

1892

# Power of a Court of Equity in Running and Building Railroads

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## POWER OF A COURT OF EQUITY IN RUNNING

AND BUILDING RAILROADS.

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R. R. DUNIWAY.

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CORNELL UNIVERSITY SCHOOL OF LAW , 1892.



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BRIEF STATEMENT OF THE POWER.

Courts exercise their power in running and building railroads through orders, receivers, and receiver's certificates. A receiver is an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation (~~pendente lite~~) pendente lite, when it does not seem reasonable to the court that either party should hold it. (a) He is not the agent (~~of either~~) or representative of either party to the action, but is uniformly regarded as an officer of the court, exercising his function in the interest of neither plaintiff nor defendant (~~nor~~), but for the common benefit of all parties in interest. (b) Being an officer of the court, the fund or property entrusted to his care is regarded as being in custodia legis, for the benefit of whoever may eventually establish title thereto, the court itself having the care of the property by its receiver, who is merely its creature or officer, having no power other than those conferred upon him by the order of his appointment, or such as are derived from the established practice of courts of equity. (c)

(a) Booth v. Clark 17 How. on #331.

(b) Baker v. Adm. of Backus 32 Ill. 79.

(c) High on Receivers # I. and cases cited.



A receiver's certificate may be defined as a non-negotiable evidence of debt, or debenture, issued by authority of a court of equity, as a first lien upon the property of a debtor corporation in the hands of a receiver. (a) The receiver can only issue such certificates as he is authorized to ~~(a)~~ by the court. If he goes beyond that, and issues certificates bearing false and fraudulent representations upon their face, and places them upon the market for sale, he will be held personally liable to any bona fide holder of such certificates, although the receiver had no purpose to defraud or deceive such holder when he executed the certificates. The certificates ~~(a)~~ must be disposed of in a manner and for a purpose authorized by the order of the court under which they are issued, or they are generally held invalid and of no effect as against the trust estate in the hands of the court. To illustrate: Where receivers of a railroad were authorized to issue certificates to a certain amount, which were made a first lien upon the road, ~~(and the receivers is sued some)~~ in order to raise funds to repair it, and the receivers issued some of these certificates to a person for an entirely

(a) Beach in 3 Law Quarterly Magazine 429.

different purpose, and did not receive any money or loan for the same, such certificates were held to be invalid and of no effect in the hands of a bona fide holder for value. (a) Nearly every quality essential to the negotiability of commercial paper is wanting in such certificates. They bind no one personally, nor can any action be maintained on them against any one. Not having the qualities of negotiable paper they are not assignable so as to bar the equities existing against the payees to whom they are issued. (b)

Courts of equity derive their power to appoint receivers and take property into their custody on account of their extraordinary jurisdiction in supplying "defects in the law." (c)

The power is justly regarded as one of a very high nature, and not to be exercised where it would be productive of serious injustice or injury to private rights. It is a pre-emptory measure, whose effect, temporarily at least, is to deprive of his property a defendant in possession, before a final judgment or decree is reached by the court determining the rights of the parties. And

(a) Receivers of Corporations (Gluck & Becker) page 441.  
Stanton v. Ala. & Chattanooga R. R. Co. 31 Fed. Rep. 485.

(b) Union Trust Co. v. Illinois Midland R. R. Co.  
117 U. S. 434, 456, 460.

(c) Turner v. I. B. & W. R. Co. 8 Bissell (U. S. C.C.) 315.  
Macon & Western R. R. v. Parker 9 Ga. 394.  
Fosdick v. Schall 99 U. S. 235.

since it is a serious interference with the rights of the citizen, without the verdict of a jury and before a regular hearing, it should only be granted for the prevention of manifest wrong and injury. (a)

The power exercised by courts of equity in the appointment of receivers is invoked upon many occasions with great advantage to the parties. It is especially beneficial when there is danger that the subject matter in controversy may be wasted, destroyed, injured or <sup>removed</sup> ~~re<sup>med</sup>~~ during the progress of the litigation; the object of the relief being to secure the fund for the person who may ultimately be found entitled thereto, with as little prejudice as possible to any of those concerned. (b)

The principal grounds upon which courts of equity grant their extraordinary aid by the appointment of receivers pendente lite, are that the person seeking the relief has shown at least a probable interest in the property, and that there is danger of its being ~~lost~~ unless a receiver is allowed; the element of danger being an important consideration in the case. (c)

(a) Crawford v. Ross 39 G a.44. Baker v. Adm. 32 Ill.79.

(b) Mercantile Trust Co. v. R. R. Co. 41 Fed. Rep. 8.

High on Receivers #4 and cases cited.

Jones on R. R. Securities 507.

(c) High on Receivers # II.

The powers and duties of a receiver are defined and limited in the order of the court appointing him. A railroad rarely gets into the hands of a court of equity until it is insolvent and there is a struggle among the creditors for the settlement of their claims. Therefore, until such a state of affairs comes about, a court of equity has no powers whatever in running and building railroads. However, when a company receiving income more than sufficient to pay the expenses of an economical management refuses to apply the surplus to the payment of a judgment or mortgage which is a lien upon its property, a receiver may be appointed. (a)

Since the railroad comes into a court of equity insolvent, and the creditors are striving to satisfy their claims, the law as regards railways in such cases is an <sup>extension</sup> of the law governing <sup>general</sup> cases of insolvency under the same circumstances. Whenever banking, insurance and manufacturing companies become insolvent and creditors start litigation to secure payment of their claims, the method employed is to stop the running of the business by injunction, appoint a receiver to preserve the property

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(a) Covington Drawbridge Co. v. Shepherd  
21 How. 112.

during the litigation, and stop all possible expense.

Then sell the property to the highest bidder as soon as the litigation is ended. From the proceeds of the sale deduct the cost of preserving the property and distribute the rest to those found entitled to it. This has been found to be the best method to pursue because it yields the largest money return to all interested. (a)

The railroad corporation necessitated a different procedure because it would deteriorate in value if allowed to stand unused for even a day. Also it is of a quasi-public character and has duties to perform to the public which necessitates its being kept as a going concern. (b)

It is fundamental in the law that a receivership is temporary---to serve an existing exigency of a temporary nature, and when that is done, it is to cease. (c) Since the causes are complicated the road may be in the hands of ~~as~~ a receiver several years, but it is there only so long as is necessary to determine the rights of those interested.

Courts of equity are reluctant to appoint receivers over a railway and will only do so under the pressure of an absolute necessity. (d)

(a) Barton v. Barbour 104 U. S. on 135 and on.

Coal & Nav. Co. v. Central R. R. Co. 41 N. J. Eq. 167, 174 & on.

(b) Gates v. B. & N. Y. Air R. R. 33 Conn. 333, 342-3.

(c) Judge Barrett in R. R. v. R. R. 50 Vt. 571.

(d) Mil. & Minn. R. R. Co. v. Souther 2 Wall. 510.

But in proper cases they will appoint a receiver to take charge of the railroad, and give him power to preserve, manage and conduct the business, and in doing this to keep the line in repair. In extraordinary cases the courts empower the receiver to buy rolling stock, build bridges, and miles of road, and (to) pay for it with receivers certificates which are a first lien on the income and corpus of the entire railroad property.

For illustrative cases see:

Kennedy v. St. Paul & Pac. R. R. Co.

2 Dillon (U. S. C. C.) 448; s. c. 5 Dillon.

Meyer v. Johnson 53 Ala. 237.

Wallace v. Loomis 97 U. S. 146.

Fosdick v. Schall 99 U. S. 235.

Miltenberger v. Logansport R. R. Co. 106 U. S. 286.

Union Trust Co. v. Illinois Midland R. R. 117 U. S. 434.

Ver. & Canada R. R. Co. v. Vermont Central R. R. Co.

50 Vt. 500.

"It is not unusual" said Mr. Justice Swayne, "for courts of equity to put receivers in charge of the railroads of companies which have fallen into financial embarrassment, and to require them to operate such roads until the difficulties are removed, or such arrangements are made that the roads can be sold, with the least sacri-

fice of the interests of those concerned. In all such cases, the receiver is the right arm of the jurisdiction invoked. As regards the statutes, we see no reason why a court of equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation without its aid." (a)

"The power of a court of equity to appoint managing ~~receiv~~ receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of encumbrances, and to authorize such receiver to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is undoubtedly a power to be exercised with great caution; and, if possible, with the consent or acquiescence of the parties interested in the fund." (b)

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(a) Davis v. Gray 16 Wall. 203.

(b) Wallace v. Loomis 97 U. S. 146, 162.

# EXPLANATION TO RECONCILE CONFLICTING CASES.

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A court of equity derives its power to appoint managing receivers of an insolvent railway and to order repairs, etc. made---the expense of which is a first lien on the railway property---from its extraordinary jurisdiction which enables it to adapt its procedure to all cases which arise and to cure defects in the law. (a) It is absolutely impossible to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of the court in shaping the relief in accordance with the circumstances of particular cases. As the nature and incidents of proprietary rights and interests, and of the circumstances attending them, are practically unlimited, so are the kinds and forms of specific relief applicable to these circumstances and relations. (b)

In many of the cases the mortgaged bondholders apply for the receiver and ask for the expenditure of the money on the property. In such cases they waive their superior lien by asking for the expenditure. There has been very

(a) Adley v. The Whitstable Co. 17 Vesey 315.

(b) 1 Pomeroy's Equitable Jurisprudence 153.



little litigation as to the priority of receiver's certificates as it is generally provided that they are a first lien on the property in the judge's order authorizing them. They are universally held to be prior to liens of all parties who were within the jurisdiction of the court.

The earlier cases extended the principle to insolvent railways which allows the mortgagee to make necessary expenditures for the preservation of his security and charge the same to the property. This was their foundation for making receiver's certificates a first lien on the property. If this was the only ground upon which they could be based the court could make no greater repairs or extensions of the road than a mortgagee could do to protect and preserve his security. The courts have gone farther than that.

The Supreme court of the United States, speaking generally, has held that receiver's certificates may be lawfully authorized "to raise money necessary for the preservation and management of the property."

"No limit has been fixed as to the purposes for which receiver's certificates may be issued, other than that they shall be germane to the objects of the receivership,

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and necessary to the proper administration of the trust." (a)

In *Galveston Railroad v. Cowdrey* (II Wall. 459) it was held that the principle applicable in maritime cases which gives priority of lien to the last creditor furnishing supplies and repairs for the conservation of the ship or voyage, does not apply to railroads.

There was an attempt made to show that the court in ordering liens to be made a charge on the property before the first mortgage bonds were violating the obligation of contracts and that the court did not have that power for it was in conflict with a provision of the United States Constitution. The point was held not to be well taken and very little explanation was given by the courts. The reason seems to be that parties cannot come into a court of equity and receive equitable relief without doing equity to others interested in the same suit; that they cannot ask equity for themselves and arbitrary legal rules for the rest of the parties to the action.

From the peculiar characteristics of railroad mortgages they are never foreclosed without the parties conceding and receiving something besides their strict legal rights

(a) High on Receivers (2d ed.) #398.

and thus an equitable situation is developed and the courts must deal with all parties as equitably as possible. A court of equity will, in the exercise of its sound discretion, take jurisdiction of an insolvent railroad and appoint a receiver over it only in cases of great urgency and when that is clearly the best relief for all the parties interested, including the public. ~~that~~ After the court acquires jurisdiction it has the power, in suitable cases, to run trains, repair, improve and extend the road, and in doing so create first liens on the property. This does not impair the obligation of contracts. Just what the court can do depends on the circumstances of each case. No rule can be given to cover the facts of the cases adjudicated and much less the cases that will arise. The controlling considerations are the necessity for the particular order of the court to protect interests of all parties interested in the property, including the public, and the exercise of entire good faith. The extent of the power of ~~the~~ court is measured by the equities of each case.

The power of a court of equity to run and repair and build railroads and in doing this to authorize the issue of receiver's certificates and to make them a first lien on the property, payable before the first mortgaged

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bonds, is not questioned in any of the cases in our State or Federal reports. The expediency of exercising the power is questioned but not the existence of the power. It has been expressly upheld in many leading cases. The courts are in great confusion as to how far this power extends and what should call it into operation.

The courts of equity will not recede from the position they have assumed in running and building railways, nor will legislation take away their power in this regard, the text-books to the contrary notwithstanding. They will come nearer fulfilling Judge Brewer's prophecy, page 90. This will come naturally when the legislatures reduce the railroad charges so all the lines become insolvent and get into equity. Then the equity judges will be educated up to the point where they can see that by the equity courts running all the railroads in the country justice will be done to all the parties interested, and then the courts will adapt themselves to the new conditions and have the necessary power.

The English courts of chancery declined to appoint receivers to manage railroads on the ground that when Parliament, acting for the public interest, authorized the construction and maintenance of a railway, both as a

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highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. (a) The appointment of receivers of railways in England is now regulated by the Railway Companies Act of 1875, 38 & 39 Vic. ch. 31, making the act of 1867, 30 & 31 Vic. ch. 127 perpetual. They provide for the appointment of receivers of railways.

The courts of New York <sup>ru</sup>deied the claims of employees to be paid ahead of the first mortgage bonds for services rendered within six months before the receiver was appointed. (b) But a statute was passed by the very next legislature making it the duty of the receiver to pay the wages of the employees in preference to all other debts or claims, and no distinction was made between wages earned before and after the receiver was appointed. (c)

From the English and New York statutes, I draw the conclusion that the decision in those places are erroneous and that the courts there should have held the same as

- (a) Gardiner v. London, Chatham, & Dover R. R. 2 L. R. Ch. Ap. 212.  
 (b) Metropolitan Trust Co. v. Tonawanda Valley etc. R. R. Co.  
 103 N. Y. 245.  
 (c) Laws of New York, 1885, ch. 376.

the united States courts have done and thus rendered the statutes unnecessary.

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#### WHY THE COURTS EXERCISE THIS POWER.

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The reason for the exercise of this power by courts of equity is thus stated by Justice Blatchford in Union Trust Co. v. Illinois ~~Midland~~ Co. 117 U. S. on page 455: "Property subject to liens and claims and debts, of various characters and ranks, which is brought within the cognizance of a court of equity for administration, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved property land may lie idle, with only payment of taxes. Improved property should be rented. Movable property which is not perishable may be locked up and kept; but if perishable, it must be sold by way of preservation. A railroad and its appurtenances are a peculiar species of property. Not only will its structures deteriorate and decay and perish if not cared for and kept up,

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but its business and goodwill will pass away, if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it, were given not merely for private gain to the corporation, but to furnish a public highway; and all persons who deal with the corporation as ~~as~~ creditors or holders of its obligations, must necessarily be held to do so in the view, that, if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property, by a sale, into other hands, to have the purposes~~of~~ of its creation still carried out, the court, while in charge of the property, has the power, and, under some circumstances, it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent or on prior notice . Consent is desirable, but is seldom practicable, where the debts exceed the value of the property."

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## THE BONDHOLDERS ARE ENTITLED TO WHAT?

*The mortgage bondholders are only entitled to the net income of the railroad to pay their debt and interest before the mortgage is foreclosed. When railroad property is in the hands of a receiver he has full authority to use all the income to pay the necessary running expenses, if it is needed. He can take the surplus of the income over the running expenses to make repairs, buy rolling stock, etc., when it is for the benefit of all parties interested. In such cases the receiver should have an express order of the court allowing him to do so. (a)*

The mortgage bondholders are only entitled to the net income of the railroad to pay their debt and interest before the mortgage is foreclosed. When railroad property is in the hands of a receiver he has full authority to use all the income to pay the necessary running expenses, if it is needed. He can take the surplus of the income over the running expenses to make repairs, buy rolling stock, etc., when it is for the benefit of all parties interested. In such cases the receiver should have an express order of the court allowing him to do so. (a)

"Notwithstanding this, if the company be not declared insolvent, or if no application be made in its behalf for the assistance of a court of equity, the persons holding the claims for labor and necessary supplies and materials have no position superior to any general creditor. They have no lien or claim upon the earnings, and if they seek payment, and it be refused, they are put to their suit at law as an ordinary creditor. But if the railroad company come into or is brought into court, and it appears

(a) Fosdick v. Schall 99U. S. 252.

Hale v. Railroad Co. 60 N. H. 333, 341 and cases cited.

Atchins v. Petersburg R. R. Co. 3 Hughes (U.S.C.C.) 502.



that within a reasonable time before this, the normal and  
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ust disposition of its earnings has been disturbed, and  
that the mortgage bondholders have received interest from  
these earnings, or that, in part or in whole, these earn-  
ings have been used for their advantage, or for that of  
the stockholders, leaving laborers, material men, unpaid,  
then the courts create an equity in favor of this latter  
class. They follow the sums so diverted from the just  
and normal mode of distribution. They order it restored,  
primarily, out of such earnings as the receiver may have. If  
these prove deficient, the restoration is made out of the  
corpus, which has been improved or made productive by the  
diversion. Were it not for the diversion---this taking of  
the money justly applicable to one class and using it for  
the benefit of another---the equity could not exist. If  
there be no earnings, or if the earnings are insufficient  
to pay expenses, and there be no <sup>ne</sup> ~~perman~~ improvements  
made, and no interest whatever paid, upon no principle of  
law or equity could the bondholders be made to pay out  
of <sup>their</sup> ~~his~~ own property the debts of a common debtor. This  
would not only be a thorough disregard of the sanctity of  
a contract obligation, (Kneeland v. Trust Co. 136 U. S. 97),  
but also would be confiscation of property. So all these

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conditions must concur before the equity will be applied. The railroad company must have been kept a going concern. The creditor must have aided with necessary material, supplies , or equipment in so keeping it a going concern. It must have made earnings. These earnings must have been used, in whole or in part, in the payment of interest, or in making permanent improvements, or for the benefit in some way of the mortgage creditors or stockholders. See Burnham v. Bowen III U. S. 781-2. When all these concur a court of equity, which is called upon to foreclose the mortgage or to administer the affairs of the company, will see to it that all earnings which may have been diverted from their proper disposition will be restored from earnings in the hands of the receiver, and, these failing, from the corpus." (a)

The above opinion is correct, but it must be read with the cases it cites or it will be misunderstood. Any diversion, or any benefit, received by stockholders or bondholders by action of these enumerated creditors will give them an equity against the corpus, If needed. (b)

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(a) Finance Co. v. Charleston C. & C. R. R. Co. 48 Fed.188.

(b) Burnham v. Bowen III U. S. page 781.

## NOTES ON SOME OF THE EXTREME CASES.

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Other cases go a great deal farther and it may be laid down as a general proposition that all outlays made by the receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful are fairly within the limit of discretion which is necessarily allowed to a receiver entrusted with the management and operation of a railroad in his hands. His duties, and the discretion with which he is invested are very different from those of a passive receiver, appointed merely to collect and hold money due on prior transactions, or rents accruing from houses and lands. And to such outlays <sup>in</sup> ordinary course, may properly <sup>be</sup> referred, not only the keeping of the road, buildings, and rolling stock in repair, but also the providing of such additional accommodations, stock and instrumentalities as the necessities of the business may require, always referring to the court, or to the master appointed in that behalf, for advice and authority in any matter of importance, which may involve a considerable outlay of money in lump. (a)

(a) Cowdrey v. R. R. Co. I Woods page 336.

Gilbert v. Washington City etc. R. R. Co.

33 Gratt. (Va.) 586, 624.

The principle ~~de~~ laid down in Wallace v. Loomis was applied in Miltenberger v. Logansport Railway Co. (106 U. S. 286, 311, 312.) In that case a bill was filed by a second mortgagee against the mortgagor, and a first mortgagee, and judgment creditors of the mortgagor, to foreclose a mortgage on a railroad. On the day the bill was filed, and without notice to the first mortgagee, a receiver was appointed, and power given him to operate and manage the road," receive its revenues, pay its operating expenses, make repairs, and manage its entire business, and to pay the arrears due for operating expenses for a period in the past not exceeding ninety days, and to pay into the court all revenues over operating expenses." After this, and without notice to the first mortgagee, who had not appeared, though notified of the order appointing the receiver, and of the pendency of the suit, the court authorized the receiver to purchase engines and cars, and to adjust liens on cars owned by the mortgagor, and to pay indebtedness, not exceeding \$10,000, to other connecting lines of roads, in settlement of ticket and freight accounts and balances, and for materials and repairs, which had accrued in part more than ninety days before the order appointing the receiver was made, and

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to construct five miles of new road, and a bridge. The petition for the order stated the necessity for the rolling stock and for the adjustment of the liens; that the payment of the connecting lines was indispensable to the business of the road, and it would suffer great detriment unless that was provided for; and that the new road and the bridge would come under the mortgages, and that their construction would be to the advantage of the bondholders. After the first mortgagee had appeared ~~(and)~~ and answered, an order was made, but not upon prior notice to it, authorizing the receiver to issue certificates to pay for rolling stock he had bought under orders of the court, and to pay debts incurred for building the five miles of road and the bridge, under those orders, and to pay debts incurred for taxes and rights of way, and back pay and supplies in operating the road, the certificates to be payable out of income, and if not paid, to be provided for by the court in its final order. Claims thus arising were afterwards allowed, to be paid out of the proceeds of the sale, before the mortgage bonds, and the United States Supreme Court sustained the decision.

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Shaw v. The Railroad Co. (100 U. S. 605) holds a careful consideration by the courts is necessary before they grant petitions asking for the appointment of receivers of railroads and that receivers should not be appointed to manage a railroad if any other arrangement can be made.

Kneeland v. American Loan & Trust Co. (136 U. S.) 89) holds the appointment of a receiver of a railroad vests in the court no absolute control of the property, and no general authority to displace vested <sup>contract</sup> liens, and when a court makes such an appointment it has ~~no~~ right to make the receivership conditional on the payment of any unsecured claims, except the few which by the rulings of the United States Supreme Court have been declared to have an equitable priority; it being the exception and not the rule that the contract priority of liens can be displaced. In this case there was a first mortgage on the road-bed and real property of the railroad and also a first mortgage on the rolling-stock. A judgment creditor had a receiver appointed of the entire property to see if the judgment creditor could not obtain payment from surplus income. The income failed to pay running expenses and interest on the mortgages. Then the mortgagee of the real property took proceedings to foreclose his mortgage and had a receiver appointed to take charge of all the railroad property and manage it. The mortgagee of the

rolling stock, at the distribution of the proceeds from the sale of the real property, wished to be paid all the deficit which had accrued to him through both receiverships from the smallness of the income of the road. The court allowed the claim for the second receivership, but not the first. In the first case the mortgage of the real property had suffered equally with the mortgagee of the rolling stock, but in the second case his application to the court to take the rolling stock and use it for his benefit made it equitable that he should pay for the use of the property during that time.

This extraordinary jurisdiction of a court of equity is not confined to railroads, but extends to anything which is of public concern, <sup>when it</sup> ~~and~~ is necessary to exercise this jurisdiction in order to prevent a failure of justice.

Jerome v. M'Carter, <sup>94</sup> 94 U. S. 734.

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### CRITICISM OF THIS POWER.

~~/s/ [redacted] /~~

There has been a great deal of criticism uttered on this extraordinary jurisdiction of a court of equity. The late Judge Baxter, of the United States Circuit Court, for the Sixth Circuit, in the unsavory Pease Receiver Case, and elsewhere, is reported to have expressed himself strongly against the practise of issuing receiver's certificates. See II Chicago Legal News, 8, where a case is cited of a Georgia railroad which cost \$15,000,000; the receiver in three years issued certificates to the amount of \$1,500,000, and upon a sale ~~(of)~~ the road did not bring enough to redeem the certificates! In another case, in Michigan, when a road which had cost \$8,000,000, came to be sold at the termination of a receivership, the counsel asked the court to fix the minimum price, so that enough might be secured to pay the receiver and his counsel!!! Ibid.

"Whilst under the care of a court of equity, property <sup>must</sup> ~~be~~ preserved in statu quo as nearly as possible; that is is an actual necessity, and it is fair to infer that all the parties interested gave an implied assent in advance to



the use of the means necessary to that end. To feed livestock; to prevent a house from falling down or burning up; to stop the leaks in a ship to prevent its sinking; these acts, and others like them, are of such actual indispensable necessity that every mind at once assents to their performance. Their omission would amount to gross negligence, sufficient to make the bailee responsible; and the idea of discretion could scarcely enter into consideration. But when you go beyond this, and invoke the interposition of discretionary powers, you pass into a veritable dreamland. Alas for the day when the owner's right and title to property can be subjected to the discretion of any court, and when a constitutional provision can be made subject to the idea of an undefined necessity! It has been said that you cannot measure a live snake; THAT is quite as easy a task as to measure the necessities of a railroad for m<sup>o</sup>ney, when in the hands of a receiver. If anything beyond such acts of necessity as are enumerated above should require the outlay of money, it is far more consistent with the principles of our Constitution and laws, and with the rights of the parties, to call a meeting of those interested,

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to obtain their consent to the expenditures, than to make unauthorized appropriations, through the exercise of discretion, upon the <sup>11</sup>idea of improvement to the property."

Alex. M. Clayton, 13 American Law Review 41.

"Now, nothing is clearer than that this impairs the obligation of contracts between mortgagors and mortgagees. What the State cannot do, and what the Federal government must not do, a Court of Chancery ought to hesitate to do. It cannot be seriously questioned that the exercise of this power by the court impairs, quoad hoc, the obligation of the mortgage contract, and in practise it is notorious that it frequently diverts a large portion of the mortgage security. It is little short of monstrous that a court of chancery should assume the exercise of such a power, and unless the courts themselves recede from the position lately taken upon this question, and abandon the pernicious practice of authorizing receiver's certificates for any other purpose than to preserve the property from destruction, or to protect the public in the use of the highway, and of making such certificates a lien prior to the mortgage liens, except by the unanimous and express personal assent of the bondholders, the legislature must

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be invoked, and we shall present to the eye of the world the unseemly spectacle of legislatures--- such as we have in this country--- enacting statutes to prevent plunder and the impairment of contracts by the Courts of Chancery!!"

Charles Fiske Beach, Jr. , Law Quarterly Review 439.

In Credit Co. of London v. Arkansas Central R. R. Co. 15 Fed.Rep. 49, Judge Caldwell said : "In the case of Paine v. little Rock & Ft. Smith R. R. Co. , April term, 1874, application was made to this court to authorize a receiver to issue certificates, which were to be a <sup>first</sup> lien, to build sixty miles of road., in order to earn a large and valuable land grant, which would lapse in a short time unless the road was completed. A majority in value of the first mortgage bondholders concurred in the application; and the orders of the court in the case of Stanton v. Alabama & Chattanooga R. R. Co. and the case of Kennedy v. St. Paul and Pacific R. R. Co. were pressed upon the attention of the court. But the order was refused, upon the ground that it was no part of the duty of a court of chancery to build railroads, and that the assent of all the parties interested in the property could not make it such. And there is no difference, so far as relates to this question; between building a railroad and making extensive and gen-

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repairs and betterments, the cost of which sometimes approximates the cost of original construction. In the case referred to, of the Fort Smith railway, the proceedings to foreclose were speeded and a decree rendered to meet the exigencies of the case, which the Supreme Court approved, (a) and said 'was a more desirable plan' than to issue receiver's certificates."

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(a) Shaw v. Railroad Co. 100 U. S. 612.



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, thus having studied at the feet of Gamaliel, I learned to believe that the and processes powers of a court of equity are equal to any and every emergency. They are potent to protect the humbles 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 another suggestion: The railroad world of to-day 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, railroad companies 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

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that the government take possession of all the railroads, and itself become the great common carrier. Is it not possible that the power 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?"

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