

# THE TEN MILLION SUIT.

## JAY GOULD AND THE UNION PACIFIC RAILROAD.

### ARGUMENT OF THE MOTION FOR AN INJUNCTION TO RESTRAIN THE TRANSFER OF STOCK—THE DECISION OF THE COURT RESERVED.

In the suit of M. M. Simpson against the Union Pacific Railroad Company, and in which Jay Gould and others of the Directors are made defendants, the complaint in which appeared in THE TIMES a few days since, a motion was argued in Supreme Court, Chambers, yesterday, before Judge Donohue, for an injunction to restrain the present stockholders, who are made defendants, from transferring the stock in their names to other parties. The plaintiff in the case was represented by Mr. Edward L. Andrews and Ex-Judge John K. Porter; the defendants by Mr. Albert Stickney and Ex-Judge Emott. The application was met on the part of defendants by the objection that the railroad company, not having an office in this State, was a foreign corporation, and not amendable to the courts of this State, and that even if it was, the relief asked for should not be granted. The court was also asked to compel plaintiff to give additional security for costs. To this counsel for plaintiff replied by affidavit to the effect that Morton, Bliss & Co. were the authorized agents of the company in this City; that that fact constituted the maintaining of an office here within the meaning of the code on that point, and that the cause of action in the suit arose in this State.

Mr. Edward L. Andrews opened the argument on behalf of plaintiff, to sustain his right to the injunction asked for. The case, he contended, presented by plaintiff's bill was clearly within the equity powers of the court. The capital stock, he said, of a corporation is a trust fund for the payment of its debts. In giving credit to a corporation, the creditor relies upon the subscriptions to the capital stock for the payment of his claim, and such subscriptions unpaid are as much an asset for his security as any other property within the corporate control. As the corporation defendant was created for and is engaged in a public undertaking, there is an implied agreement, on the part of all persons taking its capital stock, to pay assessments thereon to the amount of the par thereof. The charter, moreover, provides that the stock shall be assessed semi-annually, commencing in 1864, at the rate of five per cent., until the par of \$100 per share has been paid into the treasury of the corporation. These assessments and payments have never been made beyond \$30 per share. These unpaid subscriptions are therefore a trust fund for the benefit of the creditors, and such fund should be as much protected by a court of equity, exercising its jurisdiction over trusts, as any other portion of the corporate property which might be specially agreed to be held in trust by the corporation for its creditors. Unpaid subscriptions are a trust fund for creditors. By the terms of the charter, the Union Pacific Railroad Company should have collected that fund from the stockholders liable for it; the corporation was the trustee of creditors to make the collection of these subscriptions. It has failed in its trust; has violated its duty by not executing that trust. This is the foundation of the equity jurisdiction over the matter of unpaid subscriptions, and being thus founded, it is as broad as the chancery jurisdiction over all trusts. "The foregoing points," counsel continued, "show to the court that this trust fund has been improperly administered, and it only remains to show that the plaintiff's interest is so endangered as to justify the court in exercising its process to preserve the fund created by stock subscriptions. The bill shows that the company has admitted its inability to pay this debt of ten and a half millions, and is, besides, indebted for several millions more. Here is a case of virtual insolvency, with this enormous debt coming due in four months. Upon this state of facts, what is the main relief prayed for? Not any proceedings for the immediate enforcement of these trust stock subscriptions—not any remedies which we can employ in their full force within the next few weeks. We ask only to be protected against fraudulent transfers of the stock; that the trust estate, as it now stands on the stock register, may not be dissipated and wasted; that we may not suffer from the past failure of the corporation to perform its trust in the matter of the stock assessments. We ask for an injunction against illegal and colorable transfers of the stock by which the trust assets will be injured and reduced and the security impaired. Where the transaction (the transfer of shares to an insolvent) exhibits no notice except escape from the liability of the company, and especially where it transpires after the company is publicly declared insolvent, it was held it will be regarded as merely colorable, and not valid. And if the Court of Chancery will declare such transfer fraudulent, it will certainly protest against them and prevent them. The relief here applied for is entirely distinct from the various remedies for the payment and contribution of these stock assessments, whether within or without the statutes. The decisions in reference to the enforcement of such rights by contract or judgment creditors, for debts due or not due, against corporations insolvent or in immediate danger of insolvency, all these questions do not affect the question immediately involved in this bill, whether a court of equity having jurisdiction of a trust can prevent the trust fund being injured, wasted, or impaired." On the question of jurisdiction raised on behalf of defendants Mr. Andrews also argued at great length, contending that the cause of action had arisen in this State; that the company, through its agents, had, in effect, an office here, and that a corporation chartered by Congress could not be regarded as a foreign corporation in any State in the Union.

Ex-Judge Emott, on behalf of defendants, argued against the motion. He contended that the company was a foreign corporation in every State in which its road did not run or the company have an office; that, therefore, the court was without jurisdiction of the case; that even if it had jurisdiction, the facts alleged did not authorize the granting of an injunction; that the money to be derived from the sale of the \$16,000,000 of sinking fund bonds, of the issue of which plaintiff complains, was intended to be applied in discharge of claims similar to that of plaintiff; that the company hitherto had not failed to meet any of its obligations, nor were there any just grounds for apprehending that it would do otherwise in the future, and no facts were shown justifying the relief asked for by plaintiff.

Judge Porter replied on behalf of plaintiff, going over substantially the same ground as Mr. Andrews. In the course of his argument he asserted that it had been made to appear in the case that the company owed debts to the extent of \$82,000,000; that its net income was only \$5,250,000 annually, not sufficient to pay the interest on its indebtedness. The plaintiff, he said, had advanced his money, not on the solvency of the company, for that was a broken reed which would pierce him who leaned on it, but he advanced it on the pledge secured by mortgage to pay the interest on its bonds until payment of the principal. The time—next Fall—was drawing nigh when that principal would be due by the terms of the bonds. Those bonds were made payable before that time at the option of the company, but the company had not seen fit to exercise that option, and when the time to pay arrives, they may say they won't pay. They may say, in effect, "For your money we gave a promise and a pledge; the promise we won't fulfill, the pledge we annul. We elected ourselves \$10,000,000 on record. Instead, we will annul it by putting another deed for \$16,000,000 on record, making it payable at our pleasure, not yours, and override your deed." At the conclusion of the argument, Judge Donohue took the papers, reserving his decision on the motion.

### THE CUSTODY OF MARY ELLEN WILSON.

In Supreme Court, Chambers, yesterday, before Judge Lawrence, Mr. Elbridge T. Gerry appeared, to move for an order of court assigning the custody of the child Mary Ellen Wilson, concerning whom so much has recently appeared in the papers. Mr. Gerry gave a statement of the testimony taken in the case and already published, and which tended to show that the father of the child had been killed during the war, and that about the time the child came into the custody of the Commissioners of Charities the mother had disappeared. Counsel also submitted to the court an affidavit made in reference to the matter by a longshoreman named Thomas McCarthy, of No. 1,465 Second avenue, to the effect that he knew the child's mother; that her maiden name was Fanny Connor, of London; that her father's name was Thomas Wilson, and he was killed in the army; that when the mother came to New-York she went to the Jones House as an ironer, and subsequently went to the St. Nicholas, where she met Wilson, who was an oyster-opener; in 1865 McCarthy saw the mother in Elizabeth street, while the child was at nurse, but after that lost sight of her. The parents of the mother are living in London, England, and they sent a person here in 1857 to look for Fanny and her child, but could not find them. The grandparents are in good circumstances, own the house they live in, and own three others. Their address is, Michael and Mary Connor, No. 6 Laundry-yard, Marsden street, Westminster, London, England. After submitting the record of conviction of Mary Connolly for inhuman treatment of the child, counsel left it to the Court to make such disposition of the child as might be for her best interest, at the same time stating that several respectable persons had offered to take and provide for her. Judge Lawrence reserved his decision, committing the child in the mean time to the custody of the matron at Headquarters.

### ROBBERIES AT A BONDED WAREHOUSE.

John Clark, John Taylor and John Green were arrested yesterday by Detectives Walling and Woolsey of the Central Office, on suspicion of committing a series of robberies at Peok's bonded warehouse, Nos. 3 to 13 Stone street. Capt. Irving of the Central Detective Office was notified on Wednesday that large quantities of goods had been removed from the warehouse, evidently by some of the employes. Detectives Wolsey and Walling were detailed to watch the warehouse, and after lying in wait for some time, yesterday morning they noticed Clark, who is the foreman of the laborers at the warehouse,

in the act of rolling out a barrel of rubber which was conveyed into a junk store near by, where it was left for a short time. It was subsequently removed by John Taylor, a laborer, and John Green, a cartman, to No. 75 Pearl street where they were arrested. Clark was subsequently arrested and the trio are locked up at Police Headquarters to give the Police an opportunity to obtain the evidence necessary to secure their conviction.