nary sense. If a trust is sufficiently expressed it does not disparage, much less defeat it, to call it "precatory." But in order that a trust may be raised from the use of precatory words it must be shown from the words themselves, taken in connection with all the terms of the gift, and the circumstances and situation of the testator when he used them, that the testator's intention to raise a trust was full, settled and complete.

The uncertainties of litigation should induce counsel to advise against the careless use of precatory expressions. Testators should be persuaded either to create a trust in plain language, or to forego the pleasure of admonishing the recipients of their bounty.

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UNITED STATES *v.* MELLEN.[1] DISTRICT COURT, D. KANSAS.

The Construction of the Words "The Same Line," in § 4 of the Act to Regulate Commerce.

Where two companies by their joint tariff make a new and independent line, the rates thereon do not furnish a basis upon which either company is obliged to adjust its local rates.

The language of the body of § 4 of the Federal "Act to Regulate Commerce" is as follows:

"It shall be unlawful for any common carrier subject to the provisions of this act, to charge or receive any greater compensation in the aggregate, for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction; the shorter being included in the longer distance."

The question as to the construction of the word "line" in this section may be stated briefly to be, whether it means a physical line or a business arrangement. The ques-

[1] Reported in 53 Fed. Rep., 229.

tion usually necessarily discussed at the same time as to what constitutes an "arrangement," belongs more properly to the consideration of § 1.

The practical problem presented by this question is as to whether local shipments, shipments under agreed through rates to terminals with local rates added to intermediate points, under a through bill of lading, and shipments entirely under agreed through rates, through billing, and through bills of lading; all in the same direction, over the same physical line, the shorter being included in the longer distance, are shipments over "the same line" within the meaning of § 4.

Much labor has been expended over the study of similar clauses in English railway acts, in three State constitutions, and in fourteen State statutes, and of decisions thereon. In no one of these cases is the language construed precisely similar to that of the Federal Act, and little light has been obtained from these sources.

In 1884, three years prior to the passage of the Interstate Commerce Act, the first suggestion as to the construction of the word "line," adopted in the annotated case, came from the United States Supreme Court in the case of A. T. & S. F. R. R. *v.* D. & N. O. R. R., 110 U. S., 684. The most concise statement of the meaning and effect of this decision is that of Judge DEADY, in *ex parte* Koehler, Circuit Court, D. Oregon, 31 Fed. Rep., 318:

"The judgment of the Court is authority, then, for this proposition: Two or more corporations, in order to meet competition, may form a through line, and charge through rates for transportation thereon, which may be less than the sum of the local rates of the several roads constituting the line; and the portion of the through rate received by each corporation may be less than the local rate charged by said corporation for carrying freight over the whole length of its road."

The importance of the decision for the purposes of this annotation consists in its conception of the through line formed by two or more railroad companies as a different "line" from that of either or any of the companies.

When § 4 came up for discussion in the United States Senate, a question was put to Senator Cullom as to the proportions which would have to be maintained between rates on local traffic from Boston to Albany, and rates on through traffic to Boston *via* Albany. He answered:

"It has nothing to do with it. One is a line of railroad by itself; the other is a line of railroad in conjunction with one, two, or five others, if you please, and the one rate does not control the others:" I. C. R., Vol. 1, p. 560.

In *ex parte* Koehler, cited above, although the very suggestive opinion in Atchison, etc., R. Co. *v.* Denver, etc., R. Co., was cited, yet the decision was placed upon the clause "under substantially similar circumstances and conditions," and the question of the meaning of the words "over the same line" was not discussed.

The first decision of the Commission in a case in which this question was raised was in Boston & A. R. Co. *v.* Boston & L. R. Co. I. C. R., Vol. 1, p. 571. The Commission summarizes this decision as follows (Report for 1887, p. 22):

"'In some cases the lower rate on the longer line is a combination of rates over several lines; and it has been contended in some quarters that § 4 only applies (*sic*) to cases in which the carrier who makes the greater charge for the shorter haul controls the line of longer haul and makes the charge upon that also. The Commission does not take this view, but has decided that where a carrier unites with one or more others in making a rate for long-haul traffic, the rate so made constitutes a measure for the rates on short-haul traffic upon its own lines as much as it would if the long-haul transportation was on its line exclusively."

In the decision itself the following words are used: "By the word 'line' in the act, a physical line is meant, and not a business arrangement."

In 1891, in James & Mayer Buggy Co. *v.* C. N. O. & T. P. R. Co. I. C. R., Vol. III, p. 682, the entire question was brought squarely before the Commission. In that case the claim was made substantially that a through "line" had been formed by three companies making through rates to the terminal station of the last road; that no agreement of any kind had been made for through rates to intermediate stations on the last road, traffic being carried thereto under partly local rates; that, therefore, goods destined to the terminal station and goods destined to said intermediate stations were not carried over "the same line." The decision of the Commission was against this contention, and shortly thereafter, during the year 1891, the Commission applied to the U. S. Circuit Court for the Northern District of Georgia to enforce its decision.

In the case of Georgia R. R. Commission *v.* Clyde S. S. Co., *et als.*, I. C. R., Vol. IV, p. 122 (November, 1892), the Commission reaffirmed its decision in the case last above cited. The opinion in the Georgia R. R. Commission Case was written subsequently to the decision by Judge SHIRAS, in Osborne *v.* Chicago & N. W. R. Co., 48 Fed. Rep., 49, but prior to the reversal of that decision by the Circuit Court of Appeals in an opinion hereinafter cited. In a note to the opinion of the Commission, it is stated that nothing in the Circuit Court of Appeals decision "necessarily decided" conflicts with the opinion of the Commission; but so much of the authority upon the Interstate Commerce Act consists of dicta that it is hardly advisable in these limits to go into that question.

The Circuit Court of Appeals, in the decision referred to (52 Fed. Rep., 912), through BREWER, Circuit Justice, said:

"Where two companies, owning connecting lines of road, unite in a joint through tariff, they form for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other, nor compellable to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its line. If, therefore, the two companies by agreement make a joint tariff over their lines or any parts of their lines, such joint tariff is not the basis by which the reasonableness of the local tariff of either line is determined (p. 914).

"The use of the word 'line' is significant. Two carriers may use the same road, but each has it separate line. The defendant may

lease trackage rights to any other railroad company, but the joint use of the same track does not create the 'same line,' so as to compel either company to graduate its tariff by that of the other" (p. 916).

The annotated case (United States *v.* Mellen) was decided one month later by the District Court, D. Kansas. The expressions cited above, in the Osborne case, left the Court little to do but to repeat and follow them.

After the decisions in the Mellen and Osborne cases, the District Court for the Northern District of Georgia passed upon the application which had been made to it by the Commission in the James & Mayer Buggy Co. case. The title of the suit is Int. Com. Comn. *v.* Cin., N. O. & T. P. Ry. Co., *et al.*, and the decision was rendered on June 3, 1893. It has not yet been reported. The Court said:

"The mere reception and continuous transportation by the Georgia Railroad Company of freight which comes to it over other lines of railroads, destined to its local stations, for which the initial carrier has issued through bills of lading and quoted through rates, does not constitute such an 'arrangement' as is contemplated by § 1 of the Act to Regulate Commerce, where the through rates so quoted allow to that company its full local rates.

"The Cincinnati, etc., Co., Western, etc., Co., and Georgia R. R. Co. have formed a 'new and independent line' by the adoption of a joint through tariff from Cincinnati to Augusta; but such 'new line' is distinct from that of either of the railroads named."

This decision forms the latest adjudication upon this subject. It is more explicit than any prior decision, not only upon the point discussed herein, but upon other clauses and other sections of the act.

The importance of the entire line of decisions will be recognized when it it understood that differences between through and local rates were formerly excepted from the operation of § 4 under only the "substantially similar circumstances and conditions" clause. This not only left the question within the hazy limits of an extremely vague general clause, but it compelled, under all circumstances, the observance of some undefined relations between rates on through lines and local rates. But under the emphatic declaration of Justice BREWER, in the Osborne case, the tariff over a joint or through line is not "the basis by which the reasonableness of the local tariff of either line is determined." Under the law each rate must be reasonable in itself; and this requirement, vague as it is, has never been made clearer by the forced comparison of rates essentially different.

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