

ATTORNEY GENERAL'S OFFICE,
FEBRUARY 27TH, 1860.

To the Hon. N. J. Rusch,
President of the Senate:

SIR—The Senate, by a resolution adopted on the 21st inst., requested my opinion as to the right and power of the State to resume its title to the land granted to the Iowa Central Rail Road Company.

I respectfully submit the following opinion, which embraces my views on the questions presented:

By an act approved May 15, 1856, Congress, for the purpose of aiding in the construction of four designated lines of railway, granted to the State of Iowa every alternate section of land for six sections in width on each side of the line fixed for said roads. These roads were respectively to commence at Burlington, Davenport, Lyons City and Dubuque, on the Mississippi, and run to certain points on the Missouri River. The one embraced in your resolution is described in the grant as running from "Lyons City northwesterly to a point of intersection with the main line of the Iowa Central Air Line Rail Road, near Maquoketa; thence on said main line, running as near as practicable to the forty-second parallel, across the State of Iowa, to the Missouri River." The grant is coupled with certain conditions in which it is provided that the lands thus granted are to be held by the State, "for the purpose of building said roads," "are to be disposed of only as the work progresses"—"the said road to be a public highway, &c., &c." By the fourth section, the manner and time of sale by the State is fixed and limited as follows: First one hundred and twenty sections for each of said roads may be sold, but the same must be included in a continuous length of twenty miles; No further sales are then to take place until the Governor shall certify to the Secretary of the Interior that twenty continuous miles of road have been built, whereupon another one hundred and twenty sections may be sold, and so on until the roads are completed. The lands, for the purpose of carrying out the object of the grant, and

that had the Mississippi road been completed, and the Missouri to the Gulf of Mexico, when this grant was made, Congress would have given these lands to the State and not to the rail road, and it is the right of the State to the title of the millions of acres of land in the State, in good faith for the benefit of our people—and hence the fact and justice with which the ungranted lands your resolution and all the proceeds of any sale thereof in such an application of these lands will be held a trust on the part of the State where alone it is required, and where it cannot be held without them.

- A. H. GROGGER, Trust Co. Iowa, N. Y.
- G. M. WOODBURN, Trust Co. Marshall Co. Iowa
- J. W. DUNNISON, Cass Co. Iowa
- H. M. HURRY, Cass Co. "
- J. C. SANDERS, Boone Co. "
- J. A. HAWTHORN, Story Co. "
- W. G. SANDERS, Taylor Co. "
- J. H. GRAY, "
- A. D. STEPHENS, Boone Co. "
- JOHN WHELAN, Iowa Co. "
- J. P. KELLY, "
- CHARLES WALLACE, George Co. "
- JOHN WRIGHT, "
- JOHN HERRMAN, Boone Co. "
- OSCAR A. HARR, Boone Co. "

within the limitations therein prescribed, were made subject to the disposal of the General Assembly.

If any of the roads were not completed by the 15th day of May, 1866, such portions of the land connected with said roads as remained unsold, would "revert to the United States." The foregoing are the material conditions of the grant. The State, by virtue of the same, was invested with a title in fee. This fee title is not an absolute, but a qualified one, subject to be forfeited and lost by the State. It is not a title in fee simple, because it is restricted and subject to contingencies. No patent was necessary, in order to convey the title, the act itself, *propria vigore*, being equivalent to such conveyance.

By an act approved July 14, 1856, the General Assembly (special session) accepted the grant upon the terms, conditions and restrictions therein, and then transferred the same to the Burlington & Missouri, Mississippi & Missouri, Iowa Central Air Line, and the Dubuque and Pacific Rail Road Companies. The State, in her sovereign capacity, and as one of the contracting parties, had full power to throw such restrictions around her grant as wisdom and prudence on her part might dictate. In fact, without such legislation, she would have been faithless to the trust conferred upon her, and would have violated alike her duty to the General Government and to her own citizens. By virtue of section eight of the act, the various Companies accepting the lands, do so upon the express condition "that in case either of such railroad Companies shall fail to have completed and equipped seventy-five miles of its road within three years from the first day of December next, thirty miles in addition in each year thereafter for five years, and the remainder of their whole line of road in one year thereafter, or on the first of December, A. D. 1865, then and in that case, it shall be competent for the State of Iowa to resume all rights conferred by this act upon the Company so failing, and to resume all rights to the lands hereby granted and remaining undisposed of by the Company so failing to have the length of road completed in manner and time as aforesaid."

The companies accepted the grant upon the terms therein specified, and therefore expressly stipulated that the right of resumption should be vested in the State. After carefully considering this section, I am of the opinion that on the company failing to comply with any one of the conditions therein, the State would

be justified in resuming the lands. The latter clause of the section makes the right of resumption depend on a failure of the company "to have the length of the road completed in manner and time as aforesaid." The question naturally arises, what length of road, and what time, is here referred to? The former part of the section says, "seventy-five miles within three years from the first day of December next, (1856), thirty miles in addition each year thereafter," &c., &c.

The term, *time*, as there used, in my opinion, refers to each condition, and not merely to them in the aggregate. If therefore, the company failed to have seventy-five miles completed by the first day of December, 1859, they failed to comply with the contract, in manner and time as therein fixed. The State having reserved the right to retake the lands on a certain contingency, it follows, that whenever the time arrives, an act of resumption on her part, would not only be proper, but in lieu of violating the contract, would be an actual carrying it into effect. Such an act could not be said to affect or impair the charter of the company. A charter is one thing, and a contract made by virtue of the powers conferred by such charter, is another and distinct matter, and the two should not be confounded.

The State found the company in existence; a being in law, and made a contract with them. It is not sought to forfeit their charter, and indeed a forfeiture is a *judicial* act, and not within the appropriate sphere of legislative action. This principle results from the division of powers in our government. A charter is a contract, and like all other contracts, (unless the power to repeal is expressly reserved,) is protected from State interference by the federal compact.

In this connection, the question naturally arises, how far the right to resume may be affected by any incumbrances placed by the company on said lands. By an act approved January 28th, 1857, the Legislature conferred on the various railroad companies, the power to mortgage or convey by trust deed, said lands, "for the purpose of securing any amount of construction bonds necessary for the completion of said road." It is claimed that the company here mortgaged said lands in a large amount in order to secure such bonds. It is a matter of undoubted history, that the company have never completed a single mile of the road, and I am of the opinion, therefore, that they have never been in such

a condition as to sell or encumber more than one hundred and twenty sections in such a way as to affect the rights of the State. Before doing any work, the company were authorized to sell one hundred and twenty sections of the land, and if they have done so, and the title has passed to *bona fide* holders, it is beyond your reach and control.

By section 4, of the original grant, the residue of the lands were placed beyond the absolute disposal of the company. Neither the State or the company could convey or encumber any greater interest than they possessed. Every mortgage or *cestui que use* accepted their security, subject to the conditions of the grant. Any act, therefore, that under the grant would divest the title of the grantees would also extinguish their liens, except as limited above.

Assuming that the State has the right to resume, the enquiry arises in what way should it proceed in order to do so? Is an act of the General Assembly sufficient to re-invest the title? I am of the opinion that the title by the mere omission of the company to comply with the conditions of the grant does not re-invest in the State, but in order to resume the title the State must first assert it, by some positive act on its part, as by actual notice to the grantee or the passage of a public act which would operate as notice to all persons. Although it might be desirable first to have a judicial decision which should settle and confirm the rights of the State, yet it is by no means a condition precedent to her acting upon those rights as if already so determined. The act of resumption can in no just sense be termed a judicial one. It can only proceed from the party entitled thereto; it is perfect in itself and independent of any action of the Court. It follows, therefore, that the General Assembly may proceed to make such disposition of the laws in question as they may deem proper, keeping of course within the limitations of the grant from Congress. In conclusion, permit me to say, that the foregoing views are submitted not without some diffidence, arising from the fact that the questions presented involve not only the interests of the State with reference to the Iowa Central Railroad, but to all the other great lines provided for in the act of July 1856, under the grant of which some two million five hundred thousand acres of land have been set apart to the various companies. No one question of State policy embraces a greater magnitude of pecuniary interests, or is more worthy of a well considered and judicious action.

SAMUEL A. RICE.

REPORT

OF

THE COMMITTEE ON SCHOOLS AND STATE UNIVERSITY.

The Committee on Schools and State University, to whom was referred the report of the Trustees of the State University, respectfully report:

That they have examined the same, and find it in accordance with the law.

From this report and other sources of information, the committee learn that the State University, with the exception of the Normal department, has been closed since the summer of 1858. The reasons assigned for the closing of the University by the Trustees then in office, were, 1st, the pecuniary embarrassments of the country, rendering it difficult to collect the interest on the funds; and, 2d, the want of suitable buildings for lecture-rooms and students' apartments; in consequence of which the citizens of the State, generally, could not avail themselves of the advantages of the University.

There were complaints that it was conducted at an expense of many thousands of dollars per annum, for the sole benefit of Iowa City; that students from abroad could not procure board and suitable rooms for study unless at great expense, and that an institu-