

against; nor is it by any means clear that the obstacles as they do exist are insurmountable. I do not find that any attempt was made at any time by the company to secure the right of way within the corporate limits of the city of Clinton, either by purchase or condemnation. To secure this right of way may be expensive and unprofitable to the company; but that fact was just as patent in 1860, when the grant was made and accepted, as it is now. The conclusion I have arrived at, after examining with more than ordinary care all the facts within my reach, is that the company have failed to comply with the terms and conditions of the 6th section of the Act of March 26, 1860.

Second—The remaining question of the resolution, viz: "Whether the State of Iowa, through her Legislature, has or can exercise any control over the same, involves a legal proposition which will be more or less important, according to the particular character which the action of the Legislature may assume in the premises. Without anticipating now what that action may be, it is sufficient to say that in my opinion the Legislature has power to control any of the lands embraced within the terms of said grant, which have not already been certified to and the title from the State passed to the company, and to dispose of said lands, or so much of them as may be necessary, in such way as to secure the construction of the branch road in question to the city of Lyons, that being, as stated, the "intent and meaning" of section six of the act making the grant.

If, however, the title to all the lands has already passed to the company, then the State is left to its remedy at law, which in my opinion would be clear, to recover damages from the company for its failure to perform the contract according to the terms and conditions of the act making the grant; and the plain reading and fair construction of the 6th section of the act clearly suggests that such suit should be prosecuted by the State for the use and benefit of the citizens of Lyons, who are the real beneficiaries in that portion of the grant, and the only party really damaged by the failure to comply with its terms and conditions.

Very respectfully,

HENRY O'CONNOR,
Attorney - General.

OPINION OF ATTORNEY GENERAL

ON THE

CEDAR RAPIDS AND MISSOURI RIVER RAILROAD LAND GRANT.

OFFICE OF ATTORNEY GENERAL, }
DES MOINES, March 18, 1868 }

To the Honorable the House of Representatives:

I have the honor to acknowledge the receipt of the following resolution, viz:

"Resolved, That the Attorney-General be requested to give his opinion to the House on the following questions:

1st. Under chapter 37 of the acts of the Eighth General Assembly, and the sixth section thereof, can the Cedar Rapids & Missouri River Railroad Company be compelled to build the railroad between Lyons and Clinton in case the 40,000 acres of land reserved to secure the building of that road be taken from that company?

2d. Can the General Assembly apply said 40,000 acres of land to other use than that of securing the construction of that railroad between Lyons and Clinton as provided in section 6 of the said act, and as provided by act of Congress of June 2, 1864?"

In order to have a clear understanding of what is submitted in reply, section 6 of the act referred to is herewith set out as follows, viz:

SECTION 6. "And it is further expressly provided that said company shall build or cause to be built before the first day of January, 1861, a railroad of like gauge and equal in quality to the Chicago, Iowa & Nebraska Railroad from Pearl street in Lyons city to a point of intersection with the said Chicago, Iowa & Nebraska Railroad within the corporate limits of Clinton city with such switches and side-tracks as the business of said town of Lyons may require, and to operate or cause to be operated the same by running passenger and freight cars of the same class

with those used by the Chicago, Iowa & Nebraska Railroad, in close connection forever, with all regular trains at any time run on said Chicago, Iowa & Nebraska Railroad without occasioning any unnecessary delay to freight or passengers at said point of intersection, and the charge per mile for transportation of freight or passengers shall never exceed the regular charges for like service on the Chicago, Iowa & Nebraska Railroad. *The intent and meaning of this section being to secure to the citizens of Lyons the same privileges and benefits of a railroad connection that are enjoyed by any other place on said Chicago, Iowa & Nebraska Railroad; and it is hereby expressly provided, that no lands shall be certified by the Governor to said Cedar Rapids & Missouri River Railroad Company until they have complied with all the requirements of this section.*

The section of the law just above quoted I look upon as complete in itself as much so as if it were a separate act, and having for its purpose, intent and meaning as expressed therein, the securing of a railroad to the town of Lyons. That it was so viewed by Congress is I think evident from the following proviso in the 4th section of the act of Congress, of June 2d, 1864:

“ Provided further, that it shall be the duty of the Secretary of the Interior and he is hereby required to reserve a quantity of land embraced in the grant described in this section sufficient in the opinion of the Governor of Iowa, to secure the construction of a branch railroad from the town of Lyons in the State of Iowa, so as to connect with the main line in or west of the town of Clinton in said State, until the Governor of said State shall certify that said branch railroad is completed according to the requirements of the laws of said State.”

There can, I think be no misapprehension of the force and effect of these two acts, if laws have either force or meaning. The intent of these are, and their effect if they have any must be to secure the construction and operation of a railroad from Lyons to Clinton with a view of securing to Lyons the same railroad advantages enjoyed by Clinton, or other places on the line of road. What has the Governor of Iowa done under these acts? He has certified to the Secretary of the Interior, that in his

opinion 40,000 acres of said lands would be sufficient to secure the object of the act of the Iowa Legislature, and we are to presume that in accordance with such certificate 40,000 acres have been withheld by the Secretary of the Interior. For what purpose? Most clearly to secure the construction of this road. The construction of this road is a physical act. You can not compel its specific performance no more than you can compel a horse to drink, but you can enforce penalties for the failure to perform.

This 40,000 acres of land is the estimated damages so to say, for not building the road or rather for a failure to build it. If the land withheld as security for its construction, is taken absolutely away from the company by the State, the State so far as it can by its act has adjudicated the matter, and taken this as a penalty or forfeiture on the part of the railroad company for its failure to perform. Can the State enforce the forfeiture and afterward claim the performance of the condition of the bond. I think not. It can not have both. I therefore answer to the first proposition, that if the land, 40,000 acres, reserved for the construction of the road is taken absolutely from that company, the State can not afterward compel the company to build the road from Lyons to Clinton.

2. As to the second proposition; it involves the question of the interest of Lyons; the vested rights of that city under the acts above quoted. What are these rights? So far as the State is concerned it is not a question of legal construction. The State is a party to the contract, and it is simply a question of good faith. Lyons and the railroad company are also parties as between the State and the railroad company. The power being reserved to the State to resume the grant of land if the railroad company failed to perform I hold that when the State exercises that power, it then has the right to dispose of the land so resumed, in whatever way the Legislature may deem best, providing such disposition is in accordance with the spirit and intent of the original grant.

But the city of Lyons is a third party, and this 40,000 acres is reserved for the express purpose of securing to the citizens of Lyons the benefits of this railroad connection.

To the extent then of this 40,000 acres, the State when it resumes, becomes a trustee for the city of Lyons, and to any disposition made of said lands other than the construction of the road from Lyons to Clinton the city of Lyons should give its consent, and if it is admitted that the State having the power might arbitrarily dispose of the lands without regard to the wishes of the city of Lyons, the State would upon so disposing of the lands be equitably the debtor of the city of Lyons to the amount of the value of said lands, unless said road were constructed. This I believe to be an equitable construction of the acts above cited, at all events it is the best I can do for the question.

Very respectfully, &c.,

HENRY O'CONNOR,
Attorney General.

REPORT OF COMMITTEE

ON THE

SUPPRESSION OF INTEMPERANCE.

DES MOINES:

F. W. PALMER, STATE PRINTER,

1868.