REGULATING RAILWAYS

PROGRESS OF THE ATTEMPT IN W CONSIN.

SYNOPSIS OF THE ARGUMENTS FOR A AGAINST THE ENFORCEMENT OF T POTTER LAW.

From Our Own Correspondent.

MILWAUKEE, Wis. Friday, Aug 02 187

The motion for an injunction to enfo the Potter law, which was argued before Supreme Court at Madision, is a subject of most anxious interest not only to Wiscon but to the entire country. The authority of State or National Legislature to regulate, in most comprehensive sense, railroad corpo tions, has become a serious question during t past two years. The principle is the san whether it affect Illinois, Wisconsin, Iowa, Maine, and the cases now on trial here will far toward establishing arguments and pre dents for future cases. The Potter law, so noxious to Wisconsin railroads, has been pu lished in full in THE TIMES, and does not differ any material respect from the Railroad laws Illinois, Iowa, and Minnesota. The peculiar terest in the law arises from a refusal on t part of the railroads of the State to be govern by it. The day on which the law was to ta effect was also the day on which the roads sued new schedules of freight and passeng rates, in almost every instance not only fixi the rates higher than the new law permitte but even higher than previous schedules. decided action was taken by the State autho ties, save a windy proclamation from the Go ernor, until recently, when the Attorney Ge eral filed a motion for an injunction to enfor the law. The motion cited the Chicago, Milwa kee and St. Paul, and the Chica and North-western Railroads, and the 5th instant the case can before the court. Chief Justice Ryan presidin The attorneys for the railroads endeavored have the question of jurisdiction first consi ered; but this point was held over, and affid vits were submitted on behalf of the Chicag and North-western Railroad, setting forth th depreciation of gold bonds, preferred stock &c., of the company since the passage of th Potter law. A counter affidavit of the Railwa Commissioners was submitted affirming tha the railroad companies were receiving illeg rates.

Judge Orton opened the case for the State taking up the point of jurisdiction, claimin that a court could entertain a bill in equity fo an injunction on which a court of equity coul grant relief; and by the usual and common ju risdiction of a court of chancery in England an in this country, this bill would be entertaine and the relief granted. The Government, h held, has a paramount right over this class c corporations in order to secure a public use.

Hon. J. W. Cary, for the Milwaukee and St Paul Company, opened the defense. His open ing dealt in unimportant technicalities. Hi first point was that no injunction could issu because there is an adequate remedy at law fo the injury complained of, and, therefore, no re course can be had to a court of equity; that is the complaint alleges the railroads have disre garded, and do disregard, a public statute o the State; that they charge higher rates fo transportation than are allowed by an act in re lation to railroads, and in excess of the power conferred on the railroads by law. Now this law provides for its own enforcement upon the law side of the court. The remedy for exercis ing franchises not granted is on the same side of the court, and not upon its equity side. The writ of *quo warranto* is the remedy for all such ills. He next took up the question of jurisdiction, and held that the complaint should have been filed in the Circuit Court. The power given to that court is "to restrain by injunction any corporation from assuming or exercising any franchise, liberty, or privilege not authorized by the charter of such corporation." He held that this act in relation to railroads is an attempt to introduce an entirely new and extraordinary principle in regard to railroad property; one that, if successful, will create an entire revolution in that species of property and shake to their foundations all investments in railroad securities. Not only so, but there is now pending in this court the writ of *quo warranto* against this company, designed to try the validity of this law, and, if the State shall be successful, to deprive the company of all rights and franchises, and suspend for the time being, if not permanently, the operation and use of the property. He suggested that the question has also gone to the Supreme Court of the United States from the Circuit Court of Wisconsin District, and that a final decision is expected in October. This refers to the motion brought by the North-western Railroad creditors for an injunction to restrain the enforcement of the Potter law, which was decided against the railroads, and went up on an appeal, as already noted in THE TIMES. Mr. Cary held that the act, so far as it attempts to fix the rates of compensation to be charged by the company is unconstitutional. The right to control one's property and fix the price for its use, is an attribute of ownership, and the right to fix and determine the compensation for which any one will render his personal services, and incur risks and dangers in transacting the business of another, is a personal right necessary to man's freedom and independence. This law violates article 5 of the amendments to the Constitution of the United States: "No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Potter law assumes to take property in possession of the company and exercise over it the control of owners. Mr. Cary here referred to the letter of Senator Carpenter, which denied that railroads are private property, and hence not entitled to invoke the protection of the Constitution. Admitting this, as he termed it, monstrous proposition, still on no principle could this law be sustained, for not only is the railroad and all the property of the company confiscated by it, but the business of the common carrier as well. He denied the entire proposition and asserted that the shareholders of the company are the absolute owners of the railroad and all the property of the company. Senator Carpenter's opinion was that "if railroads are mere private estates, owned by the corporations in absolute right, then they are no more subject to legislative control than a farm or other mere private property. If, on the other hand, railroads are public highways, then they are a part of the public domain of the State, farmed out for administration, but subject to the control of the Legislature like any other highway by land or water." The reply to this is given in Mr. Cary's own words:

That a railroad is a highway in a certain sense is not disputed; that it is not a highway in the common, ordinary sense of the term, is equally certain; in the sense that it is a great thoroughfare, over which great numbers of persons and great quantities of property are transported in cars by the company, is true, but that it is open to the public, owned by the State, or in any manner controlled or managed, or used as a common highway, is not true. There is no dispute that it was built for public use, and if used at all must be used for the public or as a public use. Its ownership is exclusively in the company. It is their right to operate and control it in their own way, subject to such police and other regulations as the State may lawfully make in respect to any other property owned by any citizen of the State. That the word highway has different meanings, and is employed in different senses in the authorities cited by Judge Strong in Olcott vs. Supervisors, is most forcibly illustrated by those authorities themselves. The case in third Paige, 45, is the one before referred to, where the sole question before the court was, whether the construction of a railroad was so far a public use as to warrant the exercise of the right of eminent domain. The case of Bloodgood vs. The Mohawk and Hudson River Railroad Company was trespass for entering his close before making compensation, and the case in Metcalf was an application to compel the proper officers of Worcester to list the railroad for taxation. The motion was denied on the ground that it was a highway, and no more liable to taxation than any other common highway. Now in the sense that the term highway was used by Chancellor Walworth in third Paige, in the eighteenth of Wendell, and as I understand the case of Olcott vs. Supervisors, in sixteenth Wallace, the railroad remains the property of the company. And the word highway is used in a general sense, indicating a thoroughfare used for the transportation of freight and passengers in a peculiar manner, and not entitled to the exemptions of a common highway. Not the property of the State, but of a private company, and therefore taxable as other property, or in such manner as the Legislature might prescribe. But in the case of fourth Metcalf, Chief Justice Shaw gave it a different meaning, and held that the property was actually not taxable, because a highway. In that case, the State has reserved in the charter of the company a modified right of control of its tolls. The Legislature of this State treats railroads as private property—not as common highways. They have always been subject to taxation, and the same Legislature that passed this Potter law raised the tax on railroads, so that the amount to be paid this year amounts to nearly $500,000. The absurdity of trying to treat railroads as highways of the common character—to treat them as common highways, and owned by the State—is still further illustrated by a reference to section 31 of chapter 119, General Laws of 1872, "in relation to railroads and the organization of railroad companies," which prohibits any person, under a penalty, to ride, drive, or walk along on such railroad. If a highway belonging to the State, as other highways, why this prohibition? It is admitted that railroads are highways in one sense of the term, but denied that the title thereto is vested in the State, or that the State has any more control over them, by reason of the title of the road, than it has over any other property owned by a private citizen, or any greater or different control over it than it would have if owned by any other citizen of the State.

The sense in which the term highway is used as connected with railroads is discussed in 53 New-York, 140:

It is manifest that the question presented in this case was not determined in that, (Olcott vs. Board of Supervisors, 16 Wal., 673,) unless it shall be further held that a railroad, owned and controlled by a corporation, and operated by it for the benefit of its stockholders, is a public highway in the same sense as the common roads of the country. The towns through which the latter run may be compelled to construct and keep them in repair for the common use of the public. The substantial question in the present case is whether they may be so compelled to construct and repair railroads owned and operated for the benefit of the stockholders. It is clear that they may be, if they are public highways, in the same sense as common roads. It has been uniformly held that the right of eminent domain may be exercised so far in behalf of a railroad corporation as it is necessary for the construction and operation of the road, upon the ground that the road and its operation was for a public purpose, and therefore the real estate condemned for its use was taken for public and not private use.

Attorney General I. C. Sloan, for the State, made a long argument, which bristled with authorities. As to the question of jurisdiction, he held that the existence of the power of the court to the extent of issuing writs of injunction to restrain the commission of unlawful and injurious acts has been decided by the Constitution, which reads:

It shall have power to issue writs of habeas corpus, mandamus, injunctions, quo warranto, certiorari, and other original and remedial writs, and hear and determine the same.

He cited cases decided under the Constitutions of Florida, Missouri, Alabama, Arkansas, and California to show the right of jurisdiction. Courts of equity, both in England and this country, have jurisdiction to restrain by injunction a corporation from exceeding its corporate powers. Should the court refuse to take jurisdiction of this case, it will amount to a denial of all redress against exactions upon the people of the State made in violation of law.

As to the constitutionality of the Potter law, he held that the power reserved by the Constitution of the State to the Legislature, that "all general laws and special acts enacted under the provisions of this section may be altered or repealed by the Legislature at any time after its passage," is an unlimited power. The rule of construction is that a corporation is a franchise granted by the State, and its existence, powers, and capacities, and mode of exercising them must depend upon its creator. The exercise of this corporate franchise being the restriction of individual rights, can not be extended beyond the letter and spirit of the act of incorporation. Corporations have no right to charge toll on freight except the right given by the charters. There is no limitation on the power of the Legislature to alter the charter of a corporation where that power is reserved. The Legislative discretion cannot in that respect be controlled by the courts. The limitation of charge in no way interferes with interstate commerce. Bondholders and creditors have no greater rights than the corporation itself. If a State grant no exclusive right to one company which it has incorporated, it impairs no contract by incorporating a second one which injures or destroys the first.

These are the main points that were made in the arguments for and against the injunction, and it will be seen, cover the entire ground likely to be gone over in any of the cases that may come up for trial as affecting the power of the Legislature to control and regulate railroad rates. The feeling in the matter is intense, and the decision of the court, to be given in a couple of weeks, is eagerly looked for.

There is this fear expressed by railroad stockholders: Chief Justice Ryan will be a candidate for re-election, the judiciary being elective in this State, and a decision in favor of the railroads will utterly kill all chances of a re-election. Whether this will in any way affect the decision remains to be seen. However the matter is decided it does not close the question. Unless a compromise with the people can be effected the railroads are doomed. The people will elect judges who will decide in the popular way if the present court refuses to sustain the law.