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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

THE UNITED STATES OF AMERICA,
Appellant,
vs.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, et al.,
Appellees.

No. 386.

APPELLEES' STATEMENT AND BRIEF.

H. S. PRIEST,
T. M. PIERCE,
Solicitors for Appellees.

Real Estate Ptg. & Pub. Co., 9 N. 8th St. Phones: Kin. Central 3854; Bell, Olive 1093

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STATEMENT.

Fourteen large railroad systems, owned and controlled by a like number of companies, made defendants in this case, enter the City of St. Louis. At the time this suit was brought defendant companies owned all the shares of stock of the Terminal Railroad Association of St. Louis, and all the shares of stock of the Wiggins Ferry Company.

The Terminal Railroad Association under a contract with the St. Louis Merchants Bridge Terminal Railway Company, dated August 17th, 1893, acquired the right to use, in perpetuity, all the terminal facilities then or thereafter constructed by the latter com-

pany, together with four thousand, three hundred and eighty-four shares of its capital stock. Contemporaneously it acquired thirteen thousand, five hundred additional shares of stock from shareholders of the Merchants Company, which gave it the majority of the shares of that company's stock.

This grant of perpetual use was not to interfere with the Merchants Terminal right of use of its own tracks, and was made pursuant to requirement of Section 9, of an Ordinance of the City of St. Louis, granting the Merchants Terminal the right to lay down its tracks and terminal facilities in the City of St. Louis. That provision of the Ordinance is as follows:

> "Said Merchants Bridge Terminal Railway Company * * * and shall also permit any other railroad company, having connection with it, to run its trains, locomotives, engines and cars, loaded or empty, over its railway tracks, side tracks, switches, turn-outs, and turn-tables, for such reasonable compensation and under such reasonable rules and regulations as may be agreed upon, etc."

These three companies, (viz.: Terminal Railroad Association of St. Louis, St. Louis Merchants Bridge Terminal Railway Company, and the Wiggins Ferry Company), at that time owned and controlled substantially all the connecting or terminal facilities at St. Louis, Missouri, and East St. Louis, Illinois, except the individual yards of the defendant railway companies. The unification, in the use of the Terminal Association and Merchants Bridge Terminal systems of terminal facilities, was accomplished through the contract above referred to, in 1893. The railway companies who owned all of the stock of the Terminal Association, to increase their terminal or connecting facilities and to provide means for further

expanding them, in 1903 acquired all of the stock of the Wiggins Ferry Company.

In 1904, the then Attorney General of the State of Missouri, (Special counsel in this case) conceiving the foregoing relation between the three terminal companies to be in effect a consolidation between parallel and competing lines of railroad, and a combination in restraint of State and interstate trade, filed an information in the nature of *quo warranto* (the nsual remedy in Missouri for disrupting trusts), against the Terminal Association in the Supreme Court of Missouri.

Upon demurrer to the information a judgment was given against the informant (State v. Terminal Railroad, 182 Mo. 284); the Court holding substantially that these terminal and connecting facilities for the use of all railroads entering the City of St. Louis in common and upon equal terms, did not violate the law prohibiting the consolidation or unification of parallel or competing railroads within the legal and economic meaning of those words; and that such an arrangement promoted and facilitated trade instead of restraining it. That Court said:

> "We gather from the information that all along the lines of the Terminal tracks, intersecting the city from north to south, from east to west, and belting it on the west, there are manufacturing and other business concerns with switch tracks or spurs into their premises, which enable the shipper to load the cars on the switch tracks on his premises and have them delivered to any railroad that reaches the City. A more effectual means of keeping competition up to the highest point between parallel or competing lines could not he devised. The destruction of the system would result in compelling the shipper to employ tbe railroad with which he has switch connection, or else cart his product to a distant part of

the city, at a cost possibly as great as the railroad tariff.

St. Louis is a city of great magnitude in the extent of its area, its population, and its manufacturing and other business. A very large number of trunk line railroads converge in this City. In the brief of one of the well-informed counsel in this case it is said that St. Louis is one of the largest railroad centers in the world. Suppose it were required of every railroad company to effect its entrance to the city as best it could and establish its own terminal facilities, we would have a large number of passenger stations, freight depots and switch yards scattered all over the vast area and innumerable vehicles employed in hauling passengers and freight to and from those stations and depots. Or suppose it became necessary in the exigency of commerce that all incoming trains should reach a common focus, but every railroad company provide its own track; then not only would the expense of obtaining the necessary rights of way be so enormous as to amount to the exclusion of all but a few of the strongest roads, but, if it could be accomplished, the city would be cut to pieces with the many lines of railroad intersecting it in every direction, and thus the greatest agency of commerce would become the greatest burden.

This is what our General Assembly, as early as 1871, to some extent at least, foresaw and attempted to relieve against, and we cannot believe that the Constitutional Convention in 1875 was less appreciative of the conditions then present or in prospect, and hence we cannot believe that the Convention, when it said that two lines of railroads that were parallel or competing should not be brought under one ownership or management, meant that two lines, used exclusively for bringing the trains from the several railroad termini in the city or at the city's border to a common terminus, should not be so consolidated; because, as we have seen, the consolidation of the terminal facilities promotes the competition that this

clause in the Constitution was designed to preserve."

An ineffectual effort was then made by the special counsel in this case to have the then secretary of War (now the President), declare the Merchants Bridge forfeited under the terms of Section 11 of an Act of Congress authorizing that structure across the Mississippi River.

The matter was then brought to the attention of the Department of Justice and this suit was begun in the United States Circuit Court at St. Louis, where at trial upon bill, answer and proof, the bill was dismissed by an equally divided Court.

THE BILL.

The essence of the charge is, that the fourteen railroad companies, named in the bill, and generally referred to as the Proprietary Companies, in the manner hereinbefore stated, acquired the control of the three Terminal Companies, viz: The Terminal Railroad Association, St. Louis Merchants Bridge Terminal Railway Company, and the Wiggins Ferry Company, each competitor with the others for the purpose of stifling competition, compelling all other railroad companies to use the facilities of the Terminal Companies and imposing unreasonable charges for their use in the transfer of freight and passengers between St. Louis and East St. Louis and all the States of the United States and foreign countries.

THE ANSWER.

There is no denial in the joint answer of the co-defendants that the use of terminal systems, so designating them for convenience, has been subjected to

the control of the railroad companies and each is being operated as part of one general and comprehensive terminal plan or arrangement; but it is averred that each of the three was incomplete in itself, and that they were brought into unison in order to supplement each the deficiency of the other, and perform more economically and with more facility and dispatch the terminal service for all the railroads which enter St. Louis and East St. Louis, (both places commercially considered as a single city), giving each railroad free and undiscriminating access to every shipping or receiving interest located upon any of the three systems.

It is further averred that the combination was not made and is not operated for the purpose of a distinct profit, but that the charge for service is simply sufficient to meet cost of operation, proper maintenance and fixed charges, and that the use of the terminals is open to the non-proprietary lines upon the same terms as to the proprietors. No dividends are paid upon the shares of either of the three terminal companies, and the proprietary lines are not any of them interested in the fixed charges except as guarantors. As a result of the union, the efficiency of the terminal facilities has been greatly increased, and the cost and charge for the services has been greatly reduced; all the railways, small and great, have been put upon an equality in this respect, competition between them has been encouraged, trade promoted and a monopoly avoided.

THE ISSUE.

The essential and controlling facts seem not to be in dispute. The question as it occurs to us is: Whether the common control or ownership of all the

terminal facilities (mechanical devices for the exchange, receipt and distribution of traffic,) of a large commercial and manufacturing center by all the railroad companies, and for the benefit of all upon equal terms and facilities, without discrimination, is condemned by the Sherman Act as a conspiracy in restraint of trade or an effort to monopolize trade.

The Government affirms it is, while the defendant contends it is in harmony with the law because it expands competition by extending equal conveniences and advantages to all shippers located upon each of the three systems for all traffic to and from St. Louis:—expedites and economizes the service. The arrangement is justified by (1) the physical or topographic conditions peculiar to this locality; by (2) its commercial, industrial and railroad development and history; by (3) public opinion expressed legislatively and judicially, and (4) by the judgment of experienced railroad engineers and managers.

We do not understand that a combination between competitors for business that will give them equal opportunity for competition, as in Joy v. St. Louis, 138 U. S. 1, and Ry. v. Ry., 47 Fed. Rep't. 15, S. W. 163 U. S. 564, S. C. 217, U. S. 247, is under the condemnation of the Sherman Act. All it requires is that they shall race fairly after they have toed the mark. If one railway company may equip itself with terminals and contract their equal use to another, may they not with no less legal objection unite in joint ownership.

The Court will look at the purpose of the parties and determine from the circumstances whether, the purpose being within the law, the means, rightfully used, are reasonably calculated to attain the purpose.

It seems to us that the Government is in this fundamental error—that it regards the community sur-

rounding St. Louis, because divided physically and politically by the Mississippi River, as distinct competitive commercial integers instead of a commercial industrial unit. The traffic in this community which may properly be called greater St. Louis, is casual and incidental and is a very small per cent of the traffic, and such as would ordinarily be served by drays.

PHYSICAL AND TOPOGRAPHIC CONDITIONS.

Space for terminals in the City of St. Louis is a serious problem. While St. Louis, East St. Louis, Venice, Granite City, Madison, and the towns which lie opposite St. Louis on the east side of the Mississippi River, constitute a single commercial and industrial community, the commerce of the City of St. Louis is of the greatest consequence.

Any plan looking to the service of this commercial and industrial community must make the amplest provision for the immensely greater magnitude of it in the City of St. Louis. Its population and commerce has grown immensely in the past ten or fifteen years. Its location was originally made with reference to the Mississippi River as a highway of travel and commerce.

In 1873 practically one-fourth of its tonnage was by river. Its total tonnage at that time was nearly six million. Its total tonnage in 1905 was about forty millions, thirty-nine millions of which was served by rail, and less than four hundred thousand by river. This tonnage doubles at the rate of once every seven years.

The valley of the Mississippi River at St. Louis is on the east side and the hills on the west side. The

entire city of St. Louis is located upon hills which rapidly recede from the river shore. Its river frontage is of several miles. To the north of the city the hills recede into a valley, formed by the Missouri and Mississippi Rivers. Mill Creek, a small stream, traverses about midway east and west the center of the City. The river front is bordered by a levee, rather narrow, midway of the city; northwardly it widens at the foot of the hills. Railroads coming into the city from the north enter from the valley, those from the west come into Mill Creek Valley, those from the south along the river bluffs up to the levee. The valley on the east side of the Mississippi River is about eight to ten miles in width, and there is no natural obstacle in the way of railroad entrance into East St. Louis and the adjacent towns.

In 1893 the Mill Creek Valley was entirely occupied by the yards and tracks of the Terminal Railroad Association of St. Louis, and the tracks of the Wabash, Missouri Pacific, St. Louis and San Francisco, and the Iron Mountain Companies. At this time the only rail connection these roads had with the east was over the tracks of the Terminal Railroad Association, through a tunnel and over the Eads Bridge to East St. Louis. On these tracks was located the Union Station, to which all railroads had access, those of the east over the Eads Bridge and through the tunnel, then the only means of railroad connection between St. Louis and East St. Louis. There was no room for the expansion of terminals in the Mill Creek Valley. However great the area for expansion of terminals on the east side of the river, it would be unavailing to the commerce of St. Louis, which was limited to its own available territory and the capacity of the tunnel and the Eads Bridge. All of the terminals of the St. Louis Terminal Railway As-

sociation on the west side of the river were confined to the Mill Creek Valley, the tunnel and the Eads Bridge. It did not serve either north or south St. Louis. There were two insurmountable obstacles to the extension of its terminals either north or south—topographical and municipal. Topographical because the available space was already occupied by railroad tracks, and municipal, because it could not get the consent of the Municipal authorities. At one time it made a serious and expensive effort to do so, but the effort failed by the refusal of the Municipal Assembly to grant the right to cross or occupy overhead, or at surface, the public highways.

The Eads Bridge was completed in 1874. It is a double decked structure, the lower for railroad tracks, the upper, for street cars, vehicles and pedestrians, the surface of which was practically even with the surface of the streets in St. Louis. The exit of the railroad trains from the bridge into St. Louis was through a tunnel into the Mill Creek Valley. It was conceived as a bridge company with the right to collect tolls. Experience and necessity made it a part of a terminal system.

The Merchants Bridge was promoted in 1896 with the like idea, but long before completion it inevitably followed the same development as the Eads Bridge, and became merely a part of a projected Terminal system. It was built several miles north of the Eads Bridge; and on the St. Louis side of the river formed terminals whose plans, so far as completed in 1893, had no direct connection with the Eads Bridge Terminals, and served that part of St. Louis lying north of the Eads Bridge. Its terminals and the individual tracks and yards of the railroad companies that entered St. Louis at the north occupied practically all the territory available for railroad tracks. There

was certainly neither room for duplication, nor necessity for it. Its system was at right angles with Eads Bridge System, although the two bridges were gramatically parallel across the river.

There was no single point of connection between the terminals connected with the Eads Bridge and those constructed in connection with the Merchants Bridge. They each occupied and served distinctly different municipal territory. If they exchanged business at all it must be through their connections.

After the contract of 1893 this connection was brought about by a union of the Terminal tracks with the elevated tracks of the Merchants Company, near the foot of the Mill Creek Valley.

The system of the Wiggins Ferry Company was constituted of a track on the east side about seven miles in length, running along the levee, and the west shore of the river, connecting with the Iron Mountain tracks and through it with the Terminal Association tracks, near a station in St. Louis called Ivory. On the east side of the river this company owned a large body of land extending along the river shore for a long distance, which was available for manufacturing sites and railroad terminals.

An effort was made in 1903 by the Rock Island Railroad Company to acquire the Wiggins Ferry property for its individual use. This was contested by other companies, and ultimately the stock was acquired by all of the railroad companies at St. Louis for their equal use and benefits, just as the other two systems were acquired. Of course, as the commerce of these cities grew, the railroad terminals must be expanded to meet its necessities. When the terminals cease to expand, as one witness expressed it, the commerce of St. Louis would cease to grow. So that, of physical and commercial necessity, the terminal

facilities of this greater St. Louis community was compelled to create a more rapid, continuous and general service and to seek to expand the terminals as then constructed.

We have seen that railroad access to the commerce of St. Louis is naturally divided into four sections—North St. Louis, Middle St. Louis, which comprises the Mill Creek Valley, South St. Louis and East St. Louis. All of the railroads which enter St. Louis have their termini at one of these four points; none of them run through St. Louis. They are all connected with each other and with the traffic of St. Louis by means of the Terminal Railroad Association tracks.

When these railroads were originally established, had the growth of St. Louis and the modern conditions of municipal life been foreseen, a different and more efficient plan might have been devised for terminals, but railroad companies in those days did not take serious thought of terminals in large cities. They did not take foresight of the immense future development of industry and commerce beyond their own immediate needs. It was then thought of railways, as well as highways, that if they brought persons to the City the service was sufficient and complete. The growth in the population of cities and in the volume of traffic has brought the subject of terminal facilities more seriously and pressingly, not only to the attention of the operators of railroads, but also to the public.

The ground required for terminals in large cities is enormously expensive. As the cost of terminal service must be borne by those who benefit by it, they are interested to keep that down to the lowest possible point. Railroad tracks and yards are unsightly; the movement of trains through them is attended with noise and smoke and dust; and so they

should be confined and restricted as closely as may be consistent with the needs of the community. As a city grows it needs more sewers and more water pipes, but it does not need more sewer systems and more water systems. In like manner, as a city grows it needs more terminal facilities, but it does not need more terminal companies. Indeed, all local or municipal public utilities tend necessarily to a unitary system, for physical reasons, if for no other.

And if each railroad in a city had its own comprehensive terminus, they would still fail of their highest efficiency unless they were brought into connection with each other, for often traffic must pass from one line to another, even where those lines considered in their entirety are competitive. A factory in St. Louis might be situated on a Wabash track, and yet have its freight from Chicago brought in over the Alton, and unless the Alton could use the Wabash switch, it could not make delivery at the factory, and bulk must be broken and delivery made by wagon.

We have twenty-four roads coming into the St. Louis community from various directions, and no through roads. Each of these has, and must have, terminals for its own distinctive purpose, and none of them has, or can have, comprehensive terminals giving it access to every portion of the city. It has its own station and side tracks for the freight to be delivered to the consignee at that station or sidetrack, but this will be a small part of the freight it brings to the city, and it will not be all of that even which finds ultimate delivery in the city. Most of what it brings in is to go out to some point beyond or is to be delivered at a warehouse or factory located upon the track of some other road.

There must then be a physical bond or union between the different railroads entering a city or their

highest efficiency cannot be reached. To accomplish this union there must be some arrangement between them. An independent company may build the connecting tracks and operate them, but that does not obviate the arrangement between the railroad companies; it simply makes necessary another party to the arrangement, and it involves a distinctive profit for a distinctive service. If one terminal company does not connect up all the lines, and two or more companies divide the field, so much the worse in every respect. Each company then must have its own engines, its own crews, its own receiving and delivery tracks, its own inspection, its own billing, multiplying the labor and expense of the terminal function by the unnecessary division of the function itself. It is to the public interest and advantage that all the railroads entering a city be brought into physical union, and the function of the terminal railroad is to effect that union, and the question of competition is not involved any more than in any other case of union of connecting lines; for only in so far as they form connecting lines, have the railroads any occasion for the union effected by the Terminal Company. The best solution of the terminal problem is, therefore, the simplest one.

Radical improvement and enlargement of St. Louis terminals began with the construction of the Eads Bridge. This was the work of a bridge company which did nothing but build the bridge, and which was independent of all the railroad companies, save as it desired them to use the bridge. Another independent company constructed the tunnel; a third, connecting tracks on the east side; a fourth, connecting tracks on the west side, and a fifth built the Union Station.

The facilities of the five companies must be used to

bring passengers from the terminus of the railroad in East St. Louis, and debark them at the Union Station. This was a clumsy and inconvenient arrangement, but it was the work of thirty years ago. It should all have been done by one company, and the obvious advantages of a single system resulted in bringing these several facilities under one control in the year 1889. It is obvious also that the railroad companies having occasion to use these facilities should have the right to use them upon equal terms.

As a consequence of the construction of the Eads Bridge, the Wiggins Ferry Company was compelled to make great changes in its mode of business. Through companies, one on the east side of the river and one on the west side, it constructed tracks along the river shores connecting with inclines, by means of which it was enabled to transfer cars from one side of the river to the other and avoid the breaking of bulk.

In 1886, a new bridge, the Merchants, was projected and was authorized by Act of Congress of February 3rd, 1887. The St. Louis Merchants Bridge Company was incorporated to build the bridge. An Illinois Company was organized to construct connecting tracks on the Illinois side, and a Missouri corporation, the St. Louis Merchants' Bridge Terminal Railway Company, was organized to construct connecting tracks on the Missouri side. Here were three links in one and the same chain of communication. These three links were, and properly, brought under one control and constituted the Merchants' Terminal System. None of the railroad companies entering St. Louis had any ownership or control of this system.

Here now were three distinct terminal systems no one of which, however, was sufficient for the needs of the situation.

As to the passenger business, the older company was in control. It had the Union Station and connecting tracks, and all passenger trains must come in and go out of the Union Station. Its bridge, however, could be reached only by means of the tunnel and so all passengers to and from the East must go through the tunnel. The Merchants' Bridge had open approaches on both sides of the river, but no connections with the Union Station.

As to freight, each of the companies had its own way of getting across the river and the old company had some sort of connection direct or indirect with all of the railroads on both sides of the river. The connections of the Wiggins Ferry and Merchants companies were not complete. But each of the companies could handle some of the business across the river and there was potential, if not actual, competition between them for some of it. How much of this business was thus open to competition is not shown by the testimony, but the physical conditions indicate that it could not have been a large proportion.

On the west side of the river there was but little territory common to the three systems or to any two of them. The old company had the Mill Creek Valley, the Merchants Company had North St. Louis, and the Wiggins Ferry the southern section of the city. To transfer or switch from one section of the city to the other required the use of the tracks of two and often three of the companies.

Neither of these systems, then, was a complete one either as to passenger or freight service. If passengers to or from the east were to be spared the passage of the tunnel, properties of the older terminal company and the Merchants Company must both be used, the station and tracks of the one, and the bridge and tracks of the other. If the different railroads

entering into the city were to be brought into efficient union with each other, and if the warehouses and factories of the city were, each and all of them, to be brought into track connections with each and all of the railroads, the facilities of all the terminal companies must be united and used in common for that purpose. Either that must he done or each of the three terminal companies must develop a complete system of its own.

The railroad companies determined upon one system of terminals, and to accomplish this, the leading ones among them acquired control in the manner alleged in the answer of the three terminal companies. Fourteen railroad companies are spoken of in the pleadings as proprietors, but some of these companies have such inter-relation with others, that, excepting two short coal roads on the East side and the Chicago, Peoria and St. Louis road, and the St. Louis and Southwestern, every railroad entering the cities of St. Louis and East St. Louis is represented in the proprietorship of the consolidated terminal system; and beyond this, the roads not so represented have the use of the terminals for the actual cost of that use. No charge of discrimination or oppression by any railroad company is to be found in all this enormous record. As proprietorship carries with it nothing distinctive except an obligation to join in the guaranty of fixed charges, no application for partnership therein ever has been, and we may safely add, ever will be refused.

ADVANTAGES OF UNITARY TERMINAL SYSTEM OWNED AND CONTROLLED BY THE RAILROAD COMPANIES USING IT.

The bill of complaint seeks to dissolve the present terminal system and asks that the three elements composing it he maintained, operated and developed as independent institutions. We have one system now owned and controlled by the companies using it; will it promote the public welfare to have three systems owned independently and operated for a distinctive profit?

If we had our three independent terminal companies, we should find tbat with the present facilities, no one of them could of itself render satisfactory service to any one railroad company. For example, the Terminal Association has the Union Station for passengers, but its terminal connection with the Eads Bridge is very objectionable to many people. The Merchants Bridge has open approaches and is preferred to such an extent by some companies that they make detours of several miles to use it. To avoid the tunnel and still use the Station involves an arrangement or combination between the two terminal companies. We have tbat now, and to avoid it and still get the service desired, either the Terminal Association must build a new bridge or the Merchants Company must supersede the present Union Station.

To give all of tbe industries in the community access to all the lines of railroad, requires, as far as concerns conditions, in most cases, tbe use of tracks of two or more of the terminal companies and this again would involve a combination or agreement be-

tween them. We have that now and to avoid it and still get the service desired, each of the companies must extend its tracks in every direction to reach every point now reached by any of them.

A view of the conditions will show this to be physically impossible. Mill Creek Valley divides the city into North side and South side. It is the natural location for the railroads leading to the West. So far as the terminals are concerned, it is fully occupied by the Terminal Association and there is room for nothing more. The same is measurably true of the Northern field, occupied by the Merchants Company, and of the river front district, occupied by the Wiggins Ferry.

Even if it were physically possible, unsightly tracks and yards should not be duplicated and triplicated unless there is absolute necessity for it. They do not in themselves contribute to the beauty of the city, nor does the operation of them add to the comfort and convenience of the inhabitants. Besides, the cost would be enormous and would impose a useless burden of expense upon the business done over the terminals.

These objections to three separate systems are all of a public nature; they are, all of them, obvious and they are overcome, so far as is humanly possible, by a unitary plan.

The only objection that is made or can be made to the unitary plan is that it eliminates competition as to the terminal service. There was some territory common to two or all of the separate terminal systems, and there was some competition as to traffic in this territory. This competition, it may be urged, would have become general with the development and extension of each separate system. We may grant this, for the sake of argument, but we still in-

sist that it proves nothing in favor of numerous and independent terminals.

The transportation of any commodity begins at the point of its production and ends only at the place of its consumption. This may involve carriage over a number of roads, crossing over several ferries or bridges, and hauling in a number of wagons. Every instrumentality used in the course of this transportation is a connection, and being connections, they may all be brought under one control. The competition which public policy demands, is competition between the point of production and the place of consumption. A river breaks the continuity of transportation by rail. Freight must be unloaded and ferried across and there may be two or more ferry companies, and if so, they should compete with each other. But this does not prohibit the railroad companies, the continuity of whose lines is broken by the river, from uniting in the construction of a bridge to be used by them in common. And as they may unite to build the bridge, they may unite to acquire ferries.

A great city operates in many cases, and it certainly does in St. Louis, to break the continuity of transportation. No line runs through St. Louis, and yet freight must go through. Here, as in the case of the river, is an obstacle to be overcome. How shall it be done? The answer is the same as in the case of river—in the most economical way possible. Bulk may be broken and freight hauled through the city, but however great the competition between teamsters, this means great delay and great expense. To build a line of railway through the city destroys the competition of the teamsters and yet the law authorizes this to be done, because it is in the interest of economy. And as railway construction through a

great city is enormously expensive, two or more companies combine, as in the case of the bridge, and build one line which they use in common. The competition between the carriers remains as to the transportation from the point of production to the place of consumption. The agreement as to the line through the city is simply an agreement as to a common means for overcoming a common obstacle.

The work done over terminals is practically all of it work done for railroad companies. It is a part of the transportation of commodities from the place of origin to the ultimate destination. Most of it is the haul from one road over which it is brought into the city to another road over which it is to be taken out of the city. A lesser portion of the work, although a very considerable part of it is hauling the commodity from the shippers' place of business to the place of receiving by the railroad company, or from the place of delivery hy the railroad company to the place of business of the consignee.

Competition as to service of this kind, concerns directly and primarily the railroad companies, because it is a service which they may themselves perform and which they should perform whenever they can economically do so. The fewer the distinct agents of transportation between the point of production and the place of consumption, the better for the producer and consumer, because there are fewer profits to be paid.

Whatever in the nature of transportation others may do for the railroad company or for the shipper, the railroad company itself may do. When the business justifies it, the company may build a switch to a warehouse, mine, mill or factory, and indeed the statutes of many states requires this to be done. Competition between teamsters is destroyed when the

monopoly of the switch is established, but the switch is an economy to the shipper and the railroad company and to the general public, and this includes everybody interested to preserve competition between the teamsters so long as the work was done by them.

Our contention comes to no more than this, that the terminal service necessary to be done in a great city may, any or all of it, be done by the railroad companies for themselves. A company may build its own line connecting with another road on the other side of the city, and it may use its own wagons to receive and deliver freight at store doors.

This, and no more, the railroad companies of St. Louis have done. They have acquired the terminal facilities of St. Louis for themselves and are operating them as a part of the instrumentalities of their business. That each one might do this if the instrumentalities employed were its own is conceded, but it is denied that they may combine with each other for that purpose.

THE UNITARY SYSTEM IS IN ACCORD WITH PUBLIC POLICY.

The illegality of such a combination, if it is illegal, grows out of its subject-matter and does not depend upon the number of parties to it. Railroad companies have transportation to sell and if there are three railroad companies doing business between Chicago and St. Lonis, a combination between any two of them pooling business between St. Louis and Chicago, is just as illegal as a combination of the same kind in which the three engage. These companies are interested in terminal service in the two cities, and if this service stands upon the same footing as transportation between the two cities, then no two

of them may combine as to that service, either directly or through the common use of terminals furnished by a third party, but each must possess its own facilities.

We submit that terminal service is a matter of internal economy which the companies may adjust to mutual advantage and that no arrangement respecting it operates to restrict competition between them as to the transportation service for the public in which they are engaged.

Albeit the companies operating between Chicago and St. Louis, own in common the terminals in both cities, each has still its individual interest to do all the business possible between the two places. They stand in the same relation to the tracks which constitute their terminals that they do to the bridge spanning the Mississippi. They may use one and the same bridge and what difference does it make whether they own the bridge or lease it, or pay for its use on the wheelage basis. There is in any event a common use and a common charge. There is an arrangement between them, or should be, which puts them on an equality as to this bridge, and none the less so that each of them contracts with a bridge company, instead of with the other railroad companies, and so it is with the rest of the terminal facilities. There is a common use and a common charge and a common agreement even though it be made effective through a fourth party.

Whatever facility railroad companies may use in common, they may own in common. Whether the facility is hired or owned is a mere matter of convenience or economy. If the railroad company is poor in purse and credit, it must hire many things which otherwise it would prefer to own. If the terminals are distinctly owned, there must be a distinct

profit for their use. In our large cities it is found that one plant may furnish heat, light and power to two or more buildings. One proprietor puts in a large plant, one with capacity beyond his own needs, and he serves his neighbors, to a better advantage than they can serve themselves, and with a profit to himself. In such a case, the other owners might well conclude that one man should not reap all the profit resulting from this service and so make an arrangement that the plant which rendered this common service should be owned in common. This certainly is not on the same basis as an agreement between them fixing a schedule of rents which they all pledged themselves to maintain. The one is an adjustment of a matter of internal economy in which all participate and benefit who are concerned, while the other is a combination of landlords on the one side against tenants upon the other, in which the tenants do not participate and the benefits of which they do not share. Common arrangements affecting internal economy have never been held to be in violation of public policy and whenever, in the advance of civilization, they have suggested themselves as feasible, they have been recognized by law, and appropriate regulations have been prescribed for them. In the country every man builds independently. The man who has a hundred and sixty acres of land to build upon does not consider the question of party walls. But if in the crowded section of a great city all construction were done independently; if each building had its own distinctive walls; the waste in space and the increase in cost of construction would be very great. We are coming more and more to a common use of things and to a common ownership of the things of common use. The disposition of sewage, the supply of water and light are familiar examples of functions,

which once were performed by private agencies and under conditions of competition, the common interest in which led to the common use and common ownership of the facilities involved. There is a monopoly now of the performance of these functions, but it is not an illegal one, for the people who are to be served own, or if they do not own, through their power to regulate, control the exercise of the monopoly.

Community of use of terminals in a large city is more than a matter of convenience, or economy, it is an absolute public necessity. The bill of complaint recognizes this, and is distinctly at cross purposes with itself. It alleges that the railroad companies which are proprietors of the Terminal Association "compel all other railroad companies which are not owners of stock in said Terminal Association for inter-state commerce between Illinois and Missouri and * * * * jointly and arbitrarily fix unreasonable charges and tolls to be paid for freight and passengers to be hauled and transferred in the interstate business between Illinois and Missouri."

As to the averment respecting tolls and charges, we have to answer: First, that under the Interstate Commerce law and, indeed under the common law of the land, these must be reasonable and the government has the power to make them so if they are not. But the charge of extortion is absolutely without support in the testimony. There was not even an effort to support it, and on the other hand, the evidence is conclusive that the charges are based on cost of operation, proper maintenance and fixed charges. No one of the proprietary companies is interested in the fixed charges except as a guarantor and as helping to pay them through its use of terminal facilities.

The charge of the bill that the proprietary railroad companies compel all other railroad companies

to use the facilities is not true. There is, indeed, a compulsion, but it is inherent in the situation. The other companies use the terminal property because it is not possible to acquire adequate facilities for themselves. The cost to any one company is prohibitive. Beyond this, the city of St. Louis would not and should not permit the laying of tracks and establishment of yards everywhere throughout the city in order that each company might have a terminal system of its own. And even if it were done, if the necessary cost were incurred and the city laid waste to the extent required, these terminals to be effective of their purpose must still be co-ordinated in some way. Some arrangement must be made by the companies if freight is to pass from one road to another. The moment we deal with freight passing through here, or either originating here or destined here, which must make use of more than one line, and this means by far the greater portion of all that is handled here, that moment we find that these so-called terminals are really connections binding the various lines of railroad together so that continuous transportation can be had over them from one part of the city to the other. A common use of all the facilities in the city is thus unavoidable. A company may, indeed, as is the case with most of them, have a station and sidetracks exclusively its own, but so far as these are used exclusively by itself, it is, and can be, only for freight which it takes on at its station for shipment over its line, or which comes in over its own line and is destined for delivery at its own station.

Union stations and union terminals of all kinds are not an invention or discovery. They are a new development. They have grown out of the necessities of municipal conditions. Two railroads in the west projected as independent lines can cross a moun-

tain range only through one pass, and this of a width which permits the construction of but one line. What is to be done in such case? Is the first line to reach the pass to have a monopoly of its use? If so, the second line must be abandoned or resort to tunnels, perhaps, which will overburden it with the expense involved. The common sense solution of the problem is that both may use the pass, and whether the line through this is built on joint account or whether it is built by one of the companies, the result is still the same; there is a common use and this may properly be under a common ownership.

And so it is in a great city. Undoubtedly it would be of great advantage to the first company building in, if it acquired an extensive terminal system enabling it to reach all the different sections of the city. Companies coming in later, in order to compete successfully, must acquire like facilities and at greatly increased cost or they must be admitted to the use of those already existing and owned by the other company. The first course would be an increasingly expensive one and increasingly objectionable from the civic staudpoint. The second course would leave the latter companies too much at the mercy of the earlier one. They should all have equal facilities for the proper transaction of their business, and they get this when they are admitted to the use of the existing terminals upon equal terms.

The convenience of transportation also requires the unification of terminal systems. If we have as many systems as we have railroads, it might require a dozen handlings, in some cases, to move freight from one part of the city to another. Each company must handle it over its own road, greatly increasing both the time required and the expense involved. How it would be done is described by the witness,

Perkins. The first company takes a car over its own track and delivers it to the connecting line upon a receiving track appointed for that purpose. Then follows inspection, receipting, billing, etc.; and a new engine and crew to take the car over the second link of the chain with a repetition of the performance had at the first delivery; and so at the end of each link in the chain of connections. Delays would be unavoidable and expense would be enormous. The repetition of the performance at each delivery of the car to a connection is obviously something that should be dispensed with, but can not be except as the various links are brought under one direction and the chain is dealt with as a single line. Another great practical advantage is that at all times the route through the terminals which can be used to the best advantage is employed. If one track is occupied or otherwise obstructed, the train may be sent over another. If something has happened on the Eads Bridge, the Merchants is open for use. Thus as many routes are available as can be made up out of the various tracks and always the best one for the purpose in hand may be used.

Every consideration of a public nature points to a consolidation of the terminals and to a common use of them by all the railroad companies coming into the city. But to avoid the odious phases of a monopoly this use must be open to all upon equal terms. It matters not whether the ownership be a distinct one, or whether it be by the railroad companies, so be it the use is common and upon equal terms. Ownership by all the railroad companies gives the best assurance of the best conditions of use, and that is practically what we have in St. Louis. Fourteen companies own the stocks of the Terminal Association, and while there are some companies outside the proprietorship,

none are excluded. They remain outside of their own accord, probably because proprietorship involves guaranty of the liabilities of the Terminal Association. But they have only to knock at the door and it will be opened. Meanwhile they use the terminal facilities upon the same terms with the proprietary companies. The charge for service in any case can be stated in one word—cost. No money received for the service rendered goes to any other purpose than paying expenses of operation, taxes, fixed charges, and proper maintenance. No dividends are paid upon terminal shares, and no proprietary railroad company is a beneficiary of fixed charges. Any new railroad built into St. Louis now has hut to secure a way to a Terminal track and it has at once the advantages of the entire Terminal system.

STATUTES RELATIVE TO TERMINALS.

The public policy of the country as indicated by statutory enactments has been in favor of combination by railroad companies whenever any common matter of internal economy is involved, and also wbere the combination is in the nature of connecting lines of railroad for the purposes of continuous transportation.

We might cite numberless charters for bridges across the navigable rivers of the country intended to be used in common by two or more railroad companies which may be either common proprietors or may be tenants of a distinctive bridge company. Two bridges across a great river, where one will serve, do not facilitate commerce, but burden it with an unnecessary charge, and one bridge being constructed, the requirement of freedom from restraint of trade is met when all have occasion to use the bridge can do so upon

reasonable and equal terms. And it has never been enacted by any legislature that those who use the bridge might not have a proprietary interest in it and neither has any court decided that such an interest was against public policy.

Common use of the same facilities by different railroad companies has not only been approved, but has been enforced whenever there has been good reason therefor. The Act of Congress of March 3rd, 1875, provides that no company which shall locate its road through any canyon, pass or defile shall prevent any other company from the use of the same canyon, pass or defile for the purpose of its road, in common with the road first located.

The combination of connecting lines of road has, from the beginning, been regulated as in harmony with public policy and is provided for by the laws of perhaps every State in the Union. The combination facilitates commerce but not more so than does the combination of the various connections that make up the terminals of a great city.

The essential quality of terminals in a city, that of connections between the lines of railroad entering the city, may not have been generally perceived in the beginning, but when the railroads of the country had been fairly well developed, it became obvious that each new road, as it was constructed, could not acquire for itself a comprehensive system of terminals, and union stations and terminals were authorized by statute.

Sections 1164 and 1165, Revised Statutes of Missouri, make elaborate provisions for terminal companies to be formed either by individuals or by railroad companies, and this is done "in order to facilitate the public convenience and safety in the transmission of goods and passengers in and in the neigh-

borhood of large cities, from one railroad to another, and to prevent the unnecessary expense, inconvenience and loss attending the accumulation of a number of stations."

The State of Illinois also by an Act approved April 7th, 1875, declared the same public policy and authorized the formation of Union Depot Companies, either by individuals or by railroad companies.

The Act of Alabama, approved February 15th, 1907, respecting the establishment of depots, contains the proviso "that this Act shall not prevent the establishment or maintenance of union depots by two or more such railroad companies or corporations"

Indiana, so early as 1852, provided for "union roads," enacting that, "It shall be lawful for two or more railroad companies running railroads to the same town or city, to locate, construct, keep up, repair and use a common or union railroad of one or more tracks, connecting the railroads of such companies for business purposes." Burns Annotated Statutes, Col. 2, Secs. 5345 to 5374.

Iowa authorizes union terminals and the shareholders in the terminal company may be either individuals or railroad companies, Secs. 2099 to 2102, Annotated Code of 1897.

Maine provides for joint use of passenger stations by section 60, chapter 51, Revised Statutes of 1903.

Massachusetts has at different times passed laws requiring railroad companies to unite in stations.

Michigan has an elaborate code governing union depot companies. Chap. 166, Compiled Laws of 1897, Railroad companies may be shareholders in the union depot companies.

Minnesota, by Act of March 5th, 1879, provided for the St. Paul Union Depot Company and authorized subscription to its stock by any railroad then

or thereafter constructed and running to or into St. Paul.

Nebraska, by Chapter 20, Laws of 1887, makes express provision for union depot companies, and by section 1816, Compiled Statutes of 1901, provides for joint terminals.

North Carolina has a union depot law and under its provisions the Corporation Commissioners may compel the establishment of such depots by the railroad companies.

Ohio expressly authorizes union depot companies to be formed and operated by railroad companies. Chapter 3, Title 2, vol. 2 of Bates' Annotated Statutes.

The South Carolina Code of 1902, vol. 1, page 813, requires the railroads entering or passing through a city to build connecting tracks.

Tennessee authorizes terminal companies with very broad powers, and provides that they may lease their properties to railroad companies having occasion to use them, and it authorizes railroad companies to become shareholders in terminal corporations. Sections 2429 to 2437, Code of 1896.

Texas, by Chapter 16a, of the Civil Statutes of 1897, authorizes corporations for union depot purposes and empowers railway companies to subscribe for their stock.

Virginia, by Section 1294, of the Code of 1904, provides that where two or more railroads terminate in a city or town and they cannot get permission from the city authorities to connect their lines within the corporate limits, they may make the connection outside of those limits.

These various statutes all recognize the essential nature of the terminals in a city as being connec-

tions between the different railroad companies and the function performed by them as being an integral part of the function of transportation undertaken by the companies severally. They recognize also that co-operation as to this terminal function does not affect competition between the companies, and further, that general economy and the comfort and convenience of life in a great city are promoted by a unitary terminal system used in common by all the railroad companies entering the city.

Union depots and union terminals exist in States which have made no provision for them by name, and they were built up not in disregard of law, but in response to the demands of the public interest and general welfare, and under the sanction of the general railroad law which in every State we have been able to examine contains provisions broad enough for the purpose.

Among the general powers conferred upon railroad companies by Section 4096, of the Mississippi Code of 1906, is that, "To cross, intersect, join or unite its railroad with any other railroad heretofore constructed at any points on their routes, and upon the ground of such other railroad company, with the necessary and proper turnouts, sidings, switches and other conveniences and to exercise the right of eminent domain for that purpose."

This may be taken as a fair example of the laws of every State of the Union. It has no reference to the combination of long connecting lines and it gives no sanction to the combination of competing lines. The same laws which contain provisions like that quoted, also contain provisions authorizing the combination of connecting lines and prohibiting the combination of competing lines. The section has in view

of coming together at a city or town of two or more railroads, whether by mere convergence or by crossing, and recognizes that whenever this occurs there is a public need for the common use to some extent of the facilities of all the companies. Two railroad companies coming into a city may be in true sense parallel and competing lines, but unless they are as two tracks of one road each one has a large territory in addition to that which it serves in common with its competitor. The Wabash and the Missouri Pacific are competing lines between Kansas City and St. Lonis, but not for any intermediate points. This is generally, if not universally, true of all so-called competing railroads. A shipment from an intermediate point on one of the roads to an intermediate point on tbe other must pass over both roads, and as to such a shipment the two roads are connecting lines. Beyond this, while at a city or town where the two roads closely converge, or cross each other, one or more factories may be so situated as to have track connections directly with both, this cannot be true generally of the factories and warehouses in the city, and to give a factory or warehouse located on one line the advantage of the use of the other line, there must be established a connection between the two. Ever such connection involves a common use and a common arrangement for that use. And so from the beginning the laws provided for it and even required it, placing the public interest above what the management might conceive to be the interest of the individual company.

The United States has also recognized the propriety of union stations and terminals and to the extent of compelling the railroads entering the city of

Washington to join in the construction and maintenance of the Union Station which has recently been opened to public use.

It would be singular, indeed, if all of the States severally and the United States as well were giving their sanction to arrangements and agreements which are in violation of the Sherman Act, and it is much more probable that a construction of that Act leading to such a result is entirely without warrant.

JUDICIAL DECISIONS RESPECTING TERMINALS.

Union terminals have been frequently before the courts for consideration, and have always been recognized and approved as legitimate agencies in the work of railroad transportation.

The very arrangement we have to deal with in the present case was the subject of direct attack by the Attorney General of Missouri in State vs. Terminal Railroad Asociation, 182 Mo. 284. It was contended that the arrangement was in violation of section 17, Article 12 of the Constitution of Missouri, prohibiting the combination or consolidation of competing lines of railroad. The court said:

> "The purpose of the General Assembly was to allow such combination among the managers of the railroads entering the city as to reduce to the minimum the number of tracks, bring all the trains to one terminus, all freight to a common point for distribution, all cars to a common yard. It expressly authorized two or more railroad companies to do this and put no limit to the number that might so combine.
>
> The railroad companies in this State have for thirty years past been acting on the theory that

they had the right to do that, and so they have, unless we can say that the framers of the Constitution intended to forbid them doing so.

The purpose of the statute is not only not in conflict with the purposes of the Constitution, but is in aid of it. We have between our two great cities, St. Louis and Kansas City, four or five railroads which, in the sense above mentioned, are parallel and competing lines for the traffic between those two cities. Suppose a manufacturing concern in the northern part of the city has a switch track to its establishment connecting it with the Merchants Terminal tracks and desires to make shipments of its products to Kansas City, the business of the concern being of such magnitnde as to make its patronage an object of rivalry between all the railroad companies reaching that market. But if the Merchants Terminal Company can deliver the cars which are loaded on the switch at the manufacturer's establishment to one railroad only that railroad has a practical monopoly of the business of that manufacturer. But if the whole terminal system is open to the shipper he may invite bids on his freight and employ the railroad that will take it at the lowest rate. That is the system that this respondent has established, and it is bound to serve all railroad companies approaching St. Louis on the same terms; in the language of the information "the general object and purpose being to provide the most ample and convenient connections, accommodations and terminal facilities in St. Louis for all railroads now entering, or hereafter to enter the same, and all individuals and companies doing business with said railroads." The State has ample power to hold the respondent to a faithful performance of that public duty, to prevent favoritism and to prevent extortion.

We gather from the information that all along the lines of the terminal tracks, intersecting the city from north to south, from east to west, and

belting it on the west, there are manufacuring and other business concerns with switch tracks or spurs into their premises, which enable the shipper to load the cars on the switch tracks on his premises and have them delivered to any railroad that reached the city. **A more effectual means of keeping competition up to the highest point between parallel or competing lines could not be devised.** The destruction of the system would result in compelliug the shipper to employ the railroad with which he has switch connection, or else cart his product to a distant part of the city, at a cost possibly as great as the railroad tariff. St. Louis is a city of great magnitnde in the extent of its area, its population, and its manufacturing and other business. A very large number of trunk line railroads converge in this city. In the brief of one of the well-informed counsel in this case it is said that St. Louis is one of the largest railroad centers in the world. **Suppose it were required of every railroad company to effect its entrance to the city as best it could and establish its own terminal facilities, we would have a large number of passenger stations, freight depots and switch yards scattered all over the vast area and innumerable vehicles employed in hauling passengers and freight to and from those stations and depots. Or suppose it became necessary in the existence of commerce that all incoming trains should reach a common focus, but every railroad company provide its own tracks; then not only would the expense of obtaining the necessary rights of way be so enormous as to amount to the exclusion of all but a few of the strongest roads, but, if it could be accomplished, the city would be cut to pieces with the many lines of railroad intersecting it in every direction, and thus the greatest agency of commerce would become the greatest burden.**

This is what our General Assembly as early as 1871, to some extent at least, foresaw and attempted to relieve against, and we cannot believe

> that the Constitutional Convention of 1875, was less appreciative of the conditions then present or in prospect, and hence we cannot believe that the Convention, when it said that two lines of railroads that were parallel or competing should not be brought under one ownership or management, meant that two lines, used exclusively for bringing the trains from the several railroad termini in the city or at the city's border to a common terminus, should not be so consolidated; because, as we have seen, the consolidation of the terminal facilities promotes the competition that this clause in the Constitution was designed to preserve."

People ex rel. Bernard vs. Cheesman, 7 Colo. 376, was an action of *quo warranto*, and in this a Union Depot Company was sustained as valid and for a lawful purpose under the general incorporation laws of the State.

In Central Railroad Company vs. Perry, 58 Ga., 461, it was held that where one company owned a track and depot and permitted another company to use them jointly with itself, the track and depot might be considered as belonging to each relatively to its own business.

In Birdwell vs. Gate City Terminal Company (Ga.) 10 L. R. A., new series 909, the company was organized under the general railroad law. Its right to exercise the power of eminent domain was contested upon the ground that it was a terminal and not a railroad company. The Court, however, held it to be a railroad company and its use to be a public use, and it saw no objection to the exercise of the power of eminent domain, that it might thereafter "sell, lease, assign, or transfer its stock, property, or franchises to or consolidate with some other

company whose road connects with or forms a continuous line with it."

In Indianapolis Union Railway Company vs. Cooper, 6 Indiana Appeals, 202, it was held that a Terminal Company assumes to carry out a portion of the obligations which the railroad company owes to the public.

In Reisner vs. Strong, 24 Kan. 410, the Atchison Union Depot and Railroad Company was sustained as a corporation *de facto* and held to have the right of eminent domain.

State ex rel. vs. Martin, 51 Kan. 462, is very like the case at bar. The Union Terminal Company of Kansas City, Kansas, was organized under the general railroad law of the State, and was purely a terminal company intended to build terminals in Kansas City, Kansas, and designed to be united with similar companies in Kansas City, Missouri, its facilities to form a part of the Missouri system for switching and terminals. The suit was *quo warranto* by the Attorney General of Kansas. The Court said:

> "Even the averments of the plaintiff do not show that the proposed use of the road is not a public one. Besides switching cars from one part of the city to another, it is alleged that the road is to be leased to other railroad companies for terminal facilities. Nothing is stated which shows that the companies to which the road is intended to be leased will not afford transportation to all who may apply or to all who under ordinary circumstances would be entitled to such service. The convenience and necessity of belt and terminal roads in crowded and populous cities is well understood and has been frequently demonstrated. **A single road which reaches a union and other depots, as well as warehouses,**

> elevators and other places in the city, is made to serve all the railway companies operating to and from the city, when it would be impracticable and perhaps impossible, for each of the companies to secure an entrance and build its own line to the depots, stations and storehouses in all parts of the city where the railroad service is required. By this means unnecessary roads and expenses are avoided, and the facilities and convenience of the public are greatly enlarged. Every unnecessary mile of railroad track adds to the cost of transportation; and as the public which uses these roads is required to bear the burden of this extra cost, it is clearly in the interest of the public that a terminal road, which affords transportation to all companies and people, should be constructed and maintained."

Here without express statutory sanction and simply as inherent in the situation, a single terminal system is recognized to be a public convenience and necessity, and as not restricting, but as greatly enlarging the facilities for public use.

In Mayor vs. Norwich, etc., R. R. Co., 109 Mass. 103, the Legislature had passed an act requiring certain railroad companies to unite in a passenger station in the city of Worcester and the validity of this act was drawn in question in the case, but the contention against it was overruled. The Court said:

> "The Boston & Albany Railroad Company must of necessity have a passenger station in Worcester, and it is obviously important to the public that all the other railroads named shall be connected with it."

The same legislation was sustained in Mayor vs. Railroad Commissioners, 113 Mass. 161.

In Union Depot Company vs. Morton, 83 Mich. 265, the Union Depot Company sought to condemn

land and its right to do this was contested upon the ground that the use to which the land was to be devoted was not a public one. The Depot Company, it was contended, was not a railroad company, and the use of its property under the law chartering it was not open to the general public, but only to the railroad companies. The Court said:

"The main argument against the constitutionality of the act conferring the power of eminent domain upon these companies (see laws of 1881, page 320, How. Stat., p. 888), is based upon the proposition that they must acquire such power entirely from the act itself; that the Union Depot Company is not a railroad company; it is not a common carrier, it is a new artificial person deriving all its rights and powers and finding absolutely all its obligations in this, its organic act. Therefore, it is argued it is clearly independent of and not affected by the body of the railroad laws and amendments embraced in Chapters 91 and 92, How. Stat., which confer rights and privileges upon railroad companies and also provide certain and clearly-defined reciprocal duties to the people, the imposition of which duties by law is the criterion which makes the use for railroad purposes a public one. It may be admitted for the purposes of this case, that so far the contention of counsel is correct, and that we must look to the act itself to support the claim of the company to the right to acquire land by condemnation for public use.

But going further, the counsel also claim that in this act nothing can be found conferring upon the public at large any rights in the contemplated passenger depots and freight houses; that the people at large—the common public—are given by this statute no fixed and definite rights in these depots; and that there is nothing to prevent the companies organized under it from charging what they please for depot services to the public at large.

It is said that the provisions of the statute apply only to dealings between the depot companies and the railroad companies who may use the property of the former companies; that this company, for instance, 'may shut its doors against the approaching passenger unless he pays its price to go in, and that there is nothing in the act to compel it to open its passenger depot or its freight house at all to the community in which it is proposed to erect this structure.' That the act only provides for those entering the same by the railroads that terminate or connect with it.

The argument is, if we understand it, that the public at large have no rights specified by the act, unless they act and use the same under the privileges granted to the railroads. It appears from the record that the Fourth Street Union Depot Company was organized for the purpose of furnishing depot and terminal facilities for four different railroad corporations and for all other railroads that may hereafter desire admission thereto. The four companies now interested are the Flint & Pere Marquette Railroad Company, the Wabash Western Railroad Company, the Detroit, Lansing & Northern Railroad Company, and the Canadian Pacific Railroad Company. It would seem that a depot built to accommodate all the railroads coming into Detroit, or, any considerable number of them, and to be used by them for the same purposes that any one railroad company would use its own single depot, would be, when so used, without question, put to a public use, as it has long been settled that a railroad company may acquire, by the right of eminent domain, grounds for its depots and station houses; and this right is not questioned by the counsel for respondents.

The Act (Section 6) confers in express terms, this right upon companies organized under it, and provides that such right shall be exercised, and title to be acquired to the lands sought, in

the manner and by the special proceedings prescribed in the Act. How. Stat., Sec. 3463. Section 28 of the Act provides that all companies formed under this Act shall, for a reasonable compensation, provide suitable depot accommodations for the passengers and freight of the railroads terminating or connecting with it or desiring access thereto; and shall provide suitable tracks therefor without discrimination in favor of or against any of such roads. If the corporations cannot agree upon the terms and conditions upon which such accommodations shall be furnished, and the business transacted, the Commissioner of Railroads shall determine the rate of compensation to be paid for the accommodations required, which shall be uniform to all such railroad companies, but no such rate shall be fixed as will reduce the net annual income of the business of said company to less than seven per cent. of the cost of the property used. Section 29. Companies formed under this Act shall not at any time charge or receive for warehouse or elevator service or use more than the average rates then prevailing at the cities of Toledo, in Ohio, and Port Huron, in Michigan, for like service or use. Section 30. Any Union Railroad station and depot company may, and whenever it is expedient, and such trains will pay the expenses thereof, shall put on local passenger trains to do a local and suburban passenger business, and for such local business upon or to the end of its tracks shall be entitled to charge for each passenger not exceeding four cents per mile; and upon the application of any ten suburban citizens for the establishment of such trains, unless the company comply with the request, it shall be, upon the same request to the Commissioner of Railroads, competent for him to investigate and determine whether such trains shall be established and, if in favor thereof, it shall be the duty of such company to establish and maintain them so long as he shall re-

quire it to be done. How. Stat., Secs. 3485-3487.

It seems to me that the rights of the public to use the depots of these companies, their freight houses and elevators and, in certain cases, their trains, which under certain conditions they must operate, is fixed, definite and certain.

The public at large have the same right in them as they have in the depots and freight house and cars of railroad companies in this State; and the representative of the public, the Commissioner of Railroads in this State, is given powers of control and regulation over them. Their charges must be reasonable, and the maximum is under State control, as in the case of railroads.

No additional charge can be imposed upon the public by any railroad contracting with the Union Depot Company, by reason of its agreement with such depot company, while the public is benefited as well as the railroad companies by increased facilities of travel and transportation. **That a union depot like the one sought to be established by the petitioner in the City of Detroit, would be of great and incalculable public benefit, no one who reads this record can doubt.** The act stamps the property to be taken with a public character and imposes upon it a trust for the public use, which cannot he divested by any act of the corporators of the company. The law of its existence plainly prevents it from becoming a mere private corporation, or from disregarding its public use."

In Detroit Station Company vs. Detroit, 88 Micb. 347, it was held that a union station company might, as a part of its facilities, maintain an elevator, this being "as essential and necessary to the complainant in the handling of its grain as is its depot for the use of passengers, or its freight depot for the handling of the general merchandise it carries."

The General Statutes of Minnesota, Title 1, Chapter 34, authorized a union depot company whose business was "to build, purchase or lease and operate transfer tracks or railways in the city of St. Paul, open alike to the use of all railroads now constructed or which may hereafter be constructed to or into St. Paul. Any railroad might become a stockholder in said union depot company.

In State vs. St. Paul Union Depot Company, 42 Minn. 142, the Court speaking of the depot company said:

> "It is evident that this act contemplated that the entire stock of defendant should be owned by and equitably apportioned among the various roads desiring to use its terminal facilities * * * It is also apparent that it was never intended nor contemplated that the defendant should do what may be termed a 'separate and independent railroad business of its own,' but that it was merely designed as an agency through which there might be furnished, for the common benefit and use of all railroads coming into the city, a union depot and terminal facilities, to better enable them to perform their duties as common carriers in receiving, delivering and transferring passengers and freight in the city."

The matter was further considered in St. Paul Union Depot Company, vs. M. & N. R. Company, 47 Minn. 154, wherein the Court said:

> "It seems apparent that the object sought to be accomplished was to bring all the railroads whose lines of road should enter the city into a legal, acting efficient combination, as a convenient and advantageous means of providing and maintaining suitable depot and terminal facilities for the common use of all the roads, facilitating transfers from one line of road to another,

and contributing to the convenience and advantage both of the railroad companies and of the public."

In Chicago, St. Paul and Kansas City Railway Company vs. Union Depot Railway Company, 54 Minn. 411, the terms and conditions upon which a new railroad company might enjoy the facilities of the depot company was determined.

In Dewey vs. Railroad, 142 N. C. 392, the Court sustained the act of the Legislature empowering the Corporation Commissioners where practicable, to require railroads to construct and maintain a union depot in cities and towns.

In Riley vs. Union Station Company, 71 S. C. 457, the defendant was a union station company chartered under a special act of the Legislature. Its stock was owned by the Southern Railway Company, and the Atlantic Coast Line Railroad Company, the only two railroad systems entering the city of Charleston and having termini in the city. The right of defendant to exercise the power of eminent domain was challenged because among other reasons, its organization was in violation of the Sherman Act. The Court said:

"We do not find in this case anything to warrant a conclusion that the organization of the defendant company is a scheme by the Southern Railway Company and the Atlantic Coast Line Railroad to do something which they could not lawfully do under their own chartered powers. They have become stockholders in defendant company by authority of a valid act of the Legislature, and the plan of organizing the defendant company for the purpose of securing an important public utility in the line of their own chartered purpose has legislative sanction. The case

presented has no similarity to the Northern Securities case, 193 U. S. 358, and other cases on that line, relied on by appellants relating to combination in restraint of trade, in violation of anti-trust legislation."

In Ryan vs. Terminal Company, 102 Tenn. 124, sanction was given to the Terminal Company as promoting a legitimate public use. The Court said:

"If it is true, then, that a depot erected by the Louisville and Chattanooga Road was a public use, why should a union depot, laid out and constructed for the accommodation of all roads now concentrated at Nashville, where for greater convenience, all travel and freight will be gathered, and to be used by these roads for no other purpose than this railroad would use its own depot, be any the less a public use? The rapid growth of population, the yearly increase in volume and value of commercial interests, the pressing necessity for the speedy handling, delivery and transmission of freight to prevent accumulations and often ruinous delays, the vast economy in the matter of transfers, are among the considerations which have multiplied these depots in cities where railroads centralize, and we are satisfied no improvement in railway intercommunication more nearly touches the public than this. * * * But it is said this is a private enterprise because the Act on which the charter rests fixes no rates to be charged by the corporation for the use of its tracks, etc. This is immaterial. The corporation and its property being affected by a public use will be under governmental control and the Legislature may at any time fix rates and make more specific the duties clearly implied from the act of incorporation. Minn. vs. Illinois, 94 U. S. 113. Budd vs. New York, 143 U. S. 517. Brass vs. North Dakota, 153 U. S. 391."

In Collier vs. Union Railway Company, 113 Tenn. 96, a belt line railroad was under consideration and the Court approved its purpose as a valid public use, saying:

> "In the present case it is shown by the principal officers of the road that it is the purpose of the company to switch cars from one road to another, to receive freight on the line of its road and give bills lading over its own and other roads to any part of the world, in other words, to perform all the functions of any ordinary railroad.
>
> We think, therefore, that it is clearly established, both by the charter and parol evidence, that the road is intended to subserve a public use, to conserve a public necessity; in short, to do any and everything that is required of an ordinary public commercial railroad."

The propriety of combinations among railroad companies with respect to their tracks and other facilities in large cities has been fully recognized by the Federal Tribunals.

In Joy vs. St. Louis, 138 U. S. 1, there was under consideration a contract between the Park Commissioners of Forest Park and two railroad companies under which the Colorado Company asserted the right to use the tracks of the Wabash Company through Forest Park and to the Union Station. The Wabash Company resisted this contention upon various grounds. The Court laid great stress upon the civie interest involved, and among other things, said:

> "Railroads are common carriers and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable

> of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation. The present case is a striking illustration. Here is a great public park, one of the lungs of an important city, which, in order to maintain its usefulness as a park, must be as free as possible from being serrated by railroads; and yet the interests of the public demand that it shall be crossed by a railroad. But the evil consequences of such crossing are to be reduced to a minimum by having a single right of way, and a single set of tracks, to be used by all the railroads which desire to cross the park. These two antagonisms must be reconciled, and that can be done only by the interposition of a court of equity, which thus will be exercising one of its most beneficient functions."

In C., R. I. & P. Ry. Co. vs. U. P. Ry. Co., 47 F. R. 15, was involved a contract for the joint use of the railway tracks and facilities which were located in part in the cities of Council Bluffs and Omaha. It was objected that the contract was **ultra vires**. The case came origiually before Justice Brewer. Considering the phase of it relevant to the present inquiry, he said:

> "It (the contract) is for the interest of the public in preventing the destruction of valuable property, and the cutting up of a large city by new tracks and right of way, and in avoiding an unnecessary investment of large sums of money in railroad building, aud thus increasing the railroad burden."

The case came then before the Circuit Court of Appeals for this Circuit, 51 F. R. 309. Sanborn, J., delivering the opinion of the Court affirming the decree of the Circuit Court, said:

"These tracks are at one of its (U. P.) terminals, at the junction of three great systems of railroad, aggregating more than 14,000 miles in extent, at the crossing of the Missouri river where three large cities stand. **Courts cannot be blind to the fact that railroad companies do, and every public interest requires that they should, make proper contracts for terminal facilities over the roads of each other.**"

On appeal to the Supreme Court, 163 U. S. 564, the case was again affirmed, and in its opinion the Supreme Court quoted with approval what we have quoted from Judge Sanborn.

THE SHERMAN ACT.

This suit is based upon the Sherman Act and we must therefore consider whether the arrangement in question is in restraint of trade or commerce among the several States or whether it is a monopoly of any part of the trade or commerce among the several States.

To determine this, we should disregard all matters of form and look at the substance of things. The arrangement involves actually nearly all of the railroads entering the St. Louis community from whatever direction, and potentially all of them.

The fourteen proprietary companies named as defendants own directly seventeen of the roads into St. Louis and indirectly three more. Four companies only are not represented in the Terminal proprietorship, and these are the owners of two short coal roads and of the Bluff Line and the Cotton Belt, but these four companies participate in all the benefits of the terminal arrangement upon equal terms

with the proprietors, except that they have not incurred the contingent liability assumed by the proprietors for the financial obligations of the Terminal Companies.

The arrangement then is one, practically speaking, by all the railroad companies for a common control or ownership and a common use upon equal terms of the terminal facilities at St. Louis. It does not prohibit any company from acquiring such facilities as it may need or desire for its own individual purposes. It deals only with facilities which all of them have occasion to use. It comprehends the gap which exists between the terminus of one road and the termini of all the other roads, and the industries located upon other tracks than its own. It provides for continuous transportation from those industries and termini to and over the one road. This is its dominant, characteristic, and almost exclusive function. Everything else is petty and incidental. It is in recognition of the policy declared by section 7 of the Interstate Commerce Act, which makes unlawful "any combination, contract or agreement, expressed or implied to prevent, by change of time, schedule, carriage in different cars, or by other means or devices, the carriage of freight from being continuous from the place of shipment to the place of destination." The Terminal Association has no facilities for doing anything else than help to such continuous carriage, for it has no cars of its own, and can simply transfer cars from one railroad to another or from or to a railroad or from a warehouse or factory. What is thus approved and required by the Interstate Commerce Act cannot be in violation of the Sherman Act.

Aside from the requirements of the Interstate

Commerce Act, how can this common control and use of terminals, essential to the efficiency of each and all of the railroads, restrain trade, which, as applied to this case, means to suppress competition among the railroads themselves. They have each and all of them the right to provide the best means of receiving and delivering freight and the best means of crossing a river. A union of effort to solve a common problem in the mere operation of their roads can of itself have no effect upon their competitive relations.

The common interest of the companies as to which they may agree extends to many things; indeed, to everything which relates to the construction, maintenance and operation of their properties. They may impart to each other their experiences and they may share the cost of experimentation as to these things. We have now everywhere, the same gauge of tracks, standard types of cars, uniform coupling devices and air brakes, and as a consequence a car, freight or passenger, can move east or west, north or south, from one end of the country to the other, from Tampa in Florida, to Los Angeles in California. This has not been accomplished without concert and agreement between all of the railroad companies, as well those in competition as those not in competition with each other. And we are dealing here with something of the same general nature, a subordinate agency or instrumentality on the practical, operative side of travel and transportation. The advantages from the standpoint of the business are obvious and so are those of public comfort, public safety and public economy.

The only suggestion in the record as to the manner in which competition between railroad companies is

affected by their common use and control of the terminals is to be found in the cross-examination of the defendant's witness Perkins, vol. 4, pp. 2843 to 2846. Counsel for the Government indicated his view in the question:

> "If from East St. Louis to St. Louis the Illinois Central and the Chicago and Alton Railroad Company had equal access to the terminal facilities of the Terminal Railroad Association and paid the same price for the service rendered by the Terminal Association, and if that service price, whatever it was, was added into the rate from Chicago to St. Louis by both roads, then there would be no competition on that rate for that service from East St. Louis to St. Louis in the Chicago rate, would there?"

And this view of the matter is repeated, varied in form of expression, in question after question.

By the same token we may say that if the Alton and the Central companies pay the same price for coal, there is no competition between them as to that part of their charge for transportation which covers the cost of coal.

In each case we deal with a part of the work which must be done in conducting transportation between St. Louis and Chicago, and as to that, the companies may join their efforts whenever it is to their mutual advantage to do so. In the case of the C., R. I. & P. Ry. Co. vs. U. P. Ry. Co., 47 F. R. 15, the companies united with respect to a bridge across the Missouri, tracks in Council Bluffs and Omaha, and a railroad between Lincoln and Beatrice in Nebraska, and yet the arrangement was approved in turn by the three courts before which it came and it never occurred to any of them to condemn it as in restraint of trade. And so it was in the case of Joy vs. St. Louis. The

companies involved, the Colorado, now the Rock Island, and the Wabash come into St. Louis on the same tracks from the western limits of Forest Park and at the same cost for the use of the tracks, and so in view of counsel there is a combination between them on their Kansas City and St. Louis business as to that part of the haul of such business which lies between their point of junction on the west line of Forest Park and the Union Station. The Circuit Court and the Supreme Court none the less enforced the joint use of the tracks through the park by the two companies, being evidently of opinion that if competition was not restricted as to the rest of the haul between the two cities, it was left free as to the business in its entirety.

The journey of a passenger between Chicago and St. Louis is an entirety and so is the shipment of freight from one of the cities to the other. The Alton and Central companies might combine as to this business and divide either the traffic or the earnings. But the combination to be effective must deal with the journey or the shipment in its entirety. Such a thing as a combination as to the initial or terminal three miles of the route and competition as to the rest of it is inconceivable.

Traffic for the purposes of combination or competition cannot be split in the manner suggested but must be dealt with in its entirety. The rate for passengers or for freight between the two cities is single and indivisible. Different elements may enter into the determination of what that rate shall be, but however much may be taken into account for one thing or another, the resulting rate is unit and is fixed for the entire service. Arrangements as to joint use of bridges, terminals and tracks have no-

thing to do with the rate, save as elements of cost and expense. If the arangements lessen cost, they tend to lessen charges, precisely as do cheap fuel, more powerful engines, and more capacious rolling stock. Two carriers might nse the same road throughout from St. Louis to Chicago and pay at the same rate for wheelage over it and still be competitors. When railroad construction began it was supposed that each road would be a common highway for many carriers. This is true of water transportation today. There are many carriers over the same canal, paying the same tolls for its use, and still competing with each other. So it is with traffic on the rivers, lakes and oceans; the waterway is there, open to the use of whomsoever may launch his vessel upon it.

Two manufacturers may not combine to limit the amount of their output or to fix the price at which their products are to be sold. They may, however, derive their raw material from the same source and pay the same price for it. The same railroad may bring it to their doors and collect the same rate of freight. Water may be furnished by the city and light and power by companies chartered for the purpose, and upon a uniform schedule. But none nor all of these things constitute a combination, agreement or arrangement in restraint of trade. They each and all relate to cost of production and not to the price at which the products are to be sold.

Counsel for the government confuse the operation of the railroad and the cost of it, with the service rendered to the public and the charge for it. The Sherman Act has nothing to do with the former; its restrictions fall altogether upon the latter. No matter how many subordinate agencies of transpor-

tation different railroad companies employ in common, no matter how many combinations they may make to secure economy in operation, so long as they do not pool their business or their earnings, so long as they are left free in their relations to the shipping and the traveling public, every motive of self-interest remains to incite to competition. And when economy of operation, however accomplished, reduces costs, the end hoped for through competition, is aided, and charges are reduced to a still lower level.

These economic arrangements have received the sanction of State and National legislation and of judicial decision alike in State and Federal Courts and in the case of terminals they are supported by considerations of a higher nature. Unsightly, disturbing and dangerous railway tracks must be confined closely as may be to the mills, the factories and the warehouses, whose servitors they are, and limited in extent to the necessities of their use, if our cities are to be more than workshops and car yards, if they are to attain to something of beauty in landscape and architecture, if any evenfall there may be escape from the dust and din of the day, if pleasant homes may be reached in safety, and quiet and repose enjoyed at the winter fireside and in the summer shade.

Respectfully Submitted,

H. S. PRIEST,

T. M. PIERCE,

Solicitors for Appellees.