No. 2,220.

IN THE

# Supreme Court

OF THE

STATE OF CALIFORNIA.

CALIFORNIA PACIFIC RAILROAD CO.,
*Respondent,*

vs.

CENTRAL PACIFIC RAILROAD CO. OF CAL.,
*Appellant.*

# BRIEF FOR APPELLANT.

S. W. SANDERSON,
For Appellant.

SACRAMENTO:
H. S. CROCKER & CO., STATIONERS AND PRINTERS.
1870.

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Appellant.

## APPELLANT'S POINTS.

### I.

The Plaintiff, *in its own right*, has no lawful authority to construct a bridge across the Sacramento river *at the point in question*. Such a right can come only by grant from the State, or from the City of Sacramento, by a vote of two-thirds in number of her Board of Trustees. In view of all

other conditions, the right of the Plaintiff is not only not admitted, but is *positively prohibited* by the statute law of this State. The Plaintiff's pretensions are not founded upon any grant from the State, or the City of Sacramento.

Statutes of 1863. p. 415, Sec. 1. (City Charter.)

Statutes of 1862. p. 498, Sec. 3. (Railroad Act.)

*a.*

The only authority which the Plaintiff has, *in its own right*, to bridge the Sacramento river at all, at or near the City of Sacramento, comes from the Act of the 30th of March, 1868, which, instead of granting the Plaintiff a right to build a bridge, or bring its railroad into the city *at the point in question*—which is *below* or to the *south* of the bridge of the Sacramento and Yolo Bridge Company — only allows the Plaintiff to build a bridge and bring its road into the city at some point "*above* or *north* of the present bridge," that is to say, the bridge of the Sacramento and Yolo Bridge Company.

Statutes 1867-68, p. 671, Sec. 2. (Legislative grant to Plaintiff.)

*b.*

There being no provision in this grant to the Plaintiff to the effect that it may change the location of its bridge to the *south* of the bridge of the

Sacramento and Yolo Bridge Company, upon any consideration whatever, the Plaintiff can *in no respect* thereby sustain its pretensions—its pretended right to construct a bridge for its railroad at the point in question. When the Plaintiff applied for this privilege, it selected a crossing to the north of the present bridge, and having made no provision for a change to the south of the present bridge, it cannot make the change, no matter how great a necessity there may be for it. Even where the statute grants a right to change the location of a road or bridge, such right has become *exhausted* when the road or bridge has been constructed.

*Brigham* v. *Agricultural, etc. R. R. Co.*, 1 Allen 316.

*Hudson and Delaware Canal Co.*, v. *New York and Erie R. R. Co.*, 9 Paige 323.

*Moorhead* v. *Little Miami R. R. Co.*, 17 Ohio, 340.

*Little Miami R. R. Co.* v. *Naylor*, 2 Ohio State, 235.

*The Macedon and Bristol Plank Road Company* v. *Lapham*, 18 Barb. 312.

*The Buffalo, Corning and New York Railroad Company* v. *Pottle*, 23 Barb. 21.

*Works* v. *Junction R. R.*, 5 McLean, C. C. 425.

*Atkinson* v. *Marietta and Cincinnati R. R. Co.*, 15 Ohio State, 21.

II.

The Plaintiff has no authority to bridge the Sacramento at the point in question, *by virtue of any right which has been granted to another.* There is no pretense that it has such right, unless it has come through its contract with the Sacramento and Yolo Bridge Company.

(Transcript, folio 62—3.)

*a.*

The right to build a *railroad* bridge cannot come from that source, for the obvious reason that the Sacramento and Yolo Bridge Company itself possesses no such right under its charter, and can therefore convey no such right to the Plaintiff. The Sacramento and Yolo Bridge Company derive all their powers in the premises from its charter, and no such power is thereby conferred.

Statutes 1857, p. 175.

*b.*

In addition, the Sacramento and Yolo Bridge Company has no power to build, or authorize to be built, even a wagon-road bridge at the point in question, much less a railroad bridge. Their

charter authorizes them to build and maintain a bridge "at or near the foot of Broad street." More than ten years ago the Company selected its ground and built its bridge, and has since maintained it at the point where it now is; and in view of the fact that its charter does not provide for a change of site, and the principle of law already established that even if its charter had so provided the privilege ceased upon the completion of the bridge, it follows that the Company cannot now, even if there was a necessity for rebuilding its bridge, build one *at the point in question*, or authorize the Plaintiff to do so.

*Rush* v. *Jackson*, 24 Cal. 313.

Cases cited under Point I. Subd. b.

*c.*

But concede, for the sake of the argument, that the Sacramento and Yolo Bridge Company possesses the power to build at the point in question, and finds itself under a necessity to do so, still the Plaintiff has no power to take upon itself the role of bridge builder for other parties. Its contract with the bridge company is therefore *ultra vires*, and it cannot bolster its pretensions by leaning upon the shoulders of the bridge company.

*Miner's Ditch Company* v. *Zellerbach*. July term of this Court, 1868.

What use has a railroad company for a wagon-

road bridge, if, as has been shown, it has no lawful authority to convert it into a railroad bridge? It certainly can have no use for such a bridge, and a contract to construct one for another party is clearly *ultra vires*, and confers no rights which the railroad company does not otherwise possess.

## III.

But it may be asked: "If this be so, what right have you to attack the Plaintiff upon these grounds; the State might complain, and the city of Sacramento, for the thing about to be done has been expressly prohibited by the former, except upon the consent of the latter; but how are you concerned in the matter?" If so, there are three answers.

*a.*

The Plaintiff having no legal right to construct a bridge, at the point in question, either in its own right or under its contract with the Sacramento and Yolo Bridge Company, is not in a position to condemn the bank of the river or the wharf of the Defendant for the purposes of the abutment of its bridge; having no franchise at that point, it can condemn no land to its use.

*b.*

The Plaintiff having no rights as aforesaid, but

being expressly forbidden to do what it seeks to do, this Court will not allow itself to be made a party to the illegal act, nor will it stultify itself or the law by declaring that the law both permits and prohibits the *same act*, at one and the same time, and in view of the same conditions.

*c.*

The Plaintiff having no rights as aforesaid, the construction of the bridge will be both a *public* and a *private nuisance*—the former being an indictable offense, and the latter a cause of action in equity in favor of any person prejudiced by it. This Court will not wink at an indictable offense, or permit it to be consummated in its presence—much less give its aid to the commission of what the law punishes as a crime. Such a course would be contrary to good morals. Will this Court entertain a proposition on the part of the Plaintiff to take that which the law of the land does not only not permit it to take, but has expressly forbidden it to take, except upon conditions with which it has failed to comply, even if this Defendant had no *private* injury to complain of?

But no such contingency is forced upon this Court by the necessities of this case. The building of this bridge by the Plaintiff will take from the Defendant the *entire use* of a part of its wharf without the color of law, and sever the remainder

into separate parts, and, therefore, greatly impair and obstruct their use, which is a *private* nuisance, which a Court of equity will enjoin or abate as the case may be.

*Blane* v. *Klumpke*, 29 Cal. 193.
*People* v. *Moore*, 29 Cal. 427.
*Yolo County* v. *City of Sacramento*, 36 Cal. 427.

IV.

Conceding, however, that the Plaintiff can overcome the foregoing points to the satisfaction of this Court, the Court below erred in not allowing the injunction sought by the Defendant, because the Plaintiff had not made an effort to purchase of the Defendant the right to cut its wharf and occupy a section of the ground upon which it is built for the purposes of an abutment of its bridge, or to use any other lands belonging to the Defendant for any of the purposes expressed in the petition. The language of the Plaintiff upon this point is, that it and the Defendant have been unable to agree as to the compensation which should be made by the former to the latter "for crossing, cutting and adjusting the rails of the two companies as aforesaid," that is to say on *First street*. (Transcript p. 8, Sec. IV.) There is no averment of an attempt to agree upon

the damages to the Defendant's wharf, or the value of the land to be *exclusively* occupied by the abutment of the bridge and by the depot of the Plaintiff. But such as it is, the averment is denied, and the Court below had no power to proceed with the condemnation until that issue had been tried, for an *effort* to acquire by *convention* the rights sought, is a condition precedent to the right to take them by judicial coercion, or condemnation. It is so provided by the Statute, and has been so declared repeatedly by this Court.

Statutes 1861, p. 615, Sec. 17, Subd. 6.

*Gilmer* v. *Lime Point*, 19 Cal. 47.

*The San Francisco and Alameda Water Company* v. *The Alameda Water Company*, 36 Cal. 639.

In view of the Statute and the construction which has been put upon it by this Court, this point must prove fatal to the present case.

*Contra Costa Coal Mines Railroad Co.* v. *Moss*, 23 Cal. 323.

## V.

But conceding that this last point, as well as those before it, is not insurmountable, we come next to the merits of the Defendant's cross-complaint.

The Plaintiff's petition, as first presented, asks

no relief as against the Defendant, except "crossing" its road-bed and "cutting its rails and adjusting its own rails to them in such a manner as to perfect a safe crossing."

Transcript, Subdivision IV. of Plaintiff's petition.

But this "crossing" was useless unless the Plaintiff could reach it by condemning the bank of the river and the wharf of the Defendant, so the Plaintiff amended twice so as to ask a condemnation of the wharf and land under it as against the Defendant.

Transcript, folio 29, *et sequens* and folio 34 *et sequens*.

But this being done, all the land sought by the Defendant to the east of the Defendant's road-bed, was still omitted so far as any relief against the Defendant is *expressly* asked.

Under these circumstances the Defendant filed its cross-complaint, setting up title obtained by purchase, grant and condemnation, *for railroad uses and purposes*, to all the land which the Plaintiff seeks to condemn, from deep water to the eastern line.

*a.*

The Defendant, having first acquired the land for railroad purposes, both upon the bank of the river and to the east of its road-bed, the same had

become already dedicated to public use, and was not subject to further condemnation by the Plaintiff.

*Statutes* 1863, *p.* 288, *Sec.* 1–3.

*Contra Costa Railroad Co.* v. *Moss*, 23 Cal. 323.

*Lake Merced Water Co.* v. *Cowles*, 31 Cal. 215.

*The San Francisco and Alameda Water Company* v. *The Alameda Water Company*, 36 Cal. 639.

The Statute upon this subject nowhere authorizes an interference by one railroad company with the property or franchises of another, except so far as may be necessary to effect, first, a "crossing," or second, a "junction."

A "crossing" is a right of way across the track of another road, which may be "under, over, or on a level with the track, as may be most expedient."

Statutes 1861, p. 616, sec. 19.

It may be had "*at any point* upon its route," but not in its own yard or the yard of the other Company; no such power is given except in the case of a "junction," which is not this case.

Statutes 1861, p. 614, sec. 17, subd. 6.

*b.*

A "junction," in the sense of the statute, or a

"connection," is quite a different thing. It is such a union of tracks that cars can pass from one road upon the other; or, if the gauges of the roads differ, so that the cars of one cannot run upon the road of the other, such a connection as will admit of a convenient interchange of passengers and freight—the roads must constitute links of the same line of travel and communication. The union of the Western Pacific with the Central Pacific at Sacramento, and the latter with the Union Pacific at Ogden, are examples of a "junction."

*Philadelphia & Erie R. R. Co.* v. *Catawissa R. R. Co.*, 53 Pa. St. 20.

Only in such a case can the yard or grounds of one railroad be intruded upon by another.

The Plaintiff does not seek a junction, and is therefore not entitled, under the statute, to intrude upon the grounds of the Defendant; and not being so entitled, a "crossing" at the point in question would be useless to it, and will not therefore be granted.

*c.*

But conceding a "crossing," who is to determine the precise point and mode and manner—the Plaintiff? The Plaintiff was allowed to do it by the Court below, but we submit that it is a

question for the Court, acting by its commissioners.

Statutes 1861, p. 614, Subd. 6.

The Court should have restrained the Plaintiff in any event until the *point* and *mode* of crossing had been determined by competent commissioners appointed for that purpose. This was done in:

> *Oxford, Worcester etc. Railway Co.* v. *South Staffordshire Railway Co.*, 19 Eng., L. & E. 131, closing paragraph of the opinion on p. 136.

No men fit for the place, or having any regard to public safety, would award a crossing at the point in question upon the same level with the track of the Defendant; they would make the Plaintiff cross the river on the top of its bridge, and pass over the track of the Defendant upon a level sufficiently higher to admit of the passage of the Defendant's cars underneath.

## VI.

Equity will restrain an unlawful attempt to condemn. If, as was held by this Court, equity will *annul* an unlawful condemnation, by parity of reason it will interpose to prevent it.

> *The San Francisco & Alameda Water Co.* v. *The Alameda Water Co*, 36 Cal. 693.

*Moorhead* v. *Little Miami R. R.*, 17 Ohio, 340.

*Hicks* v. *Compton*, 18 Cal. 206.

*Grigsby* v. *Burnett*, 31 Cal. 406.

*Story's Equity, Sec.* 926, *et sequens.*

In conclusion, I submit that upon the facts stated in the cross-complaint, which were not denied, and must be taken as true for all the purposes of the Defendant's motion, an injunction ought to have been issued and continued until the Court had tried and determined the issues of fact tendered by the cross-complaint, and then made it perpetual, or modified or dissolved it, according to the result of the trial.

We therefore ask that the order be reversed, and the Court below directed to enjoin the Plaintiff from proceeding until after the trial of said issues so tendered, if the facts stated be denied by the Plaintiff, and that the injunction be thereupon made perpetual, or be modified, or be dissolved, as said Court may be then and thereby advised.

All of which is respectfully submitted

S. W. SANDERSON,

For Appellant