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THE RAILROAD LEASES TO CONTROL THE ANTHRACITE COAL TRADE.

ARE THEY VOID UNDER THE CONSTITUTION OF PENNSYLVANIA?

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The Constitution of Pennsylvania forbids parallel or competing lines of railroad to lease or in any way control each other. This provision is found in the constitutions or codes of many of the States. It was adopted as the result of long and bitter experience, and is generally regarded as a valuable safeguard for the people against the greed and power of corporations.

It was based on two ideas or propositions: First, that it is a good thing for railroads to compete, because competition makes low rates, and that is a benefit to the people. Secondly, that it is a good thing to prevent railroads from consolidating, because when consolidated they become more powerful than the government, corrupt the government, and endanger the liberties of the people.

Two suits have been thus far instituted to annul the Reading leases and agreements with the Lehigh Valley and the Jersey Central: one by Mathias H. Arnot, a citizen

who considers himself injured, and the other by the Attorney-General for the Commonwealth of Pennsylvania. From the bills and answers filed in these cases we gather the principal facts.

The anthracite coal region of Pennsylvania is a district of about 470 or 500 square miles, lying in the counties of Schuylkill, Carbon, Northumberland, Columbia, Luzerne, Lackawanna and Dauphin. This is the only tract of land in the United States where anthracite coal is found.

Before the leases were made, about three-fourths of all the coal taken from this region was carried by three sepaate and independent railroad systems—the Reading, the Lehigh Valley, and the Jersey Central—which competed with each other, more or less, except where the competition was checked by pools or agreements.

There was first the Reading, whose main line extended from Philadelphia to Mount Carbon, in the anthracite region. The Reading tapped the district on its west side, and shot out from itself numerous branches and leased lines to collect the coal. It carried the coal to tide-water at Philadelphia, where it met with but little competition. It also, by a series of lines which it owned, leased, or with which it had traffic arrangements, carried coal to tide-water at New York, where it endured a sharp competition from the other two roads. It had a satellite known as the Philadelphia and Reading Coal and Iron Company, whose stock it owned, and whose bonds it guaranteed. The satellite owned large tracts of coal lands which it worked by collieries, and sent the coal to market over the tracks of its foster-mother, the Reading Railroad. It was an arrangement to insure profit; for the combination was bound to make something either by mining the coal or by hauling it.

Secondly, there was the Lehigh Valley Railroad. This, like the Reading, was a Pennsylvania corporation, and tapped the anthracite district on the east side. Its main line extended from Easton on the Delaware up the Lehigh Valley to Wilkesbarre. When it reached the coal district it shot out branches and leased lines to gather in the product. A map of these two roads, the Reading and

the Lehigh, shows them approaching the fruitful district, from the southeast, getting into it from different sides, and, as soon as they are in, spreading out like fans or the fingers of a hand until they almost touch, and in one place are closely parallel for twenty-five miles. The Lehigh Valley carried its coal in two main directions—northwest to Buffalo and the Great Lakes, where it did not compete much with the Reading; and eastward by means of lines leased or controlled by it to New York tide-water, where its competition with the Reading was very severe. It was also interested in getting coal to Philadelphia tide-water. But as the Reading had a monopoly there, the competition at that point was slight. The Lehigh, like the Reading, had a satellite, called the Lehigh Valley Coal Company, which owned and leased large tracts of coal lands and shipped the product over the tracks of its foster-mother.

Thirdly, there was the Central Railroad Company of New Jersey. It was a New Jersey corporation, and had a line extending from Phillipsburg on the Delaware, immediately opposite Easton, Pennsylvania, to tide-water at or near New York. It had worked itself into the anthracite region in the manner following:

At Phillipsburg there began a line of railroad, called the Lehigh and Susquehanna, which crossed the Delaware to Easton, Pennsylvania, and extended from there to Union Junction, running parallel with the Lehigh Valley Railroad; and it had branches and leased roads extending into the coal regions. It was owned by another organization, a Pennsylvania corporation, called the Lehigh Coal and Navigation Company. From this company the Jersey Central leased the Lehigh and Susquehanna, and thus entered the coal regions. It also had its satellites; for the Lehigh Coal and Navigation Company, which owned the Lehigh and Susquehanna, owned also large tracts of coal land, and sent the product to market after the manner of a good and worthy satellite. But the Jersey Central was not content with one satellite. It had another, the Lehigh and Wilkesbarre Coal Company, which owned and leased large tracts of coal land and performed all the duties of a satellite.

Such were the three great systems which for many years have transported three-fourths of all the coal that was mined in the anthracite region. On the eleventh and twelfth days of February, 1892, one of these monsters swallowed the other two. It was the Reading whose maw was thus capacious; and it was managed in this wise.

The Reading, first of all, leased the whole Lehigh Valley system and all it contained, branch roads, leased lines, satellites and everything. That was on February 11, 1892. The next day it gathered in the Jersey Central system, but not so directly and easily. It put forward a little satellite called the Port Reading Railroad Company, a New Jersey corporation, which owns a line of road from Bound Brook to Arthur Kill, a tide-water tributary of New York Bay. This Port Reading Company, by a previous understanding with its mother, went and swallowed the Jersey Central system by means of a lease, taking branch roads, leased lines, Lehigh and Susquehanna and everything. Having got the Jersey Central system comfortably within the satellite, the Reading guaranteed the lease and process by which it had been done.

"What was the object of all this?"

"Oh, nothing at all; just to make more money; but not to increase the price of coal."

But what does the Constitution of Pennsylvania say about proceedings of that kind?

"No railroad, canal, or other corporation, or the lessees, purchasers, or managers of any railroad or canal corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in way control, any other railroad or canal corporation owning or having under its control a parallel or competing line."[1]

It will be observed that the Constitution says "parallel or competing;" so that competition alone without parallelism comes within the clause. In Commonwealth *v.* South Penna. R. R.,[2] and Commonwealth *v.* Beach Creek,

[1] Article XVII, Section 4.

[2] 1 Penna. County Court Rep., 214.

etc., R. R.,[1] it was held that control of any kind, whether direct or indirect, was forbidden. The Court forbade the Pennsylvania Railroad to gain control of the South Penn by making the Pennsylvania Company a cat's paw to acquire the control. It also enjoined the Pennsylvania Railroad from controlling the Beach Creek Railroad by means of the Northern Central. These two cases decided that the courts will look into the real merits of the situation and discover how the control is to be exercised, and that any kind of control, whether direct or through the medium of an agreement or a friendly line, will be prohibited.

Now, the parallelism between the Reading and Lehigh is in one instance supposed to be rather slight. The bills charge a parallelism of about twenty-five miles between Tamanend Junction and Mount Carmel. The answer admits the parallelism, but denies that it involves any competition worth considering. The coal carried from those points by the Reading is taken either northwesterly to Williamsport, or southwesterly to Philadelphia, neither of which points is reached by the Lehigh, whose coal from the neighborhood of Mount Carmel and Tamanend Junction is taken easterly to Penn Haven Junction. The general merchandise carried at these points of parallelism is, the Reading assures us, very insignificant, and not subject to competition by the Lehigh. The merchandise traffic for the year 1891 amounted to only $1,971.60, and the passenger traffic to only $6,238.18, making in all $8,209.78.

The Reading, so far as this actual parallelism is concerned, evidently intends to rely on the doctrine, "*De minimis non curat lex.*" But the question arises, is it a trifle? Twenty-five miles of parallelism is not a small thing. A railroad that long might earn enormous dividends; and some railroads of only half that length near great centres of population are well known to earn enormous dividends. Perhaps the traffic is small now; but it may become very large in the course of the next nine hundred and ninety-nine years, the period of the lease.

Moreover, the present merchandise traffic of $8,209.78

[1] 1 *Ibid.*, 223.

is not a trifle to the people who live in that neighborhood. And, it may be asked, did not the Constitution intend to protect these few people? It certainly did. It intended to protect everybody; that is its function. It was not adopted by the people for the purpose of protecting the public in a vague, general way, and allowing a few hundred or a few thousand individuals here and there to be crushed. The question is one of civil rights under the organic law of the State; and in such questions, so long as there is any appreciable injury to an individual or individuals, the doctrine of *de minimis* does not apply.

Suppose the answer of the Reading to be true, that although the roads are parallel for that twenty-five miles, yet there has thus far been no competition. Can the Court accept or act upon such a fact? Possibly the roads do not now compete. But if they are parallel, will they not necessarily, or in all human probability, compete within the next thousand years save one? The Constitution forbids parallel roads to lease or control each other, and forbids it in plain language. Is it for the courts to define away that language by saying that just at present the parallelism does not produce competition? The provision of the Constitution was made to protect the people for the future and for all time. Parallel roads were forbidden to lease, because parallelism usually brings competition. If there were only a hundred farmers and trappers within that twenty-five miles of parallelism, they are entitled to the protection of the Constitution; they are entitled to have competition maintained. They are entitled to have it maintained for all time; for within the next thousand years they may grow from a hundred to a hundred thousand, or their farms may be the seat of a great city or of two or three cities.

It is hardly an answer to say that the Court should allow the lease to stand until there is competition, and when, in the future, competition arises, annul the lease. In the same way it might be said that if the competition, having arisen, should in the future cease, the Court should revive the lease; and then, when the competition arose

again, annul the lease again. The Court is not given the power to play fast and loose with a lease—to adjudicate it good, and then with a change of trade, adjudicate it void. The Court is not a railroad administrator, a railroad commissioner or an Interstate Commerce Commission. Is the lease good or bad to-day?—that is the question. The Court is called upon to construe the law and the Constitution; and the Constitution says as plainly as words can say that parallel lines shall not lease or control each other. It is doubtful whether the Court can go further than merely to find whether the lines are parallel. Whether the parallelism at present produces competition or not is hardly the question; for the Constitution says flatly that parallel lines shall not lease.

There is another instance of parallelism which is by no means a trifle. The Lehigh and Susquehanna Railroad is parallel for practically its entire length, a distance of 105 miles, with the Lehigh Valley. Before the leases were made, the Lehigh and Susquehanna, through its owner, the Lehigh Coal and Navigation Company, or through its lessee, the Jersey Central, was an active competitor of the Lehigh Valley, which lies directly alongside of it. By the leases, the Reading has leased the Lehigh Valley on the 11th of February and stepped into its shoes, and the next day it gains control of the Lehigh Valley's competitor and parallel, the Lehigh and Susquehanna. It makes no difference that it accomplishes that control in a roundabout way, by getting the Port Reading Company to lease the Jersey Central, which leases the Lehigh and Susquehanna, and then guaranteeing the contract and lease made by the Port Reading. The Court has already decided in the South Penn and Beach Creek cases that this indirect control is just as bad as a direct lease; and, moreover, the Constitution says that parallel or competing lines shall not purchase, lease or "in any way control" each other.

The matter is, indeed, too clear for argument. There is no question of the close parallelism and close competition; and the Reading, in its answer, shows no signs of making light of the question.

There is another apparent instance of competition which the Reading says is also a trifle that the law will not regard. There is a colliery, called the Mount Carmel Colliery, the property of Mr. T. M. Righter, which is reached by both the Reading and the Lehigh. This man has been apparently enjoying the privilege of having two competing lines by which to ship his coal. He has also apparently made some use of the situation, sending, the answer says, during the year 1891, 36,000 tons by the Reading, and 23,000 tons by the Lehigh—a total of 59,000. This apparent competition is somewhat spoiled by the fact, of which we are assured from reliable sources, that Mr. Righter leases all his coal land from either the Reading or the Lehigh, and ships the coal produced on any part of it over the road of the company that owns it.

The fact that the Reading and Lehigh have owned a large part of the coal they carried, and in the future will own it all, is a troublesome factor in the problem.

The competition and parallelism between the Lehigh Valley and the Lehigh and Susquehanna are clear, and necessarily prohibit the Reading from controlling first one and then the other. The parallelism between the Lehigh Valley and the Reading for the twenty-five miles from Tamanend Junction is also clear. But what shall be said of the parallelism and competition between the Reading and the Lehigh, taking each road as a whole?

This is the most difficult part of the case; and it is impossible to come to any definite opinion about it with the facts at our command. It would require a long investigation and careful examination into the history of the two roads before any intelligent result could be reached.

First, are the roads parallel? In a certain sense, they are. A glance at the map shows that they run in the same general direction, within Pennsylvania, keeping about fifty miles apart. At what distance do roads, parallel in a wide sense, become parallel in a legal sense? The Courts have not decided. But it is not likely that they would declare the Reading and the Lehigh parallel in the sense the Constitution means.

If we may hazard a definition, we might say that railroads are parallel, in the sense intended by the Constitution, when they run side by side and near enough to each other to make it inherently probable that they will, at some time or other, compete for freight or passengers.

The Reading and the Lehigh are hardly near enough to each other to make their parallelism necessarily involve competition. We are, therefore, driven to the other question: Did they, as a matter of fact, compete before the leases were made?

Again, we must ask, what is competition? and again we must hazard a definition.

Railroads compete, in the sense intended by the Constitution, when, if left to themselves, without the interventions of pools, combinations or agreements, they would bid against each other for the same freight or passengers.

Now, there is no question but that the Reading and the Lehigh both drew their anthracite freight from that region of about 500 square miles. Were they bidding against each other for the same freight?

"No," they would answer, "because, with the exception of that colliery of Mr. Righter's, each of us ran to a different set of collieries; and, in many instances, each of us owned the coal we carried."

The reply to this is: Did you not refrain from running to the same collieries because of a private understanding or agreement between yourselves, by which each was to work his own field; and does not this agreement show that naturally there was competition between you?

Was not each one of you prevented from raising rates beyond a certain point by the fear that the understanding would be broken, and your rival would build a line to the colliery against whom you had raised the rates, or that that colliery would build a private line to reach your rival?

If you had fears and agreements of this sort, then there was competition between you.

Moreover, you were owners of coal, as well as carriers of it. Do you mean to say that you did not compete with each other as sellers of this coal? If, although chartered

as a railroad, you, through the formality of another corporation, become a coal miner, is not the Court bound to notice your competition in that respect and discover whether it is included in the intention of the Constitution?

By your leases you have acquired the ownership of the principal part of the anthracite coal of the United States. Most of the remaining part you have bought up by an agreement with the private collieries to take it, at the mouth of the mine, at a fixed percentage of whatever may be the market price. Thus you practically control the price of all the anthracite coal in the United States. There are no more rates on anthracite. You own the anthracite and you carry it. You can call it all rate or all price, just as suits your bookkeeping.

Do you mean to say that, before making this combination, you two were not competitors; and that you did not make this combination to wipe out the inconveniences of competition?

When the Constitution said that competing railroads should not lease or control each other *in any way*, did it mean merely as carriers for others? Did it mean that they could avoid competing as carriers by each one owning the product they carried? Did it mean that after that they could combine, buy up all of a valuable product produced only in Pennsylvania, and say, "We take it to market not as carriers, but as owners?"

The people of Pennsylvania at large, every man and every family that burn coal in winter, can be affected by such a combination. The question resolves itself to this: Has not the Reading, by means of these lines, the power of controlling the price of anthracite? Has it not a power, in this respect, which, before the lease, it had not? If it has such a power, then the lease is that species of control forbidden by the Constitution.

The Constitution aims at power. It aims to cut down power dangerous to the people. It aims to prevent power getting into hands where it may be used against the people. It aims to prevent possibilities and probabilities. It is not enough that the power thus far, up to the time of the

decision of the Court, has not been abused. It may hereafter be abused; and that is enough.

The Constitution did not intend the courts to be deceived by present appearances or by assertions, or even economical proofs, that, in all probability, the rates would remain the same, or, at the worst, would not be raised extravagantly. If the rates remain the same, the competing roads are still forbidden to control each other, because the control puts it in their power to raise the rates whenever they choose. It is that power over the citizen's pocket which the Constitution was aiming to strike down. It would be very futile and weak for the Court to say, "We will let you lease; but the moment you raise the rate one penny in consequence of the power we have given you, that moment we will take your lease away." The Constitution forbids even the grant of such power. It forbids the courts to give such power. It does not give them leave to give the power and then regulate it afterward.

If the rate is raised only half a penny per ton, the constitutional prohibition applies to that half-penny as much as to a dollar. If you admit the possibility of a rise of half a penny in consequence of the new power given, you admit that you are within the reason and mischief aimed at by the constitutional prohibition.

So far as the law is concerned, the question cannot be placed on the basis of profit-sharing. It may be that, as a matter of political economy, it would be wiser for the people of Pennsylvania to pay twenty-five cents more a ton for anthracite coal and have the Reading a solvent corporation. That is not the question before the Court. The question is, what the Constitution says, what it means, and what are the reasons for that meaning.

This brings us to the broader view of the subject: What was the whole object of the people in adopting that clause of the Constitution? Was it merely to get cheaper rates for themselves—a difference of two cents a mile in hauling passengers or a difference of twenty-five cents a ton in hauling coal? Was it not for a larger purpose? Was it not their method of solving the great question of

the age—the corporation problem? They were liberal to the corporations; they always had been. They recognized in them the great instrument of modern development. But they intended to check their enormous power and the abuse of that power. For that reason they adopted that clause of the Constitution.

What will be the power resulting from the whole anthracite coal trade, formerly in the hands of three, now in the hands of one? Who can estimate it? There must be added also the power which will come from having absorbed both the passenger and the general merchandise traffic of the two competitors.

In its answer filed, the Reading says that it had recently greatly increased its business by connections with the Baltimore and Ohio and the New York Central, so that it became necessary that it should acquire the best and greatest terminal facilities in New York Harbor. This was the more important because by means of the Lehigh Valley it would have a line to the Great Lakes, and thus be enabled to sweep in a vast general trade from the West to the seaboard. This means power, and enormous power.

When the prohibition contained in our Constitution was adopted in 1874, the most active incentive to its adoption was the Pennsylvania Railroad, which had been riding rough-shod over the State, controlling legislatures and city councils. The people had had enough of that master. They were not willing it should be greater; and they intended to prevent, if possible, the creation of another.

Many of the people of Pennsylvania are for the moment filled with the generous hope that the Reading leases will pull through. But if that hope should affect the judgment of the Court, might we not all live to regret it?

The provision of the Constitution is a wise one, and recent events in Philadelphia show it to have been wise. The prohibition of the Constitution against parallel or competing lines of railroads, leasing or controlling each other, does not apply to the street railways of a city.[1] In consequence, we have in Philadelphia an organization

[1] Gyger *v.* West Phila. P. R. Co., 26 W. N. C., 437.