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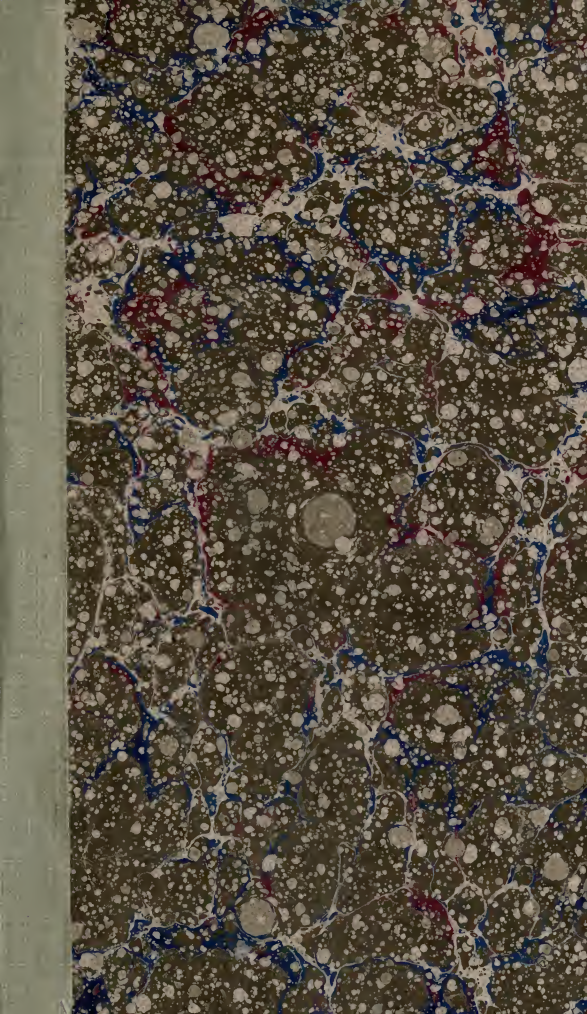
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RAILWAY AND CORPORATION
LAW JOURNAL of
July 27, 1889.

THE
PROPOSED RAILWAY TRUST.

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THE PROPOSED RAILWAY TRUST.

THE revival of discussion concerning a railroad trust, or an inter-association of such trusts in the various sections of the country where it is supposed they might be useful, is, perhaps, a natural result of the conceded failure of State and federal legislation, on the one hand, and of the several voluntary associations among railways or railway officials, on the other, to solve satisfactorily all the problems that are involved in railway operation and management in this country. We have tried State statutes and federal statutes, State boards of railroad commissioners, Interstate Commerce Commissions, Interstate Commerce Railway Associations, Granger legislation, trunk-line pools, traffic associations, Judge Cooley and Mr. Fink, all without avail, and we begin to perceive either that the railways must contrive some new, effective, stable and equitable control of themselves, having due regard to the interests of the public and of the owners of the property involved, or that we shall presently end in absolute governmental ownership and operation.

We have learned that railways without regulation will not be tolerated in this country; that legislation of the sort hitherto attempted does only a little good, and a great deal of harm; that associations between railways themselves, or among

railway officials, being only palliatives and make-shifts, are inherently too weak to serve either the railways or the public efficiently; that the progress of consolidation of lines can neither be swift nor sweeping enough to answer the purpose, and we now discover that, in midsummer, 1889, having wasted our substance on many physicians, we are little better off than we were twenty-five years ago. We have, indeed, made some progress since the early days when the public had no rights that a railroad was bound to respect, and since that later time when railroads were pillaged and plundered by the public as though they were a common enemy; but we are still in a wretched predicament, and very far from a condition of railroad operation which secures to the public all it ought to have and preserves to the railways all they are entitled to. The railways must, therefore, set about in good earnest to devise a remedy or we shall presently be face to face with governmental operation. It is idle to cry peace, peace, when there is no peace. This is precisely the turn that railway affairs in the United States are now taking.

The proposition to operate railways by means of an association between the shareowners of connecting, parallel or competing lines—associations between the railways themselves, or their officials, having proved ineffectual—is, in this view of the situation, entitled to the most intelligent consideration. It is the purpose of this essay to suggest some things to be avoided in the creation of such

an association, and to propose some objects desirable to be attained thereby.

If on consideration it be determined that voluntary, unincorporated associations between the shareholders of certain railways are desirable—that is, that railway trusts are desirable—let us begin by not calling them “trusts.” The public are possessed of an unreasoning dread of what they call “trusts,” and the public temper is in a feverish state regarding them. Not one man, indeed, in a thousand, who is in a state of consternation over “trusts,” knows what a trust really is, or how it is constituted, or what it is designed to effect, or what it actually accomplishes. He has been taught his terror by the newspapers and the politicians. Seven hundred and fifty out of the thousand will, when trusts are explained to them, cease to regard them with alarm. The remaining two hundred and fifty are possibly incorrigible. They are not, however, this time Matthew Arnold’s “redeeming minority,”—on the contrary, quite the reverse. In christening the railway trust it will then be wise to take due account of this condition of the public mind, and it will be a step in the right direction to quit calling it a “trust.” It may be called anything but that. If it be called an association, or a voluntary association, or a voluntary unincorporated association the public will not be scared. When an organization, not indeed created on the trust theory, but designed, as towards the public at least, to accomplish in some

respects very much the same ends contemplated in the creation of trusts, was lately called the "Interstate Commerce Railway Association," no one was seriously disturbed, and nobody shouted "conspiracy" or "stop thief." The partisan newspapers also who, in one column were bawling out vituperation of "trusts," on another page gleefully make small jokes over what they called an "agreement among gentlemen." They were so taken with their wit that they entirely overlooked what they might have called the "trust" iniquity that lurked in it. Witness also the persistence with which they miscall the North American Salt Co. a "trust." It will, in this state of the public intelligence and temper, be wise to throw it a sop in the matter of the name for the railway trust.

It may also be well to avoid any attempt at secrecy in the formation of such a trust. It is neither foolish, nor wicked, nor in any degree unlawful for stockholders to organize themselves in the way here proposed, and there is, therefore, no motive for any elaborate effort to conceal what is proposed. The commercial trusts, some of them, made a mistake in trying to cover up their organization. While, perhaps, it is, strictly speaking, no outsider's business how or why a trust of this sort is entered into, nevertheless, if any outsider thinks it is, and wants to see the wheels go around, it will rob the "trust" of one of its terrors to be entirely open about it. It will be remembered that last winter it was strenuously urged that trusts

are "secret," as if upon the theory that all other business undertakings among men are as open as the day; and there is, it will be conceded, some color of excuse, as people and politicians go, for popular outcry against any such enterprise which is at once novel and ostentatiously secret. Let the railroad trust, therefore, be formed just as other organizations are formed, without, on the one hand, any parade of details, and equally without any pass-words, grips, or countersigns.

Another matter to be especially insisted upon is that the trust certificates be not listed or dealt in on the floor of any Exchange here or abroad. If railway managers propose in good faith to organize a trust to promote legitimate railway operation, and are willing to conduct their business in the public interest and for the profit of the owners of the property entrusted to them, they will incorporate this provision as a cardinal principle in their deed of trust. The functions of a railway manager and of a gambler in railway securities are not compatible, and there should be no possibility and no temptation to unite them in respect of these trust certificates. Legitimate railway management imperatively requires that the manager of a railway keep out of Wall Street, at least so far as the securities of the road he manages are concerned. It is his sole function to operate his road and to discharge the trust committed to him as a business man, and not as a bull or a bear on the Stock Exchange. The declaration of trust, then, should

arbitrarily prohibit the listing of these certificates on any stock exchange. Any railway official who opposes this feature of a railway trust is primarily a stock speculator, and only incidentally a railway manager; and such a man is not a safe adviser in regard to railway policy.

Approaching the matter of the formal organization of such a trust, account must be taken, first, of the public or semi-public functions imposed by rules of law and public policy upon common carriers; and, second, of certain particular disabling requirements of law affecting railway corporations, a violation of which must be scrupulously avoided. The association contemplated must be entirely between the individual stockholders or stock and bondholders, and not at all between the railway corporations themselves. The corporation must be absolutely independent of the trust, and wholly separate and apart from it.

In formulating the scheme regard must be had to the rule of law that one railway company cannot vote on the stock of another railway company. It may sometimes lawfully acquire the stock of another road, and it may then lawfully hold it and receive dividends on it; but it is becoming a well settled rule that it cannot vote on it at corporate meetings, either directly or through the medium of trustees. There is already ample authority for this position, and there will be more before there is less. The courts of chancery are setting their face against this form of control of one railway by an-

other, and it cannot enter directly or indirectly into any feasible scheme of railway association.

Again, the courts have decided that the right to vote on railway shares cannot be irrevocably separated from the ownership. There can be no such thing as an irrevocable proxy to vote railway stock. This form of control of railway property has been tried over and over again, with all the possible variations, and has uniformly failed. The Cincinnati, Hamilton and Dayton, the Vanderbilt-Hostetter, and the Philadelphia and Reading voting trusts are recent instances of the inutility of such a device. Any scheme, therefore, to succeed, must wholly eliminate any contrivance of this nature. We must conceive something more enduring than an attempted irrevocable proxy.

It is as of course that any sort of a rope of sand will hold as long as there is no contest. What is now required is some form of association that will cohere in the face of a tempest, that can survive a lawsuit, and withstand the assaults and outlive the dissatisfaction of a minority in interest. We cannot, therefore, look to any scheme of railway consolidation, however plausible it may appear and however gigantic its proportions, as the solution of our present difficulties. The country is too large, the railways too numerous, and the legal and technical embarrassments too serious for such an undertaking to float. Consolidation creates great systems, and is good as far as it goes; but it can never go in this country as far as it is necessary for some-

thing to go in order to relieve our railways from their present straits. The promoters of the monstrous scheme to consolidate the trans-continental lines by charter from the federal government which has lately been made the subject of some newspaper comment—if it have any substantial existence—will find out, even if they succeed, that their success is only another form of failure. If our territory were no larger than England and Scotland the scheme that furnished relief there might avail here; but railways in the British Islands are, as compared to our overgrown proportions, scarcely more than a laboratory experiment. We must also avoid any plan of association which, in the disposition of earnings, is obnoxious to the objection that it violates the provision of the Interstate Commerce law against pooling. This will possibly be the most difficult point to compass in drafting or devising a trust deed.

To specialists in railroad law and to laymen trained in this sort of speculation, these suggestions, many or all of them, will seem threadbare and commonplace, but there is a much more general lack of precise knowledge upon the matters here considered, even among railway men, than is perhaps generally believed. It is, therefore, safe sometimes to talk elementary principles. The following Associated Press dispatch, which recently appeared in the morning papers, suggests the crudeness of many men's ideas on this subject:—

“CHICAGO, July 14.— The attorney for one of the largest railway companies having offices in this city, said to-day in regard to the proposed Railroad Trust:—‘The injunction obtained against the Oregon Transcontinental Company, preventing it from voting its controlling stock at the Oregon Navigation election a month ago, following the decision refusing to allow the East Tennessee to vote its Memphis and Charleston stock, killed all hopes of a railroad trust ever being formed.’”

Of course “the attorney for one of the largest railways” never delivered himself of any such nonsense as that, and of course if he did he was the cow-case member of the firm, and might with equal wisdom have included in his citation of authorities the leading case of *Bardell v. Pickwick*, which is an excellent—and to the present writing unoverruled—authority against a certain sort of “trust.”

The intent or objects to be attained by the creation of a railway trust will amply justify it, and ought to be plainly and specifically declared in the trust deed. Among the substantial inducements to such an organization are economy in the operation of the associated lines; the suppression of the competition of reckless and insolvent rivals, including the prevention of rate wars and rate cutting; the prevention of over-building, involving wholesome restraint upon speculative construction, and recognizing the fact that there is a possible over-production of railways, as well as of sugar or salt; the protection of each road from the encroachments of its rivals; the protection of all the lines in

the construction of necessary branches and feeders, and the protection of the public in the construction of new lines; the maintenance of steady rates, leaving the railways to compete in facilities only and not in rates, which is the only healthy competition among common carriers, when rates are normal; the protection of the weaker lines, and an arrest of the present tendency toward their absorption by the stronger systems, and finally a stay in the progress now certainly making toward governmental interference and operation. All this and more may be secured by a railway trust honestly and intelligently organized.

If the railways do not control themselves, the federal government will, somehow or other, be in control within a dozen years. Our railway managers have conducted themselves frequently, in the matter of competition, in the most puerile and irresponsible fashion, carrying on, at the expense of the stock and bondholders, railway slugging matches, for stock jobbing purposes or for the mere gratification that comes from a fracas. A railway trust of the sort here considered will relegate such antics to the back-yard, because it will put railway operation on the same plane as other sound business enterprises, and make it possible to operate a railway line with a decent regard both to the interests of the property to be managed and the public to be served.

To come more directly to the details of the arrangement, I suggest that it will not be necessary,

or even expedient, to bring into the trust arrangement at first more than a majority of the stock of any road embraced in the scheme. An outstanding minority of the stock, a part of which is in friendly hands, will not, even under a system of cumulative voting, interfere with the control of the property by the trust, and it will serve to secure to the minority such a voice in the management of the road as a minority of right ought to have. The advantages of the trust will probably put a premium upon coming in, and the outstanding shares will continually tend to conversion into certificates. If this be so, the trust will justify itself, if it be otherwise, no harm can come of it, and the minority can, as now, exercise all their rights, without blocking the game.

It will be necessary to divide up the territory to be covered on some natural lines of division, and to create a trust for the railways of each section. Thus, suppose a trust for the trunk lines, another for the territory west and south of St. Louis, another north and west of Chicago, another for the Atlantic seaboard, another for New England and certain of the Canadian lines, another for the south Mississippi valley, another for the territory having its center at Denver, and finally one for the Pacific coast. These several trusts could all be inter-associated and work together to a common end. In each case there might be created a trust board of twenty-one members including representatives of the stock and bonded interests of the lines in-

cluded in the scheme, which should act as a committee of the whole in determining the policy of the trust, but to be subdivided into as many committees, of three members each, as there are roads to be operated, no two members to constitute a majority of any two of these subcommittees.

A majority at least of the stock of each of the roads should then be conveyed absolutely to the trust, and the title taken in the names of these subcommittees, the stock of each road to be in the name of a different committee, to be registered on the books of the corporation in their individual names, and to be held by the trust endorsed in blank, for the purposes declared in the deed of trust. For this stock so conveyed to the trust there should be issued, as usual, trust certificates to the several surrendering shareowners. In other words, the usual provisions of a trust arrangement should be entered into between the stockholders constituting the association. This majority would elect the boards of directors and operate the properties pursuant to the provisions of the trust deed and as the interests of the business might dictate. Each road would thus maintain its corporate organization, and carry on its business independently, conforming to all the rules of law affecting its existence and operation, and performing as a common carrier all its duties to the public, precisely, *as to the public*, as though there were no trust. The public would, therefore, not be heard to challenge the trust.

Dividends should, in every instance, be declared directly on the stock of each road as earned, and paid over, as usual, directly to each stockholder as the stock books declare. Thus the outstanding stock would receive its dividend directly, and the dividends on the stock included in the trust would be paid into the trust and be re-distributed on the certificates. This contrivance would entirely avoid the inhibition of the Interstate Commerce law against pooling, and shut off any possible objection to the trust scheme at this point predicated upon the pooling of earnings or the public function of the railway as a common carrier.

The corporation, *qua* corporation, thus touches the trust at no point. There is created merely a voluntary, unincorporated association between the owners of a majority of the stock of the allied lines. Such an association, it is hardly necessary to say, is absolutely lawful, both in itself and in its purposes. No legislation, either State or federal, can ever be successfully aimed against it, and no hostile court can ever dissolve it as long as the Constitution of the United States and of the several States of the Union are the supreme law. The right to do business in partnership with one's neighbors is guaranteed to the people of these United States not only by our written constitutions, but by the rules of the common law, and it will not become unlawful in any civilized community in the near future. Upon the invitation of the editor of *The Forum* I have emphasized this view of the le-

gality of trusts in an article entitled "Facts about Trusts,"—published in the September number of that periodical—to which reference is here made for a fuller statement of the points involved.

Two classes only, speaking broadly, will, it is believed, oppose such an association among railway shareowners; namely, (*a*) such railway managers as combine the character of a railway official and stock speculator, and (*b*) the politicians and their victims. But the opposition of neither of these classes will be formidable if the owners of railway property can be united in support of the scheme. It should be carefully canvassed and seriously considered before it is abandoned as impracticable. It is, verily, a feasible proposal, and one which, if carried out intelligently and in good faith, under a declaration of trust skillfully devised, promises more for legitimate railroading in the United States than any other form of railway association and control yet suggested.

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