SAYS THE CONTRACT IS VALID.

Justice Brewer Decides the Famous Rock Island-Union Pacific Bridge Case.

JUDGE DUNDY'S DISSENTING OPINION.

Lengthy Review of the Case in All Its Bearings and a Decision on the Four Chief Points Involved.

Justice Brewer knocked the Union Pacific bridge monopoly higher than Gilderoy's proverbial kite. His decision in the case between the Rock Island and the Union Pacific was in favor of the Rock Island and in favor of the enforcement of the specific performance of the terms of the contract. He also decided that the same ruling should hold good in the case of the Chicago, Milwaukee & St. Paul road against the Union Pacific.

Before court opened the room was crowded with attorneys and predictions were freely made on the result of the famous case. The majority seemed to be of the opinion that the decision would be against the Union Pacific.

Both sides were represented in court. President R. R. Cable of the Rock Island, General Counsel Withrow and Messrs. Lew, Fish and Poppleton were on one side of the room and Hon. J. M. Thurston, W. R. Kelley and C. S. Montgomery occupied seats at the other side. Thomas L. Kimball, president of the Union depot company, was present, as were a number of citizens who have taken a great interest in the case at bar.

As soon as court opened Judge Thurston asked for a ruling of the court on the introduction of testimony at the beginning of the argument, tending to show that the Rock Island was not legally incorporated under the laws of the state. The court ruled the papers out.

Amid a solemn silence Judge Brewer proceeded to read his opinion on the case. During the reading no sound but the voice of the court was heard except when the justice referred to the teachings of Judge Dillon, when on the circuit bench, on the powers of a court of equity. The natural deductions drawn from the acts of the learned counsel for the defendants, when on the bench, were so at variance with his arguments as counsel for the Union Pacific during the present case, that the remarks of Justice Brewer caused a very audible smile to pervade the sacred precincts of the court room.

Following is the opinion of Justice Brewer in full:

Parties to the Suit.

"On the first day of May, 1890, that, which on its face purports to be a contract between five railroad companies, to-wit: The Union Pacific railway company, Omaha & Republican Valley railway company, Salina & Southwestern railway company, Chicago, Rock Island & Pacific railway company and Chicago, Kansas & Nebraska railway company, was signed and acknowledged by the respective presidents of those companies, attested by their secretaries and received the impress of their corporate seals. While five companies joined thus in the execution of this instrument, there were really but two parties to the contract: the Chicago, Rock Island & Pacific railway company and the Chicago, Kansas & Nebraska railway company, representing one interest and forming one party, the three other companies representing the other interest and constituting the other party. For convenience, the first named will be hereafter called the Rock Island party, and the latter the Pacific. The exact nature of the relations between the members of these two parties, as respects themselves, need not be stated. It is enough to say that there was on each side a unity of interest and a unity of control. Each party controlled an extensive railway system. The Rock Island embraced three main lines, each running from Chicago—one to Council Bluffs, one to Kansas City—and the third to Denver. The Pacific—one from Council Bluffs to Ogden, one from Council Bluffs to Denver, and another from Kansas City to Denver. The Denver line of the Rock Island passes through St. Joseph and Beatrice. By filling a gap between Council Bluffs and Beatrice the Rock Island would secure a shorter and better Denver line. The purpose and scope of the contract was the filling of this gap, and it provided therefor by the Pacific giving to the Rock Island the use of its track from Council Bluffs to South Omaha, this track crossing the Missouri river on the Pacific's bridge; the building by the Rock Island of a road from South Omaha to Lincoln and the giving by the Pacific of the use of its track from Lincoln to Beatrice. The Rock Island proceeded to construct a road from South Omaha to Lincoln, and about the first of January of this year sought to use the Pacific's tracks between Council Bluffs and South Omaha, and Lincoln and Beatrice, which use was denied by the Pacific. Thereupon this bill was filed in the district court of Douglas county, Nebraska, to compel specific performance of the contract. A preliminary injunction was granted by the district court, though no possession was ever in fact taken, or use made of these lines by the Rock Island. Immediately thereafter the Pacific removed the case to this court. In due course of time the pleadings were employed, the proofs taken, and the case is now before us for final determination.

Questions Involved and Argued.

"Four questions have been presented and argued with distinguished ability. They are: 1. Was the instrument, as thus signed and attested, so authorized and executed as to become and be a contract of the corporations? 2. If it was so authorized and executed, was it ultra vires? 3. If not ultra vires, is it a contract of which a court of equity may compel specific performance? 4. If it may, ought specific performance to be decreed?

"With regard to the first question: That the contract was signed by the proper executive officers and that the formalities of execution were sufficient is not disputed; and if it was one of those minor contracts which fall within the scope of the ordinary powers of chief executive officers, no question could arise as to its being a contract of the corporations. But it is not such a contract. It is one of vast moment, running for 999 years and affecting largely the financial interests, business and policy of the corporations. It so changes the sweep of the future that no mere executive officer, of his own volition and by virtue of the ordinary powers of his office, could commit the corporation thereto. But authority beyond that of the executive officers is not wanting. After the contract had been drafted and on April 22, 1890, it was submitted to the executive committee of the Union Pacific railway company, and of that company's relation to the contract I first speak, and unanimously approved by all the members of that committee then present. The committee consists of seven, and six of the seven were present.

"Thereafter, and on the 30th day of the same month, the regular annual meeting of the stockholders was held, at which over two-thirds of the capital stock of the company was represented: to-wit: 437,370 shares; and at such meeting this resolution was unanimously adopted: 'Resolved, That the agreement between the Union Pacific railway company, the Salina & Southwestern railway company, the Chicago, Rock Island & Pacific railway company, and the Chicago, Kansas & Nebraska railway company, dated May 1, 1890 (a copy of which is herewith submitted), granting to the two last named companies trackage rights over the company's lines from Council Bluffs to Omaha, including the Omaha bridge, and the lines of this company's Omaha & Republican Valley branch, from Lincoln to Beatrice, Neb., and providing, further, for the use by this company, of the Chicago, Kansas & Nebraska railway company's lines between McPherson and South Hutchinson, Kan., and the line from South Omaha to Lincoln, Neb., on the terms therein provided for, be and is hereby approved, and the action of the executive committee in authorizing the execution thereof is hereby ratified, approved and confirmed.' And at the same meeting this resolution was adopted: 'Voted unanimously that the stockholders hereby approve, confirm and ratify all the actions of their board of directors and executive committee during the past year.' While the contract was never formally presented to the board of directors, and by such board authorized or approved, yet, immediately after the annual election of directors in 1889, the board met, and after appointing the executive committee it 'voted that while the board of directors is not in session the full power thereof, under the charter and by-laws of the company, be and hereby is conferred upon the executive committee;' and this resolution was but a repetition of those passed by the boards of directors in the ten preceding years. This delegation of power was by virtue of article 4 of the by-laws of the company, which reads: 'The board of directors shall have the whole charge and management of the property and effects of the company, and they may delegate power to the executive committee to do any and all acts which the board is authorized to do, except such acts as by law, or these by-laws, must be done by the board itself.' In the original charter of the Union Pacific railway company, (12th statutes, 489, section 1) the power to make by-laws was granted by this sentence: 'Said company, at any regular meeting of the stockholders called for that purpose, shall have power to make by-laws, rules and regulations as they shall deem needful and proper, touching the disposition of the stock, property, estate and effects of the company, not inconsistent herewith, the transfer of shares, the term of office, duties and conduct of their officers and servants, and all matters whatsoever which may appertain to the concerns of said company.'

What the Other Side Claimed.

"It is clear from these quotations from the records of the company, that so far as the executive committee and the stockholders could by their approval bind the corporation to this contract they did so. As against this, it is contended that as the board of directors did not formally act upon, either to authorize or approve the contract, the corporation never became bound, because power in respect to such matters is lodged solely in the board of directors. And, secondly, that if this be not true, and the stockholders are vested with power in regard thereto, the vote of the stockholders at the annual meeting was not sufficient because in the call for such meeting no mention was made of this proposed contract; and the minority of the stockholders, who were not present, were thus given no opportunity to consider it and never joined in the approval. Neither of those propositions can be sustained. By the original Union Pacific act, there was created 'a body corporate and politic, in deed and in law,' which corporation 'was authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph,' etc., and was also 'vested with all the power, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth.'

"By this act, therefore, was created a corporation, with all the power incident to corporate existence. One of those incidents is, that the ownership of the corporate property is vested in the stockholder; and with them rests also the absolute and ultimate powers. In the Dartmouth college case, 4 Wheat., 518, Judge Story, speaking of an aggregate corporation, says, (page 677): 'Among other things, it possesses the capacity of perpetual succession and of acting by the collected vote or will of its corporate parts.' It is true, that the act provides that there shall be certain directors appointed by the government. This provision was inserted doubtless because of the fact that the government, as second mortgagee and a bountiful donor to the company, was largely interested. It is also true, that subsequent legislation, (13th statutes, 357, section 13), provides that at least one government director shall be a member of each standing committee. But there is nothing in the original act, or any subsequent legislation, giving to them either veto or controlling power; and from some of the reports which have been made in times past by these government directors to the government, as well as from some of the developments in this case, it would seem as though they were too often regarded as merely convenient and useful ornaments. While doubtless congress could have vested others in the board of directors as such, or in these government directors absolute and exclusive control in matters like this; yet it did not. Not only did it, as appears from the provisions heretofore quoted, give to the stockholders control over 'all matters whatsoever which may appertain to the concerns of said company,' but also its express grant of powers to the directors is by the same section limited to the election and appointment of officers and agents, the location and construction of the road and the matter of subscription. All other powers which the directors have are those which spring from the nature of their offices or from special grants from the stockholders.

Powers of Corporations.

"In this as in any other stock corporation with the stockholders rests not only the ownership of the property but the ultimate and absolute power and control. Much is said in the books about the ordinary and extraordinary powers of a corporation; the one vested in the directors, the other in the stockholders or members. In I. Beach on 'Private Corporations,' section 73, the rule as to the latter is thus stated: 'To the members is reserved also the right of applying to the legislature for amendments of their charter, and the power to accept or reject proposed amendments thereof, to alter the articles of association, to authorize an increase or reduction of the capital stock, to sell or lease the corporate property or modify the terms of an existing lease, to consolidate or merge the company with other corporations; and in general, all extraordinary or unusual powers not conferred upon the directors, expressly or by necessary implications, are reserved to the members.' If this statement of law be corret, then this contract is one beyond the power of directors to make and could be authorized only by the stockholders; for the making of such a contract is not among the matters expressly or by necessary implication granted by the charter to the directors. But I rest little on this distinction, for any act, although within the powers of a board of directors, when done by an executive officer with the direction or approval of the stockholders is binding on the corporation, although the directors have never directed or approved of it, unless by the terms of the charter exclusive power therefor is vested in the directors. Neither is there force in the other objection, that the notice of this annual meeting did not specify these contracts.

No Doubt of the Power.

"The charter, in the same section heretofore quoted from, provides for annual meetings of the stockholders, for the transaction of business, to be holden at such time and place and upon such notice as may be prescribed in the by laws. Notice of time and place was given as prescribed by the by laws, and the meeting was duly held. There is no by law requiring special mention of the subjects to be considered at such meeting. Every stockholder, therefore, takes notice of the fact that all business which may be transacted by the stockholders is open for consideration and action at such meeting, and their powers at such a meeting are as vast and complete as the competencies of the corporation.

"Indeed, at the time the notice was given of this annual meeting this contract was not prepared, and could not have been specified therein; and the fact that other matters were specified in the notice in no manner limited the powers of the stockholders at such meeting. State vs Bonnell, 35 Oh. St., 10; Warner vs Mower, 11 Vt., 331; I. Beach on 'Private Corporations,' Sec. 279; Sampson vs S. M. Corporation, 36 Maine, 78; I. Horawotz on 'Private Corporations,' Sec. 432; Cook on Stock and Stockholders,' Sec. 595.

"Summing up this question, the instrument was signed and attested by the proper officers. It was approved by the executive committee, which executive committee was granted ad interim by the board of directors all the powers of that board. Authority to make such a delegation of power was given to the board by the by-laws. Power to make such by-laws was bestowed by the act of incorporation upon the stockholders. At the regular meeting the contract was approved by all the stockholders present, being two-thirds of the entire number. Under these circumstances, if the contract was one which the corporation could make, it was fully authorized and duly executed, and binding.

Question of Ultra Vires.

"So I pass to the second question: Is the contract one which the corporation could make, or is it ultra vires? The doctrine of ultra vires has been thoroughly sifted within the last thirty years—its extent and limitations clearly defined. Thomas vs railroad company, 101 U. S., 71; Branch vs Jesup, 106 U. S., 468; railroad company vs railroad company, 118 U. S., 290; railway and navigation company vs railway company, 130 U. S., 1; transportation company vs palace car company, 139 U. S., 24. Two propositions are settled. One is that a contract by which a corporation disables itself from performing the functions and duties undertaken and imposed by its charter is, unless the state which created it consents, ultra vires. A charter not only grants rights, it also imposes duties. An acceptance of those rights, is an assumption of these duties. As it is a contract which binds the state not to interfere with those rights; so, likewise, it is one which binds the corporation not to abandon the discharge of those duties. It is not like a deed or patent, which vests in the grantee or patentee not only title but full power of alienation; but it is more, it is a contract whose obligations neither party, state nor corporation, can without the consent of the other abandon. The other is, that the powers of a corporation are such, and such only, as its charter confers; and an act beyond the measure of those powers, as either expressly stated or fairly implied, is ultra vires.

"A corporation has no natural or inherent rights or capacities. Created by the state, it has such powers as the state has seen fit to give it—'only this and nothing more.' And so, when it assumes to do that which it has not been empowered by the state to do, its assumption of power is vain—the act is a nullity—the contract is ultra vires. These two propositions embrace the whole doctrine of ultra vires. They are its alpha and omega. To determine the applicability of these propositions to the contract, we must notice its features a little more in detail. It is too long to quote in full, but the first section of the first article is its kernel. It is as follows:

Quoting from the Contract.

"'The Pacific company hereby lets the Rock Island company into the full, equal and joint possession and use of its main and passing tracks, now located and established, or which may be hereafter located and established, between the terminus of such tracks in the city of Council Bluffs, in the state of Iowa, and a line drawn at a right angle across said tracks within one and one-half (1½) miles southerly from the present passenger station of South Omaha, in the state of Nebraska, including the bridge on which said tracks extend across the Missouri river, between said cities of Council Bluffs and Omaha; connections with union depot tracks in Omaha, the side or spur track leading from the main tracks to the lower grade of the Pacific company's sidings and spur tracks in Omaha, and such extensions thereof as may be hereafter made; side tracks in Omaha on which to receive from and deliver to the Rock Island company freight that may be handled through the warehouses, or switched by the Pacific company, the connections with the Union stock yards tracks in South Omaha, and conveniently located grounds in South Omaha, on which the Rock Island company may construct, maintain and exclusively use a track or tracks, aggregating three thousand (3,000) feet in length, for the storage of cars and other purposes, for the term of 999 years, commencing on the first day of May, in the current year. For which possession and use of the Rock Island company covenants, promises and agrees to pay to the order of the said Pacific company monthly during the continuance of said term the sum of $3,750, with the proportion of the costs and expenses actually incurred during the month for which such payment is made, in maintaining, repairing and supplying with water that portion of such main tracks jointly used and situated east of the east end of said bridge and in the city of Council Bluffs, and in paying taxes and assessments legally laid and levied thereon, which proportion shall be to the aggregate of the amount so paid as the proportion of the number of wheels per mile operated during the same month by the Rock Island company over said tracks or any part thereof shall be to the whole number of wheels operated per mile over the same tracks during the same period, which sum the Pacific company agrees to receive as full compensation for such possession and use.'

Lease on Contract.

"It is said by the defendant that this is a lease—the language of demise is used and a lease was denounced in the 101, 181, 130 and 139 United States, supra, as ultra vires. To which it is replied that in the resolution quoted above, passed by the stockholders, approving this agreement, it was called 'one granting trackage rights.' But neither the form of expression on the one hand, nor the name on the other, is conclusive. We must see that rights and privileges were in fact granted, what burdens and obligations assumed, in order to determine whether that which was attempted to be done was beyond the competency of the corporation. The contention of the defendant is substantially threefold: 1. That the contract if put in force will at once disable the Pacific from performing the duties imposed upon it by its charter. 2. That if it will not at once have that effect, it will before the termination of the 999 years of its term. 3. That the charter neither in terms nor by implication gives power to make such contract.

"The question as to whether a contract is ultra vires or not may arise in a controversy between the state and a corporation, or between the corporation and the party with whom it has assumed to contract; and it may well be, that different rules of construction apply in two cases. All grants, even grants of corporate franchises, are construed strongly in favor of the government, and against the grants. So when the state challenges the action of one of its corporate creations, it may insist on clear warrant for such action. It may say: 'Point to the letter of your authority; I abide by my contract and protect you in the rights of franchises I have given, abide by your contract and assume to do no act in disregard of the duties I have imposed, or beyond the authority I have conferred. The rule of strict construction exists in such a case.

Rule for Repudiation.

"But a milder rule applies when a corporation seeks to repudiate a contract into which it has formally entered. It is not seemly for a corporation, any more than for an individual, to make a contract and then break it, or to abide by it so long as it is advantageous, and repudiate it when it becomes onerous. The courts may well say to such corporation, 'As you have called it a contract we will do the same, as you have enjoyed the benefits when it was beneficial, you must bear the burden when it becomes onerous; unless it clearly appears that that which you have assumed to do is beyond your powers.' In railway vs McCarthy, 96 United States 267 the supreme court said: 'When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will in the absence of proof to the contrary be presumed to be valid. Corporations are presumed to contract within their powers. The doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong. In other words, courts should be clearly satisfied that a contract is ultra vires, before at the instance of a corporation they release it from the obligations which it has voluntarily assumed. With this rule of construction in mind, I pass to the consideration of the three contentions of the defendants.

Union Pacific Not Disturbed.

"It clearly will not operate at present to disable the Pacific from discharging its duties. While the Rock Island is let into possession and use, the Pacific is not put out of possession and use. There is no surrender of the exclusive use of any portion of the Pacific's line. It remains in the undisturbed possession of every mile of its track, can operate all its trains, and discharge all the duties which it owes to the government or the public. A different question would arise, if it had attempted by this instrument to dispose of the full possession of the same length of its track. Its obligation to the government is not to hold all its tracks or property beyond the use or touch of any other corporation. It goes no further than to retain such possession and use as will enable it to run all its trains and carry all its passengers and freight. No monopoly of isolation from other currents of business is essential to this. It may do all the business which is offered and still have a surplus use of its tracks. Can it be that its obligations to the government or the public compels it to let that surplus use lie idle? It is rather for than against the interest of the government which creates it and which is itself interested as second mortgagee and the holder of a large claim against it, that it coin all such surplus use into money. Surely if this be so it does not come within the scope of the first proposition.

"I shall not attempt to refer to the testimony in detail. Indeed, I think it is conceded that if this contract was put today in full operation the Pacific would have ample accommodations for all its business. In this respect the case is very different from those cited from the supreme court. In them there was a full surrender of possession. As said by Mr. Justice Miller in the Thomas case: 'The provision for the complete possession, control and use of the property of the company and its franchises by the lessees is perfect. Nothing is left in the lessor but the right to receive rent. No power of control in the management of the road and in the exercise of the franchises of the company is reserved.' I conclude, therefore, that this contract is not objectionable as now disabling the Pacific from discharging the duties imposed by its charter. But the term of this contract is 999 years, and it is strongly insisted that long before that time has been reached the growing business of the Pacific will demand the entire possession and use of all its tracks and facilities, and that the length of the terms makes that void which might have been valid if for a few years.

Peep Into the Future.

"To this, in my judgment, there are two satisfactory replies: 'No man can foresee the future. While we have a right to believe that the country will grow in population and business, and have a right to expect that the business of this particular corporation will increase; yet we also know, that with increased volume of business as a rule come increased facilities and means for transacting that business. It is not to be expected that the business of any railroad will increase in the next twenty years in the same ratio as the last. New roads are constantly being built. Other channels of transportation will arise; and business so increasing will be divided among more. Who, indeed, can say that the railroad itself will be the common means of transportation twenty years hence. May not electric lines, on differently constructed tracks, supercede the railroads as the railroad has superceded the canal? Into that field of speculation who may safely enter, and what decrees may be founded thereon?

"But again, the powers of a court of equity do not end with a day. If the changed condition of affairs twenty years hence shall make the full use of its tracks and other facilities necessary to the Pacific for the transaction of its business and the discharge of its duties to the government and the public, the powers of a court of equity are equal to the emergency, and can relieve it from the obligations of its contract; for the obligation of a corporation to nor disable itself from the discharge of its duties is a continuing one and all contracts which its makes endure only so long as their continuance does not create such a disability.

Surplus Use Considered.

"This matter has embarrassed me a great deal, but I have come to the conclusion that 'sufficient to the day is the evil thereof,' and strong enough and adequate for tomorrow are the powers of a court of equity. It is at least clear that the government is not included by any decree between these parties and whenever its rights are disturbed it may interfere and compel, as against everybody, the full discharge of its duties by the Pacific. Neither can it be said that this contract is clearly beyond the powers granted to the Pacific. It is obvious to all that the exigencies of public interests have enlarged the area of the incidental and implied powers of a corporation. Witness the many things which railroad companies today freely and without question engage in, in furtherance of their transportation business, which are strictly not part of such business. Their depots are often eating houses and hotels, dining and sleeping cars are run on many trains; bath rooms and libraries on some; hospitals are furnished, insurance to employes is not uncommon. Yet who can say that these things are a part of the laying out, construction or operation of a railroad, strictly speaking. Yet it would startle the common sense of the business world if the contracts of the railroad companies for the carrying out of these incidental matters were by the courts declared ultra vires.

"In the case at bar, as we have seen, the contract is not one for the dispossession of the Pacific company from the use of its tracks or other facilities. It is not one disabling it from discharging its duties. It is simply one to coin into money for its benefit, the surplus use of a part of its property. Can it be that such a contract is beyond the powers implied by the grant? Concede that under the power to lay out, construct and operate a railroad, it is not authorized to build tracks for the purposes of sale or lease; but when discharging its duties it builds tracks for its own use, and uses them, if all the use it can make is limited and there is a large amount of surplus use, upon what reason can it be adjudged that the surplus use must necessarily be idle? It is a thing of value. It may be, as it is done by this contract, coined into money. What right or interest of the government or public is prejudiced thereby? If a railroad company builds a depot which is larger than its present needs require, may it not rent one room and receive profit therefrom; or must it, because it is not authorized to build buildings for rent, let that room remain vacant until the increase of business requires its use? The Pacific company may not build tracks for the purpose of leasing them; but it must have at least one track for the passage of its own trains. If its trains do not fully use that track, as in this case they do not, it has a surplus of use which is of value, and which it may make profit out of in any manner not inconsistent with its duties to the public and its obligations to the government. I think it may be laid down as a general proposition that a corporation which in the discharge of the duties imposed by its charter requires property which it must have for its own use, may, if there be a surplus use of such property, make a contract for the disposition of such surplus use in any manner not inconsistent with the purposes of its creation. So I conclude that neither of the three objections is well taken, and hold that the contract is not ultra vires.

Consideration and Compulsion.

"So far as the Omaha & Republican Valley railroad company is concerned, it is objected that the contract is invalid because it is without consideration; the contract providing that the Rock Island shall pay to the Union Pacific railway company the rental for the use of the Omaha & Republican Valley railway company's line. There is little force in this. The Union Pacific company owns substantially all the stock of the Omaha & Republican Valley railway company, and a contract by a company that the rental for the partial use of its property shall be paid directly to the stockholders, instead of the company, surely cannot be declared beyond the power of the corporation. This is all that need be said in respect to the relation of the Omaha & Republican Valley railroad company in this contract.

"Third—Is this contract one of which a court of equity may compel specific performance? Fortunately a recent decision of the supreme court in the case of Joy vs.' St. Louis, 138, United States, 1, relieves me from embarrassment. That case was originally heard before me while I was circuit judge; and after a careful examination, and though in the face of seemingly adverse precedents, I decreed specific performance of a contract for the joint use of a track. That decree was affirmed by the unanimous opinion of the supreme court. All of the objections which are here made were presented then and overruled; and the necessity of the interposition of a court of equity in cases of this kind is clearly shown by Mr. Justice Blatchford, in the opinion of the court. The spirit of that decision is expressed in this quotation: 'Railroads are common carriers and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation.'

Power of an Equity Court.

"I know, to one who is only familiar with the narrow limits and the strict lines within and along which courts of law proceed, the act of a court of equity in taking possession of a contract running for 999 years, and decreeing its specific performance through all those years, seems a strange exercise of power; but I believe most thoroughly that the powers of a court of equity are as vast and its processes and procedure as elastic as all the changing emergencies of increasingly complex business relations, and the protection of rights can demand. And in passing I may be permitted to observe that in this respect the distinguished jurist who appears for the defendants in this case taught me my first lesson; who, on the bench of the circuit court of this circuit not only took possession of and managed great railroad companies by receivers; built hundreds of miles of railroad and created millions of dollars of obligations against those roads. I then watched those proceedings with something of amazement, but the more I studied the more I admired, till having thus studied at the feet of Gamaliel, I learned to believe that the powers and processes of a court of equity are equal to any and every emergency. They are potent to protect the humblest individual from the oppression of the mightiest corporation, to protect every corporation from the destroying greed of the public; to stop state or nation from spoliating or destroying private rights; to grasp with strong hand every corporation and compel it to perform its contracts of every nature and do justice to every individual.

"May I be permitted to another suggestion: The railroad world today is in unrest. Millions of capital have gone into railroad enterprises, seeking profit therefrom. Legislators vie with legislators in efforts to reduce rates. To maintain such rates as will secure just compensation for the capital invested, railroads enter into associations and form traffic contracts. But such contracts seem but ropes of sand, and such associations but gilded figure-heads, and not controlling forces. And back of all is a wide and growing demand that the government take possession of all the railroads and itself become the great common carrier. Is it not possible that the powers of a court of equity may yet be found adequate to the situation—that such courts may yet lay strong hands upon these railroad corporations, and by compelling performance of contracts, secure stability, uniformity and justice to all, and thus quiet the clamor and avoid any necessity of governmental possession and management?

Getting Back to the Text.

"But this is outside of the question before us. Returning to the case: Counsel contend that it is distinguishable from that of Joy vs St. Louis in that there was a great public interest to be protected, which justified, as was mentioned in the opinion, the interposition of a court of equity. I think no such distinction exists. There is in this case a public interest as significant and deserving of protection. The testimony discloses that before this contract was entered into, the Rock Island had determined to build a bridge across the Missouri river at Omaha, and fill the gap between Council Bluffs and Beatrice by its own line. In conjunction with the Chicago, Milwaukee & St. Paul railway company it had obtained from congress a charter for the building of the bridge, and negotiations were pending to secure the capital, some two or three millions of dollars, with which to do the work. At that time the officers of the Pacific sought the officers of the Rock Island and St. Paul and prevented the building of the new bridge by means of this contract. If this contract had not been made, or if it should not now be enforced, two or three millions at least of additional capital would be put into railroad and bridge construction, and such an expenditure of money places an additional burden upon the public. Every unnecessary mile of railroad track or bridge that is built adds to the cost of transportation, and surely the public is interested in seeing that that cost be as light as possible.

Which is Economy?

"A very serious economic and political question is, whether this free country has not made a mistake in giving too large liberty of railroad construction. Take a single illustration: In the state of Colorado between Pueblo and Denver, are three independent lines of road, with separate and distinct tracks and rights-of-way. To say nothing of the waste of lands and the injury to farms, the cost of these three lines of road, I am assured, is much more than double that of a single right-of-way with two tracks; and such single right-of-way would be adequate for all the business that the three roads have done or are likely to do for many years. The public which uses these roads bears the burden of this extra cost. Would not its interests have been promoted, if by contract or law all these railroads could have been compelled to unite in a single line? So here—if the public can prevent an increase of railroad property by the sum of $2,000,000 or $3,000,000, it saves to itself the burden which that additional expense would cast upon it. Further, a new line running into Omaha cuts up and destroys unnecessarily a large amount of property. So in this, as in the case of Joy vs. St. Louis, there is a public interest at stake which justifies the intervention of a court of equity. This is the case in which, and a contract of which a court of equity may decree specific performance.

"I pass to a consideration of the last question: Ought this contract be specifically enforced? Of course it is familiar law that courts of equity do not always decree specific performance of even unquestionably valid contracts. Insufficiency of consideration, want of fairness or any special hardship resulting therefrom is sufficient to prevent a decree of specific performance and send the party to his action at law for damages. Pomeroy on 'Specific Performance,' section 185; Fry on 'Specific Performance,' 181, 193 and 203. These defenses are interposed here: It is insisted that the rental for the use of the bridge and the tracks between Council Bluffs and South Omaha, to-wit, $45,000, is grossly inadequate. Contemporaneous with this, another contract of similar import was executed with the Chicago, Milwaukee & St. Paul railway company, by which it also was to pay a like rental, so that the rentals secured by these two contracts for the use of the same property amounted to $90,000. A volume of testimony was taken to show the value of the Pacific's property for which this rental was to be paid. Four or five engineers of ability and real estate men of experience testified fully in respect to this matter. Their estimates were very divergent, varying from three to seven millions. I shall not attempt in this opinion to review this testimony or seek to determine which of these estimates is most reliable. Obviously the estimate of Mr. Smeed, the chief engineer of the Pacific, is too high, in that it includes property not covered by the lease. Probably the real value lies somewhere between the figures, and nearer three than seven millions. If the value be seven millions, $90,000 rental is only about 1½ per cent, and if this were the rental for the full and exclusive possession, it would obviously be too low; but there is only a partial possession and a partial use. The rent is so much in excess of that which the Pacific realizes from its own use of the property. Not only that; by section 7 of article 3 of the contract, the Pacific reserves to itself the right to let other companies into the like possession and use of this property, without sharing with these lessees the rentals thus obtained. On the other hand if the value of the property is only three millions of dollars, the rental is 3 per cent, and that for only this partial use.

Benefits to the Defendant.

"But beyond this Omaha property, the contract provides for the use of each party of portions of the others' tracks; and the benefits which flow to the Pacific from its acquisition of parts of the Rock Island's tracks elsewhere in the system, are worthy of notice in determining the sufficiency of the consideration. There are other benefits, also of a pecuniary nature, the amount of which may not perhaps be easily estimated, which will inure the Pacific from the pouring of business of the Rock Island and St. Paul roads over its tracks rather than over an independent and separate line.

"But I place more reliance upon this further matter. As heretofore stated, the contract was sought by the Pacific. The then executive officers of that company, distinguished and competent railroad gentlemen, of long experience in connection with the property, in their consultations as to the price to be demanded, and before any conference with the officers of the Rock Island and the St. Paul, fixed $50,000 as the sum to be demanded and $45,000 as that to be accepted. Now, when gentlemen so competent to determine such a matter, so interested in securing the best possible terms for the Pacific, without suggestion from the other side name $50,000 as the rental to be asked, I think it would be strange for a court to hold that a rental of $45,000 was grossly inadequate. This is not a case in which the defendant has been led into a contract or its terms fixed by inexperienced or incompetent men, but it sought the contract, named its price and received nine-tenths of the consideration which it proposed to take.

Local Competition.

"It is further objected that the Pacific does a large local business between Council Bluffs and South Omaha, from which it makes much profit, and that under this contract the Rock Island may itself put on local trains, and by reducing the fares practically cut off this source of revenue from the Pacific; whereas, if it built a separate bridge and a separate line, the amount of the cost would be so great that it would be compelled to keep up rates. My observation has taught me that the cutting of rates generally springs from quarrels between competing roads, and is little if at all affected by the cost of the property; and if the Rock Island and St. Paul were now forced to build a new bridge and establish an independent line, there would be just as much likelihood of the cutting of rates. Aside from the existence of any quarrel, self-interest will prompt the Rock Island and St. Paul to maintain any rate which is just and reasonable. More than that the Union Pacific has no right to expect. But another safeguard is this: Every contract implies good faith in the contracting parties,—no matter what may be the mere language of the instrument, and if after having been let into possession the Rock Island should in any way abuse the privileges given by this lease, the courts are open to furnish protection, even if to secure it, it be necessary to cancel the lease.

"But there are considerations on the other side which are worthy of mention, and which make specific performance right. While no estoppel runs against an ultra vires contract, yet it is fair always to consider the situation of the plaintiff if specific performance be desired. The Rock Island has constructed a time from Lincoln to Omaha, and has expended a million and a half of money in reliance upon this contract. It and the St. Paul abandoned their scheme of building a new bridge, and creating a new and independent line into and through Omaha. If now specific performance is refused, what becomes of the investment? Must it lie idle until a year or so have passed, in which a new bridge and a new line into and through Omaha can be completed—and who can tell whether in the changed financial condition, these companies could secure the money with which to build the bridge and construct line? Suppose the Rock Island was refused specific performance and relegated to an action for damages—of what avail would such action be? Long would be the delay in prosecuting it to judgment. What would be the measure of damages? And if a large sum were recovered, is there any certainty, in view of the heavily mortgaged condition of the Pacific, that the judgment could be collected?

Valid and Binding.

"I think I need continue this discussion no further. I have given this case long and careful consideration. Summing the whole matter up: The defendant sought the contract. Its executive officers were gentlemen of long experience with the property and distinguished ability as railroad officials. There was no concealment or deception, no fraud or unfairness on the part of the officers of the plaintiff. There was no opportunity for any, the officers of the defendant company fully understood the situation. To this contract not only the executive officers, but also the great body of the stockholders of the Pacific gave their approval. The rental finally agreed upon, was within a small fraction of that which the defendant had determined to ask. Relying on this contract, the plaintiff abandoned plans and negotiations for an independent line, and has expended over $1,500,000 in building from Omaha to Lincoln. It will be grievously hurt if performance is not decreed. Performance will not disable the Pacific from discharging all its duties, and performing all its functions. If the time shall ever come in which performance shall tend to have that effect, the government at least, the party having the right to complain, can interfere and put an end to the plaintiff's possession and use. The contract is for the interest of the government as second mortgagees, as coining surplus use of tracks into money. It is for the interest of the public in preventing the distribution of valuable property, and the cutting up of a large city by new tracks and right-of-way; and in avoiding an unnecessary investment of large sums of money in railroad building, and thus increase the railroad burden. It is to the higher interest of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations; that no change of interest or change of management can disturb their sanctity or break their force; but that the law which gives to corporations their rights, their capacities for large accumulations and all their faculties, is potent to hold them to all their obligations, and so make right and justice the measure of all corporate as well as individual action.

"The decree will go for the plaintiff as prayed for. The same considerations require that a like decree be entered in the case of the Chicago, Milwaukee & St. Paul railway company."

Judge Dundy Dissents.

At the conclusion of the reading by the court there was a lively bustle in the court room and Judge Thurston arose to address the court. At a sign from Justice Brewer, however, he resumed his seat and Judge Dundy proceeded to render a dissenting opinion in the case, as follows:

"When these cases were first brought into this court I listened for three days to the extended argument on the motion to dissolve the injunction that had been allowed in the state court, and continue the injunction in force. For a time, I requested the parties to forego the hearing until Judge Caldwell could be present. At that time it was understood he was to be here. I recognized the extent of the obligations involved and I did not care to grapple with the serious and complicated questions there presented without the assistance of the circuit judge, but the parties insisted on having the hearing, and they had it. The merits of the case, as they are now presented, were presented at that time, and I was asked to render a decision thereon, and that, too, in the absence of a word of testimony to settle the question of the validity of the contract as made between the parties. I disposed of the matter then. I wrote an opinion, which expressed my views on the necessary questions, as I thought, were involved, and which it was right and proper for me to consider. I had hoped that my connection with the matter would at that time end. I had no sort of an idea of listening to the argument when it was heard on its merits. The circuit justice reached here for the purpose of hearing the case. I stated to him the position I was in, my feelings in the premises, but he requested me to sit with him when the matter was heard on its merits, and I regarded the same, coming from such a source, as equivalent to a command and felt bound to perform the request he had made. I have heard the argument for six days—nearly that. I have not been convinced that a specific performance of these agreements ought to be decreed by the court; but I have no time or opportunity to reduce my views to writing, since I have known what views the the justice entertained. I may possibly do so in the future, but as it can make no sort of difference to the general result, I suppose it is not necessary to do so. But it occurs to me that if that contract is to be specifically performed, and the court is to decree it, it will put somebody in an attitude exceedingly unpleasant.

Contract Lacks Mutuality.

"It is stated in the bill, and the contract so provides, that the Union Pacific company guarantees to these two plaintiffs, in two different suits, the right to use the depot the same as it has the right to use it itself. What depot? Have you recognized the existing condition of things here to some extent? There is a place for a depot—where the depot ought to be. The railroad company does not own it—confessedly it does not. It owns an interest in it, it is true; but it has guaranteed to the plaintiffs in these two suits the use of that depot, as it shall be entitled to it itself. Has the depot been erected? Now, suppose the depot is not erected, or suppose it is erected, suppose it is completed. It belongs to a different corporation. It is the property of other parties. It does not belong to the Union Pacific, the defendant in this suit. It seems to me that we might just as well say the Union Pacific has the right to lease my house and my property to either of these plaintiffs, as it has to lease that depot, and so far as that is concerned, it occurs to me it is going too far to decree specific performance of this contract. If this form of government is to exist 1,000 years the same as it is today, and our judicial system is to remain the same, there is no way to get rid of this decree, unless it is reversed by the supreme court of the United States or the appellate court. Suppose the plaintiffs should fail to perform their part of the contract; where is the remedy? Tie up the Union Pacific for 999 years and compel it to do precisely what it has agreed to do here, while the other parties to the contract can be released in two years from the obligations under it. There is no mutuality in the contract to tie up one a thousand years, and the other for two years only. At the expiration of two years, one can escape all liabilities under the contract if it sees fit to do so. Then again, so far as one railroad is concerned, under this contract it would have the right to operate its line from the other side of the river to South Omaha without the expenditure of a dollar. It uses the Union Pacific branches for the purpose of transacting all its business. It runs its cars over the road from Council Bluffs to Omaha. It is under no obligation to the state. It has no right from the congress of the United States to do that, nor has it from the state, so far as I know. It is conceded to be a corporation; it starts somewhere, but where, I don't know. There is nothing in the record that discloses when, where or how it is to operate that road, unless it receives the exclusive right to do so. It is under no obligation to the state, and it can derive the right to do so from two sources only—from the general government of the United States, and, second, from the state. If it has no such right from the United States, then it has not derived any from the state. Manifestly, it is not from the state. It seems to me to be the policy of the state, in all its legislation, to require parties to build their own roads. They are not permitted, under the laws of the state, to consolidate where their lines are parallel and competing. They cannot do it. There is manifestly good reason for it. To require them to invest their own money in the state, and it occurs to me there is the best reason in the world for it.

May Not Live to See It.

"With reference to the contract as made between the Republican Valley and the Rock Island companies, it seems to me there are two reasons why this contract ought not to be specifically performed. In my view, before they will be entitled to a decree requiring this contract to be specifically performed it will be necessary to show that the plaintiff was in condition to do the things they contracted for. Is there anything here to show that the Rock Island road is to exist for 1,000 years? Is there anything to show that the Republican Valley road is to exist for 1,000 years? Of course this contract, if it is to be executed, must be for a thousand years—999 years. There is nothing that shows that the Rock Island road is older than George Washington's body servant is supposed to be, nor is there anything to show the time that the Republican Valley road is to endure—not a word, so far as I am able to see. Suppose one should cease to exist in a hundred years? That ends it. It seems to me they ought to show that they are in position to do what they contract for, and that the other party is in condition to contract for what they got.

"Then again, if the Rock Island road is to start at this place, or South Omaha, where its road seems to terminate, and run from there to Beatrice, the Union Pacific has a line, the Republican Valley, starting somewhere in this neighborhood, and it runs to Beatrice, and there are two parallel and competing lines that have consolidated, to all intents and purposes, under this lease, or agreement, or whatever you may call it. That, the supreme court of the state says in express terms, cannot be permitted under the laws of the state. If that is to be so we are required to do what the law prohibits. I do not know what the decree may provide for, but if these contracts are to be specifically performed it will go much further, because all they ask here is that they be let alone and that the Union Pacific shall be restrained from interfering with the operation of these proposed roads. Of course, after the decree is prepared, if I see anything open to criticism, I shall possibly, to say the least, put my views in writing, as I think that much, being required to sit and listen to the argument, is due to me."

Will Be Appealed.

After Judge Dundy had finished General Counsel Withrow asked when a decree would be entered. After a brief colloquy it was decided that counsel for both sides should hold a consultation and agree upon a decree or, in case of disagreement, submit their differences to the court Wednesday morning.

Judge Thurston said he should give notice of appeal within the specified time when the decree was entered.

After court had adjourned counsel for both sides entered at once into a conference on the decree.

President Cable declined to state anything about the intentions of his company further than to say that they should commence running trains as soon as the decree had been entered and the necessary arrangements made.

IRELAND AT THE FAIR.

The Emerald Isle Will be Fully Represented in Chicago.

LONDON, July 27.—While we hear a great deal about what all foreign countries are going to do at the Columbian fair at Chicago in 1893, little or no attention has been paid to what Ireland is going to do there. It will therefore please Irishmen and Irish-Americans in the United States to know that it has been agreed among Irishmen of all grades of political opinion that Ireland is to be fully represented at the fair, and that her exhibits are not, by any means, to take a back seat. Among these exhibits, it is already decided that an immense relief map, now in possession of the commissioners of national education, will form one of the features. It is understood that it will please many people of Irish descent, who have never had a glimpse of the "old country," to see this "lifelike" representation of the Emerald isle, with its rivers and mountains, hills and dales, towns and cities, villages and hamlets, clearly defined. But, in addition to this, Ireland will send an exhibit which will be worthy of any country.

LIBERTY OF THE PRESS.

New York Editor Arrested for Printing Electrocution Details.

NEW YORK, July 27.—Charles O'Connor Hennessey this morning pleaded to an indictment charging him with misdemeanor by the publication in the Evening News of the details of the execution of Slocum and Smiler and the others recently put to death by electricity at Sing Sing. His counsel handed up a demurrer claiming that the statute under which the indictment was found was unconstitutional inasmuch as it restrains the liberty of the press, guaranteed to it by the constitution.

Suit for Over a Million.

OWASSO, Mich., July 27.—Depositions in a case involving over $1,000,000 have been taken at the national hotel here during the past four days. Over forty witnesses have been examined, but as no reporter was allowed to enter the room no inkling of the nature of the case could be received. A stovepipe becoming disconnected in the room above the following details were ascertained last night.

Sidney Smith died in an asylum for the insane in New York city in 1886. He never intimated that he was worth a cent, but at his death he left his heirs over $1,000,000 in real and personal property. Aden Smith was appointed administrator, and as the complainants allege, formed a co-partnership with his brothers and co-heirs, J. F. D., and Harlan P. Smith, and bought up all the other claimants alleging that they were not heirs and that the personal property only amounted to $225,000. Believing this, the others settled for $50,000 per family. The defendants claim that they bought on speculation. They all live in New York city, and are represented here by William Manna of that city. The western heirs are represented by S. D. White of Hamilton, N. Y., and Judge Daboll of St. Johns, Mich.

St. Olave's Church Doomed.

LONDON, July 27.—Steps have been taken to sweep away another of the old landmarks of London. A placard on the doors of the ancient church of St. Olave, gives notice that the site and building are to be sold at auction, the living having been lately united with another city parish. This old church is not a very handsome one, but it is one of the edifices erected by Christopher Wren after the great fire of London. Previous to the fire there stood on that same spot the original church of St. Olave, which was known as St. Olave Upwell, the records of which go as far back as A. D. 1320. In the old church was buried Robert Largea, "mercer of the city of London," and the remains of William Caxton, who introduced printing into England.

Their Principles Are Identical.

NEW YORK, July 27.—Central Labor federations of New York, Brooklyn and Hudson county, New Jersey, at a joint meeting, instructed the delegates to the Brussels convention to say to the convention that the principles of the united federation of labor and the socialist labor party were identical.