

THE

# AMERICAN LAW REGISTER.

~~~~~  
MARCH, 1860.  
~~~~~

## RIGHTS AND LIABILITIES OF RAILROAD CORPORATIONS.

### SECOND ARTICLE.

It is not pretended that much direct precedent can be found for denominating the interest which the public have in a railroad an easement. A different phraseology might be resorted to; but this term is simple and definite, it is exactly descriptive of the nature of the use, and it implies no incident which cannot be established by express authorities, or by fair deduction from them. It has the further recommendation that it adapts itself readily to all the different sorts of railroads, and to the different rights by which a company may hold the several parts of the same road: we thus realize the benefit of having taken the most complicated example as the type of all. Strip the corporation of the ownership of the fee, it remains manager of the highway with all the privileges and duties belonging to that character. The franchise, which was always *distinct* from the estate, is now separated from it. That franchise cannot be aliened without the consent of the legislature; it cannot be taken on execution; nor can its exercise be impeded by any transactions which are going on in relation to the estate. What impropriety is there in the proposed description to counterbalance the advantages? the only difficulty of any importance is the confusion growing out-

of the fact, that the right by which the company occupy the road is apt to be called *their* easement, and is properly enough so called if it be understood that it is theirs in trust. A corporation authorized by its charter to occupy a certain common highway, did so, and then claimed that it was merely keeping up the previous public easement. The owner of the fee sought compensation. The court held that he must have it, because, (said Chief Justice Nelson) what the company claimed "was an easement, not a right of passage to the *public*, but to the company. The public may travel with them over the track if they choose to ride in their cars, but nevertheless the company are not the public, nor can they be regarded as standing in the place of the public."<sup>1</sup> But could not another answer have readily been found? The easement sought in that case, whether by the public or not, was a new easement, different from the old one; a right of passage on foot does not include a right of passage by cart and wagon: no more does a right of passage on a macadamized road include a right to make cuttings and embankments, and to be drawn on a railway by a steam locomotive. Much after the same manner it used to be common to say that a turnpike-road was the private easement of the company. Turnpikes, we are told,<sup>2</sup> had their beginning in the unauthorized conduct of certain individuals who merely for the sake of improving the road they were accustomed to travel, took possession of the common highway, erected gates, and devoted the tolls exclusively to repairs. No question could be made here of the continuance of the highway. Afterwards, when new turnpike roads were opened, expressly with a view to the private benefit of the companies, it was decided that these roads also were public highways; and, being such, it was clear they were public easements. At this day it would probably be disputed nowhere that the company, though nominally possessing the easement in their own right, hold it for the public. But *railroads*, of the kind common in England, and of which there are still examples in this country, railroads on which every man may of right run his own engine and car, differ in no material respect from turnpike roads. It must be acknowledged that in a railroad of *that* sort the public have an

---

<sup>1</sup> 3 Barb. Sup. C. R. 468.

<sup>2</sup> 6 M. & W. 428.

easement. We have already seen, however, that the additional restriction which confines passengers to the vehicles of the company takes nothing from the public character of the work. Now it was that public character which constituted the public easement.

These points, then, seem tolerably certain :

1. A railroad corporation has a legal estate in the soil of the road.
2. That estate is subject to the public easement.
3. The corporation is entrusted with the care and direction of the easement.

If we apply these principles to the case of a mortgage by the corporation of its real estate, we see that they do not make the transaction void for want of a subject matter to operate upon, they only render it utterly nugatory as to all practical effects. It would be possible, however, for a court to assume a still higher tone. Why was it that the corporation was allowed to take the fee and was not left, like a turnpike company, to an easement? The motive must have been to give some additional facility to the making and repair of the road. If then it is for the advantage of the public that the freehold and the regulation of the highway be in the same hands, and if the legislature so intended, a reason would not seem to be wanting for disallowing a separation of the two. Again, the court in *State vs. Rives*, admit that a franchise is by its nature incapable of transfer, unless with the aid of the power that first bestowed it. Now, although the general right to hold land may be an incident of a corporation, the right to take it as a railway is taken, and to hold it attended with the conditions and privileges which go with land so taken by virtue of a chartered authority, seems not to be a common incident but a true franchise, and therefore incapable *per se* of alienation. There is an English statute, professedly *declaratory* and retrospective, and so a good witness, which affirms that all mortgages not directly authorized by a railroad company's charter are void at common law.<sup>1</sup> It is unnecessary at this time to inquire more minutely into these last doctrines ; it is sufficient if upon any view that can be taken the practical result is that

---

<sup>1</sup> 7 and 8 Vict. cap. 85, § 19. The language of the act covers *all* unauthorized securities.

nothing of substantial value passes by the conveyance. If the new purchaser may do no act interfering with the use of the road, it perhaps matters little whether he possess the fee or not.

But very often the legislature expressly authorizes the corporation to borrow on mortgage; and it is important to know how the cases to which the execution of the power gives rise, are to be dealt with. They fall within one or the other of two classes. Sometimes the State having lent its credit to the company, becomes itself the mortgagee. Do the objections which apply to mortgages in general apply to this? It is not inconsistent with the principles we have been following to hold that they do not. They suggest no reason why the enjoyment of an easement should stand in the way of a subsequent acquisition of the freehold. That right of passage which the public has by one title, it is possible for it to have by a still higher title. Yet there is room to urge that although the State may not lose any of its already vested rights by foreclosure of the mortgage, it does not obtain that which was the object of the security, the payment of the debt: it becomes owner of the soil, but so the creditor of a turnpike company may gain the fee of *their* road, and still be no nearer the recovery of his money. This advantage, however, follows: the insolvency of the railroad corporation being ground of forfeiture, the State is able to unite the possession both of the franchise and of the highway. As there are no lands left to revert at the dissolution of the corporation to the grantors, all the benefits of an escheat are realized: the death of the trustee does not now destroy the trust, and the public road survives the private builder.

With respect to the second class which comprehends the cases where authority is given to raise money by pledging the road to another corporation, or to an individual, so much depends on the phraseology of the particular act that little can here be said to advantage. A few general observations may be hazarded. If the terms of the statute are such that the power of collecting tolls does not attend upon the mortgagee's interest in the road; a court might be warranted in holding that the intention of the legislature would be best effectuated by altering the *status* of the parties no farther than to require the officers of the corporation to pay over the net receipts to the mortgagee. In this way the corporation would become

as it were the lessee, or servant, of the legal owner, who on his part would receive the whole rents and profits of the estate on which he had entered. Authority for such construction is not wanting. In *Doe dem Myatt vs. St. Helen's Ky. Co.*,<sup>1</sup> a power to assign the undertaking" and the "property" of the company was held by the Queen's Bench not to be a power to demise the land. No power having been given to transfer the franchise of the tolls, COLERIDGE, J., in view of this circumstance remarks that the undertaking would be destroyed if the mortgagee were to succeed in his ejection; and adds it is "monstrous and improbable" to suppose that the act contemplated the repayment of the money borrowed on mortgage by means inconsistent with the continuance of the railway. The same judge observed that mandamus might be the proper remedy. If a mortgagee seek relief in equity, it is necessary for the other mortgagees, if there be any, either prior or subsequent, to be made parties to the bill. In many instances the language of the legislature will be found to admit of a construction carrying the franchise along with the estate, and the mortgagee may simply take the place of the company.

The mortgage may be of a portion only of the road, and here a court will doubtless be ready to enforce some arrangement which shall subserve the general convenience. Of all the cases, in short, it may be said we shall best succeed in their resolution, if we take it as a maxim that the charter must be so construed as not to defeat the public objects for which it was granted.

The recognition of the public character of the railroad contributes to build up no undue corporate privilege. On the contrary, it is only by thus distinguishing the corporation from the highway which runs upon its land, and over which it exercises control, that we can see how to hold it to its proper responsibilities. The road being public, is to be preserved as such. The company is private, and must be treated by the law like other associations formed for purposes of private gain. The only remaining difficulty is to discern whether the various particular questions as they arise, relate to the public interest or to the private, to the highway or to the company.

---

<sup>1</sup> 2 Ad. & E., N. S. 364.

Some concern the corporation doubtless has in every measure affecting the railroad undertaking; but does it have this in any given case directly, and as a trading company, or do they get it through the road? In other words, is the proposed measure essential or not to the public easement? The use of steam, for instance, as a locomotive agent, though a chief source of profit to the corporation, and though subjecting individuals, and especially those who do not travel upon the road to much annoyance and danger, is held to have so necessary a connection with the railway that the corporation, in putting engines upon the rails, merely fulfils its duty as manager of the improved public highway. It is not responsible for the risk inseparable from the employment of that dangerous agent, any more than the ship-owner is responsible for the consequences of a tempest. As a carrier, however, the railroad corporation is liable for any want of care in the use of this means of propulsion. There has been some diversity in the practical enforcement of the liability. Pennsylvania courts have held that, in an action against the company to recover damages for a fire occasioned by sparks from one of their engines, the plaintiff must make out a case of negligence by positive proof.<sup>1</sup> But in England the Court of Common Pleas ruled, that the fact of a damage resulting from the sparks raises the presumption of negligence; and renders it incumbent on the company to show the actual exercise by themselves and their agents of all due care.<sup>2</sup>

The legislature of Massachusetts has gone farther, and by a stringent, yet not unwise-provision, has made railroad companies responsible for *all* damages done by sparks from their locomotives.<sup>3</sup> The act gives them at the same time an insurable interest in the buildings along the road. Is there not room however for a doubt as to the constitutionality of imposing a duty of this kind upon a corporation in existence at the time of the passage of the act? The jury in assessing damages in favor of the proprietors along the road, must, it would seem, have estimated the risk from fire among the items of account, and thus the operation of this statute is to make the company twice insurers. The charter of the Boston and Wor-

<sup>1</sup> 8 Barr, 366.

<sup>2</sup> 10 Jur. 571.

<sup>3</sup> Mass. Gen'l Laws, 1840, ch. 85. Some R. R. *charters* contain a similar provision.

chester Railroad,<sup>1</sup> the earliest of the important railroads in the State, declares that the verdict of the jury shall forever be a bar to all claim for damages on account of the presence of the road.

That the railroad company (unless aided by statute) must contribute like other corporations to the support of the State, is plain. Here, as elsewhere, the only difficulty that could arise is in relation to the *railway*. But the circumstance that the public make use of the road is no reason for its being exempted from taxation. The land is owned by the company: they purchased it voluntarily, and to promote their private interest. As to individual share holders the *stock* is probably, even at common law, personal property; but a statute declaring it to be so, still leaves the land real estate as to the corporation, and it is liable to be taxed as such.<sup>2</sup> Though a contrary decision has been given by the Supreme Court of Maine, it is not easy to see on what principles it rests.<sup>3</sup>

In no character in which the railroad corporation acts, have the whole community so obvious a concern as in that of common carrier. Yet, while the importance of the questions growing out of this branch of the subject cannot be exaggerated, the ordinary principles of bailments for the most part suffice to solve them. The railroad corporation is indeed by far the greatest common carrier the world ever saw, or is likely to see; but so happily is the law of carriers framed, that it is adapted to objects of every magnitude, contracting and expanding with equal facility. And besides, it has been from the first the policy of the law to regard *all* common carriers as quasi public servants; so that the fact that the railroad corporation is, in a more exact sense, a public servant, constitutes no obstacle to its being referred to the same general class. A public quality, however, mingles with the transactions of the railroad corporation in this respect as well as others, and it belongs to the plan of this essay to notice in what manner, if at all, that public interest qualifies the company's exercise of its private trade. The nature of the

---

<sup>1</sup> Laws of 1829, ch. 25.

<sup>2</sup> Taige, Ch. R. 284; 4 Hill, N. Y. R. 29; 3 M. & W. 422; 2 Younge & C. 263.

<sup>3</sup> 8 Shep. R. 583

case renders the easement of the public entirely dependent upon the fidelity of those to whose charge the road is entrusted; and hence the State is justified in keeping a closer watch over the proceedings of the company than would be reconcilable with the principles of a free government if the corporation were a mere carrier. This public quality thus attaches for the restraint of the company and their agents, and not for the purpose of giving them any greater license. A railroad company was not allowed to excuse itself for the violation of a contract with an individual, on the ground that by so doing it would be subserving the convenience of travellers.<sup>1</sup> Though the rules of good pleading, in strictness, call for different allegations, if not quite different forms of action, in proceedings against the corporation as trustee of the highway, and as common carrier, yet in an action against it in the latter character, it is competent to introduce evidence whose direct tendency is only to show that a breach of duty has been committed in the former. For instance, the question is, was there negligence? Now the ill adjustment of the rails at the place where the accident occurred, though a matter in which the company simply as carrier has nothing to do, is yet a circumstance which may go to the jury.

There is one respect in which the public office of the company either has a very important bearing upon its liability in its private capacity, or has little or none—just according as one view or another is taken of a principal point in the law of carriers. It is admitted everywhere that the responsibility of a carrier of passengers is not the same as that of a carrier of chattels. While the latter is an insurer against everything but the act of God or of the King's enemies, the other is bound only to the exercise of the utmost care. But in deciding whether or not care was manifested in any given case, upon whom does the burden of proof lie? It seems to be settled law in this country that the plaintiff, as soon as he has shown

---

<sup>1</sup> 10 Jur. 490. But a court of equity will not interfere by injunction, to prevent the company from running their trains, and conducting the other operations of the road, whilst the rights of the parties on the contract are trying at law. Vide 10 Jur. 531.

that an accident occurred, has made out a *prima facie* case.<sup>1</sup> In England, notwithstanding the *nisi prius* decision in *Campbell*,<sup>2</sup> which has been recognized and followed by American courts as a leading authority, the rule appears to be by no means equally well established. And if there be a presumption of negligence, how far is it to be carried? What is the amount of care the carrier is bound to prove? His duty originally was to display the *utmost* care. Has he no help but to be mulcted in damages unless he is able to produce evidence that that high degree of diligence actually was displayed *in the particular transaction*? According to our law, it seems he must, yet it is certainly severe doctrine, and falls very little short of making the common carrier as much an insurer of passengers as of chattels. Perhaps there is not a single English case in which the ruling in *Christie vs. Griggs* is unequivocally recognized as law. In *Carpue vs. The Railway Co.*, counsel admitted much against the interest of their cause, and counsel, too, headed by such a lawyer as Sir Frederick Pollock, the present Lord Chief Baron of the Exchequer—that the negligence of the defendants must be *proved*. He adds: “Here, (referring to the case at bar,) if negligence in the character of the carriers had not been established, the defendants would have succeeded under “*Not Guilty*.” Lord Denman also, in charging the jury at *nisi prius*, used language which it is very difficult to believe he would have used had he been disposed to adopt the law of *Christie vs. Griggs*. Supposing, then, this case of *Carpue vs. The Railway Company*, to have been based on the doctrine that ordinary passenger carriers are taken to have shown due diligence, in the absence of any evidence to the contrary, that case establishes a most notable exception with regard to the railroad corporation. That negligence, which, as against an ordinary carrier of passengers might have to be made out by proof, is *presumed* against the railway company because they have, what no other carrier has, exclusive control of the highway over which they pass: a privilege which they obtain as managers of the road they pay for pretty dearly as carriers. Their high police powers

---

<sup>1</sup> 13 Pet. 181; 11 Pick. 106.

<sup>2</sup> *Christie vs. Griggs*, 2 Campb. 79.

were granted to enable them to keep off all trespassers, and none but themselves can enter upon the road except as wrongful intruders. Whether therefore, the accident happen in consequence of collision, of excessive speed, of the bad condition of the rails, or from any other cause, except one of those interpositions of irresistible external force which excuse any carrier, it must be traced to some tort of theirs. But even if this be *not* the proper construction of *Carpue vs. The Railway Company*, it can hardly be doubted that it was there supposed by court and bar, that some greater liability was fastened upon the company than they would have been subjected to had they not been owners of the road. On the whole it is certain, that whatever be the degree of responsibility imposed upon other carriers, the rules of bailments undergo no relaxation of their stringency when they come to be applied to railroad companies. Nor, in justice and policy, should they. The railroad corporation possesses a monopoly, necessary indeed to the general welfare, yet still a monopoly; it is also vested with enormous power; for both reasons it ought to be held to strict account.

While enough has been done, as it is hoped, to show that the principles we have been following are of no limited nor partial nature, but may be taken as useful guides through every division of this extensive subject, it has been a necessary consequence of the method pursued that they have been applied more especially to those rights and liabilities of the railroad corporation which spring out of its occupancy of land. In order to give a degree of unity to this attempt, it is not out of place to conclude by considering how the railroad acts in *acquiring* the land for its road.

That British legislation is characterized by a far less imperious disregard of the rights of private land-owners than is common here, is certain; nor is the fact difficult to be accounted for. The landed interest in England has great weight in the lower house of Parliament, and entirely controls the upper; with us that interest, though relatively to others far stronger than it is there, has neither been led by the form of our institutions, nor driven by the pressure of outward circumstances, to united action. But it is worthy of reflection, whether the State ought not of its own accord, and from motives

of the highest policy, to pay that respect to the rights of land-owners which they themselves, though chafing at the want of it, fail to insist upon.

In spite of the influences which tend to transmute all things into subjects of commercial exchange, there must exist, between the possession of land and of other property, a substantial difference, which neither the philosopher nor the practical statesman can wisely condemn. In a world where all objects are sufficiently unsteadfast, man resorts instinctively to that which by its comparative permanence gratifies his longing for security. It is a grievous moral injury, as well as a source of discomfort, if he is made to feel that he can to-day nowhere so entrench himself behind legal or natural barriers, that wanton force shall not to-morrow violate his repose. Railroads makes States prosperous, and promote international peace: it becomes us all to desire that the effect of so glorious a picture may not be marred by the presence in the background of scenes of individual oppression. If possible, let there never be found in any corner of the land, a man who, while looking upon the mighty works wrought by the "league and partnership of free power with free will," shall have occasion to sigh after the humble road of ancient ordinance which "curved round the corn-field and the hill of vines honoring the holy bounds of property."

A committee of the house of lords reported a recommendation that the assessment of railway damages should contain the following elements: a full price for the soil occupied, compensation for the injury done the estate by severance, all other actual damages, and finally, an additional compensation, equal to at least fifty per cent of the value of the land taken, as a salve for the *mere compulsion*.<sup>1</sup> The English courts of chancery have shown, if possible, still more zeal than Parliament in watching over individual interests. They have construed the act of incorporation with the utmost strictness, even when the effect was quite to prevent the completion of the road;<sup>2</sup> they have manifested a strong disposition to rule, that when such an obstacle does preclude the fulfilment of the Parliamentary intention, the company shall not proceed even up to the point of

<sup>1</sup> Hodgson on Railways, p. 260.

<sup>2</sup> 10 Jur. 264.

interruption, but must suspend the undertaking altogether;<sup>1</sup> a company would be enjoined from going to the jury with a claim for more land than the act, according to the Lord Chancellor's interpretation, warranted;<sup>2</sup> and it has been declared that each land owner along the route, besides his right to have the company's powers strictly carried into effect as regards his own land, has the right also to insist that no variation shall be made to his prejudice in carrying them out upon the lands of others.<sup>3</sup> As to the mode of assessing damages, it seems agreed in this country as well as England, that a party may be entitled to compensation, although the road do not touch his estate,<sup>4</sup> and that, up to some as yet undefined limit, *consequential*, as well as immediate damages are to be estimated. Further, the company cannot claim any deduction on account of an increase of value given by the road to another and detached estate of the same proprietor.<sup>5</sup> The question whether any set-off shall be allowed of the benefit likely to accrue in consequence of the road to the particular estate upon which the assessment is making, is decided differently in different States. A New York law forbids the set-off.<sup>6</sup> The charters in many States stipulate for it. Where no legislative provision has been made, the supreme court of Ohio holds that the set-off is legal and proper,<sup>7</sup> the supreme court of Kentucky, that (except as against a claim for consequential damages,) it is illegal and improper.<sup>8</sup>

Aside from authority, does it not seem a somewhat despotic construction of the just and liberal rule which requires that private property shall not be taken without compensation, to say that while the damage inflicted is immediate and certain, the compensation may take the shape of a contingency, a prospective advantage which five men may think they discern, but which a thousand causes may prevent from ever occurring? And supposing no error of estimate,

<sup>1</sup> 10 Jur. 364.    <sup>2</sup> M. & Cr. 116.    <sup>3</sup> 1 Younge & C. 618.    <sup>4</sup> 2 Ad. & El., N. S. 347.

<sup>5</sup> 8 Watts, 243. The charter construed in this case may be found in laws of Pa. 1832-33, pp. 141-157. It is similar in its terms to charters in other States where deducting for advantages is allowed to some extent.

<sup>6</sup> N. Y. Rev. Stats. 1848, § vol. 590.

<sup>7</sup> 14 Ohio R. 147, Read, J. dissent.

<sup>8</sup> 5 Dana 30. The statutory provision in Virginia agrees substantially with this decision. Vide Tate's Dig. 766.

what can be more unequal? That the country generally is to be benefited by the opening of railroads, we expect, and have a right to expect, otherwise, well might we complain that the beauty of our landscapes is impaired by excavations, and the stillness which once dwelt upon them banished by the steam whistle. But in what way has the proprietor through whose land the road passes, who has felt the injury when others have seen only the benefit, whose feelings have been lacerated more than his estate by the destruction of objects of taste and cherished association, forfeited his right to *share* in that general pecuniary enhancement of property? A., whose estate lies a hundred rods distant from the railroad, finds it increased in value twenty-five per cent: the land of B., which is severed in twain, would also be augmented in value to the same extent, were it not that the loss of soil, and accompanying inconveniences just balance this improvement. In pocket neither richer nor poorer than before, the proprietor of the latter estate receives by way of recompense for his mortification the privilege of observing his neighbor's prosperity, and of having perpetually before his door what he can only regard as a stupendous monument of tyranny.

Pennsylvania, whose immense latent resources induce the most unremitting efforts to develop them, has gone farthest in extending encouragement of all kinds to the undertakers of railroads. But whenever her course of policy is proposed for imitation elsewhere, it ought to be borne in mind that the proprietary grants, on which all the titles in the State depend, always contained an allowance of six per cent for highways, so that a tract nominally of three hundred acres, consisted of 318; and this circumstance has ever had great weight with both legislature and judiciary when the question has arisen between private right and public convenience. New Jersey land-patents also have a very similar provision.

The land of the railroad is taken either by the company or by the State. If, adopting the former view, we regard the transaction as between a corporation, intent upon a profitable speculation, and an individual standing on the *jus possidentis*, there can be little doubt which party should be treated with favor. If however, it be the State that takes the land, the private owner ought not to find his

case made worse; for is it not the duty of every government to deal gently with the rights of its subjects? Sovereign power is by its nature parental, and the *manner* of the exercise should never fail to be suggestive of the beneficence of the object. The habit which Democracies are unfortunately too prone to fall into, of using great freedom in the disposal of the property of individuals is not more inequitable than unwise. That which begins by tearing out of a man's breast his attachment to the homestead where he was born, to the grove he planted in his youth, or even to the field from which he expects to gather the next year's harvest, will end by extirpating all love for his country, all loyalty to its institutions.

The law of railroads however considered, is doubtless a very complex subject, and it is with unaffected hesitancy that these observations upon it are submitted: yet the writer cannot help believing that it is one step towards its disentanglement to distinguish between the corporation as the trustee of the highway, and the corporation as deriving a private profit out of the advantages which that position affords. Whether the distinction be of value or not, it is at least apparent that it does not lead to the injurious consequences which the court in *State vs. Rives*, was so anxious to shun. It is remarkable that the same court, which in that case based its decision on a desire to preserve private rights, has elsewhere subjected itself to the criticism of Chancellor Kent, for its latitudinarian construction of the doctrine of eminent domain. What we are left to gather from the whole course of North Carolina decisions is, that the corporation may proceed with a high hand when it seeks to wrest from innumerable private citizens a portion of their property, and that the land, when thus taken against the will of the occupants, may be seized upon by any single man who of free choice shall have allowed the corporation to become his debtor. The original owner, first obliged to submit to the paramount claims of the public, has afterwards to see both the rights of that public and his own, mocked by the intrusion of a stranger. No such inconsistency attends the adoption of the views now advocated. According to them, that public use which justifies the making of the road, protects it when made. Nor does the immunity which shelters the highway, afford any cover to