

OPINION
OF THE
ATTORNEY-GENERAL
RELATIVE TO THE
CEDAR RAPIDS & MISSOURI RIVER RAILROAD.

STATE OF IOWA,
ATTORNEY-GENERAL'S OFFICE,
DES MOINES, Feb. 27, 1868. }

To the Honorable the Senate of the State of Iowa :

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

Resolved, That the Attorney-General be requested to give the Senate his opinion whether the Cedar Rapids & Missouri River Railroad Company have so complied with the terms and conditions of the act of the General Assembly, approved March 26, 1860, granting certain lands to aid in the construction of said road, as to entitle the said Company to the lands so granted; and if they have not so complied, whether the State of Iowa, through her Legislature, has, or can, in his opinion, exercise any control over the same.

In reply, I beg leave to submit that I have examined the act of the General Assembly referred to in the resolution, and so far as I had opportunity, made inquiry and personal examination of the facts :

First—The grant made by the General Assembly is coupled with certain conditions, and I first call the attention of the Senate to the conditions found in the second section of the act, fixing the times within which certain portions of the road shall be completed, and expressly providing that the whole road shall be completed by the first day of December, 1865. The road was not so completed in December, 1865, and I find the following to be the facts substantially, I think, correct :

December 1, 1861.—Forty miles of the road completed to Otter Creek Station, now Chelsea.

December 12, 1862.—Seventy miles of the road completed to Marshalltown.

December, 1863.—Eighty-five miles of the road completed to State Center.

July 1, 1864.—The road finished to Nevada, about one hundred miles west from Cedar Rapids.

March 1, 1865.—The road finished to Boone Station, one hundred and twenty-two miles west from Cedar Rapids.

April, 1866.—The bridge over Des Moines River completed, and track laid to the west bank of the river.

February, 1867.—The road was completed to the Missouri River, Council Bluffs, two hundred and seventy-one miles west from Cedar Rapids.

In 1865, the road was completed between Marion and Cedar Rapids.

While I find that the road was not constructed in its several sections, nor the whole completed within the times specified and limited by Section 2, of the Act of 1860, and also find that no action was taken by the State, on account of said delay, either by the Legislature or through the Census Board, or any of the State officers, and while Section 5 of the Act clearly reserves to the State the right to resume upon the company's failure to comply with the conditions of Section 2, any lands which had not passed wholly to the Company, I think the failure of the State to take any action or insist at the time (Dec. 1, 1865) upon the "condition of the bond," may fairly be presumed, both in law and equity, as an acquiescence on its part in the delay, and to have said by its silence that under the circumstances the best was done that could be done. And the road being now completed from Marion west to Council Bluffs, I assume that the conditions of the act up to and including Section 5, have been substantially complied with by the said company, and believe this would be the view taken by our courts, were such a question before them. And as this view commends itself to the conscience and sense of equity of men who are not lawyers quite as clearly as to those who are, I deem it unnecessary to cite authorities in support of it.

The principal question, however, arises under the provisions of Section 6, of the Act aforesaid, which provides that "Before the 1st day of January, 1861, the said company shall construct from Pearl street, in Lyons City, to a point of intersection with the said Chicago, Iowa and Nebraska Railroad, within the corporate limits

of Clinton City, a road in all respects similar to the said C. I. & N. Road, &c.

"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 and Nebraska Railroad," &c., &c.

I find that this part of the road has not been built, nor is it now in process of construction.

Twice, at least, once in 1864 and once in 1867, demonstrations were made by the company looking to the construction of this branch or part of the road on the first attempt in 1864. The city of Clinton applied for an injunction to restrain the company from constructing the road through the public streets of the city of Clinton. The injunction was granted, and seems to have rested till the time of the second attempt in 1867, when the city of Clinton again applied for and obtained an injunction. At the November term, 1867, of the District Court of Clinton county, an answer was filed by the company, accompanied by a motion to dissolve both injunctions. This motion, after argument, was overruled by the Court on the authority of the case of *Milburn et al. vs. the C., I. & N. Railroad*, reported in 19 Iowa, 246. The Judge himself, however, dissenting from the views held by the Supreme Court in the last named case, and only holding as he did in deference to the binding force of said authority, the case is appealed to the Supreme Court, but has not yet been heard. Such is the present condition of this part of the road, commonly known as the "Lyons Plug."

It is claimed, I understand, by the Railroad Company, that their reasonable efforts made to construct this branch of the road, and their failing only because of the injunction restraining them from going through the streets of the city, is a sufficient cause for their failure to build the road, and that such efforts on their part are in law and reason a substantial compliance with the conditions and requirements of the 6th section of the act.

I do not so view it. There is no obstacle now to the construction of the branch from Lyons that did not exist at the time of and prior to their acceptance of the grant. It can not be called an unforeseen difficulty, or one that they could not have provided

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