

RAILWAY GRANTS.

SELECTIONS.

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The construction of railroads as aids to the settlement of our public lands is an enterprise of the highest national importance, and as such ought to receive from the community and from the Government all the assistance which they can command. Every person must have seen with satisfaction the liberality with which our rural and urban municipalities have subscribed to the stock of the various companies now in process of organization or which are already pushing on the construction of new lines. The Provincial Legislature have resolved to insure the success of these enterprises by granting to them large tracts of the public lands. Are these grants constitutional? Such is the question to which the writer purposes to draw public attention. This point of constitutional law would have been raised more opportunely before the incorporation of these companies; but it cannot be denied, even at the present time, that it is one of great practical importance. If the success of the present railway movement depends in great measure on the grant of those public lands; if the money votes of the municipalities have been given on the faith of these grants, it becomes necessary to ascertain that their legality cannot be called in question. If the constitution is defective in this respect, it must be amended, not violated. The following opinion is published only after a full discussion in the editorial committee of the *Revue*, and after having received the approbation of several *confrères* of the Montreal Bar.

By the common law, all the public lands are the property of the Crown. It was formerly a disputed question whether the Kings of England had the right to alienate the Crown Lands. In course of time the Kings certainly exercised the right of granting the Crown Lands at their pleasure. But the exercise of this prerogative having greatly impoverished the Crown, it has been restrained by several modern statutes.*

In the Province of Canada previous to 1867, the public lands were the property of the Crown for Provincial purposes and subject to many restrictions enumerated at length in chapters 22, 23 and 24 of the Consolidated Statutes of Canada. Certain free grants could even be made by the Governor in Council. As to the Legislature, its power over the public lands was unlimited.

Under the British North America Act of 1867, the tenure of the public lands has undergone very large modifications. The ownership is vested in the Dominion or in the Provinces, according to the nature and situation of the property. With regard to the Dominion, section 103 declares that "the Public Works and Property of each Province enumerated in the third schedule in this Act, shall be the pro-

perty of Canada." This property comprises the canals, public harbours and fortifications, and others of a like nature.

The right of ownership in the Dominion of this property is absolute and free from all restriction. Section 91 enacts that the exclusive legislature authority of the Parliament of Canada extends to certain matters therein specified and particularly to "the public debt and property."

Is it thus with the right of ownership vested in the several Provinces? Section 109 declares: "All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the union and all sums then due and payable for such lands, mines, minerals and royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate and arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same."

Thus, the public lands are the property of the Provinces, subject to the restrictions imposed by the law. There is no doubt that if the Imperial Parliament had not made any other provision, the Provincial Legislature could dispose of the public lands in the same manner as the heretofore Province of Canada, subject to the trusts established by previous laws, such as the trusts in favour of the Clergy, the Indians and the Schools. But the constitution, adopting in this respect a policy wholly different from the one applied to the Dominion, has taken care to limit the exercise of the right of ownership of the Provinces to certain objects. It declares at section 92, par. 5, that the exclusive authority of their legislatures shall extend, not to the ownership of the public property or lands of the Province, but to "*the management and sale of the public lands belonging to the Province and of the timber and wood thereon.*"

Thus, then, the Province is proprietor of the public lands; she can administer and sell them, but she cannot make a gift of them. Without this 5th paragraph, she might dispose of them according to her good pleasure by sale, gift or otherwise; but with these expressions the enumeration of the powers given ought to be interpreted as limiting and exclusive, according to the maxim *qui dicit de uno negat de altero*.

It cannot be asserted that the 16th paragraph, giving to the local legislature jurisdiction "generally in all matters of a merely local or private nature in the Province," gives to it by implication the right of making land grants. That paragraph, in fact, relates only to matters which have not been expressly provided for by the constitution. Now, as the public lands have been arranged in a certain way, it cannot be supposed that it was the intention of Parliament that the Local Legislature should dispose of them in a different way.

* 5 Cruise's Dig. 46 2 Greenleaf on Real Property, 39.