U.S. Dept. of Justice

OFFICIAL OPINIONS

OF

2397

THE ATTORNEYS GENERAL

OF

THE UNITED STATES,

ADVISING THE

PRESIDENT AND HEADS OF DEPARTMENTS,

IN RELATION TO THEIR OFFICIAL DUTIES,

AND EXPOUNDING THE CONSTITUTION, TREATIES WITH FOREIGN GOVERNMENTS AND WITH INDIAN TRIBES, AND THE PUBLIC LAWS OF THE COUNTRY.

EDITED

BY C. C. ANDREWS,

COUNSELLOR AT LAW.

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VOLUME VII.

CONTAINING THE

OPINIONS

OF

HON. CALEB CUSHING,

OF MASSACHUSETTS.

FROM OCTOBER 9, 1854, TO JULY 9, 1856.

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that provision ought to be made either by statute or regulation, to define the legal condition of persons and of their property in civil relations, not merely in China, but also in Turkey, and in all countries in which the right of exterritoriality is enjoyed by citizens of the United States.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

EMINENT DOMAIN OF THE STATES.—EQUALITY OF THE STATES.

The United States never held any municipal sovereignty, jurisdiction, or right of soil in the territory of which any of the new States are formed except for temporary purposes, namely, to execute the trusts created by deeds of cession of Virginia, Massachusetts, Georgia, and other States in the original common territory of the Union, or by the treaties with France, Spain, and the Mexican Republic in the territories of Louisiana, the Florida, New Mexico, and California.

The provisions of the ordinance for the organization of the North-West Territory were extinguished by the Constitution, or if any of them retain continuing validity it is only so far as they may have authority derived from some other source, either the compacts of cession or acts of Congress under the Constitution.

This doctrine has been applied in leading cases to questions touching the property in public lands, the relation of master and slave, religion, and navigable waters, and the eminent domain; and may be take as the established legal truth.

In obedience to the same principle, and proceeding in the same line of adjudication, it must have been held, if the question had come up for judicial determination, that the provision of the act of March 6th, 1820, which undertakes to determine in advance a perpetual rule of municipal law for all that portion of the province of Louisiana which lies north of the parallel of thirty-six degrees and thirty minutes north latitude, was null and void *ab incepto*, because incompatible with the organic fact of equality of internal right in all respects between the old and the new States.

The same doctrine controls the question of the relative rights of the United States and of any one of new States, in regard to lands occupied by the United States for public purposes in such State.

ATTORNEY GENERAL'S OFFICE,
October 24, 1855.

SIR: Your communication of the 5th inst. calls my attention

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to the question, submitted in a previous letter, whether the legal condition of the Navy Yard at Pensacola is such as to give complete jurisdiction to the United States and exclude that of the State of Florida?

The particular matter is one of taxation. But we need not embarrass ourselves now with that point. It will be assumed, for the purpose of this opinion, that the power of taxation claimed under the laws of the State of Florida in the present case is such, as to persons or property, as might lawfully be exercised in any place where the State has proper jurisdiction. Thus we shall have to consider only the naked question of the relative jurisdiction of the United States and of the State in the Navy Yard.

I consider it a settled point that no State retains the power of taxation, or any other municipal power, as applied to a site purchased by the Government for lawful public uses, and of which the jurisdiction has been expressly ceded to the United States in the usual form by the State in which the land lies. (See opinion of June 24th, 1854, ante, vol. vi, p. 567.)

But, here, the case finds that the site is of public domain reserved by the United States while Florida was a Territory, not of land, or of jurisdiction in land, expressly ceded by the State of Florida. (Act of June 28th, 1832, iv Stat. at Large, p. 551.) Do the United States possess exclusive jurisdiction over such a place?

The act of Congress for the admission of Florida into the Union provides that the State shall never interfere with the primary disposal of the public lands lying within it, nor levy any tax on the same whilst remaining the property of the United States. (Act of March 3d, 1845, v Stat. at Large, p. 743.) But that is question of the property of the United States as property, not of the federal jurisdiction in a military, naval, or other public site or reservation.

So that the inquiry is reduced to this: Is the jurisdiction of the State excluded by implication of law, in the case of a place reserved therein for lawful public uses by the Federal Government, either before or after the same became a State, but as to

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which there has been no cession of jurisdiction, or other express act to this effect, on the part of the State?

The language of the Constitution is, that Congress shall have power "to exercise exclusive legislation in all cases whatsoever over such District as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings."

There is another provision, which declares that "Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Now, it has been adjudged that mere ownership and occupancy, by the United States, of land within a State, do not suffice to oust the jurisdiction of the State, even when such occupancy is with the full knowledge and tacit consent of such State. (The People *v.* Godfrey, xvii Johnson, p. 225.)

And, on the other hand, it has been adjudged that an act of the legislature of the State, by which its consent is given to the purchase or cession by the United States of a parcel of land within it for any of the uses specified by the Constitution, vests the exclusive jurisdiction thereof in the United States, without there being a cession of jurisdiction in terms. "Purchased by the consent of the legislature of the State," is the condition of the Constitution. (United States *v.* Cornell, ii Mason, p. 60. S. C., p. 95.)

But, neither of these adjudications disposes of the precise question. For, in a case which occurred in Pennsylvania, it was decided that a military post, held by the United States under a title anterior to, or independent of, that of the State, did not of itself carry jurisdiction. There must also be legislative assent of the State. (Commonwealth *v.* Young, i Hall's Law J., 97; S. C., Bright's R., p. 302.)

The United States hold this tract of land in Pensacola by a title anterior to the existence of the State of Florida, it is

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clear; but does that satisfy the demand of the Constitution? I doubt if it can be so held in law.

It is remarkable how silent the Constitution is on the subject of a Territory so called, that is, an organized government within the Union, but not of it. Once only does the word "territory" occur in the Constitution, and then it is the "territory or OTHER property," of which Congress is to "dispose:" none of these being very apt expressions to describe political legislation for a territorial government.

What in this respect was left very vague in the Constitution has not been satisfactorily settled by judicial exposition, although the progress of events and of public discussion has at length contributed to impart, of late, more of distinction and of clearness to the perceptions of statesmen on the subject. But the line of legislative authority is not yet fully drawn out in the general mind, as between Congress and the legislature of a Territory.

I will not undertake, until the question arises, to determine whether, in a military or other reservation within a Territory, the legislative jurisdiction of Congress be complete and exclusive or not. Concede, for the argument's sake, that it is so. Must we, therefore, conclude that the same jurisdiction continues to subsist, by reservation of land merely, when the Territory has passed into the condition of a State, and become a member of the Union? I much incline to think not. I doubt whether simple ownership as of public domain, and reservation thereof by the President for naval or military objects, will constructively fulfil the requisition of the Constitution, and supply the absence of assent by the new State.

Nor would it seem that such assent of a State is implied by silence on the point; for, except in regard to certain proprietary interests of the United States within a new State, which interests it is customary to secure by compact, such new State comes into the Union having political rights co-equal with older States.

What is a naval or military reservation? Simply an act of the President, under authority of law, withdrawing so many acres of the public domain from the immediate administration

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of the Commissioner of Public Lands,—that is, from sale at public auction and by pre-emption or general private entry,—and appropriating it for the time being to some special use of the Government. I am not prepared to say that such an act of the President excludes the jurisdiction of the State in which the land lies, whether the reservation be made before or after the admission of such State into the Union.

By such reservation, so long as it lasts, the property remains in the Government, and the use also; but not necessarily the municipal jurisdiction.

The Supreme Court has determined that the United States never held any municipal sovereignty, jurisdiction, or right of soil in the territory of which any of the new States have been formed, except for temporary purposes, and to execute the trusts created by the deeds of cession executed by the States of Virginia, Massachusetts, Georgia, and others of the old States in regard to the original territory of the United States, and by the treaties with France, Spain, and the Mexican Republic in regard to the foreign territories of Louisiana, the two Floridas, New Mexico, and California. (Pollard *v.* Hagan, iii Howard, p. 212.)

In conformity with this doctrine, it has been recently held that the eminent domain, in a military reservation made in a Territory and continued to the present time, became vested in the State on its admission into the Union. (U. S. *v.* Rock Island Bridge Company, MS.)

To the same effect is the series of decisions of the Supreme Court, that all the provisions of the celebrated ordinance of 1787 were extinguished by the Constitution, or, if any of its provisions have continuing validity, it is not because they are in that ordinance, but only so far as they may have authority derived from some other source, either compacts of cession or acts of Congress under the Constitution.

This general proposition has been applied by the Supreme Court to questions touching the public domain, (Pollard *v.* Hagan, ubi supra,) to the relation of master and slave, (Strader *v.* Graham, x Howard's R., p. 82,) to questions of religion, (Permoli *v.* City of New Orleans, iii Howard, p. 589,) and to

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navigable waters, (Veazie *v.* Moor, xiv Howard, p. 568,) and it may be taken as an established truth.

By the force of the same principle, and in the same line of adjudications, the Supreme Court would have had to decide that the provision of the act of March 6th, 1820, which undertakes to determine in advance the municipal law of all that portion of the original province of Louisiana which lies north of the parallel of thirty-six degrees and thirty minutes north latitude, was null and void *ab incepto*, if it had not been repealed by a recent act of Congress. (Comp. iv Stat. at Large, p. 848, and x Stat. at Large, p. 289.) For an act of Congress, which pretends of right, and without consent or compact, to impose on the municipal power of any new State or States, limitations and restrictions not imposed on all, is contrary to the fundamental condition of the confederation, according to which there is to be equality of right between the old and new States "in all respects whatever."

I will not pursue the argument into other details and illustrations, but content myself with recommending that application be made to the State of Florida for cession of the jurisdiction in this case to the United States.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. JAMES C. DOBBIN,
Secretary of the Navy.

DUTIES OF ATTORNEY GENERAL.

The relation of the Attorney General to any one of the Departments, in reference to lawsuits in the business of the latter, is that of counsel to client, determining matters of law, but leaving all considerations of mere administrative expediency to the proper Department.

ATTORNEY GENERAL'S OFFICE,
October 25, 1855.

SIR: Your communication of the 18th instant transmits to me a letter from the Chief Topographical Engineer,—submitting a report of Lieutenant Colonel Graham, respecting the unlaw-

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