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THE UNION TIMES.

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U. S. Census 1880 --- 1,570
Police Census 1895 --- 2,990
Estimated now --- 3,500

Probate Office

VOL. XXVII.--NO. 42.

UNION, SOUTH CAROLINA FRIDAY, OCTOBER 16, 1896.

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THE C. K. & W. MUST RUN.
OPINION FILED BY JUDGE TOWNSEND.

RELATIVE RIGHTS OF RAILROADS AND THE PUBLIC—FRANCHISE WAS SOLD WITH THE ROAD—PUBLIC ENTITLED TO ITS EXERCISE—THE ORDER TO BE CARRIED INTO EFFECT FORTHWITH.

The long looked for decree from Judge Townsend in the C. K. & W. mandamus case arrived yesterday afternoon from Union and was filed in the clerk's office.

The prayer of the petitioners was granted and Jas. T. Williams is ordered to forthwith start operations on the road for the transfer of passengers and freight. If he doesn't wish to do this he must sell the road to some one who will.

The judge reviews at length the question of a railroad being a public highway in the operation of which the public retains vast interest, and quotes numerous authorities in support of his contention that the road must be kept in operation.

The franchise was sold along with the road. The right to operate a road is a franchise and the public is entitled to its exercise by the power.

The decree abounds in many delicate points of law and touches upon one of the greatest questions of the age—the relative rights of railroads and the public.

The attorneys interested in the case are Shuman & Dean and Haynes & Bush on the one side, and T. P. Cothran and Mr. Williams, on the other.

Following is the text of the decree: **STATE OF SOUTH CAROLINA, COUNTY OF GREENVILLE, In Court of Common Pleas.**

The State, ex-relations, T. B. Cunningham, John H. Roe, W. W. Benson, R. W. Anderson, H. Y. Batson, and E. M. Froeman, relators, vs. James T. Williams, owner of the Carolina, Knoxville & Western Railroad and its property and franchises, respondent.

This is a proceeding to obtain a writ of mandamus against James T. Williams as owner of the Carolina, Knoxville and Western railroad, commanding him to operate the road. The said road is in Greenville county. The application for the rule was made by Judge Earle on September 4th, 1896. He issued a rule, but as he was about to leave Greenville to hold court in the second circuit he made it returnable before me at Union, S. C.

The C. K. & W. R. Co., was a corporation created by the act of legislature, and possessed power to condemn lands for rights of way. It also possessed the right to receive aid from municipal taxation. The company was duly organized and received large public aid in the form of township bonds. In the year 1889 a portion of the road from Greenville by the towns of Travelers Rest and Athens to the town of Marietta in Greenville county, a distance of 12 miles, was completed. It seems that this portion was received by the railroad commissioners of the State, and that from the year 1889 it has been operated as a common carrier. In 1892 a suit was commenced in the United States court to foreclose a mortgage on the railroad and its franchises. In this suit, H. C. Beattie was appointed receiver, and under order of the court continued to operate the road. During the latter part of July 1896 the road was sold under decree of foreclosure and Jas. T. Williams became the purchaser. He immediately ceased to operate the road and has declined to run any trains upon it for the accommodation of the public. Since the road was

first established business communities have sprung up along its line and they are absolutely dependent upon its operation for railroad transportation.

The respondent in his return takes the position that he cannot be compelled to operate the road inasmuch as he was only a purchaser of the property and was under no obligation to carry on business of a common carrier. He says, further, that the railroad is in a bad condition and will not pay running expenses and that he is unable financially to operate it.

Railroads are public highways. They are authorized to be constructed more for the public good than for private gain. The companies constructing them are vested with power to condemn lands for rights of way; but private property cannot be taken except for a public use. Taxation for their construction has been held by all the courts, yet taxes can be levied only for public purposes. Railroads are therefore matters of public concern; the public has in them an easement as it has in canals, turnpikes, etc. The railroad itself is owned by the company, but this ownership is subservient to trust in favor of the public. The relative rights may be stated thus:

The public has the right to services of the railroad upon payment of lawful and reasonable charges; the owner is bound to render this service and can deny it to none, but he has the right to exact for such services charges that are reasonable and lawful. No act of the owner can deprive the public of its right except by the law of the land. The right of user is a trust which is impressed upon the railroad property itself.

See also 19 A. & E. Ency, law 780 (Scott vs. Fon Du Lac Co. 16 Wall 78. R. R. Com'r. vs. P. & R. Co. Me) Am. R. 208. Sharpless vs. Mayor (Pa.) 59 A. Dec. 774. L. & C. R. Co. vs. Chappell; Rice 84. Averill, Receiver vs. So Ry. Co. et al. Miss.

It is urged that, however, the doctrine of these cases may apply to railroad property in the hand of the original company, it has no application when the road has been sold to a third party under foreclosure proceedings. This proposition is unsound. The railroad itself is a highway. The easement belonging to the public is the road, and a trust is impressed upon the property. These public rights attach to the property and in no case depend upon a merely personal contract of the original corporation. While such company is bound to exercise the duties of a common carrier this obligation arises by reason of its relation to the road. The trust being impressed upon the property passes with it, and binds it in the hands of all purchasers. It is a fair doctrine of the law that wherever property affected by a trust is sold the purchaser will be bound by the trust. By his own act he binds himself to a public duty, and so long as his relation of ownership continues so long will he be bound to exercise this duty. The railroad company can mortgage or sell no other right than it possesses.

It is further urged that the statutes of this State do not contemplate that railroads shall be operated by private persons, but only by corporations; and reference is made to Gen. Sts. 610 et seq, providing the manner in which purchasers of railroad property may organize a corporation to operate the road. It is possible

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for some reasons of their own would decline to operate it. There is hardly a town in the South that would not suffer and property would decline in value; business would dry up and ruin and disaster would be general. Yet this would be the direct result from the doctrine insisted upon by the respondent, that the purchaser of railroad property is bound to no public duty. Railroads, irrespective of the question as to whose hands they may be in, are bound to public service.

"So overshadowing is this interest of the public that there must be no cessation even for a day in their operation;" Judge Simonton in Averill, Receiver vs. So. Ry. Co. et al.

From this use (which the public has in the railroad) neither the corporation itself, nor any person, company or corporation, deriving its title by purchase, either at voluntary or judicial sale, can divert it without the assent of the State. State vs. Dodge, City M. & T. R. Co. (Kan.) 42 Am. St. R. 295.

"But the public retain certain rights of vast consequence in the road and its appendages, which neither the company nor any creditor or mortgage can interfere with. They take their rights subject to the rights of the public and must be content to enjoy them in subordination thereto." Barton vs. Barber, 104 U. S., 135. In Metz vs. Buffalo C. & R. R. Co. (N. Y.) 17 Am. R., 201. The railroad having been purchased by private persons, the court held that they (the purchasers) "acquired the track, fixtures, rolling stock, etc., together with the rights or franchise of using it for the same purpose as the company was authorized to use it, subject to the same duties to the public."

It is further urged that the statutes of this State do not contemplate that railroads shall be operated by private persons, but only by corporations; and reference is made to Gen. Sts. 610 et seq, providing the manner in which purchasers of railroad property may organize a corporation to operate the road. It is possible

that under this section it becomes the duty of purchasers to form themselves into a corporation. But it is clear that the neglect of this duty cannot absolve them from the public duty of operating the road. The statute was intended to protect the public, and it will not be so construed as to afford a purchaser of railroad property an escape to elude a public duty.

We have thus seen that the right to operate a railroad is a franchise and that the public is entitled to its exercise by the owner. This is a public duty. The general rule is that where there is no other appropriate remedy, mandamus is proper to compel the exercise of a franchise or the performance of a public duty. The right to this remedy does not depend upon the character of the person (whether corporate or individual) against whom it is asked. It depends rather upon the character of the duty to be performed. A public officer who declines to exercise the functions of his office will be compelled to do so by mandamus. In such a case, the mandamus is asked against an individual, but the object is to compel the performance of a public duty. So here the mandamus is asked against Jas. T. Williams as the owner of a railroad to compel him to perform a public duty. I think that mandamus is the appropriate remedy. King vs. Severn Wye Ry., 2 Bran. & Ald., 646. People vs. Albany R., 24 N. Y., 261. Ohio & M. R. Co. vs. People, (Ill) 11 N. E., 249. State vs. N. E. R., 9 Rich., 247. People vs. C. & O. R. Co. N. E. R., 587. Brownell vs. Old Colony R. Co., 49 Am. St. R.

The respondent further claims that the writ ought not to issue against him because of his financial inability to operate the road. It will be remembered that he became the owner by his voluntary act, and thus became bound to the performance of this public duty. One who voluntarily assumes an obligation cannot be relieved from it by the court. So long as the respondent retains the ownership of

[CONTINUED ON EIGHTH PAGE]