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R E P O R T

OF THE

COMMISSIONER

OF THE

DES MOINES RIVER IMPROVEMENT,

FOR THE YEAR PAST.

REPORT.

KEOSAUQUA, *January 1st, 1858.*

His Excellency, JAMES W. GRIMES,
Governor of Iowa:

SIR—In compliance with law, the undersigned submits the following report of the condition and affairs of the Des Moines River Improvement up to December 1st, 1857:

The total amount of expenditures by the Des Moines Navigation and Railroad Company, as claimed by them, up to December 1st, 1856, and which will appear by my former report of January 1st, 1857, embracing moneys advanced for partial payment of old improvement indebtedness, is.....\$366,711 26

Upon which sum the said Company claim to have received and credited the State with 205,489.23 acres of land, at \$1,25 per acre, amounting to the sum of..... 256,861 53

\$109,849 73

Showing a balance claimed by said Company against the Improvement of one hundred and nine thousand eight hundred and forty-nine dollars and seventy-three cents, together with such percentage as is provided in their contract with the State, of 9th of June, 1854.

Said balance above named would be augmented by adding per cent claimed, to about the sum of \$115,000; which sum they alleged as due and unpaid against the Improvement, at the date of December 1st, 1856.

Under the adjustment of December 24th, 1856, between the Commissioner and the Company, as will appear by my former report, the entire balance before mentioned was abated and placed

hereafter be claimed of the State, until one-fourth part of the improvement is completed and made available for navigation, &c.

This adjustment with said Company was regarded by the Commissioner as having ascertained and fixed the amount then expended by said Company on the Improvement under their contract with the State; but said adjustment did not contemplate that the legal title to lands previously certified to said Company by the Register of said Improvement, should pass to said Company, or in anywise be affected thereby.

The amount therefore admitted as expended for debts, liabilities, Improvement engineering, &c, up to December 1st, 1856, by said Company upon said Improvement, &c., is.....\$256,861 53

To which sum is to be added the amount expended since Dec. 1, 1856, and up to Dec. 1, 1857, (said amount is reported by the acting engineer, as will appear herewith in exhibit marked "B,") say,.....	\$77,193 70	
Less 15 per cent. reserved by the State till final completion,.....	11,599 05	65,594 65
		<hr/> \$322,456 18

The statements above show that the aggregate amount, and all that can be claimed to have been advanced and expended by said Des Moines Navigation and Railroad Company, for and upon said Improvement, since their commencement to December 1st, 1857 cannot exceed the sum of \$322,456 18.

In the agreement and adjustment between the Company and the Commissioner, of the 24th of December, 1856, the following language is used in Sec. 1, "It is agreed, and the said party of the first part does hereby covenant and undertake to prosecute said work from the mouth of the river, in a continuous line of navigation from the mouth of said river upwards, under the supervision of the Commissioner of said Improvement, and it is expressly understood and agreed, *that no work shall be done* that shall not contemplate the making of such continuous line of navigation except with the *written and positive consent* of said Commissioner.

The Commissioner gave the Company and Engineer notice that any work not prosecuted in accordance with said agreement, would not be entitled to estimates till the navigation was completed to such points where the work was prosecuted. Th

following amounts of work have been estimated and certified by the acting engineer since said agreement was made, which the Commissioner regards as improper, and not due the Company from the State, till the written and positive consent of the Commissioner is obtained, as provided in said agreement of December 24, 1856:

Total expenditures brought forward,	\$322,456 18	
Estimates rejected by Commissioner as follows, viz :		
Work estimated at White Breast,	\$2,703 50	
“ “ “ Amsterdam,	547 00	
“ “ “ Lowaville,	7,805 62	
“ “ “ Orville,	7,860 53	
“ “ “ Litchfield,	1,047 30	19,963 95
		<hr/>
		\$302,492 23

The following amounts are estimated for repairs :

At Croton,	\$2,169 40	
At Bentonsport,	4,042 22	6,211 62
		<hr/>

which sums if improper under the contract of June 9th, 1854, would reduce expenditures above claimed to..... \$296,280 61

The following items rejected by Commissioner as improper in Engineer's estimate, December 1st, 1857, to-wit :

Expenses and supplies of Dredge Boat, ..\$	704 66	
Lock repairs,	126 02	
Removing obstructions at Pittsburg, for which the Company are liable to pay damages for having put in,	35 70	
20 per cent on amount deducted above, ..	5,408 39	6,274 77
		<hr/>
		\$290,005 84

Furthermore, I have reason to believe excessive estimates have heretofore been made for lock foundations, etc., which will approximate the sum of.....\$10,000 00

Loss of work and materials at the Keosauqua work estimated by Commissioner,	10,000 00	20,000 00
		<hr/>
		\$270,005 84

A word of explanation may be necessary as to the abatement before made for losses sustained by the State at the Keosauqua work. It will be seen by exhibit herewith, marked "B," that the sum of \$15,961 64 has been estimated for work the last year at that point, and various estimates before. The present condition of the entire work at this point is but little further advanced than it was at the time the Company received it from Messrs. Bonney & Whitteley, the original contractors, who were bound to complete the work in two years.

The Commissioner is of the opinion, therefore, that the foregoing exhibit approximates and shows all the expenditures of the Des Moines Navigation and Railroad Company, that can be regarded as proper and legitimate, under the contracts between the Company and the State, from their commencement up to Dec. 1st, 1857, say.....\$270,005 84

For the above the Company have received certificates for 205,489.23 acres of land; also they hold a requisition on the Register, now in dispute, for 24,000 acres, which estimated at \$1,25 per acre, is.....	286,861 53
	<hr/> \$16,855 69

Showing a balance in favor of the State, if said 24,000 acres were certified to said Company, of \$16,855 69. The Commissioner therefore believes that said requisition, made August 6th, 1857, was without good and sufficient considerations, and that the same may be held to be void until said Company are deemed to have complied with their contracts with the State.

I will now submit my statement on expenditures still further.

The foregoing exhibit shows the amount claimed to have been expended by the Des Moines Navigation and Railroad Company from December 1st, 1856, to December 1st, 1857, say...\$77,192 70

Less 15 per cent. reserved under contract,.....	11,599 05
	<hr/> \$65,594 65

The following items embraced in above are rejected by the Commissioner as improper estimates and excluded at this time under the agreement of December 24, 1856, viz:

Work at White Breast,.....	\$2,703 50
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“ Amsterdam,	547 00	
“ Iowa,	7,805 62	
“ Orville,	7,860 53	
“ Litchfield,	1,047 30	
		\$19,963 95

Doubtful Claims—

Repairs at Croton and Bentonsport, . . .	6,211 62	
Expenses and supplies on Dredge Boat, . . .	704 66	
Lock repairs at Croton and Bonaparte, . .	126 02	
Removing obstructions at Pittsburg, . . .	35 70	
Twenty per cent on above,	5,408 39	32,450 34
		\$33,144 31

The true balance or sum proper to be estimated to the said Company for expenditures on the Improvement from December 1, 1856, to December 1, 1857, under the adjustment and agreement of December 24, 1856, is above shown to be thirty three thousand one hundred and forty-four dollars and thirty-one cents; making a discrepancy (in favor of the State) in the amount claimed by the Company (see exhibit “B”) of \$44,048 39.

I will now submit such other facts as are regarded important at this juncture of the affairs of the Improvement.

Subsequent to the adjustment of December 24th, 1856, before mentioned, to-wit, January 29th, 1857, the Legislature passed an act authorizing and requiring the Commissioner and Assistant Commissioner, therein provided for, to proceed to settle and adjust all matters relating to the affairs of the Des Moines Improvement, &c., &c. Accordingly, on the — day of March, the Commissioner, in conjunction with the Assistant Commissioner, James F. Wilson, Esq., in obedience to the law before referred to, did proceed to discharge the duties therein contemplated, by meeting the Agents of the Des Moines Navigation and Railroad Company at Burlington, Iowa, agreeably to appointment, and did there endeavor to negotiate and arrange a settlement with said Company, with a view to a further and early progress of the Improvement.

After two ineffectual trials to adjust the difficulties between the State and the Company, the said Des Moines Navigation and Railroad Company elected and concluded to determine their rights and the validity of their contracts with the State, through a judicial proceeding. A suit was therefore instituted against the Com-

missioner in the District Court of Des Moines County, Iowa, claiming and asking a writ of mandamus, requiring the Commissioner to transfer and convey to the said Company over eighty-nine thousand acres of land.

To this application for a mandamus a demurrer was filed on the part of the Commissioner, which raised the question as to the validity of the several contracts between the State and the Company, and also assigning that the application for a mandamus did not show such a compliance with their contracts upon the part of the Company as entitled them to a specific performance on the part of the State. The cause was taken to the Supreme Court of the State by appeal. The Supreme Court held that the contracts of the 9th and 29th of June, 1854, were valid, and that the act of the General Assembly of the State, approved January 29th, 1857, so far as it was based upon the hypothesis that no valid contracts existed, was of no effect. The supplemental contracts of September 27th and December 25th, 1855, were held to be void.

The adjustment of December 29th, 1856, in so far as the same was a settlement by and between the Commissioner and the Company, was sustained.

The Supreme Court dismissed the application for a writ of mandamus, for the reason, among others, that it did not show such a compliance upon the part of the Company with their contracts as entitled them to a specific performance upon the part of the State; and the Company not choosing to amend their application and risk an issue of fact with the State upon the question of their performance, the litigation was ended.

The Commissioner employed in behalf of the State, the Hon. R. P. Lowe and C. C. Nourse, Esqrs., who conducted the cause with signal ability, maintained the rights of the State, and defeated the claim for a mandamus, as well as the claim for salaries, office expenses, &c.

In order to a more satisfactory knowledge of the case, I herewith annex a brief of the cause. (See exhibit marked "A.")

Immediately following the decision obtained in said cause, which was hastened and prosecuted with commendable zeal by the counsel in the case, in order, if possible, to afford and fix a basis that would enable the parties to readjust differences, whereby the Improvement should be more vigorously prosecuted. The Agents of the Company and the Commissioner met on the 5th of August,

1857, and the Company proposed a more vigorous prosecution of the work than previously had been done, and furthermore agreed to prosecute and complete such locks and dams as the Commissioner should direct, and such as were in an unfinished condition.

In order, therefore, to afford the desired aid and facilitate the progress of the Improvement to the greatest practicable extent, the Commissioner at once consented to stipulate terms with the Agents of the Company, whereby the work should be resumed and vigorously prosecuted under the contract of 9th June, 1854; and inasmuch as the Supreme Court had decided that said instrument was valid and subsisting between the State and Company, (vide exhibit marked "A,") an agreement of which the following is a copy, was thereupon made.

[copy.]

"Memorandum of an Agreement made the 5th day of August, 1857, between the Commissioner of the Des Moines River Improvement of the first part, and the Des Moines Navigation and Railroad Company, of the second part, *Witnesseth*: That in consideration that said party of the second part shall immediately put under contract to responsible contractors, the work at Croton, Plymouth, Bentonsport and Keosauqua, the said party of the first part, agrees to and now does make to the said party of the second part, a certificate for thirty thousand dollars' worth of land, at the rate of \$1,25 per acre, for estimates due said party of the second part, on work up to August 1, 1857; said certificate for said lands to be placed in the hands of Guy Wells, Chief Engineer of said work, to be held by him until the work is vigorously commenced at all of said points, and the prosecution of the same is secured, in the opinion of said Wells, to a like amount of thirty thousand dollars, and then the said certificate shall be subject to the order of said Company. It is also agreed that the sub-contractors shall be fully paid by the Company for work heretofore done as estimated.

"This adjustment not to be considered as an agreement superseding or in anywise changing or affecting any former contract in force between the parties.

(Signed)

E. MANNING,

Com. Des Moines River Improvement.

O. CLARK,

Vice President D. N. & R. R. Co.

Although the work was commenced in mode and manner agreed upon, the same was not vigorously prosecuted except at one point: The Contractor at Keosauqua lock and dam has prosecuted the work with vigor and dispatch. At the other points, however, the work was partially countermanded by the Agent of the Company, very soon after its commencement, and before the \$30,000 was expended, as provided in last agreement, thereby defeating the spirit, and intention of said agreement of August 5th, 1857, upon which the Company now demand 24,000 acres land. If this was the only ground of defence, I should not rely upon it as sufficient to ground a controversy upon.

But there are other reasons more grave and weighty, and more vital to the "Improvement" than any questions heretofore raised on the contract between the Company and the State. At the date of said agreement, to-wit, August 5th, 1857, between the Company and the Commissioners, and immediately previous thereto, the Agent of the Company, General Clark, proposed as a basis for the future prosecution of the work, and mutual understanding between the State and the Company, and in order to reconcile conflicting interpretations of the contract of the 9th June, 1854, that they, the D. N. & R. R. Co., would secure the expenditure to the State, the full sum stipulated for in the contract (to-wit) \$1300,000 as soon and whenever the aid of the State was rendered to obtain the balance of the lands upon the "Grant" from the General Government. The same proposition and construction given to said contract has often been made by the Agent of the Company, and he has furthermore persistently contended that said Company would expend upon said Improvement between two and three millions of money.

The agreement, therefore, of the Agent of said Company to satisfactorily arrange to expend the said sum of \$1300,000 for the lands of the grant without regard to their limit, at and before the making of the said requisition of August 5th, 1857, was a consideration with the Commissioners that entered into and caused in part said certificate for 24,000 acres land to be made; and now inasmuch as said promises to do and perform as aforesaid have been utterly and, as the Commissioner believes, intentionally violated by said Company, the said requisition in question, for this, amongst other reasons, has been countermanded. In justification of my interpretation of the law, and the contracts on the subject, vide the law authorizing the Commissioner and assistants to contract said Im-

provement, Acts 1852-3, Chap. 103, page 162—"That the said Commissioners and Assistants in contracting for means to carry on said Improvement, shall not make any contract or agreement with any Company or individual under the provisions of this Act, or any laws now in force or which may be in force at the time of making said contract or agreement, unless such contract or agreement stipulates for at least thirteen hundred thousand dollars, to be faithfully expended in the payment of debts and liabilities of said Improvement, and to the completion thereof to the greatest extent practicable." The following is Section 8 in contract between the State and D. N. & R. R. Co., June 9, 1854:

"The said party of the second part (the State of Iowa) on their part hereby covenant and agree with the said party of the first part (D. N. & R. R. Co.) to sell and convey to the said party of the first part, in manner and upon the terms hereinafter provided, all of the lands donated to the State of Iowa for the Improvement of the Des Moines River, by act of Congress of August 8th, 1846, which the said party of the second part had not sold up to the 23d day of December, 1853, for which said lands the said party of the first part covenants and agrees in manner and form as fixed by this agreement, to pay the sum of thirteen hundred thousand dollars."

Now, here is the language of the law, authorizing the contract, and a Section of the contract itself, wherein the consideration is plainly stipulated and expressed

The Company have agreed to pay and the State have agreed to take \$1300,000 for the lands, &c. The sum is fixed for the aggregate, the contract don't call for or contemplate any given or certain quantity of land, but is definite in other respects, insomuch that the Company get all that belongs to the grant after the date specified.

Now, the D. N. & R. R. Co. repudiate and decline to pay the sum agreed upon for said "Grant," and this refusal has just been announced by the Company, and their policy disclosed. The fact is no longer disguised that the said Company now utterly refuse to acknowledge any liability whatever to the State to pay more than \$1.25 per acre for the land of the Grant, and if the same exceed a certain amount, then they will or will not, as they please to elect.

This question now is the great cause of embarrassment.

The Commissioner attended a meeting of the Company in New York City in September last, at which time an agent was authorized

by the Company to visit Washington and to act in conjunction with the Commissioners in such measures as were found necessary to obtain the balance of the lands from the General Government.

General O. Clark, as agent for the Company, and the Commissioner, visited the proper Department at Washington, and found the case to rest upon Attorney General Cushing's opinion of May, 1856.

This opinion limits the Grant to the North line of the State, and imposes conditions upon the State and its assignees, to-wit: If the lands are accepted under his decision; then the State, as well as the Company, shall execute relinquishments to the General Government against any further claims for lands under said act. The present incumbent of the "Interior Department," (Hon. Jacob Thompson) proposes to carry out the *verdict* of "Cushing" if the State and the Company accept it and conform to its provisions, and make relinquishments as therein required, or if either party, the State or the Company, elect to reject Mr. C.'s opinion, then the case will be open for a new hearing before the Officer of that Department.

The language of Mr. Thompson on the subject is pertinent and to the point. He says that if a fair interpretation of the act extends the Grant to the sources of the River, the State will be entitled and shall have it; but not otherwise.

Upon this announcement the Commissioner proposed to the agent of the Company to co-operate with the Company, and either accept or reject the "Cushing" opinion, leaving the Company to elect which course to adopt.

At this juncture of our proceedings the Agent of the Company, (General Clark) required the Commissioner to accept the lands, and the interpretation of the Act as provided in Attorney General Cushing's opinion rendered in the case, and that upon the condition that the Commissioner or the State would release the D. N. & R. Co. upon their contract of 9th June, 1854, pro-rata and to the same extent that the State and the Company are required to relinquish to the General Government under Cushing's opinion, then upon that condition the Company would co-operate with the State, but upon no other or better terms.

This proposition was rejected by the Commissioner as not intended or contemplated in the contracts between the Company and the State, and thus the case now stands.

The Agent of the Company makes it an alternative that hence-

forth the State must admit the Company's interpretations of the contract of 9th June, 1854, and for every \$30,000 expended on the same they shall have lands for at \$1.25 per acre, without regard to whether the lands thus required will yield the State in the aggregate the sum of \$1300,000, as stipulated, (and which is the paramount object and consideration of said contract) or not.

The Company's constructions of said contract, in connection with their requirements of the State to accept the lands of the "Grant" to the State line, and furthermore the release they demand of the State, involves a question of at least \$400,000 importance to the State, and is, in the opinion of the Commissioners, the gravest and most vital question that has ever arisen between the D. N. & R. R. Co. and the State. In view of the fact the lands heretofore certified to the State are nearly exhausted, there being but 60,000 acres) and the further fact that the State and the Company have entirely failed to co-operate in any proper measures whereby the balance of the lands belonging to the Grant can be properly secured to the State and the progress of the Improvement in like manner secured.

Your Commissioner regards that these facts justify the conclusion that a crisis has already reached the affairs of the Company and the State, as connected with the Improvement, that warrant and justify the course adopted by the Commissioner, in order that the rights of the State may be thereby protected.

I will now submit a brief view of the work in progress, and the condition and extent it has attained under the auspices and conduct of the D. N. & R. R. Co. the past three and a half years; and for a more detailed history of the same in part I will refer to my former Report of January 7th, 1857.

The work at present at "Croton," is restoring and repairing. The Dam was heretofore constructed by the Company, and for which the Company have been fully estimated in the adjustment of Dec. 24th, 1856.

The Commissioner regards that the present expenditures in alterations and repairs cannot be legitimately estimated to said Company under the contract of 9th June, 1854.

The work at Bentonsport is also work of restoring and repairs. But it must be borne in mind that this work was constructed by the State prior to the contract with said Company, and the Dam has always been regarded a poor work, owing to bad materials and the temporary manner of its construction.

A question therefore may reasonably arise whether the Company should not be entitled to estimates for restoring and repairing this work.

The work at Keosauqua, I am gratified to report as having changed hands, and is now in possession of a reliable and vigorous sub-contractor, who has prosecuted the work the past three months with energy and dispatch.

The Lock walls are now ready for the Gates. If the high water does not prevent finishing the Gates, it is confidently expected to have the Lock in working order by the opening of navigation in the Spring.

The work at the points above Keosauqua has been suspended by the Company for several months. The amount of work performed at the different locations the past year, will be shown by Exhibit marked B.

Your Commissioner would furthermore report :

That a question of much importance has recently arisen between the Commissioners, Register and the Company, in respect to the act of your Commissioner in countermanding an order or requisition for 24,000 acres land, of date August 6th, 1857. In order that this question should be clearly understood, and in justice to the State, the Company and myself, it is proper the facts and the circumstances connected therewith, and which are relied upon for justification and defence, should be shown. Therefore I submit as follows :

1. The Company failed to prosecute the work as agreed.
2. The Company had not paid their Sub-Contractors as agreed, which was a precedent condition.
3. The Company had not performed \$30,000 additional work, stipulated for.
4. The Company claim estimates for repairs and restoring work which I reject.
5. The Company neglect and refuse to vest the *title to Rights of Way and Water Power* in the name of the State of Iowa, which is a violation of a covenant of their contract.
6. I have good reason for believing the Sub-Contractors have not been fully paid estimates for work claimed and performed since August 1st, 1857.
7. The Company have failed to perform their covenant to State, and to pay old liabilities of the Improvement.

8. I believe the State is entitled to reclamation for excessive estimates on Lock Foundations, &c., provided for in my adjustment of December 24th, 1856, say to the amount of \$10,000 or \$12,000.

9. The Agent of the Company threatened the Commissioner with a suspension of the work, if he (the Commissioner) would not release the Company and make new stipulations on their contract.

10. The acts of the Company have satisfied the Commissioner that the Improvement will not progress or be performed as the State requires under the contract of June 9th, 1854.

The reasons before named are regarded by the Commissioner as sufficient for recalling the order made August 6th, 1857, for 24,000 acres land, but other and greater reasons may be assigned. It is now about three and a half years since the D. N. & R. R. Co. commenced their contract upon the Improvement, and up to the present time it is a melancholy fact that said Company claim to have expended nearly a half million of dollars, and with this immense expenditure claimed by them, there is not a single Lock or Dam completed by them upon the work.

Furthermore, the condition in the contract to complete one-fourth part of said Improvement each and every year, has entirely failed, and under this covenant of the Company, if the State may claim damages, the entire amount expended by the Company would be absorbed and offsetted in damages arising from non-compliance.

In other respects the said Company are equally in default, inasmuch that the Navigation of the River has been unnecessarily obstructed by means of improper and unnecessary materials put into the channel of said River at Pittsburgh, clearly in violation of their contract, and which have caused great losses to Boatmen and Shippers, in consequence of detention, storage, extra freights, &c.

These failures, defaults and non-compliances on the part of said Company, must be regarded as the result of an ill-advised policy, in part at least, in the commencing as well as progressing of said work. Now, if these facts and conclusions are maintained, and it is shown that the State is not in default or chargeable with wrongs against the Company, how can the Company seek and enforce the State to perform its covenants before the considerations and stipulations are first performed by themselves?

The paramount object of the Government and of the State, and of the contract between the parties, was to Improve the Navigation of the River Des Moines, to the extent stipulated for.

Now how does this proposition stand, and have the D. N. & R. R. Co. made any Improvement whatever in the *Navigation* of said River? The answer must be emphatically No.

Have the said Company prosecuted the Improvement of said River according to mode and manner stipulated for in their contracts?

Answer—They certainly have not.

Have the Company virtually repudiated and denied their obligation to expend \$1300,000 for the lands of the "Grant," Tolls and Rents?

Answer—Most emphatically they have.

With these views before us, it is quite manifest that the affairs of the State and the Company, as connected with the Improvement, are extremely complicated and embarrassing.

The necessity, therefore, for prompt and early measures to be taken to adjust and compromise, if possible, all matters in variance with the D. N. & R. R. Co., and in failure thereof a resort to Judicial proceedings will be inevitable to maintain the rights of the State.

It is now of the most vital importance that a wise and just policy be adopted, and the works from St. Francisville to Keosauqua be completed the ensuing season. The materials on hand at points above Keosauqua, it is believed, can be transferred to points below, so as to aid and materially facilitate the completion of said works, and at the same time save the materials from loss. The works are now so far advanced between these points, that it would be an intolerable abuse of the means appropriated to this object, if they were not at once speedily used to complete this part of the line of Improvement.

The D. N. & R. R. Co. have notified some, if not all their Sub-Contractors, to suspend work upon the Improvement. The Commissioner has been informed through the Acting Engineer of the work, that said Company are ready and now invite propositions from the State for compromise and settlement.

The necessity now is apparent and manifest that an early adjustment of affairs between said Company and the State is of the first importance.

It is likewise equally important and necessary that immediate steps be taken to secure and definitely settle with the General Government, as to the extent of and the quantity of land the State is entitled to receive under the Grant of August 8th, 1846.

This question, so far as the opinions of eminent jurists have been

obtained, may be considered as settled in favor of the claims of the State.

The proper Department at Washington now desires the State to act in the premises, and either accept or reject Attorney General Cushing's opinion pronounced in the case, and thereupon have the question determined.

I shall therefore recommend to your consideration the appointment of a Commissioner with full power to settle and conclude all matters in variance, or prosecute the same to final settlement with the D. N. & R. R. Company, as well as any and all other settlements now pending and connected with the Des Moines River Improvement.

I would furthermore recommend that said Commissioner or Agent should be fully authorized and empowered to effect and conclude a final settlement with the General Government, in the matter of the Des Moines River Grant of August 8th, 1846.

I would furthermore report:

That the sub-contractors upon the line of the Improvement have received official notice by order of the Company to suspend work upon their several jobs until further notice. The work of repairs commenced at Croton are left in an unfinished and dangerous condition, so much so that the proprietors of the Mills and power at that point report that they are in imminent danger of a great sacrifice, if these repairs are not immediately prosecuted to completion.

The expenditure necessary to this object is estimated at from four to five thousand dollars.

The work at Keosauqua is also left in a situation that still obstructs the navigation of the river. The Lock walls are nearly completed, and sufficiently so to receive the Gates and machinery necessary to operate the same and render the Navigation free from obstruction at that point.

The upper portion of the Valley has heretofore been greatly injured by means of this obstruction, and the immediate completion of the work is the only remedy that will insure and obviate this evil, that is now so generally felt throughout the Valley.

The old liabilities of the improvement, which the D. N. & R. R. Co. have failed to liquidate, are now being pressed upon the Commissioner for payment, or suitable provision therefor.

The following claims are especially urged, to-wit:

Caleb O. Halstead reports himself holding thirteen

Bonds of \$500 each.....	\$6,500
Thirteen coupons, \$40 each, due Nov. 1st, 1857,...	\$520
Bangs Bro.'s & Co., alleged claims against the Improvement	\$14,000.00

Which if not paid or provided for, they notify the Commissioner that suits will be instituted therefor.

In order to give an approximating understanding, of the amount necessary to complete the works from St. Francisville to Keosauqua, I submit the following estimate, predicated upon a judicious expenditure, as a probable amount required, to-wit:

At St. Francisville, say.....	\$40,000.00
Less amount expended.....	\$6,115.04—\$33,884.96
At Belfast.....	\$40,000.00
Less amount expended.....	\$15,923.03—\$24,076.97
At Croton Repairs.....	\$4000.00
At Plymouth from \$15,000 to.....	\$20,000.00
At Bentonsport Repairs.....	\$10,000.00
At Keosauqua, including channel below Lock.....	\$20,000.00
Amount brought forward.....	\$111,961.93
To which add above indebtedness...	\$21,020.00
Total and required to complete works before mentioned and pay indebtedness.....	\$132,981.93

From the foregoing data your Commissioner believes immediate provisions are called for to meet the emergencies as stated.

The lands undisposed of heretofore certified to the State, after deducting lands certified by Commissioners to the D. N. & R. R. Co., as reported by the Register, is 61,527 78-100 acres, out of which may be deducted a certificate in dispute of 24,000 acres. Leaving.....37,527 78-100 acres.

At present unencumbered, to which may be added lands not yet certified by the Department at Washington, and which are decided as due the State by Attorney Gen'l

Cushing, to the North line of the State... 300,000 acres.

To which may be added the amount of lands due the State under the "Grant" as claimed to the sources of the River, estimated at 400,000 acres.

Making a total of.....737,527 78-100 acres

Amount of lands certified to the D. N. & R.

R. Co.	205,489 64-100 acres
Certificate or requisition dated August 6th, 1857. <i>In dispute</i>	24,000 acres
Making a total of lands belonging to the Grant of August 8th, 1846.	967,017 42-100 acres
Against the above the D. N. & R. R. Co. have expended upon the Improvement about.	\$270,000.00
Old liabilities against the Improvement remain- ing unpaid, say	\$21,020.00
	\$291,020.00

All of which is respectfully submitted.

EDWIN MANNING,

Com. D. M. R. Improvement.

Office of Com. D. R. Imp't,
Keosauqua, January 1st, 1858.

*A Schedule of Work furnished by Guy Wells, Acting Engineer
Des Moines River Improvement. (Copy.)*

Amount of work done on the Des Moines River Improvement,
from December 1st, 1856, to December 1st, 1857, at the following
named points, viz:

St. Francisville,	\$ 449 16
Belfast,	1,235 00
Croton,	2,169 40
Plymouth,	17,372 01
Benton's Port,	4,042 22
Keosauqua,	15,961 64
Litchfield,	1,047 30
Orville,	7,860 53
Iowaville,	7,805 62
Amsterdam,	547 00
White Breast,	2,703 50
	\$61,193 38

Deduct timber brought from above that
had been previously estimated,

\$1,510 18	
Amount previously estimated,	847 50
	2,357 68

\$58,835 70

Engineering,	4,625 00
Lock repairs at Croton and Bonaparte,	126 02
Expenses and supplies of dredging boat,	704 68
Endeavoring to remove obstructions at Pittsburg, ..	35 70
	<hr/>
	\$64,327 08
Add 20 per cent.,	12,865 62
	<hr/>
	\$77,192 70
Deduct certificate of August 6, 1857,	30,000 00
	<hr/>
Exhibit B.	\$47,192 70

The State of Iowa, on the relations of Wm. C. Johnson, President, &c..

vs.

SUPREME COURT, June Term, 1857.

The Commissioner of the Des Moines River Improvement.

Points presented by the demurrer to the petition suggested in argument and decided by the Court.

1st. Is the contract of June 9th, 1854, valid and subsisting?

We are of the opinion that the contract does not violate, and was not made in contravention of the act of Congress making the grant.

STOCKTON, J., *contra*.

We are of opinion that the acts of June 19 and January 24, 1853, Laws of 1853, pages 62 and 162, do not dispense with the argument of the prior statutes, that the Governor should approve any contract made thereunder.

WOODWARD, J., *contra*.

We further conclude, however, that the necessity of approval has been waived by the repeated and express action of the Executive and Legislative department of the Government; that by the action of these departments, a construction and validity has been given to said contracts, which the State is now estopped from denying.

STOCKTON, J., *contra*.

Exhibit A.

The said contract does conform satisfactorily and even technically with the requirements of the acts of the Legislature under which it was made.

STOCKTON, J., *contra*.

It is therefore concluded, on the first proposition, that the said contract of June 9, 1854, is valid and subsisting.

STOCKTON, J., *contra*.

2nd. Are the supplemental contracts of June 9 and June 29, 1854, September 27 and December 5, 1855, valid and subsisting between the parties?

It is objected that the duties of Assistant Commissioners ceased after the original contract was made, and that therefore these supplemental contracts should have been made with the *Commissioner* and Assistant; then the three should have united and concurred; and a majority could not act or contract.

We conclude that so much of section 4 of the act of January 24, 1853, as provides that the duties of said Assistant Commissioners shall not extend any further than to aid such Commissioner in negotiating such contracts or agreements as in said act are contemplated, was not intended to inhibit them from taking part in any negotiations that might become necessary to carry out the contract made, or to accomplish the general object and purpose of said act, in disposing of the lands and work, and securing the improvement, but was intended to provide that their duties should not extend to the others and various matters devolving upon the principal Commissioners in the prosecution of the improvement.

STOCKTON, J., *contra*.

We hold that the Assistant Commissioners, therefore, might take part in such subsequent negotiations, and that the Commissioner and one of the Assistants, (being a majority of the Board,) could make a valid contract.

STOCKTON, J. *contra*.

The said supplement, under the law, required the approval of the Governor as much as the original contract. Those dated June 9 and June 20, 1854, are, we think, though not thus approved, recognized and sanctioned by the action of the two departments of government, and are binding and of force in like manner and for the same reason that the original contract is binding.

STOCKTON, J., *contra*, as to so much as treats the action of the State in waiving the necessity of approval by the Governor.

WOODWARD, J., not concurring in the opinion that the approval of the Governor is necessary.

As to the contracts of September 27 and December 5, 1855, we think they are invalid for want of the approval of the Governor, and that there is nothing sufficiently to show that said contracts have been recognized, approved and acted upon by the State, so as to waive the requirement of approval.

WOODWARD, J., holding the approval unnecessary, and doubting, if

necessary, as to the acts of the State being sufficient to amount to a recognition.

We therefore conclude that the supplemental contracts of June 9 and June 29, 1854, are valid and binding, and that those of September 27 and December 25, 1855, are not binding.

STOCKTON, J., dissenting as to the first proposition, and WOODWARD, J. dissenting as to the last.

3rd. Is the contract of December 29, 1856, valid and binding?

So far as it makes a new contract, or modifies or changes former ones, it would seem prima facie to be invalid, being signed alone by the Commissioner, and not approved by the Governor.

So far as it is a statement of account or settlement, it is binding; and section three, therefore, and such other parts of said agreement as can be regarded as a settlement with the Company, as contractor or creditor, is valid and subsisting under the law of February 5, 1851. Laws of 1851, page 138, sec. 28.

By WRIGHT, C. J. I have no doubt that this agreement might be valid as a settlement or of claim preferred, but for the fact that, taking it all together, I conclude that so far as it can be called or termed a settlement in its terms, such terms are made dependant or conditional upon those provisions which are termed the contract parts; that such contract parts were the inducement to such settlement, (as such settlement was the inducement to the contract part;) that, in short, the parts relating to the settlement, and those relating to the contract proper, are so intimately connected that you cannot sever, and hold the one binding and the other not; the entire contract is valid or it is all invalid.

I wish to add further that the petition does not seek to avoid said agreement, either as a contract or settlement. The State insists upon its validity and binding force; and I cannot, therefore, see why, as the case now stands, it should not be carried out and performed.

4th. Is the act of Jan. 29, 1857, in relation to the Des Moines River Improvement valid as against the Company, and how far does it invalidate the contract of December 29, 1856, or any of its parts?

The contract of June 9, 1854, being held valid, it follows as a consequence that the act of Jan. 29, 1857, in its essential features,

is of no practical force or effect; the predicate or basis upon which it was enacted, (the invalidity of the previous contracts with the company, represented by the Relator,) proving to be incorrect, it, of course, has nothing upon which to act.

STOCKTON, J., *contra*.

The foregoing position, of course, is not to be construed that said act can in no event have an operative effect. The Company may have forfeited all rights acquired under such contract, or may voluntarily assent to modifications of existing contracts, or make a new and other arrangement under said act, or some other individual or company (if the present company shall appear to have forfeited their contract) may be contracted with, and under these and perhaps other circumstances, the said act would certainly not be without force and effect; but so far as it treats the contract referred to as being invalid, and that the Company have no rights thereunder, it can, as already stated, have no effect.

5th. What is meant by the concluding clause of the contract of December 29, 1856, which provides that in the event of the passage of any act of the Legislature invalidating the rights of either party to this agreement, then it shall become inoperative and void—is, perhaps, not very clear. We conclude, however, it cannot mean an unsuccessful attempt to invalidate, and that, therefore, the said act, as already shown, being of no practical force or validity, the right of neither party to said agreement can be violated, and that therefore said contract or agreement is not inoperative by reason of anything in said act contained.

STOCKTON, J., not assenting to so much of this position as treats said act as invalid.

6th. Under the contract of June 9, 1854, is it proper to include in the estimates, to be paid by the State in lands, the salary of the book keeper, and office rent of offices, by the Company.

We unite in answering this enquiry in the negative. The State (by the lands) pays the State officers, and those engaged in the construction of the work, and not the officers and servants of the Company proper. The Company, we think, is paid by the consideration provided for in the principal contract, and should pay its own officers and employees, and the expenses of the same.

7th. We are to enquire, finally, whether the relator is entitled to the writ of mandamus, as prayed for in the petition.

A majority of the Court conclude that, even if the contract of June 9, 1854 is valid, yet under the showing made in the petition and exhibits, the writ should not be granted.

First. Because the petition does not show that so much of the said contract as requires one-fourth of the work to be completed in each year, has been completed.

Second. That this is only a proceeding in another form to enforce the specific performance of this contract, and that the petition does not show a performance on the part of complainant, nor a readiness, willingness, or effort to perform.

Third. That from this petition and record, it is doubtful at least whether the amount claimed in the petition, or any amount in fact, is due on the contract and settlement with Manning.

WRIGHT, C. J. I do not think these questions legitimately arise at this stage of the controversy. The cause is before us by appeal from the decision of the Court below, on the demurrer to the petition. This demurrer, of course, admits the truth of those facts which are well pleaded in the petition. Taking the petition as true, therefore, and unanswered, I think that the Commissioner should be required to certify the lands as claimed, or show cause in answer to the writ why he does not. In showing such cause, the questions suggested by a majority of the Court might legitimately arise. At present, I think that the matters for our determination do not involve the question whether said Company have complied with their contract, except so far as such questions may arise from the averments, or want of averments in the petition.

When the issue shall be made and cause heard, I think it will be time to adjudicate these objections.

It is the opinion of the majority of the Court, that the mandamus should be refused by the Court.

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