

ATTORNEY-GENERAL REMLEY ON THE DESTRUCTION OF IOWA LAKES.

STATE OF IOWA, OFFICE OF ATTORNEY-GENERAL,
IOWA CITY, IOWA, JUNE 22, 1895. *Hon. Frank D. Jackson, Governor of Iowa, Des Moines, Iowa:* Dear Sir:—
Your favor of the 19th, inst. at hand in regard to a petition of citizens of Green county in which you are asked to request the commissioner of the land office of the United States that he certify to the State of Iowa the swamp lands therein described, which application is based upon the provisions of the swamp land grant of September 28, 1850; it being also stated in your communication that, “in the surveys made by the Federal Government, the tracts in question were set apart and designated as meandered lakes, and that since such survey said tract has been recognized as a meandered lake, and is so marked on the Federal maps and charts of the State.” The affidavits of a number of citizens who live adjacent, accompany the petition, in which it appears that, except in the wettest of seasons, the bed of the tract is covered with a vegetable mould, and sandy black loam and muck to an average depth of about three feet. The affiants further testify that for a great many years there has been very little water covering said bed except in the spring, when it is filled by melted snow and occasionally by heavy rains. They also state, that “Search has been made for natural springs, but they have failed to find any.”

You ask my opinion as to the advisability of complying with the request of the petitioners, and also that I convey to you my opinion as to the position to be maintained by the State in the event that said property is certified to as State land by the commissioner of the General Land Office.

The question presented is of great interest to the State, involving as it does, the right to the lake beds of the natural lakes of Iowa. To properly present my view, it is necessary to recall the history of legislation by which the United States became entitled to the public land.

Originally the Federal Government had no public land of any character. During the Revolutionary War, some of the states refused to ratify the articles of confederation proposed by Congress until provision was made for the cession of unoccupied lands to the Federal Government. The Maryland legislature, by resolution adopted September 5, 1778, declared that it would not accede to the Confederation, unless there "was secured to the United States a right in common, in and to all lands lying to the westward of the frontiers," and "extending to the Mississippi or the South Sea in such manner that said lands be sold net, or otherwise disposed of for the common benefit of all the states, and the money arising from the sale of these lands may be deemed and taken as a part of the money belonging to the United States, etc." The charters given to the Colonies, in many instances, made the western boundary very indefinite. The Virginia charter contained a grant of land, "from sea to sea, west and northwest." Under this, the Colony of Virginia, claimed all the territory lying northwest of the Ohio river, certainly, and had an indefinite claim to that extending beyond, even to the Pacific Ocean. In September, 1780, Congress, considering the remonstrances of Maryland, and an act of the Legislature of New York on the same subject, passed a resolution, "earnestly recommending to the several states who have claims to western country, to pass such laws and to give their delegates in Congress such powers as may effectually remove the only obstacle to a final ratification of the Articles of Confederation."

On January 22, 1781, the General Assembly of Virginia resolved, "that upon the ratification of the Articles

of the Federal Union, this commonwealth will yield to the Congress of the United States, the right, title and claim that said commonwealth hath to the lands northwest of the Ohio river, upon the following conditions." One condition was that new states should be formed, and that states so formed should be distinctly republican states, and be admitted to the Federal Union, "*having the same rights of sovereignty, freedom and independence as the other states.*" Another condition was that all the lands within the territory conveyed, "shall be considered as a common fund for the benefit of the United American States—according to their respective proportions in the general charge and expenditures, and shall be faithfully and *bona fide* disposed of and for that purpose and for no other use or purpose whatsoever." Hening's Statutes at Large (Va.) Vol. 10, page 564. These conditions were expressly approved by resolution of Congress, September 13, 1783.

In December, 1783, an act was passed by the General Assembly of Virginia, authorizing the delegates in Congress to execute a deed of conveyance to the United States of the territory upon the terms and conditions expressed in the resolution above referred to. Hening's Statutes at Large, Vol. II, page 328. In March, 1784, Thomas Jefferson, S. Hardy, Arthur Lee and James Monroe, the delegates of Virginia in Congress, executed the deed of cession, and it refers to and makes a part of such deed, the acts of the General Assembly of Virginia referred to and granted the territory, "to, and for the use and purposes and on the conditions of the said recited Acts." The State of Georgia, on substantially the same conditions, ceded lands to the Government of the United States; likewise New York. The treaty by which Louisiana was purchased from the French Republic has been construed to embrace substantially the same provisions.

This leads to an examination as to what rights the Federal Government acquired in and to the land thus

ceded. The Federal Government was given municipal jurisdiction until new states should be formed which should be sovereign states. It also held the title to the lands which should be sold and disposed of for the benefit of the states. The Federal Government became thereby, the trustee of municipal jurisdiction, also the owner of the land in trust. When a new state was formed and admitted to the Union, the trust imposed by the deed of cession in regard to the municipal jurisdiction, was fully executed, and new states became vested with all the rights and authority of sovereignty. When what was recognized as lands, *i. e.*, as distinguished from bodies of water or rivers, which in all time have been considered as public property, were sold and disposed of, and the proceeds turned into the treasury of the United States, that trust was likewise executed.

In *Pollard's lessee vs. Hagen*, 3 Howard, 219, the Supreme Court of the United States announced the views herein expressed and decided that the United States holds public lands within the new states, "by force of the deed of cession, and the Statutes connected with them, and not by any municipal sovereignty which it may be supposed they possessed."

The State, as a sovereign, is the owner of the shores of navigable waters below high water mark, and the soil under them. The conclusion of the Supreme Court in the case referred to is, that "the shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively." It also held, "The new States have the same rights, sovereignty and jurisdiction over this subject, as the original state."

In *Martin vs. Waddle*, 16 Peters, it was said, "when the Revolution took place, the people of each State became themselves sovereign, and in that character, hold the

right to all their navigable waters and the soil under them for their common use, subject only to the rights since surrendered by the Constitution."

I might say that the subject of litigation in the Polard case was reclaimed land in Mobile Bay, one party claiming under the grant from the State and the adverse party claiming under a grant from the government of the United States. The title granted by the state was upheld.

Our own Supreme Court has held that the State has complete and absolute property from high water mark to the middle of the channel of the Mississippi river, and holds it for public uses, subject to the power of Congress to regulate commerce among the several States and with foreign nations. *McManus vs. Carmichael*, 3 Iowa, 1. *Haight vs. City of Keokuk*, 4 Iowa, 299.

These decisions have been followed by a number of cases since. The decisions of the Iowa court are expressly approved by the Supreme Court of the United States in *Barney vs. Keokuk*, 94 U. S., 324. It is also held that inland waters, *i. e.* waters lying wholly within the State, which have no connection with navigable waters leading to other States, are wholly within the control of the government of this State. *Veazie et al. vs. Moor*, 14 Howard, 563.

When the government of the United States surveys the land and its agents or surveyors meander the lakes and return the plats which are approved by the proper department of government and disposes of all the land with reference to the plats, its interest in the land or soil ends. The lands are sold with reference to the lakes. The purchasers as part of the people in the State, acquire a right to use the lake in common with other people of the sovereign State. When the lands are thus disposed of the trust reposed in the United States is fully executed. The government retains no property or interest in the waters of the State, except such as may be public highways for inter-state commerce. No municipal sovereignty being re-

tained by the United States, the soil under the bed of the lake up to high water mark becomes the property of the State as the sovereign for the use of the public. When, under the change of circumstances, a lake becomes dry. I can conceive of no principle by which the State would lose its right and title to the lake and the property therein revert to the United States. In no instance that I have been able to discover has such a claim been made by the general government.

In the case of *Hardin vs. Jordan*, 140 U. S. Rep. 371, decided by the Supreme Court of the United States in May, 1891, this subject was again reviewed, and the principles herein expressed are reaffirmed by the highest court. It is said by the court, "Such title, being in the State, the lands are subject to State regulation and control, but on the condition, however, of not interfering with the regulations which may be made by congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them and granting fisheries in particular localities, also by the reclamation of submerged flats and the erection of wharves, etc. Sometimes large areas so reclaimed are occupied by cities and are put to other public and private uses, such control and ownership therein being supreme." In this case, the court recognizing the authority of the State over and its right in the soil under the rivers, determines the right of individual claims according to the laws of the State. It also holds that a grant of land extends only to high water mark and any rights of riparian owners below high water mark depend upon the laws of the State. That being a case from Illinois, the right of a riparian owner was determined by the law recognized by the Supreme Court of Illinois which differs from the Supreme Court of Iowa. *Noyes vs. Collins*, 61, N. W. Rep. 250.

The question of the ownership of the State in lands, formed after the survey and sale of government land, is not wholly a new one in Iowa. In 1882 the legislature authorized the sale of an island newly formed in the Mississippi river near the Iowa shore. Chapt. 143, Acts of the 19 G. A. What difference is there in principle between land formed by the action of the water forming an island and land formed by the subsidence of the water?

My conclusion from the cases referred to and many others, is that the title to the land below high water mark of the lakes of Iowa, is in the State.

The question arises whether this title passed under the swamp land act referred to. I think not. The lakes which were meandered and platted as lakes, were not treated as land to be sold or disposed of, but were recognized as lakes. After the formation of the State government the title to the lakes and soil under them, and shores to high water mark, was vested in the State. The land which passed under the grant which is called the swamp land act, is such as was then recognized as swamp land. Land that was not swamp land at the time of the grant would not pass with the grant. To so pass, the land must be within what is termed the "call of the deed" or act. The fact that the land which was dry land at the time of the act afterward became swampy would not bring it within the purview of the grant; so, if what was recognized as water or lakes, afterward became dry land, that fact would not make it pass with the grant. To illustrate, it would hardly be claimed that the land occupied by Spirit Lake, the largest of our lakes, is swamp land. If fifty years from now, by a subsidence of the water, it should become swampy, that fact would not make it pass by an act of Congress enacted one hundred years before the subsidence of the water. The grant is one *in praesenti*, passing title to the lands therein described from its date. Wright *vs.* Roseberry, 121 U. S. Rep. 488.

Hence I cannot agree with the idea that the lakes of Iowa pass to the State by virtue of the swamp land act, but am well satisfied they belonged to the State from and after the formation of the State government by virtue of its right as sovereign. There may be instances of lakes along the rivers which were practically overflow lands, and there may be exceptions to the rule, but I think that the rule is as above stated.

This being the case, I am of the opinion that it would not be advisable for the Governor to comply with the request of the petitioners from Greene county. If the position is correct, it would not be his duty to do any act tending to disparage the title of property belonging to this State, and any act which he might do, unless it is under the authority of the statute, would be null and of no effect. So would any patent issued by the commissioner of the general land office of the United States.

Replying to the latter part of your communication, I would say that in my judgment, the policy of the State should be to maintain all the lakes of Iowa in their original extent and beauty as far as it is possible to do so. To convert the many beautiful lakes of Iowa into fields for cultivation, appears to me to be utilitarianism run mad. The State has more than poetic interest in such lakes. From the report of the Secretary of State, Land Office Department, 1893, it appears that there were approximately 61,248 acres of land covered by lakes in Iowa as shown by the plats. Frequent inquiry comes to my office as to how a title can be procured to one or more of these lakes, or lake beds. Some even have inquired as to the means of acquiring title to part of the Des Moines river bed. If by any means the lakes of Iowa can be preserved, it should by all means be done. Private interests will, undoubtedly, in many cases, seek to drain them, and I understand that some few have been already drained. I cannot think this is good policy, or for the best interests of the State.

If the duty of protecting the lakes from spoliation, building dams when needed to retain the water, and their general oversight were committed to some officer of the State, or Commissioner, much might be done to preserve these sheets of water of Iowa in their pristine beauty. The matter is, in my opinion, of sufficient public interest to have the attention of the legislature called to it.

If, by reason of circumstances, it is impossible to preserve a lake, the legislature could make such provision for the disposal of the lake-bed as its wisdom would determine to be for the public interest.

Yours respectfully,

MILTON REMLEY, Attorney General.

The Des Moines *Daily Capital* calls the State Library "a vast literary storehouse;" and then dwells in detail upon the magnificent collection of periodical literature to be found there. According to the showing made by *The Capital* the Library is more than a credit to the State; it is a crowning honor. Every city in Iowa, and every town with a population exceeding 1,000, ought to have a free public library as creditable to its locality as the collection at Des Moines is to the State. Rightly conducted and freely patronized, the public library is the poor man's university, and one in which age and youth can find the best instructors at all times.—*Davenport Democrat*, July 7, 1895.

Caroline Louise Dodge, daughter of N. P. Dodge of Council Bluffs, has won the degree of LL. B. in the law department of the University of the City of New York, graduating last week with such high honors that she was selected as one of the best twelve to compete for a prize in an oral examination before three of the prominent attorneys of New York City. Miss Dodge is the first Council Bluffs girl to be admitted to the bar.—*Omaha Bee*, June 23, 1895.

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