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BRIEF FOR THE UNITED STATES IN THE CASE OF THE UNITED STATES OF AMERICA *v.* THE TRANS-MISSOURI FREIGHT ASSOCIATION.

STATEMENT.

The United States filed its bill in the circuit court for the district of Kansas against the Trans-Missouri Freight Association and the eighteen railroads composing it, to enjoin further execution of the agreement whereby such association was formed, on the ground that it was in violation of the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." The case was heard on the bill and answers. The court dismissed the bill. The Government appealed to the circuit court of appeals for the eighth circuit, which, by a majority (Judges Sanborn and Caldwell), affirmed the judgment, Judge Shiras dissenting. Both opinions are reported¹. The case comes here on the Government's appeal.

ADMITTED FACTS.

The bill averred² that the lines of the railway companies, defendants, were engaged in interstate commerce, were separate and distinct in ownership and operation, and—

furnish to the public and to persons engaged in trade, traffic, and commerce between the several States and Territories and countries aforesaid *separate, distinct, and competitive lines* of transportation and communication, extending among and between the States and Territories of the United States lying westward of the Missouri and the Mississippi rivers to the Pacific Ocean; and that the construction and maintenance of such *separate, distinct, and competitive*

¹ 58 Fed. 58.

² Record, bottom p. 3 and p. 4.

lines of railroads as aforesaid had been encouraged and assisted by the United States of America and by the States and Territories in the region of country aforesaid, and by the people of said several States and Territories, by franchises and by grants and donations of large amounts of land of great value, and of money and securities for the purpose of securing to the public and the people engaged in trade and commerce throughout the region of the country aforesaid *competitive lines of transportation and communication*.

The answers, which are alike in substance, expressly admit these averments. I quote from that of the Chicago, Rock Island and Pacific Railway Company:³

Further admitting, this defendant admits that the railroad companies, parties hereto, severally own, control, operate, and use *distinct and separate lines* of railroad, fitted up for carrying on business as common carriers of freight *independently and disconnectedly with each other*, * * * and it says that the other companies mentioned in said bill, and the combinations of interest above enumerated, are each *separate and distinct* in their organization, ownership, and management, *and are active competitors each with the others* for all common business at all points where such competition is possible. It further admits that the lines enumerated as above are lines of transportation and communication engaged in freight traffic between and among the States and Territories of the United States, having through lines for said freight traffic in that region of the country lying to the westward of the Mississippi and Missouri rivers and east of the Pacific Ocean. * * * It admits that the said lines of railroad, prior to the organization of the Transmissouri Freight Association, furnished to the public and to persons engaged in trade, traffic, and commerce between the several States, Territories, and countries named in the bill, *separate, distinct, and competitive lines* of transportation, extending among and between the States and Territories of the United States lying westward of the Missouri and Mississippi rivers to the Pacific Ocean, and it says that they still continue to do the same.

It admits that the construction of some lines owned by defendants was encouraged and assisted by the United States, and by some of the States and Territories in the region of country aforesaid, by means of land grants, loans of credit, donations of depot sites and rights of way, and, in a few cases, by investments of money; and that people of the said States and Territories to a limited extent made investments in the stocks and bonds of said railroad companies, while other of such lines were almost entirely constructed by capital furnished by non-residents of said region.

It believes that the purpose of the said land grants, loans, donations, and investments was *to obtain the construction of said competitive lines* of transportation and communication to the end that

³ Record, bottom p. 14 and p. 15.

the public and the people engaged in trade and commerce throughout said region of country might have facilities afforded by railways in communicating with each other and with other portions of the United States and of the world. * * * It also admits that prior to March 15, 1889, and subsequent to the present time, all of said defendants have been and are engaged as common carriers in the railway freight traffic connected with the interstate commerce of the United States.

The answers also admitted⁴ that the defendants had made the agreement set out in the bill,⁵ and that they were operating their respective lines under its provisions.

THE AGREEMENT.

The preamble recites that the agreement is—

for the purpose of mutual protection by establishing and maintaining reasonable *rates*, rules, and regulations on all freight traffic, both through and local.

Article I provides that—

1. The traffic to be included in the Transmissouri Freight Association shall be as follows: *All competitive traffic* between points in the following-described territory, commencing at the Gulf of Mexico on the ninety-fifth meridian, thence north to Red river, thence via that river to the eastern boundary of the Indian Territory, thence north by said boundary line and the eastern line of the State of Kansas to the Missouri river at Kansas City, thence via said Missouri river to the point of the intersection of that river with the eastern boundary of Montana, thence via the said eastern boundary line to the international line, the foregoing to be known as "The Missouri River Line;" thence via said international line to the Pacific coast, thence via the Pacific coast to the international line between the United States and Mexico, thence via said international line to the Gulf of Mexico, thence via said gulf to the point of beginning, including business done between points on the boundary line as described.

2. All freight traffic originating within the territory as defined in the first section when destined to points east of aforesaid Missouri river line.

Article II provided for the election of a chairman, for regular and special meetings, at which each party was to be represented by some one authorized to act definitely for it, and also that—

3. *A committee* shall be appointed to *establish rates*, rules, and regulations on the traffic subject to this association, and to consider changes therein, and *make rules for meeting the competition of outside lines*. Their conclusion, when unanimous, shall be made

⁴ Rec., p. 15.

⁵ Rec., pp. 5-9.

effective when they so order; but if they differ, the question at issue shall be referred to the managers of the lines parties hereto, and if they disagree, it shall be arbitrated in the manner provided in Article VII.

4. At least five days' written notice, prior to each monthly meeting, shall be given the chairman of any proposed reduction of any rates or change in any rule or regulation governing freight traffic.

5. At each monthly meeting the association shall consider and vote upon all changes proposed, of which due notice has been given, and all parties shall be bound by the decision of the association so expressed, unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of the association, provided that if the members giving notice of the change shall fail to be represented at the meeting no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if in the judgment of said majority the rate so made affects seriously the rates upon their traffic, then the association may, by a majority vote upon such other traffic, put in effect corresponding rates to take effect upon the same date. By unanimous consent any rate, rule, or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

6. Notwithstanding anything in this article contained, each member may *at its peril* make at any time without previous notice such *rate*, rule, or regulation as may be necessary to meet the *competition of lines not members of the association*, giving at the same time notice to the chairman of its action in the premises. If the chairman upon investigation shall decide that such rate is not necessary to meeting competition, of lines not members of the association and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association, held after the making of such rate, it shall be reported to the association, and if the association shall decide by a two-thirds vote that such rate was not made in good faith to meet such competition, the member offending shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two-thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

7. All agreements with connecting lines for a division of through rates, relating to traffic covered by this agreement, shall be made by authority of the association; provided, however, that when one road has a proprietary interest in another, the division of such rates shall be what they may elect, and shall not be the property of the association. Provided, further, that as regards traffic contracts at this date actually existing between lines not having common proprietary interest, the same shall be reported,

so far as the divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms.

Paragraph 8 of Article II provided the penalty as follows:

It shall be the duty of the chairman to investigate all apparent violations of the agreement and to report his findings to the managers, who shall determine by a majority vote (a member against whom complaint is made to have no vote) what, if any, penalty shall be assessed, the amount of each fine not to exceed \$100, to be paid to the association. If any line party hereto agrees with the shipper, or anyone else, to secure a reduction or change in the rates, or change in the rules and regulations, and it is shown upon investigation by the chairman that such arrangement was effected and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

For the purpose of detecting violations of the agreement, the chairman was given authority to examine all books, papers, and contracts.⁶ He was to be furnished with copies of all waybills for freight when called for.⁷ It was also provided⁸ that—

The chairman shall be empowered to authorize lines in the association to meet the rates of any other lines, or other lines in the association, when, in his judgment, such action is justified by circumstances.

The reference in the agreement to outside competing lines will be understood by reading the averment of the answers:⁹

But it is not correct to state, as alleged in the bill, that they are the only such lines, there being several others, to wit: The Northern Pacific, the Great Northern, the Southern Pacific, the Texas and Pacific, and others which would be properly included in said description.

These were all lines within the same territory as those of appellees, but not controlled by members of the association.

AVERMENTS OF THE INTENT, EFFECT, ETC., OF THE AGREEMENTS.

I contend that the various averments and denials in the bill and answers as to the real intention of the parties to the agreement, and as to its actual operation and effect, are entirely irrelevant, save in so far as they are based upon the necessary tendency and effect of the agreement itself as shown by its terms; and that,

⁶ Record, bottom p. 7.

⁷ Art 3, §5.

⁸ Art 3, §8.

⁹ Record, bottom p. 14.

therefore, the statements of the answers as to the lawful intent of the parties to the agreement and its actual effect on rates of freight are not to be taken as admitted by setting the case down for hearing on bill and answer. But it will be more convenient to treat of this subject hereafter.

QUESTIONS INVOLVED.

It appears, therefore, that the defendants are all common carriers engaged in interstate commerce, owning and operating lines which were intended to be, and in fact were, naturally and actually competing, and whose construction was authorized and aided by the government and by others for that reason; that they have surrendered to a committee of the association control over the making of rates and the conduct of their business, binding themselves by penalties to obey the orders of this committee. And the questions raised in the courts below, which will no doubt be raised here, are—

(1) Does the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies,"¹⁰ apply to railroad companies?

(2) Is the agreement in question a violation of that act?

Some minor questions have been raised which I do not think it necessary to mention here.

I maintain the affirmative of both the questions above stated.

ARGUMENT.

I.

The act of July 2, 1890, applies to railroad companies as well as to all other persons.

Its terms are sufficiently broad to include such companies, and are not to be restricted by reason of what was said or proposed in Congress while the law was pending.

Such companies are not to be excluded from its operation because they are also governed in some respects by the act to regulate commerce passed February 4, 1887.

The provisions of the act of July 2, 1890, which have been considered in the case, are as follows:

SEC. 1. Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations is hereby declared to be

¹⁰26 Stat. at Large, 209, ch. 647.

illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

It is manifest from the reading of this act that its terms are as broad as the language affords. *Every contract and combination*, in form of a trust or *otherwise*, or *conspiracy* is declared to be illegal *when it is in restraint of trade or commerce* among the several States, etc. The use of the word "commerce" as well as the word "trade" indicates a plain intention to give the act a scope which goes beyond the mere mercantile community which may be said to be engaged in trade, and includes all persons or combinations of persons, natural or artificial, which are in any way engaged in or may undertake to affect *commerce* among the several States.¹¹

¹¹ *In re Debs*, 64 Fed., at page 749; also *United States v. Joint Traffic Association* (Appendix D of brief for appellees, where it is cited on other points from which the Government dissents and has appealed), wherein Judge Wheeler said (p. 127):

The restraint and monopoly act expressly authorizes such a proceeding in equity as this to prevent its violation, and this suit is well maintained if this contract is within it. Railroads are not expressly named in this act and are said in argument not to be within its terms. No one is so named, but it applies to all combinations in restraint of trade or commerce among the States. Railroads do not trade among the States, but they carry for those who do, and what would restrain their so carrying would be a restraint of such commerce.

That transportation is commerce within the meaning of the Federal Constitution and of the various laws of Congress is now settled beyond dispute.

Commerce includes intercourse between the citizens of the several States.¹² It extends to transportation of goods and passengers.¹³ It embraces the vehicles as well as the articles of commerce.¹⁴ It includes the operations of telegraphy.¹⁵

It is useless to multiply citations. Considering the fact that railways are the chief instruments of commerce among the States, absolutely controlling it with respect to transportation, it seems to me that, taking the language of the act as it reads, the intention to include railroad companies within its operation is not

¹² 9 Wheat. 1; 114 U. S. 196, 203.

¹³ 7 How. 283; 91 U. S. 275; 15 Wall. 232; 92 U. S. 275; 95 U. S. 465, 470.

¹⁴ 7 Wall. 646; 8 Wall. 123; 24 How. 169; 154 U. S. 204, 218.

¹⁵ *Pensacola Telegraph Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 356.

In the last case cited the court, by the Chief Justice, said (p. 464):

A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, *and their business is commerce itself*.

In the *County of Mobile v. Kimball*, 102 U. S. 691, the court, by Mr. Justice Field said (p. 696):

That power is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several States, and to adopt measures to promote its growth and insure its safety.

In the *State Freight Tax Case*, 15 Wall. 232, the court, by Mr. Justice Strong, said (p. 275):

Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the State to the buyer or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the States. In his work on the Constitution (sec. 1057) Judge Story asserts that the sense in which the word commerce is used in that instrument includes not only traffic, but intercourse and navigation. And in the *Passenger Cases*, 7 How. 416, it was said: "Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the States it must have been principally by land when the Constitution was adopted.

open to debate. In fact, in the light of *U. S. v. E. C. Knight Co.*, 156 U. S. 1, it is difficult to imagine what Congress meant the act to affect if not railroads.

The circuit court held that the act did not apply to railroad companies. The circuit court of appeals assumed that it did. The question was expressly left open in *In re Debs*, 158 U. S. (see p. 600), and by Mr. Justice Harlan in *Arthur v. Oakes*, 63 Fed. (see p. 329). The act has been held in labor cases to apply to railroads by Judges Billings, McCormick, and Toulmin;¹⁶ by Judges Thayer and Philips;¹⁷ by Judges Taft and Lurton;¹⁸ by Judge Baker¹⁹ and by Judge Ross.²⁰

SCOPE NOT AFFECTED BY SECTION 6.

The claim is that, as railroad property does not come within the provisions of section 6 for seizure and forfeiture, contracts by railroad companies are not covered by the earlier sections. There are obvious public and other reasons why railroad property should be omitted from the seizure provided for—that is, the property used in the business of common carriage—leaving the companies subject only to the other penalties of the act. But, if I concede that section 6 does not apply to railways, I fail to see the connection between premise and conclusion. By what principle is it assumed that such additional penal provisions are intended or operate as a limitation of the remainder of the act to such offenders as, from the nature of their business, may possibly become liable to such added penalties? I presume it will not be denied that the act applies to telegraph and telephone companies, yet they never have property “in the course of transportation” which can be seized.

PROCEEDINGS IN CONGRESS.

It is said, however, that the proceedings in Congress during the pendency of the bill show that it was not so intended. A large part of the briefs for the various defendants has been devoted to reprinting portions of the Congressional Record with much emphasis of lead and italics.

¹⁶ *U. S. v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. 994; 57 Fed. 85.

¹⁷ *U. S. v. Elliott*, 62 Fed. 801; 64 Fed. 27.

¹⁸ *In re Phelan*, 62 Fed. 803, 821.

¹⁹ *U. S. v. Agler*, 62 Fed. 824.

²⁰ *In re Grand Jury*, 62 Fed. 840. See *dictum contra* by Judge Putnam in *U. S. v. Patterson*, 55 Fed. 605.

When the language of an act is clear the court does not look elsewhere to ascertain its meaning. Reference to the debates and proceedings of the legislative body could at most be merely an aid to construction where the meaning is doubtful. Where the meaning of a statute is plain it is the duty of the court to enforce it according to its obvious terms. In such a case there is no necessity for construction.²¹ Even if the debates could in any case be properly resorted to, this could not be done where there is no necessity for construction. But expressions in debate, or proposed amendments, cannot be permitted to control or vary the language used in the final enactment.²²

The reasons for this well settled rule have an apt illustration in the proceedings now invoked.

The bill, as originally introduced, is printed in Appendix C of the brief for the Union Pacific Railway Company and others, herein (p. 99). It was in much more specific terms than those finally adopted. It mentioned "transportation" as well as "im-

²¹ *Thornley v. United States*, 113 U. S. 310-313.

²² In *United States v. Union Pacific Railway Company*, 91 U. S. 72, the court, by Mr. Justice Davis, said (p. 79):

In construing an act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influence them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used.

In *District of Columbia v. Washington Market Co.*, 108 U. S. 243, the court, by Mr. Justice Matthews, said (p. 254):

Nor are we willing to accept the debates that are reported as occurring in Congress at the time of the passage of the deficiency appropriation act of March 3d, 1873, as evidence of the meaning of the clause on which the controversy in this case depends.

The question is whether, according to its correct construction, that clause authorized the parties to execute the agreement into which they entered.

The subject is treated more fully in the opinion of the supreme court of the District of Columbia in the same case, 3 MacArth., at page 571.

In *Mitchell v. Great Works Milling and Manufacturing Company*, 2 Story, at page 653, Mr. Justice Story said:

At the threshold of the argument, we are met with the suggestion that when the act was before Congress, the opposite doctrine was then maintained in the House of Representatives, and it was confidently stated that no such jurisdiction was conferred by the act as is now insisted on. What passes in Congress upon the discussion of a bill can hardly become a matter of strict judicial inquiry; and if it were, it could scarcely be affirmed that the opinions of a few members, expressed either way, are to be considered as the judgment of the whole House, or even of a majority. But, in truth, little reliance can or ought to be placed upon such sources of interpretation of a statute. The questions can be, and rarely are, there debated upon strictly legal grounds, with a full mastery of the subject and of the just rules of interpretation. The arguments are generally of a mixed character, addressed by way of objection, or of support, rather with a view to carry or defeat a bill, than with a strictness of judicial decision.

But if the House entertained one construction of the language of the bill, *non constat*, that the same opinion was entertained either by the Senate or by

portation" and "sale." It enumerated "arrangements" and "agreements" as well as "contracts," "trusts," and "combinations." It was made expressly applicable to "corporations" as well as to "persons." Various constitutional objections were raised and considered, and finally, on April 2, 1890, the bill was reported as subsequently passed, all the original bill after the enacting clause was stricken out.²³

In the House various amendments were offered, some of which were intended to specify contracts for preventing competition in transportation. An amendment to this effect, containing a proviso, was adopted by the House. Various changes in the amendment were discussed in conference and by the Senate, and it was finally adopted by the Senate in the language found at page 116, Exhibit C, above cited. The House amendment forbade all contracts for any restraint of competition in transportation. The Senate added the clause "so that the rates of transportation may be raised above what is just and reasonable." The House

the President; and their opinions are certainly, in a matter of the sanction of laws, entitled to as great weight as the other branch. But, in truth, Courts of justice are not at liberty to look at considerations of this sort. We are bound to interpret the act as we find it and to make such an interpretation as its language and its apparent objects require. We must take it to be true, that the Legislature intend precisely what they say, and to the extent which the provisions of the act require for the purpose of securing their just operation and effect. Any other course would deliver over the Court to interminable doubts and difficulties; and we should be compelled to guess what was the law, from loose commentaries of different debates instead of the precise enactments of the Statute. Nor have there been wanting illustrious instances of great minds, which, after they had, as legislators or commentators, reposed upon a short and hasty opinion, have deliberately withdrawn from their first impressions when they came upon the judgment seat to re-examine the statute or law in its full bearings.

See also *Aldridge v. Williams*, 3 How. 9, 24.

In *County of Cumberland v. Boyd*, 113 Pa. St., at page 57, the court said:

In giving construction to a statute we cannot be controlled by the views expressed by a few members of the Legislature who expressed verbal opinions on its passage. Those opinions may or may not have been entertained by the more than a hundred members who gave no such expression. The declarations of some and the assumed acquiescence of others therein cannot be adopted as a true interpretation of the statute. Keeping in mind the previous law, the supposed evil and the remedy desired, we must consider the language of the statute and the fair and reasonable import thereof.

To the same effect see the opinion of Mr. Justice Field in *Leese v. Clark*, 20 Cal. 387, 425.

In *The Queen v. Hertford College*, 3 Q. B. D., at page 707, the Lord Chief Justice (Coleridge) said:

We are not, however, concerned with what Parliament intended, but simply with what it has said in the statute. The statute is clear and the Parliamentary history of a statute is wisely inadmissible to explain it, if it is not; but in this case, if it could be referred to, it would appear beyond all controversy *Parliamentum voluisse quod dicit lex*.

²³ See Appendix C, above cited, p. 107.

having disagreed, the amendment was modified in conference, but the clause about just and reasonable rates was retained. The House having refused to agree, a further conference resulted, in which the House conferees were instructed to recede from the original amendment. Finally the bill was passed and approved as it originally passed the Senate.

The argument now made from all this is that the intention of both bodies was—the Senate in its change of the original form of the bill, and the House in receding from its amendments specifically mentioning agreements respecting transportation—to exclude carriers from the operation of the bill.

The same argument would necessarily lead to the conclusion that it was also the intention to exclude corporations from the operation of the law, as well as “arrangements” and “agreements” which for any technical reasons might not be considered “contracts.” A comparison of the language of the bill as introduced with that of the bill as passed will show other similar consequences to which the argument leads.

But the futility, not to say danger, of resorting to such means of ascertaining legislative intent, is demonstrated by a portion of the proceedings to which counsel do not refer. In reporting the bill again from the Judiciary Committee of the Senate with the House amendment amended, as aforesaid,²⁴ Senator Hoar, who it will be remembered, was a member of the conference committee, said:²⁵

The other clause of the House amendment is that contracts or agreements entered into for the purpose of preventing competition in the transportation of persons or property from one State or Territory into another shall be deemed unlawful. That the committee recommend shall be concurred in. *We suppose that it is already covered by the bill as it stands; that is, the transportation is as much trade or commerce among the several States as the sale of goods in one State to be delivered in another, and, therefore, that it is covered already by the bill as it stands.* But there is no harm in concurring in an amendment which expressly describes it, and an objection to the amendment might be construed as if the Senate did not mean to include it. So we let that stand.

How can counsel show that the final result, leaving the bill as it originally passed the Senate, was not due to general concurrence, at last, in the view of Senator Hoar, which applies as well to the

²⁴ Reports, it appears, stand on a somewhat different footing from debates, *Holy Trinity Church v. United States*, 143 U. S., at p. 465, *The Delaware*, 161 U. S., at p. 472.

²⁵ Cong. Rec., vol. 21, pt. 5, pp. 4559-60.

entire change of the bill in the Senate as to the amendment proposed by the House?

The same line of reasoning applies to the portions of the debate in the House relating to the effect of the proposed amendment upon, and the general relation of the bill to, the interstate-commerce act.²⁶

EFFECT OF INTERSTATE-COMMERCE ACT.

The act of July 2, 1890, is not prevented from applying to railroad companies by reason of the provisions of the previous act of February 4, 1887, relating to them.

Counsel admit²⁷ that the principle of the rule of construction for which they contend is that repeals by implication are not favored, and that therefore an act in general terms sufficiently broad to include the subject of a prior special act will be held not to repeal such special act in the absence of a repealing clause or other indication of intention to repeal.

Counsel accordingly recognize the necessity of showing irreconcilable inconsistency between the general and the special act, being fully aware of the application of the still higher rule which requires that both acts be given their full natural scope and effect, if possible. They therefore seek (p. 25) first to establish the premise that contracts and agreements in restraint of trade and commerce are permitted by the act of February 4, 1887, so as to prepare the way for the contention that the act of July 2, 1890, forbidding such contracts and agreements should be held inapplicable to railroads.

I maintain, however—

First. That the act of February 4, 1887, does not authorize associations of competing railways for the purpose of fixing and maintaining rates.

Second. That there is no inconsistency whatever between the act of 1887 and that of 1890, but that both can be given full scope and effect according to their terms.

While counsel say (p. 27), "if the *articles of agreement* in question are *authorized* by the interstate-commerce act, as we have endeavored to show," the endeavor to show (p. 25) is merely that "*associations* similar to the one in question have been repeatedly recognized by the Interstate Commerce Commission."

²⁶ See the following cases as to reference to the original form and amendments of bills: *Legal Tender Cases*, 12 Wall., at p. 559; *Blake v. National Banks*, 23 *Id.*, at p. 317; *United States v. Burr*, 159 U. S., at p. 85.

²⁷ Page 27 of brief for Union Pacific Railway Company, *et al.*

Even if it should be conceded that the Commission may put a construction upon the law which would affect the judgment of this court, it does not appear that it has put upon the law the construction contended for, much less that it has done so with the uniformity and for the time required to invoke the rule as to departmental construction. It has never approved in any way an agreement between competing lines fixing rates. So there has been no action to create a rule of practical construction. No one has ever held or contended that the mere theories of an executive officer or body can ripen into a rule of construction, no matter how long they have been held nor how often they have been uttered. The quotation from the first annual report of the Commission, which is given on the last named page of the brief, does not relate at all to associations among competing railroads for the fixing of rates, but only to associations to secure uniformity in classification. Nor can I agree to the statement on page 15 of the brief that "Tariff agreements of the general nature of that which the present bill attacks were universally known to exist among railway companies at the times, respectively, of the passage of the interstate-commerce and the anti-trust acts," if the expression "general nature" is intended to apply to agreements between competing lines for the fixing and maintaining of rates.²⁸

An examination of the act of February 4, 1887, shows plainly that it does not attempt to deal with the relations of competing lines save in the single section (five) which forbids pooling. The other sections are all intended to secure to the public from each line and its connections, considered separately, charges which are reasonable, just and uniform, and equal facilities to all. Sched-

²⁸ The views of the Commission, as well as the historical fact about such agreements, will be found in the following extract from the report of the Commission filed December 1, 1895, at page 96 in the chapter on "Traffic agreements:"

While the interstate commerce act permits and encourages the establishment of joint tariffs by carriers operating *continuous* lines, there is no authority in that act for the joint establishment and maintenance of rates by *competing* carriers operating substantially parallel lines. On the contrary, the tenor of the fifth section seems plainly opposed to any arrangement tending to limit railroad competition. The act, however, contains no express prohibition of contracts to maintain rates unless that purpose is accomplished by a pooling of freights or division of earnings. Prior to the passage of the act the plan adopted by the carriers to regulate competition and to maintain agreed rates was the pooling system, under which, whenever it was effective, each of the competing lines secured an agreed percentage of the total traffic, or in default of that an equivalent in money paid out of the pool. After the passage of the act many railroad companies apparently sought to maintain rates by such adjustment of tariffs as would in effect produce an apportionment of traffic among competing lines, and agreements containing provisions to this end were from time to time filed with the Commission.

ules of rates are required, with notice of all changes therein (sec. 7). But all penalties are imposed upon individuals and none upon corporations.

SEC. 10. That any common carrier, * * * or whenever such common carrier is a corporation, any director or officer thereof * * * shall wilfully do, or cause to be done, * * * any act, matter, or thing in this act prohibited * * * shall be deemed guilty of a misdemeanor, etc.

This section was so construed in *United States v. Michigan Central Railroad Company* (43 Fed. Rep. 26), which decision has, I believe, been generally accepted.

That the act was not intended to be a final and complete treatment of the subject to which it relates in all aspects appears from the reference in section 15 to "any law cognizable by said Commission."

We have, then, a law regulating commerce in certain respects, which does not profess to be exclusive, and which deals with railroads in the relation of competitors in one respect only, viz: by forbidding a specific form of agreement under penalties imposed upon individuals only.

If the question were between this act and the one which afterwards prohibited pooling generally, the question would arise which should prevail; and probably the decision would be that the specific provision as to pooling by railroads would be held not to be repealed by the general one; but I am quite unable to perceive how, by the application of any principle, a subsequent general act is to be so treated with respect to additional provisions entirely consistent with those of the former act. Assuming that pooling contracts are contracts in restraint of trade and commerce, so that the act of July 2, 1890, would apply to them, corporations might be subjected to penalties it imposes on individuals without in anywise interfering with the operation of the former act.

It certainly would not have affected the act of February 4, 1887, if a subsequent act had in terms forbidden all contracts in restraint of trade and commerce by railroad companies. The one would have supplemented and not contradicted or overthrown the other. Then how can it be claimed that a general act including railroad companies operates otherwise?

Counsel do not properly put the contention which they must make to sustain this point. If they did, its mere statement would be the best answer to it. It is this: The act of February 4, 1887, prohibited only one form of agreements among competing lines, viz: pooling. Congress intended, therefore, to legalize all other

forms of agreement relating to rates or division of business between such lines. The act of July 2, 1890, can not be held to apply to railroads, because its effect would be to repeal this implied authorization.

No decision or other authority has been cited, and I know of none, which sustains the proposition that any such supposed legislative negative pregnant is to be considered in construing subsequent laws. The inconsistency must always be between different positive enactments.

Nor is there any better support for the unexpressed proposition which underlies the argument of appellees, viz: that partial treatment of a subject precludes the operation upon that subject of subsequent general legislation whose terms would naturally include it, and whose effect is to supplement only.

It is a fact so well known that the court will take judicial notice of it, that the chief if not the only form of contract and combination among competing railroads for the purpose of lessening or preventing competition which was known at the time the act of 1887 was passed, was that called pooling. It is fair, therefore, to assume that in designating this form of contract in its prohibition, Congress really intended to forbid the evil itself rather than a particular form of it, but unfortunately used terms which described the particular form only. In the enormous extension and multiplication of contracts and combinations which afterwards ensued, aimed at the suppression of competition, it was found that managers of railroads had enough fertility of resource to devise other methods than pooling. Congress later, in the act of 1890, in dealing with this subject which is of such great concern to the public, considered both as individuals and as a body politic, used apt language to forbid contracts and combinations of every nature and by all persons whatsoever, whose natural tendency and effect are to restrain freedom of trade and commerce.

It seems to me a gross perversion of legal principles which are intended to facilitate the ascertainment and effectuation of the will of Congress to apply them in support of such a claim as that now made.

I conclude, therefore, that the act of July 2, 1890, applies to all contracts, combinations, and conspiracies by railroad companies in restraint of trade and commerce, as well as to those made by others—certainly to all except pooling contracts.

II.

THE AGREEMENT IN QUESTION, IN SO FAR AS IT RELATES TO THE FIXING AND MAINTAINING OF RATES, IS A VIOLATION OF THE ACT OF JUNE 2, 1890.

(A) The act stands on its terms without reference to the Common Law, and those terms forbid all contracts, etc., in restraint of commerce among the States.

(B) If reference be had to the Common Law, the agreement in question must be condemned, because it is made by corporations charged with duties to the public of the highest importance.

(C) In either case the contract is to be judged by its natural tendency and effect and not by the intention of the parties, or by its actual effect on rates so far as known down to the time of suit or trial. Such intention and effect being, therefore, irrelevant, are not subjects of either pleading or proof.

A.

Counsel for appellees cite authorities to show that there is no Common Law of the United States.

What is known as commerce among the States is a subject peculiar to the United States, which is committed to the sole and absolute control of Congress. The act of 1890 must, therefore, be taken as it reads, and is not subject to definitions or implied limitations or qualifications borrowed from the Common Law.

While the title of the act speaks of "unlawful" restraints and monopolies, the term obviously refers to such as are made unlawful by the act itself. As there is no Common Law of the United States, and as the peculiar subject in hand is not known to the Common Law of England, those restraints and monopolies are unlawful which the act condemns, and no others.

The arguments of counsel and the decisions below proceed on the theory that only those contracts, combinations, and conspiracies are unlawful which are in *unreasonable* restraint of trade or commerce. But there is no qualification whatever in the act.

*Every contract * * * in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal. Every person who shall make any such contract * * * shall be deemed guilty of a misdemeanor. * * **

I do not think the intention of this section was to forbid *bona fide* transfers of property among persons engaged in the same lines of trade or commerce, although the result may be to reduce the

number of competitors. Such transactions are "contracts" in the broadest sense of the term; but the word was used in its ordinary meaning—agreements which merely created continuing relations between the parties and deal directly with the freedom of trade or commerce. This is borne out by the companion words "combination," "trust," and "conspiracy."

But what warrant is there for excluding from the operation of the act any contract of the class which its language fairly and naturally describes, whether the restraint imposed be great or small, reasonable or unreasonable?

The court below, and other inferior courts, have held that this act creates no new offense, but merely adds penal sanctions to the making of such contracts as by the rules of the Common Law the courts had, before the passage of the act, refused to recognize or enforce. But, in view of what I have already said, which counsel will hardly venture to gainsay in view of the plain terms of the act and their own admissions, it appears clearly to follow that the act bears no relation to the Common Law.

The title of an act can never prevail against its express language. Even if it be proper ever to refer to the title to aid in ascertaining the meaning of the act itself, this can be done only in case of doubt and uncertainty and affords little aid.²⁹

But there is no doubt or uncertainty here. The language is broad, sweeping, and unqualified by reference or otherwise. It forbids every contract which in any manner or to any extent is "in restraint of trade or commerce" among the States. There is no escape, therefore, from the conclusion that the intention of Congress was to keep trade and commerce among the States and with foreign nations absolutely free from all the artificial restraints which are created by contract or combination of every kind and form. Counsel contend, and sustain the contention by quotations from public writers, that competition is, under some circumstances at least, hurtful to trade and commerce. The same claim is often made on behalf of trusts and other commercial combinations. If this should be conceded, the answer would be that Congress, acting for the people, and in this instance representing their almost universal sentiment, did not think so. It evidently believed that competition is the life of commerce as well as of trade, and therefore imposed on the courts no duty of inquiry as to reasonableness or justifiability, but condemned all restraints. For it will be noted that counsel do not attempt to deny, but virtually, if not

²⁹ *Hadden v. The Collector*, 5 Wall., at page 110; *The King v. Williams*, 1 W. Bl. 95.

expressly, admit that the prevention of competition, entire or partial, is a restraint of the trade or commerce in which it exists.

It is incredible that Congress, dealing in obedience to the popular demand for relief from a great and growing evil which affected the entire people, intended to qualify the relief it granted by leaving its enforcement to depend on the varying views of other tribunals as to public policy. No such intention is expressed, nor is there the slightest ground for implying it. On the contrary, Congress declared in no uncertain terms the public policy with respect to the trade and commerce committed to its care and control, instead of leaving it to be discovered or pieced out from the multitude of conflicting decisions, of which the briefs afford abundant examples.

It would be hard to add anything to what Judge Shiras has said on this subject in his dissenting opinion below, to which I refer the court.³⁰

RELATION OF INTERSTATE-COMMERCE ACT.

It is said that the act must be considered in connection with the "act to regulate commerce," which prescribes that rates shall be "reasonable and just." But the latter act gave no definition of those terms and prescribed no rule by which reasonableness and justness of rates are to be determined. They were plainly to be left to the operation of the natural influences which decide all commercial values, whether of property or service, and the chief, or one of the chief, of these influences is competition.³¹

Reasonableness and justness were certainly considered by Congress with reference to the public as well as with reference to the carriers (162 U. S., at pp. 219, 233), though this view of the matter seems to be overlooked or slighted by counsel. Supply and demand, which are only another name for competition, can not fairly be disregarded in considering what rates are "reasonable and just" from the point of view of the public. If folly unduly increase the supply of means of transportation, or if bad management lead to excessive investment or cost of service, there is nothing to show that Congress intended to save carriers from the consequences at the expense of the public, even if it might properly have done so.

It is said that, by reason of the act of 1887 as well as of the general duty of common carriers to treat all alike, the business of

³⁰ 58 Fed., pp. 90, 91.

³¹ Mr. Justice Brewer in *C. & N. W. R. R. Co. v. Osborne*, *supra*.

public carrying is not subject to competition like other business. This is a clear misconception. The only difference is that carriers are required, in competing with each other, to deal with the public as a whole and not with individuals. But the operation and effect of the competition are just the same. Public carriers must treat all alike; but they may, and do, when not restrained by such agreements as that now in issue, vie with each other in seeking patronage by the excellence of their service and the rates they charge. Competition with lines not covered by the agreement is expressly provided for by Article II, section 6.

It does not appear whether the appellees are or are not subject to laws fixing maximum rates, as is the case with some railway companies, at least as to passengers; but if they are, this affords no reason for exempting them from the operation of the act which forbids contracts to stifle or restrain free competition. Such a consideration could properly be addressed only to the law-making power.

It appears to me to follow from what I have said that the act of 1887 does not affect in anywise the operation of the act of 1890 upon railroad companies, but that the two acts are entirely consistent and capable of complete enforcement together.

B.

But if we must go to the Common Law to discover what contracts, etc., in restraint of trade or commerce among the States are forbidden by the act, we must, in this court and country, reach the conclusion that the agreement in question, in so far as it affects competition among the appellees, is one of them.

RESTRAINTS UPON ORDINARY TRADE.

The numerous cases relating to restrictions of *trade*, which I agree is not synonymous with *commerce*,³² deal with the questions under what circumstances contracts may impose such restrictions and to what extent of time, territory, etc. Many of them are cited and discussed in the opinions below and in the briefs.

It is true that under certain circumstances and limitations such restraints may lawfully be imposed, and that the Common Law has somewhat relaxed its strictness so as to meet new conditions. But whatever may be the rule elsewhere, I believe it to be settled in this country, by the great weight of authority, that there can be no restriction whatever upon competition in trade except as an

³² *In re Debs and United States v. Joint Traffic Assn.*, *supra*.

incident to some transaction between the parties which creates rights to whose full enjoyment or protection the restraint is necessary. The usual instances are the transfer of property, business, or good will. In such cases the restriction may go to whatever extent is necessary for the protection of the right, and no further. *But the question whether the restraint is reasonable can never arise unless and until it appear that the rights so created make it proper that there should be some restriction.*

It must appear that—

“The partial restraint is not the *primary object* but a *mere incident* of the agreement.” “The consideration and special circumstances inducing the arrangement must be shown to the court and approved by it.” There must not only be a consideration, “but a good reason shown for the contract” (*viz*: the covenant in restraint of trade). If it be on the purchase of a business, the covenant must be made “intending still to pursue the business.” “A man can not for money alone, where he has no other interest in the matter, purchase a valid contract in restraint of trade.”³³

No matter how limited, contracts in restraint of trade are not valid *when they are the main object of the parties*.³⁴

Judge Sanborn, in the opinion below, recognized this rule, after reviewing many cases. The restraint must not be “*the main purpose*” (bottom of p. 70). “If *the main purpose* or natural and inevitable effect of a contract was to suppress competition or create a monopoly, it was illegal” (bottom of p. 72).

There was no such relation between the parties to this association as justified them in entering into any agreement whatever affecting their full freedom to seek business by offering better rates than others, and in this way deprive the public of actual or possible advantage. They were merely competitors and nothing more. They had no other relations whatever to each other. The error into which the circuit court and the majority of the circuit court of appeals fell was in assuming that because, in the class of cases above mentioned, the question is whether the restraint is reasonable, therefore the question of reasonableness arises and is decisive in all cases involving restraints upon competition created by agreement or combination of parties.

I am not willing to admit, as Judge Shiras seems to do in his dissenting opinion, that this agreement among natural competitors, made for the mere purpose of fixing rates and thereby to that extent putting an end to competition by means thereof, would

³³ *Lange v. Werk*, 2 O. S. 532 *et passim*. Also, *W. W. W. Ass'n v. Starkey* (84 Mich. 76).

³⁴ *Grasselli v. Lowden*, 11 O. S. 355; *Alger v. Thacher*, 19 Pick. 51.

be sustainable even if they were private companies engaged in ordinary trade. The few cases which apparently tend to justify it are against the weight of authority. Three cases are cited on page 77 of the brief for the U. P. R. R. Co. and others already mentioned. The first two, *Central Shade Roller Co. v. Cushman* (143 Mass. 353), and *Gloucester &c., Co., v. Russia Cement Co.* (154 Mass. 92), go on the ground that the subjects of the agreements were not staple articles, but were covered by patents or secret processes to which, of course, a different rule may well apply. The third, *Kellogg v. Larkin*, 3 Pinney (Wis.) 123, was to recover rent upon the lease of a mill which contained a stipulation forbidding the lessor to deal in wheat. It was sought to defeat recovery by showing that there was a scheme to control the wheat market in Milwaukee, to which lessor and lessee were parties, and in furtherance of which the lease was made.

It is unnecessary, however, to discuss the case on the principles which apply to persons and companies engaged in ordinary trade, because none of these companies are of that class. They are all

QUASI PUBLIC CORPORATIONS.

Not only are appellees corporations of this nature, but it is admitted that they were chartered and given public aid for the very purpose of securing independent and competing lines of railway.

In *Gibbs v. Baltimore Gas Co.* (130 U. S., at pp. 408, 409) the court, by the Chief Justice, stated the distinction between such companies and private organizations and persons:

The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort [citing cases]. Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract (*Printing, etc., Registering Co. v. Simpson, L. R.*, 19 Eq. 462), yet in the instance of business of such character that it presumably can not be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy [citing cases].

It will be observed that the justification alleged in that case for an agreement between rival companies to fix the price of gas was excessive competition resulting in loss (p. 397).

I deem it unnecessary to cite any of the many other decisions to the same effect. Some of them will be referred to in discussing the alleged admissions on the pleadings as to the intention of the parties and the actual effect of the agreement on rates.

MONOPOLY.

It is said by counsel that nothing can be claimed in this case on the ground of monopoly, because the companies, notwithstanding the agreement for fixing rates, were still to continue competing for business. It appears to be claimed, too, that the principles relating to monopolies, real or attempted, can not, from the nature of things, apply to railroad companies.

All this might have been and doubtless was said of the agreement between gas companies which was the subject of the case last cited. One of the chief elements of evil in monopolies is the destruction of competition and the consequent prevention of the operation of ordinary commercial causes upon prices. When this result is reached by any form of agreement or combination, courts, which look at substance rather than form, do not hesitate to apply the wise rule above stated, whether a technical monopoly is created or not.

A monopoly, in the modern sense of the word, ordinarily consists in requiring control, more or less complete, of a business which is open to all who choose to engage in it.⁸⁵ A railroad company has, by reason of physical causes, control of the business of transportation by land between distant points which it connects. If more than one line of railway be built through the same territory, then the various companies have among them control of the business as against all the world, because the number which may engage in it is necessarily limited. This may be said to be a natural monopoly of the right to supply citizens with such transportation. In so far as concerns this control which arises from natural causes no one can lawfully complain. But when the companies which enjoy this natural monopoly of supply extend its effect artificially by an agreement fixing rates, or otherwise stifling competition among themselves, they are guilty of exactly the same public wrong as ordinary trusts or combinations. It is, in fact, more harmful in effect, though the same in principle, because it is easier to stifle competition which is limited by natural laws. When but little competition is possible, such as there is becomes all the more important and should be the more zealously guarded.

⁸⁵ United States *v.* E. C. Knight Co., *supra*, at p. 10.

The fact that the agreement does not purport to prevent the parties to it from competing by affording greater facilities, such as better service or quicker time, does not tend in any degree to excuse the express suppression of all competition in rates which was plainly its main object. Lowering of prices is the chief means of competition the world over. There can be no real competition without it. The right of the public to procure slower or less convenient transportation at a lower rate, which is a valuable right in these days of sharp and close competition in all lines of business, is entirely taken away by this agreement. It operates upon rates exactly as an ordinary trade trust does upon prices; and the argument now advanced would apply to most if not all of the combinations among rival dealers to fix the price of commodities, which were involved in the many cases in which they have been held invalid. Each was generally left at liberty to get all the business he could at the rates fixed. This is necessarily so, except in cases of pooling.

This answer to the charge of creating a restraint, under a rule of law which forbids all restraints, "*however partial*,"³⁶ is that the restraint is *only partial*.

C.

But it is contended that the question of the validity of the agreement as to fixing rates is affected by certain portions of the answers which stand admitted by submitting the case on bill and answer.

The matters so relied on are set out at page 66 *et seq.* of the brief already mentioned. They consist in denials of the unlawful intent charged in the bill, in averments of a mere purpose to further the objects of the act of 1887, and in allegations that rates have not been increased, but on the contrary have in fact been lowered, under the operation of the agreement. By so setting the case for hearing, only such averments are admitted as are well pleaded.³⁷

That is to say, only such as are relevant and open to issue and proof, for an averment upon which, if denied, evidence would not be heard, can not be the subject of admission, which is merely a mode of proof.³⁸ As the court said, speaking of an agreement in

³⁶ *Gibbs v. Baltimore Gas Co.*, *supra*.

³⁷ Story's Eq. Pl., 10th ed., pp. 741-742, 413; *Interstate Land Co. v. Maxwell Land Co.*, 139 U. S. 577; *Taylor v. Barclay*, 2 Sim. 220, quoted at 137 U. S. 215.

³⁸ *Louisville & Nashville R. R. Co. v. Palmes*, 109 U. S. 244, 253.

restraint of trade, in *Kellogg v. Larkin*, 3 Pinney (Wis.), at p. 135—a case cited by appellees on others points—

Therefore no averment could give to the agreement a character which it had not, and no admission could take from it the character which it had.

The character, business, and relations of the various companies, appellees, being admitted, as well as the making of the contract, its terms, and entry upon its performance, the sole question before the court arises upon the contract itself. The only intention which is material is that which the law implies from the instrument.³⁹

That in such agreements the actual effect, so far as it can be known at the hearing, is irrelevant, and that they are to be judged by their natural tendency and effect, is well settled.⁴⁰

In the former case the court said, by Mr. Justice Brown, at p. 676:

Whether the consolidation of competing lines will necessarily result in an increase of rates, or whether such consolidation has generally resulted in a detriment to the public, is beside the question. Whether it has that effect or not, it certainly puts it in the power of the consolidated corporation to give it that effect—in short, puts the public at the mercy of the corporation. There is, and has been for the past three hundred years, both in England and in this country, a popular prejudice against monopolies in general, which has found expression in innumerable acts of legislation. We can not say that such prejudice is not well founded. It is a matter upon which the Legislature is entitled to pass judgment. At least there is sufficient doubt of the propriety of such monopolies to authorize the Legislature, which may be presumed to represent the views of the public, to say that it will not tolerate them unless the power to establish them be conferred by clear and explicit language.

In the latter case the court said, by the Chief Justice:

Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.⁴¹

³⁹ *Interstate Land Co. v. Maxwell Land Co.*, *supra*; *Pearsall v. Gt. Northern Ry. Co.*, 161 U. S. 646.

⁴⁰ *Pearsall v. Gt. Northern Ry. Co.*, *supra*; *United States v. E. C. Knight Co.*, 156 U. S. 16.

⁴¹ See also the passage quoted by Mr. Justice Harlan, dissenting on other points, from *Central Ohio Salt Co. v. Guthrie*, 35 O. S. 672 (*id.*, 27). In addition to the various cases cited by him to the same effect, see—*People v. Sheldon*, 139 N. Y. 251; *Judd v. Harrington*, *id.* 110; *People v. Milk Exchange*, 145 *id.* 267; *Anderson v. Jett*, 89 Ky. 375; *Anheuser-Busch Brewing Ass'n v. Houck*, 27 S. W. Rep. 696; *Moore v. Bennett*, 140 Ill. 69; *Chapin v. Brown Bros.*, 83 Ia. 156.

The reasons are obvious and are stated in many of the cases, why agreements involving subjects of public concern must be judged by what *may* be done under them and not by what the parties may have chosen to do down to the time of the inquiry.

I submit that this agreement put the public "at the mercy" of appellees with respect to freight rates; that its natural tendency and effect were to deprive the people of a great region of advantages which both they and Congress believe flow or may flow from competition among railroads; and that it therefore should be condemned by this court and the judgment below reversed.

CASES CITED BY THE COURT OF APPEALS.

The majority of the court of appeals disposed of *Gibbs v. Gas Co.*, and similar cases, by saying:

But we think, in view of the state of facts on which the decisions were predicated, and the points actually adjudicated, it would be unwise to deduce an unbending rule that any and every contract between two railway companies which enjoins or contemplates concert of action in the matter of establishing freight or passenger rates between competitive points is against public policy, and an unlawful restraint of trade. No case, we believe, has yet gone to that extent, or has declared that the business of transporting freight and passengers by rail is of such character that no restraint whatever upon competition therein is permissible. On the contrary, contracts between common carriers which impose some restrictions upon competition have been frequently sustained by our highest courts, and the rule has been often applied that the test of their validity was not the existence, but the reasonableness, of the restriction imposed.

I will notice briefly in the margin the cases cited by the court in support of its statement.⁴²

⁴² *Navigation Co. v. Winsor*, 20 Wall. 64, involved a stipulation in a contract for the sale of a steamboat that it should not be used in certain waters, which the court held (p. 69) "was necessary to protect the former company (the seller) from interference with its own business," *i. e.*, by the use of the steamboat sold.

Chicago, etc., *R. R. Co. v. Pullman Car Co.*, 139 U. S. 79, was an action by the latter company to recover from the former the value of two cars which had been destroyed by fire while in use by the former. One of the defenses was that the agreement under which the cars were so used was void, as being against public policy, because it gave the Pullman Company the exclusive right for fifteen years to furnish drawing-room and sleeping cars to the railroad company. But the court said, by Mr. Justice Harlan (p. 89): "We cannot perceive that such a contract is at all in restraint of trade."

Wiggins Ferry Co. v. C. and A. R. R. Co., 73 Mo. 389, belongs to the same class of cases as the last cited. It involved merely an agreement by a railroad company for the ferriage of its passengers and freight across the Mississippi.

REPORTS OF INTERSTATE COMMERCE COMMISSION.

In addition to the cases I have mentioned, the court of appeals also cited certain extracts from reports of the Interstate Commerce Commission, which, it is claimed, show that, in the opinion of that body, the intention of Congress was, by the act to regulate commerce, "to place important restraints upon competition." (58 Fed. 75).

It will be remembered that the Commission is not charged with any duty with respect to the act of July 2, 1890, and that whatever may have been said in its reports must be considered without reference to that act.

There are undoubtedly many purposes for which railroad companies may make agreements or form associations, such as continuous carriage, interchange of cars, use of uniform coupling appliances, classification of freights, etc. But the fact that such companies form an organization which they call an association does not entitle them to add to such proper purposes others which the law condemns. As to the latter, the agreement, whatever it be, must be considered as though it stood alone.

What the Commission has said in its annual reports or otherwise with respect to such associations should be read in light of the fact that there are lawful purposes, such as those above enumerated, for which they may properly exist; and it is not just to assume that whatever may have been said in general approval of the efforts of such associations to accomplish proper purposes was intended to be in approval of all other purposes, of specific provisions in any of their agreements, or of any unlawful act they may commit.

The quotation from page 19 of the Fourth Annual Report,

It was analogous to an agreement with a connecting line, not to an agreement with a competing one.

While some of the language used in the opinion in *Manchester, etc., R. R. Co. v. Concord R. R. Co.*, 66 N. H. 100, read without regard to the case decided, might be taken, as the court below took it, as meant to justify agreements among companies *actually operating* competing lines to put an end to all competition in rates, yet, in view of the facts upon which he was passing, the judge who delivered the opinion must be absolved from any such intention. The suit was for accounting and recovery under contracts and leases by virtue of which the defendant company had been for many years in possession and operation of the railroad of the plaintiff company. The defendant sought to defeat recovery by pleading, among other things, that the contracts and leases were against public policy because the lines of the two companies were competing.

The subject of the action was *an actual lease and transfer of property*, not a purely executory agreement or combination, as in the case at bar. There

given by the court at page 75, does not profess to be a construction of the law, but merely a statement of fact with reference to such associations. The quotation from page 21 of the same report, made at page 76, is simply an utterance against what are known as "rate wars" and their consequences, and can not, in even a remote degree, be said to approve association agreements like that in question. On the contrary, in the same paragraph, on page 22 of the report, will be found this statement:

was no agreement whatever as to rates, but control of them and the consequent ending of competition resulted from an executed transaction which brought about change of possession and control of property.

It is fair to infer that the desire to terminate the competition was the motive which led to the transaction. But the common law has at no time undertaken to question actual leases or purchases of property on the ground that they were intended to result, or did result, in the cessation of competition between the parties. The right to acquire and dispose of property has always been too highly considered to be in anywise restricted. The natural limitations of the power of acquisition and the risks and liabilities which result from actual ownership of property, or its control by *bona fide* lease, or otherwise, have always been deemed sufficient protection to the public; or it has been thought unwise to seek prevention of restraint of trade by imposing a restraint upon property which would prove the greater evil. In fact the law has always encouraged the transfers of property by permitting restraints of trade as incidents thereto which it would condemn, if independent because it has always considered wholesome the restriction on the right of *mere executory contract* which forbids restraint of trade thereby. I know of no authority, ancient or modern, which would have justified the court in refusing to adjudge to the lessor company its rights for any such reasons as those invoked with respect to public policy or restraint of trade. The case would have been different if the lease had been a sham, without actual transfer of possession, to cover a mere agreement between the companies to prevent competition. But the *bona fides* of the lease in this regard was not questioned. It had not only been made, but its covenants had been fully performed by the lessor.

Assuming the corporate power of the companies to enter into the lease, there was, at the time it was made, no law forbidding the purchase or leasing of competing railroads, and without such a law there was no limit upon the right of acquisition. Recognizing this, a law was afterwards enacted in New Hampshire, as in most if not all other States, forbidding railroad companies to acquire competing lines by lease or otherwise.

The case does not justify the position in whose support it is cited. Surely the court would not have decreed an accounting and recovery upon an agreement involving no sale, lease, or other transfer of property, but simply engaging two rival railroad companies, both remaining in active operation of their lines, not to compete in rates.

The passages cited by the court from *Morawetz Priv. Corp.*, Sec. 1131, and *Redfield Law of Railways*, Sec. 146, appear to be founded on a failure to observe the distinction which I have endeavored to point out between stipulations against competition which are merely incidental to sales, leases, etc., and those which are made for the sole purpose of preventing competition, and

Agreements between railroad companies which from time to time they have entered into with a view to prevent such occurrences have never been found effectual, and for the very sufficient reason that the mental reservations in forming them have been quite as numerous and more influential than the written stipulations.

The quotation from page 25 of the second annual report, made at page 76, used in the connection in which it is used, is entirely

also on ignoring the distinction between purely private and *quasi* public companies pointed out in *Gibbs v. Gas Co.*, *supra*. They also depend on English cases which are not only contrary to the weight of authority in this country, but also are affected more or less by English statutes, and are therefore of little aid.

See *A. T. & S. R. R. v. D. & N. O. R. R.*, 110 U. S. at p. 684.

Judge Redfield says in the section cited:

But when it is considered that these companies have to a very great extent a monopoly of the traffic and travel of the country, the power to regulate fares and freight by arrangement between the different companies is certainly one very susceptible of abuse.

I quote this here, out of its regular order, as bearing on the intention and scope of the act of July 2, 1890. The object of the act was to prevent this liability to abuse, against which the very difficult inquiry as to the reasonableness of such agreements was an inadequate protection.

Mogul Steamship Co. v. McGregor, upon which the court rely as sustaining the validity of the agreement, was wholly unlike the case now before the court, and is not at all in point.

A number of ship owners, engaged in the carriage of tea from China, entered into an agreement to drive competitors from the market by offering rebates, etc. Those competitors having been by that means compelled to carry at a loss, sued for damages. The question was not whether the agreement was or was not one which would have been enforceable as among defendants themselves, but whether the alleged loss caused plaintiffs by the *too severe competition* of defendants was an injury for which they could recover damages. The case was the same as that which would be presented here if the outside lines, for competing with which by means of lowering rates the agreement specially provided (section II. § 6), had lost their business at common points or had been compelled to do it at a loss, and had then sued the members of the association for damages. The only bearing which the character of the agreement of the defendants, as among themselves and as against the public generally, was claimed to have, was that if it were unlawful, so considered, it was a conspiracy which would make whatever was done in furtherance of it actionable.

But the Lord Chief Justice said in deciding the case on its trial (21 Q. B. D., at p. 553) "Restraint of trade, with deference, has in its legal sense nothing to do with this question."

He gave judgment for defendants, not on the ground that the agreement among them was or was not invalid as in restraint of trade because the object was eventually to control the trade by driving the plaintiffs out of it, but because the loss occasioned to plaintiffs by the severe competition of defend-

misleading. As will be seen by reference to the chapter from which it is taken, the subject discussed is the unity of railroad interests. The following passage from the same connection as that quoted shows the injustice of the use to which the latter is applied:

One of the chief perplexities encountered in dealing with complaints against railroad companies arises from the fact that to the public mind the railroad interest of the country seems to be in

ants was not an injury in law. It was freedom and not restraint of trade which the decision vindicated.

On appeal the three judges divided. Lord Esher, M.R., was for reversal, chiefly on the ground that defendants were guilty of "an act beyond the limits of fair trade competition" which prevented plaintiffs from exercising their "full right to a free course of trade" and "leads to an irresistible inference of an indirect motive" (23 Q. B. D., at p. 609). He thererore held that "the act of the defendants in lowering their freights far beyond a lowering for any purpose of trade * * * was an act done evidently for the purpose of interfering with * * * the plaintiffs' right to a free course of trade, and was, therefore, a wrongful act," etc. (p. 610).

Bowen and Fry, L. J.J., voted to affirm. The former (p. 615) ridiculed the idea that a court should undertake to decide what is "reasonable" or "fair" competition or rates of freight. He maintained the right to the utmost freedom of competition (p. 617). In answer to the claim that the agreement of the defendants was illegal as among themselves, because in restraint of trade, he says (p. 619):

The term "illegal" here is a misleading one. Contracts, as they are called, in restraint of trade, are not, in my opinion, illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts. It merely declines, after they have been made, to recognize their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public. * * * No action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade.

He therefore held that—

If peaceable and honest combinations of capital *for purposes of trade competition* are to be struck at, it must, I think, be by legislation, etc. (p. 620).

See Fry, L. J., to same effect at pp. 626-7. He said, p. 627:

It is plain that the intention and object of the combination before us is to check competition, but the means it uses is competition, and it is difficult, if not impossible, to weigh against one another the probabilities of the employment of competition on the one hand and its suppression on the other.

In short, the decision was that mere competition, even though combined, gives no right of action to those who suffer loss thereby. The court was not concerned with the question whether an agreement among parties not to compete with each other was valid *inter sese* or not.

The affirmance of the judgment in the House of Lords (1892), App. Cas. 1, was upon the same lines.

It will be noted that the business of ocean navigation, which is free to all, has not the same *quasi* public character as that of transportation by rail. The former requires neither the grant of franchises nor the right of eminent domain.

some sense a unity, so that when there is cause for complaint in the system anywhere, the whole interest is chargeable with some degree of moral if not legal responsibility.

After setting forth the fact that Congress has not attempted to deal with railroads as a unity, but treats them as separate entities in the exercise of its power to regulate commerce, the report undertakes to state some of the difficulties *that would be* encountered in an effort to enforce regulation upon the theory of unity, and in this connection uses the language quoted, which is in the nature of an argument against the unit theory of regulation. Yet this was cited by counsel below, and adopted by the court, as an approval of association agreements like that now in question. The other quotation from the same report is subject to the same criticism.

It seems to me unnecessary to notice the various quotations from the reports of the Commission which appear in the opinion and in the briefs. What I have said applies with more or less aptness to all of them. But we should look for construction by the Commission to what they have done with reference to association agreements.⁴³

III.

RIGHT OF THE GOVERNMENT TO SUE.

(a) If, as I have tried to show, the act of July 2, 1890, applies to railroad companies, and the agreement among the appellees is in violation of that act, then it seems conclusively to follow that the right to sue to enjoin further performance of the agreement is given to the United States by section 4 of the act.

⁴³ See *Cincinnati Freight Bureau v. The Southern Railway and Steamship Association* and *The Chicago Freight Bureau v. The C. N. O. and T. P. Railway Company* and others, decided May 29, 1894, in which it was held by the Commission that certain provisions of the agreement were tantamount to pooling and therefore illegal, and also certain other provisions, such as that "to apply full local rates upon all traffic subject to the association agreement coming from or going to such offending lines." At the conclusion of the case the Commission said:

The mere combination or agreement to thus discriminate is not, however, made an offense under the act, and no actual discrimination of this kind has been shown in these cases. As to whether such combination or agreement alone, in the absence of an overt act, would be indictable at Common Law *or under some other statute*, it is unnecessary, and perhaps, improper, for this Commission to express an opinion.

See also *Blanton Duncan v. The A., T. & S. F. R. R. Co.* and others, decided November 3, 1893.

See also in this connection quotation (*supra*, p. 308) from the report of the Commission for 1895.

The control of interstate commerce, and the consequent duty of protecting it, made it entirely competent for Congress to add the preventive remedy by injunction to the penal provisions of the act, because the civil remedy and the criminal sanction are entirely independent and not inconsistent. This seems to me to be settled by the decision *In re Debs*, 158 U. S. 564.

In reply to the attempt to anticipate the use of that decision in this connection (brief above named, p. 86), I will only say that I understand it to go on broader lines than "the property right in its mails." I see no such gross materialism in that magnificent exposition of Federal law. The only "property interest" the Government had was in the mail bags. Surely the court was not simply protecting these, but was defending the right of the public, of which the Government was guardian and trustee, to have Federal functions proceed without impediment. The right of the whole people to free passage of the mails is chiefly valuable because they are an instrument of interstate commerce, which, as well as the mail service, is committed to the care of Congress by the Constitution. The Government does not operate the mails as a source of revenue and therefore has no pecuniary interest in them. The general public, however, for whose benefit this suit is brought, have a direct pecuniary interest in having commerce free from restrictions. By the same right it has to protect from interruption the mails, which are a mere means or incident of commerce, it may protect the latter also by preventing as well as by punishing interference or restraint.

The case of *U. S. v. U. P. R. R. Co.*, 98 U. S. 569, which is cited at page 81 of the brief already named, does not seem to me relevant. The court did not deny the right of the Government to sue as provided in the act under which the suit was brought, but simply held that it made out no case for recovery. The company on whose behalf the Government might have recovered appeared and disclaimed. The Government itself had, as the court found, neither public interest nor property right in the subject of the suit. It has an interest, and the people on whose behalf it sues have a direct pecuniary interest, in maintaining the freedom of interstate commerce from unlawful restraints, and the act expressly gives it the remedy by injunction to protect such interests.

(b) But apart from the right to sue given by the act, the Government has a right to maintain this suit.⁴⁴

⁴⁴C., *N. O. & T. P. Rwy. Co. v. Interstate Commerce Commission*, 162 U. S. 184; *Texas Pacific R.R. Co. v. same*, *id.*, 197; *In re Debs*, 158 U. S. *supra*.

The passage quoted from the Texas Pacific case (brief, p. 86) mentions the absence of persons complaining of the rates in question simply as bearing on the *fact of unreasonableness*, which had to be found to justify action by the court, and not as affecting the *jurisdiction* without which it could not proceed to any inquiry at all.

The right of the Government to sue under the interstate commerce act is not limited to the mere protection of the interest of individuals.⁴⁵

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⁴⁵ U. S. v. M. P. R. R. Co., 65 Fed. Rep. 903, 906. That the State has a right to sue to enjoin acts contrary to public policy, etc., see Pomeroy's Eq. Jur., secs. 934, 1093, and note; L. & N. R. R. Co. v. Commonwealth, 31 S. W. Rep. 477; Stockton, Atty. Gen., v. Central R. R. Co. *et al.*, 50 N. J. Eq. 52. In XI. Am. R. R. & Corp'n Rep., p. 485 (note 2 to case of People v. Milk Exchange, *supra*), the cases on the subject are collected.