“GOVERNMENT LANDS”
(1878)

BY

JAMES H. BAKER
United States Surveyor General
Minnesota District

FOREWORD

BY

DOUGLAS A. HEDIN
Editor, MLHP

Months after James Heaton Baker was mustered out of the Union army in October 1865, he was promoted brigadier general □ and ever after was known as General Baker. Like many other veterans who had been high ranking officers, he received appointments to positions in government agencies in the post-bellum years. A self-portrait published in 1879 carries his story to that point:

> Peace being restored, General Baker was mustered out of service on the 31st of November, 1865, and appointed register of the consolidated land offices at Booneville Missouri, and at the end of two years resigned. He returned to his farm in Blue Earth county, Minnesota, intending to enjoy the quiet of rural life; but in 1871, after declining to accept public positions of trust offered him, President Grant tendered the important office of commissioner of pensions, and he entered upon its duties on the first day of June of that year. “To the discharge of these duties,” said a writer for an eastern periodical in 1874, “he brought all the force of an energetic nature, and the powers of a well-balanced, vigorous and analytic mind, with a steadfast devotion to his trust. A soldier himself, in assuming the chair of commissioner of pensions he felt that every

> disabled soldier, and every widow and orphan of a deceased comrade, became his ward, whose interests, under his oath of office, he was not only to protect, but to carefully watch over."
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> Through the instrumentality of General Baker, the pension laws, formerly scattered here and there through different volumes of the statutes, were compiled in one law and very much simplified. He resigned this office on the 31st of May, 1875, having served a full term of four years, and President Grant tendered him the office of surveyor general of the state, which he now holds, having his home in Mankato. While holding this office, General Baker has contributed more largely than all other influences to bring into notice the north shore of Lake Superior. His letters from that region have attracted wide attention. [1]

After his tour of duty as Surveyor General ended, he was elected to the state Railroad and Warehouse Commission, serving from 1882 to 1886.[2] He secured these government positions because he was a competent administrator, a war veteran, and in part because of his party affiliation, but in 1890, in what must have

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[1] *The United States Biographical Dictionary and Portrait Gallery of Eminent and Self-Made Men. Minnesota Volume* 166, 167-8 (American Biographical Pub. Co., 1879) This is an excerpt.

A semi-official collection of biographical sketches published in 1912 includes this entry:

> BAKER, JAMES HEATON, general, b. in Monroe, Ohio, May 6, 1829; was graduated at the Ohio Wesleyan University, 1852; came to Minnesota in 1857; was secretary of state, 1860-2; was colonel of the Tenth Minnesota Regt. in campaigns against the Sioux, 1862-3, and served till the close of the civil war, attaining the rank of brigadier general; was U. S. commissioner of pensions, 1871-75, and later was U. S. surveyor general for this state; resides in Mankato; author of "Lives of the Governors of Minnesota," forming Volume XIII, Minn. Historical Society Collections.

Warren Upham & Rose Barteau Dunlap, *Minnesota Biographies, 1655-1912* 29 (14 Collections of the Minnesota Historical Society) (Minn. Hist. Soc., 1912).

[2] His term ran from January 10, 1882 through December 1886. 1885 Blue Book, at 259.

been a wrenching decision, he ran for Congress in the second congressional district on a ticket of the Farmers' Alliance Party[3] and the Democratic Party, losing narrowly to Republican John Lind:

> John Lind (Republican).............20,788
> James Baker (Alliance).............20,306
> Ira B. Reynolds (Prohibition)........1,146 [4]

1890 was an anti-Republican year, and Lind's victory was an aberration. According to biographer George M. Stephenson, Lind won because he was a superb politician, not because of any campaign mistakes by Baker:

> Lind's opponent was General James H. Baker of Blue Earth County, a man with an excellent war record, a long political experience, and considerably more ability than his opponents in previous campaigns. He ran as the Farmers' Alliance candidate, with the indorsement of the Democrats. He featured tariff revision and condemned the McKinley Act unequivocally.
>
> Lind survived the unpopularity of the McKinley bill and the surge of the Farmers' Alliance and was re-elected by a small margin. . . . The victory was a great triumph. Lind was the only Republican elected to Congress; the Democrats and the Alliance people each supplied two of the other four members of the Minnesota delegation.

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[3] George M. Stephenson describes the beginnings of the Farmers' Alliance Party:

> From 1886 to 1896 politics were topsy turvy; a discontented West and a restless labor world expressed themselves in third party movements, which culminated in the organization of the Populist party. The election of Grover Cleveland in 1884 was a harbinger of disasters that were to overtake the Republican part, and later the Democratic party also. The organization of the Farmers' Alliance and Industrial Union and the People's party was symptomatic of the widespread dissatisfaction with the old parties, fighting sham battles over issues that had ceased to be vital.

George M. Stephenson, *John Lind of Minnesota* 28 (University of Minnesota Press, 1935).

[4] 1891 Blue Book, at 574.

> "John Lind, the only Minnesota Republican in the Fifty-second Congress, looms up like Mount Ararat after the deluge," was the comment of the *Duluth Tribune*. . . .
>
> Though it is perhaps impossible to explain with certainty the remarkable circumstance that Lind survived the political tornado of 1890, one fact is clear: It was not by a surrender of Republican principles or an apology for his party's record. He voted against the Mills bill and for the McKinley bill and justified his action both on the stump and in Congress. It was probably his personal popularity, his reputation for integrity, the friendliness of the war veterans, and the popularity in his district of the Silver Purchase Act, together with his effective speech in favor of it. Lind was also able to handle the patronage without damage to himself, . . .[5]

James Heaton Baker

In subsequent years, Baker pursued his interests in public affairs in a different forum he published papers, articles and monographs, especially about state history. [6] Writing seems to have

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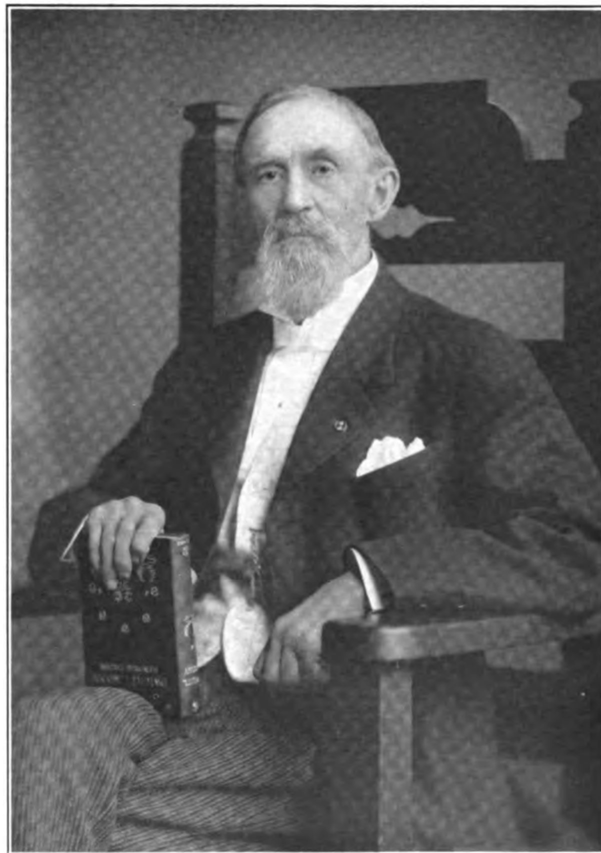
[5] George M. Stephenson, supra note 3, at 66 (citing sources).

[6] His short biographies of the first eighteen Minnesota governors, published in 1908, are still important references. See James H. Baker, *Lives of the Governors of Minnesota* (Minn. Hist. Soc., 1908) (Vol. 13 of the Coll. of the Minn. Hist. Soc.).

been an outlet for his considerable energy and wide-ranging interests. He died on May 25, 1913, at age eighty-four.

As U. S. Surveyor General for Minnesota, he contributed the following brief history of the various categories of public lands for inclusion in the annual report of the Minnesota Commissioner of Statistics for 1878. Most of the federal laws he cites are posted on the MLHP: the Organic Act (1849), Enabling Act (1857), Pre-emption Act (1841), Homestead Act (1862), Morrill Act (1862) and Timber Culture Act (1873-1878). He mentions an important decision of the state supreme court "rendered April 14, 1877" on swamp-lands. The court's ruling in *St. Paul & Chicago Railway Co. v. Charles T. Brown*, 24 Minn. 517 (1877), is posted in an Appendix. □



JAMES HEATON BAKER
(ca. 1910)

“Government Lands”

IN

REPORT OF THE COMMISSIONER OF STATISTICS

IN

EXECUTIVE DOCUMENTS

OF THE

STATE OF MINNESOTA

FOR THE YEAR 1878.

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GOVERNMENT LANDS.

The following paper prepared by Gen. Jas. H. Baker, United States Surveyor General of this district, contains an interesting history of the public lands of this State, and valuable statistical information respecting their disposition, etc., and it is, therefore, given entire:

That portion of the United States which lies within the limits of the State of Minnesota, has a double origin as to its chain of title. The title to that portion of the State lying east of the Mississippi river came through Virginia, by reason of such ownership as flowed from priority of settlement under the auspices of Great Britain. Virginia was first settled we a colony from England, May 13, 1607, by a worthless and profligate set of adventurers sent out by James the First. The courageous and chivalric conduct of Captain John Smith alone saved the colony from utter disgrace. The final royal charter to the land; including all lands westward to the Pacific, was not issued till 1619, the very year the Dutch vessel brought the first slaves to Jamestown. So that it happens that the title to the eastern portion of our State had its origin in a settlement of the continent abounding in felons and noted as the original spot where slavery in America was first instituted. In 1784, Virginia ceded to the United States her claims to all lands, founded on the grant in the charter of 1619.

Title to that part of Minnesota lying west of the Mississippi originated with France, by right of discovery, La Salle having discovered the mouth of the great river in 1691. There was a previous discovery of the river by De Soto, in 1541; but no claim was made by Spain and a charter was granted to Iberville, in 1699, by Louis the XIV. In 1717, the country known as Louisiana passed, by royal grant, into the hands of John Law and his Mississippi Company; on the explosion of which it reverted to the French crown. It is interesting here to note that the first full exploration of the Mississippi river was made by the intrepid French voyageurs descending from our own region, as early as 1682, and that the first governor of Louisiana aided in fitting out the famous expedition of Monsieur Le Sueur into the “great Sioux

country." So that we bore a part in the origin of our own title to the soil. The French ceded Louisiana to Spain in 1762. In 1800, Bonaparte, the first consul of France, induced Spain to retrocede Louisiana to France, and in 1803, Bonaparte sold it to the United States for $15,000,000. The American flag first floated at New Orleans on the morning of December 20, 1808. Such is the chain of title which is the foundation of the present ownership. Minnesota was organized into a Territory March 3, 1849, and the act admitting it as a State bears date February 26, 1857.

By the act of March 3, 1849, the north boundary of Iowa was fixed at 43 deg. 31 min. north latitude. This line was determined in the fall of 1849 by Capt. Thos. J. Lee, of the topographical bureau, and the line extended wait by Capt. Talcott in 1852. The boundary between Minnesota and Wisconsin was run the last mentioned year by Gen. H. Stuntz, now of Duluth. The surveyor general's office was established at St. Paul, Minn., by the act of March 3, 1857, and was removed to St. Paul from Detroit on the 23d of May of the same year. This is the first and original surveyor general's office, which was established by congress, May 17, 1796, the bill having bean signed by George Washington. The office was first established at Marietta, Ohio, and Rufus Putnam was the first surveyor general. In 1804 it was removed to Vincennes, Ind.; in 1805 to Cincinnati; 1814 to Chillicothe, Ohio; in 1829 back to Cincinnati; in 1845 to Detroit Mich.; and finally May 28, 1857, to St. Paul, Minn. The correspondence and important original papers have followed the office, and are now to be found in the St. Paul office, from Gen. Putnam's administration to the present time, and are full of interesting facts. The Territory of Minnesota was erected into a surveying district through the active exertions of the Hon. H. M. Rice, and a very exciting history is connected with the passage of the act, with which Toombs and Stephens, of Georgia, and George A. Jones, of Iowa, were intimately associated. The surveyor general's office of Iowa, to which we were then attached, entered largely into the polities of the day. The contest over the erection of Minnesota into an independent surveying district was exceedingly bitter. The provision of law authorizing it was only secured by placing it in the general appropriation bill. The first surveys in the Territory were made just north of the Iowa line, in the summer and fall of 1853,

when Minnesota was attached to the Iowa office. John Quigly, John Parker and William B. Yerby were the first surveyors, and the first surveyor general for the State was Charles L. Emerson. The boundary lines having been established by the act authorizing a State government, we found ourselves in possession of an area of 53,459,840 acres. It is a matter of considerable interest to know just what has become of all these millions of acres, and to reflect upon the wisdom and methods of their distribution. These matters I propose to consider as the subject of this paper.

IMPORTANT EXPLANATIONS AS TO MERIDAN AND BASE LINES IN THIS STATE.

The initial surveys in Minnesota were based on certain principal meridian lines, and from these lines we count the townships either east or west. Our surveys were begun on the fourth principal meridian, which commences in the center of the channel at the mouth of the Illinois river; and thence runs due north, and crossing Lake Superior, strikes Minnesota in township 61, north, in Cook County, and governs all our surveys east of the Mississippi river. The fifth principal meridian commences at the mouth of the Arkansas river, and thence, passing due north through Missouri and Iowa, to township 91 in Iowa; it there intersects the Mississippi River, and thence follows the river to the east boundary of township 136, north, range 25, west, in Minnesota, and thence it becomes the third guide meridian, north to the International Line. Thus the Mississippi river, as far as it is a great national highway, was adopted as the fifth principal meridian.

“These meridians are intersected by certain base lines, which serve to count the townships north and south. The base line east of the Mississippi, from which we count, is the boundary line between Illinois and Wisconsin, which is town 1, north, and strikes Minnesota at town 26, range 20, at the mouth of the St. Croix river. The base line west of the Mississippi, from which we count, is in Arkansas, passing east and west, near Little Rock. This is township 1 north, and thence it is just 600 miles, as the bird flies, to the southern boundary of Minnesota, being township 101, north. The meridian lines are very irregular, and tend to confuse;

but if it is borne in mind that all townships numbering *less* than 101 are numbered from the fourth principal meridian, and all townships numbering *more* than 100 are numbered from the fifth principal meridian, this confusion maybe partially avoided."

Let us now proceed to consider the various cessions of land by the general government to the State.

OUR SCHOOL LANDS — THEIR HISTORY

The law and liberal rulings of the general government have given us a princely domain for the benefit of schools. By the ordinance of May 20, 1785, respecting the territory northwest of the Ohio river, and before the adoption of the constitution, the cause of education was wisely identified with the advance of settlements. it was then ordained that in every six miles square there should be established a public school, supported by a fund derived from a grant of section sixteen in every township. The policy of making the public lands contribute to the cause of education was thus early established. Such men as Benjamin Franklin and Dr. Benjamin Rush were mainly instrumental in engrafting this grand feature into our formative period.

Enlarging upon this idea at a later period, it was determined to increase the school concession to two sections to a township, granting the 16th and 36th, making in all, 1,280 acres in each township. Minnesota was among the first to receive the benefit of this new concession, and in the act of March 3d, 1849, organizing the Territory, it was enacted "that when the lands in said Territory shall be surveyed sections 16 and 36 in each township shall be, and the same are hereby reserved for the purpose of being applied to schools in said Territory, and in the States and Territories to be erected out of the same." And in the subsequent act of February 26th, 1857, authorizing the formation of a State government, this grant is preserved, and provides further, that where any of these sections have been sold or otherwise disposed of, the State shall receive other lands in lieu thereof. The liberal construction of these acts goes still further, for it is held by the proper authorities that the school sections shall be made good in even the water areas, and this, in our lake State, is a matter of

very considerable importance, as we have no less than 2,700,000 acres of water areas. By a further liberal construction of the law we also secure the full allowance of two full sections for all fractional townships. It is further held that in the case of Indian reservations we shall receive lands either “in place,” or indemnity lands selected elsewhere. We have thus received indemnity lands for the Lake Pepin reservation, and for the Winnebago and Sioux reserves, south of the Minnesota river. So that it results that our State will receive the eighteenth part of the entire area of the State for the purpose of supporting the public schools. This liberal and munificent grant has endowed Minnesota with a domain for educational purposes second to no other State in the Union. The whole area of the State, water included, is 53,459,840 acres; the eighteenth part of which is 2,969,991 acres, and the fractional allowances will probably raise the whole amount to quite 3.000,000 acres, a domain for school purposes alone, nearly equal to the whole State of Massachusetts.

LANDS FOR THE PUBLIC BUILDINGS — THE HISTORY OF THE SELECTION.

The act authorizing the formation of a state government, granted ten sections of land to the state, “for the purpose of completing the public buildings, or for the erection of others at the seat of government.” The elections for this purpose were made under the direction of Hon. H. H. Sibley, when governor of the state. Under this grant 6,395 acres being the whole amount due, have been certified to the state. No action has been taken in reference to these lands, and they are now available for the purposes granted. The history of the selection is as follows: In the summer of 1847, H. H. Sibley, then superintendent and. partner of the great fur company of Chotean, Jr., & Co., in company with nine other gentlemen, made an extensive reconnoissance of the then unknown country north of the Minnesota river. Relying wholly upon their guns for subsistence, they took a wide range, and among other places, passed among the lakes of Kandiyohi, and were profoundly impressed with the beauty of the scenery, the loveliness of the lakes and the fertility of the soil. Subsequently when Mr. Sibley became governor of the state, the duty devolved on him to direct the selections of these public building lands, and

remembering the exquisite beauty of the Kandiyohi region, he issued an executive order, bearing date August 23, 1858, appointing Pierre Bottineau and James D. Skinner commissioners to visit that lake region and there select the lands. This was done, and the wisdom of the selection can never be questioned. It will be remembered that, following this action, we had the interesting fiction abroad in this state, that this selection carried with it the final location of the state capital among the lakes of Kandiyohi. It will also be remembered that the legislature of 1869 passed a bill locating the capital at Kandiyohi, which was vetoed by Governor Marshall. Three years ago, another attempt was made, and the bill for the removal of the capital to Kandiyohi passed the senate, and in the house was killed in committee of the whole.

STATE UNIVERSITY LANDS.

In addition to this concession for the support of public schools two entire townships, or 72 sections, were appropriated by the act of Feb. 19, 1851, for the use and support of a state university, embracing 46,468 acres, as located. An additional grant of 72 sections, or 46,080 acres more, was authorized by the act of July 8, 1870, in which congress directed that Minnesota’s claim for 72 sections of land as a state should be adjusted without reference to what had been reserved for that purpose when a Territory. This last statute, therefore, doubled the university grant, making a total for university purposes of 93,548 acres. Under the first grant, the university lands were selected in 1854-5-6, by order of the regents, by John Rollins, B. B. Meeker and A. Van Vorhes. The selection under the second grant was begun under the direction of Gov. Austin, in 1870, but mainly completed, with scrupulous care, by Gov. Pillsbury.

THE ENABLING ACT — VALUABLE SERVICES OF H. M. RICE

The enabling act of Minnesota contains so many thoughtful provisions in reference to our public lands, that it is due to those whose wisdom prepared that document, that they should have honorable mention here. The Hon. Stephen A. Douglas was the chairman of the committee upon territories. The Hon. H. M. Rice

was then in the house from the territory of Minnesota. The latter gentleman supervised the drafting of the bill and Senator Douglas adopted the work of Representative Rice. In this enabling act a provision was secured which was made the basis of the act of 1870, duplicating the university grant. For this we are indebted to Mr. Rice. And it may as well be noted here that it was to the active exertions of Mr. Rice, both in the house and subsequently in the senate, that we are indebted for the larger proportion of the land grants which have aided so materially in developing our state.

AGRICULTURAL COLLEGE LANDS.

By an act of July 20th, 1862, with its supplements, congress donated to every state, for each senator and representative to whom it was entitled under the apportionment of 1860, 30,000 acres of land for the endowment of colleges for the cultivation of agri-cultural end mechanical science and art. Under this act, Minnesota received 120,000 acres, but a considerable portion being double minimum lands, the state actually received but 94,439 acres. These princely grants for public schools, university and agricultural college, confer an empire upon Minnesota for school purposes alone, without an equal in the history of the world. These agricultural lands by act of the legislature bearing date March 5, 1868, were consolidated with those for the support of the state university, and their proceeds will be expended for the support of that institution. The agricultural college, which had been previously located near Glencoe, in the county of McLeod, by the act of 1866, was, by the subsequent act of Feb. 8, 1868, merged and consolidated with the state university, “near the Falls of St. Anthony.”

The flood of agricultural scrip which was thrown upon the country by the act of 1862, establishing agricultural colleges for every state, was inimical of the general interests of this State in one particular. Our fertile lands invited speculators to locate their scrip in Minnesota to the fill extent of the law, and 1,033,908 acres were located upon our best agricultural lends in an interest generally foreign to actual settlement. The selection of the agricultural college lands inuring to this State were made under the charge of the Hon. Charles McIlrath, who was appointed by

the Governor as State agent to make selections under the grant. The parties directly engaged in making the selections in the field, were Col. John H. Stephens, J. P. Wilson, and the officers of the local land offices, and the lands were selected in 1863-64.

OUR SWAMP LANDS — THEIR HISTORY.

The origin of the policy of the national government granting swamp and overflowed lands to the several States, arose from the apparent necessity of aiding the States contiguous to the lower Mississippi in repairing their levees and constructing drains. And in 1849 a grant was made to the State of Louisiana of all her swamp and overflowed lands for this purpose. On the 28th of September, 1850, a similar grant was made to the State of Arkansas and other States, and finally, by the act of March 12, 1860, the provisions of the act of 1850 were made applicable to the State of Minnesota. These lands have been the fruitful source, by conflicting claims, decisions and interests, of perplexity in their adjustment, both to the general and State governments. By virtue of the laws above recited, there have been selected for the State of Minnesota, since the date of grant, 3,134,589 acres. In addition to this we instituted a claim for 322,314 acres more, arising from conflicts with homestead, tree culture, scrip and railroad selections in past years. This claim has been confirmed by the secretary of the interior in a decision rendered December 4, 1877. When these conflicting claims shall have been finally settled, we will receive from the national government 3,456,903 acres of swamp lands. It is proper to observe, however, that of this amount, but 1,361,125 have been certified to the State. The swamp lands yet to inure to the State from pending and future surveys, will be very considerable in quantity, but not so good in quality as those heretofore received. There probably will be some valuable swamp lands in the pine areas tributary to the head waters of the St. Louis river, and some of the tributaries of streams flowing into Rainy Lake waters. But the fact should be noted that the State has received its best swamp lands. The munificence of the grant already made, more than rivals the school grants. Have we received proper compensation for the lavish manner in which they have been distributed? We have already granted of these lands to railroads 1,603,282 acres. The

Cannon River Improvement Company is to receive 300,000 acres. Public benevolent institutions and schools were awarded 525,000 acres. And with some other inconsiderable grants, the residuary amount, by act of March 3, 1865, go to the Soldiers' Orphan asylum. Under a decision of the supreme court, rendered April 14, 1877,* all grants made to railroads must be filed before other and later grants will be rendered available. The swamp lands inuring to the State are selected by the surveyor general from the field notes, and his selections are final.

THE SALINE LANDS — THEIR HISTORY.

By the act of February 26, 1857, authorizing the people of the Territory of Minnesota to form a State government, "all salt springs not exceeding twelve in numbers together with six sections of land adjoining," were granted to the State for its use. Only 34,560 acres of the amount was found in surveyed areas. But even this amount was never fully realized, as the tardy certification on the part of the government allowed settlers to occupy a portion of these lands, and the State finally received but 26,435 acres. Of this amount the Belle Plaine Salt company received from the State 7,643 acres. The remaining portion, viz: 18,771 acres became available to the State and the legislature, by act of March 10 1873 transferred these lands to the board of regents of the State University, to be sold and the proceeds thereof to be disbursed in the interest of the law authorizing a geological and natural history survey of the State. By a proper presentation of the facts to congress there is but little doubt but that the effort would result in securing the uncertified portion of this grant, viz: 19,872 acres. It is in item well worthy of the attention of the authorities

The history of this selection is as follows: In 1858, the Hon. H. H. Sibley then governor, on the 23d day of August of the year appointed Pierre Bottineau and James D. Skinner, commissioners to make selections of Salt Springs and the lands inuring thereto. Gov. Sibley's instructions for the work were drawn with that care

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* The court's decision in *St. Paul & Chicago Railway Co., v. Brown*, 24 Minn. 517 (1877), is posted in the Appendix, pages 18-30 below.

and forethought which mark all his public transactions. On the 27th of November of that year, the commissioners made a report to the governor, verified by their oaths, and said "that they have visited in person and examined said Salt Springs, and that they do exist on or adjacent to the lands designated, and are of the kind or description contemplated by the act of congress." These alleged springs lie in the northwestern part of Otter Tail and the eastern part of Wilkin counties.

INTERNAL IMPROVEMENTS —THEIR HISTORY.

What are known as the internal improvement lands of the State amount to 500,000 acres of well chosen and valuable lands. On the 5th of November, 1872, a constitutional amendment was wisely adopted prohibiting any disposition of these lands, or their proceeds, except by such enactment of the legislature as should be approved by a majority of the people. This constitutional provision authorizes the sale of these lands the same as other State lands. The proceeds constitute an accumulating fund, interest compounding with principal, and now amounts to $108,830. At one time the St. Paul & Pacific railroad contested the title to about 9,000 acres of these lands, but the contest resulted in favor of the State. There are a few pre-emption conflicts, but indemnity will be allowed for any of them which may hold good; so that now these lands, or their proceeds, remain intact for such use as the people of the State may deem best.

This grant was not special to our State, but the provisions of the general act of September 4, 1841, contained a section (8) which embodied a grant of 500,000 acres for the purpose of internal improvements to certain new States therein named, together with a proviso making the same principle applicable to such new States as might thereafter be admitted. This was long anterior to our formation even as a Territory. This act and its proviso was entirely over-looked by our State authorities till 1865, when the Hon. F. F. Drake discovered the provision of the law. He solicited of the then governor, William H. Marshall, the privilege of making application to the commissioner of the general land office in behalf of the right of the State under the law. Mr. Drake visited Washington, and speedily convinced the commissioner of the

validity of our claim. On the subsequent application of the governor to the commissioner the grant was authorized. To Mr. Drake is justly due the credit of securing to the State these valuable lands, and no recognition of his services has ever yet been made. They are estimated to be worth $2,500,000. By the act of March 4, 1870, a proposition was submitted to the electors of the State, to use these lands and the proceeds thereof in settlement of the old Minnesota State Railroad bonds. The proposition was ratified by the people but the bonds required were not filed by the holders, and so the scheme failed. Out of 2,000 bonds required, only 1,035 were filed. Other schemes involving these lands for the same object have failed.

LANDS TO RAILROADS IN MINNESOTA.

The policy of granting lands in aid of the construction of railroads, was initiated by Congress in 1850, by a grant of two million and a half of acres to the State of Illinois, to aid in the construction of railroads in that State. At the date of the grant, half of the public lands in the State were vacant. So great was the impulse given to settlement by the railroads, that in fifteen years the United States retired as a landholder from that State. This policy, for many years pursued by Congress, marks the rise and progress of the railway system in the west, and across the continent. How far the princely grant of lands to railroads, both by the national and State governments, in this State, has subserved the purposes intended, must be judged by the rapid development of our resources, and our remote geographical position. While too much has clearly been given in some cases, upon the whole, our astonishing progress would have been as nothing without the policy of land grants. It is further to be considered that these roads have been built in advance of the ability of the country to sustain them. But that we may see just what these roads have cost us in lands, we find that the and grants from the national government to this State make a total of 7,621,131, acres; the grant of swamp lands by the State amounts to a total of 1,450,133, making a grand total of 9,071,264, acres; and as we now have 2,195½ completed miles of railroad within the State, the building of which depended directly or indirectly upon the various land grants, we perceive that the roads have cost us just 4,132 acres per mile. And when the

roads shall have earned all their grants they will have cost us 5,737 acres per mile. The munificence of these grants is without a parallel in the nation, and embraces an area as large as Massachusetts, New Hampshire and Connecticut; and embraces some of the finest wheat and agricultural lands in the world. These grants, both national and State, together with the dates of the acts conceding them, the number of acres possible under the grants, and the number of acres actually earned by each road, are here tabulated from later data than will elsewhere be found. □

APPENDIX

ST. PAUL & CHICAGO RAILWAY COMPANY

vs.

CHARLES T. BROWN and others

24 Minn. 517 (April 14, 1877)

Exemption of Governor from Control of Courts.—The exemption of the governor of the state from actions or proceedings to enforce the performance of duties devolved on him as executive, rests in the constitution, and cannot be waived by any legislative act.

Trustees of Hospital for Insane may be Sued, when.—The trustees of the Minnesota Hospital for Insane are mere administrative agents of the state, and are not exempt from the control of the judiciary. An action against them to determine the title to lands of the state, held by them may, with the consent of the state, be brought.

Same—Consent of State, how given.—The consent of the state to the bringing of such an action may be expressed by a joint resolution of the two branches of the legislature, passed and approved in the manner prescribed in section 12, article 4 of the constitution, and need not be by bill.

Same—State Auditor not a Necessary Party, when.—In an action against the trustees of the hospital for insane to determine the right to lands set apart to that institution by the state, and certified to them by the auditor; the auditor is not a necessary party defendant. In determining the right to such lands, the court may pass the title by its judgment, although it could not enforce a conveyance by the governor.

Construction of Act of March 6, 1863, Granting Swamp-Lands to the St. Paul & Pacific R. Co.—The act of March 6, 1863, entitled "An act granting land to aid the Saint Paul and Pacific Railroad Company in the construction of their branch railroad from St. Paul to Winona," whether it be construed as a present grant of lands, or as an executory promise to convey on conditions stated, was, the company having complied with the conditions, a valid contract, and entitled the company to select, in order to make up deficiencies of swamp-lands within the prescribed limits, from any such lands belonging to the state at the time the right to select became perfect.

Construction of Act of February 13, 1865, setting apart Swamp-Lands to State Institutions.—The lands set apart by the commissioner of the state land-office to the purposes named in the act of February 13, 1865, entitled "An act to appropriate swamp-lands to certain educational and charitable institutions therein named, and for the purpose of erecting a state prison," could only be lawfully set apart by him from the surplus of such lands after there were enough to fill grants of such lands by the state made prior to the passage of that act.

Same—Such lands belong to State—Rights of St. Paul & Chicago Ry. Co.—The swamp-lands so set apart to the trustees of the hospital for insane belong to the state, the title being held by the trustees for it, and as its officers or agents, and, there not being enough swamp-lands without them to fill the grant to the Saint Paul and Pacific Railroad Company, are subject to the right of selection by the plaintiff, the successor in interest of that company, to make up the deficiencies of swamp-lands within the limits prescribed in the act of March 6, 1863.

Act of March 6, l863—extent of grant.—The act of March 6, 1863, is a grant of seven, and not fourteen full sections per mile.
. . .

Bigelow, Flandrau & Clark, for Appellant.

Geo. P. Wilson, Attorney General, and *Young & Newel*, also for the respondents.
. . .

[The court reporter's statement of the facts and summary of the arguments of counsel that cover pages 518-571 of the *Minnesota Reports* are omitted.]

GILFILLAN, C. J. * The case comes here upon appeal from an order sustaining demurrers to the complaint.

The complaint alleges the corporate existence of the plaintiff, and that it is the company mentioned in the joint resolution of the legislature of March 11, 1873, "To facilitate the settlement of the title to swamp-lands heretofore granted by the state of Minnesota to state institutions and railroads."

The defendant Davis, when the suit was brought, was governor of the state, and the other defendants, trustees of the Minnesota Hospital for Insane.

The complaint alleges the corporate existence of the St. Paul and Pacific Railroad Company, authorized to construct and operate a branch railroad from St. Paul to Winona, and to acquire, hold and convey lands, and that in 1867 the plaintiff succeeded to all its rights, powers, privileges, immunities, franchises and property appertaining to the branch from St. Paul to Winona. It then refers to the act of March 6, 1863, entitled "An act granting lands to aid the St. Paul and Pacific Railroad Company in the construction of their branch railroad from St. Paul to Winona," and to the acts of

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* Cornell, J., did not sit in this case, having, as attorney-general, given an opinion on some of the points involved in it. [In his opinion dated December 31, 1870, Cornell advised Governor Austin to deny the St. Paul & Chicago Railway's claim for deeds to swamp-lands. *Opinions of the Attorneys General Of Minnesota* 258-9 (West Pub. Co.,1884)].

March 2, 1865, March 2, 1867, March 4, 1868, March 5, 1869, each extending the time for the original company, or plaintiff, to comply with the conditions of the land grant, and alleges the final completion of the road and the performance of such conditions.

It alleges that within the limits of seven miles on each side of its line from St. Paul to Winona, there were only 3,541 91-100 acres of swamp-lands, and that it is entitled to swamp lands to be selected outside of said limits, to the amount of the deficiency of 919,338 9-100 acres, and that in all there have been certified to it by the governor only 112,032 10-100 acres. It then refers to the act of February 13, 1865, entitled “An act to appropriate swamp-lands to certain educational and charitable institutions therein named, and for the purpose of erecting a state prison,” and alleges that on September 15, 1870, the commissioner of the state land-office selected and set apart for the Hospital for Insane 19,816 78-100 acres of swamp-lands, donated by congress to the state, and made a record thereof. It alleges that the entire amount of swamp-lands patented by the United States to the state is only 923,825 27-100 acres, and that the state, under grants prior to that to plaintiff, has disposed of 576,495 72-100 acres, and under grants subsequent to plaintiff’s, including that by the act of 1865 to educational and charitable institutions, 136,520 65-100 acres, leaving undisposed of 98,776 80-100 acres, which are liable to be set apart to the above institutions; and that all the swamp-lands in the state which have been surveyed, except an inconsiderable quantity, have been patented to the state; and that after it became entitled to do so, it selected, to make up the deficiencies in its swamp-lands, the lands set apart to the Hospital for Insane, and demanded a conveyance thereof, and the governor refused to convey. It prays that the title to the lands be determined and adjudged to plaintiff.

To this complaint demurrers were interposed on the part of the governor, on the grounds that the court has not jurisdiction over him, and that the complaint does not state facts sufficient to constitute a cause of action; and on the part of the trustees, on the grounds that the court has no jurisdiction of the persons or of the subject of the action; that plaintiff has not legal capacity to sue; that there is a defect of parties defendant; that the complaint

does not state facts sufficient to constitute a cause of action. The demurrers were sustained.

The demurrer on the part of the governor was properly sustained, on the ground that the court has no jurisdiction over him. The duties of the governor sought to be enforced in this action are duties belonging to him as executive of the state, and not as an individual. *Rice v. Austin*, 19 Minn. 103 [1872]. He is not subject to the control of the judiciary in the performance of such duties, and no action or proceeding before any court will lie against him to compel such performance. Nor can the joint resolution of the legislature, referred to in the complaint, bring him under such control. The independence of each of the three departments of the government—the executive, legislative and judicial—rests upon the constitution, article 3, and cannot be affected by any legislative act, although it may be approved by the governor at the time it passes.

The same ground of demurrer taken by the trustees is not well founded. The exemption from control by the judiciary, on the part of the governor, does not extend to mere administrative agents, who are created, and their powers and duties defined, by the legislature. The courts may entertain suits against them as against any merely ministerial officers.

The subject-matter of the action is property belonging to the state, and the action, though nominally against the trustees, is virtually against the state, to determine its right in the property involved. The exemption of the state from actions by its citizens is not based on any constitutional provision, but merely on grounds of public policy. A waiver of such exemption does not trench upon the independence of any department of the government. There can be no doubt that the legislature may waive such exemption, nor that its consent to do so may be expressed by joint resolution, passed in the manner prescribed by the constitution, as effectually as in the more formal mode by bill. It is to matters of this character that section 12, article 4 of the constitution relates. The joint resolution of 1873 is an answer to the objection that the action is virtually against the state.

There is nothing in the ground of demurrer stated—that the plaintiff has not legal capacity to sue. Its corporate character and the purposes of its creation fully appear by the complaint. The capacity to sue and be sued, and to protect its rights and enforce its claims by judicial process is an incident to every corporation. That the plaintiff may hold these lands, if they belong to it, appears from the complaint, and that it may sue to determine its right to them follows of course.

The ground of demurrer—that there is a defect of parties defendant—is based on the proposition that the state auditor, because he certified the lands to the trustees, should be made a party defendant. The auditor is not, and never was, in any way connected with the title to the lands, any more than an attorney to convey lands is, by virtue of that relation, connected with the title to lands to which he executes a conveyance for his principal.

The further proposition is made in the argument "that if 'the legal title to the lands is in the state the governor cannot be required by the court to convey, and no alternative decree will be rendered by the court when the court has no power to direct and insist upon both conditions involved in the alternative." Section 14, *c*. 75, General Statutes, provides, "The district court has power to pass the title to real estate by a judgment, without any other act to be done on the part of the defendant, when such appears to be the proper mode to carry its judgment into effect." A case in which the court has jurisdiction over the land, but has not, or for any cause cannot enforce, jurisdiction over the person to compel a conveyance, comes within this section, and so far as compelling a conveyance by the governor is concerned, that is this case. The consent of the state and service on the trustees in whom the nominal title is vested gives the court jurisdiction to determine such title.

These grounds of demurrer being disposed of, we come to the merits of the case involved in the ground of demurrer alleged—that the complaint does not state facts sufficient to constitute a cause of action. This ground of demurrer has been discussed by counsel with great ability, the arguments taking a much wider range than we deem it necessary to follow. The arguments are

mainly directed to the right of the plaintiff to the swamp-lands certified by the commissioner of the state land-office to the Hospital for Insane.

The plaintiff bases its claim upon the act of March 6, 1863, (Sp. Laws 1863, *c*. 4,) entitled “An act granting lands to aid the Saint Paul and Pacific Railroad Company in the construction of their branch railroad from St. Paul to Winona.” Section one—the granting section—reads, “That for the purpose of aiding in the construction of a branch railroad from St. Paul to Winona along the valley of the Mississippi river, there is hereby granted to the St. Paul and Pacific Railroad Company all the swamp-lands belonging to this state, lying and being within the limits of seven miles on each side of the line of said branch road from St. Paul to Winona as the same shall be located and constructed; and as soon as any twenty continuous miles of said branch road shall be located, and as often thereafter as any further twenty continuous miles thereof shall be located, the said lands within the limits aforesaid shall be withheld from market and sale; and as soon as any twenty continuous miles of said branch road shall be completed, and as soon and as often thereafter as any further twenty continuous miles thereof shall be completed, the said lands within said limits shall be certified and conveyed to the said company by the governor of the state. And if, when, and as often as twenty continuous miles of said branch road shall have been completed, with the cars running thereon, it shall be found that any portion of the said swamp-lands within the said seven miles have been sold or otherwise disposed of by the United States or this state, the amount shall be made up and supplied to said company out of the swamp-lands belonging to the state, to be selected by said company outside of said limits. And if, upon the completion of any twenty continuous miles of said road, as aforesaid, it shall be found that within the said seven miles of said line there shall not be an amount of swamp-lands on each side of said line, belonging to the state, equal to at least seven full sections per mile of said road so completed, then the said company shall have the right to and may select from the swamp-lands belonging to this state, outside of said seven-mile limits, other swamp-lands in an amount equal to such deficiency, and the said lands so selected by said company outside of said seven-

mile limits shall be certified and conveyed to said company by the governor of the state. And the said lands shall not be subject to taxation until the same shall have been sold and conveyed by the said company: *provided*, that if the said company shall not, within three years, construct and equip for business, with the cars running thereon, at least twenty miles of said road, and the residue thereof within five years from the passage of this act, then and in that case all the lands hereby granted, appertaining to the unbuilt portion of the said branch road, shall be forfeited to the state."

On this act the defendants make, in substance, the following propositions: (1) That it was not a present grant of the lands involved in the suit, or of any lands whatever; that at most it was a mere executory promise by the state to convey, upon the performance by the company of certain conditions; (2) that this promise does not involve an undertaking by the state to reserve or retain any swamp-lands outside the seven-mile limits for the company to select from when the right to select should accrue, but merely permission to the company to select from the swamp-lands which the state might have after it had, in the meantime, made such disposition of such lands as it pleased, by grant or otherwise; (3) that the state had, before any right of selection accrued to the company, disposed of the lands held by the trustees defendants, by vesting the title in them upon the trusts specified in the act of February 13, 1865, and that when the company made its selection, those lands did not belong to the state within the meaning of the act of March 6, 1863; (4) that if the act of March 6, 1863, was merely an executory promise to convey on the conditions specified, there was no promise or undertaking of the company to perform these conditions; that it lacked the element of mutuality to make it a binding contract, was therefore without consideration until the company should commence to perform the conditions, and until that time the state might, at any time, withdraw its promise.

The terms of the act are those of present grant. "There is hereby granted to, etc." * * "All the lands hereby granted appertaining to the unbuilt portion of the said branch road shall be forfeited to the state." Notwithstanding the difficulty of conceiving a grant which

shall at once vest in the grantee the title, when the lands to which it is intended to apply are not known, acts of congress in the terms of this act have been held by the supreme court of the United States in a number of cases, and most distinctly in *Schulenberg v. Harriman*, 21 Wall. 44 [1874], to pass a present title, which; at first imperfect, acquires precision and becomes attached to specific lands as soon as the land is ascertained. But upon the case presented we do not deem it necessary to decide the point; for the act is, if not a present grant, good as an executory contract to convey, even if it be conceded, that, as an executory promise on the part of the state, it was at first without mutuality of consideration, and for that reason might be withdrawn by the state before the company should do anything toward performing the conditions of the promise. It could not be withdrawn without notice to the company. No such notice appears from the complaint. It appears that the plaintiff performed the conditions, and, so far as the complaint shows, that the state not only gave no notice of an intention to withdraw its promise, but that it never intended to withdraw it.

It is immaterial so far as concerns this controversy whether the act be considered a present grant or an executory contract to convey. In either case it is equally binding upon the state. In the latter case, the state could not rightfully defeat the right of the company, upon its performing the conditions of the act, to select and receive the lands intended by it. We see no such intention on the part of the legislature. The first section of the act of February 13, 1865, (Laws 1865, *c*. 5,) which is claimed to have defeated this right of selection, so far as concerns the lands held by the trustees, is as follows: "That as soon as the title to the swamp-lands donated by congress to the state of Minnesota shall become vested in this state, the commissioner of the state land-office shall, from the even-numbered sections of any such lands not otherwise disposed of prior to the passage of this act, proceed to select, or cause to be selected and set apart for the erection and support of an insane asylum, one hundred thousand acres of swamp-lands," and so for the other institutions. The power of the commissioner to set apart lands pertained only to those "not otherwise disposed of prior to the passage of the act." None of the lands referred to had as yet been ascertained and patented to the state, and they could

have been disposed of prior to the passage of the act, and in advance of the title to them vesting in the state, only by grants similar to that to plaintiff. To save such grants was intended by confining the appropriation to state institutions to land not otherwise previously disposed of. The legislature did not intend to dispense its charities in the name of the state, but at the expense of those to whom it had made grants of swamp-lands. The commissioner of the land-office was, therefore, not authorized to set apart to the institutions named any swamp-lands except out of the surplus that should remain after prior grants and appropriations should be filled. And this was in strict accordance with honesty and good faith; for a contract by the state to convey to this plaintiff a designated number of sections of swamp-lands, and giving it the right to select, in order to make up deficiencies, from swamp-lands outside of the designated limits, involves the obligation on the part of the state to retain for such selection, if it receive them, enough of such lands to give effect to the right of selection.

The construction of the act of March 6, 1863, as to this feature, contended for by the defendants, is entirely inadmissible. On that construction the effectual right of selection would, depend entirely upon the will of the state, for the state would have the right to prevent it by disposing of the lands as fast as received. A contract by which the rights of one party, after performance on his part, would be at the absolute pleasure of the other would be an anomaly. It is true the act of 1863 implies that until the lands are ascertained inside of the limits by location of the line, and outside by selection, the state may keep them in the market for sale. This, however, would be for sale in the ordinary course of the market, which could not seriously diminish the quantity of land, nor materially interfere with the plaintiff's right of selection, and it does not contemplate a disposition of them *en masse*; or any other disposition except by ordinary sale.

What would be the respective rights between the plaintiff and other grantees of the state in grants made subsequent to the plaintiff's, but completed by appropriation of the lands to them before a selection made by the plaintiff, leaving not enough for plaintiff to select from, we need not consider. The trustees do not

stand in the position of such grantees. Beyond any question, they are merely agents or officers of the state, appointed to hold for it, and manage, the lands set apart for the hospital. The title is the title of the state, held for it by its agents or officers, as fully so as if the legislature, instead of appointing them for that purpose, had designated to perform the duties imposed on them the state auditor, or treasurer, or attorney-general, and had, for the more convenient performance of such duties, declared that the title to the lands set apart should vest in such officer. No one but the state has any interest in the lands or control over them, except such as it permits, and as its agents. The control of the state, both over the legal title and the use, is absolute, and it is the control of the owner.

There is no analogy in this respect between the trustees, though they are a corporation, and a city, county, or other corporation created for municipal purposes. Such corporation is, indeed, created by, and its existence depends upon, the will of the state, but it is created for the benefit of, and is maintained by, not the whole state, but the people of a district, who are *cestuis que trust* of the property held by the corporation. The state has no interest in it or right of control over it, except as sovereign. The lands held by the trustees belong to the state, and are within the designation in the act of 1863, of lands from which the plaintiff may select to make up its deficiencies, and, having selected them, it is entitled to them.

Probably the most important question presented in the arguments is, as to the amount of lands granted to the plaintiff by the act of 1863. The case might be decided without determining this, but each side wishes it decided, and the preamble to the joint resolution of 1873 seems to contemplate an action in which that question may be determined. We will therefore decide it. The plaintiff claims that the act granted fourteen sections per mile. The defendants insist that it granted only seven full sections per mile.

The granting part of the act—that part in the section we have quoted down to the words “governor of the state,” first occurring, purports to grant to the company all the swamp-lands, more or less, lying within the limits of seven miles on each side of the line

of road when located. The succeeding paragraph provides for giving to the company other swamp-lands in lieu of those which shall, at the time of such location, have been sold or otherwise disposed of within the limits, by the United States or state. Had the act stopped there, the whole amount of land to which the company was entitled would be measured by the amount of swamp-lands actually lying within those limits, and the amount which it might take outside of the limits by the amount disposed of within the limits, by the United States or state. In the construction of the act it is proper to observe that if it had been the intention to grant fourteen sections per mile, and no more and no less—and that is what plaintiff claims—the most obvious and natural way to have expressed the intention would have been to state that as the amount intended in the granting part of the act, instead of stating, as the amount granted, all the swamp-lands lying within the limits.

Following the portions of the act referred to, is the language upon which the doubt arises, as follows: “And if, upon the completion of any twenty continuous miles of said road, as aforesaid, it shall be found that within the said seven miles of said line there shall not be an amount of swamp-lands on each side of said line, belonging to the state, equal to at least seven full sections per mile of said road so completed, then the said company shall have the right to and may select, from the swamp-lands belonging to this state outside of said seven-mile limits, other swamp-lands in an amount equal to such deficiency.” This is in the nature of a guaranty or undertaking on the part of the state that the swamp-lands designated in the granting part of the act, to wit, all the swamp-lands lying within the prescribed limits, shall be at least equal to a certain amount—that is, the state, having made a grant of all the swamp-lands, whatever the amount might be, within those limits, such amount being unknown, in order to induce the company to accept the grant and build the road, undertakes that if the quantities or amounts in the several subdivisions surveyed as swamp-lands, added together, do not equal a given number of full sections, it will make up the deficiency from its swamp-lands outside of the limits.

The defendants claim that the number of full sections intended for the entire line is seven per mile, or equal to one-half of all the land

lying within the strip; the plaintiff claims that it is fourteen, or equal to the whole of the lands within the strip. And it may be remarked again, as to this part of the act, that, had it been the intention to make up fourteen full sections per mile, the easiest, shortest and most obvious mode of expressing the intention would have been by using the word fourteen instead of the word seven.

The words, "on each side of said line," certainly indicate that the amount named in this part of the act—to wit, seven full sections per mile—is to apply to the half of the strip on each side of the line, and not to the entire strip. On the other hand, the words, "equal to at least seven full sections per mile," imply that within the space intended by the legislature there may be found to be more or less than the designated amount. There might be more than that amount of swamp-lands in the entire strip of fourteen miles wide; there could not by any possibility be more than that amount, and there was no probability that there would be as much as that amount, within each half of the fourteen mile strip. To make the sentence, standing by itself, clear and consistent, it is necessary to either change the position in it of the words "each side," or reject from it entirely the words "at least." As the grant is not in terms of fourteen sections per mile, nor of swamp-lands equivalent in amount to all lands lying within the strip of fourteen miles wide, but of all swamp-lands within the strip, with an undertaking to make up to the company so much as such swamp-lands should be found to fall short of a given amount in full sections, we think the words "at least" have an important place in the sentence, and ought not to be rejected from it. Putting it most favorably for the plaintiff, it is doubtful whether the act intends to give it seven or fourteen sections per mile, and within the rule that nothing will pass by legislative grant except what is clearly and manifestly intended by the legislature, the doubt requires a construction against the claim of the company. The grant is equivalent to a grant of seven full sections per mile, and no more.

The order appealed from, so far as it sustains the demurrer of the defendant Davis, is affirmed. So far as it sustains the demurrer of the other defendants, it is reversed, but without costs. ■

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