him, and he could not, if he tried, convey a title to the land which should be free from it. Such a condition attaches to the land wherever it goes, although the same should pass through a hundred hands. In our view, it operates like a covenant which runs with the land, and all assignees are bound by covenants real that run with the land.

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

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

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

it follows that the parties are relegated to their rights as defined by the authorities we have cited, which are absolutely conclusive of the whole controversy.

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

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

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

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

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

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

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

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

The Sioux Reservation in Dakota existed by virtue of various treaties, from an early day to that of April 29, 1868 (15 Stat., 635); the Crow Reservation in Montana was made by treaty of May 7, 1868 (15 Stat., 650. See also Executive orders, October 20, 1875, and May 8, 1876); the Cœur d'Alene Reservation in Idaho was made by Executive order of June 14, 1867; the Yakima by treaty of June 9, 1855 (12 Stat., p. 951), and the Puyallup by treaty of March 3, 1855 (10 Stat., 1132). They

were all reserved lands at the date of the definite location of the road, and excepted from the grant and the undertaking of the United States to extinguish the title. They were also "appropriated" and therefore excepted. (See Wilcox *vs.* Jackson, 13 Pet., 498.)

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

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

The position of the company upon this question amounts practically to a claim that they were entitled to the assistance of the treaty and war making power of the United States, whenever, in building their road, they encountered opposition from tribes or roving bands of Indians. In other words, that Congress not only donated them 48,000,000 acres of the public lands, without limitation, restriction, or condition, but also gave them the use of the treaty-making power and the Army whenever a roving band of Indians interfered with their work. Your committee decline to adopt this view of the case and on the contrary are clearly of the opinion that Congress had no such intent in the passage of the granting act and that no justification for such a claim can be found in its terms.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A *strip of land* not exceeding *four hundred feet in width*, that is to say, two hundred feet on each side of the line laid down on the map of definite location hereinbefore mentioned, wherever said line runs through said reservation between the one hun-

dred and seventh degree of longitude west of Greenwich on the east, and the mid-channel of the Big Boulder River on the west, containing five thousand three hundred and eighty-four acres, more or less. * * *

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

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

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

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

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

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

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

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

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

The Indian title was the mere right of occupancy; protected by treaty or reservation it remained the same; in either event the lands were public lands of the United States. The United States did not grant these to the company, but expressly reserved and excepted them from its donation. It could and did, however, give the company a right of way through them. Such right it would always give in a proper case.

That the recognition of a former grant of that kind or even a new grant thereof can be considered as a waiver of breach of another grant, of a separate and distinct estate, is, in the judgment of your committee, an untenable position. It would violate the obvious intent of Congress, as shown in all its legislation affecting the grant, and leave this immense area of the public domain irrevocably consecrated to this corporation, without restriction or control even to accomplish the simplest object of its creation. That Congress, by the act of 1882, intended any such result as that is beyond the credence of your committee. We think it was intended merely to confirm the right of way, and that nothing in the proceedings taken for that purpose legally operated as a waiver of the reserved rights of the United States as to the grant of lands.

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

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

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

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

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

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

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

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

In general, where there is nothing to show that a representation was intended to be acted upon as a statement of the truth or that it was *tantamount to a promise or agreement, amounting to an undertaking to respond in case of its falsity*, the party is not estopped. (Bigelow on Estoppel, p. 486; Danforth *vs.* Adams, 29 Conn., 107; Farist's appeal, 39 Conn., 150; McAdams *vs.* Hawes, 9 Bush, 15; Zuchtmann *vs.* Roberts, 109 Mass., 53; Kerhl *vs.* Jersey City, 8 C. E. Green, 84; Muller *vs.* Pondir, 55 N. Y., 325; Davis *vs.* Smith, 43 Vt., 269.)

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

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

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

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

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

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

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

VIEWS OF THE MINORITY:

The undersigned, members of the Committee on the Public Lands, dissent from the report made by the majority of said committe on the bill (H. R. 6534) to forfeit certain lands granted to the Northern Pacific Railroad Company.

The bill declares the grant of land approved July 2, 1864, by the Government of the United States to the Northern Pacific Rairoad Company, forfeited as to all of said grant except the lands coterminous with that portion of the railroad which had been constructed on and prior to July 4, 1879; *i. e.*, it declares forfeited all of said lands west of the Missouri River, except a part of the Western Oregon division.

During the late war communication between the Government authorities at Washington and the people of the Pacific slope was, owing to the state of the country which then existed, the great distance to be traveled, and the intervention of numerous hostile Indian tribes, almost impossible. It has been said with much truth that but for the regular trips to California by the overland stage line the credit of the Government would have sunk out of sight. But the energy of Halliday, who, to avoid the Indians, found for his coaches an open prairie route 300 or 400 miles south of the direct and usual line of travel, brought through large amounts of gold and silver which could not be risked by sea, in consequence of the danger of capture by Confederate privateers.

This so forcibly illustrated the necessity for a trans-continental railway and telegraph line, to place the East and seat of Government in closer communication with the rich gold-bearing Pacific coast, that on July 1, 1862, an act was passed by Congress providing for the construction of a railroad from the Missouri River to the Pacific Ocean, which resulted in the building of the Union and Central line. This, like every other wise and great act of statesmanship, excited a spirit of emulation, at all times liable to abuse and often dangerous, which culminated in chartering and subsidizing three other Pacific railroads, with numerous and extensive connections.

The Northern Pacific was the next in order of time, and while no such necessity existed for its construction as influenced the chartering of the Union and Central, yet there were considerations of no small moment in its favor as well as against it. The country it was to traverse was—the greater part of it—barren mountains, bleak prairies, or a wilderness inhabited by wild and hostile Indians, whose murderous incursions and depredations for hundreds of miles eastward, upon white frontier settlers, cost the Government annually a large amount of money to keep a sufficient force of troops to repel and punish the marauders. Besides, the building of the road from Lake Superior to Puget Sound would add to the already vast resources of the country untold mineral and agricultural wealth. The road would increase immigration from the Old World, a very desirable thing at that day, however, questionable the

policy now. Two or three generations hence, all the lands of America will be demanded for Americans.

The war was still flagrant and the minds of the people then controlling the Government highly inflamed against Great Britain on account of the sympathy there manifested for the Southern Confederacy, and nowhere within Her Majesty's dominions more than in the Canadas. Lake Superior, at their doors, is a great inland sea surrounded by prosperous cities and varied industries. Puget Sound, likewise on or near the dividing line, is the finest harbor on the Pacific coast, not excepting San Francisco and San Diego. It was therefore, at the time the Northern Pacific Company was chartered and the grant of land made, but a just anticipation of and strategic movement against Great Britain both for purposes of war and commerce. A verification in part of these apprehensions is now found in the Canadian Pacific Railroad, more than 700 miles of which is already constructed.

On the other hand, the early termination of the war took out of it the national necessity for chartering the company and making the grant, and the subsequent extension, instead of repealing the grant before any work was done, was perhaps unwise, as it gave an impetus to a sentiment, generated by one great and popular act, which soon grew into such a craze that nearly 200,000,000 of acres of the public domain were given to these soulless corporations, upon which to grow fat, insolent, and regardless of the rights of the common people. The policy went to its utmost verge, and now turns back upon itself. At last the danger of land monoply is seen; the people, in many instances, appeal to the Government for relief from corporation power and oppression. Their representatives are not unmindful of their complaints.

Now, the great question for statesmen to solve is "What shall be done?" Shall we follow the beckonings of "the blunt monster with uncounted heads, the self-discordant waving multitude," over the brink and into the billows of confiscation and communism, or shall we, like philosphers, if not as statesmen, make the most of a bad bargain by faithfully adhering to it and the law which should be the master of us all? Give a patient hearing to all, decide impartially, and legislate accordingly. We think the latter course preferable, and herein endeavor to follow it. We cannot, if we would, dig up yesterday. And the good faith of the Government to all of its citizens must be maintained.

The enthusiasm and impatience of American character were displayed in section eight of the granting act, which prescribed July 4, 1876—the centennial year—only twelve years for the construction of a railroad 2,200 miles long, over impassable mountains, across difficult and treacherous rivers, through a country inhabited only by savages.

Contrary to legislative expectation, great difficulty was encountered in raising sufficient money to begin the construction, and by various enactments the time to begin the work was extended to July, 1870, and the time finally fixed for the completion of the whole road was July 4, 1879, a period of only seven years. The company was required to construct 100 miles per annum as the minimum after the first two years; yet it will be seen that the construction must have averaged over 300 miles a year to have been completed within the time allowed.

The company began work and constructed four hundred and twenty-five (425) miles of road to the Missouri River by 1873, when the financial panic set in, and the company was unable to proceed further until after July 4, 1879. The old company utterly failed in 1875, and a new one had to be organized before the work could be resumed.

The new or reorganized company have constructed their said road to

Wallula Junction, 214 miles east of Portland; also its road from Portland to Puget Sound, a distance of 145 miles, and about 50 miles on the Cascade branch, aggregating something over 1,900 miles of completed road, 900 miles of which have been inspected and accepted by commissioners appointed by the President, under the fourth section of the granting act. Fourteen years have not elapsed since the construction was begun; the company have, therefore, averaged about 140 miles per annum, which we think evidences a commendable effort and earnestness to complete the road, considering the difficulties encountered, which are hereinafter further set forth.

The sole ground upon which the forfeiture is claimed by the majority is that the whole road was not completed by July 4, 1879.

Now, we invite attention to the character of the act approved July 2, 1864, which constitutes the charter, franchise, or contract of the company, as well as the law of the case. The third section grants to the company a present estate in these words:

> That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of such railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State. * * *

This language shows that the grant passed the title to the lands to the company. It shows, too, very largely, the consideration which induced it. The majority of the committee claim, however, that the eighth section made the grant an estate on condition subsequent, for a breach of which a forfeiture may be asserted. That section is in these words, to wit:

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

We admit that this section standing alone would make it a grant *in presenti* with conditions subsequent, for the breach of which the grantor would have a right to declare a forfeiture. But section 9 is in the following words:

> SEC. 9. That the United States make the several conditional grants herein, and that the said Northern 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 by its Congress may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

The majority of the committee treat the conditions expressed in this ninth section as being for the benefit of the Government, notwithstanding the unambiguous language that the United States make the grants herein, and the company "accept the same upon the further condition," &c.

It will be observed that the acceptance by the company was also upon condition, viz, that in case of breach one year should be allowed to repair it, and if the company failed to repair the breach of condition within the year, "the United States, by its Congress, may do any and all acts

and things which may be needful and necessary to insure the speedy completion of the said road." It does not say that the land shall revert. This language was not employed meaninglessly. In all the previous grants of land made by Congress to aid in the construction of railroads the condition was clearly set forth, as well as the penalty for a breach and words of reverter or forfeiture conspicuously set forth. They were therefore estates at the common law where the grantor might re-enter for condition broken. Shulingburg *vs.* Harryman, 21st Wallace, p. 44.

But here, instead of the grantee accepting an estate of that character as tendered by the act, down to and including the eighth section, the company placed a condition upon its acceptance which, being agreed to, made it a part of the contract. It was expressive of the purpose of Congress to dedicate the lands granted, in any contingency and irrevocably, to insure the speedy completion of said road; and although Congress may not have succeeded in its purpose and which opens a field of discussion upon which it is not necessary for us to enter, it is, however, clear to the minds of the minority that the acceptance by the company, upon its conditions, so changed the character of the estate granted that it was not a common-law forfeitable estate for breach of condition. An estate upon, condition, certainly—but in lieu of the condition, the breach of which at the common law made the estate forfeitable, a statutory penalty or reservation is retained by the grantor, which it may exercise in any manner consistent with the reservations set forth in said section 9 and in section 20 of said act.

A common-law estate upon condition subsequent, wherein a forfeiture may be declared for breach of condition, must be one upon which the grantor has the right to enter as soon as the breach occurs, and being in is reinvested with his first estate. And if the grantor accepts a stipulation that he will not, in case of breach, enter until after one year has been allowed the grantee to perform the condition, the estate becomes absolute, and the grantor is put to his action, or whatever other redress his contract gives him, for to retake the estate by forfeiture he cannot. Again, the estate granted is apportionable, and the doctrine of forfeiture, wherein the grantor receives back or is reinvested of the identical estate granted, is not applicable.

Just here we adopt the language of the Supreme Court in the sinking-fund cases in respect to this grant: "Neither is it to the purpose now to question the wisdom or policy of the new departure taken in *the case of the grant for the Northern Pacific Railroad.* In the determination of legal rights to permit present views and opinions of the wisdom or unwisdom of the legislators who enacted the law to affect the judgment would be misleading and dangerous." If the conditions referred to in sections 8 and 9 make the land granted a forfeitable estate, every other grant, right, and privilege conferred upon the company—its corporate franchises—and all its rights and powers are in like manner forfeitable for breach of any of the conditions, for there is no distinction made, expressed or implied, in the act. If these are not forfeitable the lands cannot be. (Hughes *vs.* The Northern Pacific Railroad Company and others, 18 Federal Reporter, 106 and 108.)

If, however, we concede, which we do not, that the grant was of an estate on condition, for the breach of which a forfeiture could have been declared, does that fact justify the report of the committee? We hold that it does not, for the reason that, on well-settled principles both of law and equity, the Government has waived the right of forfeiture, if it ever existed. The thing which remains with and resides in the grantor of an estate *in præsenti* with condition subsequent is in no sense prop-

erty or estate, and is not the subject of sale or transfer; it is a thing in action dependent upon a contingency, the happening of which, the breach of the condition, is necessary to raise it to the dignity of a right; while the grantor takes an estate which he may sell or mortgage, and which will pass as an inheritance subject only to the condition. If, therefore, the grantor does an act inconsistent with that right, while in either the inchoate or perfect state, it is thereby waived or lost. Mere silence or inaction when it is not the duty of the grantor to speak or act is not a bar, but, *eo converso*, when conduct or silence is misleading. (Nicoll *vs.* New York and Erie Railroad Company, 12 N. Y., Rep. 137; Marks *vs.* Marks, 10 Modern; Brooks *vs.* Martin, 43 Ala., 360.)

We concede that this great Government has the physical power to disregard the right and to do anything it pleases, but such never has been its course in dealing with its citizens, and so long as just men and enlightened statesmen control its councils and tribunals it never will be administered, in any of its departments, upon the monarchical principle that, like the king, it can do no wrong, and is bound by no obligation but its own sovereign will. This, then, being a Government of law, it will ever set a good example and bind the citizen more strongly to it by itself obeying the law.

Now, wherein has the Government of the United States, as grantor in this case, waived or prevented the performance of the condition?

1. By the joint resolution of Congress, approved May 31, 1870 (16 Stat. at Large, 378), the Government, with a knowledge of the inability of the company to construct the road, and before any of it was constructed, authorized it "*to issue its bonds to aid in the construction and equipment of its road and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchises as a corporation.*" And in the proviso it declares:

> That all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and, if the mortage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, *such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder.*

Under this authority there were $30,000,000 of bonds sold and the proceeds used in the construction of the road to the Missouri River, which were refunded in preferred stock of the company; and in the extension of the road by the new or reorganized company, $25,000 per mile of bonds have been issued and sold and the proceeds used for purposes of construction and equipment. Thus 1,870 miles of road which have been completed, inspected, and accepted by the executive branch of the Government, with the lands, have been placed under first mortgage, aggregating $46,750,000. Besides, they have issued and sold $15,000,000 of second-mortgage bonds, making in all now outstanding in the hands of purchasers for value *sixty-one million seven hundred and fifty thousand dollars.* These bonds are secured by a mortgage upon the property of the company, including the lands. The sanction of the Government by the joint resolution was inconsistent with its right as grantor to afterwards declare a forfeiture, and the right was thereby lost or suspended. (Sheppard's Touchstone, 121; Fletcher *vs.* Peck, 6 Cranch, 87, 135–137; McCravy *vs.* Remson, 19 Ala., 430.)

If we add to the above the $30,000,000 and accrued interest, in payment of which preferred stock in the reorganized company was taken, we have near one hundred millions of indebtedness, secured by lien, legal and equitable, on the company's property and the land.

In the second section, Congress reserved to itself only the right to alter or amend, and not to repeal, the joint resolution, having due regard for the rights of the company *and other parties*, which means, of course, the bondholders. What right has Congress to declare a forfeiture of these lands where the road has been constructed? To do so would be an act of bad faith bordering on repudiation. (Sheppard's Touchstone, 121; 95 U. S. Rep., 319; 6 Cranch, 135–137; 13 Gray, 239–253.)

If the forfeiture recommended by the committee is adopted, and their bill passed, it will take from the company the lands granted coterminous with nearly 1,500 miles of constructed road; and the grantor (the United States) will not be reinvested with the title of its former estate, which was a wilderness filled with savages, but will be reinvested with title to its lands increased in value tenfold, a great line of railway through them, and an intelligent white population instead of the savages. And these are but a part of the absurd consequences to which the doctrine of the committee would lead us.

2. The grantor stipulated, in section 6 of the charter, that as soon as the general route was fixed, and as fast as may be required by the construction of said railroad, the President of the United States shall cause the lands to be surveyed, &c.; while section 4 declares "that whenever the * * * company shall have twenty-five consecutive miles of said road * * * ready for the service," &c., the President should appoint commissioners to inspect the same, and if they report favorably, that thereupon patents to land coterminous with the completed section should issue to said company.

By a proviso to a clause in an appropriation bill approved July 15, 1870, Congress prohibited the issuing of any patents to the company until they first paid to the Government the cost of surveying and conveying the lands, a requirement which should have been in the charter or grant, but which was not in it. It was, therefore, a new burden imposed, and a violation of the contract. This occurred before there was any breach of conditions by the company.

3. The grantor agreed to clear the right of way of Indians to enable the grantee to construct its road. The grantor alone had the power to do that. It was not done, and many of the surveying parties of the company were killed while endeavoring to select a route for said road. What was the condition of the country through which said road has subsequently been built prior to July, 1879? Let the commanding officers of the United States Army tell. General Brisbin, commanding at Fort Keogh, wrote from that place under date of April 23, 1882, as follows:

> I mention these incidents to show you the condition of the Yellowstone country prior to 1877. It was so unsafe that not less than 1,000 armed men could penetrate it without suffering great risk. I advised the delay or abandonment of the survey for the Northern Pacific Railroad because we had not sufficient men to make the country safe. These brave fellows were several times attacked, and I expected they would be massacred.

General Gibbon, April 27, 1882, wrote:

> From 1870, when I first went to Montana, till 1876, that whole region (between Mandan, Dak., and Bozeman, Mont.) was an almost unknown wilderness, where it was not safe for any but large and well-organized parties of white men to go. Engineer parties had upon all occasions to be well protected with troops, and even after

the establishment of Forts Keogh and Custer, in 1876–'77, the bands of roving, hostile Indians rendered engineering operations along the line of the Northern Pacific Railway hazardous.

On same date General Terry, commanding the department, wrote from Fort Snelling:

I came into command in this department in January, 1873. From that time up to the beginning of 1877 it would have been *impossible* to make surveys in the valley of the Yellowstone from the mouth of the river to the western part of the Crow Reservation except under the protection of a very large escort of troops. That portion of the valley of which I have spoken has been constantly overrun by hostile Sioux, and even with a powerful escort surveys could have been prosecuted only at a very great disadvantage.

Under such circumstances, we think that the company has done all that a reasonable Government could expect or require. The condition was one which it was impossible to perform within the time required. It was rendered impossible by the failure of the grantor to keep its part of the contract. There was therefore no breach of condition. (2 Blackstone's Com. (by Cooley), 156, note 11; 4 Kent's Com., 129, 130; Coke's Ins., 206*b*, 2209*a*; Sheppard's Touchstone, 133; United States *vs.* Maca, 18 Howard, p. 557; United States *vs.* Reading, 18 Howard, 1.)

4. In the second section of the granting act is found these words:

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

When the engineers and construction men reached the Crow Reservation in Montana, they were stopped by the Indian agent and threatened with the military force if they entered, and thus they were halted until the treaty of 1882.

On the 10th day of July, 1882, while a bill was pending before Congress for the forfeiture of the land granted to this company, the Congress passed an act (22 Stat. at Large, p. 157) ratifying an agreement or treaty made with the Crow Indians, securing from them the right of way through their reservation, and consisting of upwards of five thousand acres of land, which said act declared "are hereby granted to said Northern Pacific Railroad Company * * * * for the uses and purposes in said agreement set forth." One of the uses set forth was "for the construction of said Northern Pacific Railroad." This was, in our opinion, an absolute waiver of the condition insisted on by the majority of the committee, as cause for forfeiture. An act of forfeiture would be tantamount to an attempt at confiscation. This act, if the grant was an estate upon condition, dispensed with the condition and made the estate absolute. (Ludlow *vs.* N. Y. & Harlem River R. R. Co., 12 Barb.; Willard *vs.* Alcott, 2 N. H., 121; Andrews *vs.* Lenter, 32 Maine, 395; Chalker *vs.* Chalker, 1 Conn. 79; Hume *vs.* Kent, 1 Ball & B., 554.) The company on the 19th day of August, 1882, filed its acceptance in writing of the terms and conditions thereof, and on the 23d day of August, 1882, paid to the Treasurer of the United States the $25,000 required by section 3 of the said act of July 10, 1882.

If the bill reported by the majority becomes a law, it presents the anomaly of forfeiting the land granted to the greater portion of the road, not for the failure to build, because the road is already built, but for the failure to build within the time prescribed in the granting act. Who demands such forfeiture? Certainly not the people of the United States, nor any very considerable portion of them, for if so—if it be feared that this and other great corporations are to own so much of the lands that the people cannot acquire them, why should not Congress,

by law, limit to a much smaller number the eight hundred thousand immigrants, among whom are thousands of paupers and criminals, annually flocking to our shores in quest of homes? The questionable policy of giving the public domain to homestead settlers, instead of retaining it as a source of revenue, has existed now for more than twenty years, and has opened the flood-gates of immigration from all the world. The time is, we predict, rapidly approaching when this policy will be reversed.

But suppose you forfeit these lands and return them to the public domain, what will you do with them? Give them to actual settlers is the response. Stimulate foreign immigation still higher, as though an overcrowded population was a desirable thing for future generations to enjoy. The only demands, coming directly from the people, for the forfeiture of the lands of the Northern Pacific Company come from a part only of the settlers within the limits of the grant. What is the probable cause? Have all the Government lands been taken up, and does this company exact such exorbitant prices for its lands as to render them inaccessible? It was unfortunate that the granting act did not put a limit on the price at which the company should sell, but it did not. While that was not the fault of the company, but of Congress, it is a privilege quite certain to be abused if it has not already been. The official reports of land sales made by the company up to June 30, 1883, however, do not show that they have exacted exorbitant or unreasonable prices for their lands. Four million five hundred and thirty-nine thousand seven hundred and forty-three acres had been sold for $15,593,156—an average of about $3.43½ per acre—a little less than one dollar above the Government price for the even-numbered sections within the limits of the grant.

Who knows what the public mind is? These great corporations are here, by their agents and attorneys, using their influence against the whole policy of forfeitures on the one hand, while upon the other are numerous shysters, speculators, and lobbyists in the guise of patriots and representatives of the people, urging Congress to forfeit the lands granted to every railroad where there is the slightest pretext for it. Casting about us to discover the mainspring of action of this seemingly disinterested class, we find in the eighteenth volume of Statutes at Large, page 519, an act of Congress approved March 3, 1875, in these words:

> That where any actual settler who shall have paid for any lands situate within the limits of any grant of lands by Congress to aid in the construction of any railroad, the price of such lands being fixed by law at double minimum rates, and such railroad lands having been forfeited to the United States and restored to the public domain for failure to build such railroad, such person or persons shall have the right to locate, on any unoccupied lands, an equal amount to their original entry, without further cost, except such fees as are now provided by law in pre-emption cases.

It is probable that a knowledge of the existence of this law is the cause of much of the clamor that is raised along the line of this important road for a forfeiture of its lands. In that event every person who has entered land at double minimum anywhere within twenty miles of the road on either side in the Territories or within ten miles on either side in the States through which the road runs, as well as within those limits where the road has not been constructed, would, if a forfeiture were declared as recommended by the majority, have the right, under this law of 1875, "*to locate, on any unoccupied lands, an equal amount to their original entry without further cost.*" If those who would fall within this law saw proper they could "locate" upon any unoccupied land in

any State or Territory of the United States. This would give rise to another class of land scrip and open another field for speculation and ruthless jobbery.

This law of 1875 was intended to apply to entries made at the double minimum of $2.50 per acre within the limits of withdrawal for a projected railroad which is never built and the lands forfeited "for failure to build" the road. The proposition of the committee is to forfeit, "for failure to build" *within the time limited*, the lands lying alongside of 1,500 miles of road which has actually been built and is now in operation, thereby bringing the settlers all along that line within the provisions of the law of 1875. In this, that law would receive a most odious and unjust application. It offers to double each man's real estate along the line of every land-grant railroad, if he has purchased at the double minimum, and can induce Congress to declare a forfeiture. Congress did not apprehend that the statute would ever find such a field of operation, for the simple reason that no one in Congress then had ever conceived the idea of declaring forfeited the lands granted to a railroad company after it had actually built its road merely because it was not built strictly within the time limited in the grant. Such a course finds no warrant in the law, and leads to absurd consequences.

Keeping steadily in view the great object which the Government, in making the grant, intended to accomplish, viz, the speedy construction of a transcontinental line of railway from Lake Superior to Puget Sound, parallel with and north of the forty-fifth degree of north latitude, we find—

(1.) That the eleventh section of the granting act declares that the railroad shall be a post-route and military road for the use of the Government, and subject to such regulations as Congress may impose restricting its charges for Government transportation.

(2.) That the latter part of section 4 of the granting act, under a proviso, declares "That lands shall not be granted, under the provisions of this act, *on account of any railroad, or part thereof, constructed at the date of the passage of this act.*" And a part of the proviso to the fifth section authorizes the company to form running connections with other companies on fair and equitable terms. The company have *formed a running connection*—control and operate the railroad of the Oregon Railway and Navigation Company from Wallula Junction to Portland, in the State of Oregon, a distance of 214 miles, which forms an important link in the connection between the eastern and western portions of the Northern Pacific Railroad. We learn that the lease or running arrangement is of a continuing or permanent character, at least for a great period of time. Now, we are of opinion that the company are not entitled to the lands coterminous with the 214 miles of the Oregon Railway and Navigation Company. It is not the purpose or intent of the granting act to give lands to the company on account of a road *constructed*, for the language is that "there be and hereby *is granted* to the Northern Pacific Railroad Company, *for the purpose of aiding in the construction of said railroad*," &c.

The intention of Congress is to be gathered from the entire act, and in fact from all the legislation upon the subject. In construing a legislative grant, no presumptions are to be indulged against the grantor, as in the case of individuals. The grantee must show his right in unambiguous terms. (Grand Lodge *vs.* Waddill, 36 Ala.; United States *vs.* Railroad Co., 1 Black.)

Can the Northern Pacific Company retain title to these lands along the Columbia River from Wallula Junction to Portland on account of a

road which it found there constructed and acquired by lease? We do not understand that the Northern Pacific is making any effort to construct their road to fill this gap. Indeed, there is no necessity for paralleling the line which they have leased. If the company is not entitled to hold these lands—and we hold they are not—it is the right and duty of the United States to resume the title and restore them to the public domain. There is no ground of forfeiture, for we have seen that that character of estate was not granted. But we hold that under the reservations of the 9th and 20th sections of the granting act and the right of eminent domain as lord paramount, the Government of the United States may, through its Congress and by statutory enactment, resume the title to the lands granted coterminous with the said leased road from Wallula Junction to Portland.

The granting act designed as the main line what is now known as the Cascade Branch, but the aforesaid joint resolution of 1870 so changed it as to allow the company to construct their main line along the valley of the Columbia River, via Portland, and made a grant for the Cascade as a branch line. Some portion of this branch has been built, but in order to complete it three miles of tunneling through the mountain, a vast expenditure of money, and four or five years' further time are necessary. We are unwilling to recommend that the lands granted to this branch should be withheld from settlement for such time, and think that the Government should, under its reserved powers, resume the title thereto. The Government must not be defrauded, and where no road has been constructed the company has no right to the lands. In other words, the position of the minority is this: Where a company has constructed a road, or any section of it, in the manner required by the granting act, at any time before proceedings are commenced for forfeiture or to annul the grant, that such company is entitled to the amount of land that such constructed section would entitle the company to had the whole road been constructed in accordance with the terms of the grant, and this is what we mean by "earned lands." (Van Wyck *vs.* Knevals, 106 U. S. Rept.) But where no road has been constructed, as a matter of course we are in favor of a forfeiture or resumption by the United States of the ownership of the lands granted. The said railroad company, by their attorney, have admitted to us that the remaining lands and property will be ample security for the payment of the mortgage indebtedness, so that the resumption of the title to the lands hereinabove named will not impair the security of the bondholders.

We also recommend that Ashland, on Lake Superior, in the State of Wisconsin, be made and considered the eastern terminus of said railroad, and the land grant be adjusted with said company, from that point westward, and that patents be issued to said company for all road constructed as aforesaid.

Now, to the end that the rights of all parties may be clearly defined, legally, equitably, and finally settled, we report the accompanying bill and ask that it be printed, as we will offer it as a substitute for the bill of the committee.

WM. C. OATES.
H. S. VAN EATON.
H. B. STRAIT,
JAS. B. BELFORD.

A BILL to adjust the land grant made to the Northern Pacific Railroad Company July 2, 1864, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in consequence of the failure of the Northern Pacific Railroad Company to construct its road from Wallula Junction to Portland, in the State of Oregon, a distance of two hundred and fourteen miles, over which line the said company have running connections with the Oregon Railway and Navigation Company, and have abandoned the building of their own road between said points, the United States resumes the title to the lands granted to said company, and so much of the act making the grant of lands to said Northern Pacific Railroad Company as applies between Wallula and Portland is hereby repealed, and the said land is resumed as a part of the public domain.

SEC. 2. That a joint resolution approved May 31, 1870, entitled "A resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road, and to secure the same by mortgage, and for other purposes," be, and the same is hereby, so amended as to read as follows, to wit:

That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchises as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior, and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia River: *Provided*, That all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the approval of this act, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity, or for any failure or default of said company under the existing terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder: *Provided further*, That the President of the United States, under existing laws shall, within one year from the date of this act, cause surveys of the land coterminous with all of the road constructed by said Northern Pacific Railroad Company which has not been heretofore surveyed, and such of said lands as said company have earned by the construction of their said road up to the approval of this act, in accordance with the granting act approved July 2, 1864, to be patented to said company, and cause a complete adjustment thereof between the United States and said company; and all lands which have been withdrawn from sale on account of the grant to said railroad company, either for its main trunk line or branches, which are not then and thus patented to said company, shall revert to the United States, the title to which is hereby resumed, and which, after the aforesaid adjustment, shall again become a part of the public domain and be subject to sale and settlement as such: *And provided also*, That Ashland, on Lake Superior, in the State of Wisconsin, shall be the eastern terminus of said Northern Pacific Railroad, and the lands granted shall be adjusted and patented from said terminus westward.

SEC. 3. That Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company and any other parties. And the present amendment shall not revive any part of section one of the act approved July 2, 1864, which the said joint resolution amended.

VIEWS OF MR. BRENTS.

Representing a constituency more deeply and directly interested in any legislation touching the further construction and operation of the Northern Pacific Railroad, or affecting the land grant of the company, perhaps than any other member of the Committee or of the House, I trust I may not be considered presumptuous in offering some brief suggestions, and recommending a course at variance in some of its features with the propositions of both the majority and the minority of the Committee.

In this, as in all other matters, we should endeavor to deal with the facts, not as we may wish them to be, but as we actually find them to exist, and aim at practical results most promotive of "the greatest good to the greatest number." In doing this, however, we should not in the frenzy of the hour attempt to repudiate our assumed obligations or overstep the bounds of fair dealing, even with the most unscrupulous, on the one hand, nor, in cringing deference to the arrogant claims of monopoly and power, refuse the people needed protection against their rapacity on the other.

To what consideration at the hands of Congress our assurances heretofore given to the company and its creditors, as an inducement to embark in a stupendous and hazardous enterprise, may in law and in equity now entitle them, although very pertinent questions to this inquiry, are not the only ones involved.

The rights and interests of the brave pioneers who peopled the wilderness and the plain, paying double price for the lands on which they settled in anticipation of the ultimate construction of this transcontinental thoroughfare, and of those still coming for the purpose of planting homes upon the lands to be affected by this legislation, and, indeed, all others living there, should also be scrupulously regarded.

How, then, can all these rights and interests of the company, its creditors and the people, be best conserved? What power has Congress in the premises? And how should it be exercised to attain these desirable results?

Widely divergent views are held, not only by the members of the committee, but by the most profound lawyers and jurists of the nation, as to the construction to be given to these granting acts and the effect of subsequent Congressional legislation and Executive action of the Government respecting these lands. All agree that these were present grants on conditions subsequent. The contention to a great extent arises out of the effect of the ninth section of the act of July 2, 1864, making the original grant; the joint resolution of May 31, 1870, extending the time for the completion of the road, granting the indemnity lands and authorizing the mortgaging of the granted lands in the prosecution of the work of construction; the passage of the act of July 10, 1882, securing the right of way across the Crow Indian Reserva-

tion for continuation of such construction; the acceptance of the constructed portions of the road and the certification of the adjacent lands for patent by the Interior Department under the fourth section of the act of 1864, and the non-action of Congress for their forfeiture and restoration, and relates not only to the consequences of a breach of such conditions, but to what constitutes a postponement or abrogation of the conditions themselves.

The majority of the committee, agreeing with the minority of the House Committee on the Judiciary, of the Forty-seventh Congress, hold that there is perfect consistency between the eighth and ninth sections of the act of 1864, and that neither the latter section nor the provisions of the joint resolution operate as a modification of the conditions expressed in the eighth section of the act; and they furthermore insist that nothing has occurred to suspend or destroy the power of forfeiture or right of re-entry resulting from the failure of the company to complete the road within the time specified.

On the contrary, the minority of the committee, concurring in the view taken by the United States circuit court of the ninth circuit in the cases of the United States *vs.* Childers, 8 Sawyer, 174, and Hughes *vs.* the Northern Pacific Railway Company, Report of the Commissioner of Railroads for 1883, 232, and the majority of the House Judiciary Committee of the Forty-seventh Congress, maintain that by the original granting act "these lands were devoted to the construction of the road in any event," that Congress is limited to the doing of "such acts and things as may be needful and necessary to insure the speedy completion of the said road," and that so far as completed and accepted and the lands certified for patent, the title to such lands has become indefeasibly vested and beyond the power of Congress. Moreover, they contend that if it were not so, in the passage of the joint resolution referred to, whereby the company was "authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed," and specific direction given as to sale of its lands under foreclosure proceedings, the United States became "a confirming party," as Sheppard expresses it (see the Touchstone, 121), to such mortgages as have been given in pursuance thereof, and cannot now destroy the rights acquired by the mortgagees thereunder.

Insistance has also been made that the recent legislation for opening the right of way across the Crow Reservation, and other acts and omissions on the part of the various branches of the Government operate as a waiver of the right of forfeiture.

In view of this diversity of opinion upon these perplexing questions, who can assert with any degree of confidence how the court of last resort will decide them? Should the declaration of forfeiture include the lands already earned by the company by the construction of its road, although out of time, but with the acquiescence and positive encouragement and facilitation of the Government, and which, after examination and acceptance of such road, have been certified to such company for patent as provided in section 4 of the act of 1864, mortgaged pursuant to the authority given by the joint resolution of 1870, or sold to innocent purchasers, is it to be supposed that either the company, the mortgagees, or purchasers will yield their claim to them without resistance? True, provision is made in the bill reported for the confirmation of these purchases to the extent of 160 acres. But throughout the region where these lands lie, extending over the Territories of Dakota, Montana, Idaho, and Washington, the understanding has prevailed, both among

lawyers and laymen, that the title of the company to these lands was perfect, and hundreds of persons have purchased, in good faith, more than 160 acres, paid their money—from $2.60 to $20 per acre, and received deeds therefor. Many of these purchasers are poor men, with every dollar they possess invested in these lands. Some of the lands are in a high state of cultivation, and have upon them costly improvements. The bill reported proposes to take away all these lands in excess of 160 acres. This is unmitigated confiscation, nothing more nor less. Suit cannot be brought against the Government to test the validity of the company's title, nor of the lien of the mortgages. This immunity of the Government, however, will not be available to its transferees, and the inevitable consequence will be that settlers on these lands, both sold and unsold, will be harassed by interminable litigation, their titles remain unsettled for years, the value of the lands depreciated, and the development of the country greatly retarded. Let me suggest a course by which all these titles can be made sound, litigation avoided, the speedy completion of the road (so far as necessary) insured, and other advantages of incalculable value to the people obtained.

The construction of the road between Wallula, Wash., and Portland, Oreg., is no longer required, and in all probability is not contemplated by the company for a long time to come. Another company, under the same general management, already has a road in operation over that portion of the line.

Between 50 and 60 miles of the Cascade division, between Ainsworth and the western terminus, on Puget Sound, have been built and accepted, and the lands certified for patent. Only about 180 miles remain unfinished. It crosses a rugged mountain range that must be tunneled, and portions will be quite difficult of construction. It is of the utmost importance to the country that it should be built, and that speedily. It brings all localities east of it on this and connecting roads nearly 200 miles nearer the harbors of Puget Sound and Asia than by the Wallula and Portland route, gives direct conection between the eastern and western sections of Washington Territory, opens to settlement a vast and fertile region, and completes a direct line of communication from ocean to ocean.

Manifestly Congress intended when it passed the joint resolution of 1870—though it gave rather imperfect expression to such intention—that after the expiration of five years from the time therein designated for the completion of the road, the lands granted to the company not then disposed of, so far as it might be done without impairing the mortgage securities thereby authorized, should be sold at the maximum price of $2.50 an acre, the Government to bear the expense of surveys. Many of the lands have already been sold at that price, with 10 cents an acre added to cover cost of surveys, which, it was claimed, should have been paid, but was not, by the Government. Repeated assurances of an official and quasi-official character have been given as to certain classes of these lands, that future sales should be made at that price. In October, 1879, the Board of Directors of the company promulgated this resolution:

Resolved, That the agricultural lands of the company west of the Missouri River to Puget Sound shall be offered for sale to actual settlers at the Government price of $2.50 cash per acre, with an addition of 10 cents per acre to be paid to the company to reimburse it for the cost of selecting, surveying, and conveying said lands. This resolution does not apply to coal or iron lands; nor to lands chiefly valuable for timber; nor to lands required for town sites; nor in regions where water is scarce, to lands containing springs or other natural supply, where it shall be for the interest of settlers at large that such water privileges shall not be exclusively held or controlled by any individuals; nor to lands required for the use of the company in connection with the operation of the road.

This resolution was widely published throughout the country, and served as an inducement to many persons to settle upon and improve these lands in expectation of purchasing at the price stated. Under all the circumstances such a limitation is, it seems to me, but reasonable, fair, and just, and should be applied to all the agricultural lands of the company west of the Missouri River with the exceptions specified, both in the original grant and the indemnity limits. At this price, by the course I shall suggest, the lands of the company will, without doubt, afford ample security for all indebtedness secured by mortgage thereon.

It is also desirable that these lands should be sold only to our own citizens, or persons intending to become such—persons entitled to acquire lands under the public laws of the United States, from the Government—and in small tracts. Neither should they be suffered, when earned—and I consider them earned when the coterminous road is built and accepted—to longer escape taxation, as they have in the past.

Another matter in this connection demands our consideration, and appropriate relief. By its recently established tariff, the company has been charging exorbitant and unjustly discriminating freights and fares on its road. To points in the eastern part of Washington Territory from the east, through rates to Portland, Oreg., several hundred miles beyond, and local rates back again, the extra carriage being a mere fiction, have been exacted. Loud protests are coming up from the people of this disfavored region against this gross injustice. This reprehensible practice should not be tolerated.

These are crying abuses, calling loudly for relief; but they do not call for the application of the remedy of the nihilist or the communist. The vested legal rights of the company, its bondholders and purchasers, must be regarded. Their equities must be respected. The speedy completion of the road must be secured. Fanaticism should be eschewed, and conservatism, discrimination, and calm judgment bear sway. Care should be taken not to plunge the people into greater evils than those from which we seek to rescue them. No permanent good can come to the country from a sweeping forfeiture of these lands, the resultant bankruptcy of this company, the transfer of its road and franchises to the owners of a rival transcontinental road, and the strengthening of a more powerful and no less unscrupulous monopoly.

A remedy should be applied which is both appropriate and just—just to the company and just to the people. Because wrong has been done, cannot justify us in doing wrong. In homely phrase, "two wrongs do not make one right," and it is no less true that both the doer and receiver of a wrong suffer therefrom.

As the best adapted and most effective cure for all existing ills compatible with the original purpose of the grant and of the legal and equitable rights of all concerned, and as a measure more likely to receive the favorable concurrent action of both houses, and consequently giving better promise of needed relief, I recommend the passage of the appended bill, instead of that reported by the committee.

THOS. H. BRENTS.

A BILL to forfeit certain lands granted to the Northern Pacific Railroad Company, and to confirm the residue to said company on certain conditions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all those certain lands granted to the Northern Pacific Railroad Company by act of Congress approved July second, eighteen hundred and sixty-four, and amendatory and supplementary acts and resolutions, lying coterminous with and adjacent to that part of the line of its proposed railroad between Wallula, in the Territory of Washington, and Portland, in the State of Oregon, are hereby declared for-

feited to the United States and restored to the public domain, for breach of the conditions on which they were so granted.

SEC. 2. That all the rest and residue of the lands so granted to said company are hereby confirmed to it, its successors and assigns, on the express condition that it and they shall fully and in all respects conform to and comply with all and singular the provisions and requirements of this act and the provisions and requirements of the acts and resolutions aforesaid so far as they are not modified by or inconsistent with the provisions of this act.

SEC. 3. That said company shall henceforth construct not less than 100 miles of its railroad each year, and shall fully construct, equip, furnish, and complete the whole of said road by July fourth, eighteen hundred and eighty-six, save and except said portion between Wallula and Portland, from the construction of which it is hereby released.

SEC. 4. That all lands hereby confirmed to said company lying coterminous with and adjacent to the constructed portion of its road shall henceforth be, and all lands coterminous with and adjacent to the unconstructed portion thereof shall, as such construction proceeds, become subject to assessment and taxation by the State, Territory, county, or municipality wherein they are or may be situate as other lands therein.

SEC. 5. That all agricultural lands so confirmed to said company which were not earned by it by the construction of its road coterminous therewith before July fourth, eighteen hundred and seventy-nine, not sold before January first, eighteen hundred and eighty-four, shall be sold by said company only to citizens of the United States or persons who shall have declared their intention to become such, in quantities not exceeding 160 acres to any one person, and at a price not exceeding $2.60 per acre, with such interest on deferred payments as the laws of the State or Territory wherein the same are may allow: *Provided*, That this section shall not apply to coal or iron lands, nor to lands chiefly valuable for timber, nor to lands required for town sites, nor, in regions where water is scarce, to lands containing springs or other natural supply of water, where it shall be for the interest of settlers at large that such water privileges shall not be exclusively held or controlled by any individuals; nor to lands required for use in the operation of the said railroad.

SEC. 6. That said company, its successors, or assigns, shall not charge or collect, or permit to be charged or collected, greater freights or fares for transportation of property or passengers of the same class, over a shorter than over a longer portion, or the whole, of its road; nor discriminate or suffer discrimination between its patrons in its charges for similar services; nor enter into or suffer to be entered into any contract, combination, or understanding, directly or indirectly, with any owner or controller of any competitive line of transportation relative to such charges, or for the pooling or sharing between them, in any manner, of any of the earnings or profits of the same, or either of them, or whereby any benefit or advantage may accrue to them or either of them, either directly or indirectly connected therewith.

SEC. 7. That the compensation chargeable for carriage of persons and property, or either, over said road, and each and every portion thereof, shall always be reasonable, and subject to regulation by Congress, in so far as such regulation may not conflict with paramount State legislation; and that until so otherwise provided, the maximum rates of such compensation shall be such as the Commissioner of Railroads may, under the direction of the Secretary of the Interior, from time to time, prescribe for the various classes of freights and passages, a plainly printed schedule of which shall be kept conspicuously posted in all the offices and stations of said road.

SEC. 8. That if said company, its successors or assigns, shall be guilty of a breach of the foregoing condition in respect of any of the requirements aforesaid, all lands hereby confirmed to it and remaining unsold by said company at the time of declaration of forfeiture thereof by Congress, including such as may have been sold or contracted to be sold in violation of section five of this act, shall thereupon revert to the United States.

SEC. 9. That any citizen of the United States, or person having declared his intention to become such, who, prior to the passage of this act, shall have settled upon or improved any of the lands mentioned in the first section of this act, with intent, in good faith to purchase the same of said company when earned by it, shall have a prior right for three months thereafter to make a filing for the same, not exceeding 160 acres in extent, under the pre-emption or homestead laws of the United States, or in case he or she may not then possess such right to purchase the same of the United States, under such rules and regulations as the Secretary of the Interior may prescribe, for $1.25 an acre, and to receive a patent therefor.

SEC. 10. That Congress may, from time to time, having due regard for the rights of all persons acquired under the provisions of said acts and resolutions and of this act, add to, alter, amend or repeal this act.