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DISCRIMINATION IN RAILWAY FACILITIES.

IT is the custom of railway managers to manifest partiality in their dealings with the public. For example, one man is allowed the cheap and advantageous transportation of his freight in his own cars, while the private cars of his competitor in business are driven from the road. A railway director, interested in a sleeping-car line, secures the privilege of running his sleeping-cars on a railway, and the exclusion from it of all other sleeping-cars. A huge monopoly secures cheap rates, special cars, private switches and all other facilities for cheap transportation, while its competitors must pay high rates without private switches or special cars, or any other corresponding advantages. In the matter of rates, discriminations are uniformly more constant and onerous than in facilities. Traffic managers apply a theory of wholesale and retail rates. The law authorizes a railway company to give a shipper of a large quantity a cheaper rate than is given to a shipper of a small quantity. The difference in the prices of carriage, however, must correspond with, and not exceed, the saving in expense of carrying the large quantity over the small one. This rule is entirely disregarded. In some instances 200 or 300 per cent. more is charged for carrying a small quantity of a certain kind of freight than is charged for carrying a large quantity of the same goods, although the difference in expense may not exceed 50 per cent. This is called giving the larger shipper a wholesale rate.

Another theory of railway managers is that it is their duty so to

adjust rates of transportation as to regulate the prices of commodities in the markets. This principle has been sanctioned by no less an authority than Mr. Commissioner Fink, who, in his Report on the Relative cost of Transporting Live Stock and Dressed Beef (New York, May 31st 1883), says, page 38: "We are to consider how to place the dressed beef and live stock shippers upon an equal footing, so that a man who buys in the eastern market dressed beef that is shipped from Chicago as such, and dressed beef that is derived from live stock which is shipped from the west and slaughtered here, will have to pay the same money per pound. That is the problem we have to solve."

With a view of regulating the price of meats at the east, Mr. William Stewart, the General Freight Agent of the Pennsylvania Company, recommended an advance of 125 per cent. upon dressed beef rates, Chicago to New York, making, as he said (Report upon the Relative Cost of Transporting Live Stock and Dressed Beef, p. 118, letter of William Stewart), \$1.44 per 100 as the proper rate on dressed beef, when the rate on live cattle is 40 cents per 100." It is by means of special rates and privileges that railway managers try to regulate the market prices of oil, coal, meat and many other staples.

The existence of these facts and of a multitude of others of similar import, furnishes good reason to examine the law upon the subject of railway rates and facilities. It is intended in this essay to collate a few of the authorities bearing upon Discrimination in Railway Facilities.

I. GENERAL RULE.—The law with reference to railway facilities is firmly established. A railway company must furnish all persons reasonable and equal transportation facilities. If one man is allowed a private switch to his warehouse, lumber or coal yard, any other man having a warehouse or yard accessible to the railway is entitled, as of right, to the same privilege. If one firm is given the privilege of running its cars or engines over the railway, all other firms have a right to do the same with their cars or engines. No railway company has a right to make any distinctions between persons. It must serve all alike, without fear or favor. Its obligation to do this results from its position: (1), as a common carrier, and (2), as a public agent.

1. *Railway companies are common carriers.*—Authorities need

not be cited to sustain this proposition. By railway companies is here meant, not only such as own and operate railroads, but the various "fast freight line companies, and rolling-stock or equipment companies. All these companies being common or public carriers, their obligation to serve all alike is involved in the very definition of their name. Common means belonging equally to more than one, or to many indefinitely, or to the public, or all mankind—serving for the use of all. How can the use of a thing be common to all, if some individuals are deprived of the use, or are permitted the use only under restrictions and conditions not imposed upon the rest. The Supreme Court of Maine, speaking of the definition of common carriers, says: "It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply, and in the order of their application:" *N. E. Express Co. v. M. C. R. Co.*, 57 Me. 188, 196. Mr. Justice DOB, of New Hampshire, says of a common carrier: "His service would not be public, if out of the persons and things in his line of business, he could arbitrarily select whom and what he would carry. Such a power of arbitrary selection would destroy the public character of his employment and the rights which the public acquired when he volunteered in the public service of common carrier transportation. With such a power he would be a carrier—a special, private carrier, but not a common, public one: *McDuffee v. Railroad Co.*, 52 N. H. 448. Again he says: "Common * * * contains the whole doctrine of the common law on the subject. The defendants (a railway company) are common carriers. That is all that need be said." *Id.* 457. And again, "As no one can infringe the common right of travel and commercial intercourse over a public highway, on land or water, by making the way absolutely impassable or rendering its passage unreasonably unpleasant, unhealthy or unprofitable, so a common carrier cannot infringe the common right of common carriage either by unreasonably refusing to carry one or all, for one or for all, or by imposing unreasonably unequal terms, facilities or accommodations which would practically amount to an embargo upon the travel or traffic of some disfavored individual:" *McDuffee v. Railroad Co.*, 52 N. H. 430.

2. *Railways are Public Agents.*—The doctrine that railway companies are public agents, though not new or doubtful is neither so widely known nor so readily accepted by those unacquainted with it, as the doctrine that railway companies are common carriers.

One reason why they are public agents is because they are intrusted with the disbursement of public funds. Immense sums, in bonds and money, have been raised by municipalities and donated to railway companies to assist in constructing the public highways those companies were authorized to build. Of this money railway companies are trustees to use for the purposes for which it was intended. Another reason why they are public agents is because they exercise a public franchise in condemning private property for right of way and other railway purposes. This property is taken in the right of the state and by its authority. How can a railway company take a man's land as an agent of the state and then insist upon its right to deal with the same man as a purely private company in carrying his freight over the road?

A railway company is an agent of the state because it is in charge of a public highway. It is beyond question that a railway is a public highway. Many cases have so decided. In *Bloodgood v. Mohawk, &c., Railway Co.*, 18 Wend. 9, the court of last resort in New York held that railways are public highways. It declared that the fact that railroad corporations may remunerate themselves by tolls and fares, does not destroy the public nature of a road nor convert it from a public to a private use. In *Olcott v. Supervisors*, 16 Wall. 678, the Supreme Court of the United States decided, "that railroads, though constructed by private corporations, and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question was whether a state's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies the taking of property for private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for a public use, and the reason why the use has always been held a public one, is that such a road is a highway, whether made by the government itself, or by the agency of corporate bodies, or

even by individuals when they obtain their power to construct it from legislative grant. Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who was the agent, the function performed is that of the state. Though the ownership is private, the use is public. The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used. That all persons may not put their own cars upon the road *and use their own motor power* has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge."

In *Talcott v. Pine Grove*, 1 Flippen 144, Judge EMMONS held that "the road once constructed is, instanter and by mere force of the grant and law, embodied in the governmental agencies of the state and dedicated to public use. All and singular, its cars, engines, rights of way, and property of every description, real, personal and mixed, are but a trust fund for the political power like the functions of a public office. The artificial personage * * * the corporation created by the sovereign power expressly for this sole purpose and no other—is, in the most strict, technical and unqualified sense, but its trustee. This is the primary and sole legal, political motive for its creation. The incidental interest and profits of individuals are accidents both in theory and practice."

A railway being a public highway, the person or corporation that has charge of it is a public agent. This was expressly decided in *People v. New York Cent. Railroad Co.*, 16 Cent. L. Jour. 151, in which the Supreme Court of New York compared railway companies to ordinary officers of the state. The court says: "The acceptance of such trusts on the part of a corporation by the express and implied contracts already referred to make it an agency of the state to perform public functions which might otherwise be devolved upon public officers. The maintenance and control of most other classes of highways are so devolved, and the performance of every official duty in respect to them may be compelled by the courts, on application of the state, while private damages may also be recoverable for individual injuries. The analogy between such officials and railroad corporations is strong and clear, and so far as affects the

construction and maintenance of their railroad will be questioned by no one."

It being established that a railway company is an agent of the government it follows that the agent is bound by the same obligations which bind its principal in dealing with the people. It need hardly be said that if the government operates and maintains a highway it is bound to permit the use of such highway in every reasonable and proper manner to all alike, and without undue preference or unjust prejudice toward any. And this obligation is as binding upon an agent of the government in charge of such a highway as it is binding upon the government itself.

II. RIGHT OF RAILWAY TO PREVENT COMPETITION.—May railway companies prevent the public from securing the services and facilities of their competitors?

Railway companies have always been jealous of competition, and perhaps, justly so, because competition, especially when it takes the form of competitive strife, popularly known as a "railway war" of rates, entails large losses upon them. Rates are cut down so low, that persons and property are carried for less than actual cost of transportation, and even for nothing. The earnings of the company are reduced. Dividends upon the capital stock become impossible. The value of the capital stock is seriously unsettled and depreciated. Under these circumstances it is not surprising that railway managers have sought by "pooling" contracts, combinations, and other means finally and forever to stop competitive struggles, attended only by loss of revenue and waste of capital. One of the means resorted to for the purpose of precluding competition has been the exclusion of new companies from doing business in localities served by older companies with roads already constructed, equipped, and in operation. Railway companies appropriate to themselves the country through which their roads are built, and claiming it as their "territory," resent the construction of new lines which would compete with them in the handling of traffic, urging that there is but business enough for the roads already built, and that the division of traffic with new companies can only render the business both of the new and the old companies unprofitable. The legislatures of various states in early history of railway companies seem also to have entertained a similar view. The charters of some of the early railway companies contain express

provisions of different kinds against the construction of a railroad by any one else within a defined area on each side of the line authorized by the charter. But this legislative restriction was only imposed during a limited period; it was not perpetual. Of course where such a restriction is put in the charter, the legislature can not afterwards, within the time fixed, sanction the establishment of a competing road within the area defined, without unconstitutionally impairing the older companies' charter rights; at least the legislature could not afterwards permit the construction of such a competing road without providing for the payment of compensation for the loss or diminution of the older companies' monopoly after a proper ascertainment of the amount. Probably no such improvident legislation now exists, and in the absence of it, the legislatures of the various states are under no restraint in chartering new and competing railway companies. The present policy of the government is not to limit railway construction, but to permit and encourage it, especially with a view of securing competition. In many of the states, special legislation is not necessary to charter a new company. General laws exist for incorporating railway companies, which all persons are at liberty to form upon compliance with the requirements of the statute. This policy of unlimited railway construction may be too liberal. It may be unwise to allow the building of new railways in localities amply served by those already in existence; but whether this be true or not, the law allows fullest liberty of railway construction, and any attempt by railway companies to exclude from business new competitors, chartered to build roads in "their territory," is contrary to this rule of public policy and is unlawful. It was decided in *Denver & N. Or. Co. v. Atchison, T. S. F. Railroad Co.*, 15 Fed. Rep. 650, that a contract by which two railway companies agreed to exchange their traffic and not to "connect with or take business from or give business to any railroad," which may be constructed in Colorado or New Mexico after the date of the agreement, is against public policy and void. It was further decided that if such companies refuse to accept "through" freight and passengers from a third company, whose road had been built in the territory specified in the contract after the date thereof, except at rates or fares higher than the rates or fares charged persons or property coming over the roads of the parties to the contract, such refusal amounted to an unreasonable and illegal discrimination against such traffic coming

over the new road, which would be restrained by an injunction at the suit of the new company.

III. OBLIGATION TO HAUL PRIVATE CARS.—Can railway companies lawfully deny to a private person, firm, or company, the privilege of having his or its private car hauled over the railway?

In the early history of railways it was expected that every one would be permitted to run upon the road with his own car and motive power. The company was peculiarly a *railroad* company, since it furnished merely the roadway without cars or locomotives. This appears from the charters of some of the companies, which indicate that they were not expected to engage at all in the business of transportation. Other charters indicate that the companies were expected to be both *railroad* and *transportation* companies. They were to furnish not only road-bed and track, but cars and locomotives. They were themselves carriers, and took not only toll for the use of the track, but freight and fares proper, *i. e.* charges for carriage as distinguished from tolls.

It was soon perceived that the dangers from the intensity of the pressure of steam and the frequent insecurity of boilers, from the great velocity of the trains, their extended length and immense weight, and the inability to deviate from the track, were such as to render a divided control of the locomotive power inadmissible: *Camblos v. P. & R. Railroad Co.*, 4 Brewst. 563; and the public were excluded from using locomotives other than those belonging to the company upon the road. Even private cars were not permitted to be hauled over the track by the company's locomotives without the most rigid supervision and regulation. However, with the vast increase of railway business, it soon became the policy of railway companies to encourage large transporters to furnish their own cars, the transporter paying the tariff rates on the freight and being allowed for the use of his cars over any part of the road and for any kind of traffic. In favor of this policy it is urged that to the railroad company it saves investment of capital and avoids the difficulties and jealousies that always arise in brisk times in the distribution of cars, while it specially requires fewer cars to carry the same amount of tonnage—for the private transporter will get better service out of his cars than the railroad company can do, and this, because such cars are proportioned in number to the wants of the transporter, are built for one character of freight, and run

between fixed points. To the transporter it pays a fair interest on the investment of capital and secures a larger tonnage of freight, because the cars are kept in more constant use, and the shipments are not delayed for want of cars. [Report of the investigating committee of the Penna. Railroad Co., appointed by resolution of stockholders at the annual meeting, held March 10th 1874.] Companies owning private cars have also been found of great efficiency in bringing business to railway companies. For example, the so called "fast freight lines" having agencies to solicit and undertake the carriage of freight scattered over a territory larger than that occupied by any single railway company, naturally acquire control of a traffic which they may or may not send over the railway company's road. To secure this traffic it is expedient for the railway company to haul the cars of the private companies owning them, and this is the policy which generally prevails. In accordance with this policy, thousands of cars owned by fast freight lines, sleeping car companies, rolling stock, and equipment companies, manufacturing and business firms, companies or individuals, are now permitted to run upon railroads throughout the country and probably no railway company excludes from its tracks the cars of private owners, and thousands of such cars are being constantly hauled.

The question whether a railway company can lawfully deny to a private person, firm, or company, the privilege of having his or its private car hauled over the railway, has, up to the present time, not been decided by any court. There is no doubt that when a railway company does in fact accept a private car for transportation, it assumes, as to that car, the duty of a common carrier; and if while in transit the car or its contents are damaged or destroyed through negligence of the company or its servants, the company will be liable for the injury done: *Mallery v. Tioga Railroad Co.*, 39 Barb. 488; *New Jersey R. & T. Co. v. Penna. Railroad Co.*, 27 N. J. L. 100. A railway company hauling a private car has been likened to a steam tug proprietor towing a boat, and it has been urged that since the tug owner is not liable as a common carrier for the safety of his tow, so a railway company should not be held responsible as a common carrier for the safety of a private car being pulled by its engine. But the two cases differ in this, that a railway company has full possession and control of the private car its engine is pulling, while a tugman, on the other hand, has

not full possession and control of his tow; it remains in the control of its owner. It is, therefore, reasonable that a railway company having such full possession and control should be held to a higher degree of responsibility for the safety of a private car placed in its charge, than a tugman for the safety of his tow.

In *Erie Railway Co. v. Union Locomotive & Express Co.*, 35 N. J. L. 240, s. c. 37 N. J. L. 23, the Union Locomotive and Express Company agreed to provide cars and trucks sufficient in size, strength, weight and capacity whereon to carry all locomotive engines and tenders over the road of the Erie Company, and to place such cars and trucks thereupon. The Erie Company agreed to give the locomotive company the exclusive right to carry locomotives and tenders on such cars over the Erie Road. But the Erie Company refused to haul the cars of the other company, upon which it brought suit for damages for breach of contract. It was urged that the action would not lie because the contract, being designed to give the locomotive company a monopoly of the right to transport this kind of freight, and to debar the Erie Company from carrying or permitting others to have transported over its railroad freight of this description, was void from considerations of public policy, as conferring a monopoly. It was asserted that the principle was, that as common carriers the Erie Company were bound to exercise their office with perfect impartiality in behalf of all persons who apply to them, and that practising this public employment they could not discharge themselves by contract from the obligation. Said BEASLEY, C. J. : " It is insisted this stipulation gives the plaintiffs the exclusive control on their own terms, of this branch of business; that it precludes all competition, and being the grant of a monopoly, is inconsistent with the purpose and objects of the charter of the defendants, and with their character as common carriers. The question thus presented is one of much importance, and it should not, consequently, be decided except when it shall be an element essential to the judgment of the court in the particular case. That it is not such an element, on the present occasion is obvious, for, let it be granted that the provision in question is illegal, and therefore void, still such concession cannot, in the least degree, impair the plaintiff's right of action. The suit is not for a breach of this promise of the defendants, that no other cars but those of the plaintiffs shall be employed in this branch of the carrying business, but it is for

the refusal of the defendants to permit the plaintiffs to transport locomotives and tenders, according to their contract, over the railway of the Erie Company. This latter stipulation, the violation of which forms the ground of action, is distinct and entirely separable from the former one, in which it is alleged the illegality before mentioned exists. Admitting, then, for the purpose of the argument, the illegality insisted on, the legal problem plainly is this: whether, when a defendant has agreed to do two things, which are entirely distinct, and one of them is prohibited by law, and the other is legal and unobjectionable, such illegality of the one stipulation can be set up as a bar to a suit for a breach of the latter and valid one." It was decided that the illegality could not be set up.

If a railway company had never permitted private cars to be run upon its tracks perhaps it might refuse to do so on the ground that it was ready to furnish good and sufficient cars to carry all the traffic, and had the right, by its charter, to furnish them and secure to itself the profits derivable from their use. But where it habitually allows the cars of private persons and firms to be drawn over its road, and does this as a matter of railway policy, it is difficult to perceive how it may lawfully single out an individual or firm and refuse to haul its cars, assuming them to be suitable to run over its road without danger. Such a refusal amounts to a clear discrimination against such firm or person, and some good reason must be given for making it, else it is unlawful. A good reason would be that the cars were unsafe to be hauled. But the question does not appear to have been squarely decided by the courts.

Where a railway company agrees to haul cars of a particular kind, it is bound only to haul cars within the agreement. It is not obliged to haul cars of a different sort. A Pullman car weighing twenty-one tons, and holding twenty-two persons, is not within an agreement to haul saloon sleeping carriages, weighing three tons, and fitted to carry twelve persons: *Caledonian Railroad Co. v. North British Ry Co.*, (No. 3), 3 Nev. & Mac. 56. And a railway company that is under obligation to haul the cars of a private person may subject itself to compulsion by a court by unreasonably detaining them, or by not furnishing sufficient power to haul them. *Watkinson v. W. M. & C. O. Railroad Co.*, 3 Nev. & Mac. 446, No. 2, Id. 164, and a railway company afford only a reasonable facility in running upon a private or foreign switch or siding to

collect cars loaded for shipment: *Watkinson v. Wrexham, &c., Railroad Co.*, No. 1, 3 Nev. & Mac. 5.

VI. EXPRESS FACILITIES.—Can a railway company lawfully refuse to furnish all express companies with facilities, and assume to itself exclusively the transaction of the express business upon its lines? Two decisions have answered this question affirmatively: *Camblos v. Phila. & Read. Railroad Co.*, 4 Brews. 563; *Sargent v. Boston & L. Railroad Co.*, 115 Mass. 423.

The reasoning of these decisions is that the law gave railway companies a monopoly of the business of carriage over their lines, that this includes the express business, that they have not lost this monopoly as to the express business by contracting it away for a specified time, that they may resume and exercise their exclusive rights upon the expiration of their contracts with express companies and may then exclude such companies from their lines of railway.

It may be that this theory is sound. Still it seems harsh and objectionable. The idea that an express company may be allowed and encouraged to go upon a line of railway, and to there establish, at great expense of money, time, energy and labor, a large business, and that after the lapse of years it may be excluded from the railway, and its business broken up and destroyed, or appropriated by the railway company itself, arouses a sense of wrong and injustice.

In the opinion of the writer there is a fallacy in the assumption that railway charters authorize railway companies to engage in the express business. It is not denied that a railway charter might be so written as to authorize the company to do an express business, but ordinarily they do not authorize any such business. It is *ultra vires* of railway companies. *Southern Express Co. v. Nashville, &c., Railway Co.*, 20 Am. Law. Reg. N. S. 590.

It follows almost without saying that if express business is *ultra vires* of a railway company, it certainly has no monopoly as to that business, and the admission of express companies to the use of its lines can be no deprivation of a monopoly which it does not possess.

Especially ought railway companies to be compelled to carry for express companies which for years have been permitted to do business on their roads. As pointed out in the opinion by Judge BAXTER, in the case last quoted, express companies by energy, fidelity, and the expenditure of a large amount of money, have built up a

lucrative business over the railway lines of the country. They have trained and reliable servants, suitable chests, safes, wagons, horses and trucks for collecting, transferring and delivering their freights. They have erected permanent offices and warerooms at various stations, established rapid communications and have fixed and published schedules of charges. They have a good profitable, steady and reliable business, an enviable and widely advertised reputation. All this has been accomplished under the auspices of the railway companies. Can railway companies, after long acquiescence in express companies' right to the transportation of their freight, after holding themselves out for years as carriers of express matter, after encouraging and developing that business to its present expansion, deprive the express companies of the right to suitable express facilities? Certainly not.

If ever there was a case fit for the application of the principle of estoppel, it should be such a case as this.

The express business, by the necessities of commerce and the usages of those engaged in transportation, has become sufficiently known and recognised as to require the courts to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads; and as being in particular a business whose object is to carry small and valuable packages rapidly in such a manner as not to subject them to the danger of loss and damages, which to a greater or less degree attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise and the like.

These are the views of Mr. Justice MILLER, of the United States Supreme Court, sitting at Circuit, and he decided, MCCRARY, C. J., concurring, that it has become law and usage, and is one of the necessities of the express business, that its packages should be in the immediate charge of an agent or messenger of the person or company engaged in it; and that to refuse permission to this agent to accompany these packages on steamboats or railroads in which they are carried, and to deny them the right to the control of them while so carried, is destructive to the business, and of the rights which the public have to the use of the railroads in this class of transportation.

It was further decided that the railway company had no right to open and inspect express packages when they have been duly closed or sealed by their owners, or by the express carrier; and

also that it is the duty of every railroad company to provide such conveyances by special cars, or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business. But other considerations might prevail, if a number of persons claimed the right to engage in this business at the same time: *Southern Ex. Co. v. St. L., I., M. & S. Railroad Co.*, 10 Fed. Rep. 210, 869. See also *N. E. Ex. Co. v. Maine Cent. Railroad Co.*, 57 Me. 188; *McDuffee v. Railroad Co.*, 52 N. H. 430; *Dinsmore v. L., N., A. & C. Ry. Co.*, 3 Fed. Rep. 593; *Southern Ex. Co. v. L. & N. Railroad Co.*, 4 Id. 481; *Wells v. Oregon Ry. & Nav. Co.*, 15 Id. 569.

V. DUTY AS TO DELIVERING TRAFFIC.—A railway company cannot bind itself to deliver to a particular stock-yard all the live stock coming over its line to a certain point. It is bound to transport over its road, and to deliver to all stock-yards at such point, reached by its tracks or connections, all live stock consigned, or which the shippers desire to consign to them, upon the same terms, and in the same manner as, under like conditions, it transports and delivers to their competitors; and the performance of this duty may be compelled by injunction. Said Judge BAXTER: "The business of receiving, feeding, dealing in, and forwarding live stock is legitimate and necessary. To do so on a scale commensurate with the trade of Cincinnati in that line necessitates larger expenditures in the erection of buildings and equipment of suitable yards; and being both legitimate and useful, everybody engaging in it is entitled to equal facilities in the use of railroads, upon which they are largely dependent for success; for it is obvious if the railroads centering at Cincinnati, or the officials who control them, are permitted to combine and establish a stock-yard as a private enterprise, and by contract make it the depot of the roads for the receipt and delivery of all the stock brought to, or carried through the city, and withhold like accommodations from their competitors, they can suppress competition, and establish and maintain a monopoly in that particular department of trade, and subject to the payment of undue and unreasonable exactions for the services rendered."

"I am very clear no such right exists. * * * The two yards

are contiguous. * * * The railroad defendant can receive stock from, and deliver stock to the one as to the other, but refuses so to do. The discrimination is contrary to a sound public policy and injurious to the complainant." Therefore it was enjoined: *McCoy v. C., I., St. L. & C. Railroad Co.*, 13 Fed. Rep. 3.

But may a railroad company undertake to do a stock-yard business itself, incidentally to transportation, and prefer itself to the exclusion of other stock-yard companies upon the line or termini of its railway? Judge BAXTER appears to be of the opinion that it may. "Where," says he, "a railroad company assumes to receive, take care of, water, feed, and forward stock as a part of its undertaking to transport them as it may lawfully do, they are at liberty to select such agencies as they may choose to employ for the purpose, and the exercise of the right is no wrong to any one else." *McCoy v. C., I., St. L. & C. Railroad Co.*, 13 Fed. Rep. 10. Does this mean that a railway company may make a particular stock-yard's company along its route its agent for the yarding and care of stock in transit, and prefer such agent to the exclusion of all competitors in such business? If so, the propositions quoted from Judge BAXTER appear open to just criticism. What is the use of the law prohibiting discrimination between stock-yard companies, if a railway company may evade the law by making one of them its agent, and then preferring itself and such agent in the business to the prejudice of all others. Such a proceeding is but an indirect method of discrimination. It is as unjust, and it carries with it as many evil consequences, as the direct discrimination in the shape of open preference of an independent stock-yard company. The discrimination is the same whether the preferred stock-yard company be treated as a principal or as an agent of the railway company. And it is just as iniquitous.

"A common carrier," says Mr. Justice DOE, "cannot directly exercise unreasonable discrimination as to whom, and what, he will carry. On what legal ground can he exercise such discrimination indirectly? He cannot, without good reason, while carrying A. unconditionally refuse to carry B. On what legal ground can he, without good reason, while providing agreeable terms, facilities, and accommodations for the conveyance of A. and his goods, provide such disagreeable ones for B. that he is practically compelled to stay at home with his goods, deprived of his share of the common right

of transportation? What legal principle, guaranteeing the common right against direct attack, sanctions its destruction by circuitous invasion?" *McDuffee v. Railroad*, 52 N. H. 449. See also *Thomas v. North Staffordshire Railroad Co.*, 3 Nev. & Mac. 1.

VI. LOCATION OF STATIONS.—It is also illegal for the officers and contractors of a company building a railroad, to agree for a present or prospective consideration to locate its line with reference to a proposed town. Two persons owning a tract of land on the line of a railroad, contracted with the president of another road then being constructed, and a firm of individuals who had contracted to build that road, to lay the land off into town lots, and after selling lots to the amount of \$4800, to convey to the president of the road and to the construction company an undivided half of the remaining lots. The president and the individuals composing the construction company were to pay no money, but agreed to "aid, assist, and contribute to the building up of a town on said land." It was decided that if this contract was made to secure the location of the road at a place where it would not be of the greatest benefit to the stockholders of the road, then it was in the nature of a bribe, and cannot be enforced; or, if the place where the parties agreed the road should be located which was afterwards done, was the route best calculated to promote the interests of stockholders and the public, and the officers of the company were professing to hesitate between it and another line to procure the agreement, that was a fraud, and the contract cannot be enforced in equity. And if such a contract was entered into when the line adopted was only equally as good as another, then neither the company nor the public were injured, yet the company made their power the instrument of private emolument in a manner which a court of equity will not sanction. Public policy, decided the court, forbids the sanction of such contracts: *Bestor v. Wathen*, 60 Ill. 139.

VII. EXTORTIONATE CHARGES NOT A DISCRIMINATION IN FACILITIES.—Is a railway company, which charges rates or fares higher than those authorized by the statute, guilty of a refusal to afford "reasonable facilities?" This question was raised in *Brown v. G. W. Railroad Co.*, 3 Nev. & Mac. 523. Brown alleged that the passenger fares in a number of instances were higher than the company could legally charge, and asked the railway commissioners, under the second section of the Traffic Act, 1854, providing that "every

railway and canal company shall afford all due and reasonable facilities for the receiving and forwarding of traffic," to enjoin the railway company to desist from any further continuance of the over-charges indicated, some of which were as small as three-tenths of a penny. The attorney-general ingeniously and forcibly argued thus: "Suppose," said he, "that the railway company were to say, we will carry you or your goods, but our price is such—for example \$100,000—that in all human probability the man had not the money in his pocket, or, if he had, he was not minded to part with it subject to the right of getting it back by proceedings at law. Would not this amount to a barrier in the way of his being carried as a passenger, or in the way of his goods being carried as merchandise—a barrier which he could not get over? Would it not amount to a substantial denial of the facility of having his person or his property transported over the road?" The court thought this would be a fraudulent and improper proceeding on the part of the railway company calculated to put an impediment in the way of "receiving, forwarding, and delivery of traffic." But while the court were not inclined to deny the right to relief merely because of the smallness of the amount of overcharge, where the right to relief was unquestionable, yet, it decided such small overcharges, as those complained of, did not amount to a refusal to afford reasonable facilities. It was pointed out that ample accommodations were furnished of which the complainant was at liberty to avail himself and that for the overcharges he had an adequate remedy at law.

VIII. CONCLUSION.—The prohibition of the law against unjust discrimination in facilities by common carriers does not, however, preclude the carrier from making and enforcing reasonable distinctions in the accommodations he affords for the carriage of persons or property. "A certain inequality of terms, facilities, or accommodations may be reasonable and therefore not an infringement of the common right. It may be the duty of a common carrier of passengers to carry under discriminating restrictions or to refuse to carry, those who by reason of their physical or mental condition would injure, endanger, or annoy other passengers; and an analogous rule may be applicable to the common carriage of goods. Healthy passengers in a palatial car would not be provided with reasonable accommodations if they were unreasonably and negligently exposed by the carrier to the society of small-pox patients. Sober, quiet,

moral, and sensitive travellers may have cause to complain of their accommodations if they are unreasonably exposed to the companionship of unrestrained, intoxicated, noisy, profane, and abusive passengers, who may enjoy the discomfort they cast upon others. In one sense, both classes, carried together might be provided with equal accommodations; in another sense, they would not. The feelings, not corporeal, and the decencies of progressive civilization as well as physical life, health, and comfort, are entitled to reasonable accommodations. Mental and moral sensibilities, unreasonably wounded, may be an actual cause of suffering as plain as a broken limb; and if the injury is caused by unreasonableness of accommodations (which is synonymous with unreasonableness of service), it may be as plain a legal cause of action as any bodily hurt, commercial inconvenience, or pecuniary loss. To allow one passenger to be made uncomfortable by another committing an outrage, without physical violence, against the ordinary proprieties of life, and the common sentiments of mankind, may be as clear a violation of the common right, and as clear an actionable neglect of a common carrier's duty, as to permit one to occupy two seats, while another stands in the aisle." Per Mr. Justice DOE, *McDuffee v. Railroad*, 52 N. H. 451, 452. In conformity with this doctrine, the carrier may make discriminations in his facilities based upon the sex of the passengers—as by reserving a car for ladies and for gentlemen who accompany them. So also he may make reasonable discriminations based upon the color of the passengers—as by reserving a special car for colored people. But such discrimination must be reasonable, and for example, it would be unreasonable for the carrier who sets apart a special coach for first class colored passengers, to give them a coach inferior in its conveniences to the coaches set apart for first class white passengers. But the coaches furnished to emigrants, or to second class passengers may lawfully be inferior and less comfortable than those furnished first class passengers. So a carrier by rail may exclude passengers from freight trains. These are for the carriage of property, not persons. Their speed is slower, stoppages more inconvenient, and travel upon them more dangerous than upon the regular passenger trains. The public may be excluded from them or admitted by the carrier only upon such reasonable conditions as to release of liability or otherwise as he chooses to impose.

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