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Pennsylvania Legislature.

HOUSE OF REPRESENTATIVES.

EVENING SESSION.

WEDNESDAY, February 13.

LATERAL RAILROADS.

Agreeably to order.

The House proceeded to consider the bills on the public calendar, and went into Committee of the Whole, (Mr. Passon in the Chair), on House bill, No. 180, entitled "a supplement to the Act relating to lateral railroads."

The first and only section of the bill was read as follows:

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That the Act approved the twentieth day of April, Anno Domini one thousand eight hundred and fifty-eight, entitled "An Act regulating lateral railroads," passed May fifth, one thousand eight hundred and thirty-two, shall not be so construed, or have the effect to impair or take away the right of appeal existing prior to the passage of said supplement, but the bond provided for by the said supplement shall be further conditioned for the payment of all damages which the owner or owners of the land may sustain, in case of the failure of the petitioner to obtain the final approval and confirmation of his said road.

Mr. WILLIAMS. This bill was reported by the Judiciary Committee without any dissent, I believe, in that body. It proposes to enact a provision unquestionably right. It looks to the restriction of the trial by jury in a case where it has been taken away by a late decision of the Supreme Court. It has produced some disturbance in the district from which I come, amongst a particular interest—not amounting, perhaps, to a great deal. A pamphlet has been thrown upon our tables, (designed, I suppose, to influence the members of the Legislature), in regard to the merits of this question, referring also to myself as having been professionally employed in some cases out of which this difficulty has arisen. This state of facts seems to make it necessary for me, if that duty were not imposed by my relations to the Committee and to the House, to make such explanations as the circumstances of the case may require.

I do not know whether the merits of this bill are understood even in Pittsburgh. There are parties there who desire its passage; there are other parties who protest against it. Those who desire its passage are the land owners; those who object, are the men who have an interest in obtaining the right of way through and over the property of these land owners.

The bill will, be discovered, upon examination, to be an entirely harmless one. It proposes to repeal an Act passed in the year 1858, and to restore the law to the position in which it stood before the passage of that enactment. That act will be found on page 1265 of Purdon's Digest, and reads in this way:

"Hereafter in all cases where a petition has been presented for the appointment of viewers under the provisions of the said Act, and its supplements, it shall be the duty of the viewers appointed to report in writing whether the road asked for is necessary for public or private use, as well as the damages which will be sustained by the owner or owners of intervening lands; and when in the opinion of the Court the road is necessary for public or private use, it shall be lawful for the petitioner or petitioners, upon giving bond, with one or more sureties, to be filed with the petition, and to be approved by the Court to which such petition shall have been presented, conditioned for the payment of such damages as shall be assessed under the provisions of the Acts to which this is a supplement, to proceed in the opening, constructing, completing and using the said railroad with one or more tracks, as prayed for in said petition."

Now, Mr. Speaker, by the provisions of the Lateral Railroad Act of 1852, to which this is a supplement, the final proceeding was a view by six men appointed by application; by the court, the route itself being indicated as well as the objects. It was the duty of these viewers to report whether they regarded the road as necessary for public or private use, if they found affirmatively upon this point, it was their duty to assess the damages which were likely to be sustained by the owner of the land over which the road was to pass. Upon objections made to their report, by other parties, they might consider themselves aggrieved, the right to an appeal to the courts—the trial by jury as a matter of course—was allowed to the complainant. In the meanwhile, however, there was no authority to enter upon the land. But to prevent any undue delay, the Act of 1852 contained a provision that the case should be placed at the head of the trial list, at the next ensuing term of the Court of the particular county. This was with a view to the speedy settlement of the question.

This condition of the law, however, was not satisfactory to the parties. As it stood upon the appeal, courts when it came into court, everything which had been tried before was to be tried over—the question as to the necessity of the road, (the great question in cases of this sort), and the question as to the amount of damages to be sustained by the land owner, in case the road should be deemed necessary. Cases were applying for roads of this sort, not content with awaiting the final action of the court, came to this Legislature in 1858, and procured the passage of an Act of Assembly, which is now proposed to be, to some extent, repealed, or, at all events, modified—an Act authorizing them in the meanwhile, before the decision of the cases in court, upon giving bond with sufficient security for the land owner, and which was sustained by the land owner, to enter upon the land. It was intended, by this Act of Assembly, that the right of appeal should be taken away. No lawyer dreamed that this was to be the effect. The Courts of Allegheny county, in several cases which have been before them, have never entertained the idea that such would be the construction of the law. But it has recently been decided by the Supreme Court of this State, in an opinion which I have now in my desk, published in the Pittsburgh Evening Journal within the last few days, that the effect of this Act of Assembly, authorizing the entry upon land upon appeal, is to take away, by implication, the right of trial by jury, and that in the case of the high prerogative of seizing the property of an individual, for private uses.

Now, sir, there is no Court in this Union except the Supreme Court of Pennsylvania which has ever held the doctrine that private property can be seized for private uses—a doctrine which I affirm to be entirely repugnant to the views of the highest authorities in this Union to be at war with the very ideas of republican government. But the Supreme Court of Pennsylvania have met this question, and so decided in very terms, that private property—your property or mine—may be taken from us and transferred to a third person. I say there is no Court in the

Pennsylvania Telegraph

"INDEPENDENT IN ALL THINGS—NEUTRAL IN NONE"

VOL. XIV. HARRISBURG, PA., SATURDAY AFTERNOON, FEBRUARY 16, 1861. NO. 38.

Union which has ever made such a decision other than that of the Supreme Court of Pennsylvania. I say that the doctrine is at war with the idea of the existence of property, a term which, as etymology indicates, is intended to refer to what is a man's own, to be used by him as he pleases.

Waiving the question, however, as to the right to take private property for private use, which I do not propose to raise now, and which is not in any way involved in this bill, the Supreme Court decided that the effect of the Act of 1858 is to take away the right of trial by jury by implication; or in other words, that because it allows a petitioner to enter and assert his right, pending the appeal, the Legislature must have intended that he should acquire property in the road, which could not be divested; and that the province of the jury must consequently be confined to the mere question of ascertaining the damages which the land-owner may have sustained.

Now, sir, in matters of this sort, there are two questions. The first is, as I have remarked, as to the necessity of the road. Now, the right to take private property for public purposes, depends upon the necessity of the case. This is the right of eminent domain, as it is called among the publicists. It is an inherent attribute of sovereignty as is the taxing power. It cannot be exercised under the Constitution of this State, however, without making compensation to the owner. If it may be exercised to take private property for private uses, then that property can, as well be taken without compensation as with it; for there is nothing in the Constitution to forbid it. But this point—it is the necessity of the case upon which the right of eminent domain rests. It is the same necessity which authorizes the Government to seize the property of a citizen on the occasion of great public exigency for purposes of National defense.

It is altogether to the right which has been exercised over and over again of tearing down a building contiguous to another which is in flames in a populous city, for the purpose of saving other property in its neighborhood. It depends upon the necessity of the case. It is a high prerogative power. It is only to be exercised in extraordinary cases where the public necessity absolutely requires it. Here, however, it is exercised for private purposes; private property is taken for private use, and yet the Supreme Court of Pennsylvania held that the right of trial by jury recognized in your Constitution, which is but a transcript of Magna Charta, is to be taken away in a case of this sort by mere implication. There is nothing, Mr. Chairman, in the Act of Assembly that does take it away. There is no language of the sort. There is merely the authority to enter upon the property, and, as an inference from that power, this Court has ruled that Magna Charta is to be trampled into the dust.

Now, sir, I have no particular feeling in regard to this case. It is suggested in the pamphlet which has been laid upon your tables that I am a professional man, and have been concerned in some cases of this description. This is very true, and I have no objection to its being so stated. I have not been concerned in the Courts of this State—and pretty largely concerned. But I think my position here, now, with my plough in the furrow at home, ought to satisfy every man that professional considerations are not to be allowed to influence me when I am called upon to perform public duty.

I would say, moreover, in answer to this pamphlet which has been laid upon your tables, that there is a very worthy gentleman in the Senate who has been concerned in the same cause in which I am supposed to have been employed, on the other side of the question, and that gentleman is perfectly competent to defend the interests of all parties. No man will doubt his interest in the subject, or his capacity to treat it properly. No body, I think, will suffer in that branch of the Capitol. If one side has a legitimate right to the property, the other side is still represented there. I think, however, that he and I will not differ upon this question. There was no difference in the Judiciary Committee. The members of that Committee all agreed, if I understood them properly, (and if I did not they will correct me), that it was but right that the trial by jury which is the palladium of the liberty of the citizen—if it has been taken away by inference it should be restored, and that that right ought to exist in every case where the question is in regard to the seizure of the property of a citizen. It is for this that this very objectionable bill provides. I will turn for a moment to its terms:

"That the Act approved twentieth April," etc., shall not be so construed as to have the effect to impair or take away the right of appeal existing prior to the passage of the said supplement.

This bill is to restore the right of trial by jury. *Prima facie*, it is a case which commends itself to the judgment and to the heart of every man who participates in the common inheritance of Saxon liberty. I think there is nobody here who will object to the application of the jury trial in any case; and that all that is proposed to be restored here, in a case where it has been taken away by the construction of a law, which I beg leave to say in this particular case has not shown that regard for private rights which is to be expected from a tribunal of that eminence.

There is a further provision:

"That the bond provided for by the said supplement shall be conditioned for the payment of all damages which the owner or owners of land may sustain in case of the failure of the petitioner to obtain the final approval and confirmation of his said road."

The assumption of the Court is that the Act of 1852 gives to the petitioner the title, and leaves to the jury nothing but the question of damages. An objection was taken in our courts that there was no provision for the contingency of a determination or decision by the jury that the road was not necessary—which is the great question in cases of this sort. It was objected, therefore, that the Act itself authorizing the entry and advance, was in conflict with the constitutional provision, which declares that the Legislature shall not authorize any corporation or individual to take property without payment of security before the property is taken.

It was objected that the effect of this law was such that in a given contingency there was no provision within the meaning of the Constitution for the security of the citizen; and that was the opinion I believe of the Courts of Allegheny county. They did not believe in the idea that they do not entertain the idea that if I understood them—that the effect of this Act of Assembly was not to be what the Supreme Court has given to it. The bill now before us provides that the bond shall be conditioned for the payment of all damages which the owner or owners of the land may sustain in case of the failure of the petitioner to obtain the final approval and confirmation of his said road.

The question of the necessity is the great question. We desire that this shall be restored to the province of the jury where it properly belongs. We desire that there shall be a provision made in case the jury shall decide upon the appeal that the road is unnecessary, for all damages which may have been sustained by the land owners at the hands of the petitioners. Is this wrong? Can anybody say that it is?

I hope, Mr. Speaker, that I have made myself intelligible. The members of this House are of course not all lawyers, and an act of this sort, without the explanation which I have given, would be unintelligible to many of them. If I am wrong in any of my statements, professional gentlemen here will correct me. I shall be glad to be set right. I have no desire to mislead anybody. I come here as a representative of the people, claiming on the part of the land owner the right of trial by jury. That is all.

Mr. HUHN. Will the gentleman allow me to ask him a question?

Mr. WILLIAMS. Certainly.

Mr. HUHN. I desire to arrive at the merits of the bill, and with that view I ask this question. The people of this county of Schuylkill have a great many lateral railroads. I desire to know whether by this bill the gentleman proposes that before we can construct a lateral railroad it will be necessary, (if the land owner appeals from the decision of the viewers appointed), to await the decision of the Court before the ground can be occupied.

Mr. WILLIAMS. Certainly; that is precisely what the law was before; and in order to expedite the matter my worthy friend will find it provided in the Act of 1852 that the case shall be put at the head of the trial list of the next ensuing Court.

Mr. HUHN. Then, Mr. Speaker, I must oppose this bill, because I believe that no lateral railroad can be constructed in our county, if, before the road can be made, it must await all the circumlocution of litigation upon appeals in the Supreme Court, by the decision of the viewers appointed for the purpose of assessing damages. (In the county of Schuylkill, such a construction of the law would certainly operate very disadvantageously to the improvement of our county. I feel, sir, that in some cases where land is occupied for the purpose of improvement by lateral railroads; the decision of the viewers, if appealed from and taken to the Courts, would not be adjudicated for years; therefore the construction of those roads would be delayed for years in our country. That would be the effect of this law, taking the construction placed upon it by the gentleman from Allegheny, which he admits to be the proper view of the question.)

Mr. BURNS. There is something in this bill which I do not understand; and I think there will be no objection to the amendment which I offer, and as an inference from that power, this Court has ruled that Magna Charta is to be trampled into the dust.

"Provided that nothing in this Act shall be so construed as to affect any case now pending in any Court in this Commonwealth."

Mr. WILLIAMS. I do not know what will be the effect of this amendment. I really do not know what cases are pending in any Courts of this Commonwealth. I could scarcely put my finger upon one of them. But if this bill is applied to the cases now pending in the Courts of this State, and in the Courts of Assembly is one which I undertake to say, no ten, no five able lawyers in this State, would ever have put upon it. It was supposed by our own Courts, when left home, that the trial by jury existed in such cases. It is in consequence of this very extraordinary decision of the Supreme Court, which I have referred to, that all this difficulty has arisen. They now find their rights imperilled and they want the law restored to what we believe to have been the intention of the Legislature. Trial by jury did exist under the Act of 1852; it did exist under the enactment of the Act of 1858 which is now proposed to modify.

There is nothing in the Act of 1858 to take away this right of trial by jury. This is a mere implication on the part of the Supreme Court against a private right—against, I may say, an important public right—an implication against jury trial. That is what we desire to have corrected—not for the benefit of A. or B. or anybody in particular; but why should we exclude from this privilege those who happen to be involved in litigation now. I think the members of the legislature who look at this Act will see at once that it never intended to take away the right. There is not a word of the sort in it.

That right is taken away by construction of law—by an arbitrary decision of a Court which has never paid much regard to private rights or private property. I know no reason, why there should be an exception in regard to any portion of that gentleman's constituents or the constituents of any other member of this Legislature.

The amendment was agreed to.

The section as amended was agreed to.

The Committee rose, and the Chairman reported the same to the House with amendment.

The section was read a second time.

Mr. WILLIAMS. I move to strike out the proviso inserted as an amendment in Committee of the Whole.

On the motion,

The yeas and nays were required by Mr. WILLIAMS and Mr. SELTZER, and were as follows, viz:—

Yeas—Messrs. Abbott, Acker, Anderson, Ashcom, Barnsley, Bixel, Blair, Blis, Craig, Dismant, Donley, Dunca, Frasier, Goehring, Happer, Harvey, Hays, Hood, M'Gonigal, Peirce, Randall, Reily, Robinson, Seltzer, Sheffer, Taylor, Tracy, Walker, Williams and Davis, Speaker—55.

NAYS—Messrs. Austin, Bartholomew, Boyer, Brodhead, Burns, Butler, (Carbon,) Caldwell, Cowan, Douglass, Duffield, Eilenberger, Gaskill, Gibbony, Graham, Heck, Hill, Hillman, Huhn, Kline, Koch, Lawrence, Leisenring, Lichtenwallner, Lowther, McDonough, Manifold, Moore, Morrison, Mullin, Myers, Ober, Osterhout, Patterson, Preston, Ruge, Reif, Rhoads, Roller, Schrock, Sheppard, Smith, (Berks,) Smith, (Philadelphia,) Stehman, Stoneback, Teller, Thomas, Wildey, and Wilson—49.

So the question was determined in the negative.

Mr. DOUGLASS, on leave given, presented three remonstrances from citizens of Allegheny county against the repeal or modification of the lateral railroad law.

Laid on the table.

Mr. HOFIUS moved to postpone the further consideration of the bill for the present.

Mr. WILSON. I would remark that the gentleman from Allegheny, (Mr. MARSHALL), who is expected to oppose this bill, requested of me that, if the bill should come up, I would have it laid over for the present. He is now unavoidably absent from the House, but will be here in a few days. In accordance with his request, I move that the bill be postponed for the present.

Mr. HUHN. I move to amend the motion so as to postpone indefinitely.

Mr. WILLIAMS. No doubt my worthy friend from Schuylkill, (Mr. HUHN), in offering a motion of this sort has some good reason. I should like to hear what that reason is. Is it because he thinks trial by jury ought to be abridged?

Mr. HUHN. I would inform the gentleman from Allegheny that my reason is very simple. I believe that under such a state of the law as this bill proposes to introduce, no lateral railroads can be constructed.

On Mr. HUHN'S motion to postpone indefinitely,

The yeas and nays were required by Mr. HUHN and Mr. DOUGLASS, and were as follows, viz:—

Yeas—Messrs. Burns, Byrne, Caldwell, Cope, Douglass, Duffield, Dunlap, Eilenberger, Gaskill, Hillman, Huhn, Kline, Koch, Lawrence, Leisenring, Lichtenwallner, M'Donough, Manifold, Osterhout, Randall, Schrock—20.

NAYS—Messrs. Abbott, Acker, Alexander, Anderson, Ashcom, Barnsley, Bartholomew, Bixel, Bixler, Blair, Blis, Boyer, Bressler, Brodhead, Butler, (Carbon,) Butler, (Crawford,) Clark, Collins, Cowan, Craig, Dismant, Donley, Frasier, Gibbony, Goehring, Graham, Happer, Harvey, Hill, Hood, Hays, Irvin, Lowther, M'Gonigal, Moore, Morrison, Mullin, Myers, Patterson, Peirce, Preston, Ruge, Reily, Ridgway, Robinson, Roller, Seltzer, Sheffer, Sheppard, Smith, (Berks,) Smith, (Philadelphia,) Stehman, Stoneback, Strang, Taylor, Teller, Thomas, Tracy, Walker, Wildey, Williams, Davis, Speaker—62.

So the question was determined in the negative.

The question recurring on the motion of Mr. HOFIUS to postpone for the present,

Mr. WILLIAMS. I rise merely to say to the House that I am not disposed to press unduly upon the House any question of general importance, such as this undoubtedly is, or to precipitate a decision upon it. I support no measure here that I do not believe to be right. I do not seek to take advantage of the absence of any member. I prefer that every bill which I advocate should receive a vote of a full House; and if it be wrong, it should be voted down. I declined pressing this bill on last Friday evening, on account of the absence of several of my colleagues. If the people of Allegheny are disposed to object to this bill, and if they have any champion here whom they desire to appear for them, let them send him and I shall be glad to meet him.

For these reasons I am perfectly willing that the question should go over, if the gentleman from Mercer will name a given day, so that it shall come up again in order. I understand that if it be postponed, generally, according to the motion, it will require a vote of two-thirds to call it up. I yield now, therefore, by way of amending the gentleman's motion, unless he will accept it as a modification, next Wednesday.

Mr. HOFIUS. I accept that as a modification.

The motion of Mr. HOFIUS, as modified, was then agreed to.

LAW RELATIVE TO BOROUGH.

The House went into Committee of the Whole, (Mr. HOFIUS in the Chair), on House bill, No. 181, entitled "a supplement to the Act relating to boroughs," passed the 3d of April, 1851.

The first and only section of the bill was read, as follows:

SECTION 1. Be it enacted, &c., That so much of the thirtieth section of the Act of the General Assembly, passed the third day of April, one thousand eight hundred and fifty-one, entitled "An Act relating to boroughs," as authorizes and requires the Board and Town Council of any borough to admit any section of land adjacent to said borough, into such borough, other than so much as is owned by the petitioners applying for such admission, be and the same is hereby repealed.

The section was disagreed to;

Whereupon,

The Committee rose, and the Chairman reported the bill to the House with a negative recommendation.

The House adopted the report of the Committee.

REVISION OF THE PENAL CODE.

The House went into Committee of the Whole (Mr. AUSTIN in the Chair) on House Bill No. 183, entitled "a supplement to an Act to revise the penal code."

The first and only section of the bill was read as follows:

SECTION 1. Be it enacted, &c., That the thirty-seventh section of the Act entitled "An Act to consolidate, revise and amend the laws of this Commonwealth, relating to penal proceedings and pleadings," passed the thirty-first day of March, Anno Domini, one thousand eight hundred and fifty-eight, be and the same is hereby amended, so that the same shall read as follows, to-wit:—

"That the thirty-seventh section of the Act entitled 'An Act to consolidate, revise and amend the laws of this Commonwealth, relating to penal proceedings and pleadings,' passed the thirty-first day of March, Anno Domini, one thousand eight hundred and fifty-eight, be and the same is hereby amended, so that the same shall read as follows, to-wit:—

"That the thirty-seventh section of the Act entitled 'An Act to consolidate, revise and amend the laws of this Commonwealth, relating to penal proceedings and pleadings,' passed the thirty-first day of March, Anno Domini, one thousand eight hundred and fifty-eight, be and the same is hereby amended, so that the same shall read as follows, to-wit:—

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