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UNITED STATES REPORTS

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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1912

CHARLES HENRY BUTLER

REPORTER

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1913

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, Chief Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.
HORACE HARMON LURTON, Associate Justice.
CHARLES EVANS HUGHES, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
JOSEPH RUCKER LAMAR, Associate Justice.
MAHLON PITNEY, Associate Justice.

GEORGE WOODWARD WICKERSHAM, Attorney General.[2]
JAMES C. McREYNOLDS, Attorney General.[3]
WILLIAM MARSHALL BULLITT, Solicitor General.[4]
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

[1] For allotment of The Chief Justice and Associate Justices among the several circuits see next page.

[2] Resigned March 4, 1913.

[3] On March 5, 1913, President Wilson nominated James C. McReynolds of Tennessee as Attorney General to succeed George W. Wickersham, resigned. He was confirmed by the Senate the same day. His commission was filed March 10, 1913.

[4] Resigned March 11, 1913. The office of Solicitor General was not filled until after the close of October Term, 1912. On July 28, 1913, President Wilson nominated Mr. John William Davis of West Virginia as Solicitor General. He was confirmed by the Senate July 28, 1913, and qualified August 30, 1913. His commission was filed on the opening day of October Term, 1913.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, MARCH 18, 1912.[1]

ORDER: There having been an Associate Justice of this court appointed since the commencement of this term,

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, Oliver Wendell Holmes, Associate Justice.

For the Second Circuit, Charles E. Hughes, Associate Justice.

For the Third Circuit, Mahlon Pitney, Associate Justice.

For the Fourth Circuit, Edward D. White, Chief Justice.

For the Fifth Circuit, Joseph R. Lamar, Associate Justice.

For the Sixth Circuit, William R. Day, Associate Justice.

For the Seventh Circuit, Horace H. Lurton, Associate Justice.

For the Eighth Circuit, Willis Van Devanter, Associate Justice.

For the Ninth Circuit, Joseph McKenna, Associate Justice.

[1] For previous allotment see 222 U. S., p. iv.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1912.

JACKSON *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 720. Submitted January 10, 1913.—Decided June 16, 1913.

This court considers it a grave error for the court charged with the duty of making findings of fact to include mere conclusions of law.

Statements as to what the relation of the United States is to levee work on the Mississippi River and what the power of the Mississippi River Commission over all such work is by whomsoever performed are conclusions of law and not of fact.

Congress did not, by the creation of the Mississippi River Commission, assume entire control of the levee work to the displacement of state or local authorities who continued to construct levees for protection from overflow which combined with those constructed by the United States for improvement of navigation, so that eventually a complete system would be evolved.

Damages, if any, by overflowing adjacent lands, occasioned by the levee system of the Mississippi River Valley could only result from concurrent action of the United States, the States and their subordinate agencies and individuals all impelled by different considerations, but all working towards the common end of having an efficient and continuous line of levees.

An individual owner has no right to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible.

An individual owner protecting his own property from a common natural danger acquires no right thereby to insist that other owners or the Government shall adopt the same method or that they shall not adopt different methods for the protection of their respective properties or for the public good.

The United States is not responsible for damages by overflow or for failure to construct additional levees along the Mississippi River Valley, so as to afford increased protection from increased overflow caused by the levees that were constructed by state and Federal authority at other points; nor do such damages amount to taking the land overflowed for public use within the meaning of the Fifth Amendment.

The rule that the United States has plenary power to legislate for the benefit of navigation and is not liable for remote or consequential damages caused by works constructed to that end has already been directly applied to the work of the Mississippi River Commission. *Bedford* v. *United States*, 192 U. S. 225.

THE facts, which involve the question of liability of the United States for damages alleged to have been sustained by the owner of a plantation in the Mississippi River Valley by reason of the improvement of the Mississippi River under direction of the Federal Commission charged with that work, are stated in the opinion.

Mr. Waitman H. Conaway for appellants.

Mr. Assistant Attorney General John Q. Thompson and *Mr. J. Harwood Graves* for the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This suit was brought to recover from the United States the value of property asserted to have been totally destroyed or rendered completely valueless as the result of

certain public work "done in pursuance of the acts of Congress authorizing it, for the public benefit, under the direction of the Mississippi River Commission and the Secretary of War and the United States engineers." And it was charged that under the circumstances stated and the facts alleged, the property had been taken by the United States for public use "within the meaning of the constitutional provision," and it was averred that there was consequently imposed "on the United States an implied obligation to make compensation for the property so taken and destroyed."

It becomes necessary to give a brief description of the topography of the country in which the property in question is situated, in order to make clear its relation to the public work which it is asserted constituted a taking within the meaning of the Constitution.

The Valley of the Mississippi River, may in a broad sense be said to commence at Cape Girardeau, Missouri, and to extend from there to the mouth of the river at the Gulf of Mexico. The river, however, in its course to the ocean does not run through the center of the vast fertile and alluvial plains which in a comprehensive and generic sense constitute the delta of the Mississippi. On the contrary the situation of the river in this respect varies, occasioned by the fact that at divers places the upland or hill country approaches to or constitutes the bank of the river. The difference in this regard is marked between the west and the east banks. The west bank is divided into four great basins—the St. Francis Basin, which extends from Cape Girardeau to Helena; the White River Basin, which extends from Helena to the mouth of the Arkansas; the Tensas Basin, which extends from the mouth of the Arkansas to the mouth of the Red River; and the Atchafalaya Basin, extending from the mouth of the Red River to the Gulf. Practically in the long sweep from Helena, where St. Francis Basin ends and the White River Basin

begins, to the ending of the Atchafalaya Basin at the Gulf there is no real topographical distinction between the basins, the west bank of the river in that great distance consisting of alluvial country having generally a very wide though varying expanse. The division into basins putting out of view the St. Francis Basin, is therefore merely the result of a consideration of the watershed of each basin, all the water, however, from each ultimately finding its way to the Gulf of Mexico, either through the Mississippi River, or in the lower basins in part at least by the means of streams flowing independently of the Mississippi River to the Gulf of Mexico. On the east bank the situation is different. In the long stretch from Cairo, Illinois, to a point a short distance below Memphis, generally speaking, the hills and uplands border the river and constitute its bank. From the point below Memphis to which we have referred to Vicksburg, Mississippi, this is not the case, and there is a great basin known as the Yazoo Basin, which, aside from peculiarities of its own, may be said to possess the same general characteristics as the basins on the west bank of the river. From Vicksburg where the uplands come to the river and constitute its bank, down to Baton Rouge, Louisiana, where the hills or uplands permanently recede from the river a different condition from that which exists on the west bank obtains. As we are concerned only with the situation below Natchez we put out of view any statement concerning the east bank between Vicksburg and Natchez, and refer only to the conditions existing on the east bank between Natchez and Baton Rouge.

From Natchez where the hills or uplands constitute the bank of the river to Baton Rouge, the line of hill or upland does not follow the course of the river, but recedes therefrom for a certain distance and then again abuts on the river, this process being repeated from point to point until Baton Rouge is reached. Of necessity therefore be-

tween the point of each departure of the uplands from the river to the point of reapproach there is an area of alluvial country bounded on the west by the river and constituting its bank, on the east by the hills, which as it were like a festoon or semicircle inclose the alluvial area between the river, the base of the uplands or hills, and the points of departure from and approach to the river as above stated.

These various areas constitute in the nature of things, minor basins having their own watershed. And between Natchez and Baton Rouge there are five of these minor basins, one between Natchez and Ellis Cliffs, sixteen miles below Natchez, another between Ellis Cliffs and Fort Adams, thirty-nine miles below Ellis Cliffs, a third between Fort Adams and Tunica, seventeen miles below Fort Adams, and two others between Tunica and Bayou Sara, twenty-three miles below Tunica, and from Bayou Sara to Baton Rouge, a distance of thirty-five miles. These subordinate basins are included in a general local levee district known as the Homochitto district. A full and accurate statement concerning these basins, of their relation to levee building, and overflow, will be found in Document No. 1010, House of Representatives, 63rd Congress, third session, being a letter of the Secretary of War transmitting to the House of Representatives a full report of a survey made by direction of Congress, by the Mississippi River Commission, of these basins. Of the basin between Ellis Cliffs and Fort Adams, the report of the Commission makes the following statement:

"Between Ellis Cliffs and Fort Adams, a distance of 39 miles by river, lies a basin whose protection from floods is greatly complicated by the presence of lakes, streams, and swamps.

"It has a total area of 59,412 acres, including 9,781 acres of cleared and 49,631 acres of wooded land, the assessed value of which is $204,739.

"The systematic protection of the basin as a whole is

impracticable without including drainage work of large proportions.

"It will be observed that there is a large amount of cleared land which is now being cultivated although meagerly protected from floods by small private levees.

"Owing to the extent of swamp lands the cultivated area could not be greatly extended by the construction of a levee along the river front.

"The benefits to be derived from the construction of a levee are relatively small as compared with the cost, and the work cannot be recommended."

In February, 1894, the appellants or their predecessors in title for whom they have been substituted on the record, filed their petition in the Court of Claims against the United States, alleging themselves to be the owners of various tracts of land in Adams County, Mississippi, composing three plantations. It was alleged as follows:

"2. That before and prior to the year 1890 said plantation from its natural situation, was comparatively high and exempt from overflow from the waters of the Mississippi river, except at long intervals, and the occurrence of such overflows did not materially affect its productive capacity, or its value.

"That said plantation was highly improved, well stocked with laborers and tenants, yielded yearly large crops of cotton, corn and other products, and was worth the sum of fifty thousand dollars.

"3. That about the year 1883 the officers and agents of the United States, in pursuance of the act of Congress creating the Mississippi River Commission, and of the subsequent acts for the improvement of the navigation of the Mississippi River, adopting the so-called Eads' plan, projected, and have constructed, and are constructing, a system of public works for the purpose of so confining the waters of the river between lines of embankment, or levees, as to give increased elevation and velocity

and force to the current in order to scour and deepen the channel, and have thus caused an increased and abnormal elevation of at least four feet to the waters of the river at the high water or flood stage; and for said purposes have adopted and made use of systems of public and private levees, originally constructed for the reclamation of overflowed lands, on the west bank from the highlands of Arkansas to the mouth of the Red river, and from the mouth of the Red river to the Passes, and on the east bank from the highlands of Tennessee to the mouth of the Yazoo river, and from Baton Rouge to the Passes; but from the mouth of the Yazoo river to Baton Rouge, instead of adopting and constructing levees, have made use of the highlands skirting the river for said purpose, and have thus placed the plantations of petitioners, and others similarly situated between the lines of embankment, and exposed to the full force of the currents of the river, with such increased and abnormal flood level.

"And are so raising, enlarging, strengthening, adding to and constructing such levees, as to cause the plantations of petitioners, and others so situated to be flooded annually by the waters of the river, and to destroy the crops, growing and grown thereon, and to drown the live stock, and to undermine and wash away the buildings, fences and other improvements, and to fill up the drains and ditches, and to wash off the soil, and to cover the lands with sand and gravel, and to render them unfit for cultivation, and to entirely destroy their value.

"4. That in pursuance of the said plan for the improvement of the navigation of the river, the said officers and agents of the United States have undertaken to close the Atchafalaya river, a natural outlet carrying off near one-third of the surplus waters of the Mississippi, and to force the waters of the Red river and its tributaries, from their natural course through the Atchafalaya river to the Gulf of Mexico, into the channel of the Mississippi river,

and have so obstructed, and are so obstructing, the passage of the surplus waters through the Atchafalaya as to cause the waters of the rivers at the flood stage to annually back up and overflow the lands of petitioners, and to destroy the crops, growing and grown thereon, and to deposit thereon superinduced additions of water, earth, sand and gravel, so as to render them unfit for cultivation, and to entirely destroy their value.

"5. That by reason of the premises aforesaid the lands of petitioners, which before, from their natural situation, were comparatively high and secure from overflow, have been flooded annually by the waters of the rivers thus confined, in the years 1890, 1891, 1892 and 1893, and the crops growing and grown thereon, have been each year destroyed by said overflows, so caused, and the live stock drowned, and buildings and fences and other improvements undermined and washed away, and the ditches and drains filled up and the soil washed off, and covered with sand, and earth and gravel, so as to render them unfit for cultivation, and to entirely destroy their value, to the injury and damage of petitioners, as follows, to-wit: . . ."

Following an enumeration of loss of crops and personal property in the years 1890, 1891, 1892 and 1893 and the fixing of the value of the land at $50,000, recovery was prayed of $107,257.50, asserted to be due because under the facts alleged there had been a taking of the property by the United States for public use.

A demurrer to this petition was overruled on June 1, 1896. The nature of the ruling is indicated by the following excerpt from the opinion, reported in 31 Ct. Cls. 318:

"The petition undoubtedly sets up losses which are in the nature of consequential damages, of which the court has not jurisdiction. The Government may have increased the effect of the flood wrongfully or rightfully by the erection of its levees; but it did not in the constitutional

sense of the term take the claimant's cotton, mules, corn, cattle, and sheep for public use. Such a claim is not founded on an implied contract, and of it the court has not jurisdiction. But the petition does allege that 'the value of the land and the improvements destroyed was $50,000;' and that taking is presented by allegations so closely resembling those in the *Pumpelly* v. *Green Bay Company Case* that this court does not feel at liberty to say that they present no valid cause of action."

It is stated in the record that during the year 1908, first, second and third supplemental petitions were filed, although they are not reproduced, but the court below in its opinion declares the aggregate damages claimed was $569,702.50. To these petitions a demurrer seems to have been filed by the United States, which was passed upon in 1910, the order on the subject reading as follows:

"Within the former ruling in this case (31 Ct. Cls., 318), the demurrer to the original and supplemental petitions, in so far as they or either of them aver a taking of real estate—within six years from the date of filing of said petitions—by overflow proximately caused by the construction of levees or other public works in the improvement of the navigation of the Mississippi River pursuant to acts of Congress and within the ruling of the cases of *Pumpelly* v. *Green Bay Company* (13 Wall., 166) and *United States* v. *Lynah* (188 U. S., 445), is overruled.

But as to the alleged annual destruction of crops and personal property on said land so taken by overflow the demurrer is sustained."

Besides the supplemental petitions just referred to and the action of the court thereon in the period of sixteen years which elapsed between the entry of the order overruling the first demurrer in 1896 and January 5, 1912, when what is styled a fourth supplemental petition was filed, many proceedings were had, such as a hearing, the making of findings of fact and conclusions of law,

filing of motions to set aside the same, to amend the findings, etc, etc., none of which we need particularly refer to because in the first place, although mentioned, they are not reproduced in the record and in the second place, because we take it that the filing of the fourth supplemental petition was by permission of the court and with the consent of the United States, permitted for the purpose of restating the case of the claimants in its best possible aspect so that in the light of what had transpired a final disposition of the controversy might be had. We so conclude because there is not the slightest indication in the record of any objection having been made to the filing of the fourth amended petition and because obviously it had the significance which we attribute to it since the findings of fact which the court made the basis of the decree which is here under review in most important particulars, but copies and reproduces the allegations in the fourth supplemental petition. It becomes important therefore to exactly understand the issues presented by this petition before coming to consider and dispose of the case. And to this end, omitting all reference to averments relating to the mere description of the property involved or its value, we shall endeavor, not following the order of statement in the pleading, to accurately summarize its contents.

First. As to the situation of the lands, it was averred that said "lands are situated at Jackson Point, in the Alluvial Valley of the Mississippi, on the left bank of the river, 40 miles below Natchez and 25 miles above the mouth of Red River. That the basin in which the Jackson lands are situated commences at Ellis Cliffs, about 20 miles below Natchez, and extends to Fort Adams, about fifty miles below, with an average width of 2 miles and a maximum width of 6 miles, and is one of six (6) small basins of the Homochitto Basin," a description which beyond doubt, fixes the location of the lands as within

the minor basin lying between Ellis Cliffs and Fort Adams, the area and description of which as given in the recent report of the Mississippi River Commission we have before reproduced.

Second. As to the condition of the property prior to the doing of the acts complained of, it suffices to say that it was alleged that by means of levee protection resulting from work done by the owners of the property along the river bank, the property had been protected, that crops of large value had been raised thereon, and that improvements had been put thereon and that as a result of this protection by the levees built by the owners, although the property was occasionally overflowed by breaks in the levee, the overflow when it came was not destructive or of such long duration as to prevent the making of a crop, and that the property was highly improved, stocked with implements, etc., as alleged in the original petition, and was of great productive capacity and of large value to the owners.

Third. The facts from which it was alleged the property had been so injured or destroyed by work done by officers of the United States as to constitute a taking of the property by the United States for which adequate compensation was due, are stated under the following headings:

a. That about the year 1883 the officers and agents of the United States, "in pursuance of the Act of Congress creating the Mississippi River Commission, and of the subsequent acts for the improvement of the navigation of the Mississippi River, adopted the so-called Eads plan, by Act of Congress approved March 3, 1881, in consequence whereof have projected, and have constructed, and are constructing a continuous system of public works, for the purpose of so confining the flood waters of the river between lines of embankment, or levees, as to give increased elevation and velocity and force, to the currents, in order to scour and deepen the channel,

and have thus caused an increased and abnormal elevation of at least nine feet to the waters of the river at the high water or flood stage; and for said purpose have adopted and made use of systems of public and private levees, originally constructed for the reclamation of overflowed lands, on the west bank from the highlands of Arkansas to the mouth of the Red River, and from the mouth of the Red River to the Passes. . . ."

b. That for time beyond the memory of man the flood waters of the Mississippi River, passing Helena, Arkansas, where the highlands abut on the river, had escaped into the White River and Upper Tensas Basins, and passed in part through various designated bayous, rivers or streams which as we have previously said in describing the White River and Tensas basins on the west bank carried to the Gulf independently of the Mississippi waters which enter into or overflow these great watersheds. It being moreover, however, alleged that if they—that is, the waters passing Helena and which did not escape into the White River and Tensas Basins—"ever reached the lands of claimants in sufficient volume to flow them were speedily reduced by crevasses on the west bank, which allowed them to escape into the Atchafalaya Basin, and thus relieved the lands of claimants."

That in executing their plans as above described the officers of the United States had by the levees which they had constructed or maintained along the front of the White River and Tensas Basins, prevented the flow of a large volume of water into those basins which would have found its way to the Gulf without returning to the Mississippi as above stated, and had thus increased largely the volume of water flowing past the claimants' land and which therefore in time of flood would rest against the levee which protected their lands from overflow.

c. That for the purpose of carrying out their plans, the officers had built a levee to close a very extensive

break or crevasse in the levees on the west bank opposite to, or nearly so to the lands of the claimants on the east bank, known as the Bougere Crevasse, which carried off a great volume of water and relieved the pressure on the claimants' levee and thus additionally by retaining such water in the river augmenting the risk of overflow by increasing the danger of a break in the levees of claimants.

d. Because yet further to give effect to their plans, the officers of the United States had prevented large quantities of water which otherwise would have reached the Gulf through the Atchafalaya river, from taking that course, by works designed to retain water in the Mississippi, thus causing the water to back up against claimants' levee, and greatly increasing the danger of overflow.

e. That the plantations of petitioners are located within the limits of a narrow strip of land lying between the low water bank of the Mississippi River and the highlands east of it between Vicksburg and Baton Rouge, where the highlands skirt very closely to the river bank and are not protected by levee construction other than that built by the claimants, which has been destroyed and washed away by the recent flood waters of said river after the levee system had practically reached a state of completion and the United States had closed the Bougere Crevasse, as hereinafter alleged.

"That the United States has not attempted to connect the levee line on the east side of said river by the construction of levees on said irregular and narrow strip of land lying between Vicksburg and Baton Rouge for the reason that the cost of said levee construction, as shown by the Mississippi River Commission's Report for 1896, and the report and survey of the small basins in the Homochitto levee district between Ellis Cliff and Fort Adams, made in 1895 by Col. Geo. B. McC. Derby, the engineer officer in charge of said district, would exceed the value of the land lying between the river and the foothills, (of which

petitioners' lands are a part), to the amount of $206,500.00, it being more economical to use the foothills as levees, as now being done, and pay for the land destroyed, than to build levees on the east bank of said river between said city of Vicksburg and the city of Baton Rouge. That the Mississippi River Commission, in its report for the year 1910, in part says that the lands of petitioners are now subject to perpetual inundation."

The court below made elaborate findings of fact, contained in twenty-five numbered paragraphs. The first four relate to the title of the claimants to the land and we need not review them. Findings 5, 6, 7, 8, and 9 relate to the condition of the river prior to the work done by the Government, to the escaping of water into the White River and Tensas Basins as alleged, and to the increased pressure brought upon the levees protecting the lands of the claimants, to the greater frequency of overflow of such lands, etc., etc., some of these findings as we have said, being in the very words of the allegations of the supplemental and amended petition of 1912. Concerning the work done by the officers of the United States, findings numbered 10, 11 and 15 contain the following:

"X.

"Prior to the year 1883 the States and local authorities had constructed unconnected lines of levees for the protection and reclamation of lands subject to overflow from the mouth of Red River to the mouth of Arkansas and from the mouth of the Yazoo to the highlands below Memphis. The flood waters of 1882 destroyed miles of these levees.

"Beginning about the year 1883 and continuing to the present time, the officers and agents of the United States, pursuant to an act of Congress creating the Mississippi River Commission and the other acts amendatory thereof, and for the improvement of the Mississippi River for navigation, adopted a plan, the so-called Eads plan,

and in consequence thereof have projected and constructed and maintain—and are now engaged in constructing and maintaining certain lines of levees on both sides of the river at various places for various distances from Cairo, Ill., to near the Head of the Passes, a distance of 1,050 miles by river from Cairo, and the local authorities or organizations of the States bordering along the river on both sides from Cairo to the Gulf have before and since 1883 constructed and are now constructing and maintaining certain lines of levees at various places and of various lengths for the purpose of protecting and reclaiming lands within their respective districts from overflow in times of high water.

"The levee lines so constructed by the United States and local authorities have been joined, thus giving a continuous line of levees, as contemplated by the Eads plan, with the result that the flood waters of the Mississippi River to a great extent are confined within and between said levee lines and encompassed within a narrower scope than heretofore, acquired an increased velocity and higher elevation and the current thereof has become stronger and more forceful.

"The plan of the officers and agents of the United States so acting was to increase said velocity and scouring power of the water and to scour and deepen the channel of the Mississippi River and thereby improve it for navigation, and the purpose of the officers and agents of the State and local authorities constructing lines of levees at various points along and on both sides of the river was to reclaim and to protect land from overflow in times of high water. By so doing, the waters being thus confined within a narrower compass, as above indicated, have attained a higher elevation of approximately 6 feet in times of high water.

"XI.

"From Cairo, Ill., to near the mouth of the Yazoo River, just north of Vicksburg, the Mississippi River is practically

leveed on both sides, except on the east side, where the highlands abut on or near the river in Kentucky and Tennessee (from Port Jefferson, Ky., to a short distance south of Memphis, Tenn.) and thence on the west side to near the Head of the Passes, or to a point 1,050 miles by the river from Cairo, and on the east side from Baton Rouge to the same point near the Head of the Passes, leaving a gap in the line of levees of 234 miles in length, from the mouth of the Yazoo River to Baton Rouge, unleveed, where the foothills in some places hug closely to the east bank of the river, and at other points are from 2 to 6 miles from the river, in which strip of territory the lands of claimants are located between the highlands and the river, as before stated.

"The extension of the general levee system by the United States and the local authorities, since the United States adopted to its use and assumed 'permanent control' of the levees theretofore constructed by State and local authorities, has resulted in an increased elevation of the general flood levels, which subjects the claimants' lands to deeper overflow than they were subject to formerly, or would be subject to now, if the levee system were not in existence, and consequently has destroyed its value for agricultural and grazing purposes, causing its abandonment for that purpose since the year 1908. The immediate cause of the deeper overflow of claimants' land is the increased elevation of flood heights which is the result of the general confinement of the flood discharge by the levee system as a whole.

"XV.

"Before the creation of the Mississippi River Commission by act of Congress, and the adoption of the Eads plan as aforesaid, the levee lines along the Mississippi River theretofore constructed by State and local authorities consisted of a broken chain of levees of insufficient height and strength to confine the flood waters, and had

been built without regard to a uniform grade line. The United States then caused a survey and report to be made by its officers and agents showing the condition and location of levee lines theretofore constructed by State and local authorities as they then existed. This survey suggested a proposed continuous system of levees from Cairo to the Head of the Passes. In many instances it was a blanket survey which encompassed and took in the lines of levees theretofore constructed by State and local authorities as above stated. The project recommended by the Mississippi River Commission adopting the Eads plan for the systematic improvement of the river from Cairo to the Head of the Passes was practically adopted by act of Congress approved March 3, 1881. The United States then undertook the projection and completion of a continuous line of levees from Cairo to the Head of the Passes, as suggested by this survey and the Eads plan, and as recommended by the Mississippi River Commission, and, in furtherance of that plan and as part of and supplementary thereto, adopted to its use, and is now using, the levees theretofore constructed by State and local authorities, thereafter making them much larger and stronger. Since that time, levee construction, whether done by the United States or State and local authorities, has been in conformity with the grades and methods of construction adopted by the Mississippi River Commission, and the efficiency of the levee system has been largely due to this fact.

"The extension of this levee system by the United States from Cape Girardeau, Mo., to the Head of the Passes was authorized by act of Congress in 1906." (34 Stats. 208.)

The remainder of the findings are but cumulative and we do not pause to state them.

The court concluded in view of the authority of the United States over navigation and its right to construct works for that purpose, that there was no liability on the

part of the Untied States, basing its views on this subject upon *Bedford* v. *United States*, 192 U. S. 217, 225. The petition was therefore dismissed.

Before we take up the contentions advanced by the appellants to establish that the court below was wrong in deciding that there was no liability on the part of the United States, we consider it necessary, lest misconception otherwise might result, to refer to what we deem to be grave errors committed by the court in certain particulars, even although in passing upon the merits we shall consider the case in such an aspect as to cause it to be unnecessary to review the errors in question for the purpose of passing on the merits. In the first place it is apparent that in many important respects matters which the court below has stated as findings of fact are mere conclusions of law. This is true for instance of the broad conclusion embodied in the findings of fact as to the relation of the United States to levee work and the power of the Mississippi River Commission over all such work by whomsoever performed. In the second place, treating it as a question of law, we think the error is apparent from a consideration of the statutes and the official reports relating to the subject, which we may judicially notice. It is true indeed that when the Eads theory, illustrated by the successful jettying of the mouth of the river under a contract made with Captain Eads, came to be understood and it also came to be appreciated that the most efficient way to improve the navigation of the river was to ultilize the vast power of the river, by confining its waters within its banks, thus directing its energies to cutting out a deeper channel, Congress legislated to the accomplishment of such result by the creation of the Mississippi River Commission, and by conferring the power upon that body to improve the navigation of the river and to build levees for that purpose with the appropriations which were made from time to time to carry out these great purposes. But nothing in

that legislation justifies the conclusion that, irrespective of navigation, Congress assumed control of the entire work of protection from overflow by levees, to the displacement of the state or local authorities. On the contrary, the reports of the Commission and the public documents and history connected with the same leave no room to doubt that as necessarily the levees built by the United States in aid of navigation at the same time afforded protection from overflow and thus served a twofold purpose, that thereby renewed energy was stimulated in state and local authorities to undertake the work of building levees for protection, so that one continuous and complete system of protection would be evolved. It is of course true, also, that the intelligent work of the Mississippi River Commission furnished a standard which served in a sense to control and direct the coöperating energies of others. The gravity of the error, as expressed in the findings of the court below, is illustrated by the fact that it treated the injury alleged to have been suffered as arising alone from the acts of the United States, when in truth, if there was such injury, it could only have resulted from the concurrent action of the United States, the States and their subordinate agencies, including individuals, all acting to the realization of a common end, that is, an efficient and continuous line of levees, although action was impelled by different considerations. This is illustrated by the statement made by the Mississippi River Commission in its annual report for 1894, pp. 2713–2715, where, in referring either to the claim of damage made in this case or to one like it, it was said:

"The injury will not be traceable to levees built by the United States any more than to those built by the States and local organizations. Neither can it be attributed to the levees on any particular or limited portions of the river. It will be a result of the system as a whole."

But passing, for the sake of argument, these considera-

tions, let us look at the case in the light of the findings as made.

It is apparent, taking the broadest possible view in favor of the claimants, that the grievance which they allege they have suffered, can only rest upon three grounds:

1st. The building by the officers of the United States of lines of levees along the bank of the river for the purpose of retaining the water in the river, treating, for the sake of the argument, all acts done by the local authorities in building levees or closing breaks as acts of the United States.

2nd. The failure of the United States to build on the east bank of the river along the minor basins which we have fully described, a line of levees so as to afford means of protection from the increased danger of overflow arising from the fact that the lines of levees along the river on the west bank and elsewhere had been raised and strengthened and extended, thus at least beyond doubt temporarily increasing the level of the flood in times of high water.

3rd. The performance of work by the United States tending to diminish the outflow of water from the river through streams which flowed from it, to the end that a more efficient body of water might remain in the stream for the purpose of accomplishing the deepening of the channel and thus more effectively improving the navigable capacity of the river.

Let us primarily test the merits of the first ground of complaint, that is, the building of levees. It is not averred that the land of the claimants bordering on the east bank of the river in the absence of all levees and in a state of nature would not in seasons of high water, be overflowed; and if it had been so alleged it is certain there would be no right on the part of an individual to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible. When accurately

fixed, the complaint is but this, that because the claimants had built a levee for the purpose of protecting their lands and which answered that purpose if levees were not built by others to protect their lands, actionable injury would be occasioned claimants when anybody else sought to protect his land from overflow, since to so do would increase the volume of water in the river and raise the flood level to the detriment of claimants. In its essence, however, this but amounts to saying that because the claimants have built a levee along their property for the purpose of protecting it from overflow in times of high water, they have acquired the right to stereotype the conditions existing at the time they built their levee even to the extent of preventing any one from subsequently exerting his right to build a levee to protect his land. Nothing could more completely illustrate the accuracy of this statement than the averments in the supplemental petition concerning the closing of the Bougere Crevasse, since those averments in their last analysis but charge that there was a right on the part of the claimants to subject a vast area of country on the west bank to the devastation resulting from the existence of so extensive a crevasse, simply because to close it would subject the levee of claimants across the river, to a greater pressure consequent on the retaining of the flood water of the river within its banks. And indeed a like illustration is afforded by the averments as to the escape of water from the river on the west bank, and the spread of that water through the White River and Tensas Basins until it ultimately reached the Gulf, by emptying into remote streams. To make the demonstration, if possible, clearer, let us suppose that by the acts of individuals for their own protection sanctioned by the local laws, a complete line of levees had been built accomplishing the very result which it is insisted brought about the injury here complained of. Would it be said that the claimants would have a resulting right of action in damages because

other owners had exerted the very right which the claimants had previously resorted to for the purpose of protecting their own land? If not, upon what imaginary ground can it be said that because a work which was lawful in and of itself, was done by the United States, therefore responsibility in favor of the claimants was entailed.

Coming to the second contention, we think it is disposed of by the following considerations:

In the first place—by the report of the Commission to which we have referred the impossibility was pointed out of building a levee along the line of the minor basin in which the land of claimants is situated, without destroying said land, because of its peculiar situation, unless there was a permanent system of pumping to take out the water which would gather in the watershed. In the second place—looked at from the point of individual right and corresponding responsibility, it is impossible to conceive by what principle it can be said that because an individual having a right to do so has built a levee to protect his land from overflow, and because his levee has accomplished that result by retaining the water in the river, that thereby there arose a duty on his part to build a levee to protect the land of another or in the alternative to pay for such land.

Indeed, the propositions but assert on the one hand that the United States is liable because it did that which it had a right to do and on the other that it is liable because it abstained from doing that which it was under no duty to do. Both the fundamental errors which the contentions involve are exemplified in the arguments used to sustain them since, it is urged that because the levees constructed on the bank of the river operated to keep the water in the river from flowing out, that thereby they served to bring water into the river from without, and that the mere abstention from building levees at a particular place or on a particular line operated to transfer the bank of the river

over to the foot of the hills or to move the hills over to the river so as to cause them to become its banks.

The third consideration, that is, the preventing of the outflow of water by work done in the tributaries and the consequent increase in the volume of water in the river, cannot be tested from the point of view of individual authority, as the power to so do involves necessarily the exercise of governmental power. We therefore come to consider the proposition in that aspect. In doing so, however, it is to be observed that even if all the previous considerations which we have stated concerning the nonliability to result from building levees, measured by the right of an individual to build a levee to prevent the water of a river from overflowing its banks and destroying his property, be put out of view, and the case therefore in all its aspects be tested by the scope of the governmental authority possessed by the United States, the absence of merit in all the claims is too clear to require anything but statement. We say this because the plenary power of the United States to legislate for the benefit of navigation and to construct such works as are appropriate to that end, without liability, for remote or consequential damages, has been so often decided as to cause the subject not to be open. It was directly ruled as to work done by the Mississippi River Commission in *Bedford* v. *United States*, 192 U. S. 217, 225, upon the authority of which case, as we have said, the court below placed its ruling, and as the underlying principles which controlled the decision in the *Bedford Case* and which govern the subject were again at this term with much elaboration stated and applied, we think it unnecessary to do more than refer to that ruling (*United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53), and to direct that the judgment below be

Affirmed.

HUGHES *v.* UNITED STATES.

UNITED STATES *v.* HUGHES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 718, 719. Submitted January 10, 1913.—Decided June 16, 1913.

Jackson v. *United States*, *ante*, p. 599, followed to effect that the United States is not liable for damages caused by overflow of lands in the Mississippi valley caused by the levees constructed by state and Federal authority for protection from overflow and improvement of navigation, and that such overflow does not amount to a taking of property within the Fifth Amendment.

The wrongful act of an officer of the United States, such as dynamiting a levee in an emergency so as to prevent the water from interfering with other work under construction, is not the act of the United States; nor does it amount to taking for public use the property overflowed as a result of the dynamiting.

45 Ct. Cl. 517, affirmed.

THE facts, which involve the question of liability of the United States for damages alleged to have been sustained by the owner of a plantation in the Mississippi River Valley by reason of the improvements of the Mississippi River under direction of the Federal Commission charged with that work, are stated in the opinion.

Mr. Waitman H. Conaway for appellant in No. 718 and appellee in No. 719.

Mr. Assistant Attorney General John Q. Thompson and *Mr. J. Harwood Graves* for the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This suit was commenced to recover from the United States the sum of $200,560, subsequently reduced by an

amended petition to $165,000, and $12,000 per annum until the principal sum was paid on the ground that the United States had as the result of work done by it in relation to the Mississippi River, taken, in the constitutional sense, two certain plantations belonging to the claimant, one the Wigwam plantation situated on the east bank of the Mississippi, and the other a plantation known as the Timberlake plantation also lying on the east bank but higher up the river, that is, in Bolivar County, Mississippi, and opposite Arkansas City on the west bank. As to the first, the Wigwam plantation, there was judgment below in favor of the United States, rejecting the claim, and No. 718 is an appeal by the claimant from that judgment. As to the Timberlake plantation, there was a judgment against the United States for what was deemed to be the value of the plantation, and No. 719 is an appeal by the United States from that judgment. The court made a series of general findings stating what was considered to be the facts concerning the situation upon which the right to recover in a general sense as to both plantations was based. It then made particular findings as to the Wigwam plantation and like findings as to the Timberlake plantation. Although the general findings are in some respects amenable to the criticism that they draw erroneous conclusions of law concerning the legislation of Congress, with regard to the improvement of the Mississippi River, and the action of the officers under such legislation, as was done in the *Jackson Case*, and also treat such mistaken conclusions as findings of fact, such errors are not as apparent as they were in the *Jackson Case*. This results from the fact that the general expressions in the findings manifesting the error which we pointed out in the *Jackson Case* are as a rule in this case qualified by statements incompatible with the general expressions and which therefore serve to correct the error which otherwise would exist. Thus, in finding 1, after referring to the St.

Francis and other basins on the west bank and the outflow of water into these basins ultimately reaching the Gulf of Mexico, as described in the findings in the *Jackson Case*, and the stoppage of such outflow and consequent increase of the volume of water in the river which in the *Jackson Case* was virtually attributed exclusively to work done by the United States or under its control, the finding in this case accurately states the relation of the United States and the local authorities to the work as follows:

"The outlets and drains thus provided by nature were such as to accommodate said flood waters, and the lands of claimant were not overflowed as frequently before the outlets were closed by levee construction by the United States to improve the river navigation, and by the State and local authorities to protect and reclaim land subject to overflow in times of high water, and consequently were but little injured by said overflows."

So, again, in No. 2, although the finding refers to the adoption of the Eads plan almost in the same all-embracing words used in the *Jackson Case*, it yet states in explicit terms that the acts of Congress but authorized an improvement of navigation and empowered expenditures for that purpose and in referring to levee construction done pursuant to such Congressional action, it is declared in the finding: that the United States "for the improvement of the Mississippi River for navigation . . . and the local authorities or organizations of the States bordering along the river on both sides from Cairo to the Gulf have before and since 1883 constructed and are now constructing and maintaining certain lines of levees at various places and of various lengths for the purpose of protecting and reclaiming lands within their respective districts from overflow in times of high water." Again, in the concluding part of the fourth finding a statement in accord with that made in the *Jackson Case* is found concerning the coöperation of the United States and local authorities in

levee building which is qualified, however, by subsequent statements which with reasonable accuracy displays the real situation, that is, the unifying of the energies of the United States and the local authorities to a common end, levee construction, although the purpose on the one hand was the improvement of navigation and on the other the protection of land from overflow. And this also is further illustrated by finding 3 which points out the scope and character of the authority delegated by Congress to build levees, that is, the improvement of the navigation of the river.

The special findings relating to the Wigwam plantation but established that that plantation was situated in one of the minor basins below Vicksburg like those between Natchez and Baton Rouge which were described in the *Jackson Case.* Indeed, the court, in express terms found there was identity between that case and this, and placed its conclusion against the right to recover upon its ruling in the *Jackson Case;* and in so doing, in view of our affirmance of the judgment in the *Jackson Case,* it follows that in our opinion no error was committed.

As to the Timberlake plantation, special findings were made, and omitting those which relate to the title of the claimant and to the loss suffered by the overflow of the property in the years following the special action by the Government, which it was considered gave rise to the right to relief, the findings are as follows:

"IX.

"TIMBERLAKE PLANTATION.

"Prior to the construction of the Huntington Short Line levee by the United States the waters of the Mississippi River did not overflow and submerge the Timberlake plantation hereinafter described at such frequent intervals and for such duration as to disturb the claimant in the profitable use, enjoyment, and possession thereof or so as to materially affect its cultivation, productive

capacity, or market value. It was then suitable for the purpose of raising thereon, and there was profitably raised thereon, crops of cotton, cotton seed, corn, hay, and other products. Since the completion of said Huntington Short Line levee by the United States, placing the plantation of claimant between the old and new levee, in the restricted and narrower high-water channel of the river, the rises in the water of said river, by reason of the water being thus confined and restricted in its flow, have been, and are now, occurring at such frequent intervals and for such duration as to prevent the claimant from raising any kind of a crop thereon; the buildings have become untenantable and uninhabitable; the fencing washed away; the land covered with superinduced additions of water, earth, sand, and gravel to a depth of from 3 to 12 feet; said land has since grown up in willows, cottonwood, underbrush, and weeds so as to render it valueless to her; to destroy its market value; and to compel its abandonment.

"X.

"Prior to 1898 said lands (Timberlake plantation) were comparatively high and secure from overflow by the flood waters of the Mississippi River, except at long intervals, and the occurrence of such overflows did not materially affect their productive capacity or market value. Said lands were highly improved, well stocked with tenants and laborers, yielded large crops of cotton, cotton seed, corn, hay, and other products, were located adjacent to what was formerly the town of Huntington, located between the Huntington Short Line levee and the river, since washed away by the flood waters of the Mississippi River, and deserted as a place of residence by the inhabitants some years after the building of the Huntington Short Line levee—1898–1900—was very valuable as plantation property, and was worth the sum of ninety thousand dollars ($90,000).

"The claimant, Mary E. Hughes, obtained $12,000 from

the Board of Mississippi Levee Commissioners, by judgment, for damages to the drainage of the Timberlake plantation into Black Bayou when it was thrown out by the construction of the Huntington Short Line levee in 1898–1900. This plantation is located in the vicinity of and opposite the Arkansas City gauge and was protected from overflow up until the time of the construction of the Huntington Short Line levee.

"XI.

"Prior to the year 1898 said Timberlake plantation was protected from overflow by the flood waters of the Mississippi River by a continuous levee line located in front of said lands along, by, and close to the river bank for its entire frontage, built by State and local authorities, and said plantations still remained valuable for plantation purposes, and up to that time had not been seriously injured in its use and enjoyment by the flood waters of said river.

"About the year 1898 the United States surveyed and thereafter began to construct what was known as and now called the Huntington Short Line levee, a new levee, about 15 feet high, located some distance back from the old levee, behind the land of claimant, thus placing and permanently locating said Timberlake plantation between the Huntington Short Line levee and the old levee in the narrower high-water channel and bed of the river, placing an additional burden and servitude thereon and subjecting said property to more frequent and destructive overflows and the force and scouring power of the high-water current of said river. After the completion of the Huntington Short Line levee a high water came in the river during the year 1903 and because of a break in said old levee the water of said river began to flow onto and over the plantation of claimant, then located between the old levee and the Huntington Short Line levee, and remained standing on and over said land to a great depth after the

high waters receded, and because of the great pressure of the water thus confined, standing against said Huntington Short Line levee, threatening its destruction by breaking through, the United States then caused the old levee to be blown up by dynamite in many places, so as to relieve the pressure of the water standing against the Huntington Short Line levee, and to save it, thus causing the water to rush over and across said land, injuring it for agricultural as well as all other purposes, greatly reducing its value.

"XIV.

"Upon the foregoing facts the court finds as an ultimate fact, so far as it is a question of fact, that the effect of placing and permanently locating the Timberlake plantation of claimant between the Huntington Short Line levee and the old levee, and the river bank, was and is an act on the part of the United States intending to place, and which finally resulted in placing, the lands of claimant in the narrower high-water channel of the Mississippi River, subjecting it to more frequent and destructive overflows, and the forceful and destructive action of the current, placing an additional burden and servitude thereon, which had finally resulted, since the years 1907, 1908 and 1909, in such serious and continuous interruption to the common and necessary use and enjoyment of said property, as to amount to a taking thereof by the United States under the fifth amendment to the Constitution."

It will be observed that finding 9, although special to the Timberlake plantation contains statements concerning the general raising of the flood level in the river as the result of levee work done by the United States and the state and local authorities followed by a description of the injury by overflow to the Timberlake plantation which would give rise to the inference that the judgment which was rendered against the United States as to that plantation was based upon a consideration of that subject. If

that view were taken the case would be controlled by our decision just rendered in the *Jackson Case,* but we cannot adopt that view of the court's action, as the court in the *Jackson Case* decided that like facts did not justify recovery against the United States and reiterated in this case its conclusion in that respect by rejecting the claim as to the Wigwam plantation. Under this view we assume that finding 9 was a mere inadvertence, or at all events if not so may be now put out of view. This leaves only for consideration the special facts concerning the Timberlake plantation.

The plantation bordered on the river and was protected by a levee. Whether that levee was built by the private efforts of the owner of the land or by state or local authority does not appear. The officers of the United States deeming it advisable in aid of the improvement of navigation to construct a new levee, did not locate it along the river in front of the plantation, but joining the existing line of levee somewhere above the projecting point on which Timberlake plantation was situated, built a direct line of levees which passed across the point several miles back of the Timberlake plantation and joined the line of levees on the river bank below the plantation. This levee, known as the Huntington Short Line, is thus described in the report of the Mississippi River Commission for 1898, at p. 3390:

"*Huntington Short Line.*—This is a new levee under construction from Mound Landing to a point about 1½ miles below Offutts Landing. The new levee here is 4.4 miles in length, and will shorten the levee line 7 miles over its present length."

The findings exclude the conception that this new and more direct levee was built upon land belonging to the owner of the Timberlake plantation. They show that the location and construction of this new line of levee was approved by the local levee authorities, since they estab-

lish that those authorities paid to the owner of the Timberlake plantation a sum of money for the incidental damage occasioned to that plantation by the fact that the levee in passing in the rear of the plantation obstructed drains or means of drainage by which the surface water of the plantation was carried off to the rear. The report of the Mississippi River Commission for 1900, p. 4849, shows that before this payment was made by the local authorities there was a suit brought by owners of the plantation and that that suit culminated in a recognition by the local courts of the right to build the levee on payment of the sum stated, which was but a part of a much larger claim made which was disallowed. The facts just stated serve to demonstrate the error which was committed in deciding that the exertion of national power to build levees for improving navigation had effaced the exercise of state power to construct levees for protection from overflow, since they manifest the harmonious coöperation of the two powers, the United States bearing the burden of building a great levee in the interest of navigation and the local authorities, in view of the protection from overflow which necessarily resulted from the construction of the levee for navigation purposes, contributing the amount essential to pay an award of a local character.

Upon all these facts we are unable to perceive any ground for distinguishing the claim as to the Timberlake from that as to the Wigwam plantation or from the claims which were held to be without merit in the *Jackson Case*. We say this because the claims in the *Jackson Case* as well as the claim in this case made as to the Wigwam plantation in their last analysis but involve the assertion of a right of recovery against the United States for failing to build a levee in front of the plantations in question for the purpose of affording them protection from the increased stage of high-water which it was asserted had been created by the act of the United States in building levees elsewhere along

the river. This being so, as it is not pretended that the building of the new line of levee here considered trespassed upon the property rights of the owners of the Timberlake plantation by an actual taking of land, the asserted claim but comes to this, that the owner of the Timberlake plantation abutting on the river is entitled to hold the United States responsible because in improving the navigation of the river the officers of the United States, in selecting the place where a levee should be built did not select the front of the plantation, that is, did not construct the levee along the river bank of the plantation. Thus accurately fixing the contention, it is patent that we cannot affirm the judgment of the court below against the United States as to the Timberlake plantation without reversing its judgment in favor of the United States as to the Wigwam plantation and without disregarding the decision which we have just announced in the *Jackson Case.* In saying this we are not unmindful of expressions in the findings, and which indeed the court below declared in express terms was the basis of its legal conclusion in respect to the liability of the United States, to the effect that the building of the new levee operated to change the situation of the claimant's property by putting it in the bed of the river. But the substance of things may not be changed by mere figures of speech. The plantation was situated on the bank of the river. It was protected from overflow by the levee on that bank. Whether that levee was private or public, as we have said, does not appear, but nothing in the fact that a new levee was built far in the rear of the plantation changed the physical situation, or had the magical effect of transporting the property from one place to another. Where it was before the location of the new levee, it remained after the new levee was completed. True it is that if from caving banks or other natural causes it became impossible to protect the property by means of a levee along its front, that fact was in

no way caused by the building of the new levee, and if high water and disastrous overflow subsequently came from the inherent weakness of the existing levee along the front on the river bank, the consequent loss may not be attributed to the fact that a new and stronger levee was constructed along shorter and safer lines. There is no pretense of any intention to injure the claimant by the building of the new levee; and on the contrary, light is reflexly thrown upon the conditions which led to the exercise of judgment on the part of the officers of the United States in building the new levee on the much shorter and more direct line by the report of the Commission for 1899, at p. 3555, where the caving condition of the bank of the river in and about the place where the plantation was situated, is stated.

As to the statement in one of the findings concerning the act of an officer of the United States after the old levee had given way in using dynamite to enlarge the opening, we find it difficult to understand the finding. Of course it can be easily appreciated that when a break occurred in the old levee along the bank, that impelled by the great force of the current of the river and the volume of its water, there rushed through the opening or crevasse with great momentum, a body of water which might before its force was spent strike the new levee, although it was far in the rear, and endanger its safety, a danger which is aptly portrayed as to a relatively similar situation elsewhere in the report of the chief of engineers for 1903 at p. 260. But the finding does not seem to refer to such a danger nor to assume that the dynamite was used to guard against it, that is, to expand the opening in the old levee to such a degree that although increasing the quantity of the flow of water it would diminish its momentum and thus prevent the danger of striking against the new levee and sweeping it away. We say this since taking the finding literally it gives rise to the conviction that the old levee

was dynamited after the river had subsided for the purpose of allowing the water to flow off, which had accumulated in the basin created by the remaining line of old levee along the river front and the line of the new levee. We do not stop, however, to further consider the subject, since whatever view be taken of the finding, the fact as to the use of dynamite would not in law amount to a taking by the United States, because in any event the mere act, to meet an emergency, of the officer, conceding, under the circumstances stated, that it was a wrongful act, cannot be held to be the act of the United States, and therefore affords no ground in any event for holding that the United States had taken the property for public use.

It follows from what we have said that the judgment below in favor of the United States in No. 718 must be affirmed, and the judgment against the United States in No. 719 must be and it is reversed. And it is so ordered.

EX PARTE AMERICAN STEEL BARREL CO. AND SEAMAN.

PETITION FOR WRIT OF MANDAMUS AND RULE.

No. 14, Original. Argued April 21, 1913.—Decided June 16, 1913.

The proceeding to retire for personal bias or prejudice a trial judge of a United States court from further hearing a case of which he has jurisdiction had its origin in the new Judicial Code, § 21, and is only applicable in rare instances in which not merely adverse, but biased and prejudiced, rulings are shown and facts and reasons given.

Section 21 of the Judicial Code is not intended as a means for a discontented litigant ousting a judge because of adverse rulings, or as a method of paralyzing the action of a judge who has heard the case by disqualifying him between the hearing and the determination of the matter heard.

Quære and not decided whether under § 21, Judicial Code, any affidavit of bias and prejudice is sufficient or whether the judge can pass upon its sufficiency.

The authority of a judge, whose attempted designation under §§ 14 and 21 of the New Judicial Code is beyond the judicial power of the senior circuit judge, may be excepted to; and any order or decree made by him while acting under such designation may be reviewed in due course of law.

The writ of mandamus will be granted by this court only when it is clear and indisputable that there is no other legal remedy.

Where a senior circuit judge in designating under § 14 of the Judicial Code a judge to act in place of one retired under § 21 of the Judicial Code acts in the exercise of his legitimate jurisdiction, this court cannot correct a mistake, if he makes one, by the writ of mandamus.

THE facts, which involve the construction of § 21 of the Judicial Code of 1911 and the jurisdiction of this court to issue writs of mandamus, are stated in the opinion.

Mr. John C. Spooner, with whom *Mr. Aldis B. Browne*, *Mr. Louis O. Van Doren* and *Mr. G. Murray Hulbert* were on the brief, for petitioner.

Mr. John A. Garver, with whom *Mr. Edwin T. Rice* and *Mr. Charles A. Riegelman* were on the brief, for respondents.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a proceeding for a rule on the Hon. Thos. I. Chatfield, District Judge of the United States for the Eastern District of New York, the Hon. Julius Mayer, District Judge for the Southern District of New York, and the Hon. E. Henry Lacombe, Senior Circuit Judge for the Second Judicial Circuit of the United States, to show cause why a writ of mandamus shall not be issued commanding the Hon. Thos. I. Chatfield to resume jurisdiction and

proceed to hear and determine all matters which may arise or have arisen in a certain proceeding pending in the said District Court for the Eastern District of New York wherein the Iron Clad Manufacturing Company has been adjudicated a bankrupt; and directing the vacation of an order made in said case by the Hon. E. Henry Lacombe, as Senior Circuit Judge, on April 2, 1912, designating and appointing the said Judge Mayer, District Judge to hear and exercise in the Eastern District of New York, the same powers that are now vested in the District Judges of said District, or either of them, "*and quashing and setting aside all proceedings in said matter of Iron Clad Manufacturing Co., Bankrupt,* had before said Hon. Julius M. Mayer . . . subsequent to the said order of Judge Lacombe . . . , and especially commanding the said Judge Chatfield to exercise the jurisdiction thereof which he had and was exercising on and prior to the 29th of March, 1912."

A rule to show cause issued, and a return has been made.

The question now is whether a writ of mandamus shall issue.

Shortly stated, the facts necessary to be understood are these:

1. Creditors of the Iron Clad Manufacturing Company, filed on May 23, 1911, a petition in the District Court of the United States for the Eastern District of New York, praying its adjudication as a bankrupt. The proceeding was long contested, but on December 2, 1911, the company was adjudged a bankrupt by Judge Chatfield.

2. In the meantime, controversies had arisen as to what constituted the assets of that company. On June 20, 1911, certain of the creditors filed a petition in the case, charging that the corporate capital, property and assets of another corporation, the American Steel Barrel Company, belonged to the Iron Clad Manufacturing Co., and had been controlled and managed in the interest of the

latter, and praying that the receivership under the proceeding against the Iron Clad Manufacturing Company should be extended to the American Steel Barrel Company.

3. This was bitterly resisted and the independent ownership of the Steel Barrel Company asserted. Elizabeth C. Seaman was the president and manager of both companies, and the nominal owner of all of the shares in each, save a few qualifying shares in the hands of directors. Mrs. Seaman seems to have been not only active in resisting the proceedings against the Iron Clad Company, but also in resisting every claim to the property of the Steel Barrel Company made by the creditors of the Iron Clad Company.

4. The hearing of this application was postponed from time to time and there was disagreement as to whether it should be heard upon affidavits before Judge Chatfield or referred to a commissioner to take proof and report. Finally, on March 15, 1912, Judge Chatfield filed an opinion refusing to extend the receivership to the property of the American Steel Barrel Company, or to take summary possession of its assets, as he had been asked to do. The ground upon which he acted, as shown by his opinion (194 Fed. Rep. 906), was, that the claim to the assets of the Steel Barrel Company was one which should be asserted in a plenary suit. An order in accordance with this opinion was not entered because counsel for the creditors asked for time to make a new application, and such application was made on March 29, 1912, followed, however, on the same day, by the filing of an affidavit under § 21 of the Judicial Code, to prevent further hearing of the case by Judge Chatfield. That affidavit, in substance, alleged that throughout the proceedings in the case, Judge Chatfield had manifested "a strong bias and prejudice against the petitioning creditors and against their counsel, and has shown a strong bias toward Mrs. Elizabeth C. Seaman,

who was and is the sole person interested in the subject-matter of the bankrupt corporation's property other than the creditors."

The motion to rehear the application to extend the receivership was made when District Judge Veeder was holding the bankrupt court and was by him at once referred to Judge Chatfield. In view of the filing of the disqualifying affidavit, Judge Chatfield declined to hear the motion and application to re-open and rehear the motion which had been decided by the opinion handed down on March 15th, and made a certificate in these words:

"UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

IN THE MATTER OF IRON CLAD MANFACTURING COMPANY, BANKRUPT.	March 29, 1912.

IN THE MATTER OF A MOTION TO REOPEN THE APPLICATION TO EXTEND RECEIVERSHIP, FOR A DIRECTION THAT THE PETITIONERS BE AFFORDED AN OPPORTUNITY TO TAKE TESTIMONY, ETC., AND FOR POSTPONEMENT OF THE ENTRY OF ANY ORDER OR DECREE UPON THE APPLICATION DECIDED MARCH 15, 1912, AND FOR OTHER RELIEF.

Before VEEDER, *J.*

Appearances: Whitridge, Butler & Rice, for petitioning creditors, in support of motion, James A. Allen, specially for Elizabeth C. Seaman and the American Steel Barrel

Co., Emanuel Hertz, specially for George A. Wheelock, in opposition.

Motion respectfully referred to Judge Chatfield.

VAN VECHTEN VEEDER,
U. S. J.

The within application having been referred upon the return day to me Judge Veeder, who called the motion calendar, and the motion papers having been presented by the Clerk, in the presence of James A. Allen, appearing specially, and desiring to be heard in opposition, as attorney for certain parties, Emanuel Hertz, appearing specially for George A. Wheelock, and also desiring to be heard in opposition, and Erskine B. Essig, representing certain creditors, but not taking part in said motion, and no one appearing before me on behalf of the petitioners, but a certain affidavit by Thatcher M. Brown having been brought to the attention of the Court, which affidavit was filed after the motion was referred to me by Judge Veeder and before any of the parties appeared before me, in which the said Thatcher M. Brown, as a party to the proceeding, makes an affidavit that I have a personal bias either against the creditors or in favor of the opposite party to the proceeding, and asking that another judge be designated in the matter prescribed in Section 20, to hear this motion,

I do hereby, in accordance with the provisions of Section 21 of the law known as the Judicial Code, and now in effect, proceed no further in this motion, and order that an authenticated copy of this statement be forthwith certified to the Hon. E. Henry Lacombe, Senior Circuit Judge now present in this Circuit, in order that proceedings may be had under Section 14 of said Act, it being apparent that this motion cannot proceed under section 23, which is prescribed as an alternative method in said Section 21 of said law.

The Court further certifies that it does not make an en-

try upon the records of the Court (nor does it admit) that it has any personal bias or prejudice, but on the contrary might call in question many of the statements or controvert many of the allegations contained in said papers. And this Court feels that if any disqualification exists it was also present when this Court directed a verdict of adjudication and made other decisions in favor of said creditors, and when the Judge now holding the Court upheld the findings of the Special Commissioner as to charges of contempt against Mrs. Seaman.

The Court however feels that the intent of Section 21 is to cause a transfer of the case, without reference to the merits of the charge of bias, and therefore does so immediately, in order that the application of the creditors may be considered as speedily as possible by such Judge as may be designated.

THOMAS I. CHATFIELD,
U. S. D. J."

Thereupon, Circuit Judge Lacombe made the order which it is now sought to have set aside, in these words:

"UNITED STATES DISTRICT COURT,

IN THE MATTER

OF

IRON CLAD MANUFACTURING COMPANY,
BANKRUPT.

Upon the affidavit of Thatcher M. Brown, the certificate of Charles A. Riegelman, Edwin T. Rice and John

M. Garver, Counsel for petitioning creditors and certificate of the Senior District Judge of this District, all filed in this Court on March 29, 1912, and which have been examined by me;

I, E. Henry Lacombe, Senior Circuit Judge of the Second Circuit, under the authority conferred by Section Twenty-one of the Judicial Code of the United States, do hereby designate and appoint the Honorable Julius M. Mayer, District Judge of the Southern District of New York, to have and exercise, in the above entitled proceeding within the Eastern District of New York, the same powers that are now vested in the District Judges of said Eastern District or either of them.

April 2, 1912.

E. Henry Lacombe,
Senior Circuit Judge,
Second Circuit.

Counsel for the respective parties may communicate with Judge Mayer, who will inform them at what time or times it may be convenient for him to hold Court in the Eastern District.

E. Henry Lacombe,
Senior Circuit Judge."

Thereupon Judge Mayer assumed jurisdiction and has since made many interlocutory orders and rulings in the case, to all of which the opposite parties in the proceeding objected and excepted upon the ground that his designation was null and void. Nevertheless, Judge Mayer continued to exercise jurisdiction from the time of his designation in April, 1912, down to the filing of this petition in February, 1913.

The fundamental proposition maintained by the petitioners is that all of the proceedings before Judge Mayer are null and void for lack of jurisdiction and that Judge Chatfield still retains jurisdiction, and that all of the interlocutory orders made by Judge Mayer should be vacated

and Judge Chatfield commanded to proceed with the hearing of the matters pending before him when he refused to proceed further with the case upon the filing of the affidavit objecting to his further exercise of jurisdiction.

The proceeding to retire a trial judge of a United States court from further hearing a case of which he has jurisdiction, had its origin in the new Judicial Code, effective January 1, 1912, and constitutes § 21 of that Code. It is as follows:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

The basis of the disqualification is that "personal bias or prejudice" exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts

which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term.

The case of *In re Iron Clad Manufacturing Company* had been pending since May, 1911. This affidavit was not filed until March 29, 1912, less than ten days before the April term of the court. In the meantime that company had been adjudged a bankrupt against much opposition, and as the result of a jury trial, and Judge Chatfield had made many interlocutory orders in reference to the bankrupt estate. The principal matter which was then pending before him was the petition of certain creditors of the Iron Clad Manufacturing Company to have the receivership for the property of that company extended so as to include the corporate property of the Steel Barrel Company. This was very earnestly contested. On March 15, 1912, Judge Chatfield handed down the opinion reported in 194 Fed. Rep. 906, denying the application upon the ground that the matter was one which should be asserted by a plenary suit. The order denying that application did not go down, because of the interposition of the motion for a rehearing or to file a new application, on March 29, 1912, while Judge Veeder, another of the judges of the Eastern District, was presiding, which was immediately referred by Judge Veeder to Judge Chatfield. Thereupon and before the latter could act upon it, and on the same

day, the disqualifying affidavit was filed. The action of Judge Chatfield is fully shown by the order and certificate set out heretofore.

We shall not pass upon the timeliness of the affidavit, nor upon the legal sufficiency of the facts therein stated, as affording ground for the averment that "personal bias or prejudice" existed. If Judge Chatfield had ruled that the affidavit had not been filed in time, or that it did not otherwise conform to the requirement of the statute, and had proceeded with the case, his action might have been excepted to and assigned as error when the case finally came under the reviewing power of an appellate tribunal. *Henry* v. *Speer*, 201 Fed. Rep. 869; *Ex parte Fairbank Co.*, 194 Fed. Rep. 978; *Ex parte Glasgow*, 195 Fed. Rep. 780, affirmed by this court in *Glasgow* v. *Moyer*, 225 U. S. 420. But this is not what happened. Judge Chatfield held that the affidavit was sufficient in law to make it his duty to proceed no further. Acting upon that determination he certified his withdrawal and the affidavit to the Senior Circuit Judge that he might, in the exercise of his jurisdiction under § 14 of the new Judicial Code, designate another Judge to proceed with the hearing of the case. It is obvious that if the designation of Judge Mayer under these conditions was wholly beyond the judicial power of the Senior Circuit Judge, his authority to make any order or decree acting thereunder might have been excepted to and thus made the subject of review in due course of law.

The writ of mandamus will be granted by this court only when it is clear and indisputable that there is no other legal remedy. *Ex parte Newman*, 14 Wall. 152, 165; *Bayard* v. *United States*, 127 U. S. 246; *In re Morrison*, 147 U. S. 14.

Judge Lacombe was clearly called upon to determine in the exercise of his jurisdiction as the Senior Circuit Judge, whether the situation was one in which he should designate a Judge in the room and place of Judge Chatfield. He determined the matter adversely to the petitioners. If

in this he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under § 14 of the new Judicial Code, and we cannot compel him through a writ of mandamus to undo what has thus been done. *Ex parte Burtis*, 103 U. S. 238; *In re Parsons*, 150 U. S. 150.

Aside from what has been said the long delay in asking the extraordinary remedy of mandamus would fully justify this court in the exercise of a sound discretion in denying relief.

The rule must be discharged.

ARIZONA COPPER COMPANY, LIMITED, *v.* GILLESPIE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 106. Argued January 27, 28, 1913.—Decided June 16, 1913.

In Arizona, by statute, all rivers, streams, and running waters are declared public, and may be used for purposes of milling, mining and irrigation. The first appropriator is first in right to the extent necessary for his purposes; and neither the user for mining purposes nor the user for agricultural purposes is placed upon a higher plane than the other.

Where users of waters are placed, as in Arizona, upon the same plane, the rights of lesser users are not subordinated to those of greater users; nor is a wrong done by one to the other condoned because of the magnitude or importance either of the public or the private interests of the former.

Where one of several users of waters is wrongfully injuring the others there is a remedy either at law or in equity; the latter depending upon circumstances including the comparative injury of granting or refusing an injunction.

Where, as in this case, the record does not show the damage which the injunction might cause the defendant, but does show that the interests of complainant and others of his class might be irreparably injured by a continuance of the nuisance, equity may grant relief.

The limitation of necessary use on the right of an appropriator of water applies to quality as well as quantity; and the right to use necessary water does not include the right to so destroy the quality of all the water not used as to continuously injure the property of the other appropriators.

The maxim *sic utere tuo ut alienum non lædas* applies in Arizona and elsewhere to the use of waters by one appropriator as against another.

Although the nuisance may be a public one and others may be damaged thereby, one who shows that he suffers a special grievance not borne by the public, may maintain a separate action for equitable relief.

In this case *held*, that the contamination of waters in Arizona by a copper plant constituted a nuisance as to the lower appropriators and, under the circumstances, an injunction was properly granted, the Supreme Court of the Territory having provided in the decree that the defendant might have the injunction modified on constructing remedial works to prevent contamination. *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230.

12 Arizona, 190, affirmed.

THE facts, which involve the relative rights of appropriators of water in Arizona and the jurisdiction of a court of equity to enjoin the contamination of the water by an upper appropriator using the water for mining purposes in favor of a lower appropriator using it for agricultural purposes, are stated in the opinion.

Mr. John A. Garver and *Mr. Walter Bennett* for appellant:

Even if the acts complained of constituted a public nuisance, the injury to the plaintiff did not differ in kind from that sustained by other members of the community in which the plaintiff's farm was situated; and, consequently, the plaintiff could not maintain the action. Joyce on Injunctions, § 1081; *Live Stock Co.* v. *McIlquan*, 14 Wyoming, 209; *Donahue* v. *Stockton Gas &c. Co.*, 6 Cal. App. 276, 280; *Kuehn* v. *Milwaukee*, 83 Wisconsin, 583; *Jarvis* v. *Santa Clara*, 52 California, 438.

The injury to the plaintiff did not differ in kind from

that sustained by the other members of the community; consequently, plaintiff could not maintain the action.

All streams of running water in the Territory were made public, for the purposes of irrigation and mining, including, necessarily, as one of the incidents of the latter, the use of water in the reduction of the ores. See Rev. Stat. 1901, Arizona, Par. 4168, § 1; Par. 4169, § 2; Par. 4174, § 7; Par. 4178, § 11; Par. 4179, § 12; Par. 4180, § 13; Par. 4196, § 29, which are substantially identical with Rev. Stat. of 1887, §§ 3198–9, 3203–5.

As the mining company can lawfully use the streams for the purposes of its business, such use cannot be unlawful or constitute a public nuisance, unless the company so wilfully or carelessly uses the water as to infringe upon the rights of others. Kinney on Irrigation, §§ 250, 251; 40 Cyc. 708, 713; *Hill* v. *Standard Mining Co.*, 12 Idaho, 223, 236; *Bernard* v. *Sherley*, 135 Indiana, 547, 555.

Nothing of that kind was found by the court below, and nothing of the kind is alleged in the complaint.

Even if the mining industry had not been so clearly authorized by the legislature, it is the paramount industry of the State and overwhelmingly dominates all the other industries. The public convenience will always be considered in determining whether certain acts constitute a nuisance. Pomeroy's Eq. Remedies, § 529.

Appellee has no exclusive or superior rights as prior appropriator.

The common-law doctrine of riparian rights has not obtained in Arizona since 1887; and it probably has never been recognized there. Rev. Stat. 1887, § 3198; Rev. Stat. 1901, § 4169; *Boquillas Co.* v. *Curtis*, 213 U. S. 339.

At common law, all riparian proprietors have precisely the same rights to flowing waters, and no one could so use the stream as to interfere with its reasonable use by those above and below him. 3 Kent Comm. 439; 40 Cyc. 559; *New York* v. *Pine*, 185 U. S. 93, 96.

The court below erred in holding that by the abolition of riparian rights plaintiff, as the first appropriator had acquired the exclusive right to the use of the water which could not be interfered with by the defendant. This error was both as to law and facts.

No one could acquire an exclusive right to the use of any stream for the purpose of irrigation. All that a prior appropriator is entitled to, as against others, is a sufficient quantity of water to satisfy his appropriation, while its quality cannot be impaired so as to interfere seriously with the use to which it has been appropriated. Section 22, Political Code Arizona; Kinney on Irrigation, §§ 250, 251; 40 Cyc. 708, 713.

Under the common-law doctrine of riparian rights a lower riparian owner cannot complain of the reasonable use of the stream, even if he is injured thereby. *Merrifield* v. *Worcester*, 110 Massachusetts, 216; *Hayes* v. *Waldron*, 44 N. H. 580; *Strobel* v. *Kerr Salt Co.*, 164 N. Y. 303, 320; *Pennsylvania Coal Co.* v. *Sanderson*, 113 Pa. St. 126, 146.

The principle of priority is not recognized as between an appropriator for irrigation and a subsequent appropriator for mining purposes. The legislature of Arizona in giving precedence to the mining industry merely recognized the fact that the welfare of the State is peculiarly dependent upon the development of its mineral resources.

In view of the natural conditions, it was inevitable that the legislature should have expressly provided that the principal industry of the Territory should not be hampered by claims of prior rights on the part of farmers.

The only duty owing by a mining company to other users lower down the stream using the water for irrigating purposes, is to so conduct its business as not unnecessarily to interfere with the rights of such users.

Even if defendant has operated its reduction works

carelessly, the plaintiff has an adequate remedy at law for the damages sustained.

Under the policy of the law prevailing in Arizona, appellee has no greater right to stop the operation of the appellant's works than he would have to enjoin the construction of a railroad, where the railroad company possessed the power of eminent domain. *Story* v. *N. Y. El. R. Co.*, 90 N. Y. 171, 179; *Am. Bank Note Co.* v. *N. Y. El. R. Co.*, 129 N. Y. 252, 270; *New York* v. *Pine*, 185 U. S. 93, 104.

There is no ground for claiming that the damages sustained cannot be estimated. The mere fact that it might be difficult to assess the exact damages is no reason for granting an injunction. *Wakeman* v. *Wheeler & Wilson Co.*, 101 N. Y. 205, 209.

There should be no absolute injunction because it is unreasonable to close the works completely when efforts are being honestly made to lessen the evil, and because, under the decision below, no showing is possible that the appellant can exclude all waste material from reaching the water.

In a suit in equity, the conditions existing at the time of the trial control. *Haffey* v. *Lynch*, 143 N. Y. 241, 248; *Dieterich* v. *Fargo*, 194 N. Y. 359, 363; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 342.

There is a distinction between the case of a suit brought by a State and one brought by an individual, and the disposition of this court is to grant equitable relief in the former case but, in the latter, to leave the owner to his action at law. See *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 238.

A permanent injunction will not be granted unless the evidence clearly establishes the invasion of the plaintiff's rights by the defendant, with a resulting substantial injury, and there is no finding that any appreciable injury to the plaintiff's land was caused by the defendant alone.

The injunction should be denied, because it would not materially improve the plaintiff's condition. *Wood* v. *Sutcliffe*, 3 Simons (N. R.), 163.

An injunction will not be granted where the injuries to the plaintiff are slight and where the consequences of the injunction to the defendant and others may be very injurious. 1 Spelling on Injunctions, § 417; *Powell* v. *B. & G. Furniture Co.*, 34 W. Va. 804; *Clifton Iron Co.* v. *Dye*, 87 Alabama, 468; *Madison* v. *Ducktown &c. R. Co.*, 113 Tennessee, 331; *McClure* v. *Leaycraft*, 183 N. Y. 36, 44.

Equity regards relative values. While an emission of smoke might constitute a nuisance in the City of New York, it might afford no just ground of complaint in other places such as Pittsburgh. *Bates* v. *Holbrook*, 171 N. Y. 460, 475.

In the contemplation of personal rights, equity will not lose sight of the public interest. A court of equity is never active in granting relief against public convenience merely for the purpose of protecting a technical legal right. *Smith* v. *Clay*, 3 Brown's Ch. 639, note; *Knoth* v. *Manhattan Ry. Co.*, 187 N. Y. 243; *New York City* v. *Pine*, 185 U. S. 93, 99.

If the judgment in this case is sustained, a precedent will be established that will inevitably affect the entire mining industry of Arizona. To permit the plaintiff to refuse to accept a sum representing the damages actually sustained or likely to be sustained by him, and insist upon an unconditional injunction which will result in obstructing and possibly terminating a great industry, would be to furnish him with a club to compel payment of the sum he deems the measure of his damages. *New York City* v. *Pine*, 185 U. S. 93, 97.

Mr. Ernest W. Lewis, with whom *Mr. Thos. Armstrong, Jr.*, was on the brief, for appellee.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a bill for an injunction to restrain the appellant from polluting a public stream, whereby the appellee has sustained a special injury as a lower proprietor.

The Arizona Copper Company, Limited, is engaged in mining and reducing copper ore near the town of Clifton, Arizona. Its concentration and reduction works, in which ores are treated, are situated upon or adjacent to small streams tributary to the Gila River. Much of the tailings and waste material from the reduction work is carried by the water used in the reducing process into the streams adjacent, or is deposited nearby and is later carried by the rains into the streams, and thence into the Gila River. The appellee, William Allen Gillespie, is the owner of 276 acres of arid land on the Gila River and some 25 miles below the point where the water polluted above finds its way into the river. He has reclaimed this land and brought it into a high state of cultivation, through irrigation, by means of water drawn from the river into the Montezuma Canal, and thence, by ditches, spread upon his cultivated land. In the dry seasons, particularly, this water so used for irrigating purposes deposits upon his land the tailings and waste material so suffered to get into the tributaries of the Gila River from the reduction works of the appellant above.

Gillespie and those preceding him in title began the irrigation and cultivation of this tract of land in or about 1872, and have continuously appropriated a sufficiency of water necessary for irrigating purposes from the river. A large body of like land situated in the same valley has been irrigated in the same way by waters drawn from the Gila River by the Montezuma and other like canals constructed and maintained for irrigating purposes, and a large agricultural community has grown up dependent upon irrigation.

In the mountains through which the streams tributary to the Gila River pass are great deposits of rock containing copper ore, and since 1872 many mines have been operated. Later the ore was treated in reduction and concentration works which have increased in extent of operations from time to time, until at the time this suit was begun the capital engaged aggregated several millions of dollars and 3,000 men were employed in and about the mining and reduction operations. Prior to 1885 the operations carried on by the mining companies do not appear to have polluted the tributaries of the Gila to any serious extent. Later the operations were enlarged and methods adopted which began to more and more seriously pollute the water used for irrigating purposes by the proprietors below. Thus both courts below found,—"That in or about 1885 the first concentrator was erected for the reduction of ore in connection with the mining enterprise herein mentioned; . . . that some six or eight years before the institution of this action, the water of the Gila River, at other than flood periods, theretofore clear, became discolored by slimes, slickens and tailings and began to deposit such slimes, slickens and tailings through the irrigating ditches herein mentioned in the normal and necessary course of irrigation upon the lands of plaintiff and other lands herein mentioned." The court below further found that the quantity of such waste material carried by the river and deposited upon the lands of the appellee "continuously increased until after the institution of this suit." The harmful and damaging character of these deposits was found in most explicit terms by the court below, and the character of the injury elaborately explained. The appellee's bill alleged that the injury to his crops and to his land was continuous and that his remedy at law was inadequate, and his prayer was that the appellant be perpetually enjoined from polluting the streams to his injury.

Originally there were two other corporate defendants and like relief was sought against them. One was found to be improperly a party and the bill was dismissed as to it. The other defendant was the Shannon Copper Company. As to that company the court below found:

"That after the commencement of this action and before the hearing of this cause the Shannon Copper Company, in consideration of the dismissal of this action as to it, agreed to spare no reasonable effort or expense to minimize the amount of said tailings and waste material from its said works which may find their way into said river, and if possible to do so by any reasonable effort and expense, that it would prevent the flow of any of said tailings and waste material from its said works from flowing into said river, and that said efforts should be made at once, and continued without interruption until the object thereof should be accomplished."

The District Court made a full finding of facts and enjoined the appellant from "in any manner depositing or suffering or permitting to be deposited, or suffering or permitting to flow into the waters of the said Gila River, or into the San Francisco River or said Chase Creek in such manner that they may be carried into the waters of said Gila River, any slimes, slickens or tailings."

This judgment was to go into effect January 1, 1908. But when the record was filed, upon appeal, in the Supreme Court of the Territory, that court, upon a bond being executed, suspended its operation until the case should be determined by it. Upon a final hearing that court confirmed the findings of fact by the court below, but modified its judgment by permitting the appellant, at its own expense, "to construct settling basins at or near the heads of the canals, or elsewhere along the river, by means of which the tailings and slimes carried by the Gila River from appellant's concentrators may be arrested and prevented from being deposited upon the farming lands."

"This suggestion," said the court in its opinion made part of the judgment, "does not appear to have been presented to the trial court, and its decree is so drawn that such means of relief may not be availed of since appellant is enjoined from permitting any tailings or slimes to reach the waters of Gila River. We think, to enable the mining company to take advantage of any efforts it may make in this direction, it should be left to the discretion of the trial court hereafter upon a proper showing made to it temporarily to modify the injunction so as to permit of reasonable experiments being made to ascertain the probability of successfully erecting and maintaining settling basins to effectually dispose of the tailings and slimes without detriment to the lands lying under the canals, and with authority in the District Court likewise permanently to enforce or modify the injunction in accordance with the conditions as they shall be found to be." Thus modified, the judgment was affirmed. Later, it being made to appear that the appellant had designed and put into operation large settling basins and otherwise attempted to arrest, settle and dispose of the slimes, slickens and tailings from its works, and had succeeded in arresting much of the waste material, and was in good faith operating and maintaining such works, the court suspended the operation of the judgment pending an appeal to this court.

In Arizona, by statute, all rivers, streams and running waters are declared public, and may be used for purposes of milling, mining and irrigation. The first appropriator is first in right to the extent necessary for his purposes.

Whatever advantage there may be in a first appropriation of water is with the appellee. There is no question about the quantity of water appropriated by the upper user, the objection being that the quality of the water which comes down to the lower proprietor after it is used by the Copper Company is no longer fit for irrigating purposes. Whatever the relative importance of the great

mining and reduction works, using the water on the upper reaches of the Gila River and its tributary streams and of the agriculturists using the same water below, from either a public or private point of view, the right of the lesser interest is not thereby subordinated to the greater. That is sometimes a consideration when a plaintiff seeks relief by injunction rather than by an action at law for damages. The wrong and injury, whether it results from pollution of a stream or otherwise, is not condoned because of the importance of the operations conducted by the defendant to either the public or the wrongdoer, and for that wrong, there must be a remedy. Whether upon a bill such as this a court of equity will restrain the acts of the party complained of, or leave the plaintiff to his action at law for damages, must depend upon the nature of the injury alleged, whether it be irremediable in its nature, or whether an action at law will afford an adequate remedy, and upon a variety of circumstances, including the comparative injury by granting or refusing the injunction. *Atchison* v. *Peterson*, 20 Wall. 507.

The court below found that but one of three concentrators operated by the appellant would be affected by an injunction, and that the extent of the hardship from closing that concentrator had not been shown. On the other hand, the court found that the agricultural interests of a large and prosperous community would suffer great injury and possible ruin, if the pollution should go on.

The Arizona statute places a water user for mining purposes upon no higher plane than a user for irrigation. The suggestion that the right to use for mining and reduction purposes cannot be exercised without polluting the streams with waste material, tailings, etc., and that the lower user cannot, therefore, complain of the necessary consequences of the legal right conferred by statute, is without force. The only subordination of one water user to another is the right of the first appropriator to a suffi-

ciency of water for his necessary uses. That includes the quality as well as the quantity. What deterioration in the quality of the water will constitute an invasion of the rights of the lower appropriator will depend upon the facts and circumstances of each case, with reference to the use to which the water is applied. *Atchison* v. *Peterson, supra.* In giving a right to use the waters of the public streams for mining purposes, the statute does not provide that such a user may send his waste material or debris down the stream to the destruction or substantial injury of the riparian rights of users of water below, and no such invasion of private property rights should be inferred or implied from the right to use water for mining purposes. *Woodruff* v. *North Bloomfield Mining Co.*, 18 Fed. Rep. 753. The maxim *sic utere tuo ut alienum non lædas* is as fully recognized in the jurisprudence of Arizona as it is elsewhere, and that was the maxim which governed the decision of this case in the courts of Arizona.

That the contamination of the waters of the Gila River constituted a public nuisance which affected a large community of riparian owners and users of the waters for purposes of irrigation, may be true. That as a public nuisance a public prosecution for its abatement might have been maintained, may be also conceded for the purposes of this case. But it is equally true that the appellee had and would continue to suffer a special injury not borne by the public.

Here the appellee alleged a special grievance to himself affecting the enjoyment and value of his property rights as a riparian owner and as an individual user of the water for purposes of irrigation. This gives him a clear right to apply for preventive relief. *City of Georgetown* v. *Alexandria Canal Co.*, 12 Peters, 91, 98; *Mississippi & M. R. Co.* v. *Ward*, 2 Black, 485.

The modification of the decree of the trial court so as to enable the appellant to complete the construction of the

remedial works specified and heretofore mentioned, met every reasonable equity which was asserted by it. It is in substantial accord with the decree of this court in a somewhat similar case. *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230. We find no error in the decree of the court below and it is accordingly

Affirmed.

CITY OF OWENSBORO *v.* CUMBERLAND TELEPHONE & TELEGRAPH CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 244. Argued April 22, 1913.—Decided June 16, 1913.

Rights conferred by a municipal ordinance on a corporation qualified to conduct a public business come from the State through delegated power to the city.

A municipal ordinance granting to a corporation qualified to carry on a public business, such as a telephone system, the right to use the streets for that purpose, is more than a mere revocable license; it is the granting of a property right, assignable, taxable and alienable, an asset of value and a basis of credit.

Such a grant is one of property rights in perpetuity unless limited in duration by the grant itself or by a limitation imposed by the general law of the State or by the corporate powers of the municipality.

The powers of municipalities of Kentucky to grant licenses in the streets for telephones were not limited in 1889 as to time; and, under a charter provision giving power to regulate streets and alleys, a municipality had ample power to grant a franchise to a telephone company to place and maintain poles and wires thereon.

A corporation is capable of taking a grant of street rights of longer duration than its own corporate existence if the grant expressly inures to the benefit of the grantees, assigns and successors. *St. Clair Turnpike Co.* v. *Illinois*, 96 U. S. 63, distinguished.

A reservation to alter or amend in a municipal ordinance, granting rights in the streets to a corporation to carry on a public utility, as the necessities of the city demand, is simply a reservation of police

control incidental to the unabridgeable police power and does not reserve a right to revoke or repeal the ordinance itself.

While the power to destroy contract rights may be reserved by a municipality in the ordinance granting them, the reservation must be clear and explicit.

An ordinance requiring a telephone corporation to remove from the streets its poles and wires which had been placed there under a former ordinance granting permission so to do without specifying any period, or else pay a rental not prescribed in the original ordinance, *held* unconstitutional under the contract clause of the Federal Constitution. *Greenwood* v. *Freight Co.*, 105 U. S. 13, distinguished.

Where, under the statutes of the State, a corporation formed by consolidation of several previously existing corporations becomes by express terms vested with all the assets of such constituent corporations, rights in the streets under municipal ordinances pass to the new corporation, and such rights are protected against impairment by the contract clause of the Federal Constitution.

Where the judgment itself makes the opinion a part of the record, the bar of the judgment is confined to those questions to which the opinion expressly declares the litigation was limited.

THIS case involves the nature and duration of the right of the Telephone Company to maintain its poles and wires upon the streets of the City of Owensboro. The ordinance under which it, or its predecessors in right, title and property, have maintained a telephone system in the City of Owensboro, was passed on December 4, 1889. Inasmuch as it contains several provisions which require consideration, it is set out in full in the margin.[1]

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[1] Council Proceedings, Dec. 4th, 1889.
Minute Book "F," Page 157.

The following ordinance, after being twice read, was enacted by the following vote, to-wit: Ayes, Mess. Baer, Brotherton, Vargason, Cullen, Higdon, Decker, Noes, None. Viz:

Be it ordained by the Mayor and Common Council of Owensboro, Ky.:

That the Cumberland Telephone Company its successors and assigns, is authorized and hereby granted the right to erect and maintain upon the public streets and alleys of said city *any* number of Telephone poles of proper size, straight and shaved, smooth, set plumb and kept erect, and any number of wires thereon with the right to connect such

The grantee under that ordinance at once proceeded to erect its plant and to place its poles and wires upon the streets and it and its successors and assigns have ever since maintained and operated a telephone system. The city

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wires with the building when telephone stations are established, provided such poles shall be located and kept so as not to interfere with the travel upon said streets or alleys or the substantial use thereof by the inhabitants of said city.

SEC. 2. That the said Cumberland Telephone Company shall erect only one line of poles on a street except for the length of one block on the street upon which the exchange building may be located, and where the wires of said company enter such exchange building the said company shall have the right to erect and maintain its poles on both sides of such streets and the lowest wire of said telephone company shall not be less than twenty-five feet from the ground, except where such wires enter the exchange building or telephone stations.

Nothing in this ordinance contained shall be construed as an exclusive right to said company to erect and maintain poles upon the streets and alleys of said city, and no obstruction shall be placed by said company to the erection and maintenance of poles by any other person or company. Such company shall enjoy such rights in common with all other persons or companies, to whom said city may see proper to extend the same right.

SEC. 3. The said telephone company shall repair all streets and alleys it may enter upon and use for the purpose herein provided, which by the acts of said company or persons in its employ shall have become injured or damaged or have made unsafe.

All proper precautions and safeguards shall be used to prevent such use from becoming either injurious or annoying to the inhabitants of said city, and should any damage or injury result to any person or property by reason of the erection and maintenance of such poles, or the failure to keep the streets and alleys in repair as herein required, and the said city shall be held liable by reason thereof, such company shall pay all damages and costs resulting therefrom to the parties injured, or to the city if paid by her.

SEC. 4. The rights and privileges hereby granted to said telephone company are upon the terms, and conditions following, viz: That said company shall furnish free of charge one telephone for each engine or hose house, now erected or which may hereafter be erected by said city, one for police head-quarters, and one for the mayor's office

has used the company's poles for the maintenance of its fire alarm service, and has had the benefit of a free public telephone service for municipal purposes.

In January, 1909, the city council passed an ordinance requiring the telephone company to remove from its streets and alleys all of the poles and wires "within a reasonable time after the passage of the ordinance," and upon failure to so remove, the mayor was directed to have them removed. This was, however, subject to a provision, "that said company shall have the right to purchase from the said city a franchise authorizing it to maintain said poles and wires and use same as provided under the laws of the State, upon proper conditions to be prescribed by an ordinance to be passed upon request of said company to the common council of said City."

This bill was filed for the purpose of enjoining the enforcement of this ordinance, the contention being that it was an impairment of the company's contractual property rights in the streets, and, as such, in contravention of the contract and due process clauses of the Constitution of the United States. Upon a final hearing the court below sustained the bill and permanently enjoined the enforcement of the repealing ordinance.

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making at this time only two such telephones to be furnished by said company for the use of the city, shall be kept in good order for constant use by said company.

Said company shall also allow the city the exclusive use of two feet of one arm on each pole for its fire alarm telegraph; The fire alarm telegraph poles of the city may be used by said company for its wires provided such wires be kept two feet from the said fire alarm telegraph wires, and such poles used by the said telephone company shall be replaced by it when needed.

SEC. 5. All poles of said telephone company shall be set close to the inner side of the sidewalk curbing.

SEC. 6. This ordinance may be altered or amended as the necessities of the city may demand.

This ordinance shall be in force from and after its passage."

Mr. R. S. Todd and *Mr. George W. Jolly* for appellant:

Under the Kentucky Statutes §§ 555 and 556, the consolidation of two or more corporations into one corporation terminates the corporate existence of each constituent corporation at the date of such consolidation. *Shields* v. *Ohio*, 95 U. S. 319, 323.

A grant by a municipality to a telephone company of a right to occupy the streets and alleys of the city, for putting up poles and wires and conducting a telephone business, made under a power to "regulate the streets, alleys and sidewalks, and all repairs thereof," is limited in its duration to the corporate life of the company, under its charter at the time of the grant, where no time is fixed for its duration in the ordinance making the grant. *Street Ry. Co.* v. *Birmingham*, 79 Alabama, 465; *Water Co.* v. *Boise City*, 123 Fed. Rep. 232; *Owensboro* v. *Cumberland Telephone Co.*, 174 Fed. Rep. 739, 752; *Citizens' St. Ry. Co.* v. *Detroit Railway*, 171 U. S. 48; *Railway Co.* v. *Logansport*, 114 Fed. Rep. 688; *Mercantile Trust Co.* v. *Denver*, 161 Fed. Rep. 769, 771; *Oregon Ry. Co.* v. *Oregonian Ry. Co.*, 130 U. S. 26; *Rock Island* v. *Central Telephone Co.*, 132 Ill. App. 248; *Rockwith* v. *State Road Bridge Co.*, 145 Michigan, 455; *Snell* v. *Chicago*, 133 Illinois, 413, 432; *State* v. *Cape Girardeau R. R. Co.*, 207 Missouri, 85; *State* v. *Scott Co. Ry. Co.*, 207 Missouri, 54; *St. Clair Turnpike Co.* v. *Illinois*, 96 U. S. 63; *Toll Roads* v. *People*, 21 Colorado, 429; *Virginia Canon Road Co.* v. *People*, 22 Colorado, 249; *Wyandotte Electric Co.* v. *Wyandotte*, 124 Michigan, 43, 47.

Under the provisions of the act of the legislature of the State of Kentucky creating a new charter for the City of Owensboro, in 1882 and in force when the grant in question was made, the power of amendment and repeal was given and reserved to the city, and the grant to the appellee was necessarily made subject to this power. Section 10, 1 Acts Kentucky, 1881, pp. 817–856; Kentucky Statutes (1909),

§ 570; Kentucky Constitution, § 190; *Gas Co.* v. *Des Moines*, 44 Iowa, 508; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Griffin* v. *Kentucky Ins. Co.*, 3 Bush (Ky.), 592; *Hager* v. *Walker*, 128 Kentucky, 1; *Hopkins* v. *Swansea*, 4 M. & W. 621; *City Ry. Co.* v. *Louisville*, 8 Bush, 420; *Presbyterian Church* v. *New York*, 5 Cowan, 532; *Southern Telephone & Telegraph Co.* v. *Richmond*, 98 Fed. Rep. 672; *S. C.*, 103 Fed. Rep. 31; *Stuyvesant* v. *New York*, 7 Cowan, 585; *Vanderbilt* v. *Adams*, 7 Cowan, 349; Cooley's Const. Lim. (5th ed.) 196, 240; Dillon on Mun. Corp. §§ 245–573; 23 Cyc. 1142, and cases cited in note 57.

Power to repeal or modify the ordinance of December 4, 1889, existed not only by the provisions of § 10 of city charter of 1882, but also under the general reservation act of February 14, 1856, carried into Kentucky Statutes as § 1987; it also existed by reason of the acceptance of the present constitution adopted in 1891, by appellee, January 31, 1896, § 3 of which provided that every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment.

In the absence of express legislative authorization a municipality cannot make a perpetual grant to the use of the streets and thoroughfares of the city. *Street Ry. Co.* v. *Birmingham*, 79 Alabama, 465; *Street Ry. Co.* v. *Detroit Railway*, 171 U. S. 48; *Railway Co.* v. *Logansport*, 114 Fed. Rep. 688.

Public grants should be construed liberally in favor of the public and strictly against the grantee; nothing passes by implication. *Charles River Bridge Case*, 11 Peters, 420; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 666; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Water Company* v. *Knoxville*, 200 U. S. 33; *Minturn* v. *Larue*, 23 Howard, 43, 50; *Oregon Ry. Co.* v. *Oregonian Ry. Co.*, 130 U. S. 26, 30; *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Turnpike Co.* v. *Illinois*, 96 U. S. 63.

Where there has been a previous litigation between the

same parties relative to the same cause of action, the judgment of the court therein places the matter at rest forever between the parties thereto and their privies. Bigelow on Estoppel, 72, 73, 152; Black on Judgments, §§ 720, 731; *Case* v. *Beauregard*, 101 U. S. 688; *Coffey* v. *United States*, 116 U. S. 436; *Davis* v. *McCorkle*, 14 Bush (Ky.), 754; *Frances* v. *Wood*, 81 Kentucky, 22; Freeman on Judgments, §§ 249, 270; *Hanley* v. *Donoghue*, 116 U. S. 6; *Hardwick* v. *Young*, 110 Kentucky, 504; *Henderson* v. *Henderson*, 3 Hare, 115; *Water Co.* v. *Knoxville*, 200 U. S. 33; *Lyon* v. *Perin Mfg. Co.*, 125 U. S. 700; *Martin* v. *Evans*, 85 Maryland, 8; *Rex* v. *Duchess of Kingston*, 20 Howell's St. Tr. 355; Van Fleet on Former Adjudication, §§ 37, 40; *Baker* v. *Cummings*, 181 U. S. 117–124–5; *S. P. R. Co.* v. *United States*, 168 U. S. 48, 49, 50.

It is the judgment or decree of the court that settles the matters in controversy and conclusively fixes the rights of the parties. The opinion of the judge or chancellor giving his reasons therefor, "is no part of the judgment itself." *Durant* v. *Essex Co.*, 7 Wall. 107, 110; *Case* v. *Beauregard*, 101 U. S. 692; Freeman on Judgments, § 249, and cases cited.

Mr. William L. Granbery, with whom *Mr. Clarence M. Finn* and *Mr. Hunt Chipley* were on the brief, for appellee.

Mr. Justice Lurton, after making the foregoing statement, delivered the opinion of the court.

1. That the right conferred by the ordinance involved is something more than a mere license, is plain. A license has been generally defined as a mere personal privilege to do acts upon the land of the licensor of a temporary character, and revocable at the will of the latter unless, according to some authorities, in the meantime expenditures contemplated by the licensor when the license was given,

have been made. See *Greenwood Lake & P. J. Railroad* v. *New York &c. Railroad*, 134 N. Y. 435, 440; *Trustees of Southampton* v. *Jessup*, 162 N. Y. 122, 126.

That the grant in the present case was not a mere license is evident from the fact that it was upon its face neither personal, nor for a temporary purpose. The right conferred came from the State through delegated power to the city. The grantee was clothed with the franchise to be a corporation and to conduct a public business, which required the use of the streets, that it might have access to the people it was to serve. Its charges were subject to regulation by law and it was subject to all of the police power of the city.

That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right, has been too many times decided by this court to need more than a reference to some of the later cases: *Detroit* v. *Detroit Street Railway Co.*, 184 U. S. 368, 395; *City of Louisville* v. *Cumberland Telephone and Telegraph Co.*, 224 U. S. 649, 661; *Boise Water Co.* v. *Boise City*, opinion just handed down, *post*, p. 84. As a property right it was assignable, taxable and alienable. Generally it is an asset of great value to such utility companies and a principal basis for credit.

2. The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself or as a consequence of some limitation imposed by the general law of the State, or by the corporate powers of the city making the grant. *Detroit* v. *Detroit Street Railway*, *supra*; *Louisville* v. *Telephone Co.*, *supra*; *People* v. *O'Brien*, 111 N. Y. 1, 42; *Woodhaven Gas Light Co.* v. *Deehan*, 153 N. Y. 528; *Mobile* v. *L. & N.*

Railroad Co., 84 Alabama, 115; *Town of Arcata* v. *Arcata Railroad Co.*, 92 California, 639; *Hudson Tel. Co.* v. *Jersey City*, 49 N. J. L. 303; Dillon Mun. Corp., 5th ed., § 1265; *Nebraska Telephone Co.* v. *Fremont*, 72 Nebraska, 25, 29; *Plattsmouth* v. *Nebraska Tel. Co.*, 80 Nebraska, 460, 466. If there be authority to make the grant and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights. To quote from a most weighty writer upon municipal corporations, in approving of the decision in *People* v. *O'Brien*, *supra*, a decision accepted and approved by this court in *Detroit* v. *Detroit Street Railway*, *supra*—"The grant to the Railway Company may or may not have been improvident on the part of the municipality, but having been made and the rights of innocent investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly, when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held under the legislation and facts that the right created by the grant of the franchise was perpetual, and not for a limited term only." Dillon on Mun. Corp., 5th ed., § 1265.

3. There seems to have been no general law in Kentucky under which a telephone company could acquire the necessary street easement; nor until the enactment of § 4639-b of the Kentucky Statutes, was there any provision in the general law in regard to the acquisition of such rights in or upon the public roads outside of municipal corporations. In both cases the right to place and maintain poles and wires upon either streets or roads was dependent in the one case upon the municipal power of control over its streets, and in the other upon the power of the county fiscal courts by virtue of their control over county roads.

The original source of power over both streets and highways is the State. But this power of control is generally delegated in some form to the municipalities and county authorities of the State. Thus the county fiscal courts, by § 4306, Kentucky Statutes, are given "general charge and supervision of the public roads," etc. Concerning the power resulting from the grant by the State to control streets or public highways, the Kentucky court, in *American Car Co.* v. *Johnson County*, 147 Kentucky, 69, 71, said: "The right to grant a franchise presupposes and is based upon the right of the authority granting the franchise to control the property over which the franchise is granted or which is affected by it. For example, the fiscal court could grant a franchise authorizing the erection of poles along the highways of the county, as the fiscal court had control of the highways. And so, municipal corporations may grant franchises to use the streets and public ways of a city." Again, in *Jackson-Hazard Telephone Co.* v. *Holliday*, 143 Kentucky, 149, 150, the court said: "That the fiscal court having, as it did, under section 4306, Kentucky Statutes, the control and supervision of the public roads of the county, had authority before the enactment of section 4679-b of the Kentucky Statutes to grant the company the right to erect its poles along this road in the absence of a statute expressly giving the court such authority, is we

think settled by the case of *Cumberland Telephone & Telegraph Co.* v. *Avritt*, 120 Kentucky, 34." Section 4679-b, referred to, gives to telephone companies the right to place their poles along such roads subject to regulation by the fiscal courts, but it does not deal with the streets of municipal corporations. The right of such companies to occupy the streets of villages and cities was, therefore, dependent upon the charter powers, express or implied, under which they were organized.

Owensboro was granted a special charter in 1882, by which, among other things, it is given power "to regulate the streets, alleys and sidewalks and all improvements and repairs thereof." If the county fiscal courts had power to grant to such companies a franchise to place their poles and wires along the public roads of a county under the statute giving them "general charge" and right to "supervise" such roads, it logically follows, as stated in *American Car &c. Co.* v. *Johnson, supra*, that the City of Owensboro under the power to "regulate" its streets and alleys had ample authority to grant a franchise to the Telephone Company to place and maintain its poles and wires upon the streets.

The character of the business of such companies was well known. Access with their lines to the houses of their customers in the city absolutely required the right to use the public streets, either longitudinally or to cross them. By such an exertion of its power to control and regulate the use of the streets it did not authorize a new public use. Such a use was a legitimate street use and did not impose upon the owner of the fee in the street an additional burden. *Cumberland Telephone and Telegraph Co.* v. *Avritt*, 120 Kentucky, 34. Neither was the city thereby stripped of its police power over the streets. *Louisville City Railway* v. *City of Louisville*, 8 Bush, 415, 420. Nor did it undertake to grant an exclusive right. Express power to grant an exclusive street franchise has generally

been held essential. Dillon, Mun. Corp., 5th ed. §§ 1215, 1218, 1234. The grant in this case was not exclusive, and we are not called upon to deal with that question, since the ordinance here involved expressly reserves the right to make similar grants to other companies.

The great power of Congress over interstate commerce is wrapped up in the power to "regulate" such commerce. The authority of the City of St. Louis to compel the Western Union Telegraph Company to pay a rental for the maintenance of its poles and wires upon the streets of the city grew out of a charter power to "regulate" its streets and alleys. In this case (149 U. S. 465, 469), the court said:

"The word 'regulate' is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used."

In *City of Owensboro* v. *Cumberland Telephone & Telegraph Company*, 174 Fed. Rep. 739, a case involving the regulation of the rates and charges of the present appellee, the power of the City of Owensboro under its charter power to "regulate" was held by the Circuit Court of Appeals of the Sixth Circuit to amply justify the grant here involved, though its duration was not involved or considered.

That the power to "regulate" embraces power to grant to such companies the right to place and maintain their poles upon the streets has been generally held: *Pikes Peak Power Co.* v. *Colorado Springs*, 105 Fed. Rep. 1; C. C. A. 8th Circuit; *Detroit Citizens' Railway* v. *Detroit*, 64 Fed. Rep. 628, 636; C. C. A. 6th Circuit. In the latter case

it was held that a charter power to "open, close and widen streets, and to prescribe, control and regulate the manner in which the highways, streets and avenues shall be used and enjoyed," was a power broad enough to permit the city to consent to the use of its streets for such purposes by any company having the requisite franchise of a street railway company. To the same effect see Dillon, Mun. Corp., 2d ed., § 575; *Atchison Street Railway* v. *Missouri &c. Ry.*, 31 Kansas, 661; *Southern Bell Telephone Co.* v. *Mobile*, 162 Fed. Rep. 523, 562; *State* v. *Murphy*, 134 Missouri, 562; *Brown* v. *Duplessis*, 14 La. Ann. 842; *Chicago, B. & Q. Railway* v. *Quincy*, 136 Illinois, 489; *New Castle* v. *Lake Erie &c. Railroad*, 155 Indiana, 18.

4. It is next insisted that the grant is limited to the life of the corporation that accepted it. The assumption that this life was limited to twenty-five years from the date of the organization of the grantee corporation is erroneous. The articles of agreement did provide that the company should terminate in twenty-five years, but as this was an agreement of the stockholders *inter sese*, it was competent for them, if the general incorporating act under which the company was organized permitted, to extend its life. This is precisely what the Kentucky act under which the company was organized permitted. Thus it provided that corporations organized for any work of internal improvement could be formed to endure for fifty years, and those formed for other purposes, for twenty-five years. General Statutes of Kentucky 1888, c. 56, § 7, p. 764. But the same act provided that in either case the term might be extended by action of three-fourths of the stockholders. Thus, if it be assumed that the grant was limited to the life of the grantee, that life was capable of extension at the will of the stockholders, and an extension did occur as contemplated. But this ordinance was to the Cumberland Telephone Company and its assigns. It vested a

property right, capable of passing to an assignee, and did in fact pass to the present consolidated company, whose life, by express action of its entire body of stockholders, is for two hundred years. That a corporation is capable of taking a grant of street rights of longer duration than its own corporate existence is the settled law of this court: *Detroit* v. *Detroit Street Railway, supra; Louisville* v. *Cumberland Telephone & Telegraph Co., supra.*

The case of *St. Clair County Turnpike Company* v. *Illinois,* 96 U. S. 63, has been cited and relied upon as deciding that a grant to a corporation is limited in duration to the life of the grantee. If the case is to be regarded as holding the wide doctrine for which it has been cited, it is in conflict with the cases cited above. But it does not go so far as claimed. The grant there involved was of the right to extend an existing turnpike over a certain dyke and county bridge, and to maintain a toll-gate upon the extension. The company to which this additional right was given had been incorporated for a term of twenty-five years. The grant was to the particular company by name and was not to its assigns or successors. This court likened such a grant to a grant at common law to a natural person without words of restriction, which, said the court, "creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists." The grant here involved was to the corporate grantee, its assigns and successors, and falls under the principle of the cases cited above.

5. It is next said that the power to grant found in the city charter is coupled with the power to amend or repeal. The tenth section of the city charter provides that "The Common Council shall have control of the finances and all property, real and personal, belonging to the city, and shall have full power to make, publish, and repeal all ordinances for the following purposes." Then follows fifty-seven sub-sections relating to the legislative power

of the council. The twenty-seventh section gives the council the power "to regulate the streets, alleys and sidewalks and all repairs thereof."

The power to be a corporation and to conduct a telephone business did not come from the city, nor could it. The only thing which the ordinance pretends to do is to grant an easement in the streets which, as we have already shown, was an unlimited right to place and maintain poles and wires upon the streets, subject, however, to the police power of the city. This repealing ordinance, though it purports to be an exercise of the police power in the "whereas" clause, proceeds immediately to contradict the assertion that the poles and wires are a "nuisance" by the proviso giving the company an opportunity to purchase the right to continue the use of the streets under conditions "to be prescribed by ordinance," upon request of said company. It is a plain attempt to destroy the vested property right under which a great plant had been installed and operated for more than twenty-five years. When that grant was accepted and acted upon by the grantee it became a contract between the city and the telephone company, which could not be revoked or repealed, unless the power to repeal was clearly and unmistakably reserved.

The sixth section of the granting ordinance provides that, "This ordinance may be altered or amended as the necessities of the city may demand." This is no more than a reservation of the police control of the streets and of the mode and manner of placing and maintaining the poles and wires incident to the unabridgeable police power of the city. See *Grand Trunk Railway* v. *South Bend*, 227 U. S. 544. It does not reserve any right to revoke or repeal the ordinance, or to affect the rights therein granted. Nor does the city attempt to justify its action in requiring the poles and wires to be removed from the streets under that section, but solely upon the general

power in the city charter "to make, publish and repeal ordinances." This general power to repeal ordinances obviously refers to ordinances which are legislative in character, and exertions of the governmental power of the municipal council,—a power in its nature not to be abridged by irrepealable ordinances. *Baltimore* v. *Baltimore Trust Co.*, 166 U. S. 673; *Grand Trunk Railway* v. *South Bend, supra.* The power to repeal, alter and amend such ordinances is one which inheres in the power to legislate, and its mention is pure surplusage.

To construe this general power of repeal as a reservation of a power to revoke or destroy contractual rights which have vested under an ordinance, which, upon its face, makes no such reservation, would be to place every contract made by the city by virtue of an ordinance, legislative in form, subject to the mercy of changeable city councils. In the absence of an express reservation in the contractual ordinance, or an express delegation of power to revoke contracts under such ordinances, we think no such extraordinary power is to be implied. *Ashland* v. *Wheeler*, 88 Wisconsin, 607, 616.

Much the same question arose in *Hudson Telephone Company* v. *Jersey City*, 49 N. J. L. 303, where the right granted was held to be irrevocable under a similar power. *Greenwood* v. *Freight Co.*, 105 U. S. 13, is not in point. That case involved the repeal by the Massachusetts legislature of a legislative charter, under a reserved power, by general law of the State making "every act of incorporation (after a certain date) subject to amendment, alteration or repeal, at the pleasure of the legislature." That was a plain, unmistakable reservation of the right to repeal at the pleasure of the State. This clause of the charter in the instant case reserves no more than the power to repeal, as well as to make and amend ordinances, but by no means operates to convey the power to "repeal" a grant of street rights which had been accepted and had

thereby become a contract under the protection of the contract clause of the Constitution. That the right may be reserved to destroy a contract may be conceded; but when such a right is claimed, it must be clear and explicit. The contention here advanced, if conceded, would paralyze the contractual power of the city, for if it has application to this ordinance, it would equally apply to every other contractual ordinance which the city might enact, though the contract had been accepted and expenditures made.

In *Lake Roland El. Ry.* v. *Baltimore*, 77 Maryland, 352, an ordinance consenting to the laying of a double track over designated streets was involved. This ordinance could not become effective until confirmed by the legislature. The confirming act contained these words: "The said Mayor and City Council to have the same power and control hereafter in reference to the enforcement, amendment or repeal of said ordinance as it has or would have in respect to any ordinance passed under its general power." Later this ordinance was in part repealed, and the repeal was held valid upon the ground that the control of the city over its streets was a legislative power and that the council could not consent to any rights therein which were not revocable, although the city might be liable for damages. The opinion does not rest upon the theory that any right of repeal was specially reserved in the ordinance or by the confirmatory act. The validity of the repeal was put upon the right to repeal every ordinance legislative in character. The case is out of line with the great weight of authority in respect to the irrevocable character of property rights vested under an ordinance when the right to revoke is not expressly reserved.

In *Baltimore Trust Co.* v. *Baltimore*, 64 Fed. Rep. 153, Circuit Judge Goff refused to follow the case, holding that the question of contract or no contract under such an ordinance was a Federal question, and that the confirmatory legislation reserved no right of repeal, and that

none existed under the general right to repeal ordinances. In the same case, 166 U. S. 673, the decree of Judge Goff was reversed upon the sole ground that the requirement of the so-called repealing ordinance that the railway company should maintain but one track on one of the designated streets was a legitimate exercise of the police power, and not a substantial change of the contract. The case is so explained and distinguished in *Grand Trunk Railway* v. *South Bend, supra.*

6. In June, 1900, the Cumberland Telephone and Telegraph Company consolidated with the Ohio Valley Telephone Company, likewise a Kentucky corporation, under authority of the Kentucky act of April 5, 1893 (Acts of 1891, 1893, c. 171, p. 612). Although the separate existence of the constituent corporations was terminated and they became a single corporation, the consolidated company was, by express provision of the act referred to, "vested with all the property, business, credits, assets and effects of the constituent corporations, without deed or transfer, and bound for all their contracts and liabilities." Being property, alienable and assignable, the street rights of the constituent companies passed to the consolidated company. The same question arose and was expressly decided in *Louisville* v. *Cumberland Telephone & Telegraph Co., supra.*

7. Finally, it was claimed that in a prior litigation in a state court, between the same parties, the ordinance of 1889 had been held to be in excess of the power of the city as nothing more than a revocable license. The suit referred to had been brought by the Telephone Company to restrain the city from placing poles and wires of an electric light system, in course of construction by the city, in such close proximity to the poles and wires of the Telephone Company as to interfere with its current. One of the defenses was that the city had no power under its charter to make the grant which it had assumed to

make by the ordinance of 1889, and that the Telephone Company was, therefore, a trespasser upon the streets. Upon a final hearing the bill was dismissed. This decree was pleaded as an adjudication of the question of the validity of the ordinance under which the Telephone Company now claims. But the judgment makes the opinion of the court filed at the time "a part of the record." That opinion shows that the court dismissed the bill because its object had failed, the city having actually constructed its lines before final decree. In reference to the issue as to the validity of the Telephone Company's street rights, the Kentucky court said: "In passing upon the question of granting or refusing the injunction, I deem it wholly unnecessary to pass upon the validity or invalidity of the ordinance discussed." The litigation, though between the same parties, is upon an entirely different cause of action. The bar of the former judgment is, therefore, confined to the questions which were actually litigated and decided in the former case, and it devolved upon the city to show in support of its plea, the cause of action being different in the present case, that the point here in issue was adjudged in the former case. *DeSollar* v. *Hanscome*, 158 U. S. 216; *Virginia-Carolina Chemical Co.* v. *Kirven*, 215 U. S. 252.

We find no error in the decree of the court below and it is, therefore,

Affirmed.

MR. JUSTICE DAY, with whom concurred MR. JUSTICE MCKENNA, MR. JUSTICE HUGHES and MR. JUSTICE PITNEY, dissenting.

I am unable to concur in the judgment and opinion announced in this case. In my opinion the ordinance of December 4, 1889, granting to The Cumberland Telephone & Telegraph Company, its successors and assigns, the

right to use the streets and alleys of the City of Owensboro for the purpose of erecting poles and stringing wires thereon to maintain a telephone system, did not grant a perpetual franchise, because of the limitation upon the authority of the City of Owensboro to grant a perpetual franchise.

The case is not controlled by the previous cases in this court, such as the late case of *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, which had to do with the construction of a legislative grant to a corporation having perpetual succession and did not involve the construction of the charter of a Kentucky city such as is here under consideration.

The power to grant a perpetual franchise to telephone and similar companies desiring to use the streets and alleys of the City of Owensboro is said to be derived under § 10 of the charter, conferring upon the common council in subsection 27 the right to regulate streets, alleys and sidewalks and all repairs thereof in the city. Conceding that if this power were conferred without limitation it might authorize a grant in perpetuity of the character herein involved, the authority found in subsection 27 as well as other municipal powers are all granted to the common council by the legislature of the State upon the following terms, preceding the grant of authority: "§ 10. The common council shall have control of the finances and all property, real and personal, belonging to the city, and shall have full power to make, publish, amend, and repeal all ordinances for the following purposes, to wit." In other words the authority granted to regulate the streets is limited by the express reservation that it shall be exercised subject to the power of the city to amend and repeal any ordinance so enacted.

In *Greenwood* v. *Freight Co.*, 105 U. S. 13, wherein this court held that a grant to a street railway company subject to the limitation of the right to amend, alter or repeal was

subject to future legislation ending the right of the street railway company to operate in the streets of the city, Mr. Justice Miller, who delivered the opinion of the court, stated the origin of statutory and legislative reservations of this character enacted since the decision of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, construing corporate charters as contracts between the public authorities and the grantees, beyond legislative control and within the protection of the contract clause of the Federal Constitution. The learned Justice said (p. 20):

"It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the state legislatures could retain in a large measure this important power, without violating the provision of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the *Dartmouth College Case*, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation."

In view of that policy this court held that whatever rights remained to its other property the authority to run cars upon the streets of the City of Boston, being subject to the reservation, terminated upon the repeal of the ordinance.

If there is such right to repeal, the authorities are con-

clusive that it may be exercised so as to terminate the rights of the company to further use the streets. In a recent case, *Calder* v. *Michigan*, 218 U. S. 591, this court approved and reaffirmed this principle. In that case The Grand Rapids Hydraulic Company had been incorporated by the legislature of Michigan and had constructed and was then maintaining an elaborate water system. The legislature repealed the charter, reservation to amend or repeal having been made in the original act. In aid of the contention that the repealing act was void under the Fourteenth Amendment to the Constitution, it was alleged that there were outstanding bonds and a mortgage on the company's plant, including its franchise to own and operate its system; also that, the city being a competitor of the company, the city authorities had secured the passage of the repealing statute by unfair means. This court said (pp. 598 *et seq.*):

"The defendants now, on the ground that there are limits even to the operation of a reserved power to repeal, argue that we should consider these allegations. But we do not inquire into the knowledge, negligence, methods or motives of the legislature if, as in this case, the repeal was passed in due form. *United States* v. *Des Moines Navigation & Railway Co.*, 142 U. S. 510, 544. The only question that we can consider is whether there is anything relevant to the present case in the terms or effect of the repeal that goes beyond the power that the charter expressly reserves.

". . . By making a contract or incurring a debt the defendants, so far as they are concerned, could not get rid of an infirmity inherent in the corporation. They contracted subject, not paramount, to the proviso for repeal, as is shown by a long line of cases. *Greenwood* v. *Freight Co.*, 105 U. S. 13. *Bridge Co.* v. *United States*, 105 U. S. 470. *Chicago Life Insurance Co.* v. *Needles*, 113 U. S. 574. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 313, 338, 340. *New Orleans Waterworks Co.* v.

Louisiana, 185 U. S. 336, 353, 354. *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 437, 438. *Manigault* v. *Springs*, 199 U. S. 473, 480. It would be a waste of words to try to make clearer than it is on its face, the meaning and effect of this reservation of the power to repeal.

". . . The only question before us now is the validity of the judgment ousting the defendants from 'assuming to act as a body corporate, and particularly under the name and style of the Grand Rapids Hydraulic Company.' This really is too plain to require the argument that we have spent upon it. We may add that it is a matter upon which the bondholders have nothing to say."

See also *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258.

It is said, however, and that seems to be the ground upon which the decision of the court upon this point rests, at last, that the reservation of the right to repeal does not clearly appear in the charter of Owensboro, as it did in the Massachusetts legislation considered in *Greenwood* v. *Freight Co.*, *supra*, and it is said that such right, when it is claimed, must be clear and explicit. To my mind the purpose of the Kentucky legislature was evidenced with perfect clearness, for I think that the same law which gave the city the right, which otherwise would have rested with the legislature alone of exercising authority over the streets, which in this case, it is held, authorized their use for telephone purposes, in unmistakable terms made such authority subject to the clearly stated and definite limitation named. Furthermore, the doctrine is well settled that legislative grants of municipal authority shall be construed most favorably to the public and against persons claiming thereunder, a doctrine sanctioned by decisions of this court. *Moran* v. *Commissioners of Miami County*, 2 Black, 722; *Citizens' Street Railway* v. *Detroit Railway*, 171 U. S. 48; *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558. Surely, if the intention of the

Kentucky legislature to reserve in the municipality the authority to repeal such grants as the one here involved is not clearly manifested, at least there is reasonable room for doubt, and such doubt must be resolved in favor of the public. If the doubt be determined in favor of the company and a grant which is not clearly in perpetuity is held to be such, the effect is to tie the hands of the municipality from obtaining revenue from the use of property held by it in trust for all its people.

It is also said that the exercise of the reserved right to repeal in cases like this will have the effect to destroy contract rights, upon the strength of which large investments may have been made. But this argument overlooks the proposition that, if the grant was made subject to the right to revoke by subsequent action of the authority which made the grant, then no contract was entered between the parties beyond the control of the reserved power of the municipality, for as Mr. Justice Miller said in the *Greenwood* v. *Freight Co. Case*, under such "a provision . . . reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation." So, if this limitation in fact existed, the right to repeal was inherent in the authority which made the grant, and the grantee is conclusively presumed to be aware of this limitation, and to make his investments subject to the exercise of the reserved right. *Calder* v. *Michigan, supra.* Moreover, if limited grants are to be construed into perpetuities then the control over streets for railway, telephone and other kindred enterprises of enormous value are granted to private corporations without compensation for the use of such valuable rights which belong to the municipality. Recent cases in this court have shown the great value of such privileges, and that investors are found who are willing to pay for

the privilege of using the public streets for these purposes.

A single case is cited in the opinion of the court to sustain the conclusion reached upon this branch of the case, and that is *Hudson Telephone Company* v. *Jersey City*, 49 N. J. L. 303. An examination of that case shows that it did not involve the question now under consideration. There the telephone company was organized as such under the prevailing statutes of the State and had obtained on certain conditions the permission of the municipality to use the streets in accordance with a provision in the statute that the designation of the streets to be used and manner of placing poles should first be secured. An ordinance was passed, revoking the permission, although the company had complied with the conditions, and the court held that the revoking ordinance was invalid. The court noticed the power reserved in the corporation act to repeal, suspend and alter charters, and the power of the city council to repeal ordinances. The former was held to run to the legislature solely, and it was said that there was no provision in the act authorizing the municipality to revoke its permission. Of the latter the court said that the power to repeal was a general power arising from the power to pass ordinances and existed without the express charter powers, and that such general power would not sustain the rescission of an act authorized by other legislation.

A somewhat diligent search has failed to discover cases exactly in point construing a reservation of the character herein involved. The case of *Lake Roland Elevated Railway Co.* v. *Mayor &c. of Baltimore*, 77 Maryland, 352, followed and approved in *United Railways* v. *Hayes*, 92 Maryland, 490, is, however, closely analogous. In that case the city granted a franchise to the railway company permitting it to lay tracks in the streets of the city and also to erect an elevated railway in a certain street. A statute passed to con-

firm the action of the city with respect to that part of the ordinance granting a franchise which related to the elevated railway contained a reservation to the city of "the same power and control hereafter in reference to the enforcement, amendment or repeal of said ordinance [granting the franchise] as it has or would have in respect to any ordinance passed under its general powers." This reservation was held to authorize the repeal of the grant in question. The case upon this point meets the argument made in the opinion in this case that the right to amend, alter or repeal would have existed without the statute and cannot be held to cover the grant of franchise privileges to use the streets. Undoubtedly this right of repeal would have existed, and hence its insertion was unnecessary unless it was to have some further purpose than that the law already gave, the general power of a municipality to repeal ordinances of a legislative character. We think the intention in this case was the same as in the Maryland case, to preserve in the municipality authority over the streets in the interests of the public.

In my view the case in its present attitude comes to this: The permission to place poles and string wires in the City of Owensboro was granted under a charter which expressly reserved the right to repeal by subsequent act of the municipal legislature. In the face of this authority and presumably with knowledge of it, the company has entered upon the streets and made use of them for the purposes intended. Holding its grant subject to this superior right in the city to end it, I think the subsequent repealing ordinance was within the power of the municipality.

MR. JUSTICE MCKENNA, MR. JUSTICE HUGHES, and MR. JUSTICE PITNEY concur in this dissent.

BOISE ARTESIAN HOT AND COLD WATER CO., LIMITED, *v.* BOISE CITY.

BOISE CITY *v.* BOISE ARTESIAN HOT AND COLD WATER CO., LIMITED.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

Nos. 573, 639. Argued May 7, 8, 1913.—Decided June 16, 1913.

Where appellants' direct appeal to this court under § 5 of the Judiciary Act of 1891 is taken on the claim that the ordinance on which the Circuit Court based its decision is in contravention of the Constitution of the United States, this court has jurisdiction to review not only the constitutional question but every other question properly arising in the case including error assigned by the other party on its cross writ for failure to allow its counterclaim under the contract.

Rights acquired under an ordinance granting the right to a water company to lay and maintain pipes in the streets is a substantial property right, with all the attributes of property; and the obligation of the contract in the ordinance on which it is based is protected against impairment by the contract clause of the Constitution of the United States.

There is a presumption that investments of large amounts of capital in a public utility enterprise will not be made on a franchise for necessary use of the streets which is a mere license revocable at will.

Where there is no limitation in the general law of the State, nor in the charter of the city, as to duration of franchises for public utilities in the streets, the grant of an easement for that purpose, not specifying a period of duration, is in perpetuity.

Quære whether the limitation of fifty years in § 2710, Rev. Stat., and § 2838, Rev. Codes of Idaho, on grants to corporations applies to a grant made by a municipality to an individual and afterwards assigned to a corporation.

Where there is a limitation in the law of the State of duration for which easements in streets can be granted by municipalities, an easement granted for an indefinite period continues for the statutory period.

There is a distinction between a definite grant for a period longer than

the law of the State permits and an indefinite grant; while the former may be altogether void as an effort to obtain that which is illegal, the latter is simply limited in duration to the period established by law, and during that time it is protected from impairment by the contract clause of the Constitution of the United States.

The municipal ordinance of a town in Idaho imposing additional obligations on a corporation holding by assignment an easement granted by a former municipal ordinance within fifty years for use of the streets for water mains *held* an unconstitutional impairment of the obligation of the contract of the former ordinance.

A municipality may not object to the State relieving a grantee of franchise rights from obligations formerly imposed by a general law of the State.

Municipal corporations are mere emanations from the State, exercising such public power as the State chooses to grant.

A statutory provision that all water companies must furnish free water to the municipalities in which they are situated does not constitute a contract to which the municipalities are parties; it is within the power of the State to relieve the water companies of the obligation and permit them to furnish water at reasonable cost.

A water company under the laws of the State of Idaho is entitled to compensation for water furnished and which it is ready to furnish to the municipality, even if the report of commissioners fixing reasonable rates in pursuance of the statute has not been adopted by municipal ordinance.

A municipality, which continues to use water furnished by a water company after giving notice that it will pay no further bills for such water, is not relieved by such notice from the obligation to pay therefor according to the reasonable rates which have been fixed pursuant to statute.

THE facts, which involve the constitutionality under the contract clause of the Federal Constitution of an ordinance of Boise City, Idaho, affecting a franchise for using the streets of the city for water supply purposes and the liability of the city for water supplied to it, are stated in the opinion.

Mr. Richard H. Johnson, with whom *Mr. Richard Z. Johnson* was on the brief, for plaintiff in error in No. 573, and defendant in error in No. 639.

Mr. Charles C. Cavanah and *Mr. Charles F. Reddoch*, with whom *Mr. John J. Blake* and *Mr. John F. Maclane* were on the brief, for defendant in error in No. 573 and plaintiff in error in No. 639.

MR. JUSTICE LURTON delivered the opinion of the court.

These cases come here from the District Court direct, upon a writ of error sued out by the Water Company, and a cross writ of error sued out by Boise City, the defendant below.

The Water Company is a corporation of West Virginia, authorized to carry on its business in Idaho. It brought this action to recover from the city, for water furnished for fire purposes. The city defended upon several grounds, only two being now urged. The first was that the Water Company was under a statutory obligation to furnish water for fire purposes free of charge; and the second, that the city was under no legal obligation to pay, because there was neither ordinance nor contract for the water claimed to have been furnished.

By way of set-off or counter-claim, it asserted the liability of the Water Company for a large sum of money, claimed to be due on account of monthly "license fees," which, by ordinance, it was required to pay for the use of the streets of the city for laying and maintaining its distributing water pipes. The Water Company denied the validity of the ordinance imposing the "license fees" claimed, asserting that by ordinance long prior in time, its predecessor in right and title had been granted an irrevocable easement in the streets for the purpose of laying its pipes therein, and that the later ordinance under which the city claimed the right to charge rental for their use and occupation with its pipes, was an impairment of its vested street easement and in contravention of the Constitution of the United States.

The court below ruled that the ordinance under which the Water Company claimed its right to lay and maintain its pipes in the streets of the city was a revocable license, and that the requirement of the later ordinance that it should thereafter pay monthly the sum of three hundred dollars for the privilege of so occupying the streets with its pipes was not an impairment of any contract and was in every respect valid.

The foundation of the street rights asserted by the Water Company is an ordinance of October 3, 1889, in these words:

"An Ordinance Granting Eastman Brothers the Right to Lay Water-pipes in Boise City.

"The Mayor and Common Council of Boise City, Idaho, ordain:

"Section 1. H. B. Eastman, and B. M. Eastman and their successors in interest in their water works, for the supply of mountain water to the residents of Boise City are hereby authorized to lay and repair their water-pipes, in, through and along and across the streets and alleys of Boise City, under the surface thereof; but they shall, at all times, restore and leave all streets and alleys in, through, along and across which they may lay such pipes in as good condition as they shall find the same, and shall, at all times, promptly repair all damage done by them or their pipes, or by water escaping therefrom.

Section 2. This Ordinance shall take effect from and after its passage and approval.

Approved October 3, 1889."

This was accepted and the grantees named therein immediately began the construction of their plant. Later, in July, 1890, similar street rights were granted to a corporation of Idaho known as the Artesian Water and Land Improvement Company. This last named company accepted the ordinance and expended much money in the construction of another water supply system. At some

date prior to 1895, apparently on March 28, 1891, each of these grantees conveyed and assigned all of their rights, franchises and easements to the present plaintiff in error. It has since that time made large expenditures in improving the plants acquired from its predecessors, and has since maintained its pipes in the streets and has continuously furnished water to the city for fire purposes and to private consumers. The ordinance which is claimed to be an impairment of the street rights acquired by the ordinance of 1889 and long occupancy was passed on June 7, 1906, and is in these words:

"An Ordinance requiring the Boise Artesian Hot and Cold Water Company, a private corporation, organized and existing under and by virtue of the laws of the State of West Virginia, to pay to Boise City, a municipal corporation of the State of Idaho, on the first day of each and every month, a monthly license of $300 for the use and occupancy of the streets and alleys of said Boise City, Idaho, in furnishing water to the residents of said city.

"Whereas, Boise City, is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, and

"Whereas, the Boise Artesian Hot and Cold Water Company, is a private corporation organized, existing and operating under the laws of the State of West Virginia, and

"Whereas, said Boise City, on the 3d day of October, 1889, approved an ordinance granting to H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, a license for an indefinite period to lay and repair water-pipes in the streets and alleys of said Boise City through which water is being furnished by said company to the residents of said city, for profit, and

"Whereas, the said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks."

"Now, therefore, Boise City does ordain as follows:

"Section 1. That the said Boise Artesian Hot and Cold Water Company, a private corporation organized and existing under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks now being operated and said license granted by said ordinance of October 3, 1889, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month a monthly license of $300 for the privilege granted by said ordinance of October 3, 1889, to lay and repair water-pipes in the streets and alleys of said city through which water is being furnished to the inhabitants of said Boise City by said Company.

"Section 2. That demand is hereby made by said Boise City of and from said the Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month said monthly license of $300 required by Section 1 of this Ordinance.

"Section 3. That the City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise Artesian Hot & Cold Water Company of the requirements of this ordinance to pay said license as aforesaid.

"Section 4. That nothing in this ordinance shall be construed or understood as granting any privilege or authority for any other term than that provided for in the aforesaid Ordinance of October 3, 1889.

"Section 5. This Ordinance shall take effect and go in force from and after its passage and approval."

Upon the issues there was a judgment against the city for the full amount claimed as due for water furnished for fire purposes, less the agreed amount of the city's counter-claim, which, by direction of the court, was found for it, being so much of the claim for rentals as had ac-

crued after April 1, 1909, and before the bringing of this action.

The right of the Water Company to come direct to this court is conferred by § 5 of the Judiciary Act of March 3, 1891, 26 Stat. 826, c. 517, it being a case in which it was "claimed" that the ordinance, imposing license fees, as a law of the State, was in contravention of the Constitution of the United States. *Loeb* v. *Columbia Township,* 179 U. S. 472, 477. This court has, therefore, jurisdiction to review not only the constitutional question which arose in the case, but every other question properly arising.

The City of Boise has assigned error upon the judgment which was rendered against it upon the claim of the Water Company for water furnished the city for fire purposes. That it may do so upon its cross writ of error, is plain. *Field* v. *Barber Asphalt Co.*, 194 U. S. 618.

The grant of the right to lay water pipes upon the streets for the purpose of distributing water, found in the ordinance of October 3, 1889, purports to be nothing more than a grant of the right to occupy the streets of the city, with the distributing pipes of the Water Company. It was accepted and about $200,000 has been expended in the construction of the necessary works and the laying of its system of pipes under the streets. The assertion of the right to require the company, after so many years of occupation, to pay a monthly rental for the use of the streets, is grounded upon the claim that under the grant to the Eastmans it had obtained nothing more than a revocable license, and its occupation of the streets was, therefore, subject to be terminated at any time.

The right which is acquired under an ordinance granting the right to a water company to lay and maintain its pipes in the streets is a substantial property right. It has all of the attributes of property. It is assignable and will pass under a mortgage sale of the property and franchises of the company which owned it. Dillon's Mun. Corp.,

5th ed., § 1265; *Detroit* v. *Detroit Street Railway,* 184 U. S. 368, 395, 396; *Louisville* v. *Cumberland Tel. & Tel. Co.,* 224 U. S. 649, 661. *Detroit Railway Co.* v. *City of Detroit,* 64 Fed. Rep. 628. The grant was made in contemplation of the investment of large capital in the construction of a system of water works for the permanent supply of the city with water. The presumption is that no such enterprise would have been entered upon if the street easement was subject to immediate revocation. The city had the express power to provide its inhabitants and itself with water, under its legislative charter. It could not grant a corporate franchise to a water company. Neither did it undertake in this ordinance to enter into a contract for a supply of water for public or private purposes. What it undertook to do was to grant to those who proposed to construct and maintain works for that purpose the right to "lay and repair" their distributing pipes along the streets of the city. There is no limitation in the general law of the State, nor in the charter of the city, as to the duration of a contract granting an easement in the streets for that purpose, unless it be found in § 2710, Revised Statutes of Idaho, being § 2838, Revised Codes of Idaho. That statute is in these words:

"SEC. 2710. No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts, so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years."

The original grant of street rights was assignable on its face and was made to individuals. It was held in the case of *Jack* v. *Village of Grangeville,* 9 Idaho, 291, that the section above set out applied only to corporations. A

later ordinance granted similar rights to a corporation. The plaintiff in error has succeded to the rights of both. The ordinance of June 7, 1906 imposes the rental charge, called a "license fee," for the privilege granted by the ordinance of October 3, 1889, which was the grant to the Eastmans. But, if it be assumed that § 2710 limits the term of any contract or grant with any water company, corporate or otherwise, the most that can be said is, that such a grant for an indefinite term is thereby limited to a term of fifty years. There are cases which hold that when by law a municipality is prohibited from entering into a particular class of contracts, or from granting a franchise for a term longer than one specified, that a definite contract for a longer term than is permitted, is not effective even for the shorter statutory term: *Manhattan Trust Co.* v. *City of Dayton*, 59 Fed. Rep. 327. But this ordinance is indefinite in duration, and there is a substantial distinction between a contract which on its face shows a plain intent to grant and obtain more than is legal and a contract for an indefinite term. In the latter case the parties may be assumed as intending to grant or acquire no longer term than the law provides. The statute in the one case is openly and purposely defied and in the other, the term being indefinite, is limited by the statute. The distinction was noted and observed by District Judge Rogers in the case of *Old Colony Trust Co.* v. *City of Wichita*, 123 Fed. Rep. 762, which case was affirmed by the Circuit Court of Appeals, 132 Fed. Rep. 641; and by the Supreme Court of New York, in *People ex rel. Flatbush Gas Company* v. *Coler*, 54 N. Y. Miscellaneous Rep. 21, a case reversed upon another point. 190 N. Y. 268.

For the purposes of this case we need go no further than to hold, as we do, that the street easement was not a mere revocable license, and that if limited in time by § 2710, Revised Statutes of Idaho, that time had not expired when the ordinance of 1896 was passed. The plain effect

of this later ordinance was to impair the obligation of the contract resulting from the ordinance conferring the street easement. The court below erred, therefore, in instructing the jury to allow the counter-claim.

Coming now to consider the errors assigned by Boise City. Most of them have been withdrawn. Those which have been relied upon are.—

First: That the court should have instructed a verdict against the demand for water furnished for fire purposes, because the Water Company was under a statutory obligation to furnish water for such purposes to the city, free of charge.

Second: That the city cannot be made liable for water furnished for fire purposes in the absence of a preëxisting ordinance authorizing a contract for such a purpose.

The claim that the Water Company was under an obligation to furnish free water for fire purposes is rested upon the provisions of § 2711, Revised Statutes of Idaho, which provides that "all corporations formed to supply water to cities or towns . . . must furnish water to the extent of their means in case of fire or other great necessity, free of charge." This section had no application to individuals supplying water to cities and towns. *Jack* v. *Village of Grangeville*, 9 Idaho, 291. The original grant of street rights was to the Eastmans, who were individuals, and that easement was assigned in 1891 to the present corporation or its predecessors. In March, 1905, § 2711 was amended (and as amended is § 2839, Revised Codes of Idaho), so as to omit the requirement of free water for fire purposes by substituting the words, "and must also furnish water to the extent of its means in case of fire or other great necessity at reasonable rates established in the manner hereinafter specified."

The city may not object to the change in the obligation of the Water Company to supply free water. It was a burden which had been imposed by the State under

general law, applicable to all water companies, imposed solely for the benefit of the municipalities of the State. Such municipalities are mere emanations from the State, exercising such public power as the State chooses to grant. If such a provision in the general law of the State providing for the incorporation of water companies can be considered in any sense as constituting a contract, it was one to which the municipalities of the State were not parties, and we can imagine no constitutional reason why the State might not, if it sees fit, relieve even existing companies from the burden of such a law. The provisions of the original § 2711 were taken from the California statutes, and were held by the California courts not to impose any burden upon such companies that could not be removed without contravening the obligation of any contract within the prohibition of the Constitution. *Spring Valley Water Co.* v. *San Francisco*, 61 California, 18.

The "manner" of establishing reasonable rates is a requirement in the same section that rates were to be established by commissioners, two appointed by the city, two by the Water Company, and, in case of a disagreement, a fifth to be chosen by the four. The section provides that "the decision of a majority thus selected must fix and determine the rates to be charged *for all the purposes heretofore specified* for the ensuing three years from the date of such decision, *and until new rates* are established as herein provided." (Italics ours.) Revised Codes of Idaho, vol. 1, § 2839.

Prior to furnishing the water for fire purposes which constitutes the demand sued upon in this case, the commissioners provided for by the section above referred to were appointed and they agreed upon a schedule of charges for all purposes, whereby the charge for water for fire purposes was fixed at $3,000 per annum for fire hydrants "now in use and $3.50 monthly for such additional hydrants hereafter established." This schedule of rates

was not changed or modified, so far as here appears, during the period covered by the account of the Water Company in suit, and by the terms of § 2839, Revised Codes, continued in force for three years "and until new rates should be established." The claim that the plaintiff in error, the Water Company, was under obligation to furnish free water, is wholly without merit.

The second defense was that there was no ordinance or contract touching the furnishing of water for fire purposes, and, therefore, the Water Company had no right of action.

The city, both under its charter and the general law of the State, had power to obtain a water supply for both general and fire purposes. Companies undertaking to supply cities with water were required, when the claim here involved arose, to furnish water at "reasonable rates" to be determined by commissioners. The city joined in the appointment of the commissioners which fixed the rates for fire purposes in the schedule agreed upon in July, 1905. In August of the same year, the commissioners filed a supplementary report defining the service to be rendered in furnishing water for fire purposes, in which, among others, were these conditions:

a. Hull's Gulch reservoir was to be kept filled with water.

b. A steam pressure of not less than sixty pounds was to be maintained at the boilers and pumps at the pumping station.

c. A fire alarm system outside the city limits was to be paid for, and maintained by the Water Company.

d. The plant to be kept at all times in condition for effective service in case of fire, and frequent tests made of the hydrants on the streets, defects discovered to be reported to the mayor.

That this report and the schedule of rates and charges were never adopted by the city council is of no moment. They were reported to the city and were effective by the

terms of § 2839, Revised Codes of Idaho, when agreed to by a majority of the commissioners, for a term of three years and until new rates should be established. From August 1, 1905 to May 1, 1906, the city paid the monthly rates fixed by the schedule, but from that date it refused to pay and gave notice that it would pay no longer. But there was evidence that the Water Company denied the city's right to refuse to take water upon the notice given, and continued to maintain its service and to furnish water, and that the city continued to use the water for fire purposes.

The trial judge upon the legal effect of the continued use of water by the city for fire purposes, charged the jury as follows:

"If you find that the City, through the fire department, and with the knowledge of the responsible and governing officers of the City, that is, the city council and the mayor, continued to maintain these hydrants for fire purposes, and from time to time as there was need continued to use the water therefrom and required the company to connect its mains with other hydrants—there is some testimony to the effect that eleven additional hydrants were installed at the instance of the city, and connected with the Company's mains,—in other words if you find from all of the evidence in the case that the City, through its responsible officers, the city council and the mayor, continued to maintain these hydrants and use them as there was need, and take water from the company's mains, *the water company's mains*, as there was need therefor, if this was done knowingly, I say, then there arises by implication of law what we call an implied contract on the part of the city to pay for the water, and in this case an implied obligation to pay in accordance with the schedule rates. In other words, the Water Company here stood in the position of a merchant or other person having goods to sell, with the prices thereof quoted. If you go and order an article with

price so quoted you do so with the implied agreement and the obligation upon your part to pay for the article the price at which it is offered for sale. So here the Water Company stood in the position of having water for sale, for culinary purposes, for use in business buildings, for sprinkling lawns, and for fire purposes, and if a private person took this water and used it he would do so with the implied understanding that he would pay for it at the rate quoted, and, if the City took it, it took it with the implied understanding and imposed obligation to pay for it in accordance with the rates quoted."

The notice the city gave on May 10, 1906 was at best vague and indefinite. It was a notice "to discontinue the extra pressure maintained for fire purposes, as the city would pay no further bills for this service from this date." The Water Company responded that "they should continue to furnish the additional pressure of water for fire purposes." No further action was taken by the city council subsequent to that date. But under the charge and the verdict we must assume that the Water Company did continue to maintain the pressure for fire purposes and to comply with all of the other conditions imposed by the supplementary report of the rate commissioners, and that the city continued to use the fire hydrants supplied with water by the Water Company. That the city paid no more bills after May, 1906, is true. But if its notice meant that it would no longer receive or use the company's water for fire purposes, it said one thing and did the other.

In view of the provisions of § 2839, Revised Codes of Idaho, and the action of the city under the report of the commissioners appointed by law to determine a reasonable rate for water furnished for fire and other purposes, and the conduct of the parties thereafter, there was evidence justifying a finding by the jury of a contract to supply water for fire purposes.

There was no error in the charge of the court set out above, nor in any other part of the charge of which the city can complain. Nor do we think the court erred in denying the special charges asked by the city. Its several assignments of error are overruled.

For the error in holding the ordinance of June 7, 1906, valid in law, and directing that from the amount found to be due to the Water Company there should be deducted the amount of the counterclaim of the city,

The judgment is reversed and the case remanded for further proceedings in accordance with this opinion.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, *v.* BOISE CITY. (NO. 2.)

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 313. Argued May 7, 8, 1913.—Decided June 16, 1913.

Where jurisdiction of the Circuit Court is invoked wholly on diverse citizenship but in the course of the case a constitutional question arises, the unsuccessful party may bring the case direct to this court under § 5 of the Judiciary Act of 1891 or, at his election, he may carry it to the Circuit Court of Appeals which may either certify the question to this court or decide it.

The Judiciary Act of 1891 does not contemplate two reviews in cases in which jurisdiction of the Circuit Court is invoked wholly on diverse citizenship even as to the constitutional questions which may arise, and the judgment of the Circuit Court of Appeals deciding such a case is final.

Writ of error to review 186 Fed. Rep. 705, dismissed.

THE facts, which involve the jurisdiction of this court of appeals from the Circuit Court of Appeals under the Judiciary Act of 1891, are stated in the opinion.

Mr. Richard H. Johnson, with whom *Mr. Richard Z. Johnson* was on the brief, for plaintiff in error.

Mr. Charles C. Cavanah and *Mr. Charles F. Reddoch*, with whom *Mr. John J. Blake* and *Mr. John F. Maclane* were on the brief, for defendant in error.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a writ of error seeking to review a judgment of the Circuit Court of Appeals of the Ninth Circuit, reversing and remanding for a new trial a judgment of the Circuit Court for the District of Idaho, for "license fees" or rentals claimed to be due to Boise City under ordinance No. 678, which had accrued prior to the claim involved in cases Nos. 573 and 639, argued with this case and disposed of by an opinion just handed down.

This writ of error must be dismissed. The jurisdiction of the Circuit Court, as shown by the plaintiff's pleading, depended upon diversity of citizenship, and upon that ground the Water Company removed the action from the state court to the Circuit Court of the United States. One of the defenses of the Water Company, asserted in its answer, was that it had by purchase and agreement succeeded to grants to street easements which had not expired, and that ordinance No. 678 of June 7, 1906, imposing upon it a license fee or rental for the use and occupation of the streets of the city with its pipes and appliances for the distribution of water, was in derogation of the street rights theretofore granted, and void as in contravention of Article I, § 10 of the Constitution of the United States, and in violation of the Fourteenth Amendment thereto. This claim was denied and the ordinance held valid. Upon that and other issues in the case the Circuit Judge found for the plaintiff, the facts being stipulated and a jury waived. The case was therefore one

in which jurisdiction had been invoked wholly upon diversity of citizenship, but in the course of the case there arose a question as to the constitutionality of the ordinance which was the foundation of the plaintiff's right. The unsuccessful party had, therefore, a right to bring the case direct to this court, or, at its election, carry it to the Circuit Court of Appeals. It elected the latter course. The Circuit Court of Appeals might have certified the question to this court, or it might decide it along with the other questions in the case. But from its judgment no writ of error will lie to this court, as the Judiciary Act of 1891 does not contemplate two reviews, one by the Circuit Court of Appeals and another by this court in such cases. *Robinson* v. *Caldwell*, 165 U. S. 359; *Loeb* v. *Columbia Township*, 179 U. S. 472; *Macfadden* v. *United States*, 213 U. S. 288.

For this reason the writ of error must be dismissed.

OLD COLONY TRUST COMPANY *v.* CITY OF OMAHA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 754. Argued February 27, 28, 1913. Reargued April 10, 11, 1913. —Decided June 16, 1913.

A municipality, being a creature of the State, derives its powers from the laws thereof, and is within the influence of the decisions of the State's court of last resort.

Under the laws of Nebraska, as construed by the highest courts of that State, municipalities had the power in 1884 of granting licenses to use the streets for public business; and, in the absence of specific lim-

itation of duration, such licenses were in perpetuity and conveyed rights of property within the protection of the contract clause of the Constitution of the United States.

Such grants are subject to reasonable police power of the State and forfeitable for acts of abuse or non-user; but they cannot be taken away or impaired arbitrarily.

Decisions of the highest court of the State relating to such matters of local law as the construction of the constitution and statutes of the State and the powers of its municipalities, are controlling upon this court, so long as their application involves no infraction of rights secured by the Constitution of the United States.

In the absence of any controlling statute, this court will not give any greater effect to the syllabus of a case decided by the highest court of a State and reported in the official reports of that court than is given thereto in the courts of the State.

A provision in an ordinance that the grantee of a franchise to use the streets of a municipality may be required to remove therefrom what it has placed therein under the franchise when necessity demands, *held*, in this case, not to be an intention to limit the franchise to the corporate existence of the grantee.

An ordinance, not based upon necessities of the municipality, requiring an electric light company to remove its poles and wires *held*, in this case, to be an arbitrary impairment of the contract of the original ordinance granting the right in perpetuity and therefore void because unconstitutional under the contract clause of the Constitution of the United States.

Quære what is the exact meaning of the phrase "general electric light business" as used in an ordinance granting a franchise to a corporation for that purpose, and whether it includes distribution of electricity for power and heat.

The practical interpretation of a contract by the parties thereto for a considerable period before a controversy arises is of great, if not controlling, influence; and this rule is applicable in Nebraska as in the nature of estoppel.

Acquiescence by the municipality in the extension of a franchise for electric light to distribution of electricity for power and heat evidenced, as in this case, by collection of taxes imposed on receipts therefrom and the purchase by the city of current for power, *held*, to entitle those who had advanced money on the security of the franchise to insist upon the recognition and continuation of the right of the corporation to supply electricity for power and heat as well as light; and an ordinance requiring the corporation to discontinue

such distribution of heat and power is void under the contract clause of the Constitution of the United States.

A judgment against a corporation construing its franchise is not *res judicata* as against a mortgagee who was not a party to the suit and whose rights were acquired prior to the commencement of the suit in which the judgment was entered.

THE facts, which involve the construction of ordinances of the city of Omaha, Nebraska, granting franchises for distribution of electric current, the extent of the rights thereunder and the effect of subsequent ordinances thereon and the constitutionality of the latter under the contract clause of the Constitution of the United States, are stated in the opinion.

Mr. William D. McHugh for appellant:

The ordinance in question granted to the New Omaha Thomson-Houston Electric Light Co. or assigns, a right of way over the streets of the city of Omaha for the purposes named "in perpetuity." For views as to the nature of the right "in perpetuity," see *Am. Water Works Co.* v. *State*, 46 Nebraska, 194; *Potwin Place* v. *Topeka Ry. Co.*, 51 Kansas, 609; *Fellows* v. *Los Angeles*, 151 California, 52; *Nebraska Tel. Co.* v. *City of Fremont*, 72 Nebraska, 25; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *State* v. *Neb. Tel. Co.*, 17 Nebraska, 126; *State* v. *S. C. & P. R. R. Co.*, 7 Nebraska, 374.

The circumstances attending the passage of the ordinance in question negative the idea that the grant of the right of way was for a limited term.

The provision in the ordinance in question to the effect that whenever the city council shall, by ordinance, declare the necessity of removing from the public streets of the city of Omaha, the telegraph, telephone or electric poles, the grantee company shall, within sixty days from the passage of the ordinance, remove its poles from such streets and alleys, was not a reservation of a power to

terminate at will the grant of the right of way. *New Orleans* v. *Great So. Tel. Co.*, 40 La. Ann. 41; *Louisville* v. *Cumberland Tel. Co.*, 224 U. S. 649; *Northwestern Tel. Co.* v. *Minneapolis*, 81 Minnesota, 140.

A public service corporation may accept a grant of a right of way for a period longer than its corporate existence. *Detroit* v. *Citizens' St. Ry. Co.*, 184 U. S. 368.

As the ordinance in question granted a right of way in terms which expressly recognize the right of assignment, and without limitation as to time and with no reservation of power in the city to alter or revoke the same, under general principles of law the grant of the right of way to the company or assigns was in perpetuity. *Blair* v. *Chicago*, 201 U. S. 400; *Morristown* v. *East Tenn. Tel. Co.*, 115 Fed. Rep. 304; *Citizens' Ry. Co.* v. *Detroit Ry. Co.*, 171 U. S. 48; *Detroit* v. *Citizens' St. Ry. Co.*, 184 U. S. 368; *People* v. *O'Brien*, 111 N. Y. 1; *Turnpike Co.* v. *Illinois*, 96 U. S. 63; *Louisville* v. *Cumberland Tel. Co.*, 224 U. S. 649.

It is the settled law of Nebraska, evidenced by a series of decisions by the Supreme Court of that State, that an ordinance such as the one in question grants to the company named, on acceptance, a right of way in perpetuity, and that cities in Nebraska have power to make such grants in perpetuity. *Plattsmouth* v. *Nebraska Tel. Co.*, 80 Nebraska, 460; *Nebraska Tel. Co.* v. *Fremont*, 72 Nebraska, 25; *Sharp* v. *South Omaha*, 53 Nebraska, 700; *State* v. *Citizens' St. Ry. Co.*, 80 Nebraska, 357; *State* v. *Lincoln Street Ry. Co.*, 80 Nebraska, 333.

All departments of the State have accepted this rule of law.

The charter powers of the city of Omaha, in 1884, were as broad as were the charter powers of those cities which the Supreme Court of Nebraska held were authorized to grant such a right of way in perpetuity.

The bondholders represented by complainant, purchased

their bonds with knowledge of and in reliance upon the law of Nebraska as announced by its Supreme Court, to the effect that the city of Omaha had, under its charter, authority to grant the right of way in perpetuity, and that by such ordinance there was granted such a right of way in perpetuity.

The law of the State of Nebraska as declared by its Supreme Court construing the powers of cities under the statutes of that State and construing the effect of ordinances passed by such cities pursuant to such charter authority, entered into and became part of the contract evidenced by the ordinance in question and its acceptance. *Brine* v. *Ins. Co.*, 96 U. S. 634; *Edwards* v. *Kearzey*, 96 U. S. 595; *Gulf and Ship Island R'd Co.* v. *Hewes*, 183 U. S. 71.

Where, upon the faith of a state decision affirming the validity of contracts made or bonds issued under a statute, other contracts have been made or bonds issued under similar statutes, neither the legislature nor the judiciary of a State can modify the law so as to impair the obligation of the contract previously made. *Loeb* v. *Columbia Township*, 179 U. S. 472; *Taylor* v. *Ypsilanti*, 105 U. S. 71; *Wade* v. *Travis Co.*, 174 U. S. 499; *Wilkes County* v. *Coler*, 180 U. S. 506.

The distribution and sale of electric energy to be utilized for power and heat purposes, is included within the expression "general electric light business" for the transaction of which the right of way was granted.

This is evidenced by the literature, scientific and popular, showing the state of the art of electric lighting in 1884.

The city of Omaha and the company operating the plant under the ordinance in question have, for more than twenty years, in carrying out the provisions of the ordinance, uniformly placed a practical construction upon the said ordinance, interpreting the same to mean that the company had the right thereunder to distribute elec-

tric energy for power and heat purposes. *Atty. Gen.* v. *Drummond*, 1 Dru. & Wall. 353; *Brown* v. *United States*, 113 U. S. 570; *Chicago* v. *Sheldon*, 9 Wall. 50; *Clark's Turnpike Co.* v. *Commonwealth*, 96 Kentucky, 525; *Columbia* v. *Gallagher*, 124 U. S. 510; *Insurance Co.* v. *Dutcher*, 95 U. S. 269; *New York* v. *Starin*, 106 N. Y. 1; *Mobile* v. *Louisville & N. R. R. Co.*, 84 Alabama, 115; *Gas Light Co.* v. *St. Louis*, 46 Missouri, 121; *School District* v. *Estes*, 13 Nebraska, 53; *State* v. *Cass Co.*, 60 Nebraska, 566; *United States* v. *Hill*, 120 U. S. 180; *United States* v. *Moore*, 95 U. S. 763; *United States* v. *Burlington R. R. Co.*, 98 U. S. 341.

The city of Omaha, by its legislation and acts during twenty years, has become and is estopped to deny the right of the company operating the plant, to distribute through its system, electric current for power and heat purposes as and to the extent it was doing when the resolution complained of was passed. *Omaha St. Ry. Co.* v. *Omaha*, 90 Nebraska, 6; *State* v. *Citizens' St. Ry. Co.*, 80 Nebraska, 357; *State* v. *Lincoln Street Ry. Co.*, 80 Nebraska, 333.

The decision in the case brought by the Omaha Electric Light and Power Company cannot affect the decision in this cause, since neither the bondholders nor their trustee were parties to that litigation. *Keokuk & Western Rd.* v. *Missouri*, 152 U. S. 301; *Louisville Trust Co.* v. *Cincinnati*, 76 Fed. Rep. 296.

Mr. Benjamin S. Baker, with whom *Mr. William C. Lambert*, *Mr. John A. Rine* and *Mr. L. J. TePoel*, were on the brief, for appellee:

Appellant has not pleaded or proved sufficient to entitle it to maintain the action.

Ordinance 826 was not a perpetual grant to the grantee. *Omaha Electric Light Co.* v. *Omaha*, 179 Fed. Rep. 455. No necessity existed for a perpetual grant. *Blair* v. *Chi-*

cago, 201 U. S. 400, 505; *Railroad Co.* v. *Logansport*, 114 Fed. Rep. 688; *Pennsylvania R. R. Co.* v. *Canal Commissioners*, 21 Pa. St. 9, 22; *Rock Island* v. *Central Telephone Co.*, 132 Ill. App. 248; *People* v. *Central Telephone Co.*, 232 Illinois, 260; *People* v. *Chicago Tel. Co.*, 220 Illinois, 238; *Snell* v. *Chicago Railroad Co.*, 236 Illinois, 413; *Telephone Co.* v. *Telephone Co.*, 118 Kentucky, 277; *Louisville Trust Co.* v. *Commonwealth*, 76 Fed. Rep. 296.

The municipal authorities were without power to make a perpetual grant. Section 16, Art. 1, Const. Nebraska; *Bank of Augusta* v. *Earle*, 13 Peters, 227; *Birmingham* v. *Railway*, 99 Alabama, 464; *Mobile* v. *Railroad Co.*, 84 Alabama, 115; McQuillan Mun. Ord., § 200; *San Antonio Traction Co.* v. *Altgeldt*, 200 U. S. 304.

The legislature of the State had not authorized the municipal authorities to make a perpetual grant. Section 15, Chap. 10, Laws Nebraska 1883, p. 89; Subd. 8, § 15, Chap. 10, Laws Nebraska, p. 90; *Ottawa* v. *B. S. Carey*, 108 U. S. 112; *Rhinehart* v. *Redfield*, 93 App. Div. (N. Y.) 410; *Jackson R. R. Co.* v. *Interstate Railroad Co.*, 24 Fed. Rep. 306; *Barnett* v. *Dennison*, 145 U. S. 135; *Railroad* v. *Logansport*, 114 Fed. Rep. 688; *Artesian Water Co.* v. *Boise City*, 123 Fed. Rep. 232; *Water Co.* v. *Hutchinson*, 207 U. S. 385; *People's R. R. Co.* v. *Memphis R. R. Co.*, 10 Wall. 38; *Water Co.* v. *Freeport*, 180 U. S. 587; *Water Co.* v. *Danville*, 180 U. S. 619; *Water Co.* v. *Fergus*, 180 U. S. 624; *Water Co.* v. *Knoxville*, 189 U. S. 434; *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265; *Marshall* v. *Wyandotte Gas Co.*, 127 Pac. Rep. 639; *Woodland* v. *Leach*, 127 Pac. Rep. 1040.

The Supreme Court of Nebraska has not decided that city authorities with charter powers similar to those of Omaha at the time are vested with authority to make a perpetual grant. *Brown* v. *Holliday*, 34 Nebraska, 232; *Nebraska Telephone Co.* v. *Fremont*, 72 Nebraska, 25;

Plattsmouth v. *Telephone Co.*, 80 Nebraska, 460; *Sharp* v. *South Omaha*, 53 Nebraska, 700; *State* v. *Lincoln Street Railway Co.*, 80 Nebraska, 333; *State* v. *Citizens' Street Railway Co.*, 80 Nebraska, 357.

The life of the grant was limited by the life of the grantee. *Blair* v. *Chicago*, 201 U. S. 400, 505; *Detroit* v. *Citizens' Railway Co.*, 184 U. S. 388, 395; *St. Louis* v. *Laclede Gas Light Co.*, 102 Missouri, 472; *Turnpike Co.* v. *Illinois*, 96 U. S. 63; *Electric Light Co.* v. *Wyandotte*, 126 Michigan, 43; *Rock Island* v. *Central Telephone Co.*, 132 Ill. App. 248; *Virginia Road Co.* v. *People*, 22 Colorado, 429; *People* v. *Central Tel. Co.*, 232 Illinois, 260; *People* v. *Chicago Telephone Co.*, 220 Illinois, 238; *Snell* v. *Chicago*, 133 Illinois, 413; *Venner* v. *Chicago City R. Co.*, 236 Illinois, 349; *Telephone Co.* v. *Telephone Co.*, 118 Kentucky, 277; *Louisville Trust Co.* v. *Cincinnati*, 76 Fed. Rep. 296; *Lake Roland Elevated R. Co.* v. *Baltimore*, 77 Maryland, 352; *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649.

The reservation in the grant should control against the claim of perpetuity. *Telephone Co.* v. *Richmond*, 44 C. C. A. 147; *Gas Light Co.* v. *Hamilton*, 146 U. S. 258; *Stein* v. *Bienville Water Co.*, 141 U. S. 67; *Bridge Co.* v. *United States*, 105 U. S. 470.

Ordinance 826 did not authorize its grantee to distribute current for power.

The city of Omaha has never practically or otherwise construed the grant to mean or to authorize the distribution of current for power. *Electric Co.* v. *Cleveland*, 204 U. S. 116; *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 496; *People* v. *Deehan*, 153 N. Y. 528; *Citizens' Fire Ins. Co.* v. *Doll*, 35 Maryland, 89; *Railroad Co.* v. *Trimble*, 10 Wall. 367; *Morris* v. *Thomas*, 57 Indiana, 316; *State* v. *Cass County*, 60 Nebraska, 66; *School District* v. *Estes*, 13 Nebraska, 52; *Hale* v. *Shehan*, 52 Nebraska, 184; *Water Co.* v. *Hutchinson*, 207 U. S. 385; Abbott, Municipal Corpora-

tions, § 907; *Chicago Railway Co.* v. *Elliot*, 88 Fed. Rep. 941; *Scranton Electric Co.'s Appeal*, 122 Pa. St. 154, 15 Atl. Rep. 446.

The city of Omaha has never estopped itself to deny the company the right to distribute current for power. *Crary* v. *Dye*, 208 U. S. 515; *Louisville Trust Co.* v. *Cincinnati*, 76 Fed. Rep. 296; *Detroit* v. *City Railway Co.*, 56 Fed. Rep. 867; *Mobile* v. *Sullivan Timber Co.*, 129 Fed. Rep. 298; *Philadelphia Mortgage Co.* v. *Omaha*, 63 Nebraska, 280; *Brant* v. *Virginia Coal Co.*, 93 U. S. 326; 1 Story, Equity, 391; *State* v. *Lincoln Railway Co.*, 80 Nebraska, 333; *State* v. *Citizens' Railway Co.*, 80 Nebraska, 357; *Omaha Railway Co.* v. *Omaha*, 90 Nebraska, 6.

Appellant is concluded by the adjudication in the case of *Omaha Electric Light and Power Co.* v. *Omaha*. *Keokuk Western R. R. Co.* v. *Missouri*, 152 U. S. 313; *Louisville Trust Co.* v. *Cincinnati*, 76 Fed. Rep. 296; *Mumma* v. *Potomac Co.*, 8 Peters, 102; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574; *New Orleans Water Co.* v. *Louisiana*, 185 U. S. 336; *Duluth* v. *Gas and Water Co.*, 45 Minnesota, 210; *Minneapolis* v. *Street Railway Co.*, 215 U. S. 417; *Calder* v. *People*, 218 U. S. 591; *S. C.*, 115 Michigan, 724.

Mr. Justice Van Devanter delivered the opinion of the court.

The principal questions presented by this suit are, first, whether the Omaha Electric Light and Power Company, which will be spoken of as the Electric Company, has a subsisting franchise to occupy and use the streets, alleys and public grounds of the city of Omaha, Nebraska, in the distribution of electric current, and, second, whether, if so, the franchise is limited to the distribution of such current for lighting purposes or includes its distribution for power and heating purposes. If there be a franchise it rests

primarily upon the following ordinance adopted by the council of the city in December, 1884:

"The New Omaha-Thompson-Houston Electric Light Company or assigns, is hereby granted right of way for erection and maintenance of poles and wires with all the appurtenances thereto, for the purpose of transacting a general Electric Light business, through, upon and over the streets, alleys and public grounds of the City of Omaha, Neb., under such reasonable regulations as may be provided by ordinance: *Provided*, That said company shall at all times, when so requested by the city authorities, permit their poles and fixtures to be used for the purpose of placing and maintaining thereon any wires that may be necessary for the use of the Police or Fire Department of the city; *and further provided*, such poles and wires shall be erected so as not to interfere with ordinary travel through such streets and alleys; *and provided*, that whenever it shall be necessary for any person to move along or across any of said streets or alleys any vehicle or structure of such height or size as to interfere with any poles or wires so erected, the company using and operating such poles and wires shall, upon receiving twelve hours' notice, thereof, temporarily remove such poles and wires from such place as must necessarily be crossed by such vehicle or structure; *and provided further* that whenever the city council shall by ordinance declare the necessity of removing from the public streets or alleys of the City of Omaha, the telegraph, telephone or electric poles, or wires thereon constructed or existing, said company shall, within sixty days from the passage of such ordinance, remove all poles and wires from said streets and alleys by it constructed, used or operated."

The Thompson Company, to which the grant was made, was not then incorporated, but was subsequently incorporated under the laws of Nebraska for a term which was to expire September 26, 1905. It accepted the grant,

constructed and put into operation a central generating station and an extensive distributing system, and thereby placed itself in a position to supply electric current to those desiring to use it. At first the current was used almost exclusively for lighting purposes, but it came gradually to be used for power and heat, and in a few years the Thompson Company held itself out as distributing current for all three purposes. The generating plant was enlarged and improved from time to time, and the distributing system extended and adjusted, to meet the increasing demand for current for power and heat as well as for light. In 1903 the entire plant and all rights under the ordinance were transferred by the Thompson Company to the Electric Company, and the business established by the former has since been conducted in increasing volume by the latter. In 1891 the gross earnings from current for lighting purposes was $104,646.63 and for power and heat $4,237.67. In 1903 these figures had increased to $261,421.89 and $50,390.11, respectively, and in 1908 to $563,447.57 and $130,537.72. By a series of ordinances, beginning in 1892, the city regulated in material ways the business of the two companies, each in turn, in distributing current for the three purposes, and by ordinances adopted in 1902 and 1904 the city required all their wires within designated districts, whether the current was used for light or for power or heat, to be placed in underground conduits, the ordinances being duly obeyed at a cost of $479,215.00. After March 4, 1902, the two companies, each in turn, were required to pay, and did pay, to the city three per cent. of the gross earnings from their business, including the receipts from the use of current for power and heat. The city also became and remained a purchaser of current in substantial quantities, to be used for power purposes.

In these and various other ways disclosed by the record the city acquiesced in, encouraged and directly sanctioned

the action of the two companies in successively equipping and adjusting the electric plant, at great expense, for the distribution of current for power and heat, knowing that they were engaging therein under a claim of right under the ordinance of 1884. Fifteen circuits were established to supply the current for those purposes exclusively. Prior to May 26, 1908, no objection whatever was made by the city to the use of the streets, alleys and public grounds for those purposes, but, on the contrary, it was satisfied and content therewith. On that day the city council, to use the words of the city's answer, "elected to terminate" that use and passed the following resolution, which was approved by the mayor:

"Resolved by the City Council of the City of Omaha, the Mayor concurring, that the City Electrician be and he is hereby ordered and directed to disconnect, or cause to be disconnected on or before July 1st, 1908, all wires leading from the conduits or poles of the Omaha Electric Light and Power Company transmitting electricity to private persons or premises to be used for heat or power; and to take such steps as may be necessary to prevent the said Omaha Electric Light and Power Company from furnishing or transmitting from the conduits or wires electricity to private persons or premises for heat or power purposes."

This suit is prosecuted by the Old Colony Trust Company, a Massachusetts corporation, against the city of Omaha, to enjoin the enforcement of that resolution. The trust company is the trustee in a mortgage executed in 1903 by the Electric Company upon all of its property, including its rights under the ordinance of 1884, to secure the payment of upwards of $2,000,000 of bonds issued by it in 1903 and 1904. The claim of the trust company, as set forth in the bill, is that the resolution of 1908 is a law of the State impairing the obligation of the contract resulting from the ordinance of 1884 and the action of the

parties in interest thereunder, on the faith of which contract the bonds were purchased by their several holders, and that the resolution is therefore void, because repugnant to § 10 of Article I of the Constitution of the United States.

The first question to be considered is, whether the privilege or franchise granted by the ordinance of 1884 is still subsisting, because if it has expired it will not be necessary to inquire whether it and the action of the parties thereunder resulted in any contractual rights respecting the use of the streets of the city in the distribution of current for power and heating purposes.

What was the life or duration of the privilege granted by the ordinance? Was it in perpetuity or for the corporate existence of the grantee? There is no claim, nor could there reasonably be, that it was during the pleasure of the city, or revocable at will. The trust company contends that it was a grant in perpetuity, and the city that it was for the corporate existence of the grantee. While the arguments have taken a wide range, it is of first importance to give attention to the statutes and decisions of Nebraska, because the city, being a creature of that State, derives its powers from the laws thereof and is necessarily within the influence of the decisions of the State's court of last resort.

By the charter of the city in force at the time, the city council was charged with "the care, management, and control of the city" and was given power "to provide for the lighting of streets" and "to care for and control . . . streets, avenues, parks, and squares within the city." Act of February 21, 1883, Laws 1883, p. 89, c. 10, § 15, subdivs. 8, 24.

In *Sharp* v. *South Omaha*, 53 Nebraska, 700, 705, the Supreme Court of the State had occasion to consider similar charter provisions and to determine whether and for what time they authorized the city council to grant

a franchise to use the streets for supplying gas to the people of the city. It was held that there was "an ample grant of power, unqualified as to persons, method or time, to regulate the laying down of mains, the sale and use of gas, and the rate to be charged therefor."

In *Nebraska Telephone Co.* v. *Freemont*, 72 Nebraska, 25, 29, there was involved a grant by the city council, under like charter provisions, to the Freemont Telephone Company, an unincorporated association, of the right to erect and maintain telephone poles and wires in the streets of the city, the ordinance being silent as to the life of the grant. The court said: "By the terms of the ordinance, there was a grant to the association, in perpetuity, of a right of way or easement over all its public ways, without restriction or limitation."

State ex rel. v. *Lincoln Street Railway Co.*, 80 Nebraska, 333, 343, involved the construction of an act (February 15, 1877, Laws 1877, p. 135) relating to the acquisition of a street franchise for a street railroad company. The act provided for the submission to the electors of the simple question whether the grant should be made through particular streets, which were required to be designated in the articles of incorporation and in the notice of the election, and also provided that if the consent of the electors was given, the railroad company could proceed with the construction and operation, "subject to such rules and regulations as may be prescribed by ordinance of such city." The act said nothing about the duration of the right. The court said: "This consent of the electors, when legally given to a legal proposition submitted to them, constitutes, in our view, a grant of a right of way on and over the streets named in the articles of incorporation and in the notice for the election, and confers upon the railway company an easement in the street which is irrevocable after the company has, within a reasonable time, acted upon the permission given and constructed

its lines of road." To the same effect is *State ex rel* v. *Citizens Street Railway Co.*, 80 Nebraska, 357, 360.

In *Plattsmouth* v. *Nebraska Telephone Co.*, 80 Nebraska, 460, 466, there was brought in question the right of a telephone company under an ordinance granting to it, its successors and assigns, the right of way for the erection and maintenance of poles and wires through the streets, alleys and public grounds of the city. The provisions of the city charter were substantially like those here. The power of the city to grant the right, or to make it more than a right revocable at will, was challenged, but the court denied both branches of the contention, saying: "Under the general power given to the plaintiff [the city] by its charter and the general control which it exercises over the streets and public grounds of the city, its right to extend to the defendant the privilege of occupying its streets and public grounds cannot be questioned," citing *Nebraska Telephone Co.* v. *Freemont*, *supra*. The city had passed an ordinance, not grounded upon any matter of necessity, requiring the poles and wires to be removed from some of the streets, and the court pronounced that ordinance invalid.

But while these decisions take an uniform view of the power of the cities of the State and of the effect of their action in cases such as this, and show that the grant made by the ordinance of 1884 must be regarded as in perpetuity, they also show that such grants are deemed and held by that court to be ever subject to the full exertion of the police power of the State in respect of the rates to be charged, the mode of conducting the business, and the character and quality of the service rendered. And it is further held that the public nature of the grant explains and justifies it, and that it is forfeitable for acts of abuse, abandonment or nonuser, but cannot be taken away or impaired arbitrarily.

But it is said that this grant cannot be held to be in

perpetuity, because to do so is to bring it in conflict with § 16 of art. 1 of the state constitution, which declares that "no law making any irrevocable grant of special privileges or immunities shall be passed," and this contention is made although it is conceded, as it must be, that the grant is not exclusive and does not prevent the city from making like grants to others or from establishing and operating a competing municipal plant. The contention is answered and shown to be untenable by the decision of the Supreme Court of the State in *Plattsmouth* v. *Nebraska Telephone Co., supra,* from which we excerpt the following (p. 464):

"The argument upon which it attempts to maintain the invalidity of the statute [ordinance] is as follows: Section 15, art. III of our constitution, prohibits the legislature from passing local or special laws granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever; and it is said that the legislature cannot delegate to a municipality a power which it cannot itself exercise. It is claimed that the ordinance in question is an attempt to grant to the defendant a special privilege or franchise, and that this is beyond the power of the municipal authorities. If we should concede (which we do not) that a general law, granting to cities and towns the powers which are usually found in their charters, did not confer upon such municipalities the power to pass and enforce special ordinances suited to their local conditions, still the ordinance in question is not subject to the criticism made upon it. A special privilege in constitutional law is a right, power, franchise, immunity or privilege granted to, or vested in, a person or class of persons to the exclusion of others and in derogation of common right. . . . Ordinance No. 91 does not attempt to confer upon the defendant any exclusive right or franchise, and leaves it open for the city, at any time, to extend to other companies or corporations the same privileges awarded to the defendant. The conten-

tion, therefore, that ordinance No. 91 is void and confers no right upon the defendant cannot be sustained."

To the state decisions here cited, counsel for the city interposes the objection that they are not well grounded and that some of them go beyond what is expressed in the syllabus. We need not say more of the first branch of the objection than that as the decisions relate to matters of local law, namely, the construction of the state constitution and statutes and the powers of local municipal corporations, they must be regarded by us as controlling, when their application involves no infraction of any right granted or secured by the Constitution of the United States. Such an infraction is not suggested, nor could it reasonably be. The other branch of the objection is not based upon any statute or rule of court in Nebraska, giving controlling effect to the syllabus. At most it rests upon a statement in *Holliday* v. *Brown*, 34 Nebraska, 232, respecting "an unwritten rule" to that effect, but what was said upon the subject in that case has been so pointedly criticised and so far restrained in *Williams* v. *Miles*, 68 Nebraska, 463, 479, that it is not controlling. Of course, it ought not to be given greater effect here than in the courts of the State.

We have seen that the ordinance of 1884 contained the following reservation or qualification: "That whenever the city council shall by ordinance declare the necessity of removing from the public streets or alleys of the City of Omaha the telegraph, telephone or electric poles, or wires thereon constructed or existing, said company shall, within sixty days from the passage of such ordinance, remove all poles and wires from said streets and alleys by it constructed, used or operated." It is claimed that this militates against the theory that the grant was in perpetuity and indicates, notwithstanding the state decisions before cited, that it was intended to endure only during the corporate existence of the grantee. We think the

suggestion is without force and that the reservation or qualification has no bearing upon the question whether the franchise was perpetual or for the life of the grantee. The term for which it was granted depends upon other considerations, for the reservation or qualification applies with equal force whether the term be one or the other. What is meant undoubtedly is that whenever there is public necessity for removing the poles and wires from the streets and alleys the council shall have power by ordinance to require that that be done. It is not claimed that the ordinance of 1908 was grounded upon any such necessity. The existence of one is not recited in the ordinance, is not alleged in the city's answer, and is not shown by the evidence. In this aspect, then, the case is like that in *Plattsmouth* v. *Nebraska Telephone Co., supra,* where the Supreme Court of the State said (p. 466): "That the rights of the defendant in the streets of the city must yield to public necessity . . . is beyond question or dispute; but, having acquired a right in the streets, and having made expenditures on the strength of the grant extended by the city, the authorities are quite uniform that this right cannot be taken away in an arbitrary manner and without reasonable cause."

Concluding, as we do, that the franchise has not expired but is still subsisting, we come to the question whether it is limited to the distribution of electric current for lighting purposes or includes its distribution for power and heat.

This question has been elaborately discussed at the bar and in the briefs, and the record contains a large volume of evidence taken for the purpose of shedding light, as is said, upon what commonly was understood, when the ordinance was adopted, as "a general electric light business," that being the phrase used to designate the purpose for which the street franchise was granted. We do not find it necessary to enter upon an original consider-

ation of the meaning of that phrase or of the rules which ordinarily would be applicable in interpreting it.

Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence. *Chicago* v. *Sheldon*, 9 Wall. 50, 54; *Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273; *District of Columbia* v. *Gallaher*, 124 U. S. 505, 510; *School District* v. *Estes*, 13 Nebraska, 52; *State ex rel.* v. *Commissioners of Cass County*, 60 Nebraska, 566, 572. Although not strictly such, this rule is sometimes treated as a branch of the law of estoppel. Whether in a case permitting the exercise of an independent judgment we should apply it to franchise contracts such as the one here, we need not consider. In Nebraska, according to the settled course of decision in that jurisdiction, the rule is applicable to them.

In *State ex rel.* v. *Lincoln Street Railway Co.*, *supra*, there was involved the right of a street car company to use the streets of the city under a franchise irregularly obtained twenty years before. The irregularity consisted in the submission to the electors, under the statute before mentioned, of a blanket proposition covering all the streets instead of one specifying particular streets and the termini of the proposed lines. But, notwithstanding the irregularity, the railroad company, after a favorable vote upon the blanket proposition, proceeded at great expense and with the acquiescence of all concerned to the construction and operation of the road through several streets of the city, and continued thereafter in its operation without objection until the commencement of the suit, which was a proceeding in *quo warranto* in the name of the State, brought on the relation of a local officer. Although pronouncing the election irregular and holding that no right would have been acquired had the objection been seasonably made, the court said:

(p. 346) "So far as these lines have been constructed we think the defendant may claim an easement over the streets occupied, but the blanket license under which the defendant claims the right to extend its lines or to go upon other streets must be denied.

"As to the constructed lines, it would be manifestly unjust, not only to the defendant, but to the holders of its securities, to now oust it of rights and privileges which it and those through whom it takes title have been claiming and exercising for years with knowledge and acquiescence on the part of the state. The state, like individuals, may be estopped by its act, conduct, silence and acquiescence." (p. 351) "Our conclusion is that the Lincoln Traction Company is the owner of the constructed lines of street railway of which it is now in possession, and that it has right and authority to maintain and operate the same, that its purchase of the lines formerly owned by the Lincoln Street Railway Company does not invest it with right or power to extend its lines, or to take possession of streets, or parts of streets, not now occupied by its completed lines, and that such extensions cannot be made, except by proceeding as required by law to obtain an additional franchise for that purpose and the consent of the electors of the city to such extensions as it may desire to make and such new lines as it may propose to construct."

State ex rel. v. *Citizens Street Railway Co., supra,* was a similar case, in which the court said:

(p. 361) "The manner in which the question of the consent of the electors of the city was submitted was clearly irregular, and the affirmative vote cast thereon just as clearly conferred no power upon the railway companies to use the streets of the city beyond the time when that right should be questioned by some proper authority. But we are not prepared to say that, where the companies acted in good faith and expended their

money in the construction of lines under a supposed right to occupy the streets, and this right was not questioned until the bringing of the present action, they or those claiming under them should be ousted from the possession of such streets as are now occupied by their lines, and their property rendered worthless. Under the circumstances of this case, we do not think it would be a wholesome public policy to hold that, because of the irregularity which occurred in granting the right which the people had power to confer, such irregularity renders all proceedings under the vote void and of no effect.

(p. 362) "Upon the record before us, we are of opinion that the Citizens Street Railway Company is entitled to the use of the streets now occupied by it for street railway purposes so far as its lines are completed and in operation, that it has no right to extend its lines without further authority from the electors of the city."

The case of *Omaha & Council Bluffs Street Railway Co.* v. *City of Omaha*, 90 Nebraska, 6, decided in 1911, before the commencement of the present suit, is directly in point. It was a suit by the street railway company to enjoin the city from the enforcement of a paragraph or part of the resolution of 1908 which is here in controversy, the difference between the two paragraphs being that the first was directed against the Electric Company and required it to cease using the streets of the city in the transmission of electricity for power and heat, while the second paragraph was directed against the street railway company and required it to cease using the streets in the transmission of current for light, power and heat. The two cases are alike in all material respects, save that the street railway company had been for years and was furnishing electric current for light, power and heat as an incident to the use of electrical energy as a motive power in propelling its cars, and also that that company's incidental business had not been and was not as

extensive as that of the Electric Company. The suit was begun in a local court, which on final hearing granted a perpetual injunction against the enforcement of the resolution. The Supreme Court affirmed the decision below, subject only to a modification whereby the injunction would expire on the termination of the street railway company's street franchise, which was for a limited term of years. After reciting the facts the Supreme Court said (p. 13):

"We are therefore of opinion that the general finding of the district court in favor of the plaintiff and interveners was right, and should be adopted by this court. With this view of the case, we are not required to determine the question of the incidental powers of the street railway company. It is sufficient to say that the company supposed that it had the power under its charter to engage in the business of which the defendants now complain, and the city by its officers and agents assumed that it had such power, and by its acts not only permitted, but induced, the plaintiff to expend large sums of money, acquire valuable property, and enter into contract relations with the interveners and others to carry on that business. It follows that it would now be unjust and inequitable to permit the city to destroy plaintiff's property and business, which it has thus fostered and encouraged, without compensation, and also deprive the interveners of their contractual rights therein."

Then, after referring to and citing several cases, the court further said: "This is a well recognized rule of equity. . . . We are of opinion that the facts of this case bring the defendants within the rule of *State* v. *Lincoln Street R. Co., supra.*"

In view of the facts in the present case, as before recited, these decisions of the Supreme Court of the State are conclusive upon the question of the right of the Trust Company to have the distribution of electric current for

power and heat treated as included within the franchise contract of 1884 while it continues in force. In other words, the Trust Company is entitled to insist upon a recognition and continuation, subject to all the qualifications inhering in the franchise, of all the rights conferred by the franchise ordinance as the same was interpreted in an actual practice by the Electric Company and the City prior to the resolution of 1908. But neither the Trust Company nor the Electric Company is entitled to make that construction a basis for enlarging or extending those rights, against the will of the City, or for enlarging or extending the purposes for which electric current may, through the use of the streets, be transmitted and supplied under the protection of the franchise.

A prior suit by the Electric Company against the City, largely but not entirely like the present, resulted in a decree against the Electric Company. The City now takes the position that that decree is conclusive upon the Trust Company as mortgagee. But the law is otherwise. The Trust Company's rights, and those of the bondholders whom it represents, were not acquired during or since that suit but long prior thereto, and the Trust Company was not a party to it. This being so, the Trust Company is free to maintain the present suit, unembarrassed by the decree in the other. *Keokuk & Western Railroad Co.* v. *Missouri*, 152 U. S. 301, 313; *Louisville Trust Co.* v. *Cincinnati*, 76 Fed. Rep. 296.

The decree is reversed, and the cause is remanded to the District Court with a direction to enter a decree against the enforcement of the resolution of 1908, in accordance with this opinion.

Reversed.

MR. JUSTICE HOLMES took no part in the consideration and decision of this case.

OMAHA ELECTRIC LIGHT AND POWER CO. *v.* CITY OF OMAHA.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 162. Motion to dismiss or affirm submitted October 23, 1911, and postponed to the hearing on the merits. Argued February 27, 28, 1913. Reargued April 10, 11, 1913.—Decided June 16, 1913.

As a basis of jurisdiction of the Circuit Court it is not enough that recovery might be sought upon a constitutional ground; it must clearly appear that it is actually so sought.

Where diverse citizenship exists and the complainant plants its right to relief on the doctrine of estoppel, the case is not one arising under the Constitution of the United States, even though recovery might have been sought on the ground of impairment of the contract, and the judgment of the Circuit Court of Appeals is final.

Appeal from 179 Fed. Rep. 455, dismissed.

THE facts, which involve the jurisdiction of this court of appeals from the Circuit Court of Appeals under the Judiciary Act of 1891, are stated in the opinion.

Mr. Frank Crawford, Mr. John A. Rine, Mr. William C. Lambert, Mr. Benjamin S. Baker, Mr. I. J. Dunn and *Mr. L. J. TePoel,* for appellees, in support of motion to dismiss or affirm.

Mr. Lodowick F. Crofoot and *Mr. Edgar H. Scott* for appellant, in opposition thereto.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

The facts out of which this suit arose are fully set forth in *Old Colony Trust Co.* v. *Omaha, ante,* p. 100, and need

not be repeated here. The Electric Company brought the suit in the Circuit Court, against the city and its electrician, to enjoin the threatened disconnection, pursuant to the resolution of 1908, of the company's wires used in supplying its patrons with electric current for power and heating purposes. There was a decree for the defendants, 172 Fed. Rep. 494, which was affirmed by the Circuit Court of Appeals, 179 Fed. Rep. 455, and a further appeal brought the case here.

Our jurisdiction is challenged, by a motion to dismiss, on the ground that the decision of the Circuit Court of Appeals is final. The motion is well taken if the jurisdiction of the Circuit Court was invoked solely on the ground of diverse citizenship. Act of March 3, 1891, 26 Stat. 826, c. 517, § 6; Judicial Code, § 128. That it was invoked on that ground is conceded, so it is necessary to inquire whether, as is asserted in opposition to the motion, it was also invoked upon the ground that the suit was one arising under the Constitution of the United States. This must be determined from the plaintiff's statement of its own cause of action as set forth in the bill, regardless of questions that may have been subsequently brought into the suit. *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Denver* v. *New York Trust Co.*, 229 U. S. 123.

Briefly described, the bill set forth the adoption by the city council of the franchise ordinance of 1884, its acceptance by the Thompson Company, the construction and installation of the electric plant, the transfer of the plant and franchise to the Electric Company in 1903, the business done by the two companies in supplying current for power and heating, as well as for lighting, purposes, the enlargement and improvement of the plant from time to time to meet the increasing demand for current for those purposes, the city's acquiescence in and encouragement and sanction of all this with knowledge

that it was done under a claim of right under the franchise ordinance, the exaction by the city of three per cent. of the gross earning, including those from current supplied for power and heat, the adoption of the resolution of 1908, and the threatened disconnection thereunder of all wires used for transmitting current for power and heating purposes. The bill further charged that in what was done prior to the resolution the city and the two companies had treated the franchise as including the right to use the streets in transmitting current for power and heat; that upon the faith of this practical construction the plaintiff had expended large sums of money in developing and equipping its plant according to approved modern standards; and that the interference with its wires and business which was threatened by reason of the changed attitude of the city would result in great and irreparable loss and damage to the plaintiff.

The relief sought was a perpetual injunction restraining the defendants from disconnecting the plaintiff's wires or interfering with or impeding its business as theretofore conducted. There was no prayer that the resolution be pronounced void, nor any allegation that it impaired the franchise contract or would operate to deprive the plaintiff of its property without due process of law, nor any reference to the Constitution of the United States, or any of its provisions, nor even a general statement that a constitutional right was being or about to be infringed.

Tested by the recognized standard, we think the bill did not state a case arising under the Constitution. It did not show, either in terms or by necessary intendment, that the plaintiff was asserting a right, privilege or immunity under the Constitution or was in anywise invoking its protection. For anything that appeared the plaintiff was planting its right to relief entirely upon the doctrine of estoppel. As a basis of jurisdiction, it is not enough that recovery might be sought upon a constitutional

ground, for it must clearly appear that it is actually so sought. *Crowell* v. *Randell*, 10 Pet. 368, 392; *Hanford* v. *Davies*, 163 U. S. 273, 280.

It being thus apparent that diverse citizenship was the sole ground upon which the jurisdiction of the Circuit Court was invoked, it follows that the decision of the Circuit Court of Appeals was final. *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526; *Bankers Casualty Co.* v. *Minneapolis &c. Railway Co.*, 192 U. S. 371; *Shulthis* v. *McDougal, supra; Lovell* v. *Newman*, 227 U. S. 412; *Denver* v. *New York Trust Co., supra.*

Appeal dismissed.

MR. JUSTICE HOLMES took no part in the consideration and decision of this case.

BUTTS *v.* MERCHANTS & MINERS TRANSPORTATION CO.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 131. Argued January 21, 1913.—Decided June 16, 1913.

Where the greater part of a statute is unconstitutional as beyond the power of Congress, the question for the court to determine as to the part which is constitutional is whether it was the intent of Congress to have that part stand by itself—if not, the whole statute falls.

This court holds that it was the evident intent of Congress in enacting the Civil Rights Act to provide for its uniform operation in all places in the States as well as the Territories within the jurisdiction of the United States, and that it was not the intent of Congress that the provisions of the statute should be applicable only to such places

as are under the exclusive jurisdiction of the National Government.

The provisions of the Civil Rights Act having been declared unconstitutional as to their operation within the States, *Civil Rights Cases*, 109 U. S. 3, they are not separable as to their operation in such places as are under the exclusive jurisdiction of the National Government and the statute is therefore unconstitutional in its entirety. *The Trade Mark Cases*, 100 U. S. 82.

The enforcement of a remedial statute, such as the Employers' Liability Act, in Territories of the United States, although unconstitutional as to the States, is distinguishable from the similar enforcement of a highly penal statute such as the Civil Rights Act. *El Paso &c. Railway Co.* v. *Gutierrez*, 215 U. S. 87, distinguished.

THE facts, which involve the constitutionality of §§ 1 and 2 of the Civil Rights Act of March 1, 1875, as applied to vessels of the United States engaged in the coastwise trade, are stated in the opinion.

Mr. Albin L. Richards for plaintiff in error:

Congress has two kinds of jurisdiction, that dependent upon locality and that dependent upon subject-matter. The first includes jurisdiction over vessels of the United States upon the high seas and the navigable waters of the United States.

The admiralty and maritime jurisdiction of Congress is not dependent solely upon the power of regulating commerce, *United States* v. *Burlington & Henderson Ferry*, 21 Fed. Rep. 331, 341, but also on the grant extending the judicial power to all cases of admiralty and maritime jurisdiction in Art. III, § 2 of the Constitution. *The Hamilton*, 207 U. S. 398.

Fixing the limits of admiralty and maritime jurisdiction is simply establishing a physical boundary. See *Gibbons* v. *Ogden*, 9 Wheat. 1; *Waring* v. *Clarke*, 5 How. 441, 465; *The Genesee Chief*, 12 How. 443; *Gilman* v. *Philadelphia*, 3 Wall. 724; *The Belfast*, 7 Wall. 624; *The Daniel Ball*, 10 Wall. 557; *Ex parte Easton*, 95 U. S. 68; *In re Garnett*, 141 U. S. 1; *The Robert W. Parsons*, 191 U. S. 17.

For the distinction between acts regulating interstate commerce upon land and the jurisdiction of Congress over navigable waters, see *The Daniel Ball*, 10 Wall. 557, 565; *Ex parte Easton*, 95 U. S. 68, 72; *The Robert W. Parsons*, 191 U. S. 17.

The sovereignty of Congress over United States vessels upon the high seas is in nowise impaired by the fact that within that jurisdiction for some purposes, the laws of the individual States are given effect. *The Hamilton*, 207 U. S. 398, distinguished. See article by George Whitelock, 22 Harv. Law Rev., pp. 403, 413.

That admiralty does not recognize any right of a State or sovereignty to legislate for the vessels of its citizens as if they were its own territory is shown by the *Bourgogne Case*, 210 U. S. 95, 115. See also *United States* v. *Davis*, 2 Sumner, 482; *The Queen* v. *Keyn*, L. R. 2 Ex. Div. 63, 66, 98, 101, 107, 148, 149, 150, 158, 232, 238.

The established principle that the law of the United States will govern in civil cases of collision upon the high seas between vessels of different foreign nationalities shows that the admiralty jurisdiction is not subject to the law of the State of the owner of the vessel.

The above distinction is important in determining whether to give to an unconstitutional statute a partial enforcement, based upon the first or second kind of jurisdiction.

While there must always be a doubt as to whether Congress in passing a law in terms applicable to the entire country, but held to be unconstitutional except so far as applicable to interstate commerce, desired to give rise to the difficulty and confusion which might result within the States from the partial application of the statute, these objections do not exist in the case of a partial application based upon locality; that is to say, giving the statute effect in the District of Columbia, in the Territories and

upon the high seas and navigable waters of the United States, but not elsewhere. See act to more effectually provide for the punishment of crimes, of March 3, 1825, and comments of Mr. Justice Story cited in *United States* v. *Press Publishing Co.*, 219 U. S. 1, 12. And see also Benedict, Admiralty, 4th ed, § 599; *United States* v. *Wilson*, 3 Blatchf. 435.

The application of the statute to enrolled vessels of the United States upon the high seas, to the District of Columbia and the Territories is separable from the other applications of the statute.

El Paso & N. E. Ry. Co. v. *Gutierrez*, 215 U. S. 87, holding provisions of Employers' Liability Act separable as to Federal jurisdiction, decided substantially the question which was left open by this court in the *Civil Rights Cases* upon which the defendant in error relies to prevent the enforcement of this law. *Civil Rights Cases*, 109 U. S. 3, 19, 25.

The application of this statute to those places within the plenary jurisdiction of Congress is in accordance with the intention of Congress.

The Civil Rights Act was a statute passed with the benevolent purpose of alleviating the condition of the recently enfranchised slaves. It was a law for the personal benefit and protection of individuals, an attempt to lift them up as far as possible to the plane of other citizens. It was a law of personal rights and the failure of such a law to extend throughout the Union, while regrettable, would give no reason for not having such a law in force wherever Congress could legally enact it.

Congress intended the Civil Rights Act to have a partial application so far as it was constitutional. See *Ex parte Virginia*, 100 U. S. 339, in which the fourth section of the statute was permitted to be enforced in a criminal case.

Mr. A. Nathan Williams for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is an action to recover twelve penalties of $500 each under §§ 1 and 2 of the act of March 1, 1875, 18 Stat. 335, c. 114, known as the Civil Rights Act. According to the declaration the facts are these: The plaintiff is a colored woman and a citizen of the United States, and the defendant is a Maryland corporation engaged in the transportation of passengers and freight by vessels plying between Boston, Massachusetts, and Norfolk, Virginia. Upon tickets purchased for the purpose and entitling her to the accommodations and privileges of a first class passenger, the plaintiff was carried by the defendant on one of its steamships from Boston to Norfolk and on another back to Boston. Both vessels were engaged in the coastwise trade as public conveyances, and were duly enrolled under the laws of the United States. During both voyages the plaintiff was denied, because of her color, the full and equal enjoyment of the accommodations and privileges of a first class passenger, the denials consisting in requiring her to take her meals at a second table, instead of at the first with the white passengers having tickets like her own, and in giving her a stateroom on the lower deck, instead of on the upper one where the white passengers possessing like tickets were given rooms. The acts of discrimination were twelve in number. Eleven were charged as occurring upon the high seas more than a marine league from any land, and the other as occurring merely upon the high seas. There was no attempt to set up a common law right of recovery, the sole reliance being upon §§ 1 and 2 of the act of 1875, *supra*. The defendant demurred, claiming that those sections are unconstitutional and void, and the demurrer was sustained, judgment being given for the defendant. The plaintiff then sued out this direct writ of error.

The preamble of the act and the sections under which the penalties are claimed are as follows:

"Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided,* That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by state statutes; and having so elected to pro-

ceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

The question of the constitutional validity of those sections came before this court in *Civil Rights Cases*, 109 U. S. 3, and upon full consideration it was held (a) that they receive no support from the power of Congress to regulate interstate commerce because, as is shown by the preamble and by their terms, they were not enacted in the exertion of that power, and (b) that as applied to the States they are unconstitutional and void because in excess of the power conferred upon Congress and an encroachment upon the powers reserved to the States respectively. That decision has stood unchallenged for almost thirty years and counsel for the plaintiff does not question it now. But he does contend that, although unconstitutional and void in their application to the States, the sections are valid and effective in all other places within the jurisdiction of the United States, such as upon an American vessel upon the high seas, more than a marine league from land, and in the District of Columbia and the Territories. And in this connection our attention is directed to that part of the opinion in *Civil Rights Cases* which says (p. 19):

"We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a question for consider-

ation in the cases before us; they all being cases arising within the limits of States."

The real question is, whether the sections in question, being in part—by far the greater part—in excess of the power of Congress, are invalid in their entirety. Their words, as also those of the preamble, show that Congress proceeded upon the assumption that it could legislate, and was legislating, in respect of all persons and all places "within the jurisdiction of the United States." It recognized no occasion for any exception and made none. Its manifest purpose was to enact a law which would have an uniform operation wherever the jurisdiction of the United States extended. But the assumption was erroneous, and for that reason the purpose failed. Only by reason of the general words indicative of the intended uniformity can it be said that there was a purpose to embrace American vessels upon the high seas, the District of Columbia and the Territories. But how can the manifest purpose to establish an uniform law for the entire jurisdiction of the United States be converted into a purpose to create a law for only a small fraction of that jurisdiction? How can the use of general terms denoting an intention to enact a law which should be applicable alike in all places within that jurisdiction be said to indicate a purpose to make a law which should be applicable to a minor part of that jurisdiction and inapplicable to the major part? Besides, it is not to be forgotten that the intended law is both penal and criminal. Every act of discrimination within its terms is made an offense and misdemeanor, and for every such offense it gives to the aggrieved party a right to a penalty of $500 and subjects the offender to a fine of not less than $500 nor more than $1,000, or to imprisonment for not less than thirty days nor more than one year.

The decision of this court in *United States* v. *Reese*, 92 U. S. 214, is well in point. That was a prosecution

under a congressional enactment punishing election officers for refusing to any person entitled to do so the right to cast his vote. The statute was expressed in general terms embracing some acts which Congress could condemn and others which it could not. As to the latter it was, of course, invalid, and the claim was made that, as the act charged was not of the latter class but of the former, the statute should be sustained as to acts like the one charged, notwithstanding the general terms were in excess of the power of Congress. But the court held otherwise, saying:

(p. 219) "This is a penal statute, and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used. *United States* v. *Wiltberger*, 5 Wheat. 85. If, taking the whole statute together, it is apparent that it was not the intention of Congress thus to limit the operation of the act, we cannot give it that effect.

(p. 221) "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be de-

termined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

So here, to give to the sections in question the effect suggested it would be necessary to reject or strike out the general words "within the jurisdiction of the United States," whereby Congress intended to declare and define in what places the sections should be operative, and to insert other and new words restricting their operation to American vessels upon the high seas and to the District of Columbia and the Territories. To do this would be to introduce a limitation where Congress intended none and thereby to make a new penal statute, which, of course, we may not do.

Another decision no less in point is *Trade Mark Cases*, 100 U. S. 82, which related to an act of Congress providing generally for punishing the fraudulent use of registered trade-marks, although the power of Congress in that regard extended only to trade-marks used in commerce

with foreign nations, or among the several States or with the Indian tribes. In pronouncing the statute invalid in its entirety the court said:

(p. 96) "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress.

(p. 98) "It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: . . . Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.

(p. 99) "If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law."

The two cases from which we have quoted have been often followed and applied. *United States* v. *Harris*, 106 U. S. 629, 641; *Baldwin* v. *Franks*, 120 U. S. 678, 685;

James v. *Bowman*, 190 U. S. 127, 140; *United States* v. *Ju Toy*, 198 U. S. 253, 262; *Illinois Central Railroad Co.* v. *McKendree*, 203 U. S. 514, 529–530; *Karem* v. *United States*, 121 Fed. Rep. 250, 259.

Counsel for the plaintiff cites *El Paso & Northeastern Railway Co.* v. *Gutierrez*, 215 U. S. 87, as an authority for holding the sections in question valid as applied to American vessels upon the high seas and to the District of Columbia and the Territories, notwithstanding their invalidity as applied to the States. The matter involved in that case was whether the provision in the Employers' Liability Act of 1906, 34 Stat. 232, c. 3073, relating to the District of Columbia and the Territories could be sustained, considering that the provision relating to interstate commerce had been adjudged invalid in *Employers' Liability Cases*, 207 U. S. 463. That act was quite unlike the sections now before us in two important particulars: 1. It was not a penal or criminal statute, to be strictly construed, but was a civil and purely remedial one, to be construed liberally. 2. Its applicability to the District of Columbia and the Territories did not depend upon the same words which made it applicable to interstate commerce. On the contrary, it dealt expressly, first, with common carriers "in the District of Columbia, or in any Territory of the United States," and, second, with common carriers "between the several States." The latter provision had been adjudged invalid because too broad in some of its features, and the *Gutierrez Case* involved the other provision. In that case the court, considering the terms of the statute, held that the provision relating to interstate commerce was "entirely separable from" the one relating to the District of Columbia and the Territories, and that Congress manifestly had proceeded "with the intention to regulate the matter in the District and the Territories, irrespective of the interstate commerce feature of the act." With the

invalid and separable provision eliminated, there still remained a complete and operative statute in terms applying to the District of Columbia and the Territories. The differences between that act and the sections now before us are so pronounced and so obvious that the *Gutierrez Case* is not an authority for the plaintiff. On the contrary, it is in entire harmony with the other cases before cited, as is shown throughout the opinion and by the following excerpt (p. 97):

"It remains to inquire whether it is plain that Congress would have enacted the legislation had the act been limited to the regulation of the liability to employés engaged in commerce within the District of Columbia and the Territories. If we are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall. *Illinois Central R. R. Co.* v. *McKendree*, 203 U. S. 514; *Employers' Liability Cases*, 207 U. S. *supra*."

Here it is not possible to separate that which is constitutional from that which is not. Both are dependent upon the same general words, "within the jurisdiction of the United States," which alone indicate where the sections are to be operative. Those words, as the context and the preamble show, were purposely used. They express the legislative will and cannot be limited in the manner suggested without altering the purpose with which the two sections were enacted. They must therefore be adjudged altogether invalid. *James* v. *Bowman* and *United States* v. *Ju Toy, supra; Poindexter* v. *Greenhow*, 114 U. S. 270, 305.

Judgment affirmed.

OCHOA *v.* HERNANDEZ Y MORALES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 92. Submitted December 17, 1912.—Decided June 16, 1913.

Under § 35 of the Foraker Act, appeals from the District Court of the United States for Porto Rico are subject to the provisions applicable to appeals from the Supreme Courts of the Territories under the act of April 7, 1874, under which the jurisdiction of this court is confined, in a case where there are no errors assigned upon questions of evidence, to determining whether the findings of the court below support the judgment. *Rosaly* v. *Graham*, 227 U. S. 584.

Even if the commanding officer in territory occupied by military forces of the United States has all the legislative power as to such territory possessed by Congress, he is still subject, as Congress is, to the provisions of the Fifth Amendment and cannot by military orders deprive persons of their property without due process of law.

To shorten the period for acquisition of title by prescription and give the order a retroactive effect so that the period has elapsed at the time the order is made without giving those who have interests in the property an opportunity to be heard and saving no existing rights, amounts to taking property without due process of law.

The provision in the judicial order of General Henry published April 7, 1899, during the military occupation of Porto Rico by the United States, reducing the period for prescriptive title to real estate in that island from the periods previously established by law down to six years with retroactive effect and without any opportunity for third parties to be heard, amounted to a deprivation of property of the actual owners without due process of law and was beyond the power of the Military Governor; nor was this provision ratified by any subsequent action of Congress.

The status of Porto Rico during the military occupancy and before the exchange of ratifications of the treaty of peace, was the same as that of the Philippine Islands during the same period.

From the exchange of ratifications until Congress acted by the passage of the Foraker Act the provisional government established in Porto Rico continued as before the peace.

During the entire period General Orders No. 101 relating to Cuba and

reiterated *mutatis mutandi* as to Porto Rico by General Miles continued in force as the recognized declaration of principles by which the Military Government was limited, and under this the Governor was without authority to make any order that would deprive any person of his property without due process of law.

While the exact definition of the term "due process of law" may be uncertain, it is certain that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity to be heard.

Statutes of limitation may be modified by shortening the time which is still running but only so that a reasonable time still remains for commencement of an action before the bar takes effect.

Wherever registry laws are in force, the rule is that a purchaser takes subject to any defects and infirmities that may be ascertained by reference to the chain of title as spread on the record, and this includes invalidity of an order on which title is based.

Under the registry law of Porto Rico rights of third parties were preserved and a mortgagee or grantee acquired no better right before the expiration of the period of prescription than the grantor, but took subject to the rights of infants who owned property the title to which had been fraudulently registered in the name of the grantor.

Where the limitations on a person exercising authority are notorious and are simply in accord with national and international law, there is no hardship in applying the rule that rights cannot be acquired under orders made by such person which are wholly beyond his authority.

5 Porto Rico Fed. Rep. 463, affirmed.

THE facts, which involve the title to real estate in Porto Rico and the constitutionality of certain military orders during the military occupation of that Island, are stated in the opinion.

Mr. T. D. Mott, Jr., for appellants:

The Judicial Order of April 4, 1899, is not unconstitutional nor is it repugnant to Art. V of, or the Fourteenth Amendment to, the Constitution of the United States.

Paragraph 3 of the Judicial Order is not a statute of limitations properly so called. It cut off no right of action on the part of anyone. In the present case it permitted appellants' grantor to convert his possessory into a *dominio*

title to the land in dispute and record the same. In no way did it affect the rights of appellees.

The conversion, though the result of judicial proceedings, did not have the effect of *res judicata*, and did not bind anyone who did not appear in said proceedings. *Calderon* v. *Garcia*, 14 P. R. Sup. Ct. 407; *Gonzalez* v. *El Pueblo*, 10 P. R. Sup. Ct. 458.

Even as to those who had so appeared and opposed the conversion sought by such proceedings, their rights could not be adjudged, or passed upon, in those proceedings, but such rights must be decided in an ordinary action of revindication. The court is limited in such proceedings of conversion to saying whether or not the petitioner has shown a right to the conversion asked for. It cannot pass upon the rights of others. *Diaz* v. *Waymouth*, 13 P. R. Sup. Ct. 317; *Paris* v. *Porto Rico*, 5 P. R. Sup. Ct. 29.

The alleged rights of appellees concerning the land in question were not affected by the conversion proceedings whereby appellants' grantor converted his possessory title into a title of ownership, or dominion title. Nor did the recording of the *dominio* title by such grantor cut off any of the alleged rights of these appellees. If such title was fraudulent, it was liable to attack, even after registry, within any period short of thirty years after he had entered into possession of the land and while still recorded in his name, or in that of any other person, excepting an innocent purchaser without notice, or in the language of the civil law "a third party with good faith." *Abella* v. *Antunano*, 14 P. R. Sup. Ct. 485; *Paris* v. *Porto Rico*, 5 P. R. Sup. Ct. 29; *Valdes* v. *Valle*, 1 P. R. Sup. Ct. 75 (Span. ed.); *Gonzalez* v. *El Pueblo*, 10 P. R. Sup. Ct. 458.

As appellees could have exercised their right of action against appellants' grantor after the latter had converted his possessory title into a title of dominion and had recorded such title, and the exercise by appellees of such right of action was as ample and full after the recording

of such dominion title as it was before such record, paragraph 3 did not cut off any supposed right of appellees, and therefore does not violate the provisions of Art. V of, or the Fourteenth Amendment to, the Constitution of the United States.

Paragraph 3 of the aforesaid Judicial Order, which provides for the conversion of entries of possession into records of ownership, is in no sense a statute of limitation. But, even if it be so considered, it took away no remedy which these appellees possessed before its passage. A statute of limitation which takes away no remedy which the landowner had before its passage is not unconstitutional and is valid. *Turner* v. *New York*, 168 U. S. 90; *Saranac Land Co.* v. *New York*, 177 U. S. 318.

The Judicial Order of April 4, 1899, has been enforced in many cases by the Supreme Court of Porto Rico, although in such cases its validity or constitutionality was not questioned or involved. *Ex parte Pinto*, 6 P. R. Sup. Ct. 149; *Ex parte Martinez*, 6 P. R. Sup. Ct. 169; *Ex parte Miner*, 6 P. R. Sup. Ct. 261; *Ex parte Sanfeliz*, 6 P. R. Sup. Ct. 501; *Ex parte Tarpia*, 6 P. R. Sup. Ct. 509; *Ex parte Colzada*, 6 P. R. Sup. Ct. 531.

The provisions of Art. V of, and the Fourteenth Amendment to, the Constitution of the United States do not obtain in Porto Rico.

No decision of this court directly determines this point, nor is there any act of Congress which has made the Constitution, or any part of the same, extensive to Porto Rico.

The Judicial Order of April 4, 1899, was a military order, promulgated during the occupancy of Porto Rico by the military forces of the United States, so that said order was previous to the act of Congress of April 12, 1900, which act extended civil government to Porto Rico, and ratified and confirmed all existing laws, military orders, etc., which at that time were in effect in Porto Rico, with some excep-

tions, which are not pertinent to the consideration of the present case. See § 8, act of April 12, 1900.

The trial court erred in holding as matter of law that the deed to appellants whereby their grantor sold to them the lands described in the bill of complaint, is null and void, and that neither such deed nor the recording of the same in the proper registry of property conferred title upon defendants or protected such title in them.

Mr. Hector H. Scoville and *Mr. Joseph Anderson, Jr.*, for appellees.

Mr. Justice Pitney delivered the opinion of the court.

This was a suit in equity to establish the right of the complainants (appellees) to a parcel of land containing 106 acres, situate in the Barrio Nuevo, in the Jurisdiction of Naranjito, in the Island of Porto Rico, found to exceed in value the sum of $5,000. The District Court decreed that the complainants were the legal owners of this land by inheritance, and entitled to the possession of it as against the appellants, a firm doing business under the name of J. Ochoa y Hermano; that the firm should deliver possession to the appellees; that all entries in the registry of property, of "dominio" and "posesorio" title by or in favor of that firm, and all other entries of either kind of title as against the appellees, should be canceled, etc. 5 P. R. Fed. Rep. 463. Defendants appealed to this court.

At the time the appeal was taken, § 35 of the act of April 12, 1900, known as the Foraker Act (31 Stat. 77, 85, c. 191), was in force—since superseded by § 244 of the Judicial Code of March 3, 1911, 26 Stat. 1087, 1157, c. 231,—and subjected appeals from the District Court of the United States for Porto Rico to the regulations applicable to appeals from the Supreme Courts of the Territories. These were controlled by act of April 7, 1874, c. 80, § 2,

18 Stat. 27, 28, by which it was provided that instead of the evidence at large, a statement of the facts in the nature of a special verdict, with the rulings of the court on the admission or rejection of evidence when excepted to, should be made and certified by the court below, and transmitted to this court with the transcript of the proceedings and judgment or decree. Our jurisdiction therefore is confined to determining whether the facts found by the District Court support its judgment; for no errors are assigned upon questions of evidence. *Rosaly* v. *Graham*, 227 U. S. 584, 590, and cases cited.

The findings are in substance as follows:

Jose Maria Hernandez, the paternal grandfather of complainants, was at the time of his death in the year 1872, the owner and in possession of a tract of land in which was included the parcel of 106 acres in controversy. His title to this parcel was never recorded. Upon his death his son, Juan Hernandez, became by inheritance the owner of it, and entered into and remained in possession as owner until his death, which occurred in the year 1887; but his title was never recorded. Upon his death, Juan Hernandez left surviving him two young children, the complainants, and also a widow, their mother; she died in the year 1906, and the complainants, then still minors, became sole owners of the tract by inheritance from their father; but their title has never been recorded.

In the year 1890, the title to the land in question did not appear of record in favor of any person, either in the books of the present or modern registry, or in the books of the old registry, the ancient "anotadurias" or "contadurias." In that year Raimundo Morales, the maternal grandfather of the complainants, fraudulently representing himself to be the owner, appeared before the municipal court of Naranjito, an Insular court, and by certain *ex parte* proceedings obtained from that court a decree declaring him to be entitled to the possession of the land,

but without prejudice to third parties who might show a better right to such possession. The possessory title so obtained was duly recorded or inscribed in the proper registry of property, in the same year, and was the only title to the land that then appeared recorded or inscribed in the registry.

In the year 1899, Morales again appeared before the same Insular court and petitioned for a decree converting the possessory title, or entry of possession in the registry, into a record of ownership (*titulo de dominio*). His petition and the proceedings had thereon in the Insular court were based upon the provisions of a Judicial Order, dated April 4, 1899, and promulgated in the Official Gazette of Porto Rico under date April 7, 1899. This order was made under authority of Major-General Guy V. Henry, U. S. Volunteers, at that time Military Governor of Porto Rico, and by its terms reduced from twenty years to six years the period during which real estate must be held in order to permit the conversion in the registry of a *posesorio* title to a *dominio* title. Upon the application of Morales, such proceedings were had in the Insular court as were provided for in the Judicial Order, and the court in due time made and entered its decree to the effect that the entry of possession, or possessory title which appeared in the registry recorded in favor of Morales, be converted into a record of ownership or *dominio* title. Thereafter, and in the same year (1899), this decree was duly recorded or inscribed by Morales in the proper registry of title, and the *dominio* title thereafter appeared in the registry recorded solely in his name.

In the year 1901, there appearing in the registry no claim or right or title in the land on the part of any other person or persons, Morales, still fraudulently representing himself to be the true owner, mortgaged the land for value to the defendants, constituting the firm of J. Ochoa y Hermano, who truly and in good faith believed him (Mo-

rales) to be the owner of it, and were entirely ignorant of the rights of the complainants therein. The mortgage was duly recorded in the proper registry of property in the same year.

Thereafter, and in the year 1903, the record still showing nothing respecting the ownership of the lands besides the *dominio* title of Morales and the mortgage of the defendants, and they being still ignorant of the rights of the complainants, Morales by deed duly executed before a notary public, in which his wife joined, sold and transferred the land to defendants in full payment of the amounts due and secured by the mortgage. The defendants duly recorded the deed in the same year, and by their agent immediately took possession of the land.

The present action was commenced in 1908, shortly after the complainants arrived at full age.

Upon these facts the District Court concluded as matter of law that the Judicial Order of General Henry, dated April 4, 1899—so far as it operated retrospectively upon the rights of the complainants, who were minors at the time and for some time thereafter, and who owned the land during the entire period of nine years that elapsed between the fraudulent entry of possessory title in the name of their maternal grandfather, Morales, and the promulgation of General Henry's order—was null and void because in contravention of the "due process of law" clause of the Fifth Amendment to the Constitution of the United States.

For an understanding of the questions presented, it should be premised that Congress declared war to exist between this country and Spain by act of April 25, 1898, 30 Stat. 364, ch. 189; that Porto Rico, then a colony of Spain, was occupied by the military forces of the United States from and after July 25; that a protocol was signed in Washington, August 12 (30 Stat. 1742), under which hostilities between the two countries were

suspended pending negotiation of a treaty for the establishment of peace, by the terms of which protocol (*inter alia*) Spain agreed to cede the Island of Porto Rico to the United States and to immediately evacuate it, and commissioners were appointed to meet at Paris and proceed to the negotiation and conclusion of the treaty; that accordingly a treaty was signed at Paris under date December 10, 1898, ratifications being exchanged at Washington, April 11, 1899 (30 Stat. 1754), and by its terms, Porto Rico was ceded to the United States, and (Article IX, p. 1759) "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." The military occupation of Porto Rico was immediately followed by the establishment of a provisional government, as will be mentioned below, and this government continued in control of the affairs of the Island continuously until the ratification of the Treaty, and thereafter until the enactment of the Foraker Act of April 12, 1900, entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes" (31 Stat. 77, c. 191).

The statement of facts is silent upon the question of the possession of the property from the death of the father of the appellees in the year 1887 until the appellants entered into possession under the deed given to them by Morales in the year 1903. Assuming (in favor of appellants) that Morales had possession from the time he procured the entry of a possessory title in his name, the effect of this, as between him and the true owners, was that uninterrupted possession for 30 years would ripen into a good title and confer immunity from action (former Civil Code P. R., Articles 1959, 1963, New Civil Code, P. R., §§ 1860, 1864). He was not entitled to avail himself of Article 1957, that declared a prescription by possession for ten years as to persons present, and for twenty

years with regard to those absent, because this was confined to possession "with good faith and proper title;" and Morales had neither, within the meaning of those terms as employed in the Code (Former Civil Code P. R., Arts. 1940, 1941, 1950, 1952, 1953, 1954; present Civil Code, §§ 1841, 1842, 1851, 1853, 1854, 1855). The entry of a possessory title in his name was in effect a judicial certificate declaring him to be entitled to the possession, but without prejudice to third parties, who might show a better right to it. It gave him no title as against them, but conferred a *prima facie* legitimacy upon his possession, being "provisional and presumptive evidence of ownership;" and it fixed a date from which his possession should be treated as originating; and so the entry amounted (for present purposes) to no more than public notice that from that time his possession was adverse to the true owners. *Soto* v. *Registrar of Property*, 15 P. R. Sup. Ct. 597, 600; *Morales* v. *Landrau*, 15 P. R. Sup. Ct. 761, 772; *Pares* v. *J. Reynes & Co.*, 2 P. R. Fed. 402, 428.

But appellants rest their case upon the provisions of the Mortgage Law, as amended by the judicial order of General Henry. The Mortgage Law is a somewhat elaborate system of registration for instruments of conveyance that, having been long in force in the Peninsula, was extended to Porto Rico and the Philippines in or about the year 1893. It was designed to give to purchasers and mortgagees, acquiring interests in lands in reliance upon recorded titles, protection against claims and interests of which no notice was conveyed by the records. Its provisions are to be read in connection with those of the Civil Code. By Art. 27, "Those who have not participated in the recorded instrument or contract" are considered as third persons. By Art. 33, "The record of instruments or contracts which are null in accordance with the law are not validated thereby." But, notwithstanding this, by Art. 34, "Instruments or contracts

executed or covenanted by a person who, according to the Registry, has a right thereto, shall not be invalidated with regard to third persons, after they have once been recorded, although later the right of the person executing them is annulled or determined by virtue of a prior deed not recorded, or for reasons which do not clearly appear from the Registry. Only by virtue of a recorded instrument may another later instrument, also recorded, be invalidated to the prejudice of third persons, [with exceptions not now material.] The provisions of this Article [34] may at no time be applied to the instrument recorded in accordance with the provisions of Article 390, unless the prescription has validated or secured the interest referred to therein." By Art. 36, "Suits for rescission or determination of title shall not be instituted against third persons who have recorded the instruments of their respective interests in conformity with the provisions of this law." But by Art. 37 exceptions are made to the rule thus declared, and one of them is—"Suits for rescission or determination of title which are due to the causes plainly expressed in the Registry."

Subsequent sections provide for the mortgaging of different interests in real property, and for various purposes, and declare the effect that shall be given to the mortgages, provide for the manner of keeping the registries, for making and correcting entries therein, and for proceedings for clearing the title of unrecorded mortgages and other charges and interests. Art. 389 prohibits the admission in the courts, etc., of unrecorded documents or instruments if presented for the purpose of enforcing, to the prejudice of third persons, interests which should have been recorded. Articles 390 to 395 inclusive contain provisions under which owners who lack a recorded title of ownership are permitted to record their interests by previously proving their possession before the Judge of First Instance, or the proper Municipal Judge, with

the consent of the Department of Public Prosecution and citation of the adjacent property owners, should they desire to record the absolute ownership of some estate, and with the citation of the owner or other participants in the ownership, should they desire to record some property right. Article 391 prescribes the form of the proceedings. Article 392 provides that the court, on approving the proceedings, shall "order that the record requested be made in the Registry without prejudice to a third person having a better claim." Among the prerequisites for converting entries of possession into records of ownership under this procedure it was, by par. 6 of Art. 393, provided that twenty years must have elapsed since the date of entry of possession. By Art. 394—"If the twenty years calculated from the date of the entry [of possession] have not elapsed, or the requisites mentioned in Article 393 of this law have not been complied with, the entries of possession shall have the legal effect embraced in the provisions contained in the following paragraphs, [viz]. The period of possession which appears to have elapsed at the time said entries are made shall be computed for the prescription which does not require a just title, unless a person prejudiced thereby denies it, in which case said period of possession must be proved in accordance with the common law. Entries of possession shall prejudice or favor third persons from the date of their record, but only with regard to the effects which the laws attribute to mere possession. The entry of possession shall not prejudice the person who has a better right to the ownership of the realty, although his title has not been recorded, unless the prescription has confirmed and secured the claim recorded. Between the parties the possession shall be effectual from the date prescribed by the common law. The provisions contained in the preceding Articles, regarding the entries of possession, can not be applied to mortgage rights, which can

not be recorded unless an instrument in writing is presented."

Under the Mortgage Law, it seems to be settled that there proceedings for proving possession or ownership before the courts of first instance or municipal courts, although judicial in form, are intended merely as aids to the establishment of a system of authenticated instruments of title for purposes of the public records; that although under some circumstances it is required that notice be given to the owner or other persons interested adversely to the applicant, the proceedings are really *ex parte*, have not the effect of *res judicata*, and do not bind any one who does not appear. *Gonzalez* v. *The People*, 10 P. R. Sup. Ct. 458; *Calderon* v. *Garcia*, 14 P. R. Sup. Ct. 407, 416. And even with respect to a party who appears and opposes the entry of a possessory title or its conversion into a *dominio* title, his rights can not be adjudged or passed upon in these proceedings, but must be decided in an ordinary action of revindication; the court being limited, in the proceedings under the Mortgage Law for a conversion of a possessory to a *dominio* title, to saying whether petitioner has shown a right to the conversion asked for; but without passing upon the rights of others. *Paris* v. *The People*, 5 P. R. Sup. Ct. 29; *Diaz* v. *Waymouth*, 13 P. R. Sup. Ct. 317.

This is conceded by the appellants, who, indeed, base their argument upon it; contending, further, that, because of what has just been said, the rights of appellees in the land in question were not affected by the proceedings whereby Morales converted his possessory title into a title of ownership, and that the recording of this *dominio* title by him did not cut off any of their rights; that if such title was fraudulent it was liable to attack, even after registry, within any period short of thirty years after he had entered into possession of the land and while still recorded in his name, or in that of any other person

excepting an innocent purchaser without notice; or, in the language of the civil law, "a third party with good faith." *Paris* v. *The People*, 5 P. R. Sup. Ct. 29, 37; *Gonzalez* v. *The People*, 10 P. R. Sup. Ct. 458, 462; *Abella* v. *Antunano*, 14 P. R. Sup. Ct. 485, 494; *Merchant* v. *Lafuente*, 5 Phil. Rep. 638, 644.

Upon the strength of this, it is ingeniously argued that under the law of Porto Rico it was not the conversion of the apparent title of Morales from a possessory to a *dominio* title that cut off the rights of the appellees; but it was the fact that the appellants, in reliance upon that apparent title, and (as is said) without notice of the rights of the appellees, purchased the land from Morales, which by virtue of the Mortgage Law gave to them a better right than the appellees. And from this it is contended that the Judicial Order, in reducing from twenty years to six years the time that must elapse between the entry of a possessory title and its conversion into a *dominio* title, did not cut off any right of appellees, and therefore was not and is not inconsistent with "due process of law."

But it seems to us that there can be no difference in principle—so far as concerns the question whether the property of the appellees was taken from them without due process—whether there were two steps or three steps in the course of procedure by which the end was accomplished. Whether the retroactive effect of the Judicial Order resulted in conferring upon Morales a title that he himself could maintain against the true owners, or whether it conferred upon him an apparent title that not he himself but his grantees could maintain, makes no difference in a controversy between his grantees and the true owners.

In short, the position of appellees is that by the fraudulent conduct of Morales, *plus* the Mortgage Law, *plus* the Judicial Order, *plus* the *dominio* title in Morales founded thereon, and the recording thereof, *plus* the

mortgage and deed to appellants, their property has been taken from them and given to appellants, without notice to them or an opportunity for a hearing; and that the proceedings in court for converting the possessory into a dominion title, while bearing the semblance of judicial proceedings, departed therefrom in the essentials. To this, it is no answer to say that those proceedings in court did not, under the Mortgage Law, purport to be judicial proceedings at all; nor to say that they would have done no harm except for the subsequent conveyance by Morales to the appellants.

We proceed, therefore, to consider the fundamental question upon which the court below rested its decree.

The Judicial Order of General Henry, dated April 4, and published April 7, 1899 (Mil. Ord. Porto Rico, vol. 2, p. 71), contains seven clauses or paragraphs, of which the first amends Art. 1957 of the Civil Code so as to reduce the period for prescription by possession accompanied with good faith and a proper title, from ten years with respect to persons present, and twenty years with respect to persons absent, down to six years as to persons both present and absent. This has no direct bearing upon the present case, for reasons already indicated.

Other clauses of the Order amend Articles 391, 393, 394, and 395 of the Mortgage Law. The most important is that which amends paragraph 6 of Article 393, so as to reduce from twenty years to six years the period during which possession must continue in order to convert an entry of possession into a record of ownership upon the public records. The final clause declares: "This order shall have retroactive effect."

The court below held (5 P. R. Fed. Rep. 463) that assuming General Henry possessed all the legislative power that is possessed by Congress under the Constitution, he was still necessarily subject (as Congress would be) to the

"due process of law" clause of the Fifth Amendment. And since his judicial order, because of its retroactive clause, by its terms covered the present case, where the real owners of the land were infants and unable to protect themselves, and where they still had, under the Mortgage Law as it stood, nearly twelve years in which to attain maturity and contest the possession and right of Morales,—and since the order shortened the period of limitation to six years, which period in their case had already elapsed, the order at the same time containing no provision for saving existing rights or giving to them or to others in like situation any opportunity to assert their rights; it was the same in effect as taking their property without due process of law.

We find it unnecessary to consider whether the authority of General Henry was subject to the same constitutional limitations as that of Congress; for we have reached a like result, so far as the present case is concerned, upon different reasoning.

Porto Rico at the time was still foreign territory, and was under a provisional military government established by President McKinley as Commander-in-Chief. In order to determine the extent of the authority of General Henry, and the limitations upon it, we must look to the orders under which the military government was established and maintained.

The Island was occupied by the forces of the United States under Major General Miles, Commanding U. S. Army, on July 25, 1898. He appears to have had no special instructions from the President respecting the government that should be established, but it was well understood that he and those under him were subject to the instructions communicated by President McKinley to the Secretary of War under date July 13 with reference to Cuba (10 Mess. & Pap. 214), and published by the War Department as General Orders No. 101,

under date July 18, of which a copy is set forth in the margin.[1]

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[1] [Corrected copy.—Please destroy all others.]

GENERAL ORDERS, No. 101.

WAR DEPARTMENT,
ADJUTANT GENERAL'S OFFICE,
Washington, July 18, 1898.

The following, received from the President of the United States, is published for the information and guidance of all concerned:

EXECUTIVE MANSION,
Washington, July 13, 1898.

To the SECRETARY OF WAR.

SIR: The capitulation of the Spanish forces in Santiago de Cuba and in the eastern part of the Province of Santiago, and the occupation of the territory by the forces of the United States, render it necessary *to instruct the military commander of the United States as to the conduct which he is to observe during the military occupation.*

The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their private rights and relations. It is my desire that the inhabitants of Cuba should be acquainted with the purpose of the United States to discharge to the fullest extent its obligations in this regard. It will therefore be the duty of the commander of the army of occupation to announce and proclaim in the most public manner that we come not to make war upon the inhabitants of Cuba, nor upon any party or faction among them, but to protect them in their homes, in their employments, and in their personal and religious rights. All persons who, either by active aid or by honest submission, coöperate with the United States in its efforts to give effect to this beneficent purpose will receive the reward of its support and protection. Our occupation should be as free from severity as possible.

Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent and in practice they are not usually abrogated, but are allowed

The clauses especially pertinent to the present question are the following: "The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment

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to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion. The judges and the other officials connected with the administration of justice may, if they accept the supremacy of the United States, continue to administer the ordinary law of the land, as between man and man, under the supervision of the American Commander-in-Chief. The native constabulary will, so far as may be practicable, be preserved. The freedom of the people to pursue their accustomed occupations will be abridged only when it may be necessary to do so.

While the rule of conduct of the American Commander-in-Chief will be such as has just been defined, it will be his duty to adopt measures of a different kind, if, unfortunately, the course of the people should render such measures indispensable to the maintenance of law and order. He will then possess the power to replace or expel the native officials in part or altogether, to substitute new courts of his own constitution for those that now exist, or to create such new or supplementary tribunals as may be necessary. In the exercise of these high powers the commander must be guided by his judgment and his experience and a high sense of justice.

One of the most important and most practical problems with which it will be necessary to deal is that of the treatment of property and the collection and administration of the revenues. It is conceded that all public funds and securities belonging to the government of the country in its own right, and all arms and supplies and other movable property of such government, may be seized by the military occupant and converted to his own use. The real property of the state he may hold and administer, at the same time enjoying the revenues thereof, but he is not to destroy it save in the case of military necessity. All public means of transportation, such as telegraph lines, cables, railways and boats belonging to the state may be appropriated to his use, but unless in case of military necessity they are not to be destroyed. All churches and buildings devoted to religious worship and to the arts and sciences, all schoolhouses, are, so far as possible, to be protected, and all destruction or intentional defacement of such places, of historical monuments or archives, or of works of science or art, is prohibited, save when required by urgent military necessity.

of a new political power. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their private rights and relations. . . . Though the powers of the military occupant are absolute and supreme, and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are

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Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained.

While it is held to be the right of the conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by conquest and to apply the proceeds to defray the expenses of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contribution to the expense of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the Army.

Private property taken for the use of the Army is to be paid for when possible in cash at a fair valuation, and when payment in cash is not possible, receipts are to be given.

All ports and places in Cuba which may be in the actual possession of our land and naval forces will be opened to the commerce of all neutral nations, as well as our own, in articles not contraband of war upon payment of the prescribed rates of duty which may be in force at the time of the importation.

WILLIAM McKINLEY.

By order of the Secretary of War:

H. C. CORBIN,

Adjutant General.

considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent, and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion. . . . Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause."

General Miles was second in command only to the President, and as his representative had full control in Porto Rico. That he fully sympathized with the purposes of the President, and intended that all subordinate officers should govern themselves accordingly, appears from his declaration to the inhabitants under date July 28, in which he said: "The first effect of this occupation will be the immediate release from your former political relations, and it is hoped a cheerful acceptance of the government of the United States. The chief object of the American military forces will be to overthrow the armed authority of Spain, and to give to the people of your beautiful island the largest measure of liberty consistent with this military occupation. We have not come to make war upon the people, . . . but, on the contrary, to bring you protection, not only to yourselves but to your property, to promote your prosperity, and to bestow upon you the immunities and blessings of the liberal institutions of our government. It is not our purpose to interfere with any existing laws and customs that are wholesome and beneficial to your people so long as they conform to the rules of military administration, of order and justice. This is not a war of devastation, but one to give to all within the control of its military and naval forces the advantages and blessings of enlightened civilization."

And under date July 29, a letter of instructions was published under the authority of General Miles for the information and guidance of all concerned, in which the substance of General Orders No. 101, *mutatis mutandis*, was embodied, so as to be binding upon the military government of Porto Rico (Rep. War Dept. 1900, Vol. 1, Part 13, pp. 18–22).

The protocol of August 12, 1898 (30 Stat. 1742), the purport of which has already been given, left our Government, by its military forces, in the occupation and control of Porto Rico as a colony of Spain, and bound by the principles of international law to do whatever was necessary to secure public safety, social order, and the guaranties of private property. From this time until the interchange of the ratifications of the treaty on April 11, 1899 (30 Stat. 1754), General Orders No. 101, and the instructions of General Miles to his subordinates dated July 29, 1898, continued to form the authority, and the sole authority, for the military government of Porto Rico.

This island, and the islands and keys adjacent and belonging to it, were by order of October 1, 1898 (General Orders No. 158), established as a military department, and Major General John R. Brooke was assigned to its command. He assumed the command on October 18, and held it until December 8. General Henry succeeded him on that date, and remained in command until after the ratification of the treaty.

The status of Porto Rico during the military occupancy, and before the exchange of ratifications, was the same as that of the Philippines during the same period, and is dependent upon principles expounded in frequent decisions of this court. *Fleming* v. *Page*, 9 How. 603, 614, 615; *Cross* v. *Harrison*, 16 How. 164, 190; *Dooley* v. *United States*, 182 U. S. 222, 230; *MacLeod* v. *United States*, 229 U. S. 416.

From the exchange of ratifications until Congress

acted by the passage of the Foraker Act, the provisional government continued as before the peace. *Santiago* v. *Nogueras*, 214 U. S. 260, 265; *Leitensdorfer* v. *Webb*, 20 How. 176, 178. And see *DeLima* v. *Bidwell*, 182 U. S. 1, 174, etc.

During the entire period, General Orders No. 101, as reiterated by General Miles, continued in force as the recognized declaration of principles by which the military government was limited. References to official sources of information respecting the period of the military occupancy are given in a marginal note.[1]

Under all the circumstances we deem it clear that the Governor was without authority from the President to make any order, judicial in its nature, that would have the effect of depriving any person of his property without due process of law.

It is said that § 8 of the Foraker Act (31 Stat. 79, c. 191) had the effect of ratifying the Judicial Order of General Henry. That section declared: "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by Act of Congress of the United States," with provisos not now pertinent. We can find here no legislative purpose to validate any

[1] Reports Major-General Commanding Army, 1898, pp. 31–33; 1899, pp. 321, 325.

Reports War Department, 1899, Vol. 1, Part 6, pp. 488, 491, 565; 1900, Vol. 1, Part 13, pp. 18–30.

General Orders, Department of Porto Rico, 1898, Preface (General Orders No. 101).

order of the Military Governor that was in excess of the authority conferred upon him by the President.

Without the guaranty of "due process" the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that charter (Coke, 2 Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term "due process of law," all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing.

Now, the effect and operation of the retroactive clause in the Judicial Order of April 4, 1899, as applied to the facts of the concrete case, were such that although Morales had until then no right, title, or interest in the land in question, and had merely established through fraudulent means and without notice to the persons concerned a footing of possession, as a result of which, if they should permit his claims to remain unchallenged, and he should in fact maintain continuous possession for nearly twelve years longer, he would thereby be enabled to procure, by *ex parte* proceedings, an apparent title in himself as against them; yet the Order permitted him at once, and without notice to the owners, to procure such record of ownership in his name, although they were then infants, and, so far as appears, not cognizant of his possession of the land or of any of his proceedings; and then by virtue of other provisions of the Mortgage Law, he could completely deprive them of their property if he could make sale of it to a *bona fide* purchaser without notice of the infirmity of his apparent title.

With reference to statutes of limitations, it is well settled that they may be modified by shortening the time

prescribed, but only if this be done while the time is still running, and so that a reasonable time still remains for the commencement of an action before the bar takes effect. *Terry* v. *Anderson*, 95 U. S. 628, 632; *In re Brown*, 135 U. S. 662, 701, 705; *Wheeler* v. *Jackson*, 137 U. S. 245, 255; *Turner* v. *New York*, 168 U. S. 90, 94; *Wilson* v. *Iseminger*, 185 U. S. 55, 63. Many other cases might be cited. The question of what, under given circumstances, is to be deemed a reasonable time to be allowed for the bringing of an action when a change is made in a statute of limitations has sometimes given rise to discussion. In the present case there is no such embarrassment, for here no time whatever was allowed with respect to the case of these appellees and all others against whose lawful ownership an unlawful possession had been held for more than six years but less than twenty years at the time of the making of the Judicial Order.

Since the proceeding for converting the entry of possession into a *dominio* title, as well as the proceeding for the entry of possession itself, was taken without notice to the owners, the effect of the Judicial Order was precisely the same as if the Military Governor had declared that the property in question should be taken from the lawful owner and given to the fraudulent occupant. Certainly General Henry can have had no such purpose, and must have been wrongly advised with respect to the results that would flow from making the order retroactive. Otherwise he would have confined it to cases where there still remained a reasonable opportunity for the real owner to contest the pretensions of the possessor. And in view of the instructions under which he derived his authority, the Judicial Order must be construed as if expressly thus limited.

But appellants rely upon Articles 33, 34, 36, and 37, already quoted; the effect of which is that the title of "a person who according to the registry has a right thereto

[*e. g.* Morales] shall not be invalidated with regard to third persons [*e. g.* appellants] after they have once been recorded, although later the right of the person executing them [Morales] is annulled or determined . . . for reasons which do not clearly appear from the registry;" and also, that "suits for rescission or determination of title shall not be instituted against third persons [*e. g.* appellants] who have recorded the instruments of their respective interests in conformity with the provisions of this law," except, however, "suits for rescission or determination of title which are due to the causes plainly expressed in the registry." It is said that since Morales secured the possessory title in 1890, and recorded it in the same year, and secured the conversion of that title into a title of ownership in the year 1899, and recorded this *dominio* title in the same year, and in the year 1901 mortgaged the lands for value to the appellants, and followed this with a conveyance in 1903, he at all times appearing in the registry as sole owner, and since in their transactions with Morales, appellants acted in good faith and in the belief that he was the sole owner, they are protected.

But the findings show that the entry of possession in favor of Morales declared that his right was "without prejudice to third parties who might show a better right to such possession," and that the proceedings for the conversion of the entry of possession into a record of ownership showed upon their face that they were based upon the provisions of the Judicial Order of April 4, 1899.

In other words, when appellants took from Morales the mortgage and deed under which they now claim, they were charged with notice upon the record that his entry of possession was subject to the rights of others; and that by the law as it formerly stood, those rights could not be cut off in less than twenty years. They were also charged with notice that his *dominio* title depended upon

the validity of an order made by the Military Governor purporting to have a retroactive effect and to cut off, without notice or hearing, the claims of the identical third parties whose rights were preserved by the entry of possession; for at the time of the making of the Judicial Order, the six years had already run.

It is a familiar doctrine, universally recognized where laws are in force for the registry or recording of instruments of conveyance, that every purchaser takes his title subject to any defects and infirmities that may be ascertained by reference to his chain of title as spread forth upon the public records. *Brush* v. *Ware*, 15 Pet. 93, 111; *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, 437; *Northwestern Bank* v. *Freeman*, 171 U. S. 620, 629; *Mitchell* v. *D'Olier*, 68 N. J. Law (39 Vr.), 375, 384; 53 Atl. Rep. 467; 59 L. R. A. 949.

This principle is recognized in Articles 34 and 37 of the Mortgage Law. In referring to "reasons which do not clearly appear from the registry," and "causes plainly expressed in the registry," they refer of course to matters of fact, not to matters of law. In other words, if the registry gives notice of a state of facts that renders the title invalid or subject to question in law, the purchaser who relies upon the record takes his title subject to whatever consequences may flow in law from the facts thus notified.

Appellants must be presumed, in accepting the mortgage and the conveyance from Morales, to have done so subject to whatever risk there may have been, arising from the want of authority on the part of General Henry to deprive third parties, without process of law, of those rights that were saved by the terms of the entry of possession in favor of Morales.

Nor is there any real hardship in applying this rule; for the limitations under which the Military Governor exercised his temporary authority in Porto Rico must be deemed to have been notorious everywhere, since they

were proclaimed at the outset by General Miles, repeatedly reiterated during the military *regime*, and indeed were such as arise from general rules of international law and from fundamental principles known wherever the American flag flies.

Decree affirmed.

NALLE *v.* OYSTER.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 218. Submitted April 16, 1913.—Decided June 16, 1913.

The practice of bills of exceptions is statutory under the Statute of Westminster, 2, 13 Edw. I, c. 31, which prevailed in Maryland and was continued in force in the District of Columbia by the act of March 3, 1901, except as superseded by the Code established by that act.

Error appearing on the face of the record may be assigned as ground for reversal, although no exception be taken; nor is the function of an exception confined to the trial of the action but extends to all the pleas, challenges and evidence.

This practice was not modified by the Code, nor has it been by any rules of practice established under it; there is no provision giving the right to take exceptions on rulings other than those made in the course of the trial, except as based on the Statute of Westminster; nor does any rule of court require an exception to be taken in order to preserve rights of a plaintiff against whose declaration a demurrer has been sustained.

Section 1533 of the Code applies only where the demurrer has been overruled; it has no bearing upon a case where the demurrer has been sustained.

Ordinarily malice is to be implied from the mere publication of a libel, and justification or extenuation must proceed from the defendant; but where the communication is privileged, the burden is on the plaintiff to prove malice. *White* v. *Nichols*, 3 How. 266.

Allegations of malice, falsehood and want of probable cause in issuing a libel are of fact and are necessarily admitted by a demurrer.

The issue joined upon a demurrer to one count of a declaration is legally distinct and separate from the issue joined upon a demurrer to another count; nothing can be imported from one count to the other, nor can a judgment be based upon surmise that a matter referred to in one count is the same as that referred to in another.

If the parties in the former action be the same as in the present, every matter and question of fact necessarily involved in the consideration and determination of the former issue is conclusive upon the present. *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, 48.

A judgment denying the petition in an action for mandamus to compel reinstatement of a public school teacher in which the defendants, members of the Board of Education, pleaded that the petitioner was not sufficiently qualified as a teacher and the court held this was justification of the dismissal is *res judicata* as to that question in a suit for libel subsequently brought by the petitioner against the same defendants for the statement made in such pleading.

A statement as to the qualifications of a teacher in the public schools made by members of the Board of Education in their answer to a petition for mandamus to reinstate her after dismissal is privileged; and if made without malice and with probable cause is not actionable.

Such a statement cannot be held in an action for libel to have been made without probable cause if the court has held in another proceeding that the defendants were justified in making it.

No civil action lies for a conspiracy, unless there be an overt act that results in damage to the plaintiff.

Publication of a privileged statement in an action as an essential part of a pleading by several defendants members of an official body *held* in this case not to be an overt act of a conspiracy.

36 App. D. C. 36, reversed.

THE facts, which involve the practice of bills of exceptions in the District of Columbia and the extent to which statements made by members of a Board of Education in regard to qualifications of a school teacher are privileged, are stated in the opinion.

Mr. John C. Gittings and *Mr. Justin Morrill Chamberlin* for plaintiff in error:

There is no absolute privilege where the libelous matter

was knowingly false, and malicious and wantonly made. *White* v. *Nichols*, 3 How. 266; see also *Masterson* v. *Brown*, 72 Fed. Rep. 136; *Merchants Ins. Co.* v. *Buckner*, 98 Fed. Rep. 222; *McGee* v. *Insurance Co.*, 112 Fed. Rep. 854.

Those text-writers who hold otherwise, basing their views on modern state and English authorities, have overlooked that the very ground which is the basis of the claim of absolute privilege, namely, that of public policy, is given by the Supreme Court of the United States in *White* v. *Nichols, supra*, as being the ground why such privilege does not, and should not, exist, and by careful examination of all the state authorities, it will be found that the doctrine of absolute privilege is traced to *Lake* v. *King*, 1 Saunders, 120.

The court below erred on the question of *res judicata*.

A former judgment is not binding on the parties in a subsequent action by way of estoppel to any question of fact, unless it appears, from the judgment or by extrinsic evidence, that such question was within the issue of the former action and actually litigated and determined therein. *Hopkins* v. *Lee*, 6 Wheat. 109; *Packet Co.* v. *Sickles*, 5 Wall. 592; *Aurora City* v. *West*, 7 Wall. 82; *Russell* v. *Place*, 94 U. S. 606; *Pacific R. R.* v. *United States*, 168 U. S. 1; *Cummings* v. *Baker*, 16 App. D. C. 1; *Augir* v. *Ryan*, 63 Minnesota, 373; *Teal* v. *Terrell*, 48 Texas, 491.

A judgment is not technically conclusive of any matter, if the matter is not such that it had, of necessity, to be determined before the judgment could have been given. *Hunter* v. *Davis*, 19 Georgia, 413; 1 Starkie's Ev. 223; Greenleaf Ev., § 528; *Bergeron* v. *Richardott*, 55 Wisconsin, 129; *Dixon* v. *Merritt*, 21 Minnesota, 196.

A prosecution with malice and without probable cause is just foundation of an action, though such prosecution was instituted in the appropriate court and carried on with every formality known to the law. *Masterson* v.

Brown, 72 Fed. Rep. 136; Townsend on Slander and Libel, 3d ed., No. 220, p. 380; *Olmstead* v. *Partridge*, 16 Gray, 381; *Beihofer* v. *Loeffert*, 159 Pa. St. 365; 19 Am. and Eng. Enc. Law, 2d ed., p. 694.

The second count of the declaration is not a count in libel but a count in trespass on the case in the nature of a conspiracy. *Saville* v. *Roberts*, 1st Ld. Raym. 374.

Plaintiff may maintain this count in trespass although it is not a common form of action. See *Mott* v. *Danfort*, 6 Watt. 304; *Wildee* v. *McKee*, 111 Pa. St. 337; *Van Horn* v. *Van Horn*, 56 N. J. L. 318; *Verplanck* v. *Van Buren*, 76 N. Y. 259.

Mr. Clarence R. Wilson, United States Attorney, and *Mr. Reginald S. Huidekoper* for defendants in error:

The matter is *res judicata* and the plaintiff is estopped by the former judgment referred to in the pleadings.

The plaintiff in both actions is the same person. The defendants in this action were all named parties defendant in the mandamus proceedings. The Supreme Court of the District had to entertain the petition for mandamus and the present action.

Throughout the mandamus suit there was an unsuccessful effort to lead the court to hold that the act of Congress required the Board to give the plaintiff notice of the charges against her, a trial, and the right to be represented by counsel before she could be dismissed.

Plaintiff's contention that the mandamus proceeding brought for the purpose of restoring her to an office is not the same cause of action or the same subject-matter as the libel, cannot be sustained as the alleged libel was not in existence nor had it been published until after the mandamus proceeding had been started.

If this contention were sound, there would be no room for the application of the doctrine of *res judicata* in any case.

See numerous decisions to effect that an adjudication respecting prior installments or coupons is conclusive between the parties relating to subsequent installments or coupons. *Lumber Co.* v. *Buchtel*, 191 U. S. 638; *Bissell* v. *Spring Valley*, 124 U. S. 225; *Johnson Co.* v. *Worten*, 152 U. S. 252.

A person is estopped from again setting up a claim in a subsequent suit which was necessarily involved in a prior suit between the same parties and this whether such matter was actually considered by the court or not. *Beloit* v. *Morgan*, 7 Wall. 619, 623; *Cromwell* v. *County of Sac*, 94 U. S. 351; *Hopkins* v. *Lee*, 6 Wheat. 109, 113.

It is not essential the causes of action should be the same. *New Orleans* v. *Citizens Bank*, 167 U. S. 371; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1; See also *Baker* v. *Cummings*, 181 U. S. 117; *Dickinson* v. *Wilkinson*, 3 How. 57, 61; *Southern Minnesota Ry.* v. *St. Paul S. C. R. Co.*, 55 Fed. Rep. 690; *Waterbury* v. *Marine Society*, 94 Maine, 122; *North River Co.* v. *Schrewsburg Church*, 22 N. J. L. 424; *Holt County* v. *National Life Ins. Co.*, 80 Fed. Rep. 686.

The alleged libelous matter referred to in the first count of the declaration was absolutely privileged, and malice cannot be predicated upon it. *White* v. *Nicholls*, 3 How. 266, does not sustain appellant's contention; the statement in that case that there is no absolute privilege in law, is a mere *dictum*, and is also distinguishable, because the action complained of was not, as here, in pursuance of a public official duty.

Matters appearing in the pleadings or statements of counsel made in the course of judicial proceedings which are pertinent and material to the issue are absolutely privileged and will not support an action for libel against the party making them. *McGehee* v. *Insurance Co.*, 112 Fed. Rep. 853; *King* v. *McKissick*, 126 Fed. Rep. 215; *Conley* v. *Key*, 98 Georgia, 115; *Wilson* v. *Sullivan*, 81

Georgia, 238; *Burdette* v. *Argyle*, 94 Ill. App. 171; *Strauss* v. *Meyer*, 48 Illinois, 385; *Gardemal* v. *McWilliams*, 43 La. Ann. 454; *Maulsby* v. *Reifsnider*, 69 Maryland, 143; *McLaughlin* v. *Cowley*, 127 Massachusetts, 316; *Rice* v. *Coolidge*, 121 Massachusetts, 393; *Aylesworth* v. *St. John*, 25 Hun, 156; *Link* v. *Moor*, 84 Hun, 118; *Lawson* v. *Hicks*, 38 Alabama, 279; *Gaines* v. *Ætna Ins. Co.*, 104 Kentucky, 695; *Bartlett* v. *Christhilf*, 69 Maryland, 219; *Marsh* v. *Ellsworth*, 50 N. Y. 309; *Moore* v. *Mfrs. Nat. Bank*, 123 N. Y. 420; *Gilbert* v. *The People*, 1 Denio (N. Y.), 41; *Cook* v. *Hill*, 3 Sandf. (N. Y.) 341; *Warner* v. *Paine*, 2 Sandf. (N. Y.) 195; *Perkins* v. *Mitchell*, 31 Barb. 461; *Garr* v. *Selden*, 4 Comst. (N. Y.) 91; *Nissen* v. *Cramer*, 104 N. C. 574; *Lea* v. *White*, 4 Sneed (Tenn.), 110; *Mower* v. *Watson*, 11 Vermont, 536; *Clemmons* v. *Danforth*, 67 Vermont, 617; *Abbott* v. *Natl. Bank*, 20 Washington, 552; *Johnson* v. *Brown*, 13 W. Va. 71, 119; *Jennings* v. *Paine*, 4 Wisconsin, 358; *Astley* v. *Younge*, 2 Burr. 807. See also *Hoar* v. *Wood*, 3 Met. 193, 196.

Malice cannot be predicated upon matter which is pertinent and material to a case subject to inquiry before a court. No one is permitted to allege what was rightfully done in a judicial proceeding was done with malice. Though the words used were false and malicious, the privilege is absolute. *Lawson* v. *Hicks*, 38 Alabama, 279; *Hollis* v. *Meux*, 69 California, 625; *Burdette* v. *Argyle*, 94 Ill. App. 171; *Gaines* v. *Ætna Ins. Co.*, 104 Kentucky, 695; *Gardemal* v. *McWilliams*, 43 La. Ann. 454; *Bartlett* v. *Christhilf*, 69 Maryland, 219; *Marsh* v. *Ellsworth*, 50 N. Y. 309; *Garr* v. *Selden*, 4 N. Y. 91; *Gilbert* v. *The People*, 1 Denio, 41; *Mower* v. *Watson*, 11 Vermont, 536; *Link* v. *Moor*, 84 Hun, 118; *Moore* v. *The Mfrs. Nat. Bank*, 123 N. Y. 420; *Nissen* v. *Cramer*, 104 N. C. 574; *Warner* v. *Paine*, 2 Sandf. 195.

However false and malicious, they are not libelous. *Wilson* v. *Sullivan*, 81 Georgia, 238.

If the person charging facts in a pleading in a judicial procedure in good faith believes the words thus written to be material and pertinent to the issues presented in such proceedings, then the rule of absolute privilege extends to such person, although the matter may be found to be not strictly material and pertinent. *Lawson* v. *Hicks*, 38 Alabama, 279; *Burdette* v. *Argyle*, 94 Ill. App. 171, 175; *Aylesworth* v. *St. John*, 25 Hun, 156; *Hastings* v. *Lusk*, 22 Wend. 410; *White* v. *Carroll*, 42 N. Y. 161.

For other cases on this point see *Harlow* v. *Carroll*, 6 App. D. C. 128; *De Arnaud* v. *Ainsworth*, 24 App. D. C. 167; *Dawkins* v. *Paulet*, L. R. 5 Q. B. 94; *Farr* v. *Valentine*, 38 App. D. C. 413; *Johnson* v. *Brown*, 13 W. Va. 71.

In regard to statement in appellant's brief that there is no decision in this court subsequent to *White* v. *Nichols* that in any way can be said to overrule the doctrine there propounded, this court has in several instances recognized, adopted, and applied the principle of absolute privilege. See *Randall* v. *Brigham*, 7 Wall. 523, 535; *Bradley* v. *Fisher*, 13 Wall. 335, 351; *Vogel* v. *Gruaz*, 110 U. S. 311, 315; *Spalding* v. *Vilas*, 161 U. S. 483.

Masterson v. *Brown*, 72 Fed. Rep. 136; *Merchants Ins. Co.* v. *Buckner*, 98 Fed. Rep. 222; *McGehee* v. *Insurance Company*, 112 Fed. Rep. 854, cited in appellant's brief, are not authority for the principle broadly stated in *White* v. *Nichols*.

The second count of the amended declaration states no cause of action. *Adler* v. *Fenton*, 24 How. 407; *Porter* v. *Mack*, 50 W. Va. 581; *Severinghaus* v. *Beckman*, 9 Ind. App. 388; *Kimball* v. *Harman*, 34 Maryland, 407; *Van Horn* v. *Van Horn*, 56 N. J. L. 318, 323; Pollock on Torts, 267; *O'Callaghan* v. *Cronan*, 121 Massachusetts, 114; *Rice* v. *Coolidge*, 121 Massachusetts, 393; *United States ex rel. McManus* v. *Moore*, 3 MacA. 226.

The alleged libelous matter, being incorporated in the answer of the defendants in a judicial proceeding, was

absolutely privileged, and its use in such proceedings was lawful. The use of the words complained of was an act legal in itself, and was in violation of no right of the plaintiff, and cannot therefore be made actionable upon the theory of conspiracy.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is a writ of error to review a judgment affirming a judgment of the Supreme Court of the District in favor of the defendants in an action for libel and conspiracy.

The declaration contains two counts, the first of which avers that the plaintiff was a teacher and a member of the body of teachers in the public schools of the District of Columbia, and that the defendants, without probable cause, but contriving and maliciously intending to injure plaintiff in her character and reputation as a school teacher, wrongfully and maliciously composed and published and filed in the Clerk's office of the Supreme Court of the District, as their answer in a legal proceeding wherein they and others composing the Board of Education were named as defendants, a certain false, scandalous and defamatory libel concerning the plaintiff in respect of her profession, the purport of which was that the defendants and others, composing the Board of Education, found upon examination that the plaintiff "was not sufficiently qualified in all respects to continue to teach" in the public schools, but was "deficient in the necessary academic and pedagogic equipment of a competent teacher," so that the Board of Education were unable lawfully to continue her in employment.

The second count recites that the plaintiff was and for more than thirty years had been earning her livelihood as a teacher and member of the body of teachers of the public schools of the District of Columbia, and the defendants and others constituted the Board of Education,

as provided for by the act of Congress approved June 20, 1906, 34 Stat. 316, c. 3446, by which it is, among other things, enacted that when a teacher is on trial or being investigated she shall have the right to be attended by counsel; that certain untrue charges concerning plaintiff's moral character and reputation were under investigation by the Board; that without notice to her, or an opportunity for a hearing the Board dismissed her from the rolls as a teacher, assigning as a reason that this was done for the good of the service; that feeling aggrieved and having failed to secure redress by a petition direct to the Board, plaintiff petitioned the Supreme Court of the District for a writ of mandamus to compel the Board to reinstate her; that the defendants, intending to wrong and injure her in her right to employment in the line of her occupation and calling, and specifically to prevent her from securing the writ of mandamus to reinstate her to her position and to the emoluments of her office as a member of the body of teachers of the public schools, entered into an unlawful agreement and conspiracy among themselves to ruin the plaintiff, and specifically to prevent her from obtaining her proper redress as prayed for in the mandamus proceedings, and to cause it to be believed by the public in general that she was deficient in the necessary academic and pedagogic equipment of a competent teacher, and thereby prevent her from securing employment as such; that in pursuance of the conspiracy the defendants maliciously composed and published, and filed in the Clerk's office of the Supreme Court of the District, a paper purporting to be their answer and the answer of other members of the Board of Education, which contained certain false and scandalous libel concerning the plaintiff in her profession as a school teacher (the alleged libelous matter being set forth and being of the same tenor and purport as that alleged in the first count), the defendants knowing at the time that the facts

alleged in the libel were false; all of which was done in pursuance of the alleged unlawful agreement and conspiracy; that thereby the plaintiff was prevented from securing a fair and impartial hearing in the mandamus proceedings, was prevented from being reinstated to her office as a member of the body of teachers of the public schools and receiving the emoluments thereof, and has been greatly injured in her good name and character, etc.

To the first count, defendants interposed a demurrer, upon the ground that the alleged libelous matter was privileged. The demurrer was sustained.

To the second count, defendants filed two pleas. Of these, the first sets up the proceedings and judgment in the Supreme Court in the case of *The United States of America ex rel. Mary E. Nalle, Relator*, v. *George W. Baird and others, Respondents*,[1] on plaintiff's petition for a writ of mandamus to restore her to the rolls as a teacher (being the same proceeding in which the alleged libelous matter was filed as the answer of the Board of Education), and avers that afterwards, by the consideration and judgment of the court, and upon an issue necessarily involved in the cause and litigated therein between the parties, and identical with the causes of action herein given, it was ordered that the writ of mandamus be and it was thereupon denied, as by the record appears, a copy of which is attached to the plea and made a part of it.

The second plea to the second count sets up the former adjudication in a different form, averring the facts more elaborately and including a special reference to the alleged libelous matter under circumstances such as to lay the foundation for a claim that it was privileged. This plea avers that at the time alleged in the second count of the declaration, and for a long time before, the defendants constituted the Board of Education of the District, in

[1] See *United States ex rel. Nalle* v. *Hoover*, 31 App. D. C. 311.

which was vested the control of the public schools under the laws of the United States; that plaintiff was and for a long time had been a teacher in the public schools; that the defendants as the Board of Education, acting in accordance with the laws and by virtue of the authority vested in them as such board, dismissed her from the position of teacher; that afterwards she impleaded the defendants in the Supreme Court of the District, upon a petition for a writ of mandamus, for her restoration to the rolls as a teacher in the public schools; that thereafter the defendants, as respondents in the action of mandamus, filed an answer in the Supreme Court in that suit, and in that answer, "and upon a matter material, relevant, pertinent, and necessarily involved in said cause and litigated therein between the said parties, set up the identical matters and writings complained of in the present suit, and thereupon set up in said answer and as a response to the allegations of said petition the following writing upon which this present suit is based, to wit" (here repeating the alleged libel); that such proceedings were thereafter had in the action of mandamus that by the consideration and judgment of the court, and upon an issue necessarily involved in the cause litigated therein between the parties, it was ordered that the writ of mandamus be and it was denied and the petition dismissed, as by the record appears, a copy of which is attached to and made a part of the plea, which judgment still remains in full force, etc., concluding with a verification.

To both pleas, the plaintiff demurred. Her demurrers were overruled, and as she elected to stand upon them, final judgment was entered against her.

The Court of Appeals of the District affirmed the judgment (36 App. D. C. 36), and the present writ of error was sued out.

The questions argued are: whether the first count of the declaration was properly sustained against the demurrer

interposed to it on the ground that the alleged libelous matter was privileged; and whether *res judicata* or privilege was well pleaded to the second count.

The Court of Appeals declined to go into the question of privilege, ignoring the first count because no exception was taken by plaintiff to the ruling of the court sustaining the demurrer thereto; and ignoring the question of privileged communication raised by the second plea to the second count because the judgment against the plaintiff on that count could be sustained on the plea of former adjudication.

Respecting the necessity for an exception to the court's ruling in sustaining the demurrer to the first count, counsel for defendants in error have not attempted to uphold the position taken by the Court of Appeals. The court cited no statute, rule or other authority for its position, and we have been unable to find any.

The practice of bills of exceptions is statutory. By the ancient common law, a writ of error lay only for an error in law apparent upon the judgment roll—what is now called the "strict record"—or for an error in fact, such as the death of a party before judgment. (See *Green* v. *Watkins*, 6 Wheat. 260, 262.) For an erroneous decision that did not appear upon the record there was no redress by writ of error. To relieve this, the Statute of Westminster 2, 13 Edw. I, ch. 31 (1 Eng. Stat. at L. 99; Bac. Abr., title "Bill of Exceptions"), was enacted more than six hundred years ago, providing that one who alleged an exception should write it out and require the justices to put their seals to it, and that if upon review "the exception be not found in the roll, and the plaintiff show the exception written, with the seal of the justice put to, the justice shall be commanded that he appear, etc., and if he cannot deny his seal they shall proceed to judgment according to the exception," etc. Under this act, and state statutes modeled after it, it has always been held

that error appearing upon the face of the record may be assigned as ground for reversal, although no exception be taken. *Slacum* v. *Pomery* (1810), 6 Cranch, 221, 225; *Macker's Heirs* v. *Thomas* (1822), 7 Wheat. 530, 532; *Woodward* v. *Brown* (1839), 13 Pet. 1, 5; *Bennett* v. *Butterworth* (1850), 11 How. 669, 676; *Suydam* v. *Williamson* (1857), 20 How. 427, 433; *Insurance Co.* v. *Piaggio* (1872), 16 Wall. 378, 386; *Baltimore & Potomac R. Co.* v. *Trustees* (1875), 91 U. S. 127, 130. And, on the other hand, the function of an exception is not confined to rulings made upon the trial of the action. As pointed out by Lord Coke (2 Inst. 427): "This [*i. e.*, an exception taken under the Statute of Westminster 2,] extendeth not onely to all pleas dilatory and peremptory, &c., and (as hath been said) to prayers to be received, oyer of any record or deed, and the like; but also to all challenges of any jurors, and any materiall evidence given to any jury, which by the court is over-ruled." And see *Defiance Fruit Co.* v. *Fox*, 76 N. J. Law (47 Vr.), 482, 489.

Except as modified by statute, the practice of the courts of the District of Columbia is modeled upon that which obtained in the courts of Maryland at the time of the cession. Act of February 27, 1801, § 1, 2 Stat. 103, c. 15. By act of March 2, 1889, 25 Stat. 872, c. 392, Congress provided for the making and publication of a compilation of the laws then in force in the District, to be made by commissioners appointed by the Supreme Court of the District. The result was the Abert & Lovejoy Compilation, and in it (p. 442, § 5) the statute of Westminster 2 (13 Edw. I, ch. 31, § 1) is included. Under the settled practice in Maryland (as elsewhere) under that statute, a bill of exceptions is unnecessary and inappropriate for bringing under review a ruling of the court upon a demurrer to the pleadings, since the pleadings form a part of the record and show upon their face the facts upon which the question of law is raised. *Blake* v. *Pitcher* (1877), 46 Maryland, 453,

462; *Wilson* v. *Merryman* (1877), 48 Maryland, 328, 338; *Lee* v. *Rutledge* (1878), 51 Maryland, 311, 318; *Davis, Exr.*, v. *Carroll* (1889), 71 Maryland, 568.

By the "Act to establish a code of law for the District of Columbia," approved March 3, 1901, 31 Stat. 1189, c. 854, Congress enacted that the common law, and all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, should remain in force, except so far as inconsistent with or replaced by, some provision of the Code. We find nothing in the Code, or in the rules of practice established under it, to require an exception in order that an error apparent upon the record may be reviewed. Sections 71 and 73 pertain to the taking of exceptions to rulings made during trial in the Supreme Court. There seems to be no section that in terms recognizes a right to take exceptions on rulings other than such as are made in the course of the trial, unless this right follows from the adoption of the Statute of Westminster as being among the "British statutes in force in Maryland," etc.

Sec. 65 of the Code authorizes the Supreme Court of the District to establish rules of practice for the trial terms, not inconsistent with the laws of the United States. Sec. 225 authorizes the Court of Appeals to "make such rules and regulations as may be necessary and proper for the transaction of its business and the taking of appeals to said court"; with the "power to prescribe what part or parts of the proceedings in the court below shall constitute the record on appeal except as herein otherwise provided, and the forms of bills of exceptions, and to require that the original papers be sent to it instead of copies thereof, and generally to regulate all matters relating to appeals, whether in the court below or in said Court of Appeals."

We are referred to nothing, and have found nothing in the rules of either of the courts, to require an exception

to be taken in order to preserve the rights of a plaintiff against whose declaration, or a count thereof, a demurrer has been sustained. Rules 47 and 48 of the Supreme Court relate to bills of exceptions. And rules 4 and 5 of the Court of Appeals relate to the form of the bills. There is nothing in these that touches upon the present point.

Sec. 1533 of the District Code provides that in all cases where a demurrer to a declaration or other pleading shall be *overruled*, the party demurring shall have the right to plead over, without waiving his demurrer. This is obviously designed to modify the former rule that where after demurrer overruled, leave was given to plead, and the demurring party pleaded to the pleading demurred to, he waived the demurrer, and took it out of the record, so that it did not appear in the judgment roll. *Young* v. *Martin*, 8 Wall. 354, 357; *Stanton* v. *Embry*, 93 U. S. 548, 553; *Del., Lack. & West. R. Co.* v. *Salmon*, 39 N. J. Law (10 Vr.), 299, 301. The section has no bearing upon the case where a demurrer is *sustained.*

We must therefore consider the merits of the question raised by defendant's demurrer to the first count.

Counsel for plaintiff in error rest upon the authority of the decision of this court in *White* v. *Nicholls*, 3 How. 266, 291, where, after a full review of the English and American authorities, the court declared that, in the ordinary case, malice is to be implied from the mere publication of a libel, and justification, excuse or extenuation, if any, must proceed from the defendant; that with respect to privileged communications the recognized obligation or motive that may fairly be presumed to have led to the publication, and so to relieve it from the implication of malice, so far changes the rule of evidence as to require the plaintiff to bring home to the defendant the existence of malice as the true motive of his conduct; that such malice may be proved although alleged to have

existed in the proceedings before a court, and although such court may have been the proper authority for redressing the grievance presented to it; that proof of express malice in a pleading filed in any such proceeding will render the pleading libelous and actionable; and that "in every case of a proceeding like those just enumerated, falsehood and the absence of probable cause amount to proof of malice."

The defendants, having demurred to the count in question, necessarily admit the truth of the facts stated in it, so far as they are well pleaded. Among the facts so pleaded are malice, falsehood and the want of probable cause; and the averment of these facts is not negatived or qualified by anything else that appears in the count. The count does not even show that the alleged libelous matter was pertinent or material to the issue, for it does not show the nature of the proceeding, nor what was the issue, nor that the plaintiff was a party to it.

It is unnecessary to say that the issue joined upon the demurrer to the first count is legally distinct and separate from the issue joined upon the demurrers to the pleas to the other count. Nothing in the second count or in the subsequent pleadings can be imported into the first count. And so, while we may surmise that the legal proceeding referred to in the first count is the same as that elsewhere referred to in the pleadings, we cannot base upon this surmise a judgment upon the demurrer. So far as appears from the count itself, the plaintiff may have been a stranger to the proceeding in which the alleged libelous answer was filed. Moreover, there is nothing to rebut the averment of falsehood and the absence of probable cause. And since it cannot be doubted that the matter is libelous unless protected by the privilege, it follows that the court erred in sustaining the demurrer.

The questions raised by the other demurrers need not long detain us. The established rule is that if the parties

in the former action be the same as in the present, then every matter and question of fact and of law that was necessarily involved in the consideration and determination of the former issue shall be conclusive upon the present. *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, 48, and cases cited.

The matter alleged to be libelous, was the statement made by respondents in their answer to the mandamus proceeding that they had found on examination that the plaintiff was "not sufficiently qualified in all respects to be competent to continue to teach, but was deficient in the necessary academic and pedagogic equipment of a competent teacher," so that the respondents were unable lawfully to continue employing her.

Counsel for plaintiff in error point out that while upon the decision of a demurrer in the mandamus case, the Supreme Court (by Mr. Justice Anderson) held that this was a good justification, it was afterwards traversed in fact, and it is contended that the issue thereon was determined without passing upon the precise question of plaintiff's "academic and pedagogic equipment." As evidence of this, the proceedings in the mandamus case are referred to. It appears that in giving the reason for entering final judgment in favor of the Board of Education, Justice Anderson said: "It was not necessary that the Board should find that she was lacking in the academic and pedagogic equipment of a competent teacher, if they found generally that she was not qualified to teach in the public schools." The argument now seems to be that the "necessary academic and pedagogic equipment" is not synonymous with the "sufficient qualifications" of a teacher. This, we think, is a distinction without a difference, and the Court of Appeals correctly held that both pleas to the second count were good as setting up a former adjudication of the identical matters included in the second count of the declaration.

Upon the question of privilege raised by the second plea, the Court of Appeals thought it unnecessary to pass. Strictly, this is true, for if the alleged cause of action is concluded by a former adjudication, it is immaterial whether the cause of action is in itself well founded.

However, it is not out of place to say that it cannot be doubted that the second count of the declaration, taken in connection with the second plea thereto, shows a situation that clearly renders the subject-matter of the alleged libelous answer to have been privileged.

These pleadings show that upon the plaintiff's own application for a mandamus the defendants, being the Board of Education, were required to show why they had dismissed her. They showed it by averring that upon examination they had ascertained her to be lacking in the qualifications of a teacher and had dismissed her accordingly.

The insistence is that even such a defense, if made with malice and without probable cause, may be the subject of an action of libel. The rule laid down in *White* v. *Nicholls*, 3 How. 266, 299, is to the effect that it is not to be deemed malicious unless found to be false, as well as without probable cause; and upon the face of the record this averment respecting the plaintiff's dismissal cannot be deemed to be false, or to have been made without probable cause, for it is shown to have been sustained as true by the judgment of the court. It will thus be seen that the admitted fact of the former adjudication carries with it an admission of the facts necessary to show the privilege likewise.

It is further insisted that the second count of the declaration is not, properly speaking, a count in libel, but is a count in trespass on the case for a conspiracy. But the well-settled rule is that no civil action lies for a conspiracy unless there be an overt act that results in damage to the plaintiff. To this effect are the very au-

thorities upon which plaintiff in error relies. *Mott* v. *Danfort*, 6 Watts, 304; *Wildee* v. *McKee*, 111 Pa. St. 335, 337; 2 Atl. Rep. 108; *Van Horn* v. *Van Horn*, 56 N. J. Law (27 Vr.), 318; *Verplanck* v. *Van Buren*, 76 N. Y. 247, 259. To which may be added *Brennan* v. *United Hatters*, 73 N. J. Law (44 Vr.), 729, 742, and cases therein cited.

Now in the second count of the declaration no overt act is charged except the filing of the alleged libelous matter as a part of the defendants' answer in the mandamus action. The only damage alleged to have been suffered is that which proceeded from the publication of this libel. And since, as the record shows, the alleged libel was an essential part of a pleading filed in a former proceeding between the parties herein, which by the judgment was determined to be true, and since therefore the alleged libel was privileged, and thus not actionable, it follows plainly enough that a conspiracy to publish it is not actionable.

It results that so far as the judgment of the Court of Appeals affirmed the judgment of the Supreme Court in overruling the plaintiff's demurrers to the first and second pleas filed by the defendants to the second count of the declaration, the judgment should be affirmed. But so far as the judgment sustained the defendants' demurrer to the first count of the declaration it should be reversed, and the cause remanded for further proceedings in accordance with this opinion. Under the circumstances, however, the defendants should have leave to plead to the first count, by traverse or otherwise. D. C. Code, § 1533; *United States* v. *Boyd*, 15 Pet. 187, 209.

Judgment reversed and cause remanded for further proceedings accordingly.

PENNSYLVANIA RAILROAD COMPANY *v.* INTERNATIONAL COAL MINING COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 14. Argued February 27, 28, 1912. Reargued November 4, 1912.—Decided June 9, 1913.

Under the Act to Regulate Commerce while reasonableness of rates and permissible discriminations based upon differences in conditions are administrative matters for the Commission, the courts have jurisdiction to determine whether differentials in rates can be allowed for the same commodity under similar conditions of traffic, on account of differences in the disposition of the commodity.

A carrier can only charge the published rate for the same article and when collected cannot pay back any part thereof under any pretense, however equitable, to any shipper or to every shipper; and so *held* that carriers could not after the passage of the Hepburn Act continue to give rebates to shippers pursuant to arrangements made prior to the act on merchandise which the shippers had contracted to sell before that time.

A published tariff, so long as it is in force, has the effect of a statute and is binding alike on carrier and shipper.

While departure from a published tariff is forbidden by the Act to Regulate Commerce and by §§ 7 and 8 thereof the carrier is liable to the person injured for the damages sustained, such damages must be proved and are not to be merely measured by the difference between the published rate paid by the complaining shipper and the lower rate given to a more favored shipper.

While they may be looked at to explain doubtful expressions in a statute, not even formal reports, much less the language of a member of the committee, can be resorted to for the purpose of construing a statute contrary to its plain terms.

While the Act to Regulate Commerce is in many respects highly penal there is no fixed measure of damages in favor of a shipper compelled to pay the published tariff rate while his favored competitors are given a lesser rate by means of rebates. Neither the American nor English decisions are authority for such a rule as to the measure of damages.

The Act to Regulate Commerce imposes on the carrier heavy penalties

for its violations payable to Government and independent of the amount of rebates paid, and is thus a terror to evil doers; but for private wrongs by which private injury is inflicted the compensation recoverable by the injured shipper is measured by the damages actually sustained and proved.

173 Fed. Rep. 1, reversed.

THE International Coal Mining Company shipped in interstate commerce 190,655 tons of coal over the Pennsylvania Railroad between April 1, 1894, and April 1, 1901. In 1904 it sued the carrier for $37,268, being the difference between the rates paid by the plaintiff and lower rates resulting from rebates allowed other coal dealers making like shipments over the same road from the same point to the same destination.

Prior to 1899 the carrier collected its open or published rates from all persons shipping coal from the Clearfield District in Pennsylvania. It, however, made a practice of paying rebates, and the plaintiff admits on the face of its complaint that it received rebates of from 10 to 25 cents per ton. It alleges, however, that other consignors received from 15 to 45 cents per ton, and the claim made is "for the further rebate due by the defendant to the plaintiff in excess of the rebates heretofore paid by the defendant to the plaintiff on account of said shipments."

During the trial these claims for additional rebates on shipments prior to 1889 were eliminated by the court.

The question then left in the case involved plaintiff's right to recover on account of rebates having been allowed other companies after April 1, 1899, on what was called "contract coal." The plaintiff had no contracts which overlapped April 1, 1899, and claimed to have learned after January, 1904, of the allowances being made. It thereupon brought this suit for the rebate or difference between the low rate allowed shippers of contract coal and the lawful rate paid by plaintiff on 41,000 tons.

There was a second count in the complaint, alleging

that the plaintiff charged excessive freight for the transportation of plaintiff's coal, in that it charged sums varying from 15 cents per ton to 45 cents per ton in excess of a reasonable charge, and said defendant "is liable to pay said sum of $37,268.85 with interest thereon from the time of the said overpayments, and this suit is brought to recover the said sums of money."

The plaintiff proved the number of tons in each shipment made by it between April, 1899, and April, 1901, and that it paid the full tariff rate thereon. It also proved that interstate shipments had been made by other coal companies on the same dates from and to the same points and that such companies on their "contract coal" had been paid rebates of 5, 10, 15, 25 or 35 cents per ton, depending upon the difference between the rates when shipment was made and those in force on the dates of the various contracts of sale. It did not appear how many tons had been shipped by any of these companies, nor on how many tons they had been paid 5 cents per ton, or on how many 35 cents per ton, or the intermediate figures. There was evidence that the Berwind-White Company received no rebates on 90 per cent of its shipments, being free coal, but that it did receive rebates on the remaining 10 per cent. which was contract coal.

In addition to evidence as to the payment of such rebates, there was testimony that the Railroad Co. had also made lateral and terminal allowances to some shippers without at the same time making lateral or terminal allowances to the plaintiff. It was claimed that these allowances were unjust discriminations and amounted to the payment of rebates, inasmuch as there was no such dissimilarity in condition between shipments by such companies and those made by the plaintiff as would justify the payment to them without making a similar payment to the plaintiff.

The defendant admitted the difference in treatment, but

claimed that it was justified by the difference in condition. The railroad did not allow the plaintiff for services in hauling loaded and empty cars between the railroad and its nearby mine, but claimed that it paid the Altoona Company 18 cents per ton for services in hauling loaded and empty cars between the mine and the railroad station. The carrier offered evidence to show that the Altoona mine was 4 or 5 miles from the main line, which was reached by a spur track or road having very heavy grades, sharp curves, and three switchbacks over which it was impracticable for the Pennsylvania engines to be safely operated. There was evidence that the amount paid the Altoona Company for such hauling of cars was reasonable.

It was admitted also that the carrier paid the Berwind-White Company, another shipper from the Clearfield District, a terminal charge for furnishing at the New York pier the labor, power and machinery to unload and dump the cars. There was evidence that this was the customary charge allowed for such services in New York harbor.

There was no distinct ruling as to these allowances, but the court evidently treated these payments, not as undue preferences or rebates, but as compensation for transportation services rendered by the shipper in hauling cars to and from the mine and for service on the pier in New York. He refused to charge that the jury could treat these initial and terminal allowances as rebates or as unjust discriminations, or that they could be considered in measuring the damages to which plaintiff might be entitled.

The items prior to April 1, 1899, and these items for initial and terminal allowances having been eliminated, the case was submitted to the jury to determine the amount plaintiff was entitled to recover in consequence of the admitted payment of rebates on "contract coal," no such payments being made to the plaintiff on its shipments of

"free coal." There was some evidence as to the commercial value of being able to ship contract coal at the original freight rate and an estimate of the profits which would have been derived had the same rebates been allowed plaintiff. What, if any, verdict could have been based on this theory was not submitted to the jury, the court charging that where rebates had been allowed other companies, the plaintiff "would be entitled to recover from the Railroad the difference of the returns."

On May 23, 1908, the jury found for the plaintiff a verdict of $12,013.51. Both parties moved for a new trial and both excepted to the court's refusal to set aside the verdict. 162 Fed. Rep. 996. The Circuit Court of Appeals affirmed the judgment. 173 Fed. Rep. 1. The International Coal Company accepted the decision. But the Pennsylvania Railroad Company brought the case here by writ of error, in which, among many other assignments of error, it complains of the court's refusal to charge that "to entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying, at the same time, at lower rates, coal shipped by other shippers."

Mr. Francis I. Gowen, with whom *Mr. Frederic D. McKenney* was on the brief, for plaintiff in error:

In the light of the principles established in *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, and *Balt. & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, and of the application made of those principles to the facts in *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506, the Circuit Court was not possessed of the requisite jurisdiction to consider and determine the underlying and basic issue involved in the present case.

A court is not the proper tribunal to set aside or annul the tariff rates of a carrier. This power belongs exclusively

to the Interstate Commerce Commission, and it necessarily follows that courts cannot indirectly relieve shippers from the controlling effect of such rates by permitting recoveries either of any portion thereof or, what is equivalent thereto, of damages because of their exaction, until at least the shipper has been relieved from the binding force of such rates by action of the Commission. A tariff rate is binding upon shipper as well as upon carrier. The obligation to observe the same is absolute and is, in effect, statutory in character.

The plaintiff in error in the present case, therefore, was bound to charge and collect, and the defendant in error was bound to pay the rates which were actually charged and paid. Both parties, then, being so bound, an action cannot be maintained by one to recover from the other damages claimed to have been sustained because of the payment demanded and made, when this payment represented a charge which the one party was legally obliged to make and the other one legally obliged to pay. See § 6 of the Interstate Commerce Act.

The Interstate Commerce Commission in many instances has condemned as unlawful, because unreasonable or discriminatory, rates which have been exacted from shippers, while at the same time denying reparation to them. *Anaconda Copper Co.* v. *C. & E. R. R. Co.*, 19 I. C. C. Rep. 592, and *International Salt Co.* v. *Penna. R. R. Co.*, 20 I. C. C. Rep. 539.

If the Interstate Commerce Commission has been empowered to determine whether charges or rates of a carrier are unduly discriminatory or unduly preferential, a like power cannot be exercised by the courts. As a matter of law such power is possessed by the Interstate Commerce Commission. *Int. Com. Comm.* v. *Del., Lack. & West. R. R. Co.*, 220 U. S. 235.

The payment by a carrier to one shipper of an unlawful rebate does not give to another shipper a right of action

under the Interstate Commerce Act to recover like rebates on his shipments.

Under § 8 of Commerce Act which confers, and defines the character of, the right of action which can be asserted by shippers because of violations by carriers of any provisions of the act, that right is limited to the "person or persons injured," and the recovery to the "damages sustained." *Parsons* v. *Chi. & N. W. Ry. Co.*, 167 U. S. 447.

If a carrier unlawfully refunds to a shipper any part of the tariff rate, it thereby violates the Interstate Commerce Act, but such unlawful act cannot be made the basis of an action at the instance of another shipper, the purpose of which is to compel it to repeat its original violation of the act, in order that such shipper may secure also the benefit of a concession in rates which by the terms of the act the carrier is prohibited from making, and he from receiving. The same is true of cases under the discrimination act of Pennsylvania. See *Hoover* v. *Penna. R. R. Co.*, 156 Pa. St. 220.

The "amount of injury suffered" is the measure of the single damages to be allowed. But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be or it might not be, but in any event it must be a subject of proof, and there was no proof in the case of the actual damage sustained. *Un. Pac. R. R. Co.* v. *Goodridge*, 149 U. S. 680, distinguished, as that case turned on the statute of Colorado which contained special provisions to the effect that if the carrier made concessions or rebates to shippers it must extend them to all shipping under the same circumstances and conditions.

No damages are recoverable from a carrier which has violated the provisions of the act by charging unequal rates unless the shipper seeking the damages can establish that actual injury resulted to him from such violation. *Anaconda Copper Co.* v. *C. & E. R. R. Co.; Int. Salt Co.* v. *Penna. R. R. Co., supra.*

If the right of action asserted in the present case is maintainable, it does not extend to all shipments made by the defendant in error in the period in which the unlawful rebates were paid on contract coal, without regard to the consideration that these rebates were not paid on all shipments of the shippers shipping contract coal, but only on the portion thereof which represented contract coal.

This question has not been dealt with or determined by any court in this country. It was considered by the English courts in *Denaby Colliery Co.* v. *Manchester &c. Ry. Co.*, L. R. 11 App. Cas. 97, and while some of the court were of the opinion that the amount of the overcharges paid by the Colliery Company was to be ascertained with reference to the volume of shipments which had been carried at the lower rate, the application of such a rule will not work out equitable results, nor tend to secure an equality of charge.

A like service, within the meaning of § 2 of the Interstate Commerce Act, is not rendered by a carrier in the transportation from the same district to a common point of shipments which move over a through joint line made up of its own line and that of another carrier, and shipments which move only over the carrier's own line. *Railway Co.* v. *Osborne*, 52 Fed. Rep. 912; *Tozer* v. *United States*, 52 Fed. Rep. 917; *Parsons* v. *Chicago &c. Ry.*, 63 Fed. Rep. 903; *Detroit Ry. Co.* v. *Int. Com. Comm.*, 74 Fed. Rep. 803; *Loup Colliery Co.* v. *Virginia Ry.*, 12 I. C. C. Rep. 471; *Cedar Rapids Ry.* v. *Chicago &c. Ry.*, 13 I. C. C. Rep. 250, 255; Drinker on Int. Comm. Act, § 124; Judson on Int. Comm., § 245.

To the same effect are: Beale & Wyman, Railroad Rate Regulation, § 943; Nelson on Int. Com. Comm., p. 70; Barnes on Int. Transp., § 428, paragraph D. See also *Griffee* v. *Railroad*, 2 I. C. C. Rep. 301; *Missouri Ass'n* v. *M., K. & T. Ry.*, 12 I. C. C. Rep. 483.

A like rule was followed by the English courts, in *Taylor* v. *Metropolitan Ry. Co.* (1906), L. R. 2 K. B. Div. 55.

A Federal court is not bound to give effect to a judicial sale made by a state court. It is at liberty to ignore the sale if, in its judgment, the state statutes under which the state court proceeded to decree and make the sale did not authorize a sale of the particular property or effect sold.

Mr. William A. Glasgow, Jr., with whom *Mr. James W. M. Newlin* was on the brief, for defendant in error:

The action was brought in the Circuit Court of the United States to recover sums illegally collected by the defendant carrier from the plaintiff shipper, which sums were declared to be illegal by § 2 of the Act to Regulate Commerce.

The defendant violated that section by charging and collecting from the plaintiff a greater compensation for the transportation of coal than it charged and collected from other persons "for doing for . . . them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Action was brought in the Circuit Court of the United States under § 9 of the act, to recover the damages provided by § 8 for the charging of the sums "declared to be unlawful" by § 2 of the act. The plaintiff did not complain to the Interstate Commerce Commission.

The jury rendered a verdict for an amount equal to the excess charges collected from the plaintiff over and above the charges contemporaneously to other persons for like service. Judgment was entered by the Circuit Court upon the verdict. The Circuit Court of Appeals affirmed the judgment, and the case is now here for review.

The plaintiff had the right to proceed with its action in the Circuit Court without complaining to the Interstate Commerce Commission in the first instance.

A complaint to the Interstate Commerce Commission in the first instance is only required under the Act to Regulate Commerce where "there is involved a question of administrative discretion." *L. & N. R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70.

When it is shown, as in this case, that § 2 of the act has been violated by the carrier, then there is no "question of administrative discretion" involved, as there was in the *Abilene Cotton Oil Company Case*, 204 U. S. 426, for § 2 of the act itself declares the carrier "guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 2 defines "unjust discrimination," and unlike § 3, relieves the Interstate Commerce Commission from the duty of determining in the exercise of its discretion whether certain acts therein set forth amount to "unjust discrimination," by declaring that unequal charges under similar circumstances is, as a matter of law, "unjust discrimination."

Under § 2, every shipper is entitled "under similar circumstances and conditions" to equality of charges for like service.

When the carrier violated the act by charging plaintiff "greater compensation" for like contemporaneous service than it charged others, then the plaintiff was deprived of its statutory right to equality of charges, by the "unlawful" act of defendant, and by § 8 plaintiff was entitled to recover "the full amount of damages sustained."

The measure of plaintiff's damages was such an amount as would put plaintiff upon the basis of equality of charges assured to it by § 2. See *I. C. C.* v. *B. & O. R. Co.*, 145 U. S. 263, at page 270, quoting with approval, Mr. Jus-

tice Blackburn, in *Great Western Ry. Co.* v. *Sutton*, L. R. 4 H. L. 226, 239, as follows: "When it is sought to show that the charge is extortionate, as being contrary to the statutory obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

In the case of *Great Western Ry. Co.* v. *Sutton*, *supra*, at p. 238, Mr. Justice Blackburn also said: "And I think it follows from this that if the defendants do charge more to one person than they during the same time charged to others, the charge is by virtue of the statute extortionate."

In enacting § 2 of the Interstate Commerce Act, which was substantially taken from § 90 of the English Railway Clauses Consolidation Act of 1845, Congress intended to incorporate into the statute the construction given to said section by the English courts. *I. C. C.* v. *B. & O. R. R. Co.*, 145 U. S. 263, at page 284; *I. C. C.* v. *D., L. & W. R. R. Co.*, 220 U. S. 235, at page 253.

If the excess charge to the plaintiff by the carrier was extortionate, and deprived it of its statutory right, it is submitted that at least the plaintiff is entitled to recover the amount unlawfully extorted from it.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court.

The International Coal Company operated a mine in the Clearfield District and, with its competitors, shipped between 1890 and 1902 large quantities of coal in interstate commerce. In 1904 it sued the Pennsylvania Railroad Company, basing its action, in part, on the fact that prior to April 1, 1899, the Railroad Company had paid other

shippers rebates of from 15 to 45 cents per ton, while paying plaintiff a rebate of only 10 to 25 cents per ton. Its claim for a sum equal to the difference between the rebate paid to it and that given other shippers was eliminated by the trial judge on the ground that "courts do not sit to measure the difference in degree in violation of the law in favor of one party or the other. The question of the money value that each of them received in their violation of the law will not be looked into, . . . not for the purpose of relieving the defendant, but because the plaintiff is just as culpable . . . and as much a violator of the law as the defendant."

In view of this ruling, the case, as finally submitted to the jury, involved plaintiff's right to recover on account of shipments made after April 1, 1899. On that date the carrier increased the rates and discontinued the payment of rebates, except that for the purpose of saving shippers against loss, it made a difference between what is called "free coal" and "contract coal." Under this practice, where coal had been sold for future delivery, the carrier collected the published tariff rate, but rebated the difference between it and the lower rate in force when the contract of sale had been made. When after April 1, 1899, the plaintiff applied for allowances, its demand was rejected, with the statement that all its contract coal would be protected in the same manner as others in the Clearfield District. The International Coal Company had no overlapping or unfulfilled contracts and claiming that it did not learn of the practice to protect such contracts until, in 1904, it brought this suit. It proved that between April 1, 1899, and April 1, 1901, it had shipped about 40,000 tons on which it had paid the full tariff rate, while other companies shipping from and to the same places at the same time had been allowed on their contract coal rebates of 5, 10, 15, 25 or 35 cents per ton. Plaintiff recovered a verdict.

1. In the court below the Railroad made no question of jurisdiction. But on the argument here it insisted that the case should be remanded with instructions to dismiss the complaint upon the ground that courts had no power to adjudicate the administrative question as to whether a carrier could make a difference in rate between shipments of free and contract coal. It argued that this was a rate-making question and that it was for the Commission, as the rate-regulating body, to determine not only whether a dissimilarity existed, but whether the rates were properly adjusted to meet that dissimilarity.

Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals.

None of these considerations, however, operates to defeat the courts' jurisdiction in the present case. For even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to

every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, § 2; March 2, 1889, 25 Stat. 855, c. 382, § 6. *Armour Co.* v. *United States*, 209 U. S. 56, 83.) The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid. The rebate being unlawful it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class. This departure from the published tariff was forbidden, and § 8 (24 Stat. 382) expressly provided that any carrier doing any act prohibited by the statute should be "liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation, together with reasonable attorneys' fees."

2. But although this suit was brought to enforce a cause of action given by this section to any person injured, it is a noticeable fact that in its pleading the plain-

tiff does not claim to have been damaged and there is neither allegation nor proof that it suffered any injury. It contends, however, that this was not necessary for the reason that, as matter of law, it was entitled to recover as damages the same rate per ton on all plaintiff's shipments as had been rebated any other person, on any of his tonnage, shipped at the same time over the same route. And such a right of action was expressly given in § 2 of the original Bill to Regulate Commerce, which, as it passed the Senate May 12, 1886, did provide that the carrier "shall be liable to all persons who have been charged a higher rate than was charged any other person or persons for the difference between such higher rate and the lowest rate charged upon like shipments during the same period; or if such lower rate was made on any time contract or understanding, the said common carrier shall be liable to pay a like rebate or drawback to all other shippers over the same route between the same points who have shipped goods during the time that such contract or understanding was in operation."

The fact that this provision measuring the amount of recovery by rebate was omitted from the Act, as finally reported to both Houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes—not the report of the conference committee—but a statement,[1] made by a member of

[1] Mr. Cullom. Before action on my motion, I desire to make a statement of the changes in the bill. The following is a statement of the changes in the bill as passed by the Senate which have been agreed to and are recommended by the committee of conference:

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"Sections 2, 3, and 4 of the Senate bill, prohibiting discriminations, contained provisions in relation to the recovery of damages. These have been stricken out of said sections, and have been grouped together in one section, which is made section 8 of the committee bill. Except as to this rearrangement, substantially the only change made has been the addition of the provision of the House bill that 'a reason-

the Senate Conference Committee, to support the present argument that § 8 means the same thing as the omitted clause. But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a Committee—can be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical that which is radically different. *United States* v. *Freight Association*, 166 U. S. 290, 318; *Maxwell* v. *Dow*, 176 U. S. 581, 601. Section 2 of the original Senate Bill said nothing about *damages* but in case of rebating gave a shipper a right, in the nature of an action, for a penalty to be measured by the difference between the lawful and the unlawful rate, whether damage resulted or not. That provision was stricken out and § 8 of the Act, as passed by both Houses of Congress and approved by the President, gave a right of action for *damages* and attorneys' fees to "the person injured"—and, of course, to the extent of the injury.

3. There were many provisions in the statute for

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able counsel or attorney's fee' shall be allowed by the court in every case of the recovery of damages. The parts of said sections which are stricken out in consequence of the rearrangement referred to are all of section 2 after the word 'unlawful,' in line 13, all of section 3 after the word 'business,' in line 18, and lines 23 to 27, both inclusive, in section 4. No other change is made in section 2." 49 Cong. Rec. 2d Sess., vol. 18, Part 1, p. 170.

Section 7 of the House Bill (H. R. 5667) provided that if any carrier should do an act forbidden or omitted to do an act required, or should violate the statute, such carrier should be "held to pay to the person or persons injured the full amount of damages so sustained . . . with reasonable counsel or attorney's fees. . . ." This bill was before the Conference Committee, and the House members, as required by the rules of the House, made a written statement of the action of the Conference, in which it was said (vol. 18, Part II, Cong. Rec., 49th Cong., 2d Sess., pp. 695, 698, 774) that "the eighth section of the substitute bill"—being the eighth section of the present act—"contains the substance of the seventh section of the House Bill in regard to damages and counsel fees but expressed in somewhat different language."

imprisonment and fines. On the civil side the Act provided for compensation—not punishment. Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons* v. *Chicago & N. W. Railway*, 167 U. S. 447, 460, construing this section (8) "before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury." Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government. On the contrary, and in answer to the argument that damages might be a cover for rebates, the act of June 18, 1910 (36 Stat. 539, c. 309), provided that where a carrier misquotes a rate it should pay a penalty of $250, not to the shipper, but to the Government, recoverable by a civil action brought by the United States. 35 Stat. 166. Congressional Record (1910), 7569. The danger that payment of damages for violations of the law might be used as a means of paying rebates under the name of damages is also pointed out by the Commission in 12 I. C. C. 418–421, 423; 14 I. C. C. 82.

4. It is said, however, that it is impossible to prove the damages occasioned one shipper by the payment of rebates to another; and that if the plaintiff is not entitled to recover as damages the same drawback that was paid to its competitor, the statute not only gives no remedy but deprives the plaintiff of a right it had at common law to recover this difference between the lawful and the unlawful rate.

We are cited to no authority which shows that there was any such ancient measure of damages, and no case has been found in which damages were awarded for such discrimination. Indeed, it is exceedingly doubtful whether there was at common law any right of action for any sort

of damages in a case like this, while this statute does give a clear, definite and positive right to recover for unjust discrimination. It thereby either first created the right or removed the doubt as to whether such suit could be brought. The English courts had held that a shipper, who paid a reasonable rate, had no cause of action because the carrier had charged a lower rate to another. *Great Western R. R.* v. *Sutton,* L. R. 4 H. L. 226, 238. The American decisions were conflicting, though "the weight of authority in this country was in favor of an equality of charge to all persons for similar services." *I. C. C.* v. *B. & O.,* 145 U. S. 263, 275. But even in those American courts, which held that the rates must not only be reasonable but equal, the doctrine had not been so far developed as to settle what was the measure of damages. *Hays* v. *Pennsylvania Co.,* 12 Fed. Rep. 309, decided at Circuit, is favorable to plaintiff's contention. But *Union Pacific Ry.* v. *Goodridge,* 149 U. S. 680; *Louisville E. & St. L. R. R.* v. *Wilson,* 132 Indiana, 517; *Messenger* v. *R. R.,* 8 Vroom, 37 N. J. L. 531; *Cook* v. *Chicago &c. Ry.,* 81 Iowa, 551; *Great Western Ry.* v. *Sutton,* L. R. 4 H. L. 226; *London &c. Ry.* v. *Evershed,* 3 App. Cas. 1029; *Denaby* v. *Manchester &c. Ry.,* 11 App. Cas. 97, relied on by plaintiff, do not support the proposition that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination.

In one of these cases the suit was brought by a shipper to recover damages because the railroad refused to carry out a contract to discriminate in his favor. In others the court treated the low rate as evidence of what was a reasonable rate and thereupon gave judgment for damages as for an overcharge. *Union Pacific R. R.* v. *Goodridge,* 149 U. S. 680, 709, involved the construction of the Colorado statute, which did not, as does the Commerce Act, compel the carrier to adhere to published rates, but required the railroad to make the same concessions and

drawbacks to all persons alike, and for a failure to do so made the carrier liable for three times the actual damage sustained or overcharges paid by the party aggrieved. This distinction is also to be noted in the English cases cited. The Act of Parliament did not require the carrier to maintain its published tariff but made the lowest rate the lawful rate. Anything in excess of such lowest rate was extortion and might be recovered in an action at law as for an overcharge. *Denaby* v. *Manchester Ry.*, L. R. 11 App. Cases, 97, 116. But the English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as overcharge, and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion.

Having paid only the lawful rate plaintiff was not overcharged, though the favored shipper was illegally undercharged. For that violation of law, the carrier was subject to the payment of a fine to the Government and, in addition, was liable for all damages it thereby occasioned, the plaintiff or any other shipper. But under § 8, it was only liable for damages. Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if having paid a rebate of 25 cents a ton to one customer, the carrier in order to escape this suit had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have been done in order to equalize the two companies. For, under the statute, it was not liable to the plaintiff for the amount of the rebate paid on contract coal, but only for the damages such illegal payment

caused the plaintiff. The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered, because § 8 expressly declares that wherever the carrier did an act prohibited or failed to do any act required, it should be "*liable to the person injured thereby for the full amount of damages sustained in consequence of such violation, . . . together with reasonable attorney's fee.*" In view of this language it becomes necessary to inquire what the evidence shows was the injury inflicted or the damage sustained by the plaintiff in 1901 in consequence of paying rebates in 1901 on contract coal sold in 1899.

5. On various dates between April 1, 1899, and April 1, 1901, the International Company made shipments of coal from the Clearfield District to points in New Jersey, Massachusetts, and New York, its heaviest shipments being to South Amboy, New York Harbor. The aggregate was 40,000 tons, on which the lawful rate was paid. During the same period four other companies shipped to the same points, receiving rebates of from 5 to 35 cents per ton, but the amount of tonnage on which such rebates were paid does not appear. There was no proof of injury—no proof of decrease in business, loss of profits, expense incurred or damage of any sort suffered—the plaintiff claiming that, as matter of law, the damages should be assessed to it on the basis of giving to it the same rate, on all its tonnage, that had been allowed on any contract coal shipped, on the same dates, whether such tonnage was great or small.

Considering the multitude of instances in which discrimination has been practiced by carriers, in ancient and modern times, it is remarkable how little is to be found in decisions or text books which treat of the elements and measure of damages in such cases. In the absence of any

settled rule on the subject, the new question must be determined on general principles.

The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record. For example:—

If plaintiff and one of the favored companies had both shipped coal to the same market on the same day, the rebate on contract coal may have given an advantage which may have prevented the plaintiff from selling, may have directly caused it expense, or may have diminished or totally destroyed its profits. The plaintiff, under the present statute, in any such case being then entitled to recover the full damages sustained;—

But the plaintiff may have sold at the usual profit all or a part of its 40,000 tons at the regular market price, the purchaser, on his own account, paying freight to the point of delivery. In that event not the shipper but the purchaser, who paid the freight, would have been the person injured, if any damage resulted from giving rebates. To say that seller and buyer, shipper and consignee, could both recover would mean that damages had been awarded to two where only one had suffered;—

Or, to take another example—a favored dealer may have shipped 10,000 tons of coal to the open New York market, receiving thereon a rebate of 35 cents a ton, or $3,500. The plaintiff at the same time may have shipped 20,000 tons and sold the same at the regular market price.

Under the rule contended for it would then be entitled to 35 cents a ton on 20,000 tons, or $7,000 as damages. Such a verdict, instead of compensating it for losses sustained, would have given to the plaintiff a profit on the carrier's crime in paying a rebate of $3,500 and would have made it an advantage to it instead of an injury for the carrier to violate the law.

In order to avoid this anomalous, yet logical, result it is now suggested that, as in the overcharge cases (*Denaby* v. *Manchester Ry.*, L. R. 11 App. Cases, 97), the plaintiff should only recover a rebate on 10,000 tons, or on the same weight upon which the carrier had allowed a drawback to the competitor. But, while less drastic, this is still an arbitrary measure and ignores the fact that the same anomalous result would follow if there had been, say, ten dealers, each shipping 10,000 tons on the same day. For each of the ten would have been as much entitled as plaintiff to recover $3,500 on their several shipments of 10,000 tons, and the ten verdicts would aggregate $35,000, because of the payment of $3,500 to the favored shipper.

It is said, however, that while there may be no presumption that a shipper was injured because the carrier paid a rebate on a single shipment, or on an occasional shipment, yet it could recover if rebates had been so habitually given as to establish a practice of discrimination. Proof that rebates were customarily paid, would come nearer showing that injury was suffered but would still fall short of proving the extent of the damage, and is not the theory on which the plaintiff proceeds. For it argues that whenever it showed that a lower rate had been charged on contract coal sold in 1899 it was entitled to recover the same rate on shipments made by it to the same place on the same day in 1901, even though there had been no competition in the two sales and without proof that there had been any fall in market prices, diminution in its profits, decrease in its business, or increase in its expenses. It

claimed that it was a mere matter of mathematics and that for every rebate on contract coal, plaintiff was entitled to a like reduction on every ton of its coal without further proof of damage or injury.

6. To adopt such a rule and arbitrarily measure damages by rebates would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to the statute, would make the carrier liable for damages beyond those inflicted and to persons not injured. The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and punishment is a terror to evil doers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained,—whatever they might be and whether greater or less than the rate of rebate paid.

7. This conclusion, that the right to recover is limited to the pecuniary loss suffered and proved, is demanded by the language of the statute, the construction put upon it years ago in the *Parsons Case*, and is the view taken in the only other case we find in which this question, under the Act to Regulate Commerce, has been construed. In

Knudsen v. *Michigan Central R. R.*, 148 Fed. Rep. 968, 974, it was said by the Circuit Court of Appeals for the Eighth Circuit that to "support a recovery under this section there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the Government or to corrective or coercive proceedings at the instance of the Commission." A similar principle was applied in *Meeker* v. *Lehigh Valley R. R.*, 183 Fed. Rep. 548, 550, and in *Central Coal Co.* v. *Hartman*, 111 Fed. Rep. 96, where the suit was to recover damages caused by a violation of the Anti-trust Act.

Another case, on facts quite like those here involved, is that of *Hoover* v. *Pennsylvania R. R.*, 156 Pa. St. 220, where the statute, like the Commerce Act, gave the party injured a right of action for damages suffered. In violation of the state law the railroad allowed a manufacturing company a rebate of 20 cents a ton on coal shipped. In a suit for the recovery of damages the trial court charged the jury that the difference between the high and low rate was the measure of recovery. This was reversed, the court saying (p. 244): "The amount of injury suffered is the measure of the single damages to be allowed. But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be, or it might not be, but, in any event, it must be a subject of proof. . . . It does not appear that the plaintiffs sold their coal for any less than the current market price, . . . except when they and the other dealers were engaged in a war of prices and sold it far below the actual cost, in a struggle to capture the market."

In view of the express provisions of § 8 of the Act to Regulate Commerce, it was error to refuse to charge that "to entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact

that the defendant was carrying at the same time at lower rates coal shipped by other shippers." The judgment of the Circuit Court of Appeals is reversed and the case remanded to the District Court, with directions to grant a new trial.

Reversed.

MR. JUSTICE PITNEY, dissenting.

The judgment under review sustains a recovery in behalf of a Company shipping coal in interstate commerce, that was charged and paid the lawful published rates of freight, for the difference between the rates thus charged and paid and the less rates customarily allowed to other shippers of coal during the same period and between the same termini. 173 Fed. Rep. 1. The action is based upon §§ 2 and 8 of the Interstate Commerce Act.[1] (24 Stat.

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[1] SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons, a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

379, Chap. 104.) The discrimination was accomplished by means of rebates allowed to the other shippers, the excuse for which, or the reason for the discrimination as assigned by the plaintiff in error, was that the coal on which the rebates were allowed was shipped pursuant to contracts of sale made by the favored shippers prior to the putting in force of the published tariff, and made in reliance upon the lower rates then in force. It was proved that during the two years from April 1, 1899, to April 1, 1901, the plaintiff shipped about 40,000 tons, upon which it paid the full tariff rate. The verdict and judgment for $12,013.51 represent the difference between the freight charges actually paid by the plaintiff and what it would have paid if its coal had been carried on the same terms as the "contract coal."

I agree with the view of the court that the suit was maintainable without any previous action by the Interstate Commerce Commission. I agree also that "even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged."

Were the question before us, I should be inclined to say that the Interstate Commerce Act does not admit of a difference in rate for substantially the same transportation service, at the same time and under substantially similar circumstances, based upon the mere fact that the coal of one shipper has been previously sold, under "contract" or otherwise, while the coal of the other shipper has been sold but at a different time, or remains to be sold on its arrival at market. Such a discrimination is in effect based upon the mere ownership of the goods transported, which has recently been condemned by this court. *Interstate Com. Com.* v. *Del., Lack. & Western R. R.*, 220

U. S. 235, 252. And see *New Haven R. R.* v. *Interstate Com. Com.*, 200 U. S. 361, 395; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 82.

The court, while sustaining the right of action upon the facts presented in this record, reverses the judgment and awards a new trial, on the ground that under the statute there is no presumption of loss on the part of the shipper against whom the discrimination is made, and therefore no established measure of damages in favor of the plaintiff; that § 8 of the Act, in giving a right of action for damages to the injured party, indicated the legislative intent that the responsibility of the carrier to a shipper injured by discrimination in rates should be measured not by the amount of the discrimination, but by the consequential injury accruing to the shipper because of the discrimination, and that without special proof of resulting damage there can be no recovery.

With great respect, I feel constrained to dissent from the view thus taken of the Act of Congress, and from the result to which it leads in this case.

I have not been able to bring myself to accept that view, and, on the contrary, consider that § 2 of the act deals with the prohibited discrimination in rates as a direct pecuniary injury to the disfavored shipper, precisely equivalent in amount to the discrimination; that the Act looks upon the common carrier as a public servant, bound to treat all shippers alike; that it recognizes that the established and published rates, while reasonable in law may be unreasonable in fact, and are proven to be so when the carrier customarily charges less to favored shippers; that it treats the customary allowance to favored shippers of rebates or drawbacks as an admission by the carrier that the higher rate charged to the disfavored shipper is excessive and extortionate in fact by precisely the amount of the rebate; that the disfavored shipper is the "person injured," within the meaning of § 8, and

that the "damages sustained in consequence of any such violation" are, in cases of rate discrimination, at least as great as the amount of the discrimination; that the maintaining of equality in rates being the duty of the public servant as prescribed by the Act, the question whether the shipper, on paying such rates as the law prescribes, charges the freight to his consignees, directly, or indirectly, or not at all, is a matter of no legitimate concern to the public servant. I am convinced further, as the result of a somewhat exhaustive examination of the question, that the view just indicated is not only consistent with the language and evident policy of the Act, viewed in the light of the evils that it was designed to correct, but is consistent with its legislative history, and at the same time accords with the practical construction that has been placed upon it by the Interstate Commerce Commission, and recognized by the courts (including this court) from the time of its enactment; that no other practicable mode of determining the damages, capable of general application, has been suggested for cases of rate discrimination than that which measures the recovery by the amount of the discrimination; and that this was the well-settled measure of damages in such cases, as administered generally in the courts of this country prior to the passage of the Act, and at the same time was the established rule of damages under the Act of Parliament upon which our § 2 was modeled, as already established by repeated decisions of the House of Lords when Congress passed the "Act to Regulate Commerce"; and that the English decisions are cogent evidence of the intent and meaning of Congress, as this court has several times declared.

The precise error attributed to the trial judge is the refusal to charge, as requested, that "To entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was

carrying at the same time, at lower rates, coal shipped by other shippers."

Since the recovery was based upon a discrimination arising from the payment of rebates to the other shippers on coal shipped by them in fulfillment of contracts made long before, so that the coal upon which the rebates were allowed did not and could not come into direct competition with the plaintiff's coal in the market, it is presumable that there was no consequential injury to the plaintiff attributable to this particular series of rebates, nor any provable injury aside from the fact that more money was exacted from plaintiff than ought to have been exacted on principles of equality. A reversal of the judgment upon the ground adopted by the court is equivalent to a denial of the right of action in this case, and apparently in all cases except in the rare instance where merchandise on which rebates are allowed happens to come into direct market competition with the goods of the complaining shipper.

Not only in the present case, but in most cases, it is impossible to trace actual consequential damages to the particular discrimination, and so the view adopted virtually nullifies the right of action given by § 8 of the Act, so far as concerns persons injured by the discriminations that are prohibited by § 2.

Section 8 says in terms that for anything done by the common carrier, contrary to the prohibition of the Act, it shall be "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation." Each of the preceding seven sections contains prohibitions, from the violation of which damage may result to the shipper; especially the first four, of which § 1 prohibits unjust and unreasonable charges; § 2 prohibits discriminations in charges, by whatever device accomplished; § 3 prohibits "any undue and unreasonable preference or advantage to any particular

person, etc., in any respect whatsoever;" and requires that reasonably proper and equal facilities be afforded for the interchange of traffic with connecting lines; and § 4 prohibits the charging of greater compensation 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 within the longer distance; with a proviso not now pertinent. Certainly, the Act contemplated that shippers against whom these discriminations were practiced, and for whose benefit the entire Act was framed, were to be treated as "persons injured" within the meaning of § 8. And by that section they are to have the "full amount of damages sustained in consequence of any such violation."

The word "damages," according to its customary usage, is at least as properly applicable to the immediate and direct result of imposing higher charges upon one shipper than are customarily charged under similar circumstances and for a like service to other shippers, as it is to the ultimate consequences of such discrimination. The purpose that runs throughout the Act is to require equality of treatment. How can this be so easily accomplished as to treat the damage as being complete when the freight bill is paid, based upon rates that are higher than those charged to other shippers, and to require equality by insisting upon a return of the excess?

Courts everywhere are insistent that remote and consequential and speculative damages shall be excluded from consideration, and that only those directly and proximately resulting from the injury shall be considered. What can be more direct and proximate as damage to a shipper against whom a discrimination is practiced, than the measure of the discrimination as shown by a comparison of freight bills? And what can be more remote and speculative than to enter into considerations arising out of the mode in which the shipper transacts his business,

and to consider whether the particular commodities upon which the discriminatory rates have been imposed were sold under this or that arrangement as between shipper and consignee, and whether the discriminations have resulted in the loss of a particular sale, or of a particular profit, or of a particular customer? Congress, of course, recognized the notorious fact that rate discriminations often rendered it impossible for the disfavored shippers to profitably continue in business. Rate discriminations were prohibited for that reason, amongst others. But Congress, I submit, never intended to impose upon the injured party the impossible task of tracing his ultimate losses to this or to that shipment.

But it is said that whatever view might otherwise be entertained, a particular (and, as I think, a very strained) meaning must be attributed to the word "damages" as used in the Interstate Commerce Act, because of the course of proceedings in Congress that resulted in the enactment of that statute. It is pointed out that § 2 of the original bill provided in terms that in the case of a rate discrimination, the carrier should be liable to the disfavored shipper "for the difference between such higher rate and the lowest rate charged upon like shipments during the same period," with a similar provision respecting rebates and drawbacks, and it is said that because this provision was finally omitted from the Act, the result is not only significant but conclusive evidence of a legislative intent that the "damages" in § 8, so far as discriminatory rates are concerned, are to be measured in some other manner. If § 8 had in terms prescribed any other measure than that which was in the original § 2, or if any other had been then known to the law, I could appreciate the force of the argument. The course of the debate in Congress, as quoted in the opinion, shows that Senator Cullom, who was the chief sponsor for the bill, and a member of the Senate Conference Committee, explained the change as

intended to simply group into one section all the provisions respecting damages that had been contained in three sections. That this was done merely for the purpose of simplification, and with the understanding that the courts would of course apply the proper measure of damages in each case, and would not need Congress to tell them how to do this, clearly appears from Senator Cullom's remarks in explanation of the change. If any other measure of damages in rate discrimination cases had ever been successfully applied, I could concede some force to the reasoning that is based upon this change in the bill during its progress through Congress. But no other measure has been applied, nor does the opinion point out how any other can be.

As a great English judge said,[1] in one of the cases referred to below: "I think that there would be very great difficulty, if the principle of overcharge [meaning a comparison of the rates charged] were rejected, in finding any other remedy by way of damages applicable to such a case." These words were used in the House of Lords in the last of a series of notable cases that finally settled the measure of damages for rate discriminations, under an Act of Parliament that furnished the model for § 2 of our Interstate Commerce Act. That decision was rendered a little more than a year before the passage of our Act. It was undoubtedly known to Senator Cullom (a lawyer by profession), who doubtless also knew that the English courts, in a series of decisions, had adopted the simple solution that the damage was to be measured by the amount of the discrimination. It would, I think, have surprised the learned and distinguished Senator if he had been told that in merely "simplifying" his act he had in effect deprived the disfavored shipper of any and

[1] The Earl of Selborne, formerly Lord Chancellor Selborne, and before that, as Sir Roundell Palmer, counsel for Great Britain at the Geneva Arbitration.

all remedies in the ordinary case of discrimination, and that too, in a legislative measure whose underlying purpose was to prevent such discriminations, and to add to and extend the remedies already available for securing redress against them.

Prior to the passage of the Act, while the courts of England perhaps did not recognize a right to recover for unjust discriminations unless the rate charged to the complaining party was of itself excessive, the weight of authority in this country was to the contrary, as pointed out by this court in *Interstate Commerce Commission* v. *B. & O. Railroad,* 145 U. S. 263, 275. And see *Hays* v. *Pennsylvania Co.* (1882), 12 Fed. Rep. 309, and note; *Samuels* v. *Louisville & N. R. Co.* (1887), 31 Fed. Rep. 57; *Cook* v. *Chicago &c. Ry. Co.,* 81 Iowa, 551, 563; *Louisville E. & St. R. R. Co.* v. *Wilson,* 132 Indiana, 517, 525. The Interstate Commerce Act and the reports and debates in Congress that preceded it are replete with evidence that the Act was intended to give to the shipper against whom discrimination was practiced at least as ample remedy as he would have against exactions that were for any other reason unjust or extortionate.

As a matter of practical construction, the course adopted by the Interstate Commerce Commission in reparation cases is most convincing, not only of what was deemed to be the intent of Congress, but of the fact that no other measure of reparation is practicable saving that which is based on the rate differential. In every case that has arisen, so far as I can discover, the difference in rate has been adopted as the basis of reparation. The cases will be referred to below.

Reference is made in the opinion to the declaration of this court (by Mr. Justice Brewer) in *Parsons* v. *Chicago & Northwestern Ry.,* 167 U. S. 447, 460, that "before any party can recover under the Act he must show not merely the wrong of the carrier, but that that wrong has in fact

operated to his injury." But the next succeeding words show that this had no such meaning as is now attributed to it. They are: "*If he* [the plaintiff] *had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates.*"

In short, Parsons had made only "local" shipments (Iowa to Chicago), and had paid the regular published rates therefor. The court held that he was *not injured*, under the particular circumstances of the case, by the failure of the Railway Company to file and publish a certain tariff of *through* rates, applicable not to Chicago shipments, but only to those destined to New York and other points on the Atlantic seaboard. And so the decision was, that he had *no ground of action*. The case has no proper bearing, as an authority, upon the question of the *measure of damages;* but if it is to be employed as an authority at all upon that question, the declaration of the court, that if Parsons had been entitled to recover, his damages would have been measured by the rate differential, ought not to be overlooked.

The fact is that in the *Parsons Case*, while the plaintiff claimed that the carrier was guilty of a discrimination in rates, this court upon an analysis of his petition—upon a demurrer to which the case was determined—found there was no infraction of § 2, because the plaintiff had made no shipments that entitled him to the lower rates of which he complained; so that there was no real basis for his action except the failure of the carrier to publish or file the rates as required by § 6 of the Act. The gist of the complaint was that the carrier, which operated a system of railroad from points in Nebraska through Iowa to Chicago, for the purpose of giving unlawful preference to the shippers of corn and oats in Nebraska, and to unlawfully discriminate against the plaintiffs and other Iowa shippers, put in force from Nebraska points a certain freight tariff on corn and oats in car load lots to Rochelle, Illinois, *when*

destined to New York, Boston, Philadelphia, or Baltimore; that this was never circulated or published at any of the stations on defendant's road in Iowa, nor filed with the Interstate Commerce Commission, and its existence was concealed from the knowledge of plaintiff and other shippers on the line of defendant's road in Iowa; that on certain dates named, plaintiff had for shipment at a station in Iowa, certain quantities of corn and oats, and was prevented and deprived, by reason of the matters alleged, of the right to ship the same upon the terms and at the rate thus given to shippers in the State of Nebraska, and was obliged to and did ship his grain over defendant's road from the Iowa point *to Chicago,* at a higher rate than he could have had by taking advantage of the Nebraska schedule if that had been published in Iowa; that this constituted an unlawful preference and discrimination by defendant in favor of the shippers of grain in the State of Nebraska and against the plaintiff as a shipper of grain in the State of Iowa, and the defendant thereby charged, demanded and received a greater compensation for a shorter, than for a longer haul (the longer including the shorter), under substantially similar circumstances. This court (by Mr. Justice Brewer) in dealing with the case, pointed out (p. 455) that the tariff complained of was a joint tariff, and not a tariff of local rates on grain to Rochelle, Illinois, or even to Chicago, which was the eastern limit of the defendant's road; that (p. 457) the pleader had not made out a case on which it could be said that the so-called joint tariff was a mere device under color of which defendant was shipping grain from Nebraska points to Chicago at less rates than were being charged to the nearer points in Iowa; and proceeded to show (p. 459), that plaintiff's argument practically was "that if the tariff had been filed with the Commission, it might have made an order, either general or special, requiring that it be posted at the Iowa stations; that if it had been so posted

he might have examined the rates and might have determined to ship his corn, not to Chicago, but to one of the four eastern points named in such tariff." It was this line of reasoning that led the court to the point of remarking, p. 460, that "The only right of recovery given by the Interstate Commerce Act to the individual is to the '*person or persons injured thereby* for full amount of damages sustained in consequence of any of the violations of the provisions of this act.' So, before any party can recover under the Act he must show, not merely the wrong of the carrier, *but that that wrong has in fact operated to his injury. If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates.* He did not ship to New York, and yet seeks to recover the extra sum he might have been charged if he had shipped. Penalties are not recoverable on mere possibilities."

The words italicised (not so in the original) serve, I think, to show that the court was merely negativing a recovery on the part of one who might have shipped, but did not ship, and was *not negativing, but on the contrary affirming, arguendo, the theory that in the event of the existence of a right of action the measure of damages would have been the difference in rates.*

The opinion herein refers to and undertakes to distinguish the three English cases to which I have already referred—*Great Western Ry. Co.* v. *Sutton* (1869), L. R. 4 H. L. 226; *London &c. Ry.* v. *Evershed* (1878), L. R. 3 App. Cas. 1029; and *Denaby Main Colliery Co.* v. *Manchester &c. Ry. Co.* (1885), L. R. 11 App. Cas. 97—and states that they "do not support the proposition that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination;" that "the court treated the low rate as evidence of what was a reasonable rate, and thereupon gave judgment for damages as for an overcharge;" and that "the Act of

Parliament . . . made the lowest rate the lawful rate." With great respect, it seems to me the court has misapprehended the effect of these decisions; perhaps because of not distinguishing two variant statutes there under discussion. There was no Act of Parliament that "made the lowest rate the lawful rate," or in terms declared that any excess over the lowest rate was extortionate, or recoverable in an action at law, as for an overcharge. The remedy that the courts of England accorded to the aggrieved shippers against whom the railway companies had discriminated, was based upon an Act of Parliament that, so far as concerns the measure of damages for an unlawful discrimination, is not to be distinguished from § 2 of the Interstate Commerce Act; indeed, it furnished the model for that section. True, it was a very imperfect model in some respects, and was improved upon by Congress; but it was not departed from in any respect that pertains to the *measure of damages* for favoritism in rate-making. Whatever distinction (if any) the English courts make between "overcharge" and "damages" has arisen with respect to a different statute, and one that furnished the model for § 3 of our Interstate Commerce Act.

Since the English decisions referred to were rendered prior to the adoption of our Act, and afforded a construction of the English acts from which ours was taken, it is of the utmost importance that the terms of the respective Acts of Parliament and the precise grounds of the decisions should be clearly understood.

The first of those acts is the so-called Equality Clause, being § 90 of the Railways Clauses Consolidation Act, 1845, (8 and 9 Vict. c. 20), enacted to consolidate in one act, certain provisions usually inserted in the "special acts" under which railway companies were incorporated. Section 90 is set forth in full in the margin.[1] As will

[1] 90. And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the

be observed, while requiring equality in tolls and rates, so far as it applied, this clause was quite limited with respect to the circumstances under which it applied, being especially confined in its operation by the phrase "passing only over the same portion of the line of railway under the same circumstances." It was in this respect, especially, that Congress improved upon the model. But, so far as this section did apply, the English courts held, in the cases cited in the opinion, and for reasons that will be set forth fully below, that where inequality in rates was shown, the shipper against whom the discrimination was made could recover from the railway company the amount of the discrimination in an action for money had and received, as so much money unlawfully exacted from him, just as by the common law he could recover the excess over a reasonable charge. In the cases cited, or in any others to which my attention has been called, no other measure of damages has been sanctioned, excepting that based upon the amount of the discrimination.

The other act, under which some controversy had arisen in the English courts about the *allowance* of damages

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circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portion of the railway as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all companies or carriages of the same description, and if conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favor of or against any particular company or person traveling upon or using the railway.

(but none at all about the *measure* of them), is—"The Railway and Canal Traffic Act, 1854," (17 and 18 Vict. c. 31), of which the second, third and sixth sections are pertinent to the present inquiry. The second prescribes the duty of railway companies to furnish reasonable facilities for traffic, without giving "any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The third section gives to parties complaining of anything done or omitted to be done, in violation of contravention of the Act, a special and extraordinary remedy, by applying "in a summary way, by motion or summons," to certain of the superior courts, or to any judge of such court, authorizing the court or judge to hear and determine the matter complained of, and to issue an injunction or interdict, restraining the company from further continuing such violation of the Act, and to punish disobedience by attachment or other process; also authorizing the court or judge to impose upon the company a heavy daily fine for disobedience of the injunction or interdict; and "Such moneys shall be payable as the court or judge may direct, . . . either to the party complaining, or into court to abide the ultimate decision of the court, or to Her Majesty, and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution," etc. By the sixth section it was enacted as follows: "6. No proceeding shall be taken for any violation or contravention of the above enactments except in the manner herein provided, but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or com-

pany against any railway or canal or railway and canal company under the existing law."

The courts of England have held that because § 2 of this act establishes rights beyond those existing at the common law, and § 3 gives an extraordinary remedy therefor, and § 6 excludes other remedies, there can be no recovery in an ordinary action for damages based upon the mere infringement of the provisions of § 2; but it has been queried whether for a violation of § 2, if such violation involves an unlawful extortion of money for carriage, the ordinary remedies at law for extortion may not be applicable. This question was reserved by the House of Lords in the *Denaby Colliery Case*, 11 App. Cas. 97, 112. But the Court of Appeal having in that case declared (L. R. 14 Q. B. Div. 225) that the remedy by § 6 was exclusive, the same court three years after the enactment of our Interstate Commerce Act (*Rhymney Ry. Co.* v. *Rhymney Iron Co.*, 25 Q. B. Div. 146, 150), adhered to that view. And see, on the same subject, *Lancashire & Yorkshire Ry. Co.* v. *Greenwood* (1888), L. R. 21 Q. B. Div. 215.

So far as I have observed, the English courts have never wavered upon the question of allowing the difference in freight charges to be recovered by the disfavored shipper, for violations of the Equality Clause of the act of 1845; nor ever sanctioned the view that there could be any other measure of damages. Nor can I find that any other measure of damages has been suggested for a violation of the act of 1854 in respect of a rate discrimination. The controversy about that act has been whether any suit could be maintained at all for a violation of it.

But, as this court has repeatedly pointed out, the provisions of the second section of the Interstate Commerce Act respecting equality of rates are modeled after the Equality Clause (§ 90) of the English act of 1845; while the third section of our Act is modeled after the English act of 1854.

In *Interstate Commerce Commission* v. *Balt. & Ohio R.*

R., 145 U. S. 263, 277, etc., the court referred to the English acts, and some decisions of the English courts thereunder, saying (p. 284): "These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. *But so far as relates to the question of 'undue preference,' it may be presumed that Congress, in adopting the language of the English act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. McDonald* v. *Hovey*, 110 U. S. 619."

In *Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, 222, the court (by Mr. Justice Shiras) said: "Similar legislation by the Parliament of England might render it profitable to examine some of the decisions of the courts of that country construing its provisions. In fact, the second section of our act was modeled upon section 90 of the English 'Railway Clauses Consolidation Act' of 1845, known as the 'Equality Clause,' and the third section of our act was modeled upon the second section of the English 'act for the better regulation of the traffic on railways and canals' of July 10, 1854, and the 11th section of the act of July 21, 1873, entitled—'An act to make better provisions for the carrying into effect the Railway and Canal Traffic Act, 1854, and for other purposes connected therewith.'"

In *Interstate Commerce Commission* v. *Del., Lack. & Western R. Co.*, 220 U. S. 235, 253, the court (by Mr. Chief Justice White) said: "*It is not open to question that the provisions of § 2 of the Act to Regulate Commerce were substantially taken from § 90 of the English Railway Clauses Consolidation Act of 1845, known as the Equality Clause. Texas & Pac. Railway* v. *Interstate Com. Com.*, 162 U. S. 197, 222. Certain also is it that at the time of the passage of the Act to Regulate Commerce that clause in the Eng-

lish act had been construed as only embracing circumstances concerning the carriage of the goods and not the person of the sender, or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated. It was therefore settled in England that the clause forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others. *Great Western Ry. Co.* v. *Sutton* (1869), L. R. 4 H. L. 226; *Evershed* v. *London & N. W. R. Co.* (1878), 3 App. Cas. 1029; and *Denaby Main Colliery Co.* v. *Manchester &c. Ry. Co.* (1885), 11 App. Cas. 97. And it may not be doubted that *the settled meaning which was affixed to the English Equality Clause at the time of the adoption of the Act to Regulate Commerce applies in construing the second section of that act*, certainly to the extent that this interpretation is involved in the matter before us. *Wight* v. *United States*, 167 U. S. 512; *Interstate Commerce Commission* v. *Alabama M. R. Co.*, 168 U. S. 144, 166."

Now, what was the construction of the Equality Clause of the act of 1845, that had been adopted by the English courts, in the cases thus cited by this court as controlling evidence of what Congress intended in enacting the second section of our act?

The Great Western Ry. Co. v. *Sutton* (1869), L. R. 4 H. L. 226, was an action brought and judgment recovered for "*the amount of certain alleged overcharges.*" But they were "overcharges" only in the sense that they were the differential between the rates charged to the plaintiff and those charged to others. The opinions of the judges being called for by the Lords, Mr. Justice Blackburn delivered the prevailing view, expounding the subject historically, as follows (p. 237): "At common law a person holding himself out as a common carrier of goods was not under

any obligation to treat all customers equally.[1] The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a *reasonable* compensation for so doing; and if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, *he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received, as being money extorted from him.* But the fact that the carrier charged others less, though it was evidence to show that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even *gratis*. All that the law required was, that he should not charge any more than was reasonable; see per Byles, J., in *Baxendale* v. *Eastern Counties Ry. Co.*, 4 C. B. (N. S.) 78; and per Willes, J., in *Branley* v. *Southeastern Ry. Co.*, 12 C. B. (N. S.) 74. But when railways came into operation, and it was found that they practically superseded all other modes of transit, it became a question for the legislature how far they would, when granting numerous persons power to make a railway and act as carriers on that line, impose on them restrictions beyond what the common law imposed on ordinary carriers. At first the legislature in each special act inserted such clauses as seemed, to the particular committees, reasonable in each case. Very soon those came to be usual clauses which the then Chairman of Committees of the House of Lords used to require to be inserted in all railway bills with more

[1] NOTE: Otherwise in this country. *Interstate Commerce Commission* v. *B. & O. Railroad*, 145 U. S. 275, and other cases cited *supra*.

or less modification. They were known by his name as 'Lord *Shaftesbury's* clauses.' Finally, in 1845, the legislature embodied in a general act (8 and 9 Vict., c. 20) those clauses which it was thought expedient should generally be inserted in railway acts."

Mr. Justice Blackburn, after referring to the special acts that governed the case (what, in this country, would be called the "charter" of the company), by one of which the act of 1845 was incorporated into it, and saying that the rights of the parties must depend upon the effect of certain other sections in conjunction with § 90 of the act of 1845, which was, to leave the company free to charge what it thought fit for parcels not exceeding five hundred pounds in weight, "subject, however, to the effect of the proviso for equality contained in the 90th section of the *Railway Clauses Consolidation Act*, 1845, and the similar proviso for equality contained in the former special act of this company (7 and 8 Vict., c. 3, sec. 50)," then proceeded to say:

"*Then comes the question, what is the legal effect of this proviso for equality?* I think it appears from the preamble of the 90th section of the *Railways Clauses Consolidation Act*, 1845, that the legislature was of opinion that the changed state of things arising from the general use of railways made it expedient to impose an obligation on railway companies acting as carriers beyond what is imposed on a carrier at common law. And if this be borne in mind, *I think the construction of the proviso for equality is clear, and is, that the defendants may, subject to the limitations in their special Acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances.* And I think it follows from this that *if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute extortionate.* And I think that *the rights and remedies of a person made to pay a charge beyond the*

limit of equality imposed by the statute on railway companies acting as carriers on their line must be *precisely the same as those of a person made to pay a charge beyond the limit imposed by the Common Law on ordinary carriers as being more than was reasonable. . . . When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances.*[1] One single act of charging a person less on one particular occasion would not I think, make the higher charge to all others extortionate during all that day, or week, or month, or whatever the period might be. I think it would be *necessary to shew that there was a practice of carrying for some person or class of persons at the lower rate.* But a single instance would be evidence to prove this practice; and if followed up by shewing that the smaller charge was repeatedly made at intervals over a period of time, *the jurors would, in the absence of explanation, be justified in drawing, and would probably draw, the inference that the company during the period carried for others at that lower rate, and consequently that the higher charge was extortionate as being beyond the statutable limit of equality.*"

He then proceeds to show that the weight of authority was very much in favor of this view, citing many previous cases; and wherever the measure of recovery is referred to it is in such terms as these: "The excess might be recovered back under a count for money had and received," (p. 240); "the plaintiff recovered the overcharge under a count for money had and received," (pp. 241, 242). Referring to *Garton* v. *Bristol and Exeter Railway Co.* (1861), 1 B. & S.

([1] NOTE: This sentence was quoted with approval by this court, in 145 U. S. 277.)

112, a case in which he had sat, he says (pp. 243): "If, as rather appears from the report to be the case, the decision went so far as to say that an action for money had and received would not lie where the overcharge was in breach of the statutable obligation to charge equally, as much as if it had been in breach of the common law obligation to charge reasonably, I think the decision was a mistake; and it was overruled in *Baxendale* v. *The Great Western Ry. Co.*, 16 C. B. (N. S.) 137, by the Court of Exchequer Chamber, which comprised three out of the four judges who took part in deciding *Garton* v. *The Bristol & Exeter Ry. Co.*, in the Queen's Bench."

He then reviews some later cases in which, for the first time, a difference of opinion had arisen, with the final result of concluding that the plaintiff was entitled to recover. Four other judges present concurred. Baron Bramwell (p. 250) alone took a different view; not, however, respecting the measure of damages, but upon the question whether the Equality Clause had been violated.

The House of Lords followed the majority of the judges and affirmed the judgment below, Lord Chelmsford delivering an elaborate opinion, in which, after discussing the evidence upon which the violation of the Equality Clause depended, he proceeded as follows (p. 262): "The last subject to be considered is the form of the action; *whether an action for money had and received will lie to recover back overcharges made upon the carriage of the plaintiff's goods, not absolutely but relatively to the charges made to other persons.* It was argued for the defendants that the charge upon the plaintiff's packed parcels, being warranted by the 10 and 11 Vict., ch. 226, and being reasonable, and within the absolute discretion of the company, the plaintiff was not injured by other persons being charged less than he was. But this is a fallacious way of viewing the question. The plaintiff's complaint is not that others are charged less than himself, but that *the fact*

of their having been charged less entitled him to claim the same rate of charge, and that all beyond that rate is overcharge. The very fact of the smaller charge to others is the ground of his complaint of an overcharge to himself. Now, if the defendants were bound to charge the plaintiff for the carriage of his goods a less sum, and they refused to carry them except upon payment of a greater sum, as he was compelled to pay the amount demanded, and could not otherwise have his goods carried, *the case falls within the principle of several decided cases, in which it has been held that money which a party had been wrongfully compelled to pay under circumstances in which he was unable to resist the imposition, may be recovered back in an action for money had and received.* In the language of the Court of Common Pleas, in the case of *Parker* v. *The Great Western Railway Company*, 7 Man. & G. 253—'The payments made by the plaintiff were not voluntary, but were made in order to induce the company to do that which they were bound to do without them.'" Lord Chelmsford proceeds then to cite other decisions, showing that the *Garton Case* was erroneously decided, and was overruled by the *Baxendale Case.*

London & North Western Ry. Co. v. *Evershed* (1878), L. R. 3 App. Cas. 1029; 5 Eng. Rul. Cas. 351; *was an action by a shipper to recover from the carrier an amount equivalent to the rebates given to another shipper in violation of the Equality Clause.* The House of Lords sustained the action, the Lord Chancellor (Ld. Cairns) saying (p. 1035): "The one right, to my mind, the clear and undoubted right, of a public trader is to see that he is receiving from a railway company equal treatment with other traders of the same kind doing the same business and supplying the same traffic. In my opinion that is not the case with regard to this plaintiff, and therefore I think he is entitled to recover the moneys he had paid under protest." Lord Hatherly said (p. 1035): "My Lords, I have come to

the same conclusion. I have been unable to see, since the beginning of the argument, in a case where there was this difference in the charge against the respondent, how it could possibly be said that the case comes within *the well-established construction of the provisions of the 90th section of the Railways Clauses Consolidation Act.* . . . (p. 1037). Therefore, I apprehend that your Lordships cannot possibly say that the appellants are entitled to make this distinctive charge and give to other traders a rebate without giving the respondent *a return of the money which he has so paid in excess of the charge to other people.* I think the money he has so paid, and paid under protest, can now be recovered back by him." It should be noted that the "protest" was of course not treated as a condition precedent to the recovery. The word was used merely to point out what payments were referred to; there having been, in fact, a protest in respect to the payments in question.

Denaby Main Colliery Co. v. *Manchester, Sheffield & Lincolnshire Railway Co.* (H. L. 1885), L. R. 11 App. Cas. 97, was an appeal from a decision of the Court of Appeal, reported in L. R. 14 Q. B. Div. 209; and the case came there from the Queen's Bench Division (Matthew and Day, JJ.), whose decision is reported L. R. 13 Q. B. Div. 674. The questions discussed in the Divisional Court were (a) whether certain "group rates" constituted a violation of the Equality Clause of the Consolidation Act, 1845, § 90, and, if so, whether the damages for breach of that enactment were *limited* to the amount of overcharges (and what was the measure of such overcharges), or whether *general damages* could *also* be recovered. (b) Whether an action lay for breach of the Railway and Canal Traffic Act, 1854, § 2, in view of the prohibition of § 6 of the same act; and, if so, whether the damages for breach of this act were limited to the amount of overcharges, or whether general damages could also be recovered. The "group rates" comprised the rates from

each of the collieries in a certain district, to a number of towns and places in various parts of England, and the coal going from any one of the collieries comprised in the group to any one of these towns and places must pass defendant's colliery, which was on the same line of railway. The judges held (13 Q. B. Div. 678) that the group rates were a violation of § 90 of the act of 1845, and that the overcharge could be recovered in accordance with *Evershed's Case*. This was on the ground that, in the absence of special circumstances to justify the same charge for carrying a greater distance for one customer than for another, there was a case of inequality within § 90 of the act of 1845. The question whether the damages for breach of that section were limited to the amount of overcharges, or whether general damages could also be recovered, was not answered, because there was in the statement of facts no ground upon which an action for general damages would be maintainable. With respect to the act of 1854, it was held that an action did not lie for anything done in contravention of that act, and that *Evershed's Case* was not an authority for such action, since the point was not presented there and no opinion was expressed upon it.

In the Court of Appeal (14 Q. B. Div. 209), the very special facts of the case are set forth. The court (*per* Lindley, L. J.) affirmed the judgment of the Queen's Bench Division that no action would lie in respect of any breach of the provisions of the Railway and Canal Traffic Act, 1854, § 2. Next, it was held that the "grouped rates" were not a violation of the act of 1845, because the termini were not the same; the reasoning being (p. 223) that the words "passing only over the same portion of the line" meant passing between the same points of departure and arrival, and passing over no other part of the line.

But it was held that the Company had violated the Equality Clause by charging to the defendant greater

rates than those charged to one Bannister; the coal in each case going from defendants' mine to Grimsby. As to this, the court proceeded to say (p. 226): "It remains only to consider what damages, if any, the defendants have sustained by reason of the company's reduction of their tolls, for the coal carried from the defendants' colliery for Bannister and shipped at Grimsby for the American steamers and for points south of Harwich. The defendants in fact sent no coals to Grimsby for such shipment, nor did they ever request the railway company to carry coals for such shipment. If they had, there is no reason to suppose that they would have been charged more than Bannister. . . . The fact, however, remains that at various times the railway company did carry coals to Grimsby for the defendants and Bannister, under the like circumstances, as regards trouble and cost to the company, and as regards coals got from the defendants' collieries over the same portion of the line; and the company did charge Bannister for the coals so carried for him less than they charged the defendants; and if the defendants had shown that they had thereby sustained pecuniary loss, they would have been entitled to recover damages in respect thereof. The Divisional Court has held the defendants entitled to recover overcharges made to the defendants on the principle laid down in *Evershed's Case*, i. e., the charges made to them in excess of the charges made to Bannister for similar services. But the court does not say on what quantity of coal, or on how much of the defendants' coal carried to Grimsby, this excess is to be calculated, and we are unable to see how the quantity is to be fixed. This difficulty did not arise in *Evershed's Case;* and the principle of that case seems to us inapplicable to the assessment of damages in this case. It cannot be right to calculate the amount of overcharge on all the coal sent by the defendants to Grimsby without reference to the quan-

tity on which, or the times during which, a less rate was charged to Bannister, and, as already stated, we do not see on what principle to fix the amount of alleged overcharge. Under the peculiar circumstances of this case the defendants have not shewn any grounds which will justify the court in holding the railway company liable to them for any overcharges or damages. There is, therefore, nothing to be ascertained by the arbitrator on this head."

In the House of Lords (11 App. Cas. 97), it was held, that where the railway company carried coal from a group of collieries situate at different points along their line, and charged all the collieries with one uniform set of rates in respect of such carriage, the owners of the colliery nearest to the point of arrival were not entitled to maintain an action for overcharges merely on the ground that the difference in distance showed that the same rate was a discrimination against the shorter haul. The Lords affirmed the decision of the Court of Appeal to the effect (a) that the railway had not in the above respect infringed the provisions of § 90 of the act of 1845. They affirmed the decision (b) that in this particular case an action would not lie for breach of the act of 1854, because undue or unreasonable preference or prejudice, within the meaning of that act, had not been proven. The question whether under any circumstances an action lies for breach of the act of 1854 was reserved. And (c) upon the question of the coal carried from the appellants' colliery to Grimsby at the same time that less rates were charged on Bannister's coal because of its ultimate destination for shipment on American steamers or for points south of Harwich, the House of Lords affirmed the judgment of the Court of Appeal that the allowances made to Bannister were a violation of the Equality Clause of the act of 1845.

But upon the now important question of damages the House of Lords (reversing the Court of Appeal) held that the appellants were entitled to recover the overcharges, the amount

to be ascertained by finding what quantity of coal carried under the same circumstances and over the same portion of the line was charged at the higher rate to the appellants at the time the lower rate was charged to Bannister.

There was a difference of opinion among the Law Lords as to whether the Colliery Company was entitled to recover the amount of the overcharge computed upon the entire tonnage transported for them, or only upon the less tonnage that had been carried at the reduced rate for Bannister during the same period. The Lord Chancellor (Halsbury) held to the former view; the Earl of Selborne and, apparently, Lord Blackburn, to the latter. In the end, the view of the Lord Chancellor prevailed. But the Lords all agreed that an inequality in the rates charged to two shippers for the same service was to be treated as conclusive evidence that the disfavored shipper had been overcharged; and that the rate differential—described as "overcharge"—was to be adopted as the measure of the compensation to be awarded for a violation of the Equality Clause.

The Lord Chancellor said (p. 112): "The remaining question, namely, what the appellants are entitled to recover from the company upon the hypothesis that they have been overcharged, is one which does not seem to me to be surrounded by the difficulty that has been assumed to exist. The arbitrator, to whom this question must go back, will be able to *find on what quantities of coal the appellants were charged, during the periods when the railway company were carrying for Bannister at a less rate; and if the principle is laid down by your Lordships that the appellant's coal ought to have been carried at the same rate, I am unable to see the difficulty of ascertaining the amount of overcharge.*"

The Earl of Selborne said upon this topic (p. 116): "I agree with the arbitrator in holding this to be a case of overcharge, and not a question of damages; and I should answer his question (upon the authority of *Sutton's Case*

and *Evershed's Case*, and of the opinion of Lord St. Leonards in *Finnie's Case*, 2 Macq. 186), by saying that the proper measure of the overcharge to the appellants is the difference between the amount charged to them, and that charged (after deducting the allowance) to Bannister, for coals carried over the same part of the railway and under the same circumstances, during the same periods of time. Is there, then, any insuperable difficulty arising out of the fact, that during these periods of time, not only coals on which these allowances were made, but also other coals, on which Bannister was charged the same rates with the appellants, were carried over the same distance, and under the same circumstances? I do not think so. *It being known how much coal was actually carried at the reduced rate for Bannister during these periods, it seems to me to result, from the principle established in the cases of Sutton and Evershed, that the appellants ought to have been charged at the same reduced rate up to, but not beyond, the same total quantity during the same period of time, and that this is the true measure of the overcharge, for which the arbitrator ought to give them credit. . . . I think (with the Court of Appeal) that there would be very great difficulty, if the principle of overcharge were rejected, in finding any other remedy by way of damages applicable to such a case.*"

Lord Blackburn, after quoting what was said in the Court of Appeal (as quoted above), upon the question of damages, said (p. 124): "I am not satisfied with the way in which Lindley, L. J., deals with *Evershed's Case*, and the mode in which the Divisional Court had applied it. I think that it cannot be right to calculate the amount of overcharge on all the coal sent by the defendants from their colliery to Grimsby for shipment, without reference to the quantity of coal on which, or the time during which, the less rate was charged to Bannister for coal carried from the defendants' colliery. The arbitrator has not found, and I do not think he was bound to find in the

special case, what part of the coals carried by the railway were carried only over the same part of the railway with those carried for Bannister during the same time, so as to make this charge on these coals extortionate. I think when the case goes back he will have to find this in order to ascertain the amount, if any, which can be recovered back as overcharge."

Lord FitzGerald said simply (11 App. Cas. 125): "My Lords, I have read the two elaborate opinions which have been delivered by my noble and learned friend near me, and my noble and learned friend opposite, and I entirely concur in the order which it is proposed to make, and have nothing to add."

But the Syllabus (11 App. Cas. 98) expresses the view of the Lord Chancellor, and the order for judgment (p. 126) shows that this view prevailed.

The order was—"That the arbitrator must ascertain *what quantity of coal carried under the same circumstances and on the same portion only of the line was charged at the higher rate to the defendants at the time the lower rate was charged to Bannister*, the fact that the coal was shipped on the American steamboats or to the south of Harwich not being a difference in the circumstances; *and so ascertain the amount of the overcharge.*"

The very clear result of these three important decisions of the House of Lords was that the amount of the difference in rates was to be treated as so much money unlawfully exacted from the disfavored shipper, and recovered accordingly.

There is not the least doubt that Congress, in passing the Interstate Commerce Act, had in mind these then recent decisions of the English court of last resort, and intended to adopt the principle those cases had established with respect to the Equality Clause of the English act of 1845, viz., that just as, at the common law, a shipper who had been charged an unreasonable rate could recover back

the excess, so under the statute he could treat lower rates customarily allowed to other shippers for the like service as conclusive evidence that he had been subjected to an overcharge, and recover the difference.

To this extent, at least, I deem the question of the measure of damages for unlawful discrimination, contrary to § 2 of the Interstate Commerce Act, to be covered by the previous decisions of this court, already cited (145 U. S. 283; 162 U. S. 222; 220 U. S. 253), which pointed out that the Equality Clause furnished the model for § 2 of the Interstate Commerce Act, and that it was adopted by Congress with the construction that had been put upon it by these same decisions of the House of Lords. Were the matter *res nova,* I should entertain no doubt of the propriety of adhering to the English rule.

Whether the House of Lords was right in the *Denaby Main Colliery Case* in allowing a recovery by the aggrieved shipper based upon the rate differential as applied to his entire tonnage, or whether it should have been limited to a tonnage not exceeding the tonnage of the favored shipper on which the rebate was allowed, if that was less than the tonnage of the aggrieved shipper, may be a question of some doubt. This court in the present case is not called upon to pass upon it.

For the record before us does not present the question whether the plaintiff's recovery ought to have been measured by the tonnage of the favored shippers upon which the rebates were allowed. The plaintiff in error (defendant in the trial court) did not prefer any request or take any exception that would have based the recovery upon a computation of the favored tonnage. There was no evidence, indeed, of the amount of that tonnage; it being simply made to appear that of all the coal shipped by the Berwind-White Company (one of the favored shippers) during the period of rebating, only 10 per centum was contract coal on which rebates were allowed. How much

the Berwind-White Company shipped did not appear, and so it may properly be presumed that 10 per centum of its shipments would amount to more than the total of the plaintiff's shipments.

Defendant did request the trial court to instruct the jury that if the lower rate accorded to other shippers was not justified, "the amount which the plaintiff is entitled to recover is measured by the difference between the rate per ton which it paid on all its shipments during such period, and the rate per ton which the other shipper paid on his or its whole volume of shipments during such period." This, as the Circuit Court of Appeals correctly held (173 Fed. Rep. 6), in effect requested the court to charge, as fixing the measure of recovery, not the lowest rate charged by the railroad to another shipper, but the general average paid on all shipments made by such shipper. I agree with that court in the view that Congress made no such rule. It is inconsistent with anything in the English cases, or in any case in this country to which attention is called.

The conclusion of this court that the right to recover in such a case as the present "is limited to the pecuniary loss suffered and proved," and that the fact that greater charges are exacted from the plaintiff than from his competitor for the like service is not evidence of such pecuniary loss, is, so far as I have been able to discover, entirely unsupported by authority. The *Parsons Case* (167 U. S. 447, 460) is cited as authority, but in my view is not properly to be so considered, for reasons already fully explained. The "only other case" is *Knudsen-Ferguson Fruit Co.* v. *Michigan Central R. Co.*, 148 Fed. Rep. 968, 974. This was an action to recover a sum claimd to have been unlawfully exacted for the icing of a carload of fruit. At p. 974 the court said, *arguendo:* "To support a recovery under this section [§ 8] there must be a showing of some specific pecuniary injury. . . . He [the

shipper] must show either that there has been some unreasonable or excessive charge imposed, *or some unlawful discrimination practiced against him.*" As this court holds that in the present case an unlawful discrimination was practiced against the shipper, I do not see anything in the *Knudsen Case* to deprive it of its right to recover, or to affect the question of damages. *Central Coal & Coke Co.* v. *Hartman*, 111 Fed. Rep. 96, and *Meeker* v. *Lehigh Valley R. Co.*, 183 Fed. Rep. 548, were actions to recover treble damages under the Sherman Anti-trust Act; in the latter case (p. 551) the court was careful to point out that the plaintiff was not seeking redress as a shipper, nor was the defendant sued as a carrier. *Hoover* v. *Pennsylvania R. Co.*, 156 Pa. St. 220, 224, was an action upon a Pennsylvania statute, not, like the Interstate Commerce Act, giving to the party injured a right of action for "damages sustained," but making the offending carrier "liable to the party injured for damages *treble* the amount of injury suffered." The court cited no authority for its decision that the difference in the freight rates did not furnish a measure for the amount of the single damages. Evidently because of the penal character of the remedy the court shrank from adopting what otherwise would be deemed the normal rule for determining the amount of the injury.

On the other hand, *Cook* v. *Chicago &c. Ry. Co.*, 81 Iowa, 551, 563, is a distinct authority for the proposition that in a case of discrimination in rates accomplished by means of rebating, the amount of the rebates furnishes the measure of damages; the court saying: "The only finding that can in any fairness be made is that after deducting the rebate the rate was reasonable; and that the exaction from the plaintiffs was unreasonable and the discrimination against them unjust." To the same effect is *Louisville &c. R. Co.* v. *Wilson*, 132 Indiana, 517, 525, where an instruction that the allowance of more favorable

rates to another shipper entitled the plaintiff to recover the difference, was sustained on appeal.

The present decision ignores the practical construction that has invariably been placed upon the act by the Interstate Commerce Commission.

In *Burgess* v. *Transcontinental Freight Bureau*, 13 I. C. C. 668, 680, the Commission ruled upon the precise question now before us, in dealing with a case of rates held excessive *per se*, but only so held as the result of a comparison between the rates under attack and other rates customarily charged. The complainants claimed reparation by reason of shipments under the old rate. Defendants denied that such reparation should be awarded, even though the Commission were of the opinion that that rate was excessive, and this "for the reason that no damage upon the part of the complainants has been established." It appeared that the market was not affected by the rate, and that the freight had been added to the price paid by the consumer; and it was insisted that the complainants who had paid this freight rate had not been actually injured. The Commission said: "Such is not, in our opinion, the proper meaning of this term [damage]. These complainants were shippers of hardwood lumber to this destination, and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right, and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. If complainants were obliged to follow every transaction to its ultimate result, and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not

be required to refund this amount because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity transported."

It is upon this theory that reparation has been awarded by the Commission from the beginning. After an examination of the reports of their decisions as exhaustive as the time at my disposal would permit, I think it entirely safe to say that in the thousands of reparation cases that have been passed upon, reparation has not been refused under circumstances at all resembling those of the case at bar; and that wherever reparation has been allowed it has been based upon the rate differential, and awarded to the shipper who paid the freight, without regard to whether or not he charged it over against his consignee. The same rule has been adopted in all cases, whether the rates charged to the complainant have been deemed unreasonable *per se* or not; indeed, where they have been thus denounced it has ordinarily been done as the result of comparison between the rate under attack and other rates on similar traffic. Illustrative decisions are cited in the margin.[1]

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[1] Reparation by reason of published rates held unreasonable because discriminatory, irrespective of whether they were otherwise extortionate.

12 I. C. C. 418, 426; 14 I. C. C. 422, 434; 14 I. C. C. 523; 16 I. C. C. 528; 17 I. C. C. 578; 18 I. C. C. 259; 18 I. C. C. 212, 219; 18 I. C. C. 550; 18 I. C. C. 580.

By reason of published rates held unreasonable because in excess of rate afterwards voluntarily established by the carrier.

12 I. C. C. 13; 12 I. C. C. 141; 14 I. C. C. 118; 14 I. C. C. 577; 16 I. C. C. 190, 192; 16 I. C. C. 293; 16 I. C. C. 450; 20 I. C. C. 104.

By reason of published rates held unreasonable because in excess of rate afterwards established by the Commission.

12 I. C. C. 417; 14 I. C. C. 199, 205; 17 I. C. C. 251, 253; 17 I. C. C. 333; 18 I. C. C. 301.

By reason of rates held unreasonable because resulting from error in routing chargeable to the carrier.

14 I. C. C. 527; 18 I. C. C. 527.

This court, while saying very plainly what the word "damages" in § 8 *does not* mean, reaches its conclusion without determining what the word *does* mean. It is said that the "damages may be the same as the rebate, or less than the rebate, or many times greater than the rebate." It is said that in the case under consideration there was "no proof of injury, no proof of decrease in business, loss of profits, expense incurred, or damage of any sort suffered." It is said that "If plaintiff and one of the favored companies had both shipped coal to the same market on the same day, the rebate on contract coal may have given an advantage which may have prevented the plaintiff from selling, may have directly caused it expense, or may have diminished or totally destroyed its profits. The plaintiff, under the present statute, in any such case being then entitled to recover the full damages sustained." But as the contract coal of the favored shipper had been sold long before (prior to April 1, 1899, at latest), I am unable to see how it can reasonably be supposed that the rebate could have prevented the plaintiff from selling, or have caused it expense, or have diminished or destroyed its profits upon coal that happened to reach destination on the same day.

What, then, is to be the measure of damages? Whatever it is to be, it is apparent that we must henceforward abandon the simple and direct method of computing the

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By reason of published rates held unreasonable *per se*.

14 I. C. C. 525; 14 I. C. C. 577; 16 I. C. C. 469; 20 I. C. C. 12; 20 I. C. C. 104; 22 I. C. C. 283.

By reason of published rates held unreasonable because higher than obtainable by another route.

12 I. C. C. 141.

By reason of published rates held unreasonable because exceeding the sum of the locals.

13 I. C. C. 154; 14 I. C. C. 336; 14 I. C. C. 549; 14 I. C. C. 573; 14 I. C. C. 579; 16 I. C. C. 293; 16 I. C. C. 318; 16 I. C. C. 339; 21 I. C. C. 215.

rate differentials, and therefrom ascertaining the amount of the reparation, and must enter into inquiries respecting the state of the market, and ascertain whether, upon the precise date that the goods of the injured party reached the market, goods of the like character owned by the favored shipper came into direct competition with them. All of this seems to me to be utterly impracticable, and I cannot believe that Congress intended any such result to follow from the language it employed.

It is said that under the rule of the *Denaby Colliery Case* it would follow that if there were, say, five dealers, each shipping 10,000 tons, to one only of whom rebates aggregating $3,500 had been allowed, each of the five would be as much entitled as plaintiff to recover $3,500 on their several shipments of 10,000 tons each, and the five verdicts would aggregate $17,500 because of the payment of $3,500 to the favored shipper. But if § 2 of the Act is to be given any vital force, it must be construed as estopping the carrier from saying that the amount actually charged, less the rebate, is less than ought to be charged on a shipment of 10,000 tons; and if he himself rebates $3,500 to one shipper, the requirement that he rebate the same to each of the four others, does not penalize the carrier. It simply requires him to do service for all at the rate which he himself has fixed in dealing with the favored shipper.

Nor can I see that this would "create a legalized, but endless, chain of departures from the tariff." If § 2 is enforced strictly in accordance with the English rule it will very clearly tend to prevent any departures from the lawfully established tariffs.

It seems to me a strange view of the matter to deny direct reparation *in specie* to the aggrieved shipper, by the payment to him of an amount sufficient to leave the net rate charged to him equal to the lowest rate customarily charged to a competitor; and to base this denial on the theory that reparation will do more harm than good, by

creating an "endless chain of departures from the tariff." Of course, the result would be that if there were five shippers, and rebates were given to one of them unlawfully, and then by legal compulsion the carrier were required to give equivalent rebates to the others, this would constitute five "departures from the tariff" instead of one. But what matters it, provided the five shippers are thereby put upon an equal footing? The prohibition against rebates and other discriminations, and also the requirement of established and published rates, are intended to compel fair and equal treatment by the carrier of all shippers. I can see nothing in the act that makes published rates so sacred that departures from them by the carrier must go unredressed, because to redress the grievance will require a further departure. Equality in the treatment of shippers is the end aimed at by the act; published rates are but a means to that end. We should not so exalt the means as to lose sight of the end and object of the Act.

Besides, if the theory of the opinion is to be adhered to, there will necessarily be as many different rates as there are differences in the circumstances of the disfavored shippers who seek redress because of rebates or other rate discriminations. One aggrieved party may receive damages far beyond the money equivalent of the discrimination; another may receive much less; still another may receive nothing at all. If we were to look to the outcome of these private actions for violation of the equality provision of § 2 of the Act, and treat them as amounting in the end to a determination of the freight rate, the inevitable result (on the theory adopted by the court) would be that one violation by the carrier would result in as many different rates as there were different shippers to be discriminated against.

But, with great respect, I again ask: What, in the present case, is to be the measure of damages? The plaintiff, upon shipments aggregating 40,000 tons of coal in two years,

has been charged about $12,000 more than its competitors have been charged during the same period for the same service. The plaintiff has actually paid the freight bills to the railroad company. Upon the face of the record, the plaintiff's expense account has been actually increased by the amount of $6,000 per annum, as compared with its competitors. Other things being equal, the profits of the plaintiff, upon the production and sale of the 40,000 tons of coal, were $12,000 less than otherwise they would have been. It does not appear that other things were not equal. Yet the decision is, that there is "no proof of injury, . . . expense incurred, or damage of any sort suffered." Is not the payment of a full freight bill, as compared with a reduced freight bill, an "expense incurred"? What other expense could be incurred by a shipper, attributable to a discrimination in rates?

The opinion says: "Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion. Having paid only the lawful rate, plaintiff was not overcharged, though the favored shipper was illegally undercharged." This is not only unsupported by authority, but is, I submit, inconsistent with the result reached in the present case. The court decides that the plaintiff is injured, and entitled to maintain an action against the carrier under § 8, because the carrier has collected less compensation from a favored shipper for the like service. The rebates were merely the device by which the discount from the published rates was accomplished. How can such an action lie at all, except that § 2 makes the published and otherwise lawful rates unlawful and extortionate when less rates are charged to favored shippers, through the device of rebates or otherwise? It seems a mere play upon words to say that "the favored shipper was illegally undercharged." Certainly it is not to *him* that the right of action is given by § 8. In short, the opinion treats the imposition of the "lawful

rates"—that is, the published rates—as unlawful for the purpose of establishing the *injuria*, but insists that they must be treated as lawful when we come to ascertain the *damnum*.

The result is, the legal paradox: *Injuria sine damno*. The plaintiff is wronged, but not harmed; it may sue, but may not recover.

If the rate differential is not a proper element of damages in actions brought in the courts, I suppose it will not be proper for the Commission to adhere to it. Yet the sheer impossibility of adopting any other measure of damages, in the multitude of reparation cases that the Commission has to deal with, is perfectly obvious.

The result, upon the whole, is a virtual denial of private remedy for the most common and harmful of those discriminations that the Interstate Commerce Act was designed to prevent and to redress.

MITCHELL COAL AND COKE COMPANY *v.* PENNSYLVANIA RAILROAD COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 674. Submitted December 4, 1912.—Decided June 9, 1913.

Pennsylvania Railroad Co. v. *International Coal Co.*, *ante*, p. 184, followed to effect that the courts have jurisdiction of a case brought by a shipper against a carrier for the amount of damages actually sustained by him for charging him the full tariff when it was carrying the same goods the same distance for other shippers at lower rates but that such damages must be sustained by proof as to the amount thereof.

The courts have not jurisdiction of a suit brought by a shipper against a carrier for damages by reason of paying other shippers of similar

goods an unreasonable amount for services in connection with such transportation, unless and until there has been a finding by the Interstate Commerce Commission that the payments so made to the other shippers were unreasonably large.

A carrier has the right under the Act to Regulate Commerce to pay shippers a reasonable allowance for services in connection with transportation of goods shipped by them, and the allowance paid must be treated by the courts as *prima facie* reasonable until the Interstate Commerce Commission has determined otherwise.

When the case is here on a question of jurisdiction only, this court cannot pass upon questions which go to the merits.

There is a necessity, which is recognized by the Act to Regulate Commerce, of having questions as to reasonableness of rates and allowances settled by a single tribunal in order to avoid the conflicting decisions which would result if several different tribunals could pass upon the same question; and the act itself has designated the Interstate Commerce Commission as that tribunal.

Allowances for lateral hauling may be lawfully paid, as they become unlawful only when unreasonable; whether unreasonable either past or future is a rate-making question over which the courts have no jurisdiction, even if the parties attempt to give it by consent.

This action, having been commenced without any application having been made to the Interstate Commerce Commission to declare unreasonable the allowances paid by the carrier for lateral hauling, the case must be remanded for dismissal, but the dismissal is stayed to give plaintiff an opportunity to make such application with the right to the carrier to be heard on the defense of limitations as well as other defenses.

192 Fed. Rep. 475, affirmed in part and reversed in part.

THE facts are stated in the opinion.

Mr. George S. Graham for plaintiff in error.

Mr. John G. Johnson and *Mr. Francis I. Gowen* for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

On November 20, 1905, the Mitchell Coal and Coke Company brought suit in the Circuit Court of the United States for the Eastern District of Pennsylvania against

the Pennsylvania Railroad for damages alleged to have been occasioned by the payment of rebates to the Altoona, Glen White, Millwood, Latrobe and Bolivar Companies. The complaint alleged that between April 1, 1897, and May 1, 1901, the plaintiff, in competition with these companies, made shipments of coal and coke over the Pennsylvania road from the Clearfield District to the same general markets in other States and that, during all that time, the carrier paid rebates to these companies, pretending that the money given them was an allowance for transportation services rendered by them, in hauling cars over spur tracks between their mines and the railroad station.

The parties stipulated that the case should be submitted to a Referee, who should have the powers of a special master. His findings were in favor of the plaintiff. His report, modified as to the measure of damages, was confirmed (181 Fed. Rep. 403), but before judgment was entered thereon the carrier moved to dismiss the case because the court, as a Federal court, had no jurisdiction of the cause of action until after the Interstate Commerce Commission had passed upon the legality of the allowances and the reasonableness of the amount paid to shippers for hauling cars between their mines and the station. The motion was granted (183 Fed. Rep. 908), and the case was taken by writ of error to the Circuit Court of Appeals, which dismissed the case (192 Fed. Rep. 475) upon the ground that the question could only be reviewed by the Supreme Court of the United States. A writ of certiorari was denied (223 U. S. 733), and the plaintiff thereupon brought the case here by direct writ of error, the judge certifying the following as the jurisdictional question:

"Has the Circuit Court of the United States, in advance of any application to the Interstate Commerce Commission and action thereon by that body, jurisdiction to entertain an action of trespass brought by a shipper of coal

and coke to recover damages because of alleged unlawful preferential rates accorded to other and competing shippers of coal and coke, when such alleged preferential rates are claimed to have resulted from payments made to such other shippers, which payments the plaintiff claimed were rebates from the published and filed freight rate, and the defendant claimed were made as compensation for services rendered by such shippers or for other accounts which justified it in making the same, and when it further appeared that such payments had been made pursuant to a practice of long standing, and that a number of shippers other than the plaintiff were interested in the question of the lawfulness thereof."

1. The plaintiff's cause of action for damages occasioned by the payment of illegal or unreasonable allowances was one which, under §§ 8 and 9 of the Commerce Act (24 Stat. 382), could only be brought in a District or Circuit Court of the United States. The motion to dismiss challenged the jurisdiction of the court, as a Federal court, and its power "primarily to hear complaints concerning wrongs of the character of the one here complained of." *Texas &c. Ry. Co.* v. *Abilene Co.*, 204 U. S. 426, 442; *B. & O. R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 495; *Robinson* v. *B. & O.*, 222 U. S. 506. The order of dismissal was founded on the denial of jurisdiction, and this court has power to review that ruling. *Ira M. Hedges*, 218 U. S. 264, 270; *The Steamship Jefferson*, 215 U. S. 130. The case differs from *Darnell* v. *Illinois R. R.*, 225 U. S. 243. There the Commission had found that the rate was unreasonable. The demurrer, based on the failure to allege that a reparation order had been made in favor of the plaintiff, did not attack the jurisdiction of the court, as a Federal court, since the cause of action sought to be enforced was one which, if properly brought could, under the act of June 18, 1910 (36 Stat. 539, 554, c. 309), have been maintained either in a state or Federal court.

2. In the present case the motion to dismiss for want of jurisdiction was made at the end of the trial and was based, not upon the pleadings, but upon the evidence. It becomes necessary, therefore, to make a statement of the facts material to that issue:—The plaintiff, the Mitchell Coal and Coke Company, owned six coal mines in the Clearfield District, and between 1897 and May 1, 1901, shipped its products over the Pennsylvania Railroad in state and interstate commerce. During that time the provisions of the Commerce Act were constantly violated and there were many instances in which the carrier gave secret rates to shippers from whom it collected the full tariff and subsequently refunded the difference between the legal and the illegal rate. Many such rebates were paid to the plaintiff, the Mitchell Company, which in this case claimed the right to recover, as damages, the difference between these rebates paid to it and what it claimed were the additional rebates paid to the Altoona and other companies mentioned in the declaration. The Referee found that, for a part of the time, 70 per cent. of plaintiff's shipments had been made at secret rates, and held, citing *Pa. R. R.* v. *International Co.*, 173 Fed. Rep. 1, 9, that, as to this tonnage, the plaintiff was as much a violator of the statute as was the carrier and that no cause of action arising out of this illegal contract would be enforced by the courts. He therefore limited the inquiry to a consideration of the damages in respect to that part of the plaintiff's shipments on which no rebates had been paid.

From the Referee's report, and the testimony returned therewith, it appears that Clearfield District is the name given to a large coal field reached by the lines of the Pennsylvania Railroad. In this district there were many mines—some near the railroad and others at considerable distances therefrom, but all reached by lateral lines or spur tracks, over which cars were carried to and from the

mines. This Clearfield District was treated as a single shipping station, and the rates from all points therein were the same where coal was transported to the same point beyond the State. The published tariff named the rate from station to destination, but it was uniformly construed to include the haul from the mine. The published rate was so applied on all shipments made by the plaintiff as well as on those made by the Altoona and other companies named in the complaint.

It further appeared that to these companies the carrier paid what is called a trackage or lateral allowance, claiming that it was compensation allowed them for hauling cars from their mines to the station. The defendant's contention that there was no concealment of these payments is controverted by the plaintiff, which insists that it had no knowledge of such payments until 1898, when its officers were informed that the railway was paying some companies 10 cents a ton for such services. The Mitchell Company, the plaintiff, thereupon bought an engine to be used for that purpose at its Gallitzin mine and with this engine hauled cars, loaded and empty, between that mine and the station. For this work it demanded that the defendant should pay the same lateral allowance of 10 cents a ton that the railroad paid other companies for similar services. The carrier contended that it was itself prepared to do the switching at the Gallitzin mine, though, on account of dissimilarity of conditions, it could not economically do so at the Altoona and other mines referred to in the complaint. It therefore declined to pay a lateral allowance to the plaintiff, but offered to continue to treat this haul as included in the rate and to do that work without extra charge to the Mitchell Company. The plaintiff then offered to do the hauling for less than 10 cents, the exact amount not appearing. The proposition having been declined in 1899, the plaintiff, on November 20, 1905, brought this suit, offering evidence to show that in some

cases the allowance was as high as 18 cents a ton instead of 10 cents, as it had previously understood.

In addition to the Gallitzin mine, the plaintiff owned five others in the Clearfield District. They were located at points from 1,100 to 3,000 feet from the railroad and were reached by spur tracks belonging to the plaintiff, over which cars were hauled by the locomotives belonging to the Pennsylvania Railroad. For this service the carrier made no extra charge, treating it as included in the rate, though the tariff published the rate as from station to destination.

The mines of the Altoona, Glen White and Millwood Companies were located in the Clearfield District, while those of the Latrobe and Bolivar Companies were near by in the Latrobe District.

The Millwood was reached by a narrow gauge track, over which cars were hauled by that coal company's narrow gauge engines. For doing that work it was paid a lateral allowance of 15 cents a ton until April, 1899, and after that date 10 cents a ton.

The Glen White mine was about three miles from the main road and was reached by a spur having light rails, steep grades and sharp curves, over which the evidence tended to show that the engines of the railroad could not be safely or economically operated. This company transported the coal cars with its own engine and for doing that work the defendant paid it a lateral allowance of 15 cents a ton. On December 28, 1901 (subsequent to the transactions involved in this litigation), the carrier gave notice that it would discontinue lateral allowances on coke, but would allow 15 cents per ton on coal.

The Altoona mine was reached by a spur track, over which, with its own engines, the Altoona Company hauled cars and was paid a lateral allowance of 13 cents on coal and 10 cents on coke to points on the Hollidaysburg Branch, and 18 cents on coal and 20 cents on coke to

points east of Altoona. On December 28, 1901, this lateral allowance on coal was discontinued and that on coke reduced to 12 cents a ton. On January 1, 1902, all lateral allowances were discontinued.

Inasmuch as the payments to the Altoona were larger than those to any other coal company, the plaintiff claimed that they were the legal measure by which damages were to be assessed. The evidence was therefore specially directed to the situation at this mine, which was a little over three miles in an air line from the railroad and eight hundred feet above the station level. The grade was, not only very steep, but it was necessary to make use of three switchbacks in order to reach the elevation of the mine. The line was thus lengthened so as to be about 5 miles in length. The curves on this track were very sharp; the rails were light, and only specially constructed engines could be used. There was evidence that before the Pennsylvania's locomotives could have been operated over this spur it would have been necessary to put in heavy rails, strengthen the culverts and realign the track. Owing to the steep grade only four cars could be hauled at a time, and it required from three to six times as long to do the same amount of transportation work as at the Gallitzin mine.

3. The plaintiff insists that these facts demonstrate that the payments to the Altoona and other companies were not measured by the value of the track or locomotive, or by the cost of the service rendered, but were unreasonable in amount, were arbitrarily fixed, lowered or withdrawn and constituted a mere cover for rebating. On the other hand, the defendant insisted that, though bound to haul the cars to and from the mines, it could not economically do the work on account of the physical conditions at the Altoona, Millwood and Glen White mines and that it, therefore, employed those companies to perform that transportation service, paying them therefor an allowance

which is *prima facie* reasonable and must be so treated by the courts until the Commission has determined that it was excessive or constituted an unjust discrimination.

On this hearing, involving a matter of jurisdiction, we cannot pass upon these questions which go to the merits of the controversy. But these claims of the parties emphasize the fact that there are two classes of acts which may form the basis of a suit for damages. In one the legal quality of the practice complained of may not be definitely fixed by the statute so that an allowance, otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable. But to determine that question involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of the rate-regulating tribunal. The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute.

4. The necessity under the statute of having such questions settled by a single tribunal in order to secure singleness of practice and uniformity of rate has been pointed out and settled in the *Abilene, Pitcairn* and *Robinson Cases* and is referred to here because this record and that in *Pennsylvania R. R.* v. *International Co., ante,* p. 184, just decided, furnish a striking illustration of the results which would follow if the reasonableness of an allowance could be decided by different tribunals. Both cases involve the payment of 18 cents a ton to the Altoona Company during the same period and for identically the same reasons. In both the plaintiff insisted that the payment

was a rebate, and the carrier that it was compensation for services rendered. In the *International Case* the judge treated the Altoona allowance as lawful and reasonable. In this case the Referee found that it was a rebate, while the trial judge, in passing on exceptions to the report, held that it was a question of fact about which the evidence was conflicting and thereupon approved the Referee's report. Treating it as a question of fact, there may have been sufficient testimony to sustain the finding in both instances, although the conclusion was diametrically opposite. And, applying the rule that appellate courts will not disturb findings of fact where the evidence is conflicting, contradictory judgments might have been affirmed and one plaintiff could have been awarded damages on the theory that the Altoona allowance was unlawful and the other been mulcted in cost because the Altoona allowance was legal. This and like considerations compelled the holding that, as the courts have no primary jurisdiction to fix rates, neither can they do so at the suit of a single plaintiff who claims to have been damaged because an allowance paid its competitors was unreasonable in amount.

It is argued that this conclusion ignores §§ 9 and 22, which give the shipper the option of suing in the courts or applying to the Commission. The same argument was made and answered in the *Abilene Case* by showing that to permit suits based on the charge that a particular practice was unreasonable, without previous action by the Commission, would repeal the many provisions of the statute requiring uniformity and equality. For, manifestly, such uniformity and equality cannot be secured by separate suits before separate tribunals involving the reasonableness of a rate or practice. The evidence might vary and, of course, the verdicts would vary, with the result that one shipper would succeed before one jury and another fail before a different jury, where the reason-

ableness of the same practice was involved. Manifestly, different verdicts would occasion inequality between the two shippers and it is equally manifest that if the Commission had made one order of which both could avail themselves, there would have been one finding, of which one, two or a score of shippers could equally avail themselves. The claim that this conclusion nullifies § 9 is concretely answered by the fact that the court has just decided to the contrary in *Pennsylvania R. R.* v. *International Coal Company.* There the carrier insisted that a suit for damages, occasioned by rebating, could not be maintained without preliminary action by the Commission. This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the Commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the Commission or the courts for damages occasioned by a violation of the statute. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited.

5. It is argued that under the *Abilene*, *Robinson* and *Pitcairn Cases* this may be true as to existing rates in which the public have an interest, but it is urged that a claim based upon the unreasonableness of past rates and discontinued practices raises a judicial question, of which the courts and not the Commission have jurisdiction.

There are several answers to this proposition. In the first place, the plaintiff cannot claim under the act and against it. To say the least, it is extremely doubtful whether, at common law, one shipper had a cause of action because the carrier paid another shipper more than the market value of transportation services rendered to the carrier. *I. C. C.* v. *B. & O. R. R.*, 145 U. S. 263, 275. But if any such right existed it was abrogated or forbidden by the Commerce Act, and one was given which, as a condition of the right to recover, required a finding by the Commission that the allowance was unreasonable and operated as an unjust discrimination or as an undue preference. *Texas &c. Ry.* v. *Cisco Oil Mill*, 204 U. S. 449; *Texas &c. Ry.* v. *Abilene Co.* 204, U. S. 426, 444; *Southern Ry.* v. *Tift*, 206 U. S. 428, 437; *United States* v. *Pacific & Arctic R. R.*, 228 U. S. 87. Such orders, so far as they are administrative are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only *prima facie* correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by § 16 of the act given its day in court and the right to a judicial hearing (March 2, 1889, 25 Stat. 855, 859, c. 382).

In considering the administrative questions as to reasonableness, the elements of the problem are the

same, whether they involve the validity of obsolete allowances, discarded tariffs, or current rates and practices. In both classes of cases there is a call for the exercise of the rate-regulating discretion and the same necessity for having the matter settled by a single tribunal. For if at the suit of one shipper, a court could hold a past rate or allowance to have been unreasonable and award damages accordingly, it is manifest that such shipper would secure a belated but undue preference over others who had not sued and could not avail themselves of the verdict. But more than this—to permit separate suits and separate findings would not only destroy the equality which the statute intended should be permament, even after the rates had been changed, but it would bring about direct conflict in the administration of the law. Under the statute the carrier has the primary right to fix rates, and so long as they are acquiesced in by the Commission the carrier and shippers are alike bound to treat them as lawful. After the rate had been abandoned the carrier is still obliged to treat it as having been lawful, and cannot refund what had been collected under it until the Commission determines that what was apparently reasonable had in fact been unreasonable. But such a determination cannot be made by the courts, for they would not only have first to exercise an administrative function and make a rate by which to measure the reasonableness of the charge collected, but they would have to go further and treat as unreasonable a rate, past or present, which the statute had declared should be deemed lawful until it had been held to be otherwise by the Commission.

As to past and present practices for allowances, the Commission has the same power and there is the same necessity to take preliminary action. This was recognized in *Texas &c. Ry.* v. *Abilene Co.*, 204 U. S. 426, where, after considering §§ 8 and 22, relating to jurisdiction and the statutory and common law remedy, it was said that

although a railroad might alter its rates voluntarily or in obedience to an order of the Commission, yet it can "not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force." A contrary ruling would upset a useful, time-saving, economical and established practice. For in accordance with this construction of the act the Commission, after the abandonment of a rate, has repeatedly received and heard complaints and, upon finding that it had been unreasonable, has granted reparation accordingly. See *Arkansas Fuel Co.* v. *C., M. & St. P. Ry. Co.*, 16 I. C. C. 95, 98; *Allen & Co.* v. *C., M. & St. P. Ry. Co.*, 16 I. C. C. 293, 295.

The plaintiff insists, however, that all these reasons are answered by the decision in *Wight* v. *United States*, 167 U. S. 512, where the court, without preliminary action by the Commission, held that an allowance paid a consignee for hauling his freight in wagons from depot to warehouse was a rebate and thereupon inflicted the statutory punishment.

But that case did not involve any question of reasonableness of rate or allowance. Nor was the court there called on to indirectly exercise rate-regulating power, but only to pass upon the question of fact as to whether, as charged in the indictment, the defendant had paid a secret rebate to a favored consignee. It appeared that the carrier's published rate of 15 cents included the haul from Cincinnati to the yard in Pittsburg. Neither by its terms, nor by general practice, did that rate include delivery at warehouses in the city and distant from the railroad tracks. Not having undertaken to furnish free cartage, it was unlawful for the carrier to perform that service for one patron and not for all others. Paying the

favored consignee for rendering a service the carrier was not bound to furnish, was a gift—a rebate—a thing *ipso facto* illegal and prohibited by the statute and for which the guilty carrier was subject to criminal indictment, and for which damages could have been awarded on the civil side of the court. It was therefore not necessary to have a preliminary ruling by the Commission because the statute itself prohibited the payment of rebates and the courts could apply the law accordingly.

6. The plaintiff thereupon insists that even on this view of the case the judgment should be reversed, claiming that the payments here were of that prohibited character, so that even if the allowance was reasonable in amount, its payment was nevertheless unlawful because (a) given for a service not included in the rate and (b) not mentioned in the tariff.

Under the Elkins Act of February 19, 1903, 32 Stat. 847, c. 708 (*United States* v. *Chicago & A. Ry.*, 148 Fed. Rep. 646; *S. C.*, 156 Fed. Rep. 558, affirmed by a divided court, 212 U. S. 563), and under the Hepburn Act of June 29, 1906, 34 Stat. 584, c. 3591 (*Victor Co.* v. *Atchison Ry.*, 14 I. C. C. 120) it has been held that the carrier must give notice in the tariff of free cartage, lighterage, ferriage, or any other accessorial service that will be furnished, as well as of any allowance that will be made to shippers who furnish transportation facilities or service. But the present case is not to be governed by those statutes, but by the law of force between 1897 and 1901, when the transactions complained of took place. At that time the Commerce Act [1] required the carrier to give notice of

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[1] SEC. 6. . . . The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force . . . , and shall also state separately the terminal charges and any rules or regulations which in

every charge it would make against the shipper. But the statute was not construed to compel the railroad to publish what free cartage or accessorial service it would furnish (*Detroit* v. *United States*, 167 U. S. 646), nor what sums it would pay shippers for transportation service rendered by them to the carrier. Failure to publish these items could, however, easily lead to unjust discrimination, and the court, in the case last cited, held that the Commission might, by a general order, require such matters to be published in the rate sheet. We are not cited to any such order for the period now under investigation, and, so far as we can discover, by the general and public custom of all carriers, acquiesced in by the Commission, the tariffs at that time uniformly omitted any statement of allowances that would be paid to the shipper for the use of private cars, or private tracks, or for transportation service in switching, hauling, lightering or other work, included in the rate, but actually performed by the shipper.

But although the statute then of force was not construed to require the publication of allowances, their pay-

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anywise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. . . .

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party." (Act of February 4, 1887, 24 Stat. 379, 380, 381.)

ment was lawful only when supported by a consideration. To pay shippers for doing their own work would have been a mere gratuity, and if here the carrier was not bound to haul from the mine it had no more right to pay these companies for bringing their coal over the spur track to the junction than it would have had to pay a merchant for hauling his goods in a wagon to the railroad depot. The plaintiff insists that such is the case here, and that, as the tariff named the rate from the station, it could not lawfully include the haul from the mine, and consequently paying the shippers for doing their own hauling was a mere rebate.

Such undoubtedly it would have been if naming the rate from station to destination meant that the haul had to begin at the depot building. But neither the statute nor the tariff defines what are station limits, nor do they fix the exact point from which the transportation must begin, nor the territory within which the delivery must be made. These limits necessarily vary with the size of the communities, the extent of the yards, the practice of the carrier and the bounds within which it uniformly receives and delivers freight. This is particularly true in a case like the present, where the Clearfield District was treated as a single shipping point, and where the rate, though named and published as from the station, was universally applied from the mines of the Mitchell Company as well as the other companies named in the declaration and all others located in the Clearfield District.

Inasmuch as this rate included the haul the Railroad was bound to transport the coal from the mouth of the mines, and could use its own engines for that purpose or it could employ the Coal Companies to render that service, paying them proper compensation therefor. In case any question arose as to the reasonableness of the practice, the limits within which the station rates should

apply, or the reasonableness of the allowance paid those shippers who supplied motive power, the Commission alone could act. For the courts are no more authorized to determine the reasonableness of an allowance for a haul over a spur track, between mine and station, than they are to pass upon the reasonableness of a rate for a haul, over a trunk line, between station and station. What is or was a proper allowance is not a matter of law until after it has been fixed by the rate-regulating body. The courts can then apply that law, and, measuring what has been charged by what the Commission declares should have been charged, can award damages to the extent of the injuries occasioned by the payment of the allowance found to have been unreasonable and unlawful.

That station rates may be applied from mill or mine reached by spur tracks is recognized by the ruling of the Commission in the *Tap Line Cases*, 23 I. C. C. 277, where, in dealing with the practice of paying an allowance for hauling lumber from sawmills, the Commission said (p. 293):

"In all cases it is apparently the practice of the trunk lines, where no allowance is made, to set the empty car at the mill and to receive the loaded car at the same point. Indeed, they do this in many cases even when an allowance is made to the tap line. But whenever this service is performed by the trunk line, it is included in the lumber rate and is done without additional charge. In some instances the switch or spur track connecting the mill with the trunk line is as much as three miles long. In other words, by their common practice the public carriers interpret the lumber rate as applying from mills in this territory apparently as far as three miles from their own lines. So far as the manufactured lumber is concerned, it may therefore be said that where a mill has a physical connection with a trunk line and is not more than three miles distant the transportation offered by the trunk line

commences at the mill. If, therefore, a lumber company, having a mill within that distance of a trunk line, undertakes, by arrangement with the trunk line, to use its own power to set the empty car at the mill and to deliver it when loaded to the trunk line it is doing for itself what the trunk line, under its tariffs, offers to do under the rate. In such a case the lumber company may therefore fairly be said to furnish a facility of transportation for which it may reasonably be compensated under section 15 whether its tap line is incorporated or unincorporated. In other words, the lumber company thus does for itself what the trunk line does with its own power at other mills without additional charge and what it must therefore do for the particular lumber company without additional charge. Under such circumstances we think the lumber company, under section 15, may have reasonable compensation when it relieves the trunk line of the duty. But an allowance under such circumstances is lawful only when the trunk line prefers, for reasons of its own and without discrimination, to have the lumber company perform the service. It is not lawful when the lumber company refuses to permit the trunk line to do the work." 23 I. C. C. Rep. 277.

In view of this ruling it is apparent that lateral allowances might have been lawfully paid. They became unlawful only when unreasonable. Whether they were so or not was a rate-making question as to which parties were directly at issue, and which the courts had no jurisdiction to determine so far as it concerned the allowances to the Altoona, Millwood and Glen White mines. Having no jurisdiction, the parties could not by consent give it to the court, to the judge, nor to the Referee. And if, as claimed, the stipulation to submit the case to the Referee estops the defendant from insisting on the plea of the statute of limitations, that, with all other relevant issues, can then be determined, if the Commission decides that

the allowance was unlawful, and the carrier has no other defense.

7. But the situation of the Bolivar and Latrobe Companies was very different from that at the Altoona, Glen White and Millwood mines, and a different conclusion must, therefore, follow. The Latrobe and Bolivar Companies' mines were located in the Latrobe District, where the rates to eastern points were about 20 cents higher than from the Clearfield District, except that for a part of the time they were the same, though the shipments were then small by comparison with those from the Clearfield District. During that period the plaintiff shipped in competition with the Latrobe and Bolivar Companies. These companies owned no engines, and they hauled no cars between mine and station. That work was included in the rate, and the Pennsylvania did the hauling with its own locomotives and crews. It therefore owed nothing to the Latrobe and Bolivar Companies for the service which the carrier itself performed, and the so-called allowance, regardless of the amount, was a mere gift—a rebate, absolutely forbidden by the statute and *ipso facto* illegal. Being an act prohibited by law, it was not necessary to have any preliminary decision to that effect by the Commission, but the courts could, as in any other case, apply the law to the facts proven and award damages to the person injured. The decision just rendered in *International Coal Company* v. *Pennsylvania Railroad* makes it unnecessary further to discuss this branch of the case. For the court undoubtedly had jurisdiction to proceed with this branch of the case.

The judgment, therefore, must be reversed in so far as the action is based upon payments to the Latrobe and Bolivar Companies, and affirmed in so far as based upon payments to the Altoona, Glen White and Millwood Companies. But owing to the peculiar facts of this case, the unsettled state of the law at the time the

suit was begun and the failure of the defendant to make the jurisdictional point *in limine* so that the plaintiff could then have presented its claim to the Commission and obtained an order as to the reasonableness of the practice or allowance,—direction is given that the dismissal be stayed so as to give the plaintiff a reasonable opportunity within which to apply to the Commission for a ruling as to the reasonableness of the practice and the allowance involved; and, if in favor of the plaintiff, with the right to proceed with the trial of the cause in the District Court, in which the defendant shall have the right to be heard on its plea of the statute of limitations as of the time the suit was filed and any other defense which it may have.

Affirmed and modified in part, and in part reversed.

MR. JUSTICE PITNEY, dissenting in this case and also in *Morrisdale Coal Company* v. *Pennsylvania Railroad Company, post,* p. 304.

Since the result reached by the court in these cases has the effect of virtually eliminating the option conferred by § 9 of the Interstate Commerce Act upon shippers aggrieved by unjust discriminations practiced by common carriers in violation of §§ 2 and 3—the option to "either make complaint to the Commission" or to "bring suit for the recovery of the damages"—and of conferring upon the carrier, in some cases at least, the choice of two lines of procedure, by selecting the character of the defense to be interposed; and since in this and in other respects aggrieved shippers are to be deprived, in very large measure, of the right of redress by private action at law conferred by §§ 8 and 9 for violations of §§ 2 and 3, I deem it my duty to express, somewhat at length, the grounds of my dissent.

The case of the *Mitchell Coal and Coke Company* (No.

674) presents the question whether an action for a violation of § 2 of the Act, based upon the ground of a discrimination accomplished by means of secret rebates to competitors of the plaintiff, where the defense is that the rebates were paid (under the name of "trackage or lateral allowances"), as compensation for services rendered by the shipper in aid of the carrier, can be maintained without a prior application to the Interstate Commerce Commission and a determination by that body as to whether the alleged "trackage or lateral allowances" were reasonable and proper. This case arose in the years 1897 to 1901. The action was commenced in 1905.

The case of the *Morrisdale Coal Company* (No. 207) raises the question whether an action can be maintained for a violation of § 3 of the Act in respect of unfair discrimination in car distribution, without previous action by the Commission upon the question of the reasonableness of the treatment accorded by the carrier to the complaining shipper, or the propriety of the method of car distribution that was pursued. The cause of action accrued during the years 1902 to 1905, inclusive. Suit was commenced in 1908.

These questions are answered in the negative, upon the authority of *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Balt. & Ohio R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 495; and *Robinson* v. *Balt. & Ohio R. Co.*, 222 U. S. 506. I do not at all question the authority of these cases, or the propriety of the grounds upon which they were decided. But it seems to me that the *Pitcairn Case*, as well as the case of *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, has no direct bearing upon the questions now presented; and that the authority of the *Abilene Cotton Oil Co. Case* and the case of *Robinson* v. *Balt. & Ohio R. Co.*, and the reasoning of the court therein, are directly opposed to the result reached in the present cases.

The *Abilene Case* held that a carrier who *observed* the established and published schedules of rates *without preference or discrimination* could not be held liable to an action at law to recover for alleged excessive charges when the freights charged were those prescribed by the schedule; and that although § 22 of the Act declared that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," this saving clause must necessarily be limited so as to exclude an action based upon common-law principles, when such action would run counter to the very means prescribed by § 6 of the same Act for producing uniformity and preventing discriminations.

And in the *Robinson Case* it was held, upon like reasoning, that a differential in rate between coal loaded into cars from wagons and coal loaded from a tipple, *embodied in the filed and published schedules*, could not be deemed unjustly discriminatory in an action at law, because the Act forbade any deviation from such published schedules while they remained in effect.

In both those cases *the carriers had strictly observed the filed and published tariffs*, and were *for this reason* held exempt from action upon what would have been their common-law liability if an unqualified meaning had been attributed to the language of § 22.

The present case is the very opposite of these, and the like reasoning should, I think, lead to the opposite result. For in the *Mitchell Company Case* the carrier, *instead of observing the published schedules, itself departed from them.* And the alleged "trackage and lateral allowances" had *no sanction of filing or publishing, nor of any order made by the Interstate Commerce Commission.* And in the *Morrisdale Company Case*, the car distribution scheme pursued by the defendant *had not been sanctioned* by the Commission.

Moreover, both of the present cases relate to past transactions exclusively. And for this reason are not at all within the doctrine of the *Pitcairn Case*, which related wholly to matters *in futuro*.

If the discriminations attributed to "trackage and lateral allowances" in the *Mitchell Case*, had received any previous sanction such as by § 6 of the Act is given to the filed and published schedules of rates, or if in the *Morrisdale Case* the method of car distribution had been established or approved by an order of the Commission made in the exercise of its administrative powers conferred by the Act, I should agree that the reasoning and authority of the *Abilene* and *Robinson* and *Illinois Central Cases* would control. If either of the cases at bar had to do with the control of rates or of practices in the future, it would seem to me that the authority and reasoning of the *Pitcairn Case* would control.

But to my mind, it seems a misapplication of the *Abilene*, *Robinson* and *Pitcairn Cases*, as well as a complete perversion of the act of Congress, to say that, respecting transactions in the past, which are by lapse of time put beyond the cognizance of an administrative body that normally deals only with matters *in futuro*, and respecting which the Commission has *not* acted, there shall be no right of action in the courts without previous application to such administrative body.

With great respect, it seems to me that the opinions in both the present cases err in confusing legislative and administrative functions, on the one hand, with judicial functions, on the other. Thus, in the *Mitchell Case*, after reciting the insistence of the plaintiff that the alleged "trackage and lateral allowances" were arbitrarily fixed, and constituted a mere cover for rebating, and the contention of the defendant, on the other hand, that the allowances were made *bona fide* for services actually performed by the shipper in aid of the carrier, and that they were

prima facie reasonable, and must be so treated by the courts until the Commission had determined otherwise, the opinion proceeds as follows: "These claims of the parties emphasize the fact that there are two classes of acts which may form the basis of a suit for damages. In one the legal quality of the practice complained of may not be definitely fixed by the statute, so that an allowance, otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable. But to determine that question involves a consideration and comparison of many and various facts, and calls for the exercise of the discretion of the rate-regulating tribunal. The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions were committed to different courts, with different juries, the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute."

This is the theory upon which both opinions proceed, the language employed in the *Mitchell Company Case* being: "The courts have no primary jurisdiction to fix rates."—"In considering the administrative question as to reasonableness, the elements of the problem are the same, whether they involve the validity of obsolete allowances, discarded tariffs, or current rates and practices."—"As to past and present practices or allowances, the Commission has the same power, and there is the same necessity to take preliminary action."

And in the opinion in the *Morrisdale Company Case* (No. 207), referring to the different views that have been expressed upon the question of car distribution, the opinion proceeds: "These rulings as to the validity of a particular practice, and the facts that would warrant a de-

parture from a proper rule actually enforced, are sufficient to show that the question as to the reasonableness of a rule of car distribution is administrative in its character, and calls for the exercise of the powers and discretion conferred by Congress upon the Commission,"—citing the *Pitcairn Case*, 215 U. S. 481, and the *Illinois Central Case*, 215 U. S. 452.

It is of course sufficiently obvious that where a legislative or administrative body is called upon to inquire with respect to the reasonableness of existing rates and practices and the propriety of sanctioning these or establishing others *for the future*, it is called upon to make somewhat the same kind of investigation of facts, conditions, and circumstances that a court and a jury, or a referee must make when adjudicating upon the lawfulness and reasonableness of practices *in the past* respecting which redress is sought by a suitor. Nevertheless, the function performed in the one case is legislative or administrative, as the case may be, and in the other case judicial.

Courts and juries, and referees, time out of mind, have been called upon to investigate the reasonableness of the past practices of common carriers. They did it long before commissions and other administrative boards were devised, and when legislation for the future rested wholly in Parliament, and Congress, and state legislatures.

It seems to me erroneous to conclude that, because the things that a court must do in order to pass judgment upon a past transaction respecting the rates or practices of a carrier are *like* the things that a commission or a committee, or other administrative or legislative body must do in order to perform their proper functions respecting present management and future regulation, therefore all investigations into the past practices or rates of a carrier are administrative or legislative.

Legislation consists in laying down laws or rules for

the future. Administration has to do with the carrying of those laws into effect—their practical application to current affairs by way of management and oversight, including investigation, regulation and control, in accordance with, and in execution of, the principles prescribed by the law maker. The judicial function is confined to injunctions, etc., preventing wrongs for the future, and judgments giving redress for those of the past.

The Interstate Commerce Act, as I look upon it, clearly recognizes these distinctions.

In the Act as originally passed and under which these cases arose (February 4, 1887, 24 Stat. 379, c. 104) the duties of the company and the prohibitions of discrimination in rates and otherwise are prescribed, and *the Commission is established* for the purpose, I submit, *primarily of seeing that those duties are observed in the future.* See the proviso of § 4, permitting the Commission to relieve the carrier from the operation of the long and short haul clause; and the requirement in § 6 that copies of the schedules of rates, fares and charges established and published in compliance with the same section shall be filed with the Commission, and notice given to it of all changes made in the same; that all traffic agreements or arrangements with other common carriers shall be likewise filed; that joint tariffs on through rates shall be filed, and these "shall be made public by such common carriers when directed by said Commission in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates," etc. And for a refusal by the carrier to file or publish schedules the carrier shall be subject to a writ of mandamus at the relation of the Commissioners, and the Commissioners as complainant may apply for an injunction.

But then comes § 8, declaring the common carrier to be liable to the person injured for the full amount of damages

sustained in consequence of any violation of the Act, with a counsel fee to be fixed *by the court.*

The next section has been so completely overlooked that it may be well to quote it:

"SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act *may either make complaint to the Commission as hereinafter provided for*, or *may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act*, in any district or circuit court of the United States of competent jurisdiction; *but such person or persons shall not have the right to pursue both of said remedies*, and must in each case *elect which one of the two methods of procedure* hereinafter provided for he or they will adopt. In any such action brought for the recovery of damages *the court* before which the same shall be pending may compel any director, etc., to attend, appear, give testimony, etc., and may compel the production of the books and papers of such corporation," etc. No similar compulsory powers are given to the Commission.

Sec. 11 authorizes the appointment of the Interstate Commerce Commission and prescribes the qualifications.

Sec. 12 prescribes the general duties of the Commission, and remains for the most part unaltered by subsequent amendments. Unimportant amendments were made by the act of March 2, 1889, 25 Stat. 855, c. 382, and a somewhat more important one respecting the production of evidence, and the use of testimony taken under depositions elsewhere, was made by the act of February 10, 1891, 26 Stat. 743, c. 128. But an examination of § 12 is convincing of the purpose of Congress to establish the Commission as *an administrative body*, the language being that it "shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as

to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created;" and (amendment of 1899), "*the Commission is hereby authorized and required to execute and enforce the provisions of this Act,*" etc. The remaining provisions of this section relate entirely to the machinery by which these duties are to be performed.

Sec. 13 provides for complaints or charges to be made by any person, association, municipal organization, etc., respecting anything done or omitted to be done, by a common carrier in contravention of the provisions of the Act; that a statement of the charges "shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant *only for the particular violation of law thus complained of.* If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to *investigate the matters complained of* in such manner and by such means as it shall deem proper," etc.

By § 14, "Whenever an investigation shall be made by said Commission, it shall be its duty to make a *report in writing in respect thereto,* which shall include the *findings of fact upon which the conclusions of the Commission are based,* together with its *recommendation* as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all

judicial proceedings, be deemed *prima facie evidence* as to each and every fact found."

By § 15 it is made the duty of the Commission to deliver a copy of its report to the common carrier, with a notice to *cease and desist from the violation of the law, or to make reparation for the injury found to have been done, or both, within a reasonable time;* and if the carrier does so, "a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be *relieved from further liability or penalty for such particular violation of the law.*"

By § 16, if the carrier violates or refuses to obey a lawful order or requirement of the Commission, the latter is to *apply in a summary way by petition to the United States Circuit Court for an injunction, mandatory or otherwise.* The amendment of this section made by act of March 2, 1889, 25 Stat. 855, 860, c. 382, expressly saves the right of trial by jury in controversies requiring such a trial under the Seventh Amendment. In any such proceeding the findings of the Commission are made *prima facie* evidence of the matters therein stated.

The remaining provisions of the Act are, as it seems to me, all in accord with the general policy indicated by those above cited. The Commission is not primarily, or in any proper sense, a judicial tribunal. It can render no judgment binding upon the parties, can hold no trial by jury, cannot enforce its awards by process against the person or against property; its awards are merely *prima facie* evidence, without any conclusive effect, and must be enforced through the aid of the courts of law. It is an administrative body, a branch of the Executive Department, charged with the duty of aiding in the enforcement of the duties imposed upon the carrier by the Act; and with incidental—and only incidental—authority to award reparation, or, rather, to *recommend* reparation where it happens, in the course of its investigations,

to learn that some improper practice of the carrier has produced an injury to the shipper that calls for such redress.

The *Mitchell Case* arose in the years 1897 to 1901; the *Morrisdale Case* during the period from March, 1902, to December, 1905, both inclusive. Both actions arose, therefore, prior to the Hepburn Act of June 29, 1906, 34 Stat. 584, c. 3591, and the acts of April 13, 1908, 35 Stat. 60, c. 143, and June 18, 1910, 36 Stat. 539, c. 309.

I do not see, however, that any of the amendments makes any material change in the duties of the carriers, or the remedies for breach of them, or in the functions of the Interstate Commerce Commission, or the mode in which they are to be performed, so far as the question now under consideration is concerned. By those amendments, and by the Elkins Act of February 19, 1903, 32 Stat. 847, c. 708, the original scheme of the Interstate Commerce Act has been elaborated and the powers of the Commission extended, including a grant of the rate-making power, the power to prevent advances in rates, etc. But this only emphasizes that the Commission was established as a body having executive and legislative rather than judicial powers. For the rate-making power is a branch of the legislative.

There is another important distinction, very clearly recognized in the opinion of the court in the *Abilene Cotton Oil Co. Case*, and pretty nearly lost sight of, as it seems to me, in the present decisions; and that is, the distinction between the general rules of conduct prescribed by the Act, and the standards by which obedience to those rules is to be tested. Thus, by § 1, the rates shall not be unreasonable; and by § 2 they shall not be discriminatory. These are the general rules; but the method of enforcing them in the practical operations of the carrier is by the rate sheets prescribed by § 6 and the function committed to the Commission to revise them.

Where the rate sheet has been filed, etc., it of course becomes binding as the particular expression of the general principle. Again, in § 4, there is the general prohibition known as the "long and short haul clause"; but for a particular expression of it, as applicable to the management of a given railroad system, the Commission may act, as the proviso to that section declares. Clearly, until the Commission acts, the general prohibition is unqualified; and, when the Commission has acted, its modification is as much law as the general prohibition was before. And this reasoning, I think, applies to the respective causes of action, now under consideration. Section 2 says— "No unjust discrimination." If and when the rates are duly published, or the Commission has lawfully acted, the schedule or the order furnishes for the time the measure of determining what is an unjust discrimination. But, until the rates are filed or the Commission has acted, it is, like every other case of violation of law, a question for the courts, to be determined according to the terms of the law. And so with § 3, prohibiting undue and unreasonable preferences and advantages to particular shippers, of which, of course, discrimination in car distribution is an instance. When the Commission has lawfully taken action in accordance with its administrative duties, prescribed by the Act, its order or requirement becomes applicable; but until such order or requirement is made, the duty prescribed by § 3 remains unqualified. And if, under either section, the question of reasonableness arises in the course of an action in the courts, it must be determined according to the facts and the law, just as courts determine any and every other question of reasonableness in cases within their cognizance.

In the *Abilene Case* the court recognized that something must be taken from the force and effect of §§ 9 and 22 in order to give full effect to the context and the general scheme of the Act; and therefore it naturally (and, as

I concede, necessarily) held that the right of action conferred by § 9 "must be confined to redress of such wrongs as can, consistently with the context of the Act, be redressed by courts without previous action by the Commission, and therefore does not imply the power in a court to primarily hear complaints concerning wrongs *of the character of the one here complained of*."

That is to say, complaints against a carrier who had *observed* the established schedule that was made by the Act the conclusive evidence (until modified by the Commission) of what rates should be deemed reasonable in law, could not be entertained by the courts (prior to action by the Commission) upon the theory that although reasonable in law the rates were excessive in fact.

This, however, in plain terms left open the doors of the courts to the suitor seeking pecuniary redress for other violations of the Act, not sanctioned by public schedules or by any other regulation declared obligatory by the Act. And within that category, as I think, are these present actions, brought against a carrier that (as we must assume in order to determine the jurisdictional question) violated the Act, instead of observing it; that so far from adhering to published regulations, or mandate of the Commission, or other order rendered obligatory by the Act, set up its own standard of practices and discriminations, and maintained them in defiance of the right of these plaintiffs to fair and equal treatment.

But the effect of the present decisions, if I apprehend them correctly, is to leave no force whatever remaining to § 9. The *Abilene Case* excluded from its wrongs of the character of the one there complained of; the present decisions excluded from its wrongs of the opposite character. That case exempted from action, the carrier who had consistently *observed* the published schedules; the present (*Mitchell*) case shields the carrier who systematically *departs from* the published schedules; and, by a parity

of reasoning, the decision in the *Morrisdale Case* exempts from primary liability at law the carrier who systematically violates the rule of equality with respect to car distribution.

In the numerous amendments that have been enacted by Congress during the 25 years that the Interstate Commerce Act has been in force, in no instance has any change been made in either of the sections (§§ 2, 3, 8 and 9) that are here important. Nor has any of the changes made in the duties of the Commission operated to deprive the aggrieved shipper of his private action at law. Indeed, in the third section of the Elkins Act of February 19, 1903, 32 Stat. 847, 848, c. 708, Congress,—while authorizing the Commission to apply to the Federal court for an enforcement of the published tariffs, or a discontinuance of discrimination, and authorizing the district attorneys, under the direction of the Attorney General, to institute and prosecute such proceedings,—was careful to declare that—"The proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled," etc.

But, according to the construction now for the first time adopted, in the majority of instances the right of the aggrieved shipper to resort to the ordinary courts of law for the recovery of his damages is subjected to an onerous condition precedent; or at least it may be so subjected at the option of the carrier; for, in No. 674 (the *Mitchell Coal Co. Case*), the shipper is driven to the Interstate Commerce Commission in respect of part of his claim because of the defense that the carrier interposed; while with respect to the residue of his claim, because the character of the defense was different, the action must proceed at law.

In short, without any legislative repeal of § 9, the op-

tion there conferred upon the shipper has been transferred to the carrier.

How serious is the difference becomes apparent upon a little reflection. The shipper must go first to the Commission. But when he gets before the Commission he may or may not succeed; and if he succeeds he gets no adjudication that is binding upon the carrier, for by the terms of the Act such findings are only *prima facie* correct in so far as they determine the fact and amount of damage. In order to recover them he must still resort to the courts. Thus, the shipper has a chance to *lose* his case before the Commission, but no chance to *win* it there. The ruling of the Commission may conclude the case *against* him, but cannot conclude it *in his favor*.

Now, let us suppose the normal case of a *bona fide* claim, where there is no more probability that the complaining party will succeed than that he will fail. The probability of success before the Commission is represented by the fraction ½. If successful, he must then go to the court, and the finding of the Commission being no more than evidence, and not even shifting the burden of proof, the shipper's probability of success is again represented by the fraction ½. Since he must receive two concurring awards, his probability of ultimate success in both tribunals is represented by $\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$. In short, instead of having the option that Congress gave him, he is confined to a single line of procedure, contrary to the tenor of the Act, and his probability of success is reduced from "equal chances" down to "one chance out of four."

It is said that the questions that arise about these practices of rebating and car distribution are complicated and difficult. Certainly that objection is not pertinent to the present cases. I see nothing beyond the grasp of a court of law in the *Mitchell Case*. The question that, as this court now holds, must await the determination of the Commission, concerns the allowances

to the Altoona, Milwood, and Glen White Mines; and it is in substance a mere question of fact as to whether anything, and if so how much, ought to be allowed for certain hauling services, and the like; if too much was allowed, the allowance was a cover for rebating; otherwise, not. And the *Morrisdale Case* reduces itself, according to the opinion, to a narrow question of law upon admitted facts. It is the old question whether, during periods of car shortage, when the carrier is unable to furnish all the cars necessary to meet the demands for transportation, shippers having cars privately owned by themselves, or railroads having cars of their own used to transport their fuel, shall, by reason of these "private cars" or "fuel cars," have a greater share in the distribution of the gross facilities for transportation than would be the case if the carrier undertook to supply cars of its own for all shippers. It is a familiar question, that has been several times before the Interstate Commerce Commission, and decided by them as a question of law upon the authority and reasoning of the decisions of the courts of law. *R. R. Com. of Ohio* v. *Hocking Valley R. R. Co.* 12 I. C. C. 398; *Traer* v. *Chicago & Alton R. R. Co.*, 13 I. C. C. 451; *Hillsdale Coal Co. & Pa. R. R. Co.*, 19 I. C. C. 356. The order of the Commission in the *Hocking Valley Case*, 12 I. C. C. 398, is the same that was sustained by this court in the *Illinois Central Case*, 215 U. S. 452.

But, conceding everything that may be claimed respecting the inherent difficulty of properly passing upon such cases, they are no more difficult than many others with which courts of law and of equity have to grapple. The Interstate Commerce Commission, so far as it passes any *quasi* judicial judgment upon such matters, does so by the pursuing methods that are modeled upon those of the courts, and which this court has recently held cannot be departed from without rendering the proceedings void. *Int. Com. Com.* v. *Louisville & Nashville R. R.*, 227 U. S. 88.

But if all the Federal judges, in all the Federal courts, and the masters and referees who are at their command, are unable as a practical matter to grapple with these questions, what shall be said of the probability that the Interstate Commerce Commission, a single body, with headquarters at Washington, with limited powers, and with enormous labors in the line of its legitimate administrative functions, will be able to properly dispose of the mass of judicial work that is now to be imposed upon it?

It is said that it is necessary to have these matters of rate discriminations and other preferential practices settled by a single tribunal. But is not this a question for Congress? And did not Congress in plain terms confer upon the aggrieved shipper the option of going to the courts rather than to the Commission? And has Congress manifested any intent to repeal the second, third, eighth, and ninth sections of the Act?

The opinion in the *Mitchell Case* recognizes that the orders of the Commission are only "quasi-judicial and only *prima facie* correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by § 16 of the Act, given its day in court and the right to a judicial hearing (25 Stat. 859)." But is the shipper not entitled to his day in court and to a judicial hearing? Has the Constitution any greater regard for the right of a carrier to trial by jury than it has for the right of a shipper? Conceding, as I do, that Congress could not, because of the Fifth Amendment, make the finding of an administrative body, acting without jury trial, final as against the carrier, I submit, with great respect, that it gives an unconstitutional meaning to the Act if we construe it as depriving the shipper of his remedy without trial by jury.

It is said that if actions were to be brought in the courts—"to permit separate suits and separate findings would not only destroy the equality which the statute

intended should be permanent, but would bring about direct conflict in the administration of the law." I confess myself unable to understand how giving redress by a private action for the consequences of past maladministration can conflict in any way with the proper administration of the law, which, if I understand the term, applies to the execution of it in the present and for the future. It is unfortunately true that, since courts and juries are human, the result in one case does not always seem to accord with the result in another. This is theoretically true of all suits at law; practically, the successful administration of justice in the courts belies the theory.

The court sees in the Act a purpose to have all matters affecting rates and the regulation of practices that have to do with equality of service on the part of the carrier towards the shippers "settled by a single tribunal." I have no difficulty in finding in the Act a purpose to confer the administrative power, the regulating power, upon a single tribunal, to wit, the Commission. But I find nothing, and the opinions refer to nothing, indicating a purpose that past transgressions of the Act and the cognizance of suits brought for the redress of injuries consequent upon such transgressions shall be determined by a single tribunal. It would seem more probable that Congress considered precise uniformity with respect to administering justice for past offences to be an unattainable dream. I repeat, administration, management, regulation, concern themselves with the present and the future. The awarding of relief for past offences is properly a judicial function. And, as I read the Act, Congress conferred jurisdiction over such offences upon the courts; giving at the same time an option to the shipper to resort if he would to the Commission in the first instance; doubtless on the theory that the simple cases, and those involving small amounts, would go (as experience demonstrates that they have gone) to the Commission, and that thereby that body,

while enabled to accomplish (by its recommendations and warnings) much in the way of remedying past grievances, would at the same time be put in possession of information from sources that otherwise would hardly be accessible, so that on the basis of that information it could proceed to establish regulations for the future.

Be this as it may, it seems to me highly illogical to say that damages shall not be awarded to a shipper for violations of the law committed by the common carrier in the past, because the shipper would thereby "secure a belated but undue preference." The argument overlooks the fact that, upon the hypothesis that a cause of action exists, it is the carrier who has given a preference to the plaintiff's competitor; it is for the damages resulting from that preference that the action is brought; and, if the action be justly determined, it gives to the aggrieved shipper a belated, but presumably a due, recompense.

That I have not misunderstood the real questions at issue in the *Abilene*, the *Robinson*, the *Illinois Central*, and the *Pitcairn Cases* will, I think, appear from a critical examination of those cases, in aid of which the following extracts and comments are submitted (the italics, in most instances, being my own).

Texas & Pacific Ry. Co. v. *Abilene Cotton Oil Co.* (1907), 204 U. S. 426, was a review under § 709, Rev. Stat., of a judgment of a Texas state court. The Abilene Cotton Oil Co. sued on common-law principles to recover moneys alleged to have been exacted for freight on cotton seed over and above a just and reasonable charge. There were averments (p. 430) "That the rate exacted was discriminatory, constituted an undue preference, and amounted to charging more for a shorter than for a longer haul." But (p. 432) these averments were eliminated in the course of the trial. The findings, as condensed by the court below, were (p. 432) that it was an interstate shipment, and the rates charged by the railroad company were those

established under the Interstate Commerce Act, and had been duly filed and published; but that they were in fact unreasonable and excessive. This court (by the present Chief Justice, then Mr. Justice White) said (p. 436) that the question presented was:

"The scope and effect of the Act to Regulate Commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the Act to Regulate Commerce, and which it was the duty of the carrier under the law to enforce as against shippers."

After pointing out that the right of recovery sustained by the court below was clearly within the common-law principles stated, and was not in so many words abrogated by the Commerce Act, the court proceeded to inquire whether this common-law right had been impliedly taken away by the Act, and to what extent. The general scope of the Act was then reviewed as follows:

"Let us, without going into detail, give an outline of the general scope of that Act with the object of fixing the rights which it was intended to conserve or create, the wrongs which it proposed to redress, and the remedies which the Act established to accomplish the purposes which the lawmakers had in view.

"The Act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, *made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the Act*, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the Act and the punishments

which it imposed were directed not only against carriers but against shippers, or *any person* who, directly or indirectly, by any machination or device in any manner whatsoever, *accomplished the result of producing the wrongful discriminations or preferences which the Act forbade.* It was made the duty of carriers subject to the Act to file with the Interstate Commerce Commission created by that Act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules and penalties were imposed for not establishing and filing the required schedules. The *Commission was endowed with plenary administrative power to supervise* the conduct of carriers, to *investigate* their affairs, their accounts and their methods of dealing, and *generally to enforce the provisions of the Act.* To that end it was made the duty of the District Attorneys of the United States, under the direction of the Attorney General, to prosecute proceedings commenced by the Commission to enforce compliance with the Act. The Act specially provided that whenever any common carrier subject to its provisions 'shall do, cause to be done, or permit to be done any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act. . . .' *Power was conferred upon the Commission to hear complaints* concerning violations of the Act, to *investigate* the same, and, if the complaints were well founded, *to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future.* In the event of the failure of a carrier to obey the order of the Commission that body, or the party in whose favor an award of reparation was made, was empowered to *compel compliance by invoking the authority of the courts of the*

United States in the manner pointed out in the statute, *prima facie* effect in such courts being given to the findings of fact made by the Commission. By the ninth section of the Act it was provided as follows:

"*That any person or persons claiming to be damaged* by any common carrier subject to the provisions of this Act *may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any District or Circuit Court of the United States of competent jurisdiction;* but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. . . .'

"And by section 22, which we shall hereafter fully consider, existing appropriate common-law and statutory remedies were saved.

"When the Act to Regulate Commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable, the person from whom such a charge was exacted had at common-law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. (*Parsons* v. *Chicago & Northwestern Ry.*, 167 U. S. 447, 455; *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 145 U. S. 263, 275.) That the Act to Regulate Commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the Act. (*Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 494.) And it is apparent that *the means by which these great purposes*

were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. (*Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 184; *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.,* 167 *Ib.* 479.)

"When the general scope of the Act is enlightened by the considerations just stated it becomes manifest that there is *not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.* This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, *without reference to prior action by the Commission,* finding the established rate to be unreasonable and *ordering the carrier to desist in the future from violating the Act,* it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however,

is manifestly without merit, and only serves to illustrate the absolute destruction of the Act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally *to determine the reasonableness of an established rate,* it would follow that unless all courts reached an identical conclusion *a uniform standard of rates in the future* would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is *wholly inconsistent with the administrative power conferred upon the Commission* and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the Act created, with power, on due proof, not only to award reparation to a particular shipper, but to *command the carrier to desist from violation of the Act in the future,* thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the

Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the Act impossible.

"Nor is there merit in the contention that section 9 of the Act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section when taken alone might sanction such a conclusion, but when the provision of that section is read in connection with the context of the Act and in the light of the considerations which we have enumerated, we think the broad construction contended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the Act; in other words, to command a correction of the established schedules, which power, as we have shown, is conferred by the Act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the Act that *the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the Act conferred by the ninth section must be confined to redress of such wrongs as can, con-*

sistently with the context of the Act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

After citing two decisions in the lower Federal courts, and distinguishing several previous decisions of this court, and relying upon the *Hefley Case*, 158 U. S. 98, and the *Mugg Case*, 202 U. S. 242, as showing that the established rates were binding, the opinion proceeds (p. 445):

"In view of the binding effect of the established rates upon both the carrier and the shipper, as expounded in the two decisions of this court just referred to, the contention now made if adopted would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement, when, if the agreement had been made, both the carrier and the shipper would have been guilty of a criminal offense and the agreement would have been so absolutely void as to be impossible of enforcement. Nor is there force in the suggestion that a like dilemma arises from the recognition of power in the Commission to award reparation in favor of an individual because of a finding by that body that a rate in an established schedule was unreasonable. As we have shown, there is a wide distinction between the two cases. *When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established*

rate, its power is invoked not merely to authorize a departure from such rate in favor of the complainant alone, but to exert the authority conferred upon it by the Act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the statute to secure and on the other from enforcing that equality which the statute commands.

"But it is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in section 22 of the Act to Regulate Commerce viz: '. . . Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common-law or by statute, but the provisions of this Act are in addition to such remedies.' This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the Act. In other words the Act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the Act and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the Act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the Act.

"The proposition that if the statute be construed as depriving courts generally, at the instance of shippers, of the power to grant redress upon the basis that an estab-

lished rate was unreasonable without previous action by the commission great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency and affords no justification for so interpreting the statute as to destroy it. Even, however, if in any case we were at liberty to depart from the obvious and necessary intent of a statute upon considerations of expediency, we are admonished that the suggestions of expediency here advanced are not shown on this record to be justified. As we have seen, although the Act to Regulate Commerce has been in force for many years, it appears that by judicial exposition and in practical execution it has been interpreted and applied in accordance with the construction which we give it. That the result of such long-continued, uniform construction has not been considered as harmful to the public interests is persuasively demonstrated by the fact that the amendments which have been made to the Act have not only not tended to repudiate such construction, but, on the contrary, have had the direct effect of strengthening and making, if possible, more imperative the provisions of the Act *requiring the establishment of rates and the adhesion by both carriers and shippers to the rates as established until set aside in pursuance to the provisions of the Act.* Thus, by section 1 of the act approved February 19, 1903, commonly known as the Elkins Act, which, although enacted since the shipments in question, is yet illustrative, the willful failure upon the part of any carrier to file and publish 'the tariffs or rates and charges,' as required by the Act to Regulate Commerce and the acts amendatory thereof, 'or strictly to observe such tariffs until changed according to law,' was made a misdemeanor, and it was also made a misdemeanor to offer, grant, give, solicit, accept, or receive any rebate from published rates of other concession or discrimination. And in the closing sentence of section 1 it was provided as follows:

"'Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to Regulate Commerce or acts amendatory thereof, or participates in any rates so filed or published, *that rate as against such carrier, its officers, or agents in any prosecution begun under this Act, shall be conclusively deemed to be the legal rate, and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section of this Act.*'

"And, by section 3, power was conferred upon the Interstate Commerce Commission to invoke the equitable powers of a Circuit Court of the United States to enforce an observance of the published tariffs.

"Concluding, as we do, that a shipper seeking *reparation predicated upon the unreasonableness of the established rate must,* under the Act to Regulate Commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the Act to Regulate Commerce. It follows from what we have said, that the court below erred in the construction which it gave to the Act to Regulate Commerce."

In short, what the *Abilene Cotton Oil Case* decides is, that with respect to interstate commerce the Act by its own language prescribed *how it should be determined what rates should be charged* by carriers, and how such rates should be made manifest; and that while § 1 of the Act prohibited any charge beyond just and reasonable rates, it imposed the duty of establishing and *publishing schedules, to the very end of enforcing that provision,* and in the effort to prevent unjust preferences and discriminations it rendered it *unlawful to depart from the established schedules*

until they were changed by the administrative Commission; wherefore the rate thus established and published must be deemed in law a reasonable rate for all purposes affecting the rights of the carrier and shipper between themselves *until it had been altered by the commission*, which might be done if they found it unreasonable in fact. The entire reasoning of the opinion is quite consistent and logical, as well as most cogent and convincing, if confined to that subject-matter.

But to so apply that reasoning as to make it support the contention that discriminations by the carrier in *the past*, amounting to a *departure by the carrier from the established schedule*, and effectuated by the giving of secret rebates to competitors in violation of § 2, or by other discriminatory practices violative of § 3, and where the conduct of the carrier has no *prima facie* sanction under the law by reason of the filing and publishing of a schedule, or otherwise, shall not be actionable in the ordinary course of law without a previous investigation or determination by the commission upon the subject, is not only to ignore the essential differences between the facts in this case and those in the *Abilene Case*, but is to *virtually eliminate § 9 of the Interstate Commerce Act, which Congress in all its amendments has been scrupulously careful to leave untouched; and to make of the Interstate Commerce Commission, instead of an administrative and quasi-legislative body, with duties to perform respecting the laying down of rules for the future and seeing that the carriers continue to conform to their duties under the Act, a judicial body but without judicial powers, proceeding not by the ordinary process of law, but by written notices, sent here and there and everywhere to the persons concerned; not in actions inter partes, but in omnibus investigations conducted with associations of shippers and municipal corporations and other organizations, as parties of the one part, and groups of railroads, as parties of the other part; holding their sessions in Washington or wherever*

it pleases them; without ample power to enforce the production of evidence; and without any power to enforce their findings.

Robinson v. *Baltimore & Ohio R. Co.* (1912), 222 U. S. 506, is in principle exactly like the *Abilene Case*, and was decided upon its authority. There, the schedule published and filed conformably to the Act made a differential between coal loaded into the car from wagons and coal loaded from a tipple. Robinson's shipments having come under the higher rate, he sued to recover from the company $150 which was the excess paid by him over what would have been required if his coal had been loaded from a tipple. There was an agreed statement of facts, but in it was no suggestion that the schedule had been the subject of complaint before the Interstate Commerce Commission or had been found by that Commission to be unjustly discriminatory, or that any order had been made about it. Naturally and properly this court held that there was no right of action. The pith of the reasoning is lucidly expressed in the opinion of the court (by Mr. Justice Van Devanter) as follows (pp. 508, 509):

"The Act, c. 104, 24 Stat. 379; c. 382, 25 Stat. 855; c. 61, 28 Stat. 643; c. 708, 32 Stat. 847, whilst prohibiting unreasonable charges, unjust discriminations and undue preferences by carriers subject to its provisions, also *prescribed the manner in which that prohibition should be enforced;* that is to say, the Act laid upon every such carrier the duty of *publishing and filing in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the Act, forbade any deviation from them while they remained in effect, invested the Interstate Commerce Commission with authority to receive complaints against rates so established, and to inquire and find whether they were in any wise violative*

of the provisions of the Act, and, if so, what, if any, injury had been done thereby to the person complaining or to others, and further authorized the Commission to direct the carrier to desist from any violation found to exist, and to make reparation for any injury found to have been done. Provision was also made for the enforcement of the order for reparation, by an action in the Circuit Court of the United States, if the carrier failed to comply with it.

"Thus, for the purpose of preventing unreasonable charges, unjust discriminations and undue preferences, a system of establishing, maintaining and altering rate schedules and of redressing injuries resulting from their enforcement was adopted whereby publicity would be given to the rates, their application would be obligatory and uniform while they remained in effect, and the matter of their conformity to prescribed standards would be committed primarily to a single tribunal clothed with authority to investigate complaints and to order the correction of any non-conformity to those standards by an appropriate change in schedules and by due reparation to injured persons.

"When the purpose of the Act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the Act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards."

The *Abilene* and *Robinson Cases* maintain the binding force of published rates and differentials established *pursuant* to the Act, until modified by the Commission in the manner provided by the Act.

The present decisions give the same force to discriminatory practices established by the carrier without leave of the Commission, *not* included in the published rates

and differentials, the practices being *in direct violation* of the Act.

Interstate Commerce Commission v. *Illinois Central R. Co.* (1909), 215 U. S. 452, was a suit brought by the Railroad Company in the United States Circuit Court to restrain the enforcement of an order of the Interstate Commerce Commission respecting car distribution. The issues were recited in the opinion of the court (by the present Chief Justice, then Mr. Justice White) as follows (p. 465):

"Being unwilling to comply with the order of the commission, the Illinois Central Railroad Company commenced the suit which is now before us to enjoin in all respects the enforcement of the order of the commission. It was averred that although the company was adequately equipped with coal cars and with sufficient motive power and operative forces, yet at times an inadequate supply of coal cars to meet the demand arose from the circumstances which we have previously stated. It was alleged that the regulations adopted by the company for ascertaining the capacity of the mines and for the distribution of cars were in all respects just and reasonable, and *it was charged that the order of the commission, directing the taking into account of private cars in the distribution of cars, was unjust, unreasonable, oppressive and unlawful, because it deprived the owners of such cars of the right to the use of their own property.* It was further alleged that, as to the foreign railway fuel cars, the order was also unjust, unreasonable, oppressive and unlawful, because such cars constituted no part of the equipment of the road, and, failing to count them, could not constitute an unlawful discrimination or the giving of an unjust preference within the intendment of the act to regulate commerce. *Besides charging that the order to count the company fuel cars was unjust, unreasonable, etc., it was averred that the attempt of the commission to deal with such cars was*

beyond its power, and was but an effort to deprive the company of its lawful right to freely contract for the purchase of the fuel necessary for the operation of its road. In addition, the proceedings in the suit brought by the Majestic Coal Company were set out, the granting of a temporary injunction therein as to counting foreign railway fuel cars and private cars was alleged, and it was charged that in any event, as to those two classes of cars, the order of the Commission was not lawful since it compelled the company to violate the injunction which was yet in force. *The Commission answered by asserting the validity in all respects of the order by it made, substantially upon the grounds which had been set out in its report and opinion announced when the order was made. All the averments in the complaint as to want of power were traversed and it was expressly charged that the subject of the distribution of coal cars as dealt with by the order was within the administrative power delegated to the commission by the terms of the Act to Regulate Commerce.*"

The Circuit Court enjoined the Commission from enforcing its order "in so far as it directed the taking into account the company fuel cars in the distribution of coal cars in times of car shortage, and in so far as it directed the future taking such cars into account." The Interstate Commerce Commission appealed to this court, and the decree was reversed *on the ground that so far as it related to the company fuel cars the order of the Commission was within its administrative power.*

Baltimore & Ohio R. R. v. *Pitcairn Coal Co.* (1910), 215 U. S. 481, arose on a petition of the Coal Company for a mandamus upon the Railroad Company to restrain discrimination in the distribution of cars in the "Fairmont region" of West Virginia, alleged to be in violation of § 3 of the Interstate Commerce Act. The petition was filed January 16, 1907, in the United States Circuit Court, under § 10 of the act of March 2, 1889 (25 Stat.

855, 862, ch. 382), sometimes called § 23 of the Interstate Commerce Act, because printed under that number in the pamphlet compilation of Interstate Commerce Laws. This section provided that for a violation of any of the provisions of the act of 1887 and amendments, preventing the relator from having interstate traffic moved at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar circumstances, to any other shipper, "a mandamus might be issued commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ." There were numerous grounds of complaint, some of which were abandoned at the hearing, and of the others the United States Circuit Court (154 Fed. Rep. 108, 120) overruled all except one, and with respect to that awarded a writ of mandamus. There were cross writs of error from the Circuit Court of Appeals, which court affirmed the judgment so far as questioned by the defendant's writ of error, and reversed it in part so far as questioned by the relator's writ of error (165 Fed. Rep. 113, 132). Upon review in this court it was pointed out in the opinion (by the present Chief Justice) at p. 492, that the question was, whether the court could grant the relief prayed consistently with the provisions of the Act to Regulate Commerce; and (p. 493): "*That a prohibition, by way of mandamus, against the act is sought* and an order, by way of mandamus, was invoked, and was allowed *which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of interstate commerce in the future.* When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the *administrative competency* of the Interstate Commerce Commission, and not subject to be judically enforced, at least

until that body, clothed by the statute with authority on the subject, had been afforded by a complaint made to it the opportunity to exert its administrative functions."

And, after referring to the decision in the *Abilene Case*, which dealt with the provisions of the Act as they existed prior to the amendment of 1906, the opinion pointed out (p. 494) that the amendment adopted in 1906 to § 15 of the Act (34 Stat. 584, 589, c. 3591), had the effect of partially repealing (what was called § 23 of the Act of 1887, but was really) § 10 of the Act of March 2, 1889, 25 Stat. 855, 862, c. 382, already referred to, which permitted the courts to award mandamus in certain cases. The opinion discusses at length the effect of the 1906 amendment of § 15 upon the remedy by mandamus conferred by the previous Act, with the result of holding that *there was an implied repeal so far as the adjustment of the car-shortage regulations in the case under consideration was concerned.*

But it will be observed that *the aid of the courts was there invoked with respect to future regulations*, and it was denied because by the terms of the act of 1906 it was placed within the administrative functions of the Interstate Commerce Commission, and the mode in which their orders were to be carried into effect was by the same amendment prescribed.

I confess myself unable to find in the *Illinois Central* and *Pitcairn Cases*, or in the reasoning of the opinions therein, any ground for holding that the *general right of action* conferred by § 8 of the original Interstate Commerce Act for a violation of §§ 2 or 3, or the *option conferred upon the party injured*, by § 9 of the same Act, has been repealed as to *past transactions where the conduct of the carrier has not the sanction of an order of the commission*, or (what is in essence the same thing) *has not the sanction of a formal compliance with the Act, which the Act itself declares shall be prima facie lawful*, as was the case with

the published tariffs that were under consideration in the *Abilene* and *Robinson Cases*.

To declare, as was declared in the *Abilene Case*, that a *carrier shall not be held actionable as for extortion in the past where it has merely charged the rates that were fixed in the schedule established in accordance with the Act*, is to my mind as far as possible from declaring that *past* practices of the carrier that are *not sanctioned by any finding or schedule*, or otherwise protected from attack by the provisions of the Act, are exempt from court inquiry; *or that the carrier is exempt from an ordinary action at law for violations of the Act, when §§ 8 and 9 in plain terms declare that the carrier shall for such violations be subject to an ordinary action at law, and declare also that the aggrieved shipper shall have the option whether he will make complaint to the Commission or bring his action in court.*

In answer to the suggestion that the result reached in these cases virtually nullifies § 9 of the Act, it is said that the contrary is shown by the decision just announced in *Pennsylvania Railroad* v. *International Coal Co.*, No. 14, *ante*, p. 184. As I have endeavored to point out in the dissenting opinion in that case, the court there concedes the right of action, but in effect denies the right of recovery; for it excludes from consideration the only measure of damages that has ever been, or can be, generally applied in actions of that character.

The result of the decisions in these three cases, taken together, is, as it seems to me, to so greatly restrict and hamper the private right of action that Congress intended to confer by §§ 8 and 9 of the Act, that it is difficult to conceive of a case where the injured shipper can, by the simple and direct mode of an action at law, recover any substantial compensation for the discriminations practiced upon him by the carrier.

MORRISDALE COAL COMPANY *v.* PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 207. Argued April 15, 1913.—Decided June 9, 1913.

Without preliminary action by the Interstate Commerce Commission declaring that the carrier had, by the rule adopted in regard to distribution of cars, discriminated against a shipper in such distribution, the Federal courts have no jurisdiction of a suit by such shipper for damages alleged to be occasioned by undue discrimination against him and undue preference in favor of his competitor.

The question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Interstate Commerce Commission.

Where the alleged discriminations in distribution of cars occurred more than two years before its commencement, the action cannot be stayed to permit an application to the Interstate Commerce Commission as, under the act of June 29, 1906, all of such claims are barred after two years. *Southern Railway* v. *Tift*, 206 U. S. 434.

THE facts are stated in the opinion.

Mr. William A. Glasgow, Jr., with whom *Mr. Chester N. Farr, Jr.*, was on the brief, for appellant:

This action was brought in the Circuit Court of the United States under § 9 of the Act to Regulate Commerce to recover damages by reason of a violation by the carrier of § 3 of that act.

Under § 9 of the act, the person damaged may proceed by "complaint to the Commission," or "may bring suit . . . for the recovery of the damages for which such common carrier may be liable under the provisions of this act in any District or Circuit Court of the United States of competent jurisdiction."

For violation of § 3, § 8 gives the party aggrieved the

right to recover in the forums provided by § 9, "the full amount of damages sustained in consequence of any such violation of the provisions of this act."

The complaint was that the defendant, during the period from 1902 to January 1, 1906, promulgated certain rules providing a *pro rata* coal car distribution when it was unable to furnish all the cars which shippers needed, and that during such period the defendant unjustly discriminated against plaintiff by: (a) violating such rules, or (b) establishing and carrying out rules which unjustly discriminated against plaintiff. On January 1, 1906, the defendant canceled the rules theretofore in effect, and established rules which were not thereafter complained of, and the purpose of the action was to recover damages for past violation of § 3 of the act. There was a verdict for the plaintiff, and upon a question of law reserved, the court held that the proceedings should in the first instance have been by complaint to the Interstate Commerce Commission, under the case of *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, and thereupon entered judgment for defendant. This judgment was affirmed by the Circuit Court of Appeals, and the judgment of that court is here for review.

The plaintiff is entitled to the right of action in the Circuit Court given by § 9 of the act, unless the exercise thereof would "deprive the subsequent statute of its efficiency; in other words, render its provisions nugatory." *Abilene Cotton Oil Co. Case*, 204 U. S. 437.

The complaint is only required to be made to the Commission in the first instance when "there is involved a question of administrative discretion." *L. & N. R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70.

And where there is involved "a question of administrative discretion," there must necessarily be a complaint to the Commission in the first instance, for in such case the finding of fact by the Commission, when the proceed-

ing is according to law, is conclusive and beyond the competency of any court to reëxamine. *I. C. C.* v. *Union Pacific R. R. Co.*, 222 U. S. 541, at page 550; *I. C. C.* v. *D., L. & W. R. R. Co.*, 220 U. S. 235, at page 255.

A question of "administrative discretion" can only arise upon and be "involved" in the consideration of a present or future action or course of conduct. It cannot arise in a judicial or quasi judicial determination of whether a past course of conduct either (a) violated certain rules, or (b) created unjust discrimination. The reason for requiring a complaint to the Commission in the first instance when a question of "administrative discretion" is involved is clear, because the finding of fact thereon by the Commission is "conclusive," and no court is competent "to reëxamine" such finding.

The present case, however, is an action brought in 1908 for damages accruing prior to January 1, 1906, and for a cause which did not exist after that date. It involved no question of "administrative discretion," but a judicial determination of whether the carrier during a period in the past (a) violated its rule, or (b) whether such rules in the past discriminated against plaintiff.

In this case, if there had been complaint to the Commission in the first instance, and it had found the fact of violation of the rules or discrimination, and ordered the payment of the damages to which plaintiff was entitled, such finding and order would have to be enforced by an action at law in the Circuit Court and trial by jury, upon the same issues passed upon by the Commission, in which action the finding of the Commission and its order would only be "*prima facie* evidence of the facts therein stated." See Act to Regulate Commerce, § 16.

It is perfectly reasonable, therefore, to hold that in a case where the finding of fact by the Commission is conclusive under the act, that resort must be had in the first instance to the Commission and then to the courts. It

is equally as unreasonable to hold that when, under § 9, a party may proceed for the recovery of damages for past grievances, either by complaint to the Commission or by action in the Circuit Court, that he must in the first instance complain to the Commission, and then have a jury pass upon exactly the same issues, with the finding of the Commission as *prima facie* evidence only.

When the plaintiff has the option under § 9 to complain to the Commission or by action in the Circuit Court, there can be no reason to require him to complain to the Commission in the first instance, when the *prima facie* finding of the Commission must be submitted to the court and jury, and may be promptly rejected.

When the question is one of "administrative discretion," every reason would require a party to secure in the first instance the "conclusive" finding of fact by the Commission; otherwise confusion would arise in having a court not charged with administrative duty to find the facts, instead of the Commission, which was charged with the duty of administration in connection with the question involved. When, however, the complaint is simply to recover damages for past wrongs, no reason can require the party to get, in the first instance, the *prima facie* finding of the Commission to submit to a jury which, by § 9, has the right to pass upon the case in the first instance, and no confusion can arise because the finding of the Commission in such a case is only *prima facie* and must finally be submitted to the jury. When no confusion can arise as between the Interstate Commerce Commission and the Circuit Court, jurisdiction remains in the Circuit Court. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, at pages 440, 441.

Mr. John G. Johnson, with whom *Mr. Frederic D. McKenney* and *Mr. Francis I. Gowen* were on the brief, for appellee:

The coal company can only recover in case it establishes:

That the rule or system established and pursued by the railroad company or in the distribution of its cars was transgressive of the provisions contained in the Interstate Commerce Act prohibiting discrimination by a common carrier.

That the rule or system advocated by the coal company should have been pursued by the railroad company in making the distribution of its cars.

That in making distribution of its equipment in any given period of time a carrier is guilty of discrimination if it fails in any month in such period to allot and deliver to each shipper his or its *pro rata* of cars, and that over-deliveries in other months more than sufficient to make good the shortage in any one or more months cannot be taken into consideration.

All of these propositions were primarily, at least, for the consideration of the Interstate Commerce Commission. *Int. Com. Comm.* v. *Illinois Cent. R. R. Co.*, 215 U. S. 452; *Balt. & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481.

In this case the coal company attacked as discriminatory, and as consequently unlawful, the regulation or rule which had governed the railroad company in the distribution of its equipment, and sought to have substituted therefor a different regulation or rule as the one which should have governed in such distribution.

The power and authority of the Interstate Commerce Commission must be regarded as extending to and embracing the authority necessary to pass upon and determine whether the method or system of the defendant in error was proper, and if not, whether that advocated by the plaintiff in error was the proper and correct one.

MR. JUSTICE LAMAR delivered the opinion of the court.

There are a large number of coal mines in the Clearfield District, Tyrone Division of the Coal Region, in the State

of Pennsylvania. Between January 1, 1900, and December 31, 1905, the total output of the mines in the Clearfield District averaged 18,500 tons per day. When there was a car shortage, the Pennsylvania Railroad allotted to each mine a percentage of cars assigned to the District, calculated according to the capacity of the mine.

On this basis the Morrisdale Coal Company was entitled to about 4.8 per cent and the Berwind-White Company to about 18 per cent.

In 1908 the Morrisdale Company brought suit against the Railroad for damages alleged to have been occasioned by an unfair distribution of cars to it and an undue allotment of cars to its competitor, the Berwind-White Company.

Alleging that in violation of its duty to see that no undue preference was given to any other person or corporation in the District, the carrier failed to assign to the plaintiff its *fair proportion of the entire number of coal cars of the Railroad Company,* to which plaintiff was entitled and that this failure continued from the beginning of 1900 to the close of 1905, the effect of which was to subject plaintiff to unreasonable prejudice with respect to the facilities for shipping coal as contrasted with the facilities furnished other competitors in the Clearfield District, and as a result of the unfair discrimination and the failure to furnish a proper allotment of cars and equal facilities, plaintiff was obliged to buy coal at various times in the outside market at prices then prevailing in order to fill its contracts previously entered into—to its damage $250,000. The defendant entered a plea of not guilty and *actio non accrevit infra sex annos.* On the trial, the jury found that the exhibit showing damages of $67,156.07 was correct. "If the court shall be of opinion that the questions of law involved in the case are in whole or in part with the plaintiff, we find for the plaintiff. If,

however, the court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant."

There was no conflict in the evidence, and in view of the admissions of the plaintiff incorporated in the record, the facts can be briefly stated.

The capacity of plaintiff's mine was 4.8 per cent. of the output of the Clearfield region, and having been furnished access to the books of the carrier, it made up a statement showing that during 23 months between March, 1902, and December 31, 1905, in which there was a car shortage, the Morrisdale Company received less than its 4.8 of all the coal cars in the Clearfield region, while the Berwind-White Company received more than its 18 per cent. of all the coal cars in the region. This was admitted by the Railroad, which insisted that during periods of car shortage it divided the cars into four classes:

1. Private cars, belonging to persons or corporations operating mines in the district;
2. Cars of foreign railroads consigned to designated mines to be loaded with fuel for such foreign railroads;
3. Pennsylvania Railroad fuel cars, consigned to designated mines to be loaded with fuel for railroad use;
4. The balance, or System cars, available for general use, it distributed among the various mines in the proportion their capacity bore to the total output of the Clearfield region, the plaintiff being allotted its due proportion, or 4.8 per cent thereof.

The Railroad explained that the apparent excess of cars furnished the Berwind-White Company during the 23 months referred to was due to the fact that that company owned a large number of private cars on which it appeared that wheelage was paid and submitted the following table

showing the number and character of cars in the Clearfield Region during those years:

	Individual	Company coal	System	Commercial Foreign	Commercial Box	Total
1902 Cars placed	14,221	16,119	31,048	22,544	11	83,943
1903 Cars placed	20,483	15,614	20,947	24,222	13	81,279
1904 Cars placed	16,705	11,477	21,888	14,568	12	64,650
1905 Cars placed	26,716	22,812	24,769	5,542	374	80,213
Total	78,125	66,022	98,652	66,876	410	310,085

During the trial plaintiff admitted that there had been no intentional discrimination against it, but contended that its statement was made up from the books on the basis of what it considered to be the law of the case, under which *all cars available for shipment of coal should be counted in the distribution.*

Plaintiff admitted that if the Berwind-White Company was entitled to the use of their private cars, without counting them against what it was entitled to under the percentage, then the Berwind-White Company did not get an excess of their percentage. It further admitted that if Fuel cars of the Pennsylvania Railroad, and Fuel cars of foreign railroads, consigned to particular mines were not to be counted against such mines, then plaintiff had no cause of complaint, inasmuch as it had received its percentage of the balance or system cars.

The Circuit Court dismissed the case on the ground that, without preliminary action by the Commission, the court had no jurisdiction of a suit for damages alleged to be occasioned by undue discrimination against the plaintiff and undue preference in favor of its competitor.

The plaintiff took the case to the Circuit Court of Appeals, complaining of this ruling and further assigning error in that the court failed to enter judgment in its favor on the special verdict.

The Circuit Court of Appeals held, one judge dissenting, that the plaintiff had the option of taking the question

of jurisdiction by direct writ of error to the Supreme Court of the United States, or it could take the whole case, including the matter of jurisdiction, to the Circuit Court of Appeals. That court, thereupon, considered the whole record, and (one judge dissenting) affirmed the judgment of the Circuit Court on the ground that the Circuit Court had no jurisdiction as a Federal court until after the Commission had passed on the reasonableness of the method of car distribution. The case was brought here, the only question presented by the record being whether the Circuit Court as a Federal court had jurisdiction.

The prohibitions of § 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution in case of car shortage, and at the time of the transactions out of which this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission. As late as 1910, it was said (19 I. C. C. 387) that the question was in a state of flux, and an examination of the decisions in the numerous cases brought about that time will show that it was a matter about which there was much difference of opinion. In some cases it was held that private cars and fuel cars of foreign railroads consigned to particular mines, should be counted in making the distribution. Others held that such cars should be counted, but that if the foreign cars, or those owned by the private corporations, exceeded their percentage, the excess might be retained by those coal companies. This view was adopted by the Commission, which also held that fuel cars belonging to the carrier should be counted except where the railroad purchased the entire output of the mine. *Traer* v. *Chicago &c. R. R.*, 13 I. C. C. 451; *Hillsdale Coal Co.* v. *Pennsylvania R. R.*, 19 I. C. C. 356, 372; *Jacoby* v. *Pennsylvania R. R.*, 19 I. C. C. 392; *Minds* v. *Pennsylvania R. R.*, 20 I. C. C. 52.

It was, however, recognized that there could be no hard and fast rule and that circumstances might arise which would otherwise warrant a departure so as to enable the carrier to meet emergencies arising from a strike on its own road, or embargoes by connecting lines which refused to haul certain articles of merchandise in order to supply communities with necessaries of life. *Parks* v. *Cincinnati &c. Ry.*, 10 I. C. C. 47; *Thompson* v. *Pennsylvania R. R.*, 10 I. C. C. 640.

These rulings as to the validity of a particular practice and the facts that would warrant a departure from a proper rule actually in force, are sufficient to show that the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission. It was distinctly so ruled in the *Pitcairn Case*, 215 U. S. 481, and in *I. C. C.* v. *Illinois Central*, 215 U. S. 452. Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. If in those direct proceedings the courts could not pass upon the question of reasonableness of a method of allotting cars neither can it do so as an incident to an action for damages.

In view of the decision in the *Abilene*, *Pitcairn* and *Robinson Cases* it is unnecessary again to discuss the statute or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable.

The plaintiff, however, seeks to take the case out of the principle of those decisions, insisting that this is a suit for damages occasioned by a violation of the rule—and that, therefore, without any order of the Commission it

is entitled to institute a suit for the recovery of damages resulting from the failure to distribute cars according to the method established by the Railroad itself. The record, however, does not sustain this position, for the evidence does not show any breach of the rule or any failure to deliver to the Morrisdale Company all of the cars to which it was entitled under the method of allotment in force between 1900 and 1906. On the contrary, it was admitted at the hearing that there had been no discrimination against the plaintiff in the application of the rule, the complaint being that the basis of allotment was unreasonable and that *all cars in the district* should be distributed according to the capacity of the mine without deducting private cars, foreign fuel cars, or the carrier's own fuel cars. Whether this should be done as a general rule, or under the peculiar conditions prevailing on defendant's road at that time was, as we have seen, an administrative question and to be decided by the Commission as preliminary to the right to maintain this suit. The Circuit Court rightly held that until this was done it had no jurisdiction as a Federal court of the cause of action sought to be enforced.

It is argued in the plaintiff's brief that if this view of the law should be sustained the case should not be dismissed but stayed until the plaintiff could apply to the Commission and obtain a ruling on the question as to whether the method adopted by the Pennsylvania Railroad was not, during the years 1900 to 1906 unjustly discriminatory. Attention is called to *Southern Ry.* v. *Tift*, 206 U. S. 428, 434, which it is said would support such a provision in the mandate. In that case the shippers filed, on April 14, 1903, a bill to enjoin an advance in rate. The injunction was refused and the advance went into effect. The cause was stayed while the complainants were pressing their application for an order from the Commission that the rates were unreasonable. Its report was in their favor and

on it the Circuit Court made an order of restitution (206 U. S. 436). But, in that case the statute of limitations had not run when the bill was filed, when the stay order was granted, nor when the application was made to the Commission; while in the present case the plaintiff was barred of the right to apply to the Commission at the date the suit was filed in the United States Circuit Court. The damages which were claimed arose from a failure to deliver cars prior to Dec. 31, 1905. The suit was brought July 17, 1908, more than two and a half years later and after the passage of the act of June 29, 1906, 34 Stat. 584, 590, c. 3591, that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrued and not after and a petition for the enforcement of an order shall be filed in the Circuit Court within one year from the date of the order and not afterwards; Provided that claims accrued prior to the passage of this act may be presented within one year."

The provisions of this statute would prevent the modification asked for, and the judgment is

Affirmed.

MR. JUSTICE PITNEY dissented.[1]

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[1] For dissenting opinion of MR. JUSTICE PITNEY in this case and in *Mitchell Coal & Coke Company* v. *Pennsylvania Railroad Company*, see *ante*, p. 267.

FOURCHE RIVER LUMBER COMPANY *v.* BRYANT LUMBER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 296. Argued May 6, 1913.—Decided June 9, 1913.

Carriers, whether saw-mill companies or railroads or both combined, cannot purchase land by rebating to the grantor a part of the freight rate on interstate shipments over the road built on the right of way.

A rebate made for purchase of land is illegal even though much less than the value of the land acquired.

The prohibitions of the Act to Regulate Commerce against rebates cannot be evaded by calling them differentials or concessions, nor by taking the money from a corporation that is the same as the rebating carrier.

97 Arkansas, 623, reversed.

THE facts, which involve the right, under the Act to Regulate Commerce, of a carrier to pay rebates to a shipper in consideration of a right of way granted by the latter, are stated in the opinion.

Mr. Luther M. Walter and *Mr. W. E. Hemingway,* with whom *Mr. U. M. Rose, Mr. G. B. Rose, Mr. D. H. Cantrell, Mr. J. F. Loughborough* and *Mr. M. W. Borders* were on the brief, for plaintiff in error:

The contract of August 3, 1905, became invalid as to the rate for transportation of logs when tariffs were filed by the Fourche River Valley & Ind. Terr. R. R. Co. prescribing another and different rate from the contract price.

The award of the arbitrators and the judgment of the court awarding damages equal to the amount of the division of the joint rate received by the Fourche River Valley & Ind. Terr. R. R. Co. constitutes a device where-

by the Bryant Lumber Company is given transportation at less than the published interstate rates.

The Interstate Commerce Commission alone has jurisdiction in the first instance to require establishment of switch connection or award damages for failure to make such connection or damages for unjust discrimination. *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S. 155; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286; *Int. Com. Comm.* v. *D., L. & W.*, 216 U. S. 531; *Balt. & Ohio* v. *United States*, 215 U. S. 481.

Mr. Charles C. Reid, with whom *Mr. T. M. Mehaffy* was on the brief, for defendant in error:

No right or immunity under the Interstate Commerce Act having been pleaded or claimed by the plaintiff in error with sufficient particularity until the motion for rehearing was filed in the state Supreme Court, it was then too late to sustain writ of error. *Miller* v. *Texas*, 153 U. S. 535; *Texas & Pac. R. R. Co.* v. *So. Pac. Co.*, 137 U. S. 48; *Caldwell* v. *Texas*, 137 U. S. 692, 698; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291; *Budzisz* v. *Ill. Steel Co.*, 170 U. S. 41

The writ will not be sustained because the judgment of the state court was based upon grounds entirely sufficient to sustain it independently of the Interstate Commerce Act, and did not regard the act as involved. *Ballinger* v. *Iowa*, 18 Wall. 129; *Detroit City R. R. Co.* v. *Suthard*, 114 U. S. 133; *Fisher* v. *Cockrill*, 5 Pet. 248; *Allen* v. *So. Pac. R. R.*, 173 U. S. 480.

The Fourche Lumber Company itself has no interest in nor is it concerned with the validity of the rates charged by the Fourche River Valley & Ind. Terr. R. R. Co. No right of plaintiff in error under the Interstate Commerce Act is denied or involved and it cannot set up such right

for another. *McNulta* v. *Lochridge*, 141 U. S. 327; *Brown* v. *Smart*, 145 U. S. 455; *Owings* v. *Norwood*, 5 Cranch, 344; *Hale* v. *Gaines*, 22 Howard, 144; *Iron Clifts Co.* v. *Negaunee*, 197 U. S. 463; *Long* v. *Converse*, 91 U. S. 105; *Pinney* v. *Sheppard et al.*, 177 U. S. 170.

That the Fourche Lumber Company received by reason of its affiliation with the Fourche River Valley & Indian Territory Railroad advantages in the way of rate concession which it enjoyed over the Bryant Company was a question of fact which was determined by the judgment of the lower court and which this court will not review. *Hendrix* v. *Atchison*, 167 U. S. 673; *Gardner* v. *Bonesteel*, 180 U. S. 362; *Christian* v. *Miller*, 197 U. S. 313; *Chapman Land Co.* v. *Bigelow*, 206 U. S. 41; *Thayer* v. *Spratt*, 189 U. S. 376.

Mr. Justice Lamar delivered the opinion of the court.

The Bryant Lumber Co. had its mill and saw mill plant at or near Bigelow, Arkansas, on the Rock Island Railroad. The Fourche Lumber Co.'s plant was located near by on a spur track laid about a mile from the main line of the Rock Island R. R. Both of these lumber companies owned timber in a rough, hilly country which could only be reached by a railroad, belonging to the Bryant Co. The Fourche Lumber Co. had already built a road on this land, claiming that it had been granted a right-of-way by the Bryant Co., and had applied for a railroad charter. This application was resisted by the Bryant Co., which denied that it had made any grant of a right-of-way. Finally, and in order to avoid threatened litigation the parties, in August, 1905, entered into an agreement in which, among many other matters, it was provided that a charter should be granted to the Fourche River Valley & Indian Territory R. R., to be organized by the Fourche Company; that the Bryant Co. would grant this Fourche Railroad a right-of-way and that the Fourche Co. was to

arrange for the building of switches to enable the Bryant Co. to reach its timber, which was to be transported at 37½ cents per 100, and that "the price for hauling future acquired lumber of the Bryant Co. over the Fourche R. V. & I. T. R. R. should be fixed by a board of arbitrators, who should have authority to settle any differences that might arise between the parties as to the details of carrying out the contract," and "so that the Bryant Co. might be secured against any discrimination in favor of the Fourche Co. in the transaction of its business, and the Fourche Co. shall be required to carry timber and other freight equally without discrimination for or against the Bryant Co."

The Fourche Co. agreed that it would cause the contract to be ratified by the Fourche River Valley & Indian Territory R. R. Co. Thereafter the contract was carried out; the Fourche R. R. was incorporated; the Bryant Co. made to it a conveyance of the right of way as stipulated; the railroad was constructed and hauled freight in intrastate and interstate commerce.

There was evidence that all of the stock of the Railroad, except one or two qualifying shares, were held by the persons who owned the Fourche Lumber Co., but the two corporations kept separate books, and when the Railroad made dividends they were paid to its stockholders of record.

In August, 1907, differences arose between the parties and under the provisions of the contract the Bryant Co. demanded an arbitration of several matters in issue—among others submitting to the Board the following proposition:

"Fourth. That the Fourche River Lumber Company through the Fourche River Valley & Indian Territory Railroad Company shall secure to the Bryant Lumber Company from the Fourche River Valley & Indian Territory Railroad Company, the same freight concessions as

are now enjoyed by the Fourche River Lumber Company, through its interest and the interest of its owners in the Fourche River Valley & Indian Territory Railroad Company."

The arbitrators found in favor of the Bryant Company and the terms of the award not having been complied with, the Bryant Company brought suit against the Fourche Lumber Company.

It appears that under the blanket rate, then of force, the same rate of freight was charged from any point in Arkansas to St. Louis, to Memphis or to Oklahoma points. Out of this through rate the Rock Island allowed 2, 3 and 3½ cents to the Fourche R. R. on all lumber originating on such road and shipped over the Rock Island to St. Louis, Memphis or Oklahoma. This division of through rate between the two roads on interstate shipments was noted on the tariffs filed with the Interstate Commerce Commission.

On the trial, the president of the Bryant Co. testified that it had shipped 13,251,759 pounds of lumber in interstate shipments, and on it the Bryant Co. claimed 2 cents per 100.

Being asked what was the basis of the claim he said: "They are getting it. Q. Who is getting it? A. The Fourche River Vy. & Indian River R. R., which are the same people as the Fourche River Lumber Co. Q. They are two separate and distinct corporations? A. Yes." In reference to the claim for failing to lay the tracks and switches as agreed he was asked: "Did the Fourche R. R. furnish you with a profile? A. I don't know that it was the Railroad Co., it was the lumber company I think. Q. Who did you get the profile from?—The Lumber Co. or the Railroad Co.? A. I don't know. To me they are all the same. Q. I understand that; it is to your advantage to have them all the same, but as a matter of fact from which institution did you get the profile? A. I could look

at the papers and see which one wrote the letter, but it is the same people all the time."

The defendant excepted to the refusal of the court to instruct the jury that "a payment to the plaintiff of the differentials provided in the award of the arbitrators would be the granting to the Bryant Co. of a rebate forbidden by law, enabling the Bryant Co. to transport its goods at less than the tariff rate and you will find for the defendant on that issue." Instead of giving the charge requested the court instructed the jury that "under the contract, and findings of the arbitrators, the Fourche Lumber Co. was required to pay the Bryant Co. the same differentials that the Fourche R. R. received on interstate shipments of the Fourche Lumber Co. If you find from the testimony that the Fourche R. R. has received certain differentials from the Rock Island on interstate shipments and that the Fourche Lumber Co. has not paid to the Bryant Lumber Co. the same differentials on lumber that the Bryant Co. has shipped to the same territory, then you are instructed that the defendant (Fourche Co.) is indebted to the Bryant Co. the amount of any such differentials which it has not paid."

A judgment on the verdict rendered in accordance with this charge having been affirmed, the Fourche Lumber Company brought the case here, insisting that the charge and verdict were in violation of the Interstate Commerce Act, and, in effect, amounted to the giving of a rebate to the Bryant Lumber Company. The latter replies that the suit is against the Fourche Lumber Co. and that there is no law preventing one company from paying the whole or any part of the freight due by another. That may be true but not where that other party is sued as being in effect a common carrier engaged in interstate commerce. The arbitration was demanded and the award made on the theory that, inasmuch as the contract provided that there should be no discrimination, the Bryant Company

was entitled to receive from the Fourche Lumber Company "the same freight concessions as are now enjoyed by the Fourche Lumber Company through its interest and the interest of its owners in the Fourche Railroad." This suit is based upon the assumption that the two companies are identical in fact, though different in name.

Thus treating it, the case is as though the Bryant Lumber Company had sued the Fourche Lumber Company, doing business as an interstate carrier, for so much of the through rate as had been paid to it on the division by the Rock Island for hauling the Bryant Company's shipments of lumber. To state the proposition is to manifest its illegality, and to show that thereby the Bryant Company would get a reduction on the through rate on all of its lumber originating on the Fourche line.

The Fourche Railroad was not only incorporated as a common carrier but is treated as such by the Interstate Commerce Commission, and, under the filed tariffs of the Rock Island road, receives a part of the through rate on all lumber originating upon the line and shipped in interstate commerce. The status of this road is discussed in *Tap Line Cases*, 23 I. C. C. 277, and its right to a division of the freight recognized notwithstanding the fact that the stockholders are the same as those who own the shares of the Fourche Lumber Company. But it receives this part of the through rate, not as a concession, but for services actually rendered by it as a common carrier in hauling freight for part of the distance between the point of origin and the point of destination. In any other view it would have been unlawful for the Rock Island to pay, and, if so, no agreement to divide such unlawful receipts would be enforced by the courts. On the other hand, if the Fourche Railroad was lawfully paid for such services in hauling the lumber it would be illegal, directly or through a subsidiary, to give to the shipper a part of such joint rate under any pretext whatever. Carriers, whether saw-mill

companies or railroads or both combined, cannot purchase land by rebating to the grantor a part of the freight rate on interstate shipments over the road built on the right of way, even though the amount of such rebate was much less than the value of the land thus acquired. Cf. *Louisville & Nashville Ry. Co.* v. *Mottley*, 219 U. S. 467; *United States* v. *Lehigh Valley Railroad*, 220 U. S. 257; *United States* v. *Union Stock Yards*, 226 U. S. 287, 308.

The Commerce Act prohibits the payment of rebates, and its command cannot be evaded by calling them differentials or concessions, nor by taking the money from the Railroad itself or from a company that is proved to be the same as the Railroad. Otherwise nothing would be easier than for lumber companies to charter a railroad, collect freight as a railroad, but pay it out as a lumber company to shippers.

The suit in the present case proceeds on the theory that the Fourche Lumber Company and the Fourche Railroad are the same and that therefore the division of the through rate allowed to the Railroad was in fact received and enjoyed by the Lumber Company. And yet, notwithstanding that fact, it is claimed that if the Fourche Lumber Company should, under the contract, pay a part of that freight to the Bryant Company it would do so as a saw-mill and not as a carrier. The law will not permit such a chameleon-like change. The Fourche Lumber Company and the Fourche Railroad are either the same or different. If they are the same it cannot refund a part of the rate to the Bryant Company. If they are different the Fourche Lumber Company was not bound by the terms of the contract to make the payment now demanded. The court below found that they were the same and not different, and it results that its judgment must be

Reversed.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 458. Argued February 19, 20, 1912.—Decided June 9, 1913.

The meaning of the Act to Regulate Commerce and whether it applies to street railways carrying passengers over a state line cannot be determined from statements made in Congress during the debates on the bill; the act must be interpreted by its own terms as looked at in the whole.

In terms the Act applies to all carriers engaged in the transportation of passengers or property by railroad, and the scope of the act depends on the definition of the word "railroad" as used in 1887 when the act was originally passed.

Street railways for passengers only, as they existed in 1887, were not within the contemplation of Congress in passing the Act to Regulate Commerce, such railroads are not subject to its provisions or under the jurisdiction of the Interstate Commerce Commission even though they carry passengers across the state line.

Quære to what extent since the passage of the act of June 18, 1910, interstate railways doing passenger, freight and express business are now under the jurisdiction of the Interstate Commerce Commission, and if so, to what extent.

191 Fed. Rep. 40, reversed, and 179 Fed. Rep. 243, affirmed.

THE facts, which involve the jurisdiction of the Interstate Commerce Commission over certain classes of street railway systems, are stated in the opinion.

Mr. John Lee Webster, with whom *Mr. Frederic D. McKenney* was on the brief, for appellants:

The original and amendatory statute regulating commerce at the time said order was made, did not include street railway companies. The term "railroad" in said act applies only to commercial railroads as distinct from street railway companies.

See express statement to that effect by Senator Cullom, chairman of the committee having the bill in hand. Cong. Rec., Vol. 17, Pt. IV, p. 3472; *Wilson* v. *Rock Creek Railway Co.*, 7 I. C. C. Rep. 83.

The word "railroad" as used in the constitutions and statutes of the various States does not include street railway companies, and street railway corporations are not governed by laws relating to railroads. This distinction between the two kinds of railroads was well known at the time of the passage of the act to regulate commerce.

In the following cases the word "railroad" as used in the constitutions and statutes of the several States does not include a street railway. Street railways are not included in fellow servant acts, in railway commission acts, in judgment lien acts, and other laws enacted to govern and control railroads, unless specifically mentioned therein. *Street Ry. Co.* v. *Cedar Rapids*, 106 Iowa, 467; *Funk* v. *St. Paul Ry. Co.*, 61 Minnesota, 435; *Lincoln Traction Co.* v. *Webb*, 73 Nebraska, 136; *Daily* v. *Milwaukee & E. R. L. Co.*, 119 Wisconsin, 398; *Lincoln Street R. R. Co.* v. *McClellan*, 54 Nebraska, 672; *Omaha Street R. Co.* v. *Boesen*, 74 Nebraska, 765; *Railroad Co.* v. *Railroad Commissioner*, 73 Kansas, 168; *State* v. *Cain*, 69 Kansas, 186; *Manhattan Trust Co.* v. *Sioux City Cable Ry. Co.*, 68 Fed. Rep. 82; *Bridge Co.* v. *Iron Co.*, 59 Ohio St. 179; *Front Street Cable Ry. Co.* v. *Johnson*, 2 Washington, 112; *Louisville &c. Ry. Co.* v. *Louisville City Ry. Co.*, 2 Duvall (Kentucky), 175; *In re New York District Ry. Co.*, 107 N. Y. 42; *Railroad Commissioners* v. *Market Street R. R. Co.*, 132 California, 677; *Thompson-Houston Co.* v. *Simon*, 20 Oregon, 60; *Sams* v. *St. Louis Ry. Co.*, 174 Missouri, 53; *State* v. *Duluth Gas Co.*, 76 Minnesota, 96; *Gyger* v. *West Phila. Ry. Co.*, 136 Pa. St. 16; *Riley* v. *Galveston City R. R. Co.*, 35 S. W. Rep. 826; *State* v. *Lincoln Traction Co.*, Nebraska, Jan. 3, 1912; *Sears* v. *Railway Co.*, 65 Iowa, 742; *Freiday* v. *Sioux*

City Transit Co., 92 Iowa, 191; *Massachusetts Trust Co.* v. *Hamilton*, Rep. 588.

Under the constitution and laws of Nebraska, appellant is a street railway and is not a street railroad.

There is a well defined and marked distinction between railroad corporations and street railway corporations under the constitution and laws of the State of Nebraska. *Lincoln Street Railway* v. *McClellan*, 54 Nebraska, 672; *Omaha Street Ry. Co.* v. *Boesen*, 74 Nebraska, 764; *Lincoln Traction Co.* v. *Webb*, 73 Nebraska, 136; *Tyrrell* v. *Lincoln Traction Co.*, January 3, 1912.

Appellant is incorporated as a street railway company under the laws of the State of Iowa which also recognize the well defined distinction between street railways and railroads. *Sears* v. *Railway Co.*, 65 Iowa, 742; *Freiday* v. *The Sioux City Transit Co.*, 92 Iowa, 191; *City R. R. Co.* v. *Cedar Rapids*, 106 Iowa, 476.

The dual functions of a commercial railroad and a street railway cannot be combined in the same corporation. *Gillette* v. *Aurora Ry. Co.*, 228 Illinois, 261; *Chicago & Southern Traction Co.* v. *Flaherty*, 222 Illinois, 67; *Bradley Mfg. Co.* v. *Traction Co.*, 229 Illinois, 170, 176.

The Act to Regulate Commerce has been under discussion, and various amendments have been made thereto since its first enactment in 1887. If Congress intended to extend said act to include street railways why has not such amendment been made when other amendments were being made to the act?

In deciding whether the Act to Regulate Commerce applies to street railways it is proper to consider the inconveniences that would result to the public by compelling interchange of freight and cars and passengers between commercial railroads and street railway companies, as well as the fact stated *supra* that there exists no necessity, nor public demand for the regulation of street railway companies by the Interstate Commerce

Commission. *Michigan Ry. Co.* v. *Hammond Electric Ry. Co.*, 83 N. E. Rep. 650; *Massillon Bridge Co.* v. *Cambria Iron Co.*, 59 Ohio St. 179.

The order of the Commission is void because it was beyond the scope of the complaint, and for the further reason that the effect of the order is to require appellant to receive and carry in its cars to all points within the city of Omaha, and without compensation, persons who have paid a fare of ten cents to ride on the bridge line from Council Bluffs, Iowa, to the eastern boundary of the city of Omaha, and is therefore a direct interference with what is intrastate business.

Mr. Charles W. Needham for the Interstate Commerce Commission:

The power of Congress to regulate commerce is not confined to any particular agency or instrumentality. *Gibbon* v. *Ogden*, 9 Wheat. 1, 196; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Employers' Liability Case*, 207 U. S. 493; *Hopkins* v. *United States*, 171 U. S. 597.

It embraces all the instruments by which such commerce may be conducted. *Welton* v. *Missouri*, 91 U. S. 275; citing *Mobile County* v. *Kimball*, 102 U. S. 691; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Hooper* v. *California*, 155 U. S. 648, 653; *United States* v. *E. C. Knight Co.*, 156 U. S. 1.

Commerce as used in the commerce clause of Constitution has reference to transportation, that is, the movement of either property or persons. *Chicago R. R. Co.* v. *Fuller*, 17 Wall. 560.

Congress exercises its regulating power by direct and appropriate legislation and in this case through the Interstate Commerce Commission acting under the powers granted by the Act to Regulate Commerce. See the Act to Regulate Commerce, as amended, and the acts supplementary thereto, see also *Texas R. Co.* v.

Int. Comm. Comm., 162 U. S. 197; *Cincinnati R. Co.* v. *Int. Comm. Comm.*, 162 U. S. 184; *Balt. & Ohio R. R. Co.* v. *United States*, 215 U. S. 481; *Int. Comm. Comm.* v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88; *Southern Pacific Co.* v. *Int. Comm. Comm.*, 219 U. S. 433; *Southern Pacific Terminal Co.* v. *Int. Comm. Comm.*, 219 U. S. 498; *Int. Comm. Comm.* v. *Del., Lack. & West. R. R.*, 220 U. S. 235.

The Act to Regulate Commerce as amended defines the carriers subject to the act.

Congress and the Interstate Commerce Commission have jurisdiction over a common carrier operating cars by electricity, and the fact that it is an electric street railway does not exempt it from such regulating power. As to legislative construction see *Willson* v. *Rock Creek R. Co.*, 7 I. C. C. 83, 88.

See also *Chi. & Mil. Electric R. R.* v. *Ill. Cent. R. R. Co.*, 13 I. C. C. 20; *Beall* v. *Washington & Mt. Vernon Ry.*, 20 I. C. C. 406; *Cincinnati Traction Co.* v. *B. & O. S. W. R. R. Co.*, 20 I. C. C. 486.

If the Act to Regulate Commerce did not include "street electric passenger railways" there was no reason for excepting this class of railways from the additional power conferred upon the Commission to establish through routes and joint rates. As to judicial construction, see *Grinsfelder* v. *Spokane Street R. Co.*, 53 Pac. Rep. 719; *Densmore* v. *Racine M. R. Co.*, 12 Wisconsin, 649; *McCleary* v. *Babcock*, 82 N. E. Rep. 453, 456; *Riggs* v. *San Francois County Ry. Co.*, 96 S. W. Rep. 707, 708; *Heastonville R. R. Co.* v. *Philadelphia*, 89 Pa. St. 210; *Gyger* v. *Philadelphia City Passenger R. Co.*, 136 Pa. St. 96; *Cheaton* v. *McCormick*, 178 Pa. St. 186; *Old Colony Trust Co.* v. *Rapid Transit Co.*, 192 Pa. St. 596; *Penna. R. R. Co.* v. *Pittsburg*, 104 Pa. St. 552; *Rafferty* v. *Central Traction*, 147 Pa. St. 579; *Reeves* v. *Philadelphia Tr. Co.*, 152 Pa. St. 153; *Old Colony Trust Co.* v. *Allentown*, 192 Pa. St. 596; *Employers' Liability Cases*, 207 U. S. 463, 497.

The comprehensive language of the statute includes trolley lines and every common carrier engaged in interstate traffic by railroad.

Appellants are not ordinary street car companies; they are bridge and railway companies. The bridge company was not organized as a "street" railway company, but as a "railway and bridge company," and its lessee, as operating company, is exercising these functions.

Traffic over a bridge spanning navigable waters separating two States is interstate commerce. *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204.

The railroad is an interurban road connecting two cities located respectively in two States, and such transportation and facilities constitute interstate commerce. *Gibbon* v. *Ogden, supra; Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Munn* v. *Illinois*, 94 U. S. 113; *C., B. & Q. R. Co.* v. *Iowa*, 94 U. S. 155; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557.

Where several instrumentalities of commerce have been merged in one ownership by purchase or lease and are operated by one company, such instrumentalities, in so far as they are used for interstate commerce, are voluntarily brought under the jurisdiction of Congress and the Interstate Commerce Commission. The fact that one or more of such instrumentalities are used in a greater degree for intrastate business than for interstate business does not lessen the regulating power of the Interstate Commerce Commission over the interstate traffic, and the Commission may establish a through route and a joint through rate for interstate traffic over all of said instrumentalities. *C., N. O. & T. P. Ry. Co.* v. *Int. Comm. Comm., supra.*

The fact that these corporations are organized under state laws, general or special, as commercial or as street railways does not change the character of the commerce nor exempt the companies actually doing the interstate

business from Federal regulation as to the interstate traffic.

The fact that this company does not carry freight, but confines its business to the carrying of passengers, does not exempt it from Federal control.

Mr. Assistant Attorney General Denison, with whom *Mr. Thurlow M. Gordon*, Special Assistant to the Attorney General, was on the brief, for the United States:

The Act to Regulate Commerce covers, among other things, "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad." Even assuming for the purpose of argument that this generic language does not include merely municipal trolley railroads, it still includes the species of railroad known as "interurban" railroads.

The Interstate Commerce Commission reported as a fact, and upon facts sufficient to justify their conclusion, that the appellants were an "interurban" railroad, as distinguished from a local street railroad.

It is of no importance that this species of railroad did not exist at the time the act was originally passed, because it falls within the generic term, and also within the policy. *Weems* v. *United States*, 217 U. S. 349, p. 373; *De Lima* v. *Bidwell*, 182 U. S. 1, p. 197; *Bishop* v. *North*, 11 Mees. & W. 418.

Nothing in the language or context excludes this species of railroad from the general language. The word "railroad" does not exclude it, and indeed "interurban railroads" are considered to be "railroads" as distinguished from "street railways" by the laws not only of Iowa, Code, § 2033 a and b; *Cedar Rapids &c. M. C. Ry. Co.* v. *Cummins*, 125 Iowa, 430, and of Nebraska (Cobbey's Ann. Stat. of Nebraska, 1909, § 10517); but by numerous other authorities. *City of Philadelphia* v. *Philadelphia Traction Co.*, 55 Atl. Rep. 762 (Penn.); *Cincinnati &c. Electric R. R.*

Co. v. *Lohe*, 68 Oh. St. 101; *Malott* v. *C. & E. St. L. Electric R. Co.*, 108 Fed. Rep. 313; *Riggs* v. *St. Francois Co. Ry. Co.*, 120 Mo. Supp. 335; *Montgomery St. Ry. Co.* v. *Lewis*, 148 Alabama, 134; *Katzenberger* v. *Lawo*, 90 Tennessee, 238; *Hestonville &c. R. R.* v. *Philadelphia*, 89 Pa. St. 210; *In re Washington Street Ry. Co.*, 115 N. Y. 442; *Central National Bank* v. *Worcester H. R. Co.*, 13 Allen, 105; *Egan* v. *Cheshire St. Ry. Co.*, 78 Connecticut, 291; *Savannah &c. R. Co.* v. *Williams*, 117 Georgia, 414; *Rafferty* v. *Central Traction Co.*, 147 Pa. St. 579; *Bloxham* v. *Consumers' &c. Co.*, 36 Florida, 519; *City of Chicago* v. *Evans*, 24 Illinois, 52, 55; *Citizens' R. Co.* v. *Pittsburg*, 104 Pa. St. 522; *Clinton* v. *Iowa*, 37 Iowa, 61; *Lieberman* v. *R. R.*, 141 Illinois, 140; Baldwin, Am. Railroad Law, 9; *Birmingham R. Co.* v. *Jacobs*, 92 Alabama, 187; *Diebold* v. *Ky. Traction Co.*, 24 Ky. L. R. 1275; Elliott on Railroads (2d ed., Ch. XLIV).

The essential thing, however, is not the classification of the operating company under the corporation laws of the State, but the nature of the operation within the intent of the Interstate Commerce Act. *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566.

The mere use of electric power rather than steam does not take a railroad out of the sphere of the Interstate Commerce Law. *Malott* v. *C. & E. St. & Electric Ry. Co.*, 108 Fed. Rep. 313; *Diebold* v. *Ky. Traction Co.*, 25 Ky. L. Rep. 1275 (77 S. W. Rep. 674); *Riggs* v. *St. Francois Co. Ry.*, 120 Mo. App. 335; *Stillwater & St. R. Co.* v. *Boston &c. R. Co.*, 171 N. Y. 589.

Nor does the fact that it carries no freight. Sections 1, 6, 15, 20 and 22 of the Statute.

The Interstate Commerce Commission has constantly assumed jurisdiction over this class of railroads. *Willson* v. *Rock Creek Ry.*, 7 I. C. C. 83 (decided in 1897); *C. & M. Electric R. R. Co.* v. *I. C. R. R. Co.*, 13 I. C. C. 20; *Beall* v. *W. A. & Mt. V. Ry.*, 20 I. C. C. 406; *C. & C. Traction Co.* v. *B. & O. S. W. R. R. Co.*, 20 I. C. C. 486.

This assumption of jurisdiction has generally been acquiesced in, there being now in the public records of the Commission between 3,000 and 4,000 electric-railway tariffs.

This assumption of jurisdiction was confirmed by Congress by the amendment in 1910 of § 15, withdrawing from the Commission the power to establish a through route between "street electric passenger railways not engaged in transporting freight in addition to their passenger and express business and railroads of a different character."

Even if prior to this amendment the Commission did not have the power, it was granted by the amendment and thereby the order was ratified. *Hamilton* v. *Dillon*, 21 Wall. 73, 88, 95; *Mattingly* v. *Dist. of Col.*, 97 U. S. 687, 690; *Nat. Bank* v. *Shoemaker*, 97 U. S. 692; *United States* v. *Heinszen*, 206 U. S. 370.

At least the amendment validated the order from the time it went into effect, which was June 10, 1910. *B. & O. R. R. Co.* v. *I. C. C.*, 221 U. S. 612.

Mr. Justice Lamar delivered the opinion of the court.

The Omaha & Council Bluffs Railway & Bridge Company was chartered as a Street Railroad Company under the laws of Iowa. It owned street car lines in Council Bluffs and, in 1887, was authorized by Congress to construct a bridge across the Missouri River and to operate thereon "steam, cable and street cars." (March 3, 1887, 24 Stat. 501, c. 356.) The Omaha & Council Bluffs Railway, chartered as a Street Railroad under the laws of Nebraska, owned the street car lines in Omaha and its suburbs, South Omaha, Benson, Dundee and Florence. This street railroad had no right of eminent domain and was not authorized to haul freight, being limited by its charter to carrying passengers only. By lease it acquired

the bridge and car lines in Council Bluffs which thereafter it operated as part of its system. Complaint having been made that certain interstate fares were unreasonable, a hearing was had before the Commerce Commission, which, on November 27, 1909 (17 I. C. C. 239),ordered a reduction in the rate between Council Bluffs, Iowa, and points beyond the Loop, in Omaha, Nebraska. The two companies, lessor and lessee, thereupon filed a bill in the United States Circuit Court for the District of Nebraska to enjoin the order. The case was heard before three Circuit Judges, who (179 Fed. Rep. 243) granted a temporary injunction.

The case was transferred to the Commerce Court, which, on October 5, 1911, dismissed the bill, 191 Fed. Rep. 40.

On the argument of the appeal in this court, the sole question discussed was whether the provisions of the Commerce Act as to railroads applied to street railroads, the appellant relying, among other things, on the fact that during the discussion in the Senate the author of the bill and Chairman of the Senate Committee to which it had been referred, said (17 Cong. Rec. Pt. IV, p. 3472) "that the Bill is not intended to affect the stage coach, the *street railway*, the telegraph lines, the canal boat, or the vessel employed in the inland or coasting trade, even though they may be engaged in interstate commerce, because it is not deemed necessary or practicable to cover such a multitude of subjects." After quoting § 1 [1] and this statement and construing it in the light of the broad scope of the act, the Commerce Court held that the meaning of the statute could not be determined from statements used in debate. We concur in that view. The act must

[1] SEC. 1. That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by

be interpreted by its own terms, and we must look to it as a whole, in order to determine whether it applies to Street Railroads, carrying passengers between cities divided by a state line.

The statute in terms applies to carriers engaged in the transportation of passengers or property by railroad.

But, in 1887, that word had no fixed and accurate meaning, for there was then, as now, a conflict in the

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means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) from one State or Territory of the United States or the District of Columbia to any other State or Territory or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of the property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier," as used in this act, shall include express companies and sleeping car companies. The term "railroad," as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property. (24 Stat. 379.)

decisions of the state courts as to whether street railroads were embraced within the provisions of a statute giving rights or imposing burdens on railroads. The appellants cite decisions from twelve States holding that in a statute the word "railroad" does not mean "street railroad." The defense cite decisions to the contrary from an equal number of States. The present record discloses a similar disagreement in Federal tribunals. For not only did the Commerce Court and the Circuit Court differ, but it appears that the members of the Commission were divided on the subject when this case was decided and also when the question was first raised in *Willson* v. *Rock Creek Ry. Co.*, 7 I. C. C. 83.

This conflict is not so great as at first blush would appear. For all recognize that while there is similarity between railroads and street railroads, there is also a difference. Some courts, emphasizing the similarity, hold that in statutes the word "Railroad" includes Street Railroad, unless the contrary is required by the context. Others, emphasizing the dissimilarity, hold that "Railroad" does not include Street Railroad unless required by the context, since, as tersely put by the Court of Appeals of Kentucky, "a street railroad, in a technical and popular sense, is as different from an ordinary railroad as a street is from a road." *Louisville & Portland R. R. Co.* v. *Louisville City Ry. Co.*, 2 Duvall, 175.

But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word "Railroad" will include Street Railroad. On the other hand, if the act was aimed at Railroads proper, then Street Railroads are excluded from the provisions of the statute. Applying this universally accepted rule of construing this word, it is to be noted that ordinary

railroads are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street Railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for the use of a single community, even though that community be divided by state lines, or under different municipal control. When these street railroads carry passengers across a state line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. Street railroads transport passengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight "between States," "between States and Territories," "between the United States and foreign countries." The act referred to Railroads which were required to post their schedules—not at street corners where passengers board street cars, but in "*every depot, station or office where passengers or freight are received for transportation.*" The railroads referred to in the act were not those having separate, distinct and local street lines, but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce.

Every provision of the statute is applicable to railroads. Only a few of its requirements are applicable to street railroads which did not do the business Congress had in contemplation and had not engaged in the pooling, rebating and discrimination which the statute was intended to prohibit. This was recognized in *Willson* v. *Rock*

Creek Ry. Co., 7 I. C. C. 83, where, although it was held that the statute applied to a street railroad between Washington, D. C., and a point in Maryland, the Commission nevertheless said (7 I. C. C. 88): "It may be conceded that this class of railroads was not specifically within the contemplation of the framers of that law, for the evils which it was intended to remedy would, in the nature of the case, but rarely arise in the management of such roads in their dealing with the public."

Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad "subject to the act" being such that they could not be obeyed by street railroads because of the nature of their business and character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word "railroad" cannot be construed to include street railroad.

But it is said that since 1887, when the act was passed, a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight, express and the mail for long distances at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight. The case was heard on demurrer, with the opinion of the Commission treated as a part of the record. It indicates that at some points the line is on private property, but where this is and to how great an extent does not appear. Indeed, the record does not show that electricity was used as a motive power, though, in the light of modern methods, that may possibly be assumed. But it affirmatively appears that the company was chartered as a street railroad, and hauls no freight and is doing only a business appropriate to a street railroad.

So that whatever the motive power or the size or speed of the cars is immaterial. In any event, there were "street cars" referred to in the act of Congress authorizing the construction of the Bridge from Council Bluffs to Omaha (24 Stat. 501). The company used such cars and did a street passenger business only. It laid its tracks in crowded thoroughfares of those cities and their suburbs and it is manifest that Congress did not intend that these tracks should be connected with Railroads for hauling freight cars and long trains through and along the streets of Omaha and Council Bluffs.

It is contended, however, that the amendment of June 18, 1910, 36 Stat. 539, 553, c. 309, shows that Congress considered that street railroads were under the jurisdiction of the Commission inasmuch as it then provided that "the Commission shall not establish any through route, classification or rate between street electric passenger railways not engaged in . . . transporting freight . . . and railroads of a different character." It is contended on the other hand that in that statute Congress distinctly recognized that a street electric road was "a different character of railroad," and apprehending that the broad language of the amendment of 1910 might be construed to take in street railroads, this provision was inserted out of abundant caution to prevent that result, as in the case of establishing routes wholly by water, which certainly were not within the terms of the original Act.

This section of the act of 1910, however, having been passed after the order was made by the Commission, Nov. 27, 1909, is not before us for construction and, manifestly, cannot be given a retrospective operation, though the Government insists that it should be given a prospective operation and in its brief contends that "even if the Commission's order was without lawful authority at the time it was made (Nov. 27, 1909) the amendment of 1910 either ratified it altogether, or, at least, validated

it for the future," and, therefore, it was contended "that the judgment should be affirmed, or if not affirmed as rendered, should be modified to set aside the order only in its operation prior to June 18, 1910," on which day the amendment as to electric street passenger cars became effective. *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Lowrey* v. *Hawaii*, 206 U. S. 206; *B. & O. R. R.* v. *I. C. C.*, 221 U. S. 612, are cited to show that Congress might ratify what had not been originally commanded. The first two decisions relate to transactions of a nature entirely different from that here involved; and, in the *Baltimore & Ohio Case*, which was more like this on its facts, the parties pending the suit stipulated that the order should apply only to the future, and it was said that the "question of the authority of the Commission at the time the order was made has become a moot one" (621). There was no such stipulation here, and there being nothing to show that Congress attempted an express ratification, and it being open whether the amendment was intended to confer a jurisdiction not previously given, the motion of the Government to make the order of November 27, 1909, effective from June 18, 1910, cannot prevail.

The decree of the Commerce Court is reversed and that of the three Circuit Judges made permanent.

Reversed.

MR. JUSTICE PITNEY did not hear the argument and took no part in the decision of this case.

MISSOURI PACIFIC RAILWAY COMPANY *v.* TUCKER.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 52. Submitted November 14, 1912.—Decided June 16, 1913.

To require a railroad company to charge such rates for transportation as prevent it from obtaining a reasonable return for the service rendered amounts to deprivation of property without due process of law in violation of the Fourteenth Amendment and is beyond the power of the State. *Atlantic Coast Line* v. *North Carolina Commission*, 206 U. S. 1.

Rates that a railroad company may charge for transportation as fixed by the legislation of a State are presumptively valid, but not conclusively so; and the company is entitled to have the question of whether the prescribed rates are confiscatory and therefore deprive it of its property without due process of law determined in appropriate judicial proceedings.

A common carrier is not at liberty to accept or decline shipments of lawful merchandise but must accept them and name to the shipper the rate of transportation.

While it may be within the power of the State to impose double or treble damages on a carrier for overcharging transportation rates, it is beyond its power to impose a fixed amount as liquidated damages in every case regardless of, and as a general rule many times in excess of, the actual damages. To do so would deprive the carrier of its property without due process of law in violation of the Fourteenth Amendment.

A state statute which does not permit a carrier to have the question of sufficiency of rates determined by a court of competent jurisdiction, and which imposes such conditions upon the appeal for judicial relief as works an abandonment of the right rather than face those conditions, is unconstitutional as depriving the carrier of its property without due process of law. ***Ex parte Young***, 209 U. S. 123, 147.

That part of the statute of Kansas of 1905 establishing maximum rates for transportation of oil, gasoline, etc., which fixes $500 as liquidated damages in favor of the shipper for any excess charge regardless of the amount thereof, is so arbitrary and oppressive as to render it

unconstitutional under the Fourteenth Amendment as taking the property of the carriers without due process of law.

82 Kansas, 222, reversed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of the statute of 1905 of the State of Kansas establishing maximum rates for transportation of oil, gasoline, etc., which fixes five hundred dollars as liquidated damages for violations of the act, are stated in the opinion.

Mr. Bailie P. Waggener for plaintiff in error:

The act is, on its face, in conflict with the Constitution of the United States, and denies the railway companies the equal protection of the law.

When the railroad company is called to account for a violation of the law, it may then, and not until then, question the rates. The Supreme Court of Kansas has so construed the statute. *C., M. & St. P. R. R. Co.* v. *Minnesota*, 134 U. S. 418, 458.

Violation of this section of the act is not made a misdemeanor, and no public officer is charged with its enforcement. The unreasonableness of the rates, therefore, cannot be tested or questioned in a comprehensive bill in equity. The company can initiate no affirmative action.

The judgment in one case would not be *res judicata* as against any other shipper seeking to collect the penalty. The statute is void on its face under *Ex parte Young*, 209 U. S. 123, 146.

The statute of Kansas involved in this case is far more drastic, arbitrary and unreasonable than the statute of Nebraska, declared unconstitutional in *Mo. Pac. Ry.* v. *Nebraska*, 217 U. S. 207, and see also *C., M. & St. P. Ry. Co.* v. *Minnesota*, 134 U. S. 460.

While the railway company is testing the validity of the law as to one shipment, either the confiscatory rates are in force or enormous penalties are accruing against

the carrier for non-observance of the statutory schedules. The remedy afforded must be adequate, or it is not due process of law. *Smyth* v. *Ames*, 169 U. S. 466, and see also *Davidson* v. *New Orleans*, 96 U. S. 102.

The construction placed upon the act by the Supreme Court of Kansas in effect closes all approach to the courts by the carrier for relief from unreasonable and confiscatory legislative rates. To provide a remedy which is unreasonable, and which is so onerous and impracticable as to substantially give none at all, renders the law invalid, although what is termed a remedy is in fact given. *McGahey* v. *Virginia*, 135 U. S. 662, 694; *Ex parte Young*, *supra*.

The act is class legislation of the rankest character, arbitrary and unreasonable, and denies to railroad companies the equal protection of the law.

The rates prescribed by the schedule in the act are unreasonable and confiscatory, and deprive the railroad company of its property without compensation, and without due process of law, and deny to it the equal protection of the law.

Mr. John S. Dawson, Attorney General of Kansas, *Mr. S. N. Hawkes*, *Mr. Richard Henry Towne* and *Mr. John W. Tucker*, *pro se*, for defendant in error:

No violation of the due process clause of the Fourteenth Amendment is shown in the statute involved in this case.

There being no showing of any reduction in rates of oil transported, there can be no violation by the legislation of the due process clause of the Fourteenth Amendment. Because an article may be carried at a loss the rate is not necessarily unreasonable.

Under the rule of commercial necessity, certain commodities are at times transported at a figure below the average of tariffs, sometimes at an actual habitual loss. The fact that such rate may be prescribed as to a particu-

lar commodity will not from that fact alone lay the prescription open to the imputation of unreasonableness. *State* v. *Minn. & St. L. R. Co.*, 80 Minnesota, 191; *S. C.*, aff'd 186 U. S. 257; *State* v. *Railroad Co.*, 57 So. Rep. 673; *Reagan* v. *Farmers' L. & Tr. Co.*, 154 U. S. 362, 412.

In so flagrant a case of discrimination as here shown, public interest, public policy, and public welfare demand adequate means for fixing rates at least as low as those habitually given the most favored shipper, and especially is this applicable to an integral product, the theme of such notorious comment and animadversion as the oil traffic. *Ala. & V. R. Co.* v. *Mississippi R. R. Com.*, 203 U. S. 496; *Seaboard Air Line Co.* v. *Florida*, 203 U. S. 261.

Public interest and even custom, under the guise of "commercial necessity," may outweigh the usual considerations entering into the fixing of a rate. Carriage at habitual loss is of so common occurrence that the courts take judicial notice of the usual course of business in that regard, and will refuse to condemn as unreasonable a prescription of that nature, when falling within the rule of necessity or demanded by public interest. *McCue* v. *Nor. Pac. R. Co.*, 25 L. R. A. (N. S.) 1001; *S. C.*, aff'd, 216 U. S. 579; see also cases compelling a road to put on additional trains at a positive loss, whether it be for public safety, or mere personal convenience. *Atlantic Coast Line* v. *North Car. Com.*, 206 U. S. 1; *Mo. Pac. Ry. Co.* v. *Kansas*, 216 U. S. 262. And as to other requirements, *Consumers' Co.* v. *Hatch*, 224 U. S. 148; *Memphis* v. *Postal Tel Co.*, 164 Fed. Rep. 342.

Legislation fixing rates of transportation is presumptively reasonable, and the burden is on plaintiff in error to show that the rate is unreasonable from every angle. *Texas & P. R. Co.* v. *R. R. Com.*, 192 Fed. Rep. 280; *Railroad Commission* v. *Cumberland Tel. Co.*, 212 U. S. 414, see, also, *So. Pac. Cov. R. R. Com.*, 193 Fed. Rep. 699.

If the statute be doubtful, the court will presume that

the legislature intended the enactment of a valid, sensible and just law, Black on Interpretation, 87, and that the legislature did not attempt to transcend the rightful limits of its authority. *Id.* 89. Every act is presumed to be valid and constitutional until the contrary is shown. *Id.* 93, and cases there cited; see also *Sinking Fund Cases*, 99 U. S. 700; 1 Willoughby on Constitutional Law, 20, 23.

Charges must be reasonable, is the requirement of the law, as expressed by the cases. As to the question of reasonableness, the test is not alone if it be compensatory to this or that particular individual. *Reagan* v. *Farmers' Co.*, 154 U. S. 362, 412.

Reasonableness should be determined from average normal conditions. *C. & G. T. R. Co.* v. *Wellman*, 143 U. S. 680; *Covington & L. T. Co.* v. *Sandford*, 164 U. S. 578; *Dow* v. *Biedleman* (Ark.), 5 S. W. Rep. 297; *S. C.*, aff'd, 125 U. S. 680; *St. L. & S. F. R. Co.* v. *Gill*, 54 Arkansas, 101; *S. C.*, aff'd, 154 U. S. 649; *Purdy* v. *Erie R. Co.* (N. Y.), 48 L. R. A. 669.

The legislature is given, under the police power, not only the clear right to fix rates, in which it necessarily is given wide discretion, but when the legislature shall directly fix the rate, the rule that the question of reasonableness is a judicial one does not apply, but the rate fixed must be reasonable. Judicial determination does not precede the execution of the law, but on attempted enforcement it may be invoked in a proper case. *Budd* v. *New York*, 143 U. S. 517, and note 5 L. R. A. 559; *Munn* v. *Illinois*, 94 U. S. 113.

The State is simply farming out the operation of public utilities. See *Smyth* v. *Ames*, 169 U. S. 466, 544, holding that a railroad corporation maintaining a highway under the authority of the State may not fix its rates with a view solely to its own interests, and ignore the rights of the public.

This exercise of legislative discretion is subject to judicial supervision to no greater extent than is like exercise in any applications of the police power; the occasion for judicial determination does not arise until the law is applied as effectual.

This is an action for damages expressly given by the statute, not a penalty. If it were for a penalty, the only remedy therefor at common law would be an action in debt on the statute. This action would be trespass on the case at common law. This action sounds in tort. *Smith* v. *Chicago & N. W. Ry. Co.*, 49 Wisconsin, 443; *Heiserman* v. *Burlington Ry. Co.*, 63 Iowa, 736; *Graham* v. *Railway Co.*, 53 Wisconsin, 473.

It is not necessary that the statute to be constitutional must be weighted with a clog to its enforcement so as to give to the party affected an opportunity to obtain a judicial annulment of the legislation, not only as to himself, but as to every other person similarly affected.

That would mean that every penalty imposed, whether corporal or pecuniary, on behalf of the public, and as well every remedy given private parties damaged through infractions of the law, must be subject to some means of judicial investigation of the reasonableness of the requirement, in depriving the malefactor of property, or the tortfeasor in private injuries, if the one or the other shall be conducting business charged with public use or interest.

If that be the law, there is no legislative discretion in the case of business charged with public use and interest.

It is the province of the legislature to provide what the law shall be, and the duty of the court to determine and declare what the law is with reference to a given state of facts. McGehee on Due Process of Law, 77; *Roller* v. *Holly*, 176 U. S. 398; *Ex parte Young*, can be clearly distinguished from this case.

The act is not class legislation.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

By an act of February 17, 1905, the legislature of the State of Kansas prescribed a schedule of maximum rates to be charged by common carriers for the transportation, between points in that State, of "illuminating oil, gasoline, fuel oil, or crude petroleum, in cans, barrels, tanks or tank cars," and provided that every such carrier "which shall demand, exact or receive for such transportation or delivery any sum in excess of the rates hereby made lawful, shall be liable to any person injured thereby in the sum of five hundred dollars as liquidated damages, to be recovered by action in any court of competent jurisdiction, together with a reasonable attorney's fee, to be fixed by the court." Laws, 1905, c. 353, p. 589.

In December, 1906, there were shipped from Humboldt, Kansas, to Cawker City, in that State, 25 barrels of fuel oil, of which J. W. Tucker was the consignee. The shipment was carried from the point of origin about 253 miles over the railroad of the Santa Fe Company to Concordia, and thence to the point of destination, about 47 miles, over the line of the Missouri Pacific Railway Company. According to the statute the charge for the entire transportation should have been $12.00, but the Missouri Pacific Company demanded and collected therefor from Tucker, the consignee, $3.02 in excess of that sum. He thereupon brought an action in one of the courts of the State, under the act before named, to recover from that company $500 as liquidated damages and a reasonable attorney's fee, to be fixed by the court. The company defended upon the grounds that the statutory rates were confiscatory and void, and that the statute, and particularly the provision for the recovery of $500 as liquidated damages, was so arbitrary and unreasonable as to be repugnant to the due process of law and equal protection

clauses of the Fourteenth Amendment to the Constitution of the United States. Other defenses, based on the state constitution, were interposed, but we need not notice them. The plaintiff recovered a judgment for the $500, which was affirmed by the Supreme Court of the State, the Federal questions being decided adversely to the company, 82 Kansas, 222, and the latter prosecutes this writ of error.

As the right of recovery and the judgment sustaining it were rested upon the provision imposing a liability for liquidated damages in the sum of $500, we come at once to the question of the validity of that provision under the Fourteenth Amendment.

Primarily it is to be observed that the rates prescribed by the legislature, while presumptively valid, are not conclusively so; that to require the company, in the operation of its road, to give effect to rates which prevent it from obtaining a reasonable return for the service rendered to the public is to deprive it of its property without due process of law; and that whether the prescribed rates are thus in excess of the State's power (see *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission,* 206 U. S. 1, 24–26, and cases cited) is a question which the company is entitled to have determined in appropriate judicial proceedings. And it also is to be observed that the act of 1905 and other laws of the State, as construed by the state court, afford the company no opportunity for securing a judicial determination of the validity of these rates otherwise than as it may do so in a defensive way when charged, in a case like this or in some criminal prosecution, with failing to give effect to them.

Being a common carrier, the company is not at liberty to accept or decline shipments of oil. It must receive and carry them when offered and must be ready to name to shippers the rates at which that service will be rendered. If the statutory rates permit a reasonable return they are

controlling; if they prevent it they are invalid. But of their obligatory character the company is not the judge. And yet it must choose whether it will give effect to them or no, and then must abide the result of its action. If they be so unreasonably low as to be invalid it cannot give effect to them without sustaining a serious and irreparable loss; and if effect be not given to them and they be subsequently adjudged lawful, the enforcement of the prescribed liabilities and penalties will likewise entail a most serious loss, for the transactions involved must necessarily be numerous. In one of the briefs it is said that the intrastate oil shipments on the company's lines in Kansas in a single year are as many as 10,000. Thus it will be perceived that the position of the company, with no right itself to institute a proceeding to determine for itself and all shippers the validity of the legislative rates, is one of exceeding perplexity.

On the other hand, the interests of shippers and consumers of oil must be considered no less than those of the carrier. Experience teaches that to secure adherence to rates, even when lawfully prescribed, it is essential that deviations from them be discouraged by adequate liabilities and penalties.

It is in the light of these considerations that the validity of the provision imposing a liability for liquidated damages in the sum of $500 for every charge in excess of the legislative rates must be tested.

It will be perceived that this liability is not proportioned to the actual damages. It is not as if double or treble damages were allowed, as often is done, and as we think properly could have been done here. Nor is it as if there would be difficulty in proving or ascertaining the actual damages, thereby furnishing a reason for prescribing a liquidated amount reasonably approximating the probable damages, taking one case with another. *Chicago, Burlington & Quincy Railroad Co.* v. *Cram*, 228 U. S. 70. What the

statute does is to authorize a recovery of $500 in every case, whether the shipment be of one barrel, or of ten or twenty-five barrels, or of a tank car, and this although it is of common knowledge that the possible damages in respect of the charge for carrying any of these from one point in the State to another could never be more than a small fraction of that sum. In the present case the shipment was of 25 barrels for a distance of 300 miles, and the excess over the legislative rate, $3.02, was less than 1–150 of the authorized recovery.

The state court, although recognizing that the solution of the problem is not free from difficulty, reached the conclusion that "so long as the defendant [the carrier] cannot be made to suffer until a competent court has passed upon the justice of the legislative rates, the guarantees of the Federal Constitution are not infringed." But that this view fails to recognize the real plight of the carrier is made plain by the following extract from the opinion in *Ex parte Young*, 209 U. S. 123, 147:

"If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

"It is urged that there is no principle upon which to

base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested, the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event."

What was said in that case is conclusive of the question here. True, the act then under consideration subjected the officers and agents of the carrier to penalties not found in the act now before us, but, notwithstanding this, we think the liabilities and penalties imposed by the Kansas statute bring it within the controlling principle of that

decision. As applied to cases like the present the imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law and therefore in contravention of the Fourteenth Amendment. See *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 111; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 286.

Upon this ground the judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

THE MINNESOTA RATE CASES.

SIMPSON ET AL., CONSTITUTING THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA *v.* SHEPARD.

SAME *v.* KENNEDY.

SAME *v.* SHILLABER.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Nos. 291, 292, 293. Argued April 9, 10, 11, 12, 1912.—Decided June 9, 1913.

These appeals involve the validity of the orders of the Railroad and Warehouse Commission, and the legislative acts, of the State of Minnesota prescribing maximum rates for freight, and a maximum fare of two cents a mile for passengers. The rates relate to traffic exclusively between points within the State. It was contended, however, that as applied to cities on the State's boundary, or to places within competitive districts crossed by the state line, the rates disturbed the relation previously existing between interstate and intrastate rates, thus imposing a direct burden upon interstate commerce and creating discriminations as against localities in other States. The rates were also assailed as confiscatory. The rates are sustained as to the Northern Pacific and Great Northern companies. In the case of the Minneapolis and St. Louis Railroad Company, the rates are held to be confiscatory in view of the particular facts shown with respect to that road.

In reviewing the questions involved, the court *held* that:

The Federal Constitution gives Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control and to provide effective regulation of that intercourse as the National interest may demand.

The commerce that is confined within one State, and does not affect other States, is reserved to the State. This reservation is only of that power which is consistent with the grant to Congress.

The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried

on; and the full control by Congress over the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations.

Even without action by Congress, the commerce clause of the Constitution necessarily excludes the States from direct control of subjects embraced within the clause which are of such a nature that, if regulated at all, their regulation should be prescribed by a single authority. There is thus secured the essential immunity of interstate intercourse from the imposition by the States of direct burdens and restraints.

There remains to the States the exercise of the power appropriate to their territorial jurisdiction in making suitable provision for local needs. The State may provide local improvements, create and regulate local facilities, and adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved.

Where matters falling within the state power, as above described, are also by reason of their relation to interstate commerce within the reach of the Federal power, Congress must be the judge of the necessity of Federal action; until Congress does act, the States may act.

The paramount authority of Congress enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, Congress may displace local laws by substituting laws of its own.

Regulation of railroad rates by the State began with railroad transportation.

The authority of the State to prescribe what shall be reasonable charges for intrastate transportation is state-wide, unless it be limited by the exertion of the constitutional power of Congress with respect to interstate commerce and its instruments. As a power appropriate to the territorial jurisdiction of the State it is not confined to a part of the State, but extends throughout the State—to its cities adjacent to its boundaries as well as to those in the interior of the State. If this authority of the State be restricted, it must be by virtue of the actual exercise of Federal control and not by reason merely of a dormant Federal power, that is, one which has not been exerted.

Congress in the Act to Regulate Commerce expressly provided that the provisions of the act should not extend to transportation wholly within one State.

Having regard to the terms of the Federal statute, the familiar range

of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court recognizing and upholding such authority, this court finds no foundation for the proposition that the Act to Regulate Commerce contemplated interference with the authority of the State to prescribe reasonable rates for the exclusively internal traffic throughout the extent of its territory.

Neither by the original act nor by its amendment, has Congress sought to establish a unified control over interstate and intrastate rates; it has not set up a standard for intrastate rates or prescribed, or authorized the Federal commission to prescribe, either maximum or minimum rates for intrastate traffic.

The fixing of reasonable rates for intrastate transportation was left by the act where it had been found, that is, with the States and the agencies created by the States to deal with that subject.

Under the established principles governing state action, Minnesota did not transcend the limits of its authority in prescribing the rates here involved, assuming them to be reasonable intrastate rates. It exercised an authority appropriate to its territorial jurisdiction and not opposed to any action thus far taken by Congress.

The interblending of operations in the conduct of interstate and local business by interstate carriers, and the exigencies that are said to arise with respect to the maintenance of interstate rates by reason of their relation to intrastate rates, are considerations for the practical judgment of Congress.

When the situation becomes such that adequate regulation of interstate rates cannot be maintained without imposing requirements with respect to such intrastate rates of interstate carriers as substantially affect interstate rates, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments, the measure of the regulation it should supply.

It is the function of the court to interpret and apply the law already enacted, but not, under the guise of construction, to provide a more comprehensive scheme of regulation than Congress has decided upon.

In the absence of Federal action, effect may not be denied to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power.

As to whether the rates are confiscatory, *held* that:

The rate-making power is a legislative power and necessarily implies a range of legislative discretion.

This court does not sit as a board of review to substitute its judgment for that of the legislature or of the commission lawfully constituted by it, as to matters within the province of either.

The question involved is whether, in prescribing a general schedule of rates involving the profitableness of the intrastate operations of the carrier, taken as a whole, the State has superseded the constitutional limit by making the rates confiscatory.

While the property of railroad corporations has been devoted to a public use, the State has not seen fit to undertake the service itself and the private property embarked in it is not placed at the mercy of legislative caprice, but rests secure under the constitutional protection which extends not merely to the title, but to the right to receive just compensation for the services given to the public.

For fixing rates the basis of calculation of value is the fair value of the property of the carrier used for the convenience of the public. *Smyth* v. *Ames*, 169 U. S. 466.

There is no formula for the ascertainment of the fair value of property used for convenience of the public, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts.

Where a carrier does both interstate and intrastate business, to determine whether a scheme of maximum intrastate rates affords a fair return the value of the property employed in intrastate business and the rates prescribed must be considered separately, and profits and losses on interstate business cannot be offset.

Assets and property of a carrier not used in the transportation business cannot be included in the valuation as a basis for rate making.

Property of a railroad company cannot be valued for a basis of rate making at a price above other similar property solely by reason of the fact that it is used as a railroad, and increases in value over cost cannot be allowed beyond the normal increase of other similar property.

In valuing the plant of a carrier for purpose of fixing rates there should be proper deductions for depreciation.

Where the constitutional validity of state action is involved general estimates of division between interstate and intrastate business cannot be accepted as adequate proof to sustain a charge of confiscation.

In the cases of the Northern Pacific and Great Northern companies on the examination of estimates of value, and methods of apportionment, *held* that the proof is insufficient to justify a finding that the rates were confiscatory; and in each of those cases the decrees are reversed with instructions to dismiss the bill without prejudice.

In the case of the Minneapolis and St. Louis Railroad Company, *held*, in view of the special facts appearing, that the margin of error in the estimates and calculations was not sufficient to affect the result. The decree in that case, adjudging the rates to be confiscatory, is therefore affirmed with the modification that the State may apply to the court by bill or otherwise, as advised, for a further order or decree whenever it shall appear that by reason of a change in circumstances the rates fixed by the State's acts and orders are sufficient to yield to this company reasonable compensation for the services rendered.

184 Fed. Rep. 765, modified and in part affirmed and in part reversed.

THESE appeals involve the validity of the orders of the Railroad and Warehouse Commission, and the legislative acts, of the State of Minnesota prescribing maximum rates for freight, and a maximum fare of two cents a mile for passengers. The rates relate to traffic exclusively between points in the State. It was contended, however, that as applied to cities on the State's boundary, or to places within competitive districts crossed by the state line, the rates disturbed the relation previously existing between interstate and intrastate rates, thus imposing a direct burden upon interstate commerce and creating discriminations as against localities in other States. The rates were also assailed as confiscatory.

Mr. Thomas D. O'Brien for appellants:

The judgments in the court below enjoined the enforcement of three distinct schedules. The first of these was prescribed September 6, 1906, by an order of the Railroad & Warehouse Commission after an exhaustive hearing. It was accepted by the carriers and put in operation, and remained in effect until the entry of the judgments in 1911. The subsequent enactment of the passenger and commodity rates by the legislature of Minnesota had no effect upon the validity of the merchandise rates thus voluntarily accepted by the carriers. Acceptance of those

rates by the officers of the carriers bound the stockholders of each company. The statutes of Minnesota prohibit a change in a lawfully adopted rate without application to the Railroad & Warehouse Commission, hence, the complainants as stockholders had no cause of action to enjoin the further observance of the rates upon classified merchandise.

The Circuit Judge, following the findings of the Master, determined that the carriers were entitled to a return of seven per cent. upon the cost of reproducing new the property devoted to the service.

This was ascertained by assuming that the railway was non-existent, and that it was necessary for the company now to acquire, under present conditions, its right of way and terminal lands, and construct and equip the railway as it now actually exists.

By adding to the market value, as that term has always been understood, allowances for severance damage, cost of acquisition and railway value, the lands were given a purely fictitious value ranging from 130 to 225 per cent. of the present market value.

Part of the lands so valued were those over which an easement for right of way had been donated by the Government; others, in which an easement had been acquired by condemnation; others, lands purchased for future use and not now actually used for transportation purposes, and areas in streets in municipalities upon which easements had been granted.

Property other than lands may be included under the term "construction." The assumption of reproduction being similarly fictitious as to this class of property, necessarily led to an equally false conclusion.

By following literally the fiction of reconstruction, excessive unit prices were employed upon the theory that construction upon such a large scale would tend to enhance prices. Allowances were made for contingencies to

be encountered, engineering expenses and interest during construction, covering the period arbitrarily taken for completion of the assumed work. At the same time the fact that the property, being valued, constituted a completed plant actually earning large net returns was ignored.

Although it was found that depreciation existed, no allowance was made on that account; nor was a definite amount of depreciation found, but there was offset against depreciation "knowledge derived from experience, adaptation to the needs of the public, readiness to serve, together with physical appreciation of roadbed, and a reasonable amount of working capital always on hand for immediate use."

There is no relation between the depreciation of a specific item of property, and the items thus sought to be offset against it, nor can a Master be thus permitted to strike a balance mentally, rather than give specific amounts appearing upon each side of the account.

The result arrived at by this method bore no relation to present value. It consisted in imagining every existing condition to be absent, and substituting as facts purely fictitious and imaginary conditions and circumstances.

Therefore the court having found as a basis upon which to predicate rates, only "reproduction cost," arrived at by improper methods and assumptions, and having entirely disregarded every other element going to make up fair value, and having erroneously included many items of property upon which carriers are not entitled to earn a return, there was no finding of value upon which to compute the return, and therefore, no basis for the finding of confiscation. *Knoxville* v. *Water Co.*, 212 U. S. 1; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 17; *Railroad Commission* v. *Cumberland Tel. C. Co.*, 212 U. S. 414; *Omaha* v. *Water Co.*, 218 U. S. 18.

To entitle a physical valuation, for rate making pur-

poses, to any consideration, it must be based upon an inventory which properly segregates the items of property. To this end land should be divided into four classes: (a) Donated right of way; (b) secured by condemnation; (c) purchased for prospective use; (d) secured by private purchase.

Construction should be divided between; (e) that procured or produced by the expenditure of private means; (f) that procured or purchased by the use of earnings.

(a) Where a right of way has been donated free of cost it should not be included in the aggregate amount upon which to base a return, since it is a mere privilege granted by the public to the carrier, to enable it to make its actual investment reasonably profitable, without the imposition of exorbitant rates. Thus considered, the public and the carrier obtain the full benefit of the grant.

(b) Lands secured under the right of eminent domain should never be valued at more than original cost, since only an easement is thus obtained, and that through the exercise by the carrier of the governmental power delegated to it under a free grant from the State.

(c) Lands purchased for prospective use should not be included, if for no other reason than this; that the practice would permit a carrier to speculate in land, the carrying charges being paid by the public.

In addition to the fact that a large portion of the estimated cost of construction accrued from the use of earnings, the items "engineering," "contingencies" and "interest during construction" should not have been included in the inventory.

Since the valuation is of specific items actually in existence, there can be no contingencies, and since no money is to be borrowed, but upon the contrary the railway is a going concern, producing net earnings, there is no interest to be paid. The amounts claimed necessarily depend upon the assumptions indulged in by the estimator. The

evidence now before this court shows these to vary to an extent sufficient alone to demonstrate the impropriety of their use.

Assuming that present physical value is an element to be considered in arriving at the fair value which, as said in *Smyth* v. *Ames*, should be taken as the basis upon which to compute the return, the method here adopted for arriving at the "cost of reproduction new" does not determine present value.

The fictions of re-acquisition and re-construction were taken throughout as elements of value in themselves, and the irresistible conclusion is that the total amount found bears no closer relation to the truth than do the assumptions upon which that amount was based.

During recent years this method for determining present value has been frequently pressed upon the attention of the Interstate Commerce Commission, resulting in its complete rejection by that distinguished body. *Spokane* v. *N. P. Ry. Co.*, 15 I. C. C. Rep. 376; *Western Advance Cases*, 20 I. C. C. Rep. 307.

The record teems with specific instances of gross overvaluation, amounting in the aggregate to an appalling sum, and if the method itself is now approved of, as a matter of law, not only supervising officers, but courts as well, will be helpless in any effort to establish reasonable values.

In the cases of the Northern Pacific and Great Northern companies, the capital stock admittedly represented properties of enormous values not devoted to railway purposes. Notwithstanding this, the return which the Master finds would be received under the rates in controversy, would amount to a net return of seven per cent. upon the proportion of the capital stock assignable to Minnesota intrastate business based upon the Master's methods for the assignment of value, while seven per cent. upon "cost of reproduction new," as here found, would result in a return,

basing the computation upon the capitalization when the suits were commenced, of more than fifteen per cent. to the Northern Pacific and more than eighteen per cent. to the Great Northern.

The total capitalization of the three railway companies here considered (Minneapolis & St. Louis, Minnesota proportion only) was, January 1, 1905, in millions 596. Reproduction cost as found 931, or 156.26% of capitalization. Apply this ratio to all the railways in the United States, and we have capitalization of about 18,890 millions; reproduction cost over 29,000 millions; actual excess about 10,627 millions. To return seven per cent. upon the excess alone would require the sum of 744 million dollars per annum. It is impossible to imagine that confiscation can be predicated upon a result arrived at by any such method.

Mr. Edward T. Young, also for the appellants:

In holding that the rates here involved violated the commerce clause of the Federal Constitution, the court below held in effect:

That in addition to its plenary power of control over interstate commerce, Congress also has power to prescribe the standards and rules for the regulation of intrastate commerce, so as to prevent intrastate rates from indirectly affecting interstate rates.

That notwithstanding the express declaration of the Interstate Commerce Act that its provisions do not apply to intrastate commerce, that act does nevertheless so apply, and in such application it amounts to an exercise by Congress of its power over intrastate commerce.

That differences between interstate and intrastate rates amount to discrimination between localities as the same is prohibited by the Interstate Commerce Act, though the intrastate rates be prescribed by public authority and the interstate rates be fixed by the carriers themselves, without regard to the inherent reasonableness or unreason-

ableness of either set of rates as to the traffic to which they apply, and in all such cases the intrastate rates are void.

That under the Interstate Commerce Law, railroads have such a vested right to the inviolable enjoyment of interstate rates fixed by themselves regardless of their inherent reasonableness, that they may, under the plea of discrimination between localities, prevent a State from fixing fair and reasonable rates for its internal commerce, if such reasonable intrastate rates differ from, and might therefore indirectly, menace the continuation of the interstate rates made by the carriers.

That the indirect or incidental effect of state-made rates on interstate rates may amount to unconstitutional "interference" if it is substantial in degree, and the extent of such indirect effect, and whether it is sufficient in degree to be unconstitutional must be determined by the court as a question of fact whenever it is raised.

Each of the foregoing propositions is at variance with the theory of our dual form of government, and contrary to every decision of this court. *Gibbons* v. *Ogden*, 9 Wheat. 194; *Sands* v. *Manistee R. I. Co.*, 123 U. S. 288, 295; *Ill. Cent. R. Co.* v. *McKendree*, 203 U. S. 514; *Howard* v. *Ill. Cent. R. Co.*, 207 U. S. 463; *M. P. R. Co.* v. *Kansas*, 216 U. S. 262.

As to apportioning value, the court below erroneously made the apportionment of the value of the property used in common in interstate and intrastate business on relative revenue for the year of the test, thereby assigning to intrastate business a much higher proportion of the value of the property than the volume of intrastate business for the same period measured in ton and passenger miles, bears to the interstate business done in the State.

As to apportioning common cost, there is a difference in the cost of handling interstate and intrastate freight, arising mainly out of the different train service it receives.

There are two classes of freight trains, the "through," which runs from end to end of a division without change, and the "local," which transacts business at intermediate stations. The local train is the more expensive, and the through trains the less expensive.

Each of these trains carries state and interstate commerce. Therefore, to determine the cost of each class of business it is necessary to first ascertain the cost of each class of trains upon each division; next to ascertain the tonnage of each class of freight upon these respective trains; and thereafter, the determination of the average cost per ton-mile of each class, state and interstate, is a comparatively simple mathematical problem.

The appellants by the testimony of their accountant, as well as by the admissions made upon cross-examination of witnesses called by appellees, demonstrated that by the application of modern cost accounting, the cost of each class of service could be determined with substantial mathematical accuracy.

The court below erroneously based its findings on opinions expressed by railway officials who confessedly ignored the most important consideration going to make up the difference in cost, namely, whether the articles were carried upon through or local trains upon each operating division, and without attempting to distinguish between cost items incurred in the actual hauling of freight, and those incurred in the general maintenance of the business.

The extra cost thus imposed upon intrastate business was much in excess of what the facts would warrant.

Mr. George T. Simpson, Attorney General of the State of Minnesota, and *Mr. Lyndon A. Smith* were on the brief, for appellants:

Mr. Clifford Thorne, Mr. H. T. Clarke, Jr., Mr. Geo. A. Henshaw, Mr. John Marshall, Mr. Royal C. Johnson,

Mr. P. W. Dougherty, Mr. Grant G. Martin, Mr. U. G. Powell, Mr. John H. Henderson, Mr. Dwight N. Lewis, Mr. William D. Williams, Mr. W. H. Stutsman and *Mr. H. R. Oglesby,* by leave of the court, filed a brief as *amici curiæ* on behalf of the Railroad Commissions of Nebraska, Iowa, Kansas, South Dakota, North Dakota, Oklahoma, Missouri and Texas:

Mr. Charles W. Bunn for appellees.

The state rates operate directly and necessarily upon commerce among the States, destroying that commerce and the regulation thereof by Federal authority.

This is affirmed as a fact, as to which it was found by the Master:

In 1906 the railway companies were carrying passengers and freight locally within Minnesota at the same charges established for the same distances by interstate tariffs filed with the national commission.

The Railroad and Warehouse Commission made a reduction in all class rates, effective November 15, 1906, amounting from twenty to twenty-five per cent. The legislature (Laws of 1907, c. 232) ordered a reduction amounting to over seven per cent. in charges on grain, lumber, live animals and coal, and by Laws 1907, c. 97, reduced passenger fares from three to two cents per mile.

Among other things, the Master found that local and interstate freight and passengers are handled by the same employés and facilities, are carried in the same trains and in the same cars and must be handled in this manner in the exercise of fair economy; that much the larger part of business transported in or through Minnesota is interstate; that conditions of transportation of traffic in Wisconsin, Minnesota, North and South Dakota, and, as to much traffic, conditions in Montana, are the same whether the transportation is local in a State or between

States; that both the local and interstate traffic in question move from the same and similar points of origin and to the same and similar destinations, and that any substantial change in local rates without a corresponding change in interstate rates would constitute unjust discrimination.

It was found also that the local rates were reduced to a basis below the interstate rates for much longer hauls, established under the Interstate Commerce Act and partly by express orders of the Interstate Commerce Commission, applicable to traffic between Minnesota and other States and from one State to another extending across Minnesota; and that the local rates decreased to such an extent with distance that extending them for considerable distances beyond the state line showed enormous discrepancies between the extended state rates and the established interstate rates.

The operation on interstate commerce of the said Minnesota laws and commission orders was found to be immediate, direct and substantial in the following respects: (a) in destroying interstate rates; (b) in destroying interstate commerce by substituting local in lieu of interstate rail movement; (c) in turning over to one carrier the interstate commerce of another, which would occur in many cases unless the competing carrier would adopt the state rate for its interstate business; (d) in destroying the interstate commerce of cities of other States, should the carriers serving them fail to apply to them rates on the basis of the Minnesota rates.

On the findings appellees contend that:

If the carrier should obey the Minnesota laws and orders and reduce its rates to the line of the State, it could not maintain its previously existing higher interstate rates to and from points beyond the state line without violating the third section of the Interstate Commerce Law, which forbids unjust discrimination; that the only

answer attempted to be made to this contention, viz., that such a difference in rates would be only a difference and not a discrimination, is unsound. Appellants contend that the power of the States to regulate their internal commerce is equal to the power of Congress to regulate commerce among the States; that the two regulating authorities are like sovereigns foreign to and independent of each other, and consequently Congress cannot prohibit, under its power to regulate commerce, discriminations in favor of commerce wholly within a State as against commerce among the States. Appellees contend, however, that this sort of discrimination was largely, even principally, what the commerce clause in the Federal Constitution was intended to prevent; that the power over commerce with foreign nations and among the States is vested in Congress as absolutely as it would be in a single general government were there no States. *Gibbons* v. *Ogden*, 9 Wheat. 197; *Champion* v. *Ames*, 188 U. S. 321, 347; *Welton* v. *Missouri*, 91 U. S. 275, 280; *Mobile* v. *Kimball*, 102 U. S. 691, 696; *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196, 203; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 493; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 349. The framers of the Constitution never intended that the legislative power of the Nation should find itself incapable of disposing of a subject-matter specifically committed to its charge. *In re Rahrer*, 140 U. S. 545, 562.

Congress may lawfully exercise, and has long exercised, exclusive power to regulate navigation and commerce by water, even navigation and commerce wholly local within a State. Such action implies no direct power to invade the State, but is necessarily incidental to the power expressly granted to Congress to regulate commerce among the States. *Gibbons* v. *Ogden*, 9 Wheat. 1, 204; *Wisconsin* v. *Duluth*, 96 U. S. 379, 387; *The Daniel Ball*, 10 Wall. 557; *The Hazel Kirke*, 25 Fed. Rep. 601; *Oyster*

Police Steamers, 31 Fed. Rep. 763; *Patterson* v. *Bark Eudora*, 190 U. S. 169; *In re Garnett*, 141 U. S. 1; *The Lottawanna*, 21 Wall. 558, 577. The power to regulate commerce is the true foundation of the laws of Congress touching navigation. It is difficult to maintain the suggestion in *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, and *In re Garnett*, 141 U. S. 1, that Congress has any broader authority than the commerce power by virtue of Art. III, § 2, of the Constitution, granting judicial power to the Federal courts; because, if this grant of judicial power be held to contain a grant of power to Congress over maritime matters, it would appear to follow that, by the grant of power to the courts to try actions between States, between citizens of different States and between aliens and citizens of a State, Congress was given power to pass laws applicable to those controversies.

In *Gibbons* v. *Ogden*, p. 195, it was held within the power of Congress to regulate those concerns wholly within a State which affect the States generally and which it was necessary to interfere with for the purpose of executing any general power of the government. On this principle it was said, p. 203, *Gibbons* v. *Ogden*, that the legislature of the Union could interfere with and overrule state health and inspection laws wherever necessary for national purposes. See Chief Justice Savage in *Steamboat Co.* v. *Livingston*, 3 Cow. 713, 745.

The power of Congress over land commerce is identical with, and as complete as, its control over water commerce. *The Daniel Ball*, p. 565; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 341; *California* v. *Cent. Pac. R. R. Co.*, 127 U. S. 1, 39; *In re Debs*, 158 U. S. 564, 589, 591.

The power of Congress incidentally to regulate, where necessary, internal affairs of a State is a doctrine of general application not confined to commerce by water and is based on the necessity for such exercise of power in order

to make effective some grant of power to Congress in the Federal Constitution. *McCulloch* v. *Maryland*, 4 Wheat. p. 426, was planted upon this doctrine and holds that the Federal power modifies, and where necessary may overrule, state power of taxation. In *Southern Railway Company* v. *United States*, 222 U. S. 20, the court rested on the same ground the power of Congress to regulate as to safety appliances all the cars and engines of a railway, including those engaged wholly in commerce within a State, the reason being that such regulation of internal commerce is necessary to make the National power effective. The same principle has been applied to hours of labor of railway employés engaged partly in commerce local within a State. *Baltimore & Ohio R. R. Co.* v. *Int. Comm. Comm.*, 221 U. S. 612; *State* v. *Chi., Mil. & St. P. Ry. Co.*, 136 Wisconsin, 407. The same doctrine was involved in *United States* v. *Coombs*, 12 Pet. 72.

The rule therefore is universal that the powers of Congress extend incidentally to affect the internal affairs of the States and control state power and state action so far as may be necessary to execute at all times and under all conditions every authority vested in Congress by the Constitution.

On this established principle state power to fix local rates is subordinate to the commerce power of Congress; as much subordinate as it is to other provisions of the Federal Constitution, e. g., state power to fix rates is controlled by the Federal prohibition against violation of the obligation of contracts and by the Fourteenth Amendment prohibiting States from taking property without due process of law.

The power of Congress has been executed in some respects fully, in other respects partially, by the Act to Regulate Commerce. The third section prohibits not some but all undue or unreasonable preference or advantage. To this extent it is a complete exercise of the power

vested in Congress and, as before shown, must be held to forbid preference and advantage in favor of local commerce within a State as compared with interstate commerce. This law requires rates to be filed and gives the commission power to fix rates. Such rates are in either case the only lawful rates and no judicial inquiry lies as to their reasonableness. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

If the act of Congress forbids discrimination as between interstate business and business local within a State, collision is established between the state law and the act of Congress. It must be admitted that the power of Congress is paramount and that the state power must give way. *McCulloch* v. *Maryland*, 4 Wheat. 405–6, 426; *Gulf, Col. & Santa Fe Ry. Co.* v. *Hefley*, 158 U. S. 98; *Northern Securities Co.* v. *United States*, 193 U. S. 332, 335, 347; *Gibbons* v. *Ogden*, pp. 195, 209; *License Cases*, 5 How. 574; *Employers' Liability Cases*, 207 U. S. 463.

It appears therefore to be a pure question of fact whether the state rates do destroy, impede or directly operate upon interstate commerce and interstate rates. If they do, the Federal power is shown to be ample to prohibit such interference. *Louis. & Nash. R. R. Co.* v. *Eubank*, 184 U. S. 27.

The argument, that if the state rates are reasonable in and of themselves they cannot be objected to and therefore the whole inquiry is as to their reasonableness, is fallacious. The court determines only whether rates are confiscatory and cannot entertain the broader question of their reasonableness, nor can this be determined by any mathematical formula. Public policy of the Nation may be to permit carriers a large return. Public policy of a State may be to permit but a small one. In such a conflict National authority controls. There being no mathematical measure of reasonableness, Congress has set up a standard—

the published tariff and the findings of the Interstate Commerce Commission. This standard controls commerce among the States and any state rate inconsistent therewith, or destructive thereof, is unreasonable measured by that standard.

In many cases state action has been for the purpose of protecting home industry, of destroying commerce among the States by substituting therefor state commerce, of destroying National regulation by substituting therefor state regulation. See report of Iowa Railroad Commission for year ending December 7, 1909, p. 14; *In Matter of Freight Rates*, 11 I. C. C. 209; *Saunders* v. *Southern Express Co.*, 18 I. C. C. 415; *Meredith* v. *St. Louis Southwestern Ry. Co.*, recently decided by the Interstate Commerce Commission.

The proviso in § 1 of the Interstate Commerce Act, that the act does not apply to transportation wholly within a State, shows that Congress has not exercised its complete power and has intended to leave to the States the regulation of transportation which is wholly, completely and purely internal, but it does not indicate an intention of Congress to exercise less than its full power to prevent discriminations against transportation among the States, less than its complete power to prevent the favoring of any State at the expense of other States and of the country at large. It cannot be read as a grant of power, either to States or to carriers chartered by them, to create against the people of other States and their traffic whatever discrimination a State may choose.

It is not contended that any transportation is free from regulation. In view of the proviso of § 1 of the Commerce Act, the States may fix local rates and prevent discriminations as between them as well as prevent discriminations against local commerce in favor of interstate commerce. State power and state action must give way to whatever extent is necessary to complete an efficient National

control over the subjects committed to that control by the Constitution; that reduction by a State of its domestic rates is permissible until such reduction interferes with interstate rates, or with the free flow of interstate commerce, or with the regulation under congressional authority of commerce among the States, but that the States have no right to reduce their local rates below the interstate rates lawfully established and thus to impede or destroy interstate commerce, or destroy the regulations and rates touching the same as they have been established under National authority.

Mr. Pierce Butler, with whom *Mr. Hale Holden*, *Mr. Jared How* and *Mr. William D. Mitchell* were on the brief, also for appellees:

Appellants' contentions in regard to the valuation of railroad properties are unsound. Appellees contend that the well established principles of law applicable are:

Railroad corporations are persons within the meaning of the Fourteenth Amendment;

Railroad property is private property, subject to public use under just regulations. *Railroad Commission Cases*, 116 U. S. 307, 331; *C., M. & St. P. Ry. Co.* v. *Minnesota*, 134 U. S. 418, 458; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 399, 410; *Int. Com. Comm.* v. *C. G. W. Ry. Co.*, 209 U. S. 108.

The hazards affecting railroad property inhere in the fact that while in a measure such property performs a function of the State there is no guaranty to its owners against loss.

The right to increase in value inheres in the very terms of the constitutional guaranties against taking property without due process of law.

Public grants of lands to railroad companies in Minnesota constitute contracts based upon valuable considerations. *First Div. St. Paul & Pacific R. Co.* v. *Parcher*, 14

Minnesota, 297; *City of St. Paul* v. *St. Paul & Sioux City Ry. Co.*, 23 Minnesota, 469; *State* v. *Winona & St. Peter R. R. Co.*, 21 Minnesota, 472; *M. & St. L. R. R. Co.* v. *Koerner*, 85 Minnesota, 149; *Northern Pacific Ry. Co.* v. *Townsend*, 190 U. S. 267.

Income derived from the public through rates charged for services rendered belongs to the owners of the property. Under laws requiring the publication of charges, the amounts thereof must be collected and are *prima facie* reasonable. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Brymer* v. *Butler Water Co.*, 179 Pa. St. 331, 36 Atl. Rep. 249.

There must be a fair return upon the reasonable value of the property at the time it is being used for the public, unless, in exceptional cases, the enforcement of rates necessary for that purpose would be unjust to the public. *Stanislaus County* v. *San Joaquin Canal Co.*, 192 U. S. 201; *San Diego Land Co.* v. *Jasper*, 189 U. S. 439; *San Diego Land Co.* v. *National City*, 174 U. S. 739; *Knoxville* v. *Water Co.*, 212 U. S. 1; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *S. C.*, 157 Fed. Rep. 849; *Mo., Kans. & Tex. Ry. Co.* v. *Love*, 177 Fed. Rep. 493; *Shepard* v. *Nor. Pac. Ry. Co.*, 184 Fed. Rep. 765.

The original cost of the property as well as the outstanding capital in stocks and bonds, while admissible in evidence, are matters for consideration only in so far as in the particular case they are competent evidence of present value.

Where original cost or outstanding capital have appeared to be in excess of present value the courts have declined to determine the validity of rates upon either as a basis of value. *Smyth* v. *Ames*, 169 U. S. 546; *San Diego Land Co. Cases*, *supra*.

The general rule is that where the property has been efficiently located, constructed and maintained and results of operation as a whole show volume of traffic and

earnings sufficient to support the property, pay reasonable dividends and leave something in addition, the true value is in excess of the mere cost of reproduction of the physical or tangible property. Cases *supra*, and *A., T. & S. F. Ry. Co.* v. *Sullivan*, 173 Fed. Rep. 456; *M., K. & T. Ry. Co.* v. *Love*, 177 Fed. Rep. 493; *Waterworks Co.* v. *Kansas City*, 62 Fed. Rep. 853, 864; *Southern Pac. Co.* v. *Bartine*, 170 Fed. Rep. 725, 751; *Metropolitan Trust Co.* v. *Houston & Tex. Cent. Ry. Co.*, 90 Fed. Rep. 683; *Spring Valley Waterworks* v. *San Francisco*, 124 Fed. Rep. 574, 594; *Kennebec Water District* v. *Waterville*, 97 Maine, 185; *Water District* v. *Water Co.*, 99 Maine, 371; *Proposed Advance in Freight Rates*, 9 I. C. C. 402; *Ames* v. *Railroad*, 64 Fed. Rep. 165; *Cotting* v. *Kansas City Stock Yards*, 82 Fed. Rep. 850; *S. C.*, 183 U. S. 79, 91.

Cost of reproduction of the tangible property is an element of prime importance in determining present value.

A carrier owning property which is valuable for railroad terminals has in law the right to the full and true value of them as measured by every legitimate standard—generally for any and all uses for which it might be suited. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Boom Co.* v. *Patterson*, 98 U. S. 403.

Railroad utility is a higher use than ordinary business, residence or farm use and makes for higher cost and therefore higher value. Vol. 10, Nor. Pac. Exam. Morgan Nor. Pac.

As to operating expenses:

The intrastate rates fixed by the Commission cannot be sustained, on the ground that the earnings from all business—interstate and intrastate—in the State are sufficient. That ground cannot be sustained.

It is necessary to take into account the cost of doing the business covered by the rates complained of.

Intrastate business, both freight and passenger, has

been found in all the reported cases to have been attended by much higher cost than corresponding interstate business.

The cost of intrastate business may be indicated:

By the relation of the cost of the intrastate unit (the ton mile or the passenger mile) to the cost of the corresponding interstate unit.

By the relation of the cost of the intrastate business in proportion to revenue derived therefrom to the cost of the corresponding interstate business in proportion to revenue derived therefrom, i. e., the cost to earn a dollar in the one class to the cost to earn a dollar in the other.

The relation of the cost of the intrastate business in proportion to revenue derived therefrom to the cost of all business on the system—or within the State—in proportion to the revenue derived therefrom.

The revenue derived from the intrastate business must be found and compared with the cost thereof.

The exact cost of doing either class of business, either intrastate or interstate, has never been kept by any railroad company. There is no recognized method for the keeping of such cost in railroad accounts, or for its ascertainment with mathematical exactness.

The courts and men experienced in such matters agree that, while the exact cost of doing either of such classes of business cannot be shown, the opinions of experts, familiar with conditions bearing upon the relation of cost of the intrastate business to that of the interstate business, furnish the only guide for such determination.

In all reported cases it has been found that it costs substantially more to earn a dollar in the intrastate than in the corresponding interstate business—and very much more to produce a ton-mile in the intrastate freight business than in the interstate freight business.

That the cost to produce a ton-mile (where the relation of cost is expressed on that basis) has never been found to

be less than two and one-half times as much in the intrastate business as in the interstate business.

Neither the "straight ton-mile basis" or the "straight revenue basis" has ever been found to fairly divide freight operating expenses between the intrastate business and the interstate business, because the intrastate business costs more per ton per mile and has always been found to cost more in proportion to revenue than in the corresponding interstate business.

In all cases a fair division of freight operating expenses may be made between intrastate business and interstate business on either the "Equated Ton-Mile Basis" or the "Equated Revenue Basis," as found and used by the master. Each basis may be expressed in terms of the other and the result is the same whether one or the other is used.

It costs more to produce an intrastate passenger mile than an interstate passenger mile, but such proportion of extra cost is usually, if not always, less in the passenger department than the corresponding extra cost of producing an intrastate ton-mile in the freight department.

Passenger operating expenses may fairly be divided between intrastate business and interstate business on the "Equated Passenger Mile Basis" or the "Equated Revenue Basis" as found and employed by the Master in these cases.

The value of services rendered the public is greater than the rates therefor in effect immediately before the making of the orders and laws complained of.

Rates have been reduced greatly from time to time. The cost of other service and of commodities generally—especially of labor and supplies required to operate railroads—has advanced greatly during recent years.

A rate of return to be reasonably adequate must be higher than seven per cent upon the value of the property used, at the time it is used, to render the service covered by the rates.

As to fair returns from banks, railroads, and public utility corporations, etc., see *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Ames* v. *Union Pacific R. R. Co.*, 64 Fed. Rep. 165, 186, 187; *Pennsylvania R. R. Co.* v. *Philadelphia County*, 68 Atl. Rep. 676; *Brymer* v. *Butler Water Co.*, 179 Pa. St. 331, *S. C.*, 36 Atl. Rep. 249, 36 L. R. A. 250; *Spokane* v. *Northern Pacific Ry. Co.*, 15 I. C. C. 417; Report Railroad Securities Commission, under § 16 of the act of June 18, 1911; *M., K. & T. Ry. Co.* v. *Love*, 177 Fed. Rep. 493, 501, and numerous cases cited in the opinion of the court below.

Mr. W. P. Clough filed a brief in behalf of the Northern Pacific Railway Company and the Great Northern Railway Company, appellees.

Mr. Edmund S. Durment, by leave of the court, filed a brief as *amicus curiæ*.

Mr. Justice Hughes delivered the opinion of the court.

These suits were brought by stockholders of the Northern Pacific Railway Company, the Great Northern Railway Company and the Minneapolis and St. Louis Railroad Company, respectively, to restrain the enforcement of two orders of the Railroad and Warehouse Commission of the State of Minnesota and two acts of the legislature of that State prescribing maximum charges for transportation of freight and passengers, and to prevent the adoption or maintenance of these rates by the railroad companies. In addition to the companies, the Attorney-General of the State, the members of the Railroad and Warehouse Commission, and also, in the cases of the Northern Pacific and Great Northern companies, certain representative shippers, were made defendants.

The order and acts, which by their terms related solely to charges for intrastate transportation, were as follows:

(1) The Commission's order of September 6, 1906, effective November 15, 1906, fixing the maximum class rates for general merchandise.

(2) The act, approved April 4, 1907, to take effect May 1, 1907, prescribing two cents a mile as the maximum fare for passengers, except for those under twelve years of age, for whom the maximum rate was to be one cent a mile. (Laws of 1907, c. 97.)

(3) The act, approved April 18, 1907, to take effect June 1, 1907, fixing maximum commodity rates for carload lots of specified weights. (Laws of 1907, chap. 232.)

(4) The Commission's order of May 3, 1907, effective June 3, 1907, establishing maximum "in-rates" for designated commodities in carload lots from St. Paul, Minneapolis, Minnesota Transfer and Duluth to certain distributing centers. (No complaint is made of this order in the case of the Minneapolis and St. Louis Railroad Company.)

In 1905, the legislature of Minnesota had adopted a joint resolution directing the Commission "to undertake the work of securing a readjustment of the existing freight rates in this State, which will give a more uniform system of rates throughout the State and a uniform scale of percentages which each class rate shall bear to the first class, the readjustment to secure a substantial reduction in the existing merchandise rates." (Laws of 1905, c. 350, p. 631.) Pursuant to this direction, the Commission conducted a prolonged investigation. Public hearings were held extending over several months in which the railroad companies took an active part, submitting a large amount of testimony with respect to the matters involved. The Commission found the existing class rates for general merchandise to be unreasonable and by the order of September 6, 1906, above mentioned, established

a new schedule of lower maximum rates. These rates were applied to the classes shown by the so-called "Western Classification" between stations in the State. This was a classification, by which articles were arranged in groups with reference to their general character, value and the cost of transportation, and with modifications made from time to time; it had long been used by common carriers in the west and northwest as a basis for rates, the commodities of each class taking the same rate under like conditions. In Minnesota, however, a large number of commodities, amounting to several hundred, had, by the intervention of the Commission, been removed from this classification by the application of special rates known as "commodity rates" or reduced in class so that the Western Classification in operation in that State was very materially different from that in general use as a basis of rates in other States.

The schedule of rates set forth in the order of September 6, was such that each rate for each class bore an exact relation to each other rate. The plan of the schedule was this: For first-class merchandise an allowance of 11.02 cents per cwt., was made for terminal charges and in addition, there was permitted a hauling charge of .98 of a cent for each five miles up to 200 miles, for each ten miles over 200 miles up to 400 miles, and for each twenty miles over 400 miles up to 500 miles. For other classes, the rates were a fixed per centum of the corresponding rates for the first class. These rates were maximum terminal rates; that is, they related to transportation to or from certain important stations called terminal or distributing stations. Between stations neither of which is so designated the rates of the schedule might be increased by five per centum.

The railway companies complied with this order and the class rates were put into effect on November 15, 1906.

The Commission also had under consideration a reduction in the commodity rates, at which certain commodities

such as grain, coal, lumber, and live stock were moved in carload lots. Because of the agitation with respect to these charges, the railroad companies voluntarily reduced their rates about ten per cent. on grain (September 1, 1906) and coal (October 22, 1906). The Commission, however, on December 14, 1906, ordered a further reduction in the commodity rates. The railroad companies brought suit in the Circuit Court of the United States and obtained a temporary injunction restraining the enforcement of this order. Thereupon the legislature passed the act above mentioned, approved April 18, 1907, which established a new schedule of maximum commodity rates in all respects like that fixed by the Commission save that the reduction was not so great. The act grouped the various commodities which it embraced in several classes, for which different rates were prescribed. There was no fixed percentage relation between the classes and no regular rate of progression of the various charges with increasing distance. In other respects the method of making the schedules was similar to that adopted in the order of September 6, 1906, the hauling charge decreasing as the mileage increases.

The remaining action with respect to freight rates was taken by the Commission in the order of May 3, 1907, for the purpose of securing more favorable in-rates to a number of minor jobbing centers. It applied to certain commodities, such as groceries in carload lots, and was supplemental to the order of September 6, 1906, being intended to reëstablish the relation which had previously existed between the in-rates to these distributing points and the general schedule of class rates.

The railroad companies obeyed this order of May 3, 1907, as they had that of September 6, 1906, and they also put into effect the passenger rate of two cents a mile. They were about to adopt the commodity rates fixed by the act of April 18, 1907, when these suits were brought and a

temporary injunction restrained them from taking that course. The other rates, that is, the class rates, special in-rates and the passenger rates were permitted to remain in force pending the suits.

The complainants assailed the acts and orders upon the grounds (1) that they amounted to an unconstitutional interference with interstate commerce, (2) that they were confiscatory and (3) that the penalties imposed for their violation were so severe as to result in a denial of the equal protection of the laws and a deprivation of property without due process of law. The jurisdiction of the Circuit Court was sustained in *Ex parte Young*, 209 U. S. 123, where it was also held that the penal provisions of the acts, operating to preclude a fair opportunity to test their validity, were unconstitutional on their face. The Circuit Court then referred the suits to a special master, who took the evidence and made an elaborate report sustaining the complainants' contentions. His findings were confirmed by the court and decrees were entered accordingly, adjudging the acts and orders (with the exception, in the case of the Minneapolis and St. Louis Railroad Company, of the order of May 3, 1907) to be void and permanently enjoining the enforcement of the prescribed rates, freight and passenger, and their adoption or maintenance by the railroad companies. 184 Fed. Rep. 765.

From these decrees, the Attorney-General of the State and the members of the Railroad and Warehouse Commission prosecute these appeals.

The penal provisions being separable (*Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 395; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53, 54; *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 443; *West. Un. Tel. Co.* v. *Richmond*, 224 U. S. 160, 172), the question of the validity of the acts and orders fixing maximum rates is presented in two distinct aspects, (1) with respect to their

effect on interstate commerce, and (2) as to their alleged confiscatory character.

First. As to interference with interstate commerce.

None of the acts and orders prescribes rates for goods or persons moving in interstate commerce. By their terms, they apply solely to commerce that is internal. Despite this obvious purport it has been found below that the inevitable effect of the State's requirements for intrastate transportation was to impose a direct burden upon interstate commerce and to create unjust discriminations between localities in Minnesota and those in adjoining States; and hence that they must fall as repugnant to the commerce clause and to the action of Congress under it. To support its conclusion, the Circuit Court presents an impressive array of facts drawn from the approved findings of the master. (184 Fed. Rep. 775–792.) Without giving all the details they embrace, these findings may be summarized as follows:

I. The railroad property of each of the three companies constitutes a single system. On June 30, 1906, the Northern Pacific Railway Company (a Wisconsin corporation) operated 7,695 miles of track, of which 1,625 miles were in Minnesota. The Great Northern Railway Company (a Minnesota corporation) at the same time operated 8,528 miles of track, of which 2,779 miles were in Minnesota. Their lines extend westerly from Superior, Wisconsin, and Duluth, Minnesota, and from St. Paul and Minneapolis, through the States of Minnesota, North Dakota, Montana, Idaho, Washington and Oregon, to the Pacific Coast. The Minneapolis and St. Louis Railroad Company (also a Minnesota corporation) operated 1,028 miles of track running from St. Paul and Minneapolis westerly and southerly to points in South Dakota and Iowa. In the case of each company, the movement of interstate and local traffic takes place at the same time, on the same rails, with the same employés, and largely

by means of the same trains and cars. There has never been a separation, and it is impracticable in the exercise of fair economy to make a separation, between the interstate and intrastate business in the case either of freight or of passengers. By far the larger part of the traffic is interstate. In the year 1906 the freight business of the Northern Pacific Company, local to Minnesota, was 2.67 per cent. of its entire freight business and 12.33 per cent. of its freight business touching the State, and its passenger business local to the State was 5.79 per cent. of its entire passenger business and 67.21 per cent. of its passenger business touching the State.

The conditions attending the transportation of passengers and freight are substantially the same for like distances within those portions of the States of Wisconsin, Minnesota, North Dakota and South Dakota reached by the lines of these companies, whether the transportation is interstate or wholly intrastate. Prior to the acts and orders in question, the companies had maintained rates which were relatively fair and not discriminatory as between interstate and intrastate business; and it is concluded that any substantial change in the basis of rates thus established due only to the fact that the transportation was interstate or was local to a State, and any substantial difference in rates as between the two sorts of traffic, would constitute unjust discrimination in fact.

II. The state line of Minnesota on the east and west runs between cities which are in close proximity. Superior, Wisconsin, and Duluth, Minnesota, are side by side at the extremity of Lake Superior. Opposite one another, on the western boundary of the State, lie Grand Forks, North Dakota, and East Grand Forks, Minnesota; Fargo, North Dakota, and Moorhead, Minnesota; and Wahpeton, North Dakota, and Breckenridge, Minnesota. The cities in each pair ship and receive, to and from the same localities, the same kinds of freight. The railroad com-

panies have always put each on a parity with the other in the matter of rates, and if there were a substantial difference it would cause serious injury to the commerce of the city having the higher rate. If the Northern Pacific Company failed to maintain as low rates on traffic in and out of Superior as on that to and from Duluth, its power to transact interstate business between Superior and points in Minnesota would be seriously impaired and the value of its property in Superior would be depreciated.

The maximum class rates fixed by the order of September 6, 1906, were from 20 per cent. to 25 per cent. lower than those theretofore maintained by the Northern Pacific and Great Northern Companies for transportation in Wisconsin, Minnesota and North Dakota, whether such transportation was local to one of these States or was interstate between any two of them. When the Northern Pacific Company, pursuant to this order, installed the new intrastate rates, it reduced its interstate rates between Superior and points in Minnesota to an exact parity with its rates from Duluth. Reduction was also made in the rates between both Duluth and Superior and the above-mentioned points on the western boundary so as to put the border cities in North Dakota on an equal basis with the neighboring cities in Minnesota. This reduction was substantial and, had it not been made, the places adjoining the boundary, but outside the State, could not have competed with those within. Although the Northern Pacific Company thereby suffered a substantial loss in revenue from its interstate business, it had the choice of submitting to that loss or suffering substantial destruction of its interstate commerce to these border localities in articles covered by the orders. At the same time, the Great Northern Company made similar reductions, although, in its case, the transportation between Duluth and points in Minnesota was interstate—its line passing through Wisconsin. The reason for these reductions was

to preserve the relation in rates from Duluth which had always existed between localities on the Great Northern line and those similarly situated on the line of the Northern Pacific, and to meet the reduced rates on the latter.

III. Moorhead, Minnesota, Fargo and Bismarck, North Dakota, Billings and Butte, Montana, are so-called jobbing centers. Rates had always been accorded to them by the Northern Pacific Company which would allow them to compete with their nearest neighbors and with St. Paul, Minneapolis and Duluth. The order of September 6, 1906, as supplemented by that of May 3, 1907, substantially reduced carload rates from the eastern terminals to Moorhead. This reduction would have given Moorhead an advantage in territory accessible to its jobbing industry not only as against Fargo, unless carload rates to Fargo were similarly reduced, but also as against Duluth, St. Paul and Minneapolis unless less-than-carload rates from these places to points accessible to Moorhead, which included a considerable territory in North Dakota, were proportionately reduced. If Fargo were protected as against Moorhead, it would have an advantage over Bismarck in territory common to them both and an advantage over the eastern terminals in territory common to them and to Fargo, unless carload rates from the eastern terminals to Bismarck and less-than-carload rates from those terminals to the territory accessible to Fargo were correspondingly reduced; and so on from distributing point to distributing point.

IV. Every rate comprehends two terminal charges, the initial and the final, and a haulage charge. It is declared to be a cardinal principle of rate-making that a rate for a longer distance should be proportionately smaller than one for a shorter distance; for even if the haulage charge in the former case were the same per mile, the rate per ton per mile should be less for the longer haul, as the terminal charges would be spread over a greater distance.

A comparison disclosed that the rates established by the order of September 6, 1906, and maintained by the Northern Pacific Company between St. Paul and Moorhead were in general substantially less than the proportion of the interstate rates maintained by the company to various points in North Dakota and Montana, based on the mileage in Minnesota as compared to that of the entire haul. Maintaining such a relation of rates involves, it is found, substantial and unjust discrimination in fact against the interstate localities.

V. After the installation by the Great Northern and Northern Pacific Companies of the rates prescribed by the order of September 6, 1906, it appeared that the sum of the local rates from St. Paul to Moorhead and from Moorhead to many points in North Dakota was less than the interstate rates theretofore maintained from St. Paul to these points. Both companies thereupon established rates from St. Paul to the North Dakota points as a rule no greater than the sum of the locals on Moorhead but substantially lower in general than the interstate rates in force when the order took effect. Maintaining interstate rates from St. Paul to North Dakota localities substantially greater than the sum of the locals based on the state line would have caused unjust discrimination in fact. The actual reason for the reduction in the interstate rates was to prevent transshipment at Moorhead in order to take advantage of the lower sum of the locals and to retain on its line traffic which might reach Moorhead over other lines by reason of competition, and, as to less-than-carload lots, to enable jobbers in the Twin Cities and Duluth to compete with those in Moorhead and Fargo in territory which otherwise the latter would have exclusively occupied by reason of their closer proximity.

VI. It is further held to be one of the fundamental dogmas of rate-making that the haulage charge per mile should not increase with increasing distance if the condi-

tions be the same. Under the progressive decrease in the haulage charge within the State, provided by the order of September 6, 1906, 100 pounds of merchandise transported by the Northern Pacific from St. Paul to Moorhead, 248 miles, would have been hauled for 48 miles, at the rate of .98 cents per ten miles, when Moorhead is reached. If the same haulage charge of .98 cents per ten miles were applied for the remaining distance to Spokane, 1,510 miles from St. Paul, (which is said to be taken as a fair example merely to illustrate the principle), it would produce a rate from St. Paul to Spokane on first-class merchandise of $1.79 per cwt. The Interstate Commerce Commission in the Spokane rate case fixed the reasonable rate on first-class merchandise from St. Paul to Spokane of $2.50 per cwt. Maintaining this rate and the state schedule in Minnesota at the same time necessarily involves the raising of the per mile haulage charge after the Minnesota state line has been crossed, or the charge of a higher rate within Minnesota for its mileage proportion of long-haul interstate business than for business local to the State which is carried under the same conditions, and hence is found to result in unjust discrimination in fact against localities west of the Minnesota line.

VII. For more than twenty-five years the Northern Pacific Company has maintained an equal basis of rates on merchandise between its eastern and western terminals respectively and Butte, Montana, and between its eastern and western terminals respectively and localities intermediate between them and Butte. Other railroads reaching Butte have during the same time maintained like rates to Butte from Sioux City, Omaha, St. Joseph and Kansas City on the east, and from San Francisco, Sacramento and Los Angeles on the west. Butte has been as the hub of a wheel with spokes representing equal rates to these various cities. Industries, it is said, have been born and have grown in reliance upon this parity of rates.

Intermediate points have had rates fixed in proportion to the Butte rates. Competition of markets and of carriers has brought this about. The Northern Pacific Company cannot maintain the state rates between its eastern terminals and Moorhead and at the same time its interstate rates from its eastern terminals to Butte without substantial discrimination in fact against Butte or localities intermediate between its eastern terminals and Butte. If it lowers its rates from its eastern terminals to Butte and intermediate stations to such an extent as to obviate this discrimination, it must, to preserve the relation which has always existed, lower to a like extent its rates from its western terminals to Butte and intermediate stations. Consequently, it is found that if the Northern Pacific Company maintains the commission-made rates between its eastern terminals and Moorhead it must either substantially discriminate in fact or destroy the general relation of rates which has existed for many years in the territory between the Missouri River and the Pacific Coast.

VIII. Prior to the taking effect of the order of September 6, 1906, the Great Northern and Northern Pacific Companies had established joint through rates in connection with other carriers from all localities east or south of Minnesota to all points in Minnesota west of St. Paul and Minneapolis. After the rates prescribed by this order were installed, the sum of the locals on St. Paul from all localities south and east of Minnesota to points in Minnesota west of St. Paul and Minneapolis, was substantially less than the then existing interstate rates for the through haul to such western points. To avoid the resulting discrimination in favor of St. Paul, the companies withdrew the existing interstate rates and established a new tariff no higher than the sum of the locals on St. Paul.

IX. Further illustrations are given of inequalities resulting from the reduced Minnesota rates as compared

with rates for like transportation under similar conditions into adjoining States, as, for example, from Moorhead easterly to Minnesota points and westerly into North Dakota, and also of the effects produced in the application of the state rates by reason of the difference in the distances from St. Paul at which the state line is reached on similar hauls over different lines. As the schedule of September 6, 1906, prescribes a fixed relation between rates for different distances and different classes, the conclusion is that if the rule must be adhered to in Minnesota, it cannot be departed from substantially because of the intervention of a state line at one distance or another without involving unjust discrimination in fact.

It is found further that while, after the order of September 6, 1906, became effective, both the Great Northern and the Northern Pacific Companies reduced certain interstate rates, as already mentioned, the reduction was not to such extent as to remedy the discrimination resulting from the fact that in most cases the general basis of rates within Minnesota was substantially lower than that maintained in North Dakota or upon traffic crossing the state line.

X. The similarity in the conditions of interstate and intrastate transportation is found also with respect to the commodities for which rates were prescribed by the act of April 18, 1907 (c. 232). The main lines and branches of the Northern Pacific and Great Northern Companies within Minnesota and North Dakota, with the exception of certain limited tracts, lie within grain fields, and grain is shipped in substantial quantities from nearly all stations in these fields to Duluth, Minneapolis and Superior. Shipments of coal originate at the head of the Lakes—that is, at Duluth or Superior—and find their destination at all localities served by the companies in Minnesota and eastern North Dakota. Shipments of lumber originate at Duluth, Cloquet, Little Falls and other

places in Minnesota, and are destined to points throughout Minnesota and North Dakota. Shipments of live stock are made in Minnesota, South Dakota and eastern Montana and go to South St. Paul or Chicago. So far as the conditions of transportation are concerned, it matters not, as to commodities moving eastwardly, whether the shipment is made in Montana, North Dakota or Minnesota or the transportation ends in Minnesota or in Wisconsin, and, as to commodities moving westwardly, whether the shipments are from Minnesota points or from Superior or whether they find their destination in Minnesota or in North Dakota. The conclusion is that to maintain the commodity rates for transportation wholly within Minnesota simultaneously with the interstate rates now in force would involve unjust discrimination and would seriously impair the interstate business of the companies, to avoid which it would be necessary to reduce the basis of the interstate rates to a substantial parity with that prescribed by the state law. It is also stated that if the rates fixed by chapter 232 of the Laws of 1907 should become effective, the rate on shipments of wheat, with milling-in-transit privileges, from points in Minnesota via Minneapolis to Chicago, would be automatically reduced and that unless all interstate rates between Minnesota points and Chicago via interior mill towns with similar privileges should be correspondingly reduced, Minneapolis would have a substantial advantage over such towns in its interstate rates.

XI. Prior to the act of 1907, fixing the rate of two cents a mile, the general basis of rates for passengers (of 12 years of age or over) between any two points on the Northern Pacific system, had been for some years three cents a mile. After the new state rate had been installed, the sum of the locals between Moorhead and other Minnesota points and Moorhead and points westerly thereof was less than the then-existing through interstate rates. The passenger

fare act took effect May 1, 1907, and in the first month thereafter the revenue from passengers on the Northern Pacific line between Moorhead and other Minnesota points increased 647 per cent. over that of the corresponding month of the preceding year, while, eliminating Moorhead business, the revenue from passenger business within the State decreased two per cent. In June, 1907, the second month, there were sold by the Northern Pacific Company, 4,037 tickets between St. Paul or Minneapolis, on the one hand, and Moorhead or East Grand Forks on the other, as compared with only 172 such tickets in the corresponding month of the year before; and in June, 1907, there were sold only 173 tickets between St. Paul or Minneapolis, and Grand Forks and Fargo, as compared with 984 such tickets in the corresponding month of the previous year. In May and June, 1906, only one cash full fare was collected on a train from Moorhead to St. Paul or Minneapolis. In those months in 1907 there were 1,168 cash full fares and 82 cash half fares so collected. Hence, it is said, the necessary, immediate and direct effect of the law was to deprive the Northern Pacific Company of a substantial amount of its interstate passenger business through Moorhead.

Notwithstanding the facility with which interstate passengers could avoid the discrimination against them by making two contracts with the company, it is found that discrimination in fact still existed against the interstate passenger who applying for a through ticket did not know that the sum of the locals on Moorhead was less than the through rate, against the passenger with a trunk which he could not check through unless on a through ticket, and against a passenger who was compelled to use a sleeping car. The Northern Pacific Company shortly remedied this discrimination by reducing all its interstate fares for passenger transportation through Moorhead to an amount no greater than the sum of the locals over

Moorhead. Before this reduction Wisconsin had fixed the maximum passenger fare at two cents a mile, and North Dakota at two and one-half cents a mile. The rates thereafter established by the Northern Pacific Company between St. Paul, for example, and points in North Dakota and beyond, and by the Northern Pacific Company jointly with other companies for transportation between points easterly of Minnesota and points on the line of the Northern Pacific, were in general less than the previous rates by approximately one cent per mile for the mileage in Wisconsin and Minnesota, and by one-half cent per mile for the mileage in North Dakota. It is concluded that these reductions were compelled to avoid unjust discrimination and in order that the companies might transact interstate passenger business freely and without impairment of volume.

There are added various hypothetical calculations of the losses which would have been sustained if the basis prescribed by the state acts and orders had been applied to the interstate business and to local business in other States. We shall have occasion later to refer to the actual results of the business of the railroad companies during the time that the rates fixed by the acts and orders (with the exception of the commodity rates) were in force, and to the effect upon revenue which the adoption of the commodity rates would have had.

The foregoing findings, as stated by the Master, were made "without regard to the justness or otherwise in fact of the interstate rates so affected by such local rates." The determination of the reasonableness of the interstate rates was not deemed to be within the province of the court.

The appellants do not concede the correctness of the findings in their full scope and insist upon qualifications. They deny that the evidence justified the finding that the

companies had maintained "an equable, that is, relatively fair basis of rates" prior to the acts and orders in question. The general or comprehensive system of interdependent and fairly related rates, each so equitably adjusted to the others that any local change must of necessity throw the whole out of balance, is declared to exist only in imagination—to be a fiction constructed in disregard of the facts of rate-making and without attention to the inconsistencies shown by the schedules which had been in force. The actual reductions in interstate rates, which followed upon the adoption of the state tariffs, were made, it is urged, in rates voluntarily established by the companies themselves which had not been declared to be reasonable by competent authority and in any case furnish no standard by which the validity of the action of the State, in the control of its internal affairs, should be judged. The appellants say that the local rates in Minnesota were incongruous and unreasonable; that frequent changes in the interest of favored shippers had been made through the filing of temporary intrastate tariffs until the practice was stopped by a statute of 1905 (Chapter 176) forbidding changes without the consent of the Commission; that with respect to grain and live stock, the principal agricultural products of the State, the companies maintained an "inharmonious jumble of arbitrary rates;" and that the acts and orders in question were designed to correct inequalities in the intrastate tariffs and to prescribe charges which, upon thorough investigation and after public hearings in which the companies participated, were found to be reasonable and were brought into suitable relation with each other by means of a scientific plan. And it is denied that unjust discrimination as against localities without the State can be predicated of the establishment of reasonable state rates.

It is also insisted that the prescribed intrastate freight rates were not in general lower than the existing interstate

rates. Reference is made to the long-distance traffic which, it is said, was moved within the State on proportionals of long-haul rates which were much below the local rates fixed by the State. It is pointed out that the Master found, in passing upon the question whether the rates were confiscatory, that the gross revenue which was derived from the intrastate freight business during the fiscal year ending June 30, 1908, (when all the rates in question were in force save the commodity rates), was greater per ton-mile than that derived in the same period from the interstate business within the State, being in the case of the Northern Pacific Company in the ratio of 1.4387 to 1 and in that of the Great Northern Company of 2.02894 to 1. The appellants also contest the validity of the argument based on an hypothetical extension beyond the state line of the "rate of progression" for additional distance which had been prescribed by the State solely with reference to internal traffic, and they submit illustrations of incongruities which they contend would be shown by a similar extension of the rate of progression disclosed by the former intrastate tariffs of the companies. Again, it is urged that the extent of the reductions attributable to the two-cent fare law may not be estimated properly by a comparison with the former maximum rate of three cents a mile. Various rates had been in force less than the maximum allowed. For the six years prior to the two-cent fare law the average rate per passenger per mile for intrastate transportation in Minnesota, on the Northern Pacific line, had ranged from 2.299 cents in 1901 to 2.435 cents in 1905, 2.406 cents in 1906, and 2.197 cents in 1907; [1] and during the same time the average rate per passenger per mile for interstate transportation in Minnesota varied from 2.075 cents in 1901, 2.027 cents in 1905, 1.949 cents in 1906, and 1.981 cents in 1907.[1] In the fiscal year ending

[1] The two-cent fare law was in force for two months of the fiscal year ending June 30, 1907.

June 30, 1908, with the two-cent fare law in force, the average rate per passenger per mile in Minnesota was 1.930 cents for intrastate and 1.928 cents for interstate carriage.

It is conceded, however, that the schedules fixed for intrastate transportation "necessarily disturbed the equilibrium theretofore existing between the rates on the two classes of business" (state and interstate) "on the boundary lines." This applies to the rates to and from the cities situated on opposite sides of the Red River of the North, the boundary between Minnesota and North Dakota, and to and from Duluth and Superior on the eastern boundary. The reduction of the state rates brought them below the level of the interstate rates in those instances in which formerly both had been maintained on a parity. So also, whatever may be said as to the nonexistence of a general or comprehensive system of equitably adjusted rates, it is clear that there are competitive areas crossed by the state line of Minnesota and that the State's requirements altered the existing relation between state and interstate rates as to places within these zones of competition and not merely as to the cities on the boundary of the State.

The situation is not peculiar to Minnesota. The same question has been presented by the appeals, now before the court, which involve the validity of intrastate tariffs fixed by Missouri, Arkansas, Kentucky and Oregon. Differences in particular facts appear, but they cannot be regarded as controlling. A scheme of state rates framed to avoid discrimination between localities within the State, and to provide an harmonious system for intrastate transportation throughout the State, naturally would embrace those places within the State which are on or near the State's boundaries; and, when these are included in a general reduction of intrastate rates, there is, of course, a change in the relation of rates as theretofore existing to

points adjacent to, but across, the state line. Kansas City, Kansas, and Kansas City, Missouri; East St. Louis, Illinois, and St. Louis, Missouri; Omaha, Nebraska, and Council Bluffs, Iowa; Cincinnati, Ohio, and Covington and Newport, Kentucky; and many other places throughout the country which might be mentioned, present substantially the same conditions as those here appearing with respect to localities on the boundaries of Minnesota. It is also a matter of common knowledge that competition takes but little account of state lines and in every part of the land competitive districts embrace points in different States.

With appreciation of the gravity of the controversy, the Railroad Commissioners of eight States [1] have filed their brief as *amici curiæ*, in support of the appeals, stating that, if the doctrine of the court below were accepted, the regulation by the States of rates for intrastate transportation would be practically destroyed. They say that "there is practically no movement of traffic between two towns within a State that does not come into competition with some interstate haul," and that "if the disturbance of the existing relation between competitive state and interstate rates is the correct criterion, no reduction can be made in state rates without interfering with interstate commerce." The Governors of three States, pursuant to a resolution of a conference of the Governors of all the States, have also presented, by leave of the court, their argument in defense of the position taken by Minnesota. They do not seek "to belittle the effect of the action of Minnesota on the business between the places" named in the findings, but they are convinced that if the principle announced by the Circuit Court is upheld, it can be made to apply by a showing of similar facts in virtually every State. Insisting that, under their reserved power, "the

[1] Nebraska, Iowa, Kansas, South Dakota, North Dakota, Oklahoma, Missouri and Texas.

right of the States to regulate their own commerce is as clear and broad as that of Congress to regulate interstate commerce," they assail the decision below, not upon the ground that it incorrectly sets forth conditions in Minnesota and adjoining States, but for what they consider to be "its plain disregard of the provisions of the Federal Constitution, which establish the relations between the Nation and the States." "The operation of these provisions," they maintain, "was not made to depend on geography or convenience or competition. They cannot apply in one State and not in another, according to circumstances as they may be found by the courts, because they are vital principles which constitute the very structure of our dual form of government."

The controversy thus arises from opposing conceptions of the fundamental law, and of the scope and effect of Federal legislation, rather than from differences with respect to the salient facts.

For the purpose of the present inquiry, the rates fixed by the State must be assumed to be reasonable rates so far as intrastate traffic is concerned; that is, they must be taken to be rates which the State, in the exercise of its legislative judgment, could constitutionally fix for intrastate transportation separately considered. If the state rates are not of this character—a question to be dealt with later—they cannot be sustained in any event; but, assuming them to be otherwise valid, the decree below, with respect to the present branch of the case, rests upon two grounds: (1) That the action of the State imposes a direct burden upon interstate commerce; and (2) that it is in conflict with the provisions of the Act to Regulate Commerce.

These grounds are distinct. If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation. The point of such

an objection is not that Congress has acted, but that the State has directly restrained that which in the absence of Federal regulation should be free. If the acts of Minnesota constitute a direct burden upon interstate commerce, they would be invalid without regard to the exercise of Federal authority touching the interstate rates said to be affected. On the other hand, if the State, in the absence of Federal legislation, would have had the power to prescribe the rates here assailed, the question remains whether its action is void as being repugnant to the statute which Congress has enacted.

Prior to the passage of the Act to Regulate Commerce, carriers fixed their interstate rates free from the actual exertion of Federal control; and under that act, as it stood until the amendment of June 29, 1906, 34 Stat. 584, c. 3591, the Interstate Commerce Commission had no power to prescribe interstate rates. *Interstate Commerce Commission* v. *C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, 511. The States, however, had long exercised the power to establish maximum rates for intrastate transportation. Was this power, apart from Federal action, subject to the limitation that the State could not fix intrastate rates, reasonable as such, generally throughout the State, but only as to such places and in such circumstances that the interstate business of the carriers would not be thereby affected? That is, was the State debarred from fixing reasonable rates on traffic, wholly internal, as to all state points so situated that as a practical consequence the carriers would have to reduce the rates they had made to competing points without the State, in order to maintain the volume of their interstate business or to continue the parity of rates or the relation between rates as it had previously existed? Was the State, in prescribing a general tariff of reasonable intrastate rates otherwise within its authority bound not to go below a minimum standard established by the interstate rates made by the

carriers within competitive districts? If the state power, independently of Federal legislation, is thus limited, the inquiry need proceed no further. Otherwise it must be determined whether Congress has so acted as to create such a restriction upon the state authority theretofore existing.

(1.) The general principles governing the exercise of state authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several States is supreme and plenary. It is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. The conviction of its necessity sprang from the disastrous experiences under the Confederation when the States vied in discriminatory measures against each other. In order to end these evils, the grant in the Constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control and to provide effective regulation of that intercourse as the national interest may demand. The words "among the several States" distinguish between the commerce which concerns more States than one and that commerce which is confined within one State and does not affect other States. "The genius and character of the whole government," said Chief Justice Marshall, "seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself."

(*Id.*, p. 195.) This reservation to the States manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, 426; *The Daniel Ball*, 10 Wall. 557, 565; *Smith* v. *Alabama*, 124 U. S. 465, 473; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618, 619; *Southern Railway Co.* v. *United States*, 222 U. S. 20, 26, 27; *Mondou* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1, 47, 54, 55.

The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special

requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. *Cooley* v. *Board of Wardens*, 12 How. 299, 319; *Ex parte McNiel*, 13 Wall. 236, 240; *Welton* v. *Missouri*, 91 U. S. 275, 280; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 204; *Bowman* v. *Chicago &c. Railway Co.*, 125 U. S. 465, 481, 485; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Hefley*, 158 U. S. 98, 103, 104; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370, 378; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 436.

The principle, which determines this classification, underlies the doctrine that the States cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains.

Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it (*State Freight Tax Case*, 15 Wall. 232; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Leloup* v. *Mobile*, 127 U. S. 640; *McCall* v. *California*, 136 U. S. 104; *Brennan* v. *Titusville*, 153 U. S. 289; *Galveston, Harrisburg & San Antonio Railway Co.* v. *Texas*, 210 U. S. 217; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 1, 56; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Crenshaw* v. *Arkansas*, 227 U. S. 389); or upon persons or property in transit in interstate commerce (*Passenger Cases*, 7 How. 283; *Crandall* v. *Nevada*, 6 Wall. 35; *State Freight Tax Case, supra*, p. 281; *Coe* v. *Errol*, 116

U. S. 517; *Kelley* v. *Rhoads*, 188 U. S. 1; *Bacon* v. *Illinois*, 227 U. S. 504).

They have no power to prohibit interstate trade in legitimate articles of commerce (*Bowman* v. *Chicago &c. Railway Co., supra; Leisy* v. *Hardin*, 135 U. S. 100; *Vance* v. *Vandercook Co.* (No. 1), 170 U. S. 438; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *L. & N. R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70); or to discriminate against the products of other States (*Ward* v. *Maryland*, 12 Wall. 418; *Welton* v. *Missouri, supra; Hannibal & St. J. R. R. Co.* v. *Husen*, 95 U. S. 465; *Guy* v. *Baltimore*, 100 U. S. 434; *Walling* v. *Michigan*, 116 U. S. 446; *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Darnell* v. *Memphis*, 208 U. S. 113); or to exclude from the limits of the State corporations or others engaged in interstate commerce or to fetter by conditions their right to carry it on (*Crutcher* v. *Kentucky*, 141 U. S. 47; *Western Union Telegraph Co.* v. *Kansas, supra; Pullman Co.* v. *Kansas, supra; International Text Book Co.* v. *Pigg*, 217 U. S. 91; *Buck Stove Co.* v. *Vickers*, 226 U. S. 205); or to prescribe the rates to be charged for transportation from one State to another, or to subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection (*Wabash &c. Railway Co.* v. *Illinois*, 118 U. S. 557, 577; *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204; *Louisville & Nashville R. R. Co.* v. *Eubank*, 184 U. S. 27; *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617; *R. R. Commission of Ohio* v. *Worthington*, 225 U. S. 101; *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *Hall* v. *DeCuir*, 95 U. S. 485, 488; *Cleveland, C., C. & St. L. Railway Co.* v. *Illinois*, 177 U. S. 514; *Houston & T. C. R. R. Co.* v. *Mayes*, 210 U. S. 321; *McNeill* v. *Southern Railway Co.*, 202 U. S. 543; *Mississippi R. R. Commission* v. *Illinois Cent. R. R. Co.*, 203 U. S. 335;

Atlantic Coast Line v. *Wharton*, 207 U. S. 328; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 217 U. S. 136; *Herndon* v. *C., R. I. & Pac. R. R. Co.*, 218 U. S. 135; *Yazoo &c. R. R. Co.* v. *Greenwood Grocery Co.*, 227 U. S. 1).

But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals

because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible.

The leading illustrations may be noted. Immediately upon the adoption of the Constitution, Congress recognized the propriety of local action with respect to pilotage, in view of the local necessities of navigation. Act of August 7, 1789, c. 9, § 4; 1 Stat. 53, 54; *Cooley* v. *Board of Wardens, supra.* It was sixty years before provision for Federal license of pilots was made (act of August 30, 1852, c. 106; 10 Stat. 61), and even then port pilots were not included. *Pacific Mail Steamship Co.* v. *Joliffe,* 2 Wall. 450, 459. And while Congress has full power over the subject and to a certain extent has prescribed rules, it is still in a large measure subject to the regulation of the States. *Anderson* v. *Pacific Coast S. S. Co.,* 225 U. S. 187.

A State is entitled to protect its coasts, to improve its harbors, bays and streams, and to construct dams and bridges across navigable rivers within its limits, unless there is conflict with some act of Congress. Plainly, in the case of dams and bridges, interference with the accustomed right of navigation may result. But this exercise of the important power to provide local improvements has not been regarded as constituting such a direct burden upon intercourse or interchange of traffic as to be repugnant to the Federal authority in its dormant state. *Willson* v. *Blackbird Creek Marsh Co.,* 2 Pet. 245; *Gilman* v. *Philadelphia,* 3 Wall. 713; *Pound* v. *Turck,* 95 U. S. 459; *County of*

Mobile v. *Kimball, supra; Escanaba Co.* v. *Chicago,* 107 U. S. 678; *Cardwell* v. *American Bridge Co.,* 113 U. S. 205; *Huse* v. *Glover,* 119 U. S. 543, 547; *Willamette Bridge Co.* v. *Hatch,* 125 U. S. 1; *Lake Shore & Michigan C. Ry. Co.* v. *Ohio,* 165 U. S. 365; *Cummings* v. *Chicago,* 188 U. S. 410; *Manigault* v. *Springs,* 199 U. S. 473. Thus, in *Gilman* v. *Philadelphia, supra,* the complainants were the owners of a valuable wharf and dock property in the Schuylkill River and sought to prevent the construction of a bridge which had been authorized by the legislature of Pennsylvania to connect East and West Philadelphia. It appeared that the bridge would prevent the passage of vessels having masts which had formerly navigated the river up to the complainants' wharf, and would largely reduce the income from the property. The court affirmed the dismissal of the bill upon the ground that in the absence of legislation by Congress the State was acting within its authority. "The States have always exercised this power," said the court (*id.,* p. 729), "and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the States shall be exerted within the sphere of the commercial power which belongs to the Nation." Again, in *Escanaba Co.* v. *Chicago, supra,* the question related to the power of the City of Chicago, acting under the authority of the State, to regulate the closing of draws in the bridges over the Chicago River. The court said: "The Chicago River and its branches must . . . be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation. But the States have full power to regulate within their limits matters of internal police, including in that general designation, whatever will promote the peace, comfort, convenience, and prosperity

of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. . . . When its (the State's) power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. . . . But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary." (*Id.*, p. 683.)

While the State may not impose a duty on tonnage (*Steamship Co.* v. *Portwardens*, 6 Wall. 31; *State Tonnage Tax Cases*, 12 Wall. 204, 212; *Cannon* v. *New Orleans*, 12 Wall. 577), it may regulate wharfage charges and exact tolls for the use of artificial facilities provided under its authority. The subject is one under state control, where Congress has not acted, although the payment is required of those engaged in interstate or foreign commerce. *Keokuk Packet Co.* v. *Keokuk*, 95 U. S. 80; *Cincinnati &c. Packet Co.* v. *Catlettsburg*, 105 U. S. 559; *Parkersburg & O. R. Transportation Co.* v. *Parkersburg*, 107 U. S. 691; *Huse* v. *Glover, supra; Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444; *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288, 295. In *Transportation Co.* v. *Parkersburg, supra*, the court had before it an ordinance of that city prescribing rates of wharfage on vessels discharging or receiving freight at public landings belonging to the city. A transportation company having steamers plying between Pittsburg and Cincinnati complained that the wharfage charge was exorbitant. The court held that the reasonableness of the charge, it being simply one for wharfage, was to be determined by the state law. "The regulation of wharves belongs *prima facie*, and in the first instance, to the States, and would only be assumed by Congress when its exercise by the States is incompatible with the interests of commerce." (*Id.*, p. 703.) Again, in *Ouachita*

Packet Co. v. *Aiken, supra,* where the owners of steamboats engaged in interstate commerce on the Mississippi River complained of wharfage rates at New Orleans as unreasonable and excessive, and in effect "a direct duty, or burden, upon commerce," the court, overruling the contention, held that the case was "clearly within the principles of the former decisions of this court, which affirm the right of a State, in the absence of regulation by Congress, to establish, manage and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce." (*Id.,* p. 447.)

Quarantine regulations are essential measures of protection which the States are free to adopt when they do not come into conflict with Federal action. In view of the need of conforming such measures to local conditions, Congress from the beginning has been content to leave the matter for the most part, notwithstanding its vast importance, to the States and has repeatedly acquiesced in the enforcement of state laws. (Act of February 25, 1799, c. XII, 1 Stat. 619, R. S., § 4797; Act of April 29, 1878, c. 66, 20 Stat. 37; Act of February 15, 1893, c. 114, 27 Stat. 449.) Such laws undoubtedly operate upon interstate and foreign commerce. They could not be effective otherwise. They cannot, of course, be made the cover for discriminations and arbitrary enactments having no reasonable relation to health (*Hannibal & St. J. Railroad Co.* v. *Husen,* 95 U. S. 465, 472, 473); but the power of the State to take steps to prevent the introduction or spread of disease, although interstate and foreign commerce are involved (subject to the paramount authority of Congress if it decides to assume control), is beyond question. *Morgan's &c. S. S. Co.* v. *Louisana,* 118 U. S. 455; *Missouri, Kansas & Texas Ry. Co.* v. *Haber,* 169 U. S. 613; *Louisiana* v. *Texas,* 176 U. S. 1; *Rasmussen* v. *Idaho,* 181 U. S. 198; *Compagnie Francaise &c.* v. *Board of Health,* 186

U. S. 380; *Reid* v. *Colorado*, 187 U. S. 137, 138; *Asbell* v. *Kansas*, 209 U. S. 251. In *Compagnie Francaise &c.* v. *Board of Health, supra*, the court had before it the quarantine law of Louisiana which, among other things, provided the State Board of Health might "in its discretion, prohibit the introduction into any infected portions of the State, persons acclimated, or unacclimated or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease." The Supreme Court of the State, interpreting the statute, held that it empowered the Board to exclude healthy persons from a locality infested with a contagious or infectious disease, whether they came from without or within the State. It was objected that this provision was too broad and that the former decisions of the court were based upon the right of the States to exclude diseased persons and things which were not legitimate subjects of commerce. The court sustained the law, saying, with respect to this argument: "But it must be at once observed that this erroneously states the doctrine as concluded by the decisions of this court previously referred to, since the proposition ignores the fact that those cases expressly and unequivocally hold that the health and quarantine laws of the several States are not repugnant to the Constitution of the United States, although they affect foreign and domestic commerce, as in many cases they necessarily must do in order to be efficacious, because until Congress has acted under the authority conferred upon it by the Constitution, such state health and quarantine laws producing such effect on legitimate interstate commerce are not in conflict with the Constitution. True is it that, in some of the cases relied on in the argument, it was held that a state law absolutely prohibiting the introduction, under all circumstances, of objects actually affected with disease, was valid because such objects were not legitimate commerce. But this implies no limitation on the power to

regulate by health laws the subjects of legitimate commerce. In other words, the power exists until Congress has acted, to incidentally regulate by health and quarantine laws, even although interstate and foreign commerce is affected, and the power to absolutely prohibit additionally obtains where the thing prohibited is not commerce, and hence not embraced in either interstate or foreign commerce." (*Id.*, p. 391.)

State inspection laws and statutes designed to safeguard the inhabitants of a State from fraud and imposition are valid when reasonable in their requirements and not in conflict with Federal rules, although they may affect interstate commerce in their relation to articles prepared for export or by including incidentally those brought into the State and held for sale in the original imported packages. *Gibbons* v. *Ogden, supra*, p. 203; *Turner* v. *Maryland*, 107 U. S. 38; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Patapsco Guana Co.* v. *North Carolina*, 171 U. S. 345, 357, 358; *Savage* v. *Jones*, 225 U. S. 501. And for the protection of its game and the preservation of a valuable food supply, the State may penalize the possession of game during the closed season whether obtained within the State or brought from abroad. *Silz* v. *Hesterberg*, 211 U. S. 31.

Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the State for nonfeasance or misfeasance within its limits. *Chicago, Milwaukee &c. Ry. Co.* v. *Solan*, 169 U. S. 133, 137; *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477, 491; *Martin* v. *Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284, 294; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 613. Until the enactment by Congress of the act of April 22, 1908, c. 149, 35 Stat. 65, the laws of the States determined the liability of interstate carriers by railroad for injuries received by their employés while engaged in interstate commerce, and this was because Congress, although empowered to regulate the subject,

had not acted thereon. In some States the so-called fellow-servant rule obtained; in others, it had been abrogated; and it remained for Congress, in this respect and in other matters specified in the statute, to establish a uniform rule. *Mondou* v. *N. Y., N. H. & H. R. R. Co., supra; Michigan Central R. R. Co.* v. *Vreeland,* 227 U. S. 59, 66, 67. So, where Congress has not intervened, state statutes providing damages for wrongful death may be enforced not only against land carriers but also against the owners of vessels engaged in interstate commerce where the wrong occurs within the jurisdiction of the State. *Sherlock* v. *Alling,* 93 U. S. 99, 103. See *American Steamboat Co.* v. *Chase,* 16 Wall. 522; *The Hamilton,* 207 U. S. 398. And, until Congress legislated on the matter, liability for loss of property, on interstate as well as intrastate shipments, was subject to state regulation. Some States allowed an exemption by contract from all or a part of the common law liability; others allowed no exemption. These differences in the applicable laws created inequalities with respect to interstate transportation, but each State exercised the power inherent in its territorial jurisdiction, and the remedy for the resulting diversity lay with Congress, which was free to substitute its own regulations; and this was done in the recent amendment of § 20 of the Act to Regulate Commerce. Act of June 29, 1906, c. 3591, 34 Stat. 584; *Adams Express Co.* v. *Croninger,* 226 U. S. 491, 500. It is within the competency of a State to create and enforce liens upon vessels for supplies furnished under contracts not maritime in their nature, and it is no valid objection that the state law may obstruct the prosecution of a voyage of an interstate character. *The Winnebago,* 205 U. S. 354. It may also create liens for damages to property on land occasioned by negligence of vessels. *Johnson* v. *Chicago &c. Elevator Co.,* 119 U. S. 388; *Martin* v. *West,* 222 U. S. 191. Cars employed in interstate commerce may be

seized by attachment under state law, in order to compel the payment of debts. *Davis* v. *C., C., C. & St. L. Ry. Co.*, 217 U. S. 157. And the legislation of the States, safeguarding life and property and promoting comfort and convenience within its jurisdiction, may extend incidentally to the operations of the carrier in the conduct of interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. *Smith* v. *Alabama*, 124 U. S. 465; *Hennington* v. *Georgia*, 163 U. S. 299; *N. Y., N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628; *Lake Shore & M. S. Ry. Co.* v. *Ohio*, 173 U. S. 285; *Missouri Pacific Ry. Co.* v. *Larabee Mills*, 211 U. S. 612; *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262. It has also been held that the State has the power to forbid the consolidation of state railroad corporations with competing lines although both may be interstate carriers and the prohibition may have a far-reaching effect upon interstate commerce. *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S. 646, 677; *Louisville & Nashville R. R. Co.* v. *Kentucky*, 161 U. S. 677, 701, 702. See *Northern Securities Co.* v. *United States*, 193 U. S. 197, 317, 348, 382.

Again, it is manifest that when the legislation of the State is limited to internal commerce to such degree that it does not include even incidentally the subjects of interstate commerce, it is not rendered invalid because it may affect the latter commerce indirectly. In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State enacted exclusively with re-

spect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the State. It was an objection of this sort that was urged and overruled in *Kidd* v. *Pearson*, 128 U. S. 1, to the law of Iowa prohibiting the manufacture and sale of liquor within the State, save for limited purposes. See also *Geer* v. *Connecticut*, 161 U. S. 519, 534; *Austin* v. *Tennessee*, 179 U. S. 343; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 245; *Missouri Pacific Ry. Co.* v. *Kansas*, *supra*. When, however, the State in dealing with its internal commerce undertakes to regulate instrumentalities which are also used in interstate commerce, its action is necessarily subject to the exercise by Congress of its authority to control such instrumentalities so far as may be necessary for the purpose of enabling it to discharge its constitutional function. *Southern Railway Co.* v. *United States*, *supra*; *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, *supra*.

Within the state power, then, in the words of Chief Justice Marshall is, "that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to a general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass. No direct general power over these objects is granted to Congress: and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given." *Gibbons* v. *Ogden*, *supra*, pp. 203, 304.

And, wherever as to such matters, under these estab-

lished principles, Congress may be entitled to act, by virtue of its power to secure the complete government of interstate commerce, the state power nevertheless continues until Congress does act and by its valid interposition limits the exercise of the local authority.

(2) These principles apply to the authority of the State to prescribe reasonable maximum rates for intrastate transportation.

State regulation of railroad rates began with railroad transportation. The railroads were chartered by the States and from the outset, in many charters, maximum rates for freight or passengers, or both were prescribed.[1] Frequently—and this became the more general practice—the board of directors was permitted to fix charges in its discretion, an authority which in numerous instances was made subject to a limitation upon the amount of net earnings.[2] In several States maximum rates were also established, or the power to alter rates was expressly reserved, by general laws.[3] In 1853, the State of New

[1] E. g. Maryland, Laws of 1826, c. CXXIII, § 18; 1830, c. 117, §§ 2, 3; 1834, c. 281, § 3: Massachusetts, Laws of 1829, c. XXVI, § 6; 1830, c. XCIII, § 10: New York, Laws of 1828, c. 21, § 11; c. 238, § 11; 1831, c. 83, § 10; 1836, c. 242, § 9: Virginia, Laws of 1830–1831, c. CXIX, § 19; c. CXXI, § 18; 1835–1836, c. 121, § 24: Ohio, Laws of 1833–1834, p. 203, § 19; p. 396, § 9: North Carolina, Laws of 1836–1837, c. XL, § 30.

[2] Connecticut, 1832, II Resolves and Private Laws (1789–1836), p. 992: Indiana, Laws of 1832, c. CXLVI, §§ 23, 24: Florida, Laws of 1848, c. 244, § 11: New York, Laws of 1828, c. 304, § 13; 1832, c. 162, §§ 12, 17: Massachusetts, Laws of 1833, c. CXVIII, § 4: Virginia, Laws of 1839, c. 110, § 5: Wisconsin, Laws of 1847, p. 72, § 15; 1851, c. 262, § 7.

[3] Illinois, Laws of 1849, p. 15, §§ 21, 32: Massachusetts, Laws of 1845, c. 191, § 2; 1860, c. 201, § 2: New York, Laws of 1850, c. 140, § 33: California, Laws of 1850, c. 128, § 77; 1861, c. DXXXII, § 51: Iowa, Code of 1873, § 1305; Laws of 1874, c. 68, §§ 1–5: Report of Industrial Commission, 1901, Vol. IX, pp. 903–905, 911–915.

York fixed the maximum fare for way passengers on the railroads forming the line of New York Central at two cents a mile (Laws of 1853, c. 76, § 7) and this rate extending to Buffalo and Suspension Bridge, on the boundary of the State, has continued to the present day (Cons. Laws, N. Y., 1910, c. 49, § 57). As a rule the restrictions imposed by the early legislation were far from onerous, but they are significant in the assertion of the right of control. More potent than these provisions, in the actual effect upon railroads tariffs, was the state canal. It is a matter of common knowledge that the traffic on the trunk lines from the Atlantic seaboard to the west was developed in competition with the Erie Canal, built, maintained and regulated by the State of New York to promote its commerce.

The authority of the State to limit by legislation the charges of common carriers within its borders was not confined to the power to impose limitations in connection with grants of corporate privileges. In view of the nature of their business, they were held subject to legislative control as to the amount of their charges unless they were protected by their contract with the State. This was decided in *Chicago, Burlington & Quincy R. R. Co.* v. *Iowa*, 94 U. S. 155; *Peik* v. *Chicago & Northwestern Railway Co.*, 94 U. S. 164; *Winona & St. Peter R. R. Co.* v. *Blake*, 94 U. S. 180, and other cases, following *Munn* v. *Illinois*, 94 U. S. 113. The question was presented by acts of the legislatures of Illinois, Iowa, Wisconsin and Minnesota, passed in the years 1871 and 1874 in response to a general movement for a reduction of rates. The section of the country in which the demand arose was to a large degree homogeneous and one in which the flow of commerce was only slightly concerned with state lines. But resort was had to the States for relief. In the *Munn Case*, the court had before it the statute of Illinois governing the grain warehouses in Chicago. Through these elevators,

located with the river harbor on the one side and the railway tracks on the other, it was necessary according to the course of trade for the product of seven or eight States of the West to pass on its way to the States on the Atlantic coast. In addition to the denial of any legislative authority to limit charges it was urged that the act was repugnant to the exclusive power of Congress to regulate interstate commerce. The court answered that the business was carried on exclusively within the limits of the State of Illinois, that its regulation was a thing of domestic concern and that "certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction." In the decision of the railroad cases, above cited, the same opinion was expressed. The language of the court, however, went further than to sustain the state law with respect to rates for purely intrastate carriage. Thus, the act of Wisconsin covered traffic which started within the State and was destined to points outside, and this was treated as being within the state power (*Peik* v. *Chicago & Northwestern Railway Co.*, 94 U. S. 164, 177, 178), a view which was later repudiated. *Wabash, St. L. & P. Railway Co.* v. *Illinois*, 118 U. S. 557.

It became a frequent practice for the States to create commissions, as agencies of state supervision and regulation, and in many instances the rate-making power was conferred upon these bodies. A summary of such legislation is given in *Interstate Commerce Commission* v. *Chicago, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 495, 496. One of these state laws, that of Mississippi, passed in 1884, came under review in *Stone* v. *Farmers Loan & Trust Co.*, 116 U. S. 307. The suit was brought to enjoin the Railroad Commission from enforcing the statute against the Mobile and Ohio Railroad Company. It had been incor-

porated in the States of Alabama, Mississippi, Tennessee and Kentucky, for the purpose of constructing a railroad from Mobile to some point near the mouth of the Ohio River where it would connect with another railroad, thus forming a continuous line of interstate communication between the Gulf of Mexico and the Great Lakes. The Commission as yet had not acted. Sustaining the state power to fix rates upon traffic wholly internal, the court directed the dismissal of the bill. The State, said the court, (p. 334) "may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi." In the same case, it was declared that the power of regulation was not a power to confiscate; and that under pretense of regulating fares and freights, the States could not "require a railroad corporation to carry persons or property without reward," or do that which in law amounted "to a taking of private property for public use without just compensation, or without due process of law." (*Id.*, p. 331.)

In *Wabash, St. L. & P. Railway Co.* v. *Illinois, supra,* it was finally determined that the authority of the State did not extend to the regulation of charges for interstate transportation. There the state statute was aimed at discrimination. It was said to have been violated by the railroad company in the case of shipments from points within Illinois to the city of New York. The state court had construed the statute to be binding as to that part of the interstate haul which was within the State although inoperative beyond the boundary. So applied, this court held the act to be invalid.

But no doubt was entertained of the State's authority to regulate rates for transportation that was wholly intrastate. And, in illustrating the extent of state power

(*id.*, p. 564), the court selected transportation across the State from Cairo to Chicago and from Chicago to Alton, all boundary points constituting important centers of commerce—the one on Lake Michigan, and the others at the confluence of the Mississippi and Ohio rivers, and of the Mississippi and Missouri rivers, respectively. After reviewing decisions holding state laws to be ineffective which imposed a direct burden upon interstate commerce, including the cases of the *State Freight Tax*, 15 Wall. 232; *Hall* v. *DeCuir*, 95 U. S. 485; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34, the court emphasized the distinction with respect to the operation of the statute upon domestic transactions saying: "Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the state legislature to determine that question." (*Id.*, p. 577.)

The doctrine was thus fully established that the State could not prescribe interstate rates but could fix reasonable intrastate rates throughout its territory. The extension of railroad facilities has been accompanied at every step by the assertion of this authority on the part of the States and its invariable recognition by this court. It has never been doubted that the State could, if it saw fit, build its own highways, canals and railroads. (*Railroad Company* v. *Maryland*, 21 Wall. 456, 470, 471.) It could build railroads traversing the entire State and thus join its border cities and commercial centers by new highways of internal intercourse to be always available upon reasonable terms. Such provision for local traffic might indeed alter relative advantages in competition, and, by virtue of economic forces, those engaged in interstate trade and transportation might find it necessary to make readjust-

ments extending from market to market through a wide sphere of influence; but such action of the State would not for that reason be regarded as creating a direct restraint upon interstate commerce and as thus transcending the state power. Similarly, the authority of the State to prescribe what shall be reasonable charges of common carriers for intrastate transportation, unless it be limited by the exertion of the constitutional power of Congress, is state-wide. As a power appropriate to the territorial jurisdiction of the State, it is not confined to a part of the State, but extends throughout the State—to its cities adjacent to its boundaries as well as to those in the interior of the State. To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name while denying it in fact. It is to assert that the exercise of the legislative judgment in determining what shall be the carrier's charge for the intrastate service is itself subject to the carrier's will. But this state-wide authority controls the carrier and is not controlled by it; and the idea that the power of the State to fix reasonable rates for its internal traffic is limited by the mere action of the carrier in laying an interstate rate to places across the State's border, is foreign to our jurisprudence.

If this authority of the State be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant Federal power, that is, one which has not been exerted, but can only be found in the actual exercise of Federal control in such measure as to exclude this action by the State which otherwise would clearly be within its province.

(3.) When Congress, in the year 1887, enacted the Act to Regulate Commerce (24 Stat. 379, c. 104), it was ac-

quainted with the course of the development of railroad transportation and with the exercise by the States of the rate-making power. An elaborate report had been made to the Senate by a committee authorized to investigate the subject of railroad regulation in which the nature and extent of state legislation, including the commission plan, were fully reviewed (Senate Report 46, submitted January 6, 1886, 49th Congress, 1st session). And it was the fact that beyond the bounds of state control there lay a vast field of unregulated activity in the conduct of interstate transportation which was found to be the chief cause of the demand for Federal action.

Congress carefully defined the scope of its regulation, and expressly provided that it was not to extend to purely intrastate traffic. In the first section of the Act to Regulate Commerce there was inserted the following proviso:

"*Provided, however*, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

When in the year 1906 (act of June 29, 1906, c. 3591, 34 Stat. 584), Congress amended the act so as to confer upon the Federal commission power to prescribe maximum interstate rates, the proviso in section one was reënacted. Again, in 1910, when the act was extended to embrace telegraph, telephone and cable companies engaged in interstate business, the proviso was once more reënacted, with an additional clause so as to exclude intrastate messages from the operation of the statute. Act of June 18, 1910, c. 309, 36 Stat. 539, 545. The proviso in its present form reads:

"*Provided, however*, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or han-

dling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid."

There was thus excluded from the provisions of the act that transportation which was "wholly within one State," with the specified qualification where its subject was going to or coming from a foreign country.

It is urged, however, that the words of the proviso are susceptible of a construction which would permit the provisions of section three of the act, prohibiting carriers from giving an undue or unreasonable preference or advantage to any locality, to apply to unreasonable discriminations between localities in different States, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rates exclusively. If it be assumed that the statute should be so construed, and it is not necessary now to decide the point, it would inevitably follow that the controlling principle governing the enforcement of the act should be applied to such cases as might thereby be brought within its purview; and the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts. The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the

court without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87. In the present case, there has been no finding by the Interstate Commerce Commission of unjust discrimination violative of the act; and no action of that body is before us for review.

The question we have now before us, essentially, is whether after the passage of the Interstate Commerce Act, and its amendment, the State continued to possess the state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic. That, as it plainly appears, was the nature of the action taken by Minnesota, and the attack, however phrased, upon the rates here involved as an interference with interstate commerce, is in substance a denial of that authority.

Having regard to the terms of the Federal statute, the familiar range of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court recognizing and upholding this authority, we find no foundation for the proposition that the Act to Regulate Commerce contemplated interference therewith.

Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment, did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates, or prescribe, or

authorize the Commission to prescribe, either maximum or minimum rates for intrastate traffic. It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the States without the provision of a substitute. On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the States and the agencies created by the States to deal with that subject. *Missouri Pacific Ry. Co.* v. *Larabee Mills*, 211 U. S. 612, 620, 621.

How clear was the purpose not to occupy the field thus left to the exercise of state power is shown by the clause uniformly inserted in the numerous acts passed by Congress to authorize the construction of railways across the Indian Territory. This clause, while fixing a maximum passenger rate, made the laws of an adjoining State (in some cases Arkansas, in others Texas, and in others Kansas) applicable to the freight rates to be charged within the Territory; and while the right to regulate rates on the authorized line of railroad was reserved to Congress until a state government should be established, it was expressly provided that, when established, the State should be entitled to fix rates for intrastate transportation—the right remaining with Congress to prescribe rates for such transportation as should be interstate. Within a month after the Act to Regulate Commerce was enacted, two acts were passed by Congress for this purpose with respect to railways extending across the Territory from the Texas to the Kansas boundary. The provision—in both cases in identical language—save that the one referred to the laws of Texas and the other to the laws of Kansas—was as follows (act of Feb. 24, 1887, c. 254, § 4, 24 Stat. 420; act of March 2, 1887, c. 319, § 4, *id.*, 447):

"SEC. 4. That said railroad company shall not charge the inhabitants of said Territory a greater rate of freight

than the rate authorized by the laws of the State of Texas for services or transportation of the same kind: *Provided*, That passenger rates on said railway shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railway, and messages on said telegraph and telephone lines, *until a State government or governments shall exist in said Territory within the limits of which said railway, or a part thereof, shall be located; and then such State government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by said railway;* but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one State into another, or shall extend into more than one State: *Provided, however*, That the rate of such transportation of passengers, local or inter-State, shall not exceed the rate above expressed: *And provided further*, That said railway company shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law the Postmaster-General may fix the rate of compensation."

The same provision is found in similar statutes passed in almost every year from 1884 to 1902 and relating to lines intended to serve as highways of interstate communication.[1] When Oklahoma became a State, the laws

[1] Referring to Laws of Texas: Acts of July 4, 1884, c. 177, § 4, 23 Stat. 69, 70; July 1, 1886, c. 601, § 4, 24 Stat. 117, 119; Feb. 18, 1888, c. 13, § 4, 25 Stat. 35, 37; May 14, 1888, c. 248, § 4, 25 Stat. 140, 142; May 30, 1888, c. 337, § 4, 25 Stat. 162, 163; June 26, 1888, c. 494, § 4, 25 Stat. 205, 207; Oct. 1, 1890, c. 1248, § 4, 26 Stat. 632, 634; July 30, 1892, c. 329, § 4, 27 Stat. 336, 338; Mar. 1, 1893, c. 188, § 4, 27 Stat. 524, 525; Aug. 4, 1894, c. 215, § 4, 28 Stat. 229, 230; Mar. 23, 1898, c. 87, § 4, 30 Stat. 341, 342.

Referring to Laws of Kansas: Acts of July 4, 1884, c. 179, § 4, 23 Stat. 73, 74; June 21, 1890, c. 479, § 4, 26 Stat. 170, 171; June 30, 1890,

of other States which were referred to in these various acts ceased to be operative within its limits, and by virtue of its Statehood and with the direct sanction of Congress, it became authorized to prescribe reasonable maximum rates for intrastate transportation throughout its extent. *Oklahoma* v. *A., T. & S. F. Ry. Co.*, 220 U. S. 277, 285; *Oklahoma* v. *C., R. I. & Pac. Ry. Co.*, 220 U. S. 302, 306.

The decisions of this court since the passage of the Act to Regulate Commerce have uniformly recognized that it was competent for the State to fix such rates, applicable throughout its territory. If it be said that in the contests that have been waged over state laws during the past twenty-five years, the question of interference with interstate commerce by the establishment of state-wide rates for intrastate traffic has seldom been raised, this fact itself attests the common conception of the scope of state authority. And the decisions recognizing and defining the state power wholly refute the contention that the making of such rates either constitutes a direct burden upon interstate commerce or is repugnant to the Federal statute.

In *Dow* v. *Beidelman*, 125 U. S. 680, the statute of Arkansas, enacted in April, 1887 (April 4, 1887, Acts 1887,

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c. 638, § 4, 26 Stat. 184, 185; Sept. 26, 1890, c. 947, § 4, 26 Stat. 485, 487; Feb. 27, 1893, c. 171, § 4, 27 Stat. 492, 493; Mar. 18, 1896, c. 60, § 4, 29 Stat. 69, 70; Mar. 30, 1896, c. 82, § 4, 29 Stat. 80, 82.

Referring to Laws of Arkansas: Acts of June 1, 1886, c. 395, § 4, 24 Stat. 73, 74; July 6, 1886, c. 744, § 4, 24 Stat. 124, 125; Feb. 18, 1888, c. 13, § 4, 25 Stat. 35, 37; May 30, 1888, c. 337, § 4, 25 Stat. 162, 163; Feb. 26, 1889, c. 280, § 4, 25 Stat. 745, 746; Feb. 24, 1891, c. 288, § 4, 26 Stat. 783, 785; Mar. 3, 1891, c. 535, § 4, 26 Stat. 844, 846; Feb. 24, 1896, c. 30, § 6, 29 Stat. 13, 15; Mar. 2, 1896, c. 38, § 4, 29 Stat. 40, 41; Apr. 6, 1896, c. 93, § 4, 29 Stat. 86, 88; Jan. 29, 1897, c. 108, § 4, 29 Stat. 502, 504; Mar. 30, 1898, c. 104, § 6, 30 Stat. 347, 349; Jan. 28, 1899, c. 65, § 5, 30 Stat. 806, 808; Feb. 4, 1899, c. 88, § 6, 30 Stat. 816, 818; Mar. 3, 1899, c. 453, § 6, 30 Stat. 1368, 1370.

Referring to Laws of Territory of Oklahoma: Act of Feb. 28, 1902, c. 134, § 4, 32 Stat. 43, 45.

p. 227) which established three cents a mile as the maximum fare for carrying passengers within the State on railroads over seventy-five miles in length, was sustained against the objection of the owners of the Memphis and Little Rock Railroad who attacked the act as confiscatory and arbitrary in its classification. The same statute was again upheld in *St. Louis & San Francisco Railway Co.* v. *Gill*, 156 U. S. 649. In *Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418, the statute of that State (March 7, 1887, Gen. Laws 1887, c. 10) creating a commission with power to prescribe intrastate rates was adjudged to be invalid, but this was upon the ground that the act as construed by the state court made the rates published by the commission final and conclusive and precluded any judicial inquiry whether they were reasonable. In *Chicago &c. Railway Co.* v. *Wellman*, 143 U. S. 339, the act of the legislature of Michigan (June 28, 1889, Pub. Laws 1889, p. 282) fixing the maximum fare for passengers within the State at two cents a mile in the case of companies whose gross earnings exceeded three thousand dollars a mile was unsuccessfully assailed as confiscatory and no contention was advanced that such an act operating throughout the State was an unwarrantable interference with interstate commerce.

In *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, the trustee of a railroad mortgage attacked the statute of Texas (April 3, 1891, Gen. Laws 1891, c. 51, p. 55) which established a railroad commission with authority to regulate tariffs, and the order of the commission providing a schedule of classified rates for the transportation of goods within the State. The challenge was of the tariff as a whole and the inquiry was whether the body of rates was unreasonable and such as to work a practical destruction of rights of property. Viewed in this aspect, the court, upon the allegations admitted by demurrer, held the action of the commission to be beyond its constitutional power

and affirmed the decree of the Circuit Court enjoining the rates. The decree, however, was reversed so far as it restrained the commission from discharging the duties imposed by the statute and from proceeding to prescribe reasonable rates and regulations. A further question was presented in *Reagan* v. *Mercantile Trust Company*, 154 U. S. 413, in respect to the same statute and order as applied to the Texas and Pacific Railway Company which had been organized under the laws of the United States (March 3, 1871, 16 Stat. 573, c. 122) and operated its road not only within that State but also for several hundred miles outside. It was insisted that this company was "not subject to the control of the State, even as to rates for transportation wholly within the State," the argument being that it was not within the state power to limit the Federal franchise to collect tolls. But the court held that the act of Congress did not go to the extent asserted but left the company, as to its intrastate business, subject to state authority.

The effect of intrastate rates upon interstate rates was urged in *Smyth* v. *Ames*, 169 U. S. 466, and in the cases decided therewith. These suits were brought by stockholders of the Union Pacific Railway Company, the Chicago and Northwestern Railroad Company and the Chicago, Burlington and Quincy Railroad Company, to enjoin the enforcement of the act of the legislature of Nebraska passed in 1893 (April 12, 1893, Acts 1893, c. 24). This was a comprehensive statute classifying the freight transported from any point in Nebraska to any other point in that State and prescribing tables of maximum rates. The companies affected were interstate carriers engaged in a vast commerce only a small portion of which was wholly local to the State. On the eastern boundary lay Omaha, a city of large importance in interstate trade, situated on the Missouri river with Council Bluffs, in the State of Iowa, directly opposite. The point was distinctly

made in the Circuit Court that the statute interfered with interstate commerce because, first, it established a classification of freights different from that which prevailed west of Chicago, and second, by reducing local rates it necessarily reduced rates on interstate business. Mr. Justice Brewer, who tried the cases, overruled these objections holding that neither the convenience of the carriers nor the consequences of competition with respect to interstate rates could be pleaded "in restraint of the otherwise undeniable power of the State." *Ames* v. *Union Pacific Railway Co.*, 64 Fed. Rep. 165, 171, 172. Having disposed of this contention, the court considered the question of the reasonableness of the rates and reached the conclusion that they were invalid because they amounted to a deprivation of the carriers' rights of property. On appeal to this court the counsel for the appellees directed attention to the conditions of transportation in Nebraska. It was argued that the local traffic was carried over the same tracks, in the same trains and often in the same cars with the interstate traffic; that to separate the cost of carrying the one sort of traffic from that of the other was a "manifest impossibility;" and that it was a necessary consequence of existing conditions that, if Nebraska controlled the local rates, it at the same time controlled the interstate rates. But this contention was not sustained and the affirmance of the decree was placed upon the distinct ground that the rates were confiscatory. It was ruled that the reasonableness of intrastate rates was to be determined by considering the intrastate business separately. In answer to the suggestion that the conditions of business might have changed for the better since the decrees, the court called attention to the proviso in the decrees intended to meet such a case, adding that if the Circuit Court found that conditions were such as to permit the application of the state rates without depriving the carriers of just compensation it would "be its duty

to discharge the injunction" and to make whatever order was necessary "to remove any obstruction placed by the decrees in these cases in the way of the enforcement of the statute." (*Id.*, p. 550; see *Smyth* v. *Ames*, 171 U. S. 361, 365.)

In that one of the *Smyth Cases* which was brought by the stockholders of the Union Pacific Railway Company not only was the case presented of a trunk line crossing the State with a relatively small proportion of business local to Nebraska, but the company had been formed by a consolidation of several companies by authority of Congress, one of them being the Union Pacific Railroad Company, incorporated by the act of July 1, 1862, c. 120, 12 Stat. 489. By this act (§ 18, *id.* 497), it was expressly provided that Congress might reduce the rates of fare if unreasonable and might fix the same by law whenever the net earnings of the entire road and telegraph should exceed a certain amount. But this language, while showing that Congress intended to reserve the power to prevent unreasonable exactions, was not deemed to be equivalent to a declaration that the States through which the road might be constructed should not regulate rates for intrastate transportation. The court said: "It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limits of a State, is a subject primarily within the control of that State. . . . Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a State prescribing rates for transporting property on that road wholly between points within its territory. Until Congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of 1862 or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by

the railroad company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits." (169 U. S., pp. 521, 522.) It is plain that had the intrastate rates, established by the comprehensive statute of Nebraska, not been found to be confiscatory they would have been sustained in their application to all intrastate traffic notwithstanding the reserved power of Congress over the Union Pacific line and despite the argument based upon the interdependence of interstate and intrastate rates.

The cases of *Louisville & Nashville Railroad Co.* v. *Kentucky*, 183 U. S. 503, and *Louisville & Nashville Railroad Co.* v. *Eubank*, 184 U. S. 27, concerned the validity of the long and short haul provision of the constitution of Kentucky adopted in 1891. In the first case, violation was charged with respect to the transportation of coal from Altamont to Lebanon, an intermediate station, as compared with charges for transportation from Altamont to Elizabethtown and Louisville, all places being within Kentucky. The difference in rate was justified by the company on the ground that at Louisville the coal hauled from Altamont came into competition with that brought down the Ohio River and at Elizabethtown with western Kentucky coal brought there by the Illinois Central Railroad. The contention that the state provision operated as an interference with interstate commerce was presented and overruled, the court saying: "It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the State, and the long and short distances mentioned are evidently distances upon the railroad line within the State. The particular case before us is one involving only the transportation of coal from one point in the State of Kentucky to another by a corporation of that State. It may be that the enforcement of the state regulation forbidding discrimination in

rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a State." (183 U. S., pp. 518, 519.) In the *Eubank Case*, which had been argued before the first case was decided, it appeared that the state court had construed the same provision of the Kentucky constitution as embracing a long haul from a place outside to one within the State (Nashville and Louisville) and a shorter haul on the same line and in the same direction between points within the State. The court held that, so construed, the provision was invalid as being a regulation of interstate commerce because it linked the interstate rate to the rate for the shorter haul and thus the interstate charge was directly controlled by the state law. (184 U. S., pp. 41, 43.) The authority of the former decision upholding the state law, as applied to places all of which were within the State, was in no way impaired and the court fully recognized the power of the State to prescribe maximum charges for intrastate traffic although carried over an interstate road to points on the state line. (*Id.*, pp. 33, 42.)

The case of *Minneapolis & St. Louis Railroad Co.* v. *Minnesota*, 186 U. S. 257, involved shipments of hard coal in carload lots from Duluth, Minnesota, to points in the southern and western portions of that State. The Railroad and Warehouse Commission of Minnesota, in 1899, prescribed a joint rate to be observed by the St. Paul and Duluth Railroad Company, the Minneapolis and St. Louis Railroad Company and other carriers. The state court directed the issue of a writ of mandamus to compel compliance with the order. It was objected that the act under

which the order was made was unconstitutional so far as it assumed to establish joint through rates over the lines of independent connecting railroads and to divide joint earnings, and that the tariff as fixed was not compensatory. This court affirmed the judgment. In *Alabama & Vicksburg Railroad Co.* v. *Mississippi Railroad Commission*, 203 U. S. 496, the company made what it called a "rebilling rate" on grain shipped from Vicksburg to Meridian, Mississippi, which was applicable only in case of shipments received at Vicksburg over the Shreveport line. It gave, however, to such shippers an option for a specified time to send other grain from Vicksburg instead, and thus it was in fact a local rate. To end this discrimination, the state commission, in 1903, fixed the same rate for all grain products shipped from Vicksburg to Meridian. It was urged that the effect of the order would be to force the plaintiff to enter into joint through interstate tariffs and divisions with all lines reaching Vicksburg by rail or river whether it desired such arrangements or not. The court sustained the order holding that it was competent for the State to enforce equality as to local transportation, and that this equality could not be defeated "in respect to any local shipments by arrangements made with or to favor outside companies."

In *Northern Pacific Railway Co.* v. *North Dakota*, 216 U. S. 579, the Attorney General of North Dakota charged the company with continuous violation of a law fixing rates for the carriage of coal within the State (North Dakota, Laws of 1907, c. 51) and asked for an injunction. It appears by the record that in its return to the rule to show cause in the state court, the company alleged that the statute was void because repugnant to the commerce clause and also that the rate fixed thereby was confiscatory. In support of the last contention the return set forth that the maximum rates for carrying coal which the company was allowed to charge under the act in question, were

greatly lower than the rates for similar service fixed by Minnesota for that State (reference being made to c. 232 of the Laws of 1907, the commodity rate act now in question) and those fixed by the Railroad Commissions of Illinois and Iowa, respectively; and that the conditions existing in North Dakota made it impossible to transport coal at a less rate than in the States named. The contention that the act violated the interstate commerce clause was said by the Supreme Court of the State to be based upon the assumption that state regulation of local rates on interstate lines amounted to an interference with interstate commerce. In view of the decisions of this court, the last question was not considered open to debate. *State* v. *Northern Pacific Railway Co.*, 19 N. Dak. 45, 55. This ruling was not challenged by the argument for the plaintiff in error here, and the question as to interference with interstate commerce was treated as removed from the case by the holding of the state court that the rates applied only to transportation within the State. (216 U. S., p. 580.)

To suppose, however, from a review of these decisions, that the exercise of this acknowledged power of the State may be permitted to create an irreconcilable conflict with the authority of the Nation, or that through an equipoise of powers an effective control of interstate commerce is rendered impossible, is to overlook the dominant operation of the Constitution which, creating a Nation, equipped it with an authority, supreme and plenary, to control National commerce and to prevent that control, exercised in the wisdom of Congress, from being obstructed or destroyed by any opposing action. But, as we said at the outset, our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. It thus clearly appears that, under the established principles governing

state action, the State of Minnesota did not transcend the limits of its authority in prescribing the rates here involved, assuming them to be reasonable intrastate rates. It exercised an authority appropriate to its territorial jurisdiction and not opposed to any action thus far taken by Congress.

The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right-of-way, terminals, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year and, indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic, can be made to-day, which will hold to-morrow; that terminals, facilities and connections in one State aid the carrier's entire business and are an element of value with respect to the whole property and the business in other States; that securities are issued against the entire line of the carrier and cannot be divided by States; that tariffs should be made with a view to all the traffic of the road and should be fair as between through and short-haul business; and that, in substance, no regulation of rates can be just, which does not take into consideration the whole field of the carrier's operations, irrespective of state lines. The force of these contentions is emphasized in these cases, and in others of like nature, by the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom.

But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the inter-

blending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power.

Second. Are the State's acts and orders confiscatory?

The rate-making power is a legislative power and necessarily implies a range of legislative discretion. We do not sit as a board of revision to substitute our judgment for that of the legislature, or of the commission lawfully constituted by it, as to matters within the province of either. *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 446. The case falls within a well defined category. Here we have a general schedule of rates, involving the profitableness of the intrastate operations of the carrier taken as a whole, and the inquiry is whether the State has overstepped the constitutional limit by making the rates so unreasonably low that the carriers are deprived of their property without due process of law and denied the equal protection of the laws.

The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is engaged—which private exigency may not be permitted to ignore—that there shall not be an exorbitant charge

for the service rendered. But the State has not seen fit to undertake the service itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title but to the right to receive just compensation for the service given to the public. *Stone* v. *Farmers' Loan & Trust Co., supra; Georgia Banking Co.* v. *Smith,* 128 U. S. 174, 179; *Chicago &c. Ry. Co.* v. *Minnesota, supra; Reagan* v. *Farmers' Loan & Trust Co., supra; St. Louis & S. F. Ry. Co.* v. *Gill,* 156 U. S. 649, 652; *Covington &c. Turnpike Road Co.* v. *Sandford,* 164 U. S. 578, 596, 597; *Smyth* v. *Ames, supra; San Diego Land & Town Co.* v. *National City,* 174 U. S. 739, 754; *San Diego Land & Town Co.* v. *Jasper, supra; Stanislaus County* v. *San Joaquin Co.,* 192 U. S. 201, 215; *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 17; *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 41.

In determining whether that right has been denied, each case must rest upon its special facts. But the general principles which are applicable in a case of this character have been set forth in the decisions.

(1.) The basis of calculation is the "fair value of the property" used for the convenience of the public. *Smyth* v. *Ames, supra* (p. 546). Or, as it was put in *San Diego Land & Town Co.* v. *National City, supra* (p. 757), "What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public." See also *San Diego Land & Town Co.* v. *Jasper, supra; Willcox* v. *Consolidated Gas Co., supra.*

(2.) The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. The scope of the inquiry was thus broadly described in *Smyth* v. *Ames, supra* (pp. 546–547): "In order to ascertain that value,

the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

(3.) Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the State for intrastate transportation affords a fair return, must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. This was also ruled in the *Smyth Case* (*id.*, p. 541). The reason, as there stated, is that the State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, the carrier cannot justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business.

In the present cases, the necessity of this segregation of the domestic business in determining values and results of operation, was recognized by both parties. Voluminous testimony was taken before the Master, and numerous exhibits containing data and calculations were submitted for the purpose of showing their respective estimates

of the value of the entire property of the carriers in Minnesota, the amount of income and expense in that State, their theories of apportionment between the interstate and intrastate business, and their contentions as to the net return for intrastate transportation under the state rates. The multitude of facts which are involved makes it impossible here to present a comprehensive review, even in a summary way. We must be content with a statement of the salient points and deal only with those matters which, after a careful consideration of the entire record, we regard as controlling our decision.

In each of the three cases (save in certain particulars with respect to that of the Minneapolis and St. Louis Railroad Company) the method adopted by the Master was as follows:

The period taken for the purpose of testing the sufficiency of the rates was the fiscal year ending June 30, 1908. During this period, all the rates in question, freight and passenger, were actually in force, with the exception of the commodity rates prescribed by the act of April 18, 1907, which had been enjoined. The amount of the reduction in the intrastate revenue which would have been caused by the application of the commodity rates is shown.

The Master found the present value of the entire property of the carrier, used in the public service in the State of Minnesota. This valuation was as of June 30, 1908, and was made on the basis of the cost of reproduction new. The Master also made findings as to the original cost of construction, and as to the present value on the basis of cost of reproduction new, of the entire system of the carrier. The estimated value of the railroad property within the State was divided between the freight and passenger business upon the relation of the gross revenue derived from each. The part of the total value which was thus assigned to the freight business within the State was then divided between the interstate and intra-

state freight business on the basis of gross revenue; and a similar division was made between the interstate and intrastate business of the property value assigned to the passenger department. In this way the Master found the value of the property used in intrastate transportation, freight and passenger, upon which he computed the net return received by the carrier.

There was no substantial dispute as to the amount of the entire revenue assignable to the State or as to its division between interstate and intrastate business, as an examination of the transactions in which the revenue was obtained permitted the making of the requisite apportionments with reasonable certainty.

The Master also ascertained the total expense incurred by the carrier within the State. This expense was first divided between freight and passenger business. Those items of cost which were directly incurred in each sort of business, and not common to both, were directly assigned; and such items were found to cover about sixty per cent. of all expenses. The remaining items, those of common expense, were divided between the freight and passenger business upon the relation, as to most of them, of revenue train-miles, and as to the others, of revenue engine-miles.

Having thus ascertained the share of the expense within the State of the freight and passenger departments respectively, it remained to divide that share, in each case, between the interstate and intrastate business. This apportionment was made, in the case of freight expense, upon what was termed an "equated ton-mile basis;" and in the case of passenger expense upon an "equated passenger-mile basis." That is to say, the Master concluded that the cost per ton-mile of doing the intrastate freight business was at least two and one-half times the cost per ton-mile of the interstate freight business, and hence he divided the total freight expense according to the relation of the interstate and intrastate ton-miles after

the latter had been increased two and one-half times. In the case of the passenger expense, he concluded that the cost per passenger-mile in the intrastate business was at least fifteen per cent. greater than that in the interstate business, and the total passenger expense was divided upon the relation of passenger-miles after increasing the intrastate passenger-miles fifteen per cent.[1] By the use of equalizing factors, the same result was obtained upon what was called an "equated revenue basis." [2]

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[1] The method is illustrated from the following extract from the findings in the *Northern Pacific Case:*

EQUATED TON-MILE BASIS.

Freight—On basis of 1 Intrastate ton mile costing as much as 2.5 Interstate ton miles.

	Actual	Equated	Proportion	Operating Exps.
Intra. ton mi.	130,580,988×2.5	=326,452,470	=25.362%	$1,355,273.82
Inter. ton mi.	960,709,494×1.0	=960,709,494	=74.638%	3,988,444.43
	1,091,290,482	1,287,161,964	=100.%	$5,343,718.25

EQUATED PASSENGER-MILE BASIS.

Passenger—On basis of 100 Intrastate passenger miles costing as much as 115 Interstate passenger miles.

	Actual	Equated	Proportion	Operating Exps.
Intrastate passenger miles	52,317,140×1.15	= 60,164,711	=37.347%	$863,325.18
Interstate passenger miles	100,931,180×1.00	=100,931,180	=62.653%	1,448,306.77
	153,248,320	161,095,891	=100.%	$2,311,631.95

[2] *Equated Revenue Basis.*—In the case of the Northern Pacific Company it was found that the relation of freight revenue per ton per mile derived from the intrastate business, as compared with the interstate business, was as 1.4387 is to 1.0000. The relation of cost per ton per mile in the intrastate business in proportion to revenue, to the cost

The net profits of the interstate and intrastate businesses, respectively, passenger and freight, were then found by deducting the apportioned share of expense from the apportioned share of revenue, and the rate per cent. of the net profit upon the property value assigned to each sort of business was computed. The Master concluded that the returns from intrastate transportation were unreasonably low and hence that the rates in question were confiscatory.

The validity of the result depends upon the estimates of the value of the property within the State and the apportionments both of value and of expense between interstate and intrastate operations.

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per ton per mile in interstate business in proportion to revenue, was then found to be as 1.7377 is to 1.0000, as follows:

$$\frac{250}{100} \div \frac{1.4387}{1.0000} = \frac{1.7377}{1.0000}$$

The actual intrastate freight revenue was multiplied by 1.7377 to obtain the equated revenue and thus the same percentages were obtained as on the equated ton-mile basis, as follows:

EQUATED REVENUE BASIS. FREIGHT.

	Actual Revenue	Equated Revenue
Intrastate	$1,555,342.92 × 1.7377	= $2,702,719.39 = 25.362%
Interstate	7,953,734.41 × 1.	= 7,953,734.41 = 74.638%
		$10,656,453.80 = 100.%

The relation of revenue per passenger mile intrastate and interstate was found to be as 1.0092 is to 1.0000; and thus, the relation of cost per passenger mile in relation to revenue was as 1.1395 is to 1.0000. The division was then made as follows:

EQUATED REVENUE BASIS. PASSENGER.

	Actual Revenue	Equated Revenue
Intrastate	$1,015,150.34 × 1.1395	= $1,156,763.81 = 37.347%
Interstate	1,940,718.17 × 1.	= 1,940,718.17 = 62.653%
		$3,097,481.98 = 100.%

It will be convenient to take up the three cases separately:

1. *Northern Pacific Railway Company.*

The par value, April 30, 1908, of the stock of this company was found to be $215,539,634.99, and of the bonds $190,256,577.66; total, $405,796,392.65. (Included in this statement of capital stock is the sum of $60,539,634.99 received to April 30, 1908, upon subscriptions to new capital stock ($95,000,000) authorized by stockholders' resolution January 7, 1907.)

These securities and their value in the market rest upon the entire property of the company. They include assets of considerable value (for example, the stock of the Northwestern Improvement Company owning extensive coal lands) which, however, do not form part of what may be called the operating property of the company, or that devoted to the public service, upon which the fair return is to be calculated (15 I. C. C. Rep. 376, 397, 407). Referring to the market value of the securities, the Master said: "Assets and property not devoted to public service have not been valued, and as they are a large element in stock valuation it follows that value of bonds and stocks is wholly unreliable and cannot be used in these cases as an element in determining the value of operating property or as a basis for rate-making." In this view the Master was undoubtedly right.

Much evidence was produced before the Master for the purpose of showing the actual cost of construction and equipment of the entire railroad system from the beginning down to April 30, 1908. This, the Master states, could be shown only by the corporate books and records; and in the early history of the original company these are somewhat obscure and uncertain and, by reason of lapse of time, could not be verified by other proof. The total investment cost of the railroad system of the Northern Pacific thus shown, was $369,252,755. This included

certain items which the Master held not to be properly allowable as a part of the cost, and after their deduction the cost was found to be $312,243,555. Of this investment cost, it appears from the evidence submitted by the company's controller that the sum of $128,184,985.82 was expended for construction and equipment, and for improvements and betterments, during the period from September 1, 1896, to April 30, 1908. The Master found that the Minnesota track mileage is substantially 21% of the track mileage of the whole system [1] and that if the cost were proportioned accordingly, the amount assignable to the State of the entire cost of construction and equipment, as stated, would be $65,571,462.

The Master, however, and the court below in confirming his findings, held that rates were not to be predicated upon the original investment.

Taking, as the basis, the cost of reproduction new, the Master found the value of the entire railroad system or operating property of this company to be $452,666,489.[2] The value of that portion of the system which was in the State of Minnesota was separately found, on the same basis, to be $90,204,545. It was upon this estimate of the value of the property in the State, as apportioned between the interstate and intrastate business, that the Master computed the rate of return.

The total net profits of the company for the fiscal year

[1] The Master found that the total track mileage of the system was 7695.80 and that the track mileage in Minnesota was 1625.20. In both cases spurs, yards and sidings were included. In Minnesota, as shown by the company's statement, the "passing, side and industry tracks" amounted to 512.41 miles, leaving for the single track, and second and third main track, miles, a total of 1112.79 miles.

[2] This estimate did not include the interest of the Northern Pacific in the Spokane, Portland & Seattle Railroad which was under construction, or the Big Forks & International Falls Railway or the Minnesota & International Railway, or in certain lines in Manitoba under lease which were found not to be part of the operating system.

ending June 30, 1908, from its Minnesota business (interstate and intrastate) was found to be $5,431,514.56. This was equal to 6.021% on the entire estimated value of the property. This showing of the results of the entire business at once directs attention to the importance of the methods adopted in making apportionments, but before considering these, the question is presented as to the soundness of the underlying estimate of value. May it be accepted as a basis for a finding that the rates are confiscatory?

Values. The items entering into the valuation, are set forth in the margin.[1]

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[1] *Valuation—Northern Pacific.*

1.	Lands for right of way, yards and terminals	$21,024,562
2.	Grading, clearing and grubbing	12,331,541
3.	Protection work, rip-rap, retaining walls	374,091
4.	Tunnels	253,250
5.	Cross-ties and switch-ties	3,657,576
6.	Ballast	1,960,969
7.	Rails	5,645,307
8.	Track fastenings	727,228
9.	Switches, frogs and railroad crossings	303,717
10.	Track laying and surfacing	1,600,591
11.	Bridges, trestles and culverts	3,586,063
12.	Track and bridge tools	28,073
13.	Fences, cattleguards and signs	471,609
14.	Stockyards and appurtenances	37,098
15.	Water stations	436,489
16.	Coal stations	120,039
17.	Stations, buildings and fixtures	920,423
18.	Miscellaneous buildings	1,054,874
19.	Steam and electric power plants, gas plants	196,338
20.	General repair shops	1,162,934
21.	Shop machinery and tools	529,322
22.	Engine houses, turntables and cinder pits	1,026,346
23.	Track scales	38,520
24.	Docks and wharves	768,306
25. 26.	Interlocking plants and other signal apparatus	114,430

The first item is:

"Lands for right-of-way, yards and terminals—$21,024,562.90."

This is for the bare land, without structures or improvements of any sort, as the entire cost of reproduction in building the road and erecting all the existing structures is covered in other items. The Master states that the amount thus allowed for land is made up as follows:

"Terminal properties, St. Paul appraisement of Read, Watson & Taylor, as modified by railroad company.	$7,645,100.24
"Add 5 per cent for the cost of acquisition and consequential damages.	382,255.01

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27. } 28. } Telegraph and telephone lines	285,145
28½. General office furniture	73,654
29. Solidification of roadbed. (Absorbed in above)	
Total 1 to 28½	$58,728,685
30. Engineering, superintendence, legal expenses, 4½ per cent 1 to 28.	2,785,036
31. Locomotives	3,454,040
32. Passenger equipment.	1,349,829
33. Freight car equipment.	7,519,722
34. Miscellaneous equipment	372,477
35. Marine equipment (none)	
Total items 1 to 34	$74,209,789
36. Freight on construction material—absorbed.	
37. Contingencies, 5 per cent 1 to 34.	3,710,479
38. Stores and supplies in Minnesota	2,658,976
39. Interest during construction, 4 per cent 2½ years Items 1 to 36	7,420,957
40. Interest in terminal properties, St. Paul depot, Duluth depot, Minnesota Transfer.	2,204,344
	$90,204,545

"Property acquired after appraisement.	328,725.69
"Minneapolis appraisement of Elwood, Barney and Ridgeway, as modified by railway company.	4,027,616.17
"Add 5 per cent for acquisition and consequential damages.	201,380.80
"Property acquired after appraisement.	227,737.26
"Duluth, appraisement of Stryker, Mendenhall and Little.	3,602,443.43
"Add 25 per cent for railway value, cost of acquisition and consequential damages.	900,610.85
"Total value of terminals.	17,315,869.45
"Lands outside of terminals.	3,708,693.45
"Grand Total.	21,024,562.90"

The appellants insist that no more than $9,498,099.27 should have been allowed.

It is contended that the valuation was made upon a wrong theory; that it is a speculative estimate of "cost of reproduction;" that it is largely in excess of the market value of adjacent or similarly situated property; that it does not represent the present value, in any true sense, but constitutes a conjecture as to the amount which the railway company would have to pay to acquire its right-of-way, yards and terminals, on an assumption, itself inadmissible, that, while the railroad did not exist, all other conditions, with respect to the agricultural and industrial development of the State, and the location, population and activities of towns, villages and cities, were as they now are.

We may first consider the basis for the finding with respect to the "lands outside terminals," that is, the right-of-way and station grounds, etc., outside the three cities.

(a) *Lands outside terminals.* The complainants' witness was Mr. Cooper, the Land Commissioner of the company, who has charge of the land grants for its entire system, of its right-of-way and land purchases, and has had a wide experience in connection with land values along the lines of the railway. In the latter part of 1906, the State notified the company to report the value of its properties, requiring a statement in one column of the "market value" and in another column, of the "value for railway purposes." Mr. Cooper was instructed to prepare the valuation for this report. From the information he received in special inquiries, and his own knowledge, and following what he understood to be the instructions from the State, he set down under the heading of "market value," not the market value in the proper sense of that term, but what in his judgment it would cost the railroad company to acquire the land. This included an excess which he estimated the company would have to pay over the market value of contiguous and similar property if it were called upon to undertake such a reproduction of its right-of-way. It did not, however, embrace an allowance for payments which might have to be made for improvements that possibly might be found upon the property in such case, or for the consequential or severance damages which might possibly have to be met, or for the expense of acquisition. These supposed additional outlays he undertook to estimate. For this purpose he increased the "market value" as stated (in the case of agricultural lands generally multiplying it by three) and thus reached the amount set down as the "value for railway purposes." As it serves clearly to illustrate the theory upon which the land valuations were made, we make the following excerpts from Mr. Cooper's testimony:

"The Master: When you speak of value, you mean cost of purchase?

"Witness: Cost of purchase; we are using the word 'value' somewhat wrongly, as we are talking along here. It is the cost of purchasing that property to-day.

* * * * * * * *

"Witness: The word 'value' doesn't seem to me to fit this case, because all the time we are figuring on the cost of reproducing this property, and our instructions from the State use the word 'reproduce.' Now, if a railroad company could buy property at what is generally considered its value, the word 'value' would fit in all right, but there is this excess which a railroad company has to pay beyond what is generally accepted as its value which increases the cost of reproducing a railroad property.

"Q. And this excess which you now speak of is included in your market values as reported to the State and used in your testimony? A. That is right. * *

"Q. . . . Well, now, does the term 'market value' as you have used it in making this report to the State and in your testimony here, have the same meaning, or is it used in the same sense with reference to the values you have fixed and reported to the State for properties on the right-of-way outside of the terminals and outside of the larger cities? A. Oh, yes.

"Q. As in the cities here? A. Yes; the same rule was applied all through in the Minnesota valuations.

* * * * * * * *

"Q. Therefore, your judgment as to the value of the railroad property is always that it is higher than the value of contiguous property? A. Yes, yes, that is true. * * * * * * * *

"Q. So that, in every case, what you call the market value is the value of contiguous or similarly situated property, with an additional amount which a railroad company is ordinarily compelled to pay? A. That is right. * * * * * * * *

"Q. You have put into the market value the excess which a railroad company pays for land? A. That is correct.

"Q. Then, when you multiply that by three, you are multiplying by three one of the elements going to make up excessive cost to a railroad company? A. That is right. * * * * * *

"Q. And you are unable to state how much upon the average you have added to the true or normal market value, to allow for the additional amount which the railroad company would have to pay upon the hypothesis that it is now compelled to purchase the land? A. That is correct.

"Q. And then having determined, to your satisfaction at what figure or sum you would place the market value of this property to the Railroad Company, as you have described, you have added another sum for severance damage, cost of improvements unnecessary to the Company, easements in abutting property, and general expenses? A. That is correct.

"Q. And you have determined that, in agricultural communities this second addition is shown by the use of the multiple 3? A. I think the multiple of 3 is too low, and I so testified in this case. When you are going through a highly cultivated country, I think the multiplier of 3 is not enough.

"Q. But that is what you used for the purpose of the right-of-way value of land through the agricultural communities? A. That is right, in this State.

"Q. And in the cities, in the three large terminals, you have added to what you describe as the market value of the lands to the Railroad Company, ascertained as described by you already, the amount necessary to produce the difference shown in your testimony between the market value of the terminals and the right-of-way value? A. That is right.

"Q. And while you are able to show, and we can ascertain

from an inspection of your testimony, the amount of the difference between the market value to the Railroad Company, as you have described, and the right-of-way value, and, in the rural communities or agricultural districts, the difference between the market value to you and the right-of-way value, there is nothing in any of your exhibits which will show, nor are you now prepared to state, the difference in what might be termed the normal, true, ordinary market value of the lands to the ordinary individual, and the sum which you have fixed as the market value to the Railroad Company if it were now compelled to purchase? A. That is correct."

The "market value" of the lands (outside of the three cities) thus fixed and reported to the State was $2,008,491.50, and the increased amount estimated, in the manner stated, which was reported as the "value for railway purposes" was $4,944,924.60. The latter amount was submitted by the complainants in this case as the value of the lands. The Master thought that the complainants' witness used too large a multiplier and allowed 75 per cent. of the amount thus claimed, or $3,708,693.45, stating that this was determined upon as the "fair reproduction value of the property." This allowance, it will be observed, was about $1,700,000 in excess of Mr. Cooper's estimate of "market value" as that term was used in making the report.

(b) *Terminal properties.* This term is used to designate the lands for the right-of-way, yards and terminals in St. Paul, Minneapolis and Duluth. The total original cost of these lands to the company (according to its statement based on the best information obtainable) including purchases to April 30, 1908, was $4,527,228. 76. The Master allowed as their value, apart from the improvements made by the company which, as we have said, were em-

braced in the other items of reproduction cost, the sum of $17,315,869.45.

In preparing the valuation for the report to the State, Mr. Cooper employed real estate men in each of the cities to make an appraisement. He instructed them, as he testifies, "to make a conservative report of the cost reproducing the properties owned by the company in each of their respective cities." They divided the property into districts and reported their estimate of units of value, as, for example, by the square foot. Mr. Cooper took these reports, discussed their valuations with the appraisers and aided by his own knowledge, formed an independent judgment, in no case increasing and in some instances (with respect to certain St. Paul and Minneapolis property) reducing the appraisers' values. He then set forth under the heading "market value" in the report to the State, as described in the testimony we have quoted, his estimate of what it would cost the company to purchase these lands, exclusive of improvements that might be upon them, severance and consequential damages and expenses incident to acquisition. The amounts he thus fixed were as follows: For the property in St. Paul, $7,645,100.24; in Minneapolis, $4,027,616.17; in Duluth, $3,555,593.93. In the case of the St. Paul and Minneapolis properties the amounts are precisely those adopted by the Master in his findings, and to this he adds 5 per cent. to cover cost of acquisition and consequential damages. The Master was of the opinion that the appraisers of these properties were "fully impressed with their value for railroad purposes" and that their appraisement as verified by them before him and modified by the railway company "is a generous valuation and should be accepted as full railroad value of the terminal properties," and it was so accepted with the addition above stated. With respect to the Duluth property, where the appraisement appears to have rested upon the ordinary values of real estate,

the Master sets forth as the appraised value, $3,602,443.43, to which he adds 25 per cent. or $900,610.85 "for railway value, cost of acquisition and consequential damages."

In reviewing the findings, the court below reached the conclusion that "the Master in effect found that the cost of reproduction and the present value of the lands for the terminals in the three great cities, including therein all cost of acquisition, consequential damages, and value for railroad use which he allowed, was only about 30 per cent. more than the normal value of the lands in sales between private parties. He found the value of the lands outside the terminals to be only twice their normal value."

From our examination of the evidence we are unable to conclude that the excess stated may be thus limited. What is termed the normal value does not satisfactorily appear. It further will be observed—from the summary of valuations we have set forth in the margin [1]—that the amount thus allowed in Item 1 for lands, yards and terminals, both in and out of the three cities ($21,024,562), was included in the total on which 4½ per cent. was allowed in Item 30 for "Engineering, superintendence, legal expenses," and again was included in the total on which 5 per cent. was allowed in Item 37 for "Contingencies," and, in addition, was included in the total on which 10 per cent. was allowed in Item 39 for "Interest during construction."

These are the results of the endeavor to apply the cost-of-reproduction method in determining the value of the right-of-way. It is at once apparent that, so far as the estimate rests upon a supposed compulsory feature of the acquisition, it cannot be sustained. It is said that the company would be compelled to pay more than what is the normal market value of property in transactions between private parties; that it would lack the freedom

[1] See note, p. 442.

they enjoy, and, in view of its needs, it would have to give a higher price. It is also said that this price would be in excess of the present market value of contiguous or similarly situated property. It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? But, aside from this, it is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value. It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessities. It would be free to stand upon its legal rights and it cannot be supposed that they would be disregarded.

It is urged that, in this view, the company would be bound to pay the "railway value" of the property. But, supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation, its *fair market value* for all its available uses and purposes. *United States* v. *Chandler-Dunbar Water Power Co.*, decided May 26, 1913, 229 U. S. 53. If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. *Mississippi &c. Boom Company* v. *Patterson*, 98 U. S. 403; *Shoemaker* v. *United States*, 147 U. S. 282; *United States* v. *Chandler-Dunbar Co.*, *supra*. But still the inquiry would be as to the fair market value of the property; as to what the owner had lost, and not what the taker had gained. *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195. The owner would not be entitled to demand payment of the amount which the property might be deemed worth to the company; or of an enhanced value by virtue of the purpose for which it was taken; or of an

increase over its fair market value, by reason of any added value supposed to result from its combination with tracks acquired from others so as to make it a part of a continuous railroad right-of-way held in one ownership. *United States* v. *Chandler-Dunbar Co., supra; Boston Chamber of Commerce* v. *Boston, supra.* There is no evidence before us from which the amount which would properly be allowable in such condemnation proceedings can be ascertained.

Moreover, it is manifest that an attempt to estimate what would be the actual cost of acquiring the right-of-way, if the railroad were not there, is to indulge in mere speculation. The railroad has long been established; to it have been linked the activities of agriculture, industry and trade. Communities have long been dependent upon its service, and their growth and development have been conditioned upon the facilities it has provided. The uses of property in the communities which it serves are to a large degree determined by it. The values of property along its line largely depend upon its existence. It is an integral part of the communal life. The assumption of its non-existence, and at the same time that the values that rest upon it remain unchanged, is impossible and cannot be entertained. The conditions of ownership of the property and the amounts which would have to be paid in acquiring the right-of-way, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination. The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture. It is fundamental that the judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases. The constitutional invalidity

must be manifest and if it rests upon disputed questions of fact, the invalidating facts must be proved. And this is true of asserted value as of other facts.

The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the Master were in substance appraisals of what was considered to be the peculiar value of the railroad right-of-way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers—men of ability and experience—were manifestly seeking to give their best judgment as to what the railroad right-of-way was worth. And doubtless it was believed that it might cost even more to acquire the property, if one attempted to buy into the cities as they now exist and all the difficulties that might be imagined as incident to such a "reproduction" were considered. The railroad right-of-way was conceived to be a property *sui generis*, "a large body of land in a continuous ownership," representing one of the "highest uses" of property and possessing an exceptional value. The estimates before us, as approved by the Master, with his increase of 25 per cent. in the case of the Duluth property, must be taken to be estimates of the "railway value" of the land; and whether or not this is conceived of as paid to other owners upon a hypothetical reacquisition of the property is not controlling when we come to the substantial question to be decided.

That question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right-of-way not only in excess of the amount invested in it, but also in excess of the market value of contiguous and similarly situated property. For the pur-

pose of making rates, is its land devoted to the public use to be treated (irrespective of improvements) not only as increasing in value by reason of the activities and general prosperity of the community, but as constantly outstripping in this increase, all neighboring lands of like character, devoted to other uses? If rates laid by competent authority, state or National, are otherwise just and reasonable, are they to be held to be unconstitutional and void because they do not permit a return upon an increment so calculated?

It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law. But still it is property employed in a public calling, subject to governmental regulation and while under the guise of such regulation it may not be confiscated, it is equally true that there is attached to its use the condition that charges to the public shall not be unreasonable. And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right.

The increase sought for "railway value" in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which cannot be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world. It is an increment which in the last analysis must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the activities of the community. For an allowance of this character there is no warrant.

Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, cannot properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. Otherwise we enter the realm of mere conjecture. We therefore hold that it was error to base the estimates of value of the right-of-way, yards and terminals upon the so-called "railway value" of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which were embraced in the items of "engineering, superintendence, legal expenses," "contingencies" and "interest during construction."

By reason of the nature of the estimates, and the points

to which the testimony was addressed, the amount of the fair value of the company's land cannot be satisfactorily determined from the evidence, but it sufficiently appears for the reasons we have stated that the amounts found were largely excessive.

Finding this defect in the proof, it is not necessary to consider the objections which relate to the sources from which the property was derived or its mode of acquisition, or those which are urged to the inclusion of certain lands which it is said were not actually used as a part of the plant; and we express no opinion upon the merits of these contentions.

The property other than land, as the detailed statement shows, embraced all items of construction, including road-bed, bridges, tunnels, etc., structures of every sort, and all appliances and equipment. The cost of reproduction new was ascertained by reference to the prices for such work and property. In view of the range of the questions we have been called upon to consider, we shall not extend this opinion for the purpose of reviewing this estimate, or of passing upon exceptions to various items in it, as their disposition would not affect the result.

The Master allowed the cost of reproduction new without deduction for depreciation. It was not denied that there was depreciation in fact. As the Master said, "everything on and above the road-bed depreciates from wear and weather stress. The life of a tie is from eight to ten years only. Structures become antiquated, inadequate and more or less dilapidated. Ballast requires renewal, tools and machinery wear out, cars, locomotives and equipment, as time goes on, are worn out or discarded for newer types." But it was found that this depreciation was more than offset by appreciation; that "the road-bed was constantly increasing in value"; that it "becomes solidified, embankments and slopes or excavations become settled and stable and so the better resist the effects of

rains and frost"; that it "becomes adjusted to surface drainage, and the adjustment is made permanent by concrete structures and rip-rap"; and that in other ways, a road-bed long in use "is far more valuable than one newly constructed." It was said that "a large part of the depreciation is taken care of by constant repairs, renewals, additions and replacements, a sufficient sum being annually set aside and devoted to this purpose, so that this, with the application of road-bed and adaptation to the needs of the country and of the public served, together with working capital . . . fully offsets all depreciation and renders the physical properties of the road not less valuable than their cost of reproduction new." And in a further statement upon the point, the "knowledge derived from experience" and "readiness to serve" were mentioned as additional offsets.

We cannot approve this disposition of the matter of depreciation. It appears that the Master allowed, in the cost of reproduction, the sum of $1,613,612 for adaptation and solidification of road-bed, this being included in the item of grading and being the estimate of the engineer of the state commission of the proper amount to be allowed. It is also to be noted that the depreciation in question is not that which has been overcome by repairs and replacements, but is the actual existing depreciation in the plant as compared with the new one. It would seem to be inevitable that in many parts of the plant there should be such depreciation, as for example in old structures and equipment remaining on hand. And when an estimate of value is made on the basis of reproduction new, the extent of existing depreciation should be shown and deducted. This apparently was done in the statement submitted by this company to the Interstate Commerce Commission in the *Spokane Rate Case* in connection with an estimate of the cost of reproduction of the entire system as of March, 1907. (See 15 I. C. C. Rep. 395, 396.) In

the present case, it appears that the engineer of the state commission estimated the depreciation in the property at between eight and nine million dollars. If there are items entering into the estimate of cost which should be credited with appreciation, this also should appear, so that instead of a broad comparison there should be specific findings showing the items which enter into the account of physical valuation on both sides.

It must be remembered that we are concerned with a charge of confiscation of property by the denial of a fair return for its use; and to determine the truth of the charge there is sought to be ascertained the present value of the property. The realization of the benefits of property must always depend in large degree on the ability and sagacity of those who employ it, but the appraisement is of an instrument of public service, as property, not of the skill of the users. And when particular physical items are estimated as worth so much new, if in fact they be depreciated, this amount should be found and allowed for. If this is not done, the physical valuation is manifestly incomplete. And it must be regarded as incomplete in this case. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 10.

Apportionment of Values. As the rate of net return from the entire Minnesota business (interstate and intrastate) during the test year was 6.021 per cent. on a valuation of $90,204,545, and would be greater if computed upon a less value, we are brought to the question whether the methods of apportionment adopted are so clearly appropriate and accurate as to require a finding of confiscation of property used in the intrastate business.

The apportionment of the value of the property, as found, between the interstate and intrastate business was made upon the basis of the gross revenue derived from each. This is a simple method, easily applied, and for that reason has been repeatedly used. It has not, however, been approved by this court and its correctness

is now challenged. Doubtless, there may be cases where the facts would show confiscation so convincingly in any event, after full allowance for possible errors in computation, as to make negligible questions arising from the use of particular methods. But this case is not of that character.

In support of this method, it is said that a division of the value of the property according to gross earnings is a division according to the "value of the use," and therefore proper. But it would seem to be clear that the value of the use is not shown by *gross* earnings. The gross earnings may be consumed by expenses, leaving little or no profit. If, for example, the intrastate rates were so far reduced as to leave no net profits, and the only profitable business was the interstate business, it certainly could not be said that the value of the use was measured by the gross revenue.

It is not asserted that the relation of expense to revenue is the same in both businesses; on the contrary, it is insisted that it is widely different. The Master found that the revenue per ton-mile in the intrastate business, as compared with the revenue per ton-mile in the interstate business, was as 1.4387 to 1.0000. And, on his assumption as to the extra cost of doing the intrastate business, he reached the conclusion that the cost per ton-mile in proportion to the revenue per ton-mile in the intrastate business, as compared with the interstate business, was as 1.7377 to 1.0000. It is contended, according to the computations, that only a little over 10 per cent. of the entire net revenue of the test year ($5,431,514.66) was made in the intrastate business, and that 90 per cent. thereof was made in the interstate business; but approximately 21 per cent. of the total value of the property was assigned to the intrastate business.

If the property is to be divided according to the value of the use, it is plain that the gross-earnings method is not an accurate measure of that value.

In *Chicago, Milwaukee &c. Ry. Co.* v. *Tompkins*, 176

U. S. 167, the court below had found the value of the plaintiffs' property in South Dakota to be $10,000,000, and had divided it between the interstate and intrastate business according to the gross receipts from each. Mr. Justice Brewer, in delivering the opinion of the court, after referring to the result reached, said:

"Such a result indicates that there is something wrong in the process by which the conclusion is reached. That there was, can be made apparent by further computations, and in them we will take even numbers as more easy of comprehension. Suppose the total value of the property in South Dakota was $10,000,000, and the total receipts both from interstate and local business were $1,000,000, one half from each. Then, according to the method pursued by the trial court, the value of the property used in earning local receipts would be $5,000,000, and the per cent. of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one fifth of what they had been, so that instead of receiving $500,000 the company only receives $100,000. The total receipts for interstate and local business being then $600,000, the valuation of $10,000,000, divided between the two, would give to the property engaged in earning interstate receipts in round numbers $8,333,000, and to that engaged in earning local receipts $1,667,000. But if $1,667,000 worth of property earns $100,000 it earns six per cent. In other words, although the actual receipts from local business are only one fifth of what they were, the earning capacity is three fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as $8,333,000, and it earned $500,000, its earning capacity was the same as that employed in local business—six per cent. So that although the rates for interstate business be undisturbed, the process by which the trial court

reached its conclusion discloses the same reduction in the earning capacity of the property employed in interstate business as in that employed in local business, in which the rates are reduced." (*Id.*, pp. 176–177.)

The value of the use, as measured by return, cannot be made the criterion when the return itself is in question. If the return, as formerly allowed, be taken as the basis, then the validity of the State's reduction would have to be tested by the very rates which the State denounced as exorbitant. And, if the return as permitted under the new rates be taken, then the State's action itself reduces the amount of value upon which the fairness of the return is to be computed.

When rates are in controversy, it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue, and this must be found in the use that is made of the property. That is, there should be assigned to each business, that proportion of the total value of the property which will correspond to the extent of its employment in that business. It is said that this is extremely difficult; in particular, because of the necessity for making a division between the passenger and freight business and the obvious lack of correspondence between ton-miles and passenger-miles. It does not appear, however, that these are the only units available for such a division; and it would seem that, after assigning to the passenger and freight departments respectively, the property exclusively used in each, comparable use-units might be found which would afford the basis for a reasonable division with respect to property used in common. It is suggested that other methods of calculation would be equally unfavorable to the state rates, but this we cannot assume.

It is sufficient to say that the method here adopted is not of a character to justify the court in basing upon it a finding that the rates are confiscatory.

Apportionment of Expenses. As already stated, it was held in dividing the freight operating expenses, that the cost of doing the intrastate freight business was two and one-half times that of doing the interstate freight business. That is to say, the division of expenses was made according to ton-miles, interstate and intrastate, after the intrastate ton-miles had been increased two and one-half times.

The substantial question is whether the proof established this extra cost with that degree of certainty which is requisite to support a decree invalidating the state rates.

It appeared that the cost of intrastate business was not kept separately or set up in the accounts or statistics of the company.

The president of the company testified as to his judgment in the matter, which was based, in the absence of such accounts, upon the general facts of operation. His testimony was supported by that of other eminent railroad men, who testified in the Great Northern & Minneapolis and St. Louis cases. The elements entering into the greater expense of doing intrastate business were defined to be: That the average haul was shorter, being (in the case of the Northern Pacific) 104.52 miles for intrastate transportation as against 485.3 miles for interstate transportation; that the state business had to be handled twice at terminals; that the local short-haul business used most valuable terminal facilities in order to obtain its proper handling from the larger distributing centers, and used those facilities to a greater extent for the tons handled than did the longer through business; that the amount of clerical and warehouse labor in connection with the local business was much greater than in the case of the long-haul through business; that the chances of damage were greater in the short-haul business because of the greater number of individual transactions; that in the short-haul business there was an excess of equipment for loading and unload-

ing; that local or way freight trains were "loaded lighter"; that the wear and tear on the local trains was greater because of frequent stopping and starting; that there was increased switching resulting in greater damage to equipment and tracks; that the local train was generally on the road more hours than a through train and therefore consumed more coal; that in the smaller stations the amount of shifting was large; that many of the local trains carried passengers, involving two stops at each station, one for passengers and the other for the local freight work; that the manner of operation of local trains increased the chances of injury to employés; that the short-haul business moved irregularly and spasmodically and that its facilities were worked at their full capacity only for limited periods.

From these considerations, which were elaborated in the testimony, the witness reached the conclusion that the "so-called local short-haul intrastate business costs anywhere from three to six or seven times as much as the so-called long-haul through interstate business." In the Great Northern case, the witnesses expressed the opinion that the extra cost of intrastate freight was three or four times greater than that of the interstate freight. One witness said that it would be from four to six times. These estimates, it is understood, had relation to the cost per ton mile.

The appellants do not dispute that business carried for short distances on local trains is more expensive than the handling of other business, but it is insisted that this is due solely to the different train service that it receives. It is said that all through trains start from divisional points and run from one end of the division to the other without stop; that the local trains are made up of cars carrying business destined for points intermediate the termini of the division and take up all traffic originating at the intermediate stations; that the word "local" as

applied to these trains is not synonymous with intrastate, but that the local trains carry a large part of the interstate traffic both in receiving and distributing it; and that by far the greater part of the extra cost of the local train service is properly chargeable to interstate business. It is also insisted that so far as this extra expense can be charged to intrastate business, it is adequately met by the additional revenue of that business, which per ton mile, as compared with the interstate business, is as 1.4387 to 1.0000.

To establish these propositions, and to meet the testimony of the complainants' witnesses, the appellants introduced an elaborate series of calculations, made by a professional accountant, which were deduced from the results of an extended examination of the records of the companies. The witness made computations as to the character of the freight on each road, dividing it between through and local freight upon each operating division, and then sub-dividing it between intrastate and interstate freight. It is contended by the appellants that these calculations are sufficient to show that in the case of the Northern Pacific, about 91 per cent. of the freight on through trains was interstate and about 9 per cent. intrastate, and that on the local trains the interstate freight amounted to 68.67 per cent. and the intrastate, 31.33 per cent. Calculations of this witness were also introduced showing his division of the total expenses between the passenger and freight business, and then in each department between the interstate and intrastate business; and by means of these, it was estimated that, under the rates in question (assuming them to have been applied to the business of the fiscal year ending June 30, 1907, to which the calculations were directed), the net profits on the intrastate business as a whole would have been slightly more than six per cent. upon an amount equal to the share of property value attributed to that

business by the Master's estimate and apportionment of total value.

These computations are assailed by the appellees as inaccurate and as based upon erroneous estimates. We shall not go into the details, and, for the present purpose, we may assume that the appellees are right in their criticism.

Our conclusions may be briefly stated. The statements of the complainants' witnesses as to the extra cost of intrastate business, while entitled to respect as expressions of opinion, manifestly involve wide and difficult generalizations. They embrace, without the aid of statistical information derived from appropriate tests and submitted to careful analysis, a general estimate of all the conditions of transportation and an effort to express in the terms of a definite relation, or ratio, what clearly could be accurately arrived at only by prolonged and minute investigation of particular facts with respect to the actual traffic as it was being carried over the line. The extra cost, as estimated by these witnesses, is predicated not simply of haulage charges, but of all the outlays of the freight service including the share of the expenses for maintenance of way and equipment assigned to the freight department. And the ratio, to be accurately stated, must also express the results of a suitable discrimination between the interstate and intrastate traffic on through and local trains respectively and of an attribution of the proper share of the extra cost of local train service to the interstate traffic that uses it. The wide range of the estimates of extra cost, from three to six or seven times that of the interstate business per ton mile, shows both the difficulty and the lack of certainty in passing judgment.

We are of opinion that on an issue of this character involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be

accepted as adequate proof to sustain a finding of confiscation. While accounts have not been kept so as to show the relative cost of interstate and intrastate business, giving particulars of the traffic handled on through and local trains, and presenting data from which such extra cost, as there may be, of intrastate business may be suitably determined, it would appear to have been not impracticable to have had such accounts kept or statistics prepared at least during test periods properly selected. It may be said that this would have been a very difficult matter, but the company having assailed the constitutionality of the state acts and orders was bound to establish its case, and it was not entitled to rest on expressions of judgment when it had it in its power to present accurate data which would permit the court to draw the right conclusion.

We need not separately review the findings with respect to the division of passenger expenses, as the same considerations are involved, with the distinction, however, that the extra cost attributed to the intrastate business is relatively small as compared with that charged to intrastate freight. And, in view of the conclusions reached on the controlling questions we have considered, we express no opinion with respect to the method adopted in dividing expenses between the passenger and freight departments.

For the purpose of determining whether the rates permit a fair return, the results of the entire intrastate business must be taken into account. During the test year the entire revenue, as found, from the intrastate business, passenger and freight, amounted to $2,897,912.26. All the rates in question were in force save the commodity rates and it is further found that the loss that would have accrued in intrastate commodity business, by the application of the commodity rates which were under injunction, would have amounted to $21,493.67.

As neither the share of the expenses properly attrib-

utable to the intrastate business, nor the value of the property employed in it, was satisfactorily shown, and hence it did not appear upon the facts proved that a fair return had been denied to the company, we are of the opinion that the complainant failed to sustain his bill.

(2.) *Great Northern Railway Company.* The Master found that at the time this suit was brought the par value of the stock of the company was $149,577,500, and of bonds $83,119,939; total, $232,697,439. On June 30, 1908, the par value of the stock was $209,962,750, and of bonds, $97,955,939.39; total $307,918,689.39. The property upon which these securities and their value in the market are based includes, it is found, a very considerable amount not devoted to the public service.

The balance sheet of the company of June 30, 1908, showed the book valuation of the entire system, employed in the public service, to amount to $319,681,815. The Master held that various items were included which were not properly allowable as a part of the cost, and deducting these, there remained as the book-showing of the total amount expended in construction and equipment, $295,401,213. The Minnesota track mileage was found to be practically 32.59 per cent. of the total mileage, and upon this basis, the amount assignable to the State of the total cost, as stated, amounted to $96,271,255.

The Master found that the cost of reproduction new of the entire system was $457,121,469.[1] The value of the portion of the system in Minnesota was separately found, on the basis of reproduction new, to be $138,425,291. The net profits of the company during the test year from its Minnesota business, interstate and intrastate, were $8,180,025.11, equal to 5.909 per cent. upon this estimated value.

The items entering into the estimate are the same in

[1] This did not include the interest of the company in the Spokane, Portland & Seattle Railroad, or lines under construction.

character as those set forth in the estimate of the value of the property of the Northern Pacific Company.[1]

Included in this reproduction cost was an allowance, for "lands for right-of-way, yards and terminals," of $25,172,650.80, as follows:

"St. Paul, appraisement of Read, Watson and Taylor.	$ 6,433,348.00
"Add 5 per cent. for cost of acquisition and consequential damages.	321,667.40
"Minneapolis, appraisement of Elwood, Barney and Ridgeway.	11,619.765.00
"Add 5 per cent. for cost of acquisition and consequential damages.	580,968.15
"Duluth, appraisement of Stryker, Mendenhall and Little.	713,280.00
"Add 25 per cent. for railroad value, cost of acquisition and consequential damages.	178,320.00
"Total value of terminals.	19,847,366.55
"Lands outside of terminals.	5,325,284.25
"Grand total.	25,172,650.80"

The appraisements thus referred to, adopted by the Master with the additions stated, were made by the appraisers in the three cities who were employed in the case of the Northern Pacific Company. The valuations were made at the same time, and upon the same basis, as the corresponding valuations in that case and are open to the same objections. In the company's estimate of the value of the lands outside these cities, the amount stated as the market value was largely increased to obtain the "right-of-way value"; with respect to lands in agricultural sec-

[1] See page 442.

tions, the "market value" was generally multiplied by three; and of the total amount of the estimate of the company the Master allowed seventy-five per cent. as in the Northern Pacific case.

In addition, 4½ per cent. of the aggregate land values, as found, was allowed in the item for "engineering, superintendence, legal expenses" and the further allowance of 16 per cent. of these land values was made in the item of "interest during construction" (4 per cent. for 4 years).

In the physical valuation estimated on the basis of the cost of reproduction new, the Master made no deduction for depreciation, while, on the other hand, there was included under the item of grading the sum of $3,219,642 for adaptation and solidification of road-bed. The engineer of the state commission estimated the depreciation in the property at approximately $13,000,000.

What has already been said in the case of the Northern Pacific Company with respect to estimates of value, the apportionment of value, the testimony as to the extra cost of doing the intrastate business and the division of expenses between interstate and intrastate business, is equally applicable here.[1] In these respects there is no material distinction between the two cases and the same conclusion must be reached in both.

(3.) *Minneapolis & St. Louis Railroad Company.* This case presents distinct considerations. The lines of this company consist of about 1028 miles of track of which 396 miles are operated under lease or trackage rights. Of its owned mileage (632 miles) approximately sixty per cent. is in the State of Minnesota. The Master thus describes it: "It runs south from the inland cities of St.

[1] The total revenue received by the Great Northern during the fiscal year 1908, from its intrastate business, passenger and freight, was $4,641,829.58; and it was found that the loss that would have been sustained by the application of the enjoined commodity rates to the intrastate commodity traffic would have amounted to $87,261.43.

Paul and Minneapolis to Des Moines, with a branch to Storm Lake, Iowa, and a branch to the South Dakota grain fields. Along its entire line it comes in sharp competition with strong intersecting railroad lines, and, while as before stated, it subserves a useful public purpose and is operated in response to public demand, it can be maintained only by the exercise of the highest economy and watchfulness in its operation and to succeed must be given greater latitude than is necessary with respect to the more favorably located and prosperous lines of railway."

The less favorable situation of the road is fully recognized by the appellants who object to its being regarded as affording a fair test of the sufficiency of the rates. They say that its "total mileage and the geographical location" are such "that it cannot be taken as typical of the railway situation in Minnesota"; and they insist that "the important and material questions are raised by the showing made in the Northern Pacific and Great Northern Cases." And the appellees, on their part, assert that "it cannot be seriously contended that the rates complained of are sufficient to yield any reasonable return on a proportionate value of the property used in the conduct of the business covered by the rates"; that the net income of the road "from all sources is scarcely sufficient to pay interest on its outstanding bonds;" that "the value of the property is greatly in excess of the par value of the bonds"; and that, as it seems to the appellees, "this company must earn more money or go into the hands of a receiver, within a comparatively short time."

The main facts are: The par value in 1908, of its stock and bonds was $30,011,800, divided as follows: stock, $10,000,000 (preferred, $4,000,000, common, $6,000,000); bonds, $20,011,800. It appeared that no dividends had been paid on the common stock since 1904. The annual interest charges amounted to $952,583.

The book cost of its property, after deducting items disallowed by the Master, was $28,574,225; and this, if divided according to mileage, would give to Minnesota as its share, $17,127,390. The mileage basis of division, however, fails to take account of the fact that the property in Minnesota has a greater relative value.

The Master found the total value of the property in Minnesota on the basis of the cost of reproduction new to be $21,608,464. In this estimate there was included the sum of $5,999,397.90 for lands, yards and terminals. Of this amount $4,556,298 was allowed for the lands in Minneapolis on the estimate of the same appraisers who had been employed in that city by the other companies; and to this the Master added five per cent. The lands outside these terminals were valued at $1,215,285.

The net earnings of the entire system, after paying only operating expenses and taxes, from 1903 to 1909, were found to be as follows: 1903, $1,398,895.30; 1904, $1,229,524.49; 1905, $1,277,870.96; 1906, $1,511,961.99; 1907, $1,419,822.54; 1908, $1,220,862.21; 1909, $1,286,-494.08.

The net earnings of the company on all its business in Minnesota, interstate and intrastate (involving any use of the property valued as stated), after paying only operating expenses and taxes, were, during the same period: 1903, $1,222,941.77; 1904, $1,052,478.74; 1905, $1,054,853.35; 1906, $1,109,260.56; 1907, $895,977.66; 1908, $742,377.46; 1909, $794,472.58. The reference in each case is to the fiscal year ending on June 30.

It thus appears that the net return from the entire Minnesota business in 1907 was about 4.14 per cent. on the estimated value of the property ($21,608,464) in Minnesota; in 1908, less than 3.5 per cent.; and in 1909, less than 3.7 per cent.

The Master made his computations, with respect to the return permitted under the rates in question, upon the

operations of the fiscal year ending June 30, 1907. The class rates had been effective from November 15, 1906, and the passenger fare act from May 1, 1907. It was estimated by the Master that the additional loss, which would have accrued in the intrastate business if these rates had been in force during the entire fiscal year ending June 30, 1907, and if in addition the commodity rate act, which was enjoined, had been applied to the intrastate traffic of that year, would have amounted to $131,358, thus making a very serious reduction in a return already inadequate; and his conclusion was that the rates in question were plainly confiscatory.

It is not necessary here to reproduce the computations, as we are satisfied, after a careful examination of the evidence, that while the methods of estimating value, and of apportionment, which have been disapproved in the discussion of the cases of the other companies are subject to the same objections in this case, so far as they have been employed, the margin of error which may be imputed to them is not sufficiently great to change the result. The net return from the entire business in Minnesota, interstate and intrastate, fell to $742,000 in the fiscal year ending June 30, 1908, and it is plain that the latter amount would have been largely reduced had the commodity rate act been enforced. In view of the actual results of the business in the State, and the clearly established facts with respect to the conditions of traffic upon this road, the conclusion cannot be escaped that the rates prescribed by the acts and orders of Minnesota would not permit a fair return to this company.

Without approving, therefore, the methods of calculation which have been adopted, but recognizing the peculiar situation of this road, and the undoubted effect of the rates in question upon its revenues, we are of the opinion that the decree, so far as it rests upon the confiscatory character of the rates as applied to this company, should

be affirmed. In the desire, however, to prevent the possibility that the decree may operate injuriously in the future, we shall modify it by providing that the members of the Railroad and Warehouse Commission, and the Attorney-General of the State, may apply at any time to the court by bill or otherwise, as they may be advised, for a further order or decree, whenever it shall appear that, by reason of a change in circumstances, the rates fixed by the State's acts and orders are sufficient to yield to the company reasonable compensation for the services rendered.

The decrees in Numbers 291 and 292 are reversed and the cases remanded with directions to dismiss the bills respectively without prejudice.

The decree in Number 293 is modified as stated in the opinion and, as modified, is affirmed.

MR. JUSTICE MCKENNA concurs in the result.

MISSOURI RATE CASES.[1]

APPEALS AND CROSS APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Nos. 9, 12, argued October 12, 13, 1910; Ordered for reargument April 10, 1911; Reargued April 1, 2, 3, 1912. Nos. 339, 340, 341, 342, 345, 346, 349, 350, 351, 352, 357, 358, 365, 366, 367, 368, argued April 1, 2, 3, 1912. —Decided June 16, 1913.

These suits were brought to restrain the enforcement of the freight-rate and passenger-fare acts of the State of Missouri, passed in 1907. The question of interference with interstate commerce is the same

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[1] Docket titles of these cases are as follows:

No. 9. Knott *et al.*, Railroad and Warehouse Commissioners, *v.* Chicago, Burlington & Quincy R. R. Co.

No. 12. Chicago, Burlington & Quincy R. R. Co. *v.* Knott &c.

No. 339. Knott &c. *v.* St. Louis & San Francisco Railroad Co.

No. 340. St. Louis & San Francisco Railroad Co. *v.* Knott.

No. 341. Knott *v.* Atchison, Topeka & Santa Fe Railway Co.

No. 342. Atchison, Topeka & Santa Fe Railway Co. *v.* Knott.

No. 345. Knott *v.* Chicago, Rock Island & Pacific Railway Co.

No. 346. Chicago, Rock Island & Pacific Railway Co. *v.* Knott.

No. 349. Knott *v.* Kansas City Southern Railway Co.

No. 350. Kansas City Southern Railway Co. *v.* Knott.

No. 351. Knott *v.* St. Louis & Hannibal Railway Co.

No. 352. St. Louis & Hannibal Railway Co. *v.* Knott.

No. 357. Knott *v.* Missouri, Kansas & Texas Railway Co.

No. 358. Missouri, Kansas & Texas Railway Co. *v.* Knott.

No. 365. Knott *v.* Kansas City, Clinton & Springfield Railway Co.

No. 366. Kansas City, Clinton & Springfield Railway Co. *v.* Knott.

No. 367. Knott *v.* Chicago Great Western Railway Co.

No. 368. Chicago Great Western Railway Co. *v.* Knott.

There were altogether thirty-six Missouri Rate Cases of which eighteen were disposed of by this opinion. In eight of the last mentioned suits, it was stipulated in the court below that they should abide by the decision reached in other cases. Of the remaining ten, two were consolidated into one for purposes of trial, see p. 512, *post*, leaving nine

as that presented in the *Minnesota Rate Cases, ante*, p. 352, and the decision is the same.

Where an act fixing rates and imposing penalties for violation is repealed by a subsequent act which saves the penalties and simply substitutes other rates, the essential features of a controversy involving the constitutionality of the statute are the same; and, under the circumstances of this case, a supplemental bill may be filed setting up the new and additional legislation and praying relief in regard thereto.

Where the ends of justice are advanced and no substantial rights of

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suits which were submitted to the court below upon the proofs. The court below enjoined the rates as being confiscatory.

On the appeals in these nine suits (there being an appeal and cross-appeal in each case) this court sustains the rates as to six companies, to wit: the Chicago, Burlington & Quincy, the Atchison, Topeka & Santa Fe, the Kansas City Southern, the Missouri, Kansas & Texas, the Chicago, Rock Island & Pacific (including the St. Louis, Kansas City & Colorado), and the St. Louis & San Francisco.

In the cases of these companies, the decrees are reversed and the cases remanded with instructions to dismiss the bills, respectively, without prejudice.

The court holds the rates to be confiscatory in three of the nine cases whose appeals were heard, to wit: the St. Louis & Hannibal, the Kansas City, Clinton & Springfield and the Chicago Great Western.

In these three cases, the decrees are affirmed, with the modification that the Railroad Commissioners and the Attorney-General of the State, may apply to the court whenever it shall appear that by reason of a change in circumstances the rates fixed by the State's acts are sufficient to yield reasonable compensation.

Under the stipulations made in the court below, the decision sustaining the rates as to the six companies above-mentioned will also apply to six other companies, to wit: the St. Louis Southwestern, the Missouri Pacific, the St. Louis, Iron Mountain & Southern, the Wabash, the Chicago, Milwaukee & St. Paul, and the Chicago & Alton, see p. 509, *post*.

The decision in the case of the Chicago Great Western Company, holding the rates to be confiscatory, will also apply by virtue of the stipulations made below to the Quincy, Omaha & Kansas City Railroad Company and the St. Joseph & Grand Island Railway Company. For other cases involving Missouri rates, see pp. 509, 512, *post*.

the objectors are violated, this court will not interfere with the reasonable discretion of the trial judge in a matter of practice.

Where the Federal court already has jurisdiction of an action to determine the constitutionality of a state statute fixing rates, that jurisdiction is not ousted by a substitution of rates by the legislature, because the State files a bill to enforce the new rates; the Federal court retains jurisdiction under a supplemental bill.

Minnesota Rate Cases, *ante*, p. 352, followed to effect that the legislative acts of Missouri establishing maximum rates for transportation wholly intrastate are not unconstitutional as an unwarranted interference with interstate commerce.

Legislative acts of a State establishing maximum freight and passenger rates for wholly intrastate commerce will not be declared unconstitutional under the Fourteenth Amendment as confiscatory in the absence of clear and convincing proof as to the value of the property used by the carrier and on which returns are based. General evidence as to assessed valuations without showing the method of appraisement are insufficient, either as to value of property or apportionment of expenses between interstate and intrastate business.

Minnesota Rate Cases, *ante*, p. 352, followed, disapproving the establishment of values of property used in interstate and intrastate business by apportionment based on the gross revenue received from each class of business.

Where a number of different carriers bring separate suits to enjoin the enforcement of railway rates established by a state statute on the ground that the rates are unconstitutional as confiscatory, the bills can be sustained as to those carriers which actually prove that the rates are confiscatory as not yielding a return on their property, although dismissed as to other carriers which fail to offer clear and convincing proof to that effect.

Where a statute is valid on its face, each person attacking it as depriving him of his property without due process of law must show it does so deprive him; he cannot rely on the fact that it deprives others of their property without due process of law.

168 Fed. Rep. 317, affirmed in certain cases and reversed in others.

APPEALS and cross-appeals from decrees of the Circuit Court entered March 8, 1909, as amended April 17, 1909, adjudging the maximum freight rate acts passed by the legislature of the State of Missouri, April 15, 1905, Laws, p. 102, and March 19, 1907, Laws, p. 171, and the maxi-

mum passenger fare act passed February 27, 1907, Laws, p. 170, to be confiscatory, and enjoining their enforcement. 168 Fed. Rep. 317.

Eighteen suits, brought by as many railroad companies, were begun in June, 1905, assailing the act of April 15, 1905 (effective June 16, 1905), which prescribed maximum rates for intrastate transportation of certain commodities in carload lots. The members of the Board of Railroad Commissioners, the Attorney-General of the State, and representative shippers, were made defendants.

Preliminary injunction was granted in each case, demurrers to the bills were overruled, answers were filed and in March, 1906, the cases were referred to a master to take evidence and report. The Master proceeded, by agreement, to take testimony in three of the cases.

While this reference was pending, the legislature in 1907, passed the following acts:

(1) That of February 27, 1907, fixing a maximum passenger fare within the State of two cents a mile, for railroads over forty-five miles in length.

(2) That of March 19, 1907, repealing the act of April 15, 1905, and prescribing new maximum intrastate rates for specified commodities in carload lots, the rates being higher in certain instances than those of the former act. It also repealed an act passed April 15, 1905 (not mentioned in the original bills) relating to rates on stone, sand and brick, and made new rates therefor. It was provided that the repeal should not relieve any railroad company from liabilities and penalties previously incurred.

(3) That of March 19, 1907 (Laws 1907, p. 187), fixing maximum rates for fruit in carload lots.

(4) That of April 4, 1907 (Laws 1907, p. 176), requiring carriers of live stock in carload lots to carry the shipper or his agent free of charge. (This statute was held unconstitutional by the state court and needs no further notice. *McCully* v. *Railroad Co.*, 212 Missouri, 1.)

These acts took effect on June 14, 1907.

On June 11, 1907, the complainant in each of the eighteen cases moved for leave to file an amended and supplemental bill, then presented to the court, which set forth the legislation of 1907, above-mentioned, and asked relief against its enforcement upon the grounds that these acts constituted an unwarrantable interference with interstate commerce and that they were confiscatory. On June 13, 1907, the court made an order setting down the applications for argument and meanwhile restraining the enforcement of the new rates. On June 17, 1907, upon hearing, leave to file was granted and a temporary injunction was allowed as to the freight rate laws of 1907, but not as to the passenger fare law. The latter was permitted to go into effect for three months without prejudice and was thereafter continued in force until the final decrees.

Meanwhile on June 14, 1907, bills were filed in the name of the State in the state court against the railway companies seeking an injunction requiring them to put in force both the freight and passenger rates as prescribed.

The supplemental bills in the Federal courts were amended so as to show these proceedings. On demurrer to these bills, as amended, it was insisted that they were without equity; that the matters alleged were not germane to or supplementary of the original bills; and that the state court had jurisdiction of the proceedings therein instituted. The demurrers were overruled and the defendants answered.

It was ordered (June 13, 1908) that the eighteen cases should be set down for hearing before the court upon the testimony theretofore taken before the Master, and upon such further oral and documentary evidence as should then be offered in open court. And the cases were so heard.

With respect to eight of the suits, it was stipulated that they should abide the result in other suits named.

The case of the St. Louis, Kansas City & Colorado Railroad Company was consolidated with that of the Chicago, Rock Island & Pacific Railway Company, the latter having acquired the property of the former, and the court ordered that the "findings, statements and figures" of the two companies should be combined. In the suit brought by the Chicago, Burlington & Quincy Railway Company, then the lessee of the property, the Chicago, Burlington & Quincy Railroad Company was substituted as complainant on the cancellation of the lease.

In the nine cases thus remaining, the court held that the rate acts, both of 1905 and 1907, were invalid, as confiscatory. The contention as to the invalidity of the acts by reason of interference with interstate commerce was not sustained. The costs were equally divided.

And from the final decrees entered in these nine suits, the above-entitled appeals and cross-appeals were taken.

Mr. Elliott W. Major, Attorney General of Missouri, *Mr. Sanford B. Ladd* and *Mr. F. W. Lehmann,* with whom *Mr. John M. Atkinson,* Assistant Attorney General of Missouri, was on the brief, for the Railroad and Warehouse Commissioners of the State of Missouri, appellants in the appeals and appellees in the cross-appeals:

The two-cent passenger fare act and maximum freight rate acts involved do not interfere with nor constitute a direct and substantial burden upon interstate commerce.

Ours is a dual form of government. *Howard* v. *Ill. Cent. R. R. Co.,* 207 U. S. 463; *Sands* v. *Manistee River Imp. Co.,* 123 U. S. 295; *B. & O. R. R. Co.* v. *Maryland,* 21 Wall. 485; *In re Debbs,* 158 U. S. 564; *Cardwell* v. *Bridge Co.,* 113 U. S. 210.

Each State has the sole and exclusive authority to prescribe reasonable maximum passenger and freight rates on traffic wholly within the State.

It is a legal impossibility for state rates on intrastate traf-

fic to change interstate rates. If, however, it were legally possible for state rates to change or interfere with interstate rates, it is no objection to the validity of such laws that such rates incidentally affect interstate commerce. Cases *supra* and *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204; *Stone* v. *Farmers' L. & T. Co.*, 116 U. S. 325; *Nor. Pac. Ry. Co.* v. *North Dakota*, 216 U. S. 579; *New York* v. *Hesterberg*, 211 U. S. 41; *N. Y., L. E. & W. R. R. Co.* v. *Pennsylvania*, 158 U. S. 439; *C., B. & Q. R. R. Co.* v. *Cutts*, 94 U. S. 155; *Peik* v. *Chic. & N. W. Ry. Co.*, 94 U. S. 164; *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413; *Houston & Tex. Cent. Ry. Co.* v. *Mayes*, 201 U. S. 328; *Howard* v. *Ill. Cent. R. R. Co.*, 207 U. S. 502; *Ames* v. *Union Pac. Ry. Co.*, 64 Fed. Rep. 171.

The two classes of rates and traffic, interstate and intrastate, are separate, distinct and independent, and the raising or lowering of one cannot affect the other.

The lowering of one works no legal compulsion on the roads to change the other, and the roads cannot plead their own convenience or business reasons or the effect of competition between themselves in restraint of the otherwise undeniable power of the State. *Ames* v. *Union Pac. Ry. Co.*, 64 Fed. Rep. 171; *Oregon Navigation Co.* v. *Campbell*, 173 Fed. Rep. 978, 988; *Woodside* v. *Tonopah & G. R. Co.*, 174 Fed. Rep. 360; *Louisville & N. R. Co.* v. *Siler*, 186 Fed. Rep. 198; *Arkansas Rate Cases*, 187 Fed. Rep. 296; *Saunders* v. *Southern Express Co.*, 18 I. C. C. Rep. 415, 421; *Hope Cotton Oil Co.* v. *Tex. & Pac. Ry.*, 12 I. C. C. Rep. 265, 269; *Gibbons* v. *Ogden*, 9 Wheat. 194; *Employers' Liability Cases*, 207 U. S. 463; *Wabash Ry. Co.* v. *Illinois*, 118 U. S. 557, 565; *Chicago Ry. Co.* v. *Minnesota*, 134 U. S. 418, 459; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 350; *Mo. Pac. Ry. Co.* v. *Kansas*, 216 U. S. 262, 283. See also *Louis. & Nash. Co.* v. *Eubank*, 184 U. S. 42; *Atlantic Coast Line Co.* v. *Nor. Car. Corp. Comm.*, 206 U. S. 1; *Mo. Pac. Ry. Co.* v. *Taylor*, 216 U. S. 283;

Oregon Navigation Co. v. *Campbell*, 183 Fed. Rep. 979; *Wabash, St. L. & Pac. Ry. Co.* v. *Illinois*, 118 U. S. 557; *Smyth* v. *Ames*, 169 U. S. 466; *St. Louis S. W. Ry. Co.* v. *Allen*, 187 Fed. Rep. 295; *Southern Pac. Co.* v. *Campbell*, 189 Fed. Rep. 182.

The opinion in *Shepard* v. *Northern Pac. Ry. Co.*, 184 Fed. Rep. 765, is without precedent, is a radical departure, a legal impossibility, and is founded upon neither law, logic nor reason. The opinion itself is its own undoing.

Intrastate and interstate commerce constitute two separate, distinct and independent classes, and the rates of each are fixed and controlled by separate sovereignties. The change in the rates of one by the state and in the other by Federal authority only operates upon and affects its own separate, distinct and independent class of commerce.

The enforcement of the passenger and freight rate acts in question would not, in fact, have the effect of directly and substantially burdening interstate commerce. *Chic. & G. T. R. R. Co.* v. *Wellman*, 143 U. S. 339, 343.

The law presumes the Missouri acts are valid and that includes the presumption they do not violate the commerce clause of the Constitution. *San Diego Land Co.* v. *National City*, 174 U. S. 739, 754; *Knoxville* v. *Water Co.*, 212 U. S. 1, 8, 16; *Chic., Mil. & St. P. Ry. Co.* v. *Tompkins*, 176 U. S. 167, 173; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, 91, 97; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 395; *Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614; *St. L. & San Francisco Ry. Co.* v. *Gill*, 156 U. S. 649, 666; *Day* v. *Chic. & N. W. R. R. Co.*, 35 Fed. Rep. 866, 874; *Louis. & Nash. R. R. Co.* v. *Kentucky*, 183 U. S. 503, 511.

The freight and passenger rates involved are not violative of the Fourteenth Amendment and are not, therefore, confiscatory.

The legislature of Missouri was authorized to prescribe

reasonable maximum rates on intrastate traffic. *Stone* v. *Farmers' L. & T. Co.*, 116 U. S. 307; *Chic. & Grand Trunk R. R. Co.* v. *Wellman*, 143 U. S. 739; *Lehigh Valley R. R. Co.* v. *Pennsylvania*, 145 U. S. 192.

The freight and passenger laws involved are presumptively valid. *Chic., Mil. & St. P. Ry. Co.* v. *Tompkins*, 176 U. S. 167, 173; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 91, 97; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 395.

The burden of proving that the state laws are confiscatory rests upon the railroad company which must establish that the rates are confiscatory, clearly, unmistakably and beyond all doubt. *San Diego Land Co.* v. *National City*, 174 U. S. 739; *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19; *Louis. & Nash. Ry. Co.* v. *Kentucky*, 183 U. S. 503, 511; *Nor. Pac. Ry. Co.* v. *North Dakota*, 216 U. S. 579.

All doubts must be resolved in favor of the validity of the freight act and passenger fare law involved and if the court is in doubt one way or the other as to the laws giving a fair return upon the reasonable valuation of the properties employed, that doubt sustains the laws. *Bridge Co.* v. *Henderson City*, 173 U. S. 614; *Day* v. *Chic. N. W. R. R. Co.*, 35 Fed. Rep. 866, 874; *Nor. Pac. Ry. Co.* v. *North Dakota*, 216 U. S. 579.

The case is heard and the questions determined *de novo* by this court and without regard as to how the questions were found and determined by the trial court. *Knoxville* v. *Water Co.*, 212 U. S. 1.

The rates, both freight and passenger, and business of the road in the State, may be considered in their entirety. *San Diego Land Co.* v. *National City*, 174 U. S. 739.

The road may be compelled to carry an article or articles at cost or even at a loss if the return on its entire business in the State affords it a reasonable compensation. *Nor. Pac. Ry. Co.* v. *North Dakota*, 216 U. S. 579.

The road must affirmatively advise the court what it

has done with the receipts and earnings of the company on its entire business in the State, and must not only give the amount showing the disposition of its revenues, but must give the items thereof; its expenses in general statements and in large sums will not be accepted so that the court may not be misled into doing grievous wrong to the public. *Chic. & Grand Trunk R. R. Co.* v. *Wellman*, 143 U. S. 739.

The service rendered by the road is an element which must be considered in determining the questions, because the road can only demand what the services rendered by it are reasonably worth. *Minn. & St. L. R. R. Co.* v. *Minnesota*, 186 U. S. 257; *Smyth* v. *Ames*, 169 U. S. 466.

Each case must be heard and determined upon its own particular facts and evidence. Reduction in rates does not necessarily mean reduction in revenue. They may have increased business volume and therefore increased earnings. *Smyth* v. *Ames; Chic. Grand Trunk R. R. Co.* v. *Wellman, supra; St. L. & San Francisco R. R. Co.* v. *Gill*, 156 U. S. 649.

In three cases only, *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Covington Turnpike Co.* v. *Sanford*, 164 U. S. 578; *Smyth* v. *Ames*, 169 U. S. 466, has this honorable court held rates fixed by legislative bodies for public service corporations confiscatory. In each of the three cases the facts were either admitted or not seriously controverted, and can be distinguished from this case.

This court, on the other hand, has refused in thirteen or more cases to hold such rates invalid on account of being unreasonable and confiscatory. *San Diego Land Co.* v. *National City*, 174 U. S. 739; *Chic. & G. T. R. R. Co.* v. *Wellman*, 143 U. S. 739; *Stanislaus Co.* v. *San Joaquin River Co.*, 192 U. S. 201; *Dow* v. *Beidelman*, 125 U. S. 680; *St. L. & S. F. R. R. Co.* v. *Gill*, 156 U. S. 649; *San Diego Land Co.* v. *Jasper*, 189 U. S. 439; *Minn. & St. L. R. Co.* v. *Minnesota*, 186 U. S. 257; *Atlantic Coast Line*

v. *Florida*, 203 U. S. 256; *Sea Board Air Line* v. *Florida*, 203 U. S. 270; *Alabama & V. R. Co.* v. *Mississippi*, 203 U. S. 496; *Knoxville* v. *Water Co.*, 212 U. S. 1; *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19; *Nor. Pac. Ry. Co.* v. *North Dakota*, 216 U. S. 579.

There are numerous factors necessary to know in order to determine whether or not the rates, both freight and passenger, are confiscatory or afford a reasonable return, including: the reasonable value of the properties employed in the business; the reasonable value of the properties less the franchise; the amount of the value assignable to state freight traffic; the amount of the value assignable to state passenger traffic; gross amount of revenue received; the gross amount of revenue received from state freight traffic; the gross amount of revenue received from state passenger traffic; total amount of expense; amount of expense assignable to state freight traffic; amount of expense assignable to state passenger traffic; taxes assignable to freight traffic; taxes assignable to passenger traffic; amount of diminution in revenue if freight acts had been in effect.

Each and every one of these factors must be established by affirmative proof on the part of the road.

Appellants' briefs show the total value of the properties of the various railroad companies in Missouri, together with the separate amounts of that part of the valuation assignable to state freight and state passenger traffic and upon which separate values they are entitled to a reasonable return. The railroad companies, however, are not entitled to any return upon that part of the valuation represented by their franchise.

Appellants challenge the correctness of the findings of the trial court, the method of dividing the operating expense between state and interstate traffic, the amount of operating expense charged to Missouri, the character of evidence received, the absence of primary or best evidence,

although within the keeping of the railroad, and like questions as applied, first, to freight rates, and, second, to passenger rates.

The court should not have divided the total freight expense between state and interstate traffic upon the basis of gross revenue; and certainly should not have added 50 per cent. to the expense of handling state freight in addition thereto. *Ames* v. *Union Pac. R. R. Co.*, 64 Fed. Rep. 182; *Chic., Mil. & St. P. R. R. Co.* v. *Tompkins*, 176 U. S. 176; *Atlantic Coast Line* v. *Ellis*, 203 U. S. 256, 260.

Total expenses should not have been divided between state and interstate traffic upon the basis of gross earnings. As to freight traffic it should have been divided on the ton-mile basis and as to passenger traffic on the passenger miles and service rendered.

It costs more to handle interstate freight less than carload lots than it does state freight less than carload lots.

The railroad officers and employés who testified in this case were forced to admit the correctness of the ton-mile theory.

The courts condemn the gross revenue theory and properly proceed upon the basis of the ton-mile theory.

Mr. Frank Hagerman, with whom *Mr. O. M. Spencer* was on the brief, for the Railroad Companies, appellees and cross-appellants:

The court below found the rates to be confiscatory. This finding was made from 5027 printed pages of evidence specifically applicable to all roads traversing the same territory. In the light of the peculiar circumstances surrounding the case, great weight should be given to the finding. It surely was as effective as like action by a master would have been. Especially is this true in view of the extended inquiry of the experts, their long oral cross-examinations and the reasons given for their methods of

dividing expenses and their determination that it costs more to do the state than the interstate business. This court cannot possibly be in as good a situation to pass upon the facts found as was the court below.

The State had every opportunity to ascertain the facts. Besides this, the law presumed it ascertained all the facts before it attempted to fix the rates by legislative enactment. If it failed so to do, the legislative acts should not be permitted to stand.

The State refused to request any finding of fact or point out any error or inaccuracy therein.

The evidence discloses that the rates in question are confiscatory. Every presumption is in favor of the finding below (*Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep. 765, 807, 808), which must be sustained unless the record shows there has been some clear misconception of the evidence or misapplication of the law. This is applicable to masters' reports, *Tilghman* v. *Proctor*, 125 U. S. 126, 149; *Callaghan* v. *Nyers*, 128 U. S. 617; *Furrer* v. *Ferris*, 145 U. S. 132; *Fisher* v. *Shropshire*, 147 U. S. 133, 146, especially where the reference was by consent. *Warren* v. *Burt*, 58 Fed. Rep. 101, 106.

Here, by agreement, the court heard the case upon oral evidence and dispensed with a master. The finding ought, therefore, to be as effective as if it had been made by a master, and should be given great weight, especially in view of the facts recited.

The rates in question on any and all classes of business are absolutely confiscatory unless, to obtain as between state and interstate business, the original or equal cost of each, there be a division of freight expenses upon the ton-mile basis. When this is done, the freight rates are confiscatory unless a very large percentage be added as the extra cost.

The rates are confiscatory. This conclusion was reached by the court below; and the method of ascertaining their

insufficiency was upon the same principle as that adopted in *A., T. & S. F. R. R. Co.* v. *Love*, 167 Fed. Rep. 493; *S. C.*, 185 Fed. Rep. 321; certiorari denied, 218 U. S. 675; 220 U. S. 618; *Re Arkansas Rates*, 163 Fed. Rep. 141; *S. C.*, 187 Fed. Rep. 290; *Ames* v. *Union Pac. R. Co.*, 64 Fed. Rep. 165; *Smyth* v. *Ames*, 169 U. S. 469; *C., M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167; *Nor. Pac. R. Co.* v. *Keyes*, 91 Fed. Rep. 47; *Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep. 765; *Penna. R. Co.* v. *Philadelphia County*, 220 Pa. St. 100; *Central Ry. Co.* v. *Northampton County*, 11 Northampton Co. Ct. Rep. 342.

As a start upon the question of valuation, there must be ascertained the value of the whole property in the State devoted to all its uses. Presumptively, the bonds and stocks properly apportioned, represent that value. *Ames* v. *Union Pac. R. Co.*, 64 Fed. Rep. 165, 177; *So. Pac. R. Co.* v. *Bartine*, 170 Fed. Rep. 725, 751. However, included therein as elements of value, are the income, good-will, franchises, cost of construction, action of the State equalizing board, and other considerations, such as the company being a going concern.

For the rule under which this valuation is to be determined, see *Ames* v. *Union Pac. R. Co.*, 64 Fed. Rep. 165, 177; *Smyth* v. *Ames*, 169 U. S. 466, 547; *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19; *Spring Valley Water Works* v. *San Francisco*, 124 Fed. Rep. 574, 592; *M., K. & T. R. Co.* v. *Love*, 177 Fed. Rep. 493; *Love* v. *A., T. & S. F. R. Co.*, 185 Fed. Rep. 321; *Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep. 765, 808; *Re Arkansas Rates*, 187 Fed. Rep. 290; *So. Pac. R. Co.* v. *Bartine*, 170 Fed. Rep. 725, 751. See also *People* v. *State Board*, 196 N. Y. 39, holding that this valuation was to be fixed as of the time when the inquiry was made.

The franchise value is to be considered. *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19, 44; *Spring Valley Water Works* v. *San Francisco*, 124 Fed. Rep. 574, 592; *Monongahela Nav. Co.* v. *United States*, 158 U. S. 312, 328. In

tax assessments the franchise is always an element of value to be taxed. *State Railroad Tax Cases*, 92 U. S. 602, 605; *Columbus Southern Ry.* v. *Wright*, 151 U. S. 470, 479; *Adams Express Co.* v. *State Auditor*, 165 U. S. 194, 221; *Pittsburg &c. Ry. Co.* v. *Backus*, 154 U. S. 421, 429; *Franklin County* v. *Nashville & Chatt. Ry.*, 12 Lea, 521, 539; *Metropolitan Trust Co.* v. *Houston & Texas Cent. R. R.*, 90 Fed. Rep. 683; *Re Advance in Freight Rates*, 9 I. C. C. Rep. 382.

In any event, interest actually paid should always be returned. Bonded debt upon which for years interest has been paid, as in these cases, is substantial evidence of value. Interest upon bonds of a going concern is at least a criterion of a higher value than the amount of the bonded debt. *C., M. & St. P. R. R.* v. *Tompkins*, 90 Fed. Rep. 363, reversed, 176 U. S. 167; *C., M. & St. P. R. R. Co.* v. *Smith*, 110 Fed. Rep. 473, 475.

Unless the property is clearly shown to have been over-bonded, then interest is a fixed charge which ought in any event to be paid. That there was no over-bonding is the express finding below. Where money has been borrowed and mortgage bonds issued therefor, upon which for years interest has been paid, no court has ever yet denied that such charge was at least to be paid. Beale & Wyman on Railroad Rate Regulation, §§ 388, 393, 437; *Gas Light Co.* v. *New Memphis*, 72 Fed. Rep. 952; *C. & N. W. R. R. Co.* v. *Dey*, 35 Fed. Rep. 866, 879.

The only way in which to ascertain what part of this value is properly assignable to the classes of traffic in question is by taking such proportion of the entire value as the earnings from that class of business which is in question bears to the entire revenue in the State from all sources. *Re Arkansas Rates*, 163 Fed. Rep. 141; *S. C.*, 187 Fed. Rep. 290, 317; *M., K. & T. R. Co.* v. *Love*, 177 Fed. Rep. 493, 497; *S. C.*, 185 Fed. Rep. 321, 328; certiorari refused, 218 U. S. 675; 220 U. S. 618; *Shepard* v.

Nor. Pac. R. Co., 184 Fed. Rep. 765, 810. This method of division was also adopted in *Ames* v. *Union Pac.*, 64 Fed. Rep. 165, 179; *Smyth* v. *Ames*, 169 U. S. 466; *C., M. & St. P. R. Co.* v. *Tompkins*, 90 Fed. Rep. 363; *State* v. *Atlantic Coast Line*, 40 Florida, 146; Beale & Wyman, § 466; *Southern Pac. R. Co.* v. *Bartine*, 170 Fed. Rep. 725, 751.

The question of rate of interest to which the companies are entitled was considered below. *St. L. & S. F. R. Co.* v. *Hadley*, 168 Fed. Rep. 317, and six per cent was adopted as the least rate to be allowed. This was the rate held proper in *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19; in the Pennsylvania two cent fare cases, *Penna. R. Co.* v. *Philadelphia Co.*, 220 Pa. St. 100; *Central R. Co.* v. *Northampton Co.*, 11 Northampton Co. Ct. Rep. 342; and in *People* v. *State Board*, 196 N. Y. 39. See also *M., K. & T. R. Co.* v. *Love*, 177 Fed. Rep. 493; *S. C.*, 185 Fed. Rep. 321, and certiorari 218 U. S. 675; 220 U. S. 618. In *Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep. 765, 815, seven per cent. was sustained. *Re Arkansas Rates*, 187 Fed. Rep. 290, 345, 7.5 per cent. was sustained. See also *People* v. *Tax Commissioners*, 196 N. Y. 39; *S. C.*, 128 App. Div. 13.

The proper method of the first or equal division of expenses, as between state and interstate business, is upon the revenue basis. It was adopted in *Ames* v. *Union Pac.*, 64 Fed. Rep. 165; *C., M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167; *Smyth* v. *Ames*, 169 U. S. 466; *C., M. & St. P. R. Co.* v. *Keyes*, 91 Fed. Rep. 47, 55; *Re Arkansas Rates*, 163 Fed. Rep. 141; *M., K. & T. R. Co.* v. *Love*, 177 Fed. Rep. 493, 498, 499; *S. C.*, 185 Fed. Rep. 321, 330, 331; 218 U. S. 675; 220 U. S. 618; *Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep. 765, 810, 812; *Re Arkansas Rates*, 187 Fed. Rep. 290, 320, 344. See also *Cedar Hill Coal Co.* v. *C. & S. Ry. Co.*, 16 I. C. C. 387, 393; *Gustin* v. *A., T. & S. F. R. Co.*, 8 I. C. C. 277.

The auditors of the eighteen railroads adopted the

revenue basis, it being the method used by all railroads where it has been necessary to divide expenses as between state and interstate. The best railway experts in the world favored it, giving many reasons for their views.

There is a substantial extra cost of doing state business over interstate, which should be deducted from the earnings.

If the division were made differently, the result would be the same. The Nebraska, North Dakota, South Dakota and Oklahoma divisions were by the same method. The Minnesota and Arkansas divisions of expenses upon final hearing prove that the theory adopted below brought a fair result.

The laws under which the rates were to be imposed are invalid: they directly affect interstate commerce and, therefore, violate the Federal Constitution, which vests in Congress exclusively the regulation of interstate commerce. *Ex parte Young*, 209 U. S. 123; *M., K. & T. R. Co.* v. *Love*, 177 Fed. Rep. 493, 498; *Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep. 765.

The making of state rates in Missouri necessarily and directly affects interstate rates for that competition forces the interstate rates to the same figures. The state rate necessarily fixes the interstate.

When there are two lines between the same points, like the C., B. & Q., and Mo. Pac., between St. Louis and St. Joseph the interstate rate must be fixed at the same as the state or else the interstate carrier will do no business between the same points.

Where points are practically the same (for instance, as Kansas City, Missouri, and Kansas City, Kansas) with nothing but a street or invisible state line intervening, the interstate rate must necessarily meet the state; otherwise there would be discrimination between localities.

Any law, no matter what its form, which substantially and directly affects or interferes with interstate commerce,

is void. The court will disregard forms or names, and look through both for the substance of things. *Galveston & H. T. R. Co.* v. *Texas*, 210 U. S. 217, 227; *Western Union Tel. Co.* v. *Coleman*, 216 U. S. 1, 27; *Pullman Co.* v. *Kansas*, 216 U. S. 56, 62; *International Text Book Co.* v. *Pigg*, 217 U. S. 91; *L. & N. R. Co.* v. *Eubanks*, 184 U. S. 27, 47.

The rule has been applied to the piping of natural gas, *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229; the issuance of free transportation, *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467; *C. I. & L. R. Co.* v. *United States*, 219 U. S. 486; the stoppage of all trains at junctions, *Herndon* v. *C., R. I. & P. R. Co.*, 218 U. S. 159; state car distribution, *St. L. & S. W. R. Co.* v. *Arkansas*, 217 U. S. 136. See also *Nor. Pac. Ry. Co.* v. *Washington*, 222 U. S. 370; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424; *Southern Ry. Co.* v. *United States*, 222 U. S. 20; *Mondou* v. *N. Y., N. H. & H. R. Co.*, 223 U. S. 1.

The laws are void in part and hence void as a whole. *Ill. Cent. R. Co.* v. *McKendree*, 203 U. S. 514; *Cotting* v. *Godard*, 183 U. S. 79, 112; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 564.

A general law upon its face applicable to all, yet void as to some, cannot be sustained as to the part. *United States* v. *Ju Toy*, 198 U. S. 253, 262; *United States* v. *Reese*, 92 U. S. 214, 222; *Trade Mark Cases*, 100 U. S. 82, 98–99; *Allen* v. *Louisiana*, 103 U. S. 80; *Baldwin* v. *Franks*, 120 U. S. 678, 685–689; *Poindexter* v. *Greenhow*, 114 U. S. 270, 305; *Ill. Cent. Ry. Co.* v. *McKendree*, 203 U. S. 514, 529; *Howard* v. *Ill. Cent. R. Co.*, 207 U. S. 463.

The provision in the two-cent fare law that makes that rate apply only to roads having more than forty-five miles in length is clearly discriminatory for this reason. *Cotting* v. *Godard*, 183 U. S. 79, 112; *Gulf, C. & S. F. R. R. Co.* v. *Ellis*, 165 U. S. 150–159; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 564.

There was the right to continue the litigation previously

instituted as against the rates fixed by the acts of 1907. The State is in no position to raise the question.

Amendatory and supplementary matter can in the interest of justice be treated as an original bill. A court will freely construe a bill to be original or supplementary as its character warrants. *Kennedy* v. *Bank*, 8 How. 586, 609, 610; *Great Western Tel. Co.* v. *Purdy*, 162 U. S. 329, 335; *Schenck* v. *Peay*, Woolw. 175, 21 Fed. Cas. 667, 669, No. 12450; *Ross* v. *Ft. Wayne*, 58 Fed. Rep. 404, 406; *Vigneron* v. *Auto Time Saver Repair Kit Co.*, 171 Fed. Rep. 580, 581; *MacIntosh* v. *Flint & P. M. R. Co.*, 34 Fed. Rep. 582, 614; *Neale* v. *Neale*, 9 Wall. 1.

The bill, however, was properly supplementary. Story on Equity Pleading (10th ed.), §§ 336, 345.

The bill was not multifarious. *Perkins* v. *Nor. Pac. R. Co.*, 155 Fed. Rep. 445, 447, 448; *Salvidge* v. *Hyde*, 5 Mad. 138; *Hayden* v. *Thompson*, 71 Fed. Rep. 60, 67; *Brown* v. *Safe Deposit Co.*, 128 U. S. 403, 412; *Grant* v. *Phœnix L. Ins. Co.*, 121 U. S. 105; *Nelson* v. *Hill*, 5 How. 127; *United States* v. *Flournoy Live Stock Co.*, 69 Fed. Rep. 886; *Way* v. *Bragaw*, 16 N. J. Eq. 213; Story, Equity Pleading, 10th ed., 285–286; Foster, Fed. Pr. 75; *Virginia* v. *West Virginia*, 206 U. S. 290.

There was the right to enjoin state officers if the rates were confiscatory. *Smyth* v. *Ames*, 169 U. S. 466; *Ex parte Young*, 209 U. S. 123; *Hunter* v. *Wood*, 209 U. S. 205; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19; 161 Fed. Rep. 419; 168 Fed. Rep. 317; *A., T. & S. F. R. Co.* v. *Love*, 174 Fed. Rep. 59; *M., K. & T. R. Co.* v. *Love*, 177 Fed. Rep. 493; *S. C.*, 185 Fed. Rep. 321; certiorari denied, 218 U. S. 675; 220 U. S. 618; *Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep. 765; *Re Arkansas Rates*, 187 Fed. Rep. 290.

Mr. Gardiner Lathrop also for the Railroad Companies, appellees and cross-appellants:

The commerce clause of the Constitution gives to Con-

gress exclusive and plenary power over commerce among the States and any state legislation which directly affects or discriminates against such commerce is void.

The power of the General Government over commerce among the States by the great artificial highways of rail is just as comprehensive and controlling and all-embracing and exclusive of state burden or interference as it is over such commerce by the great natural highways of water. *Perkins* v. *Nor. Pac. Ry. Co.*, 155 Fed. Rep. 445, 454; *Pensacola Tel. Co.* v. *West &c. Tel. Co.*, 96 U. S. 1; *California* v. *Pacific R. R. Co.*, 127 U. S. 1; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 342; *In re Debs*, 158 U. S. 564, 590, 591; *Employers' Liability Cases*, 223 U. S. 1; *Swift* v. *United States*, 196 U. S. 375, 398; *Loewe* v. *Lawlor*, 208 U. S. 274, 299; *United States* v. *Rio Grande Dam Irrigation Co.*, 174 U. S. 690; *Railroad Co.* v. *Maryland*, 21 Wall. 456.

The power of the State over local rates was unquestioned in the early history of railway transportation when railroads operated within the limits of the State which created them and all traffic was intrastate. But that power has been necessarily curtailed by the development of the railway systems, the legislation of Congress, the growth of commerce among the States and the method of handling all commerce indiscriminately on the same trains, whether intrastate or interstate, so that whenever local rates directly affect interstate rates the national authority is supreme and state regulation is superseded. *Southern Ry. Co.* v. *Reid*, 222 U. S. 424; *Saunders* v. *Southern Express Co.*, 18 I. C. C. 415, 421.

Every state law, regardless of the purpose for which it was passed, whose direct and necessary effect is substantially to interfere with interstate commerce, is void. *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Galveston, H. & T. R. Co.* v. *Texas*, 210 U. S. 217, 227; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 162.

The compelling force of competition in the adjustment of interstate rates to meet state-made rates demonstrates the direct effect of such rates upon interstate commerce.

Competition is a distinct and most important factor in the making and adjustment of rates. As a vital force in transportation, it is controlling and irresistible if traffic is to be transported by a given line between points where there are other transportation lines, either rail or water.

The law of competition is just as forceful in commerce as the law of gravitation is over matter. *Int. Comm. Comm.* v. *B. & O. Railroad*, 145 U. S. 263, 276; *Cin. N., O. & Tex. Pac. Railway* v. *Int. Comm. Comm.*, 162 U. S. 184; *Int. Comm. Comm.* v. *B. & O. Railroad Co.*, 43 Fed. Rep. 37; *Int. Comm. Comm.* v. *Alabama Midland Ry.*, 168 U. S. 144; *Louisville &c. R. R. Co.* v. *Behlmer*, 175 U. S. 648, 670–2; *East Tenn. &c. Ry. Co.* v. *Int. Comm. Comm.*, 181 U. S. 1, 18–19; *Louis. & Nash. R. R. Co.* v. *Eubank*, 184 U. S. 27; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 337, 338; *Int. Comm. Comm.* v. *Chic. G. W. Ry.*, 209 U. S. 108; *Int. Comm. Comm.* v. *Diffenbaugh*, 222 U. S. 42, 48; *Shepard* v. *Nor. Pac. Ry. Co.*, 184 Fed. Rep. 765, 792; *Re Arkansas Rate Cases*, 187 Fed. Rep. 290.

Analogous cases decided by this court show that this doctrine has already had express judicial sanction. The *Daniel Ball*, 10 Wall. 557; *Gilman* v. *Philadelphia*, 3 Wall. 724; *Hall* v. *DeCuir*, 95 U. S. 485; *Wabash &c. Ry. Co.* v. *Illinois*, 118 U. S. 557, 572–3; *Southern Ry. Co.* v. *United States*, 222 U. S. 20; *Nor Pac. Ry. Co.* v. *Washington*, 222 U. S. 370.

The proviso contained in the first section of the Interstate Commerce Act does not militate against the view that the State is powerless to prescribe intrastate rates in cases where interstate rates are directly and necessarily affected. *Cooley* v. *Wardens*, 12 How. 318; *Gunn* v. *Barry*, 15 Wall. 623; *Railway* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

Hence, the proviso leaves the States just as they have been ever since the case of *Gibbons* v. *Ogden*, in control of the transportation of passengers or property wholly within their borders which is "completely," "exclusively" and "purely" internal commerce and which does not "affect other States."

Mr. R. C. Johnson, Attorney General, and *Mr. P. W. Dougherty*, Assistant Attorney General, of South Dakota; *Mr. Grant G. Martin*, Attorney General of Nebraska; *Mr. George E. Cosson*, Attorney General of Iowa, and *Mr. J. H. Henderson*, *Mr. Jno. S. Dawson*, Attorney General, and *Mr. S. M. Brewster*, Assistant Attorney General, of Kansas; *Mr. R. C. Brickell*, Attorney General of Alabama, and *Mr. Harry C. Selheimer*; *Mr. Charles West*, Attorney General of Oklahoma, and *Mr. Frederick N. Judson*, filed a brief on behalf of the States of South Dakota, Nebraska, Iowa, Kansas, Alabama and Oklahoma, *amici curiæ*.

Mr. William T. Thompson, Attorney General of Nebraska, and *Mr. Jared How*, also filed briefs as *amici curiæ*.

Mr. Justice Hughes, after making the above statement, delivered the opinion of the court.

1. The contention of the appellants that the court erred in permitting the filing of the amended and supplemental bills is without merit. Although the commodity rate act of 1907 repealed that of 1905, it saved the penalties and liabilities incurred under the repealed statute. Both the original and supplemental bills proceeded upon the broad ground that the returns of the companies from their intrastate business, prior to the act of 1905, were unreasonably low and that any reduction in rates would

only diminish the income already inadequate. The additional legislation pending the suits, and the substitution of slightly higher rates on certain commodities embraced in the earlier act, did not alter the essential features of the controversy. There was identity of parties and subject-matter, although nominally different acts were involved. To have required original bills would have involved double litigation, double costs and great delay. The ends of justice were advanced by allowing the amended and supplemental bills and we are not inclined to interfere with the reasonable discretion of the trial judge in a matter of practice which in no way violated any of the substantial rights of the appellants.

Neither can it be said that the state court had prior jurisdiction. That the State filed in one of its courts bills for the enforcement of the act of 1907, before the actual filing of the supplemental bills, may be true; but the application for leave to file the supplemental bills was pending in the Circuit Court of the United States and action was suspended, merely to give opportunity for hearing, the court meanwhile restraining the enforcement of the new rates. In view of the pending bills assailing the act of 1905, the substantial identity of the question arising under the acts of 1907, and the pendency of the motion for leave to file supplemental bills, we are clearly of opinion that priority of jurisdiction belonged to the United States and the state court could not properly oust that jurisdiction.

2. It is insisted by the cross-appellants that the legislative acts, although relating exclusively to intrastate transportation, constituted an unwarrantable interference with interstate commerce and that the decrees should have afforded relief upon this ground. We need not review the arguments addressed to conditions of transportation in Missouri and the relation of intrastate to interstate rates for while the case has its special facts by

reason of the location of the State, and the use of the Mississippi and Missouri rivers as basing points in rate-making, the controlling question thus presented with reference to the authority of the State to prescribe reasonable intrastate rates throughout its territory, unless limited by the exercise on the part of Congress of its constitutional power over interstate commerce and its instruments, is not to be distinguished in any material respect from that which was considered and decided in the *Minnesota Rate Cases, ante,* p. 352. For the reasons stated in the opinion in those cases, it must be held that the court below properly refused to sustain this objection to the Missouri statutes.

3. We are thus brought to the question whether the action of the State was confiscatory, that is, whether by the reduction in rates of which complaint is made, the carriers were denied the just compensation to which they were entitled for the use of their property in the public service. It is to be observed that the freight rate acts of 1907 applied only to a portion of freight transportation, that is, to the transportation of specified commodities in carload lots. But, as we have said, it is contended that the return from the intrastate business was already inadequate and that the scope of the State's action in the passage of the passenger fare act and the commodity rate acts was such as necessarily to preclude a fair return upon that business taken as a whole. If it be assumed that the question of the profitableness of the entire intrastate operations is thus presented, the inquiry leads at once to a consideration of the fair value of the property devoted to the public use.

The findings of value made by the court below, in the case of seven [1] of the nine companies were the same as

[1] These companies were the Chicago, Burlington & Quincy, St. Louis & San Francisco, Atchison, Topeka & Sante Fe, Chicago, Rock Island

the valuations placed respectively upon the properties by the state assessing board, for the purpose of taxation, multiplied by three.[1] The multiplication was made because the assessments were on the basis of one-third of the value in the judgment of the state board. In the case of two of the companies, the St. Louis & Hannibal and the Kansas City, Clinton & Springfield, the value as found was equal to twice the assessed valuation, that is, the value was taken to be two-thirds of the estimate of the assessing board.

None of the members of the state assessing board was examined. There is no satisfactory proof of the grounds of their judgment. Nor was it shown that these valuations, made by them for the purposes of taxation, were upon a basis which could properly be taken in determining the fair value, where the sufficiency of prescribed rates is involved and the issue is one of confiscation.

It is urged that there was other evidence in support of the conclusions reached. The court below, while finding values equal to those estimated by the state assessing board, also found that apart from the valuations of the state board, and upon the whole evidence, the property was at least worth the amounts mentioned in the findings. It was said that there had been considered "the immense terminal values of most of the roads, the amount of stock and bonds outstanding, what it would cost to duplicate the properties both with and without terminals in the large cities, and all the evidence bearing on present values."

& Pacific, Kansas City Southern, Missouri, Kansas & Texas, and Chicago Great Western.

[1] In certain instances there are slight differences which appear to be accounted for by additions to the state assessments of certain local assessments. But in every instance, the value as found corresponds to what was assumed to be three times the assessed valuation in the statements of computations submitted to the court.

On examining the evidence, however, we find it to be too general and inconclusive to be regarded as sufficient proof to sustain the values as found. Undoubtedly, the companies possessed valuable terminals, but what the values were was not suitably shown. There is an absence of evidence, appropriately specific, dealing with the lands, improvements, structures, equipment and other property owned by each company and showing what the various items of property were worth. It would seem manifest from the character of the evidence which can be supposed to have relation to value, that reliance was principally placed upon the estimates of the state assessing board. There was proof of the amount of stocks and bonds, of earnings, and also testimony as to the cost of certain recent construction, but while these matters could properly be considered in reaching a conclusion, we fail to find any adequate basis for the definite findings of value that have been made. We are referred to the testimony of two witnesses for the complainants, men of considerable experience in railroad affairs, but this consisted of broad estimates. Thus, one of these witnesses testified as follows:

"Q. I want to ask you a question as to the Rock Island, the St. Louis & Hannibal, the Kansas City Southern, the M. K. & T., the Kansas City, Clinton & Springfield, and the Chicago Great Western. In speaking of the Rock Island, I include the St. Louis, Kansas City and Colorado.

"The figures in those cases being based upon three times the valuation of said property, as shown by the State Board's of Equalization assessment for the year 1907, I think it is . . . and the Atchison, Topeka & Santa Fe Railway Company.

"One or two of these roads had the figures for 1908, and I want to see which those are. I think those I named are all for 1907, and the Burlington figures are for 1908.

"Now I want to ask you the general question as to each

and all of those roads, whether in your opinion each of those roads is worth an amount equal to three times the valuation fixed by the State Board of Equalization in those years—at least that much?

"A. Yes sir, in a general way I should say the value of those roads is at least three times the amount shown in the report of the State Board of Equalization of Missouri, for the years 1907 and 1908. I have examined both books, and substantially there is not very much difference.

"Q. I do not remember whether we gave the Frisco figures for 1907 or for 1908. But you make them applicable to all the roads you have testified to, as to both 1907 and 1908, do you?

"A. Yes sir, with the exception possibly of the St. Louis & Hannibal and of the Kansas City, Clinton & Springfield. I am not certain as to those roads being worth three times the assessed value, as shown in the printed report of the proceedings of the State Board of Equalization.

"Q. As to each of those roads, which are losing ventures any way, according to the testimony here, about what would you say they are worth, at least how much?

"A. Well, I should say twice as much as the assessed valuation.

"Q. Your statement, with the exception you make as to the St. Louis & Hannibal, and the Kansas City, Clinton & Springfield Railroads, is applicable to all the roads whose cases have been tried here?

"A. Yes sir."

Another witness testified with respect to the Rock Island road that the value was not less than three times the assessed valuation, that is, not less than the amount taken on this basis as the valuation of the state board.

It is clear that testimony of this general character cannot be deemed sufficient to support a finding of con-

fiscation or to justify the annulment of the legislative acts of the State.

In the case of the Chicago, Burlington & Quincy Company, the value of the property in the State of Missouri was fixed at the amount of $53,172,907.83. This amount, as stated in the exhibit of computations submitted by the company to the court, was precisely three times "the assessment for 1908" ($17,724,302.61), the assessment being made upon the basis of one-third of the board's estimate. The court found that the mileage in Missouri was 1136.34 miles and that the value as fixed amounted to $46,793 a mile. If this valuation were extended to the mileage of the entire system, it would mean that for the purpose of determining the validity of prescribed rates and the issue of confiscation, the Burlington property as a whole should be regarded as worth over $400,000,000. According to the evidence, as stated in the brief of counsel for the company, the actual bonded indebtedness of the company at the time in question was $174,172,000 and its stock, $110,839,100, making a total of $285,011,100. In short, the contention would be, on this basis of valuation extended to the system, that unless the Burlington were permitted to calculate its fair return upon an amount exceeding by more than $115,000,000 its total capitalization, it would be deprived of its property without due process of law.

Manifestly, a finding of confiscation could not be based on such a valuation in the absence of clear and convincing proof that the value actually existed and that the different items of property were estimated respectively by correct methods and in accordance with proper criteria of value. This proof was lacking. In the case of the other roads, although the special considerations which have been mentioned with respect to the Burlington property may not be applicable, still we are left in uncertainty as to the correctness of specific valuations which have been made.

It cannot be regarded as sufficient to introduce assessments, or valuations made for the purposes of taxation; and this is particularly true when the principles governing the assessments are not properly shown, and for all that appears, they may have rested upon methods of appraisement which would be inadmissible in ascertaining the reasonable value of the property as a basis for charges to the public. *Minnesota Rate Cases, ante,* p. 352.

There is a further question, and that is, whether these estimates of value which the court below adopted in its findings were accepted by the defendants and hence are not open to objection here. It is undoubtedly true that these estimates were used in the computations, on both sides, which were submitted to the court. The amounts assessed respectively were conceded and it was also agreed that the assessments were made at one-third the value in the judgment of the board. Concessions of this sort were made at various times during the taking of evidence and the following extracts from the record are sufficient, we think, to show their nature.

Thus, with respect to the Burlington road, on the original bill, the following stipulation was made before the Master:

"It is agreed between the parties that the basis of the assessment is upon the basis of one-third of the value of the property, in the judgment of the Board."

And later, on the hearing before the court on the amended and supplemental bills, the following took place:

"Mr. Hagerman: We have a stipulation in the other three cases that the State Board of Railroad and Warehouse assessment was based upon one-third of what they regarded as a $33^1/_3$ per cent. valuation.

"General Hadley: Whatever the stipulation was, it would be equally applicable to the other fifteen roads as it was to the three.

"The Court: If you are able to make an agreed statement now, better do so.

"Mr. Hagerman: I would like to get the fact, whatever it may be.

"The Court: Who assesses the railroads?

"Mr. Hagerman: The state officers.

"Mr. Lehmann: We do not accept that as indicating the real value because under the law the State Board is required to take into account a great many things, the amount of the bonds and the stock, the franchises, the income of the property, and the income might be unduly high, and upon that basis give an unduly high valuation to the property.

"Mr. Hagerman: I did not ask you to admit that is the value of itself, but that the State Board valuation is fixed by them upon three times the amount of the returns.

"Mr. Lehmann: We object to that as immaterial and irrelevant.

"Mr. Hagerman: Will you admit it subject to the objection?

"General Hadley: My recollection is that the stipulation or understanding was that the State Board assessment was one-third of what they regarded as the value of the property, including the franchise.

"Mr. Hagerman: One-third of the value as listed in the statement. I shall follow it by the introduction of a statement.

"General Hadley: That is all right."

Our conclusion is that the stipulation extended only to the fact that the judgment of the board was as stated. While the evidence on the question of value, considering the character of the issue involved, was extremely unsatisfactory and these estimates based upon the assessments were used by both parties in the calculations which were submitted to the court, still it cannot be said that there was an agreement as to the values. Nor did the

court in making its findings proceed upon the view that the values had been stipulated. We can entertain no doubt upon this record that the defendants are free to urge, as they do urge, that the values as found are not supported by the proof.

It is not necessary to consider the merits of the contention based on the assumption that in the item of the assessment entitled "All other property" the state assessors included franchises of the companies. There is no clear showing as to what they did include in this item. As we have said, they were not called as witnesses and in many essential particulars we are unable to judge upon what basis they made their specific appraisements.

4. The value of the entire property within the State, as found, was apportioned between the interstate and intrastate business, passenger and freight, according to the gross revenue derived from each.

The reasons for disapproving this method were stated in the *Minnesota Rate Cases*, *ante*. p. 352, and the ruling there made is controlling here.

5. A large part of the controversy relates to the division of expenses between the interstate and intrastate traffic. It is contended by the defendants that the division should have been made with respect to freight according to the relation of ton-miles, and that the passenger expense should have been divided according to the relation of passenger-miles, or, to include another factor upon which the defendants insist, according to passenger-miles and "service rendered," meaning by the latter that the quality of the service should be taken into account.

The court made the division in each case upon the basis of gross revenue with an addition for the extra cost of intrastate traffic, this being estimated at not less than fifty per cent. in the case of freight and not less than twenty-five per cent. in the case of passengers.

It is evident that in an apportionment of expenses

either upon the revenue method, or upon the ton-mile and passenger-mile method, relations may be assumed which do not in fact exist. Thus, a division of expenses according to gross revenue assumes that the cost in relation to revenue is the same with respect both to intrastate and interstate traffic; in fact, it may be very different. A greater average sum may be charged for intrastate than for interstate hauls; and this greater sum may or may not be equal to the difference in cost. In the Minnesota cases, the Master found that the revenue per ton per mile derived from intrastate business as compared with interstate business, was, with respect to the Northern Pacific company, as 1.4387 to 1.0000, and with respect to the Great Northern company, as 2.02894 to 1.00000. And, there is further illustration in the present case, it appearing, for example, that in the case of the St. Louis & San Francisco company, the revenue per ton per mile from the intrastate business, as compared with the interstate business was as 1.7286 to 1.0000; and in that of the Chicago, Burlington & Quincy company, approximately as 2 to 1. An apportionment of expenses on the basis of revenue which did not take into consideration the differences in revenue in relation to cost in the two classes of traffic would be plainly inaccurate.

On the other hand, a division according to ton-miles assumes that the cost of moving a ton of intrastate freight one mile is the same on the average as the cost of moving a ton of interstate freight one mile. If the average cost differs in the two classes of traffic, the difference must be allowed for in order to make a correct apportionment of the total expense.

When the apportionment is on the revenue basis, with an allowance such as was made by the court below for the assumed extra cost of intrastate traffic, it is manifest that the purpose is to express in a given percentage the additional cost of intrastate traffic in proportion to revenue.

This was clearly illustrated in the computations made by the Master in the *Minnesota Rate Cases, ante,* p. 352. The Master concluded that the cost per ton-mile of doing intrastate freight business was two and one-half times that of doing interstate freight business. The division of expenses was then made according to ton-miles after increasing the intrastate ton-miles two and one-half times. To reach the same result on the revenue basis it was necessary to ascertain the relation of cost per ton-mile in proportion to revenue, and for this purpose, for example, in the Northern Pacific case, the relation of cost per ton-mile (2.5 to 1.0) was divided by the relation of revenue per ton-mile (1.4387 to 1.0000) and the relation of cost in proportion to revenue was thus found to be as 1.7377 to 1.0000. The division of expenses was then made upon the revenue basis after multiplying the intrastate revenue by 1.7377; and the result, of course, was identical with that obtained upon the ton-mile basis as already stated.

The allowance of 50 per cent. (which was made below) for the extra cost corresponds in its nature to the 73.77 per cent. allowed in the *Minnesota Case* on the "equated revenue basis." If, for example, it were assumed that it cost three times as much per ton-mile to do the intrastate freight business as the interstate, and the revenue per ton-mile of the former was twice that of the latter, the cost in proportion to revenue would be 50 per cent. more. Or, if the assumption were that the intrastate freight business cost two and one-half times as much per ton-mile as the interstate, and the revenue per ton-mile of the former, as compared with the latter, was as 1.66 to 1.00 (as it is said to be in the case of the Atchison, Topeka & Santa Fe company) the extra cost in proportion to revenue would be substantially 50 per cent.

As the counsel for the railroad companies says in his brief, the court below "took the estimates of two to four

times extra cost given by witnesses, and because of extra state or short-haul revenue per mile and other considerations, reduced them to 50 per cent., saying that this as a minimum added to the equal division upon the revenue basis, brought to each road a result that was fair, just and representative."

We have then in substance the same question that was presented in the *Minnesota Cases* with respect to the evidence of the additional cost of transacting the intrastate business. There are numerous expressions of judgment on the part of the witnesses as to the amount of the intrastate cost, some estimating it on the revenue basis and others on the ton-mile basis. The estimates took a similarly wide range, making the cost of the intrastate or short-haul business from two to eight or more times that of the interstate or long-haul business. There was also testimony on each side as to certain tests, but these covered only a few days. We can reach no different conclusion from that stated in the decision to which we have referred, that, in an issue of this character involving the constitutional validity of state action, general estimates of the sort here submitted with respect to a subject so intricate and important should not be accepted as adequate proof to sustain a finding of confiscation. *Minnesota Rate Cases*, *ante*, p. 352.

For the reasons that have been set forth, we must conclude that, save in the cases mentioned below, the complainants failed to sustain their bills.

The exceptions are these: In the case of the St. Louis & Hannibal company, operating, as found by the court below, 120.61 miles within the State, the net revenue from the entire Missouri business, interstate and intrastate, for the fiscal year ending June 30, 1908, appears to have been $15,687.18. In the case of the Kansas City, Clinton & Springfield company, operating 151.01 miles within the State, the net revenue from the entire business therein,

interstate and intrastate, for the same year amounted to $32,500.72. In each of these cases the experts employed by the parties unite in the statement that it is apparent from the results shown that "upon neither the revenue nor ton-mile nor passenger-mile theory of expenses can any adequate return on the investment be earned."

In the case of the Chicago Great Western company, operating 84.43 miles of road within the State, the entire net revenue from the Missouri business, interstate and intrastate, for the six months ending December 31, 1907, being the period taken by both parties for the purpose of calculation, amounted to $41,839.06. From our examination of the evidence and the various computations we are satisfied in this case, as in the two others above-mentioned, that errors attributable either to valuation or to apportionments cannot be regarded as sufficiently great to change the result.

The decrees in these three cases will accordingly be affirmed, with the modification that the Railroad and Warehouse Commissioners, and the Attorney-General of the State, may apply at any time to the court by bill or otherwise, as they may be advised, for a further order or decree whenever it shall appear, that by reason of a change in circumstances the rates fixed by the State's acts are sufficient to yield to these companies reasonable compensation for the services rendered.

The contention raised by the complainants, that these legislative acts cannot be enforced against one company unless enforced against all, cannot be sustained. The argument, in effect, is that although the charges of carriers may be clearly exorbitant, the State is powerless to compel them to put into effect reasonable rates because as to another carrier differently situated the rates thus prescribed might be unreasonably low. The acts are valid upon their face as a proper exercise of governmental authority in the establishment of reasonable rates, and

each complainant in order to succeed in assailing them must show that as to it the rates are confiscatory.

The decrees in Numbers 9, 12, 339, 340, 341, 342, 345, 346, 349, 350, 357 and 358 are reversed and the cases remanded with directions to dismiss the bills respectively without prejudice.

The decrees in Numbers 351, 352, 365, 366, 367 and 368, are modified as stated in the opinion and, as modified, are affirmed.

KNOTT ET AL., RAILROAD AND WAREHOUSE COMMISSIONERS OF THE STATE OF MISSOURI, *v.* ST. LOUIS SOUTHWESTERN RAILWAY CO.[1]

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* KNOTT.

APPEALS AND CROSS-APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Nos. 343, 344, 353, 354, 355, 356, 359, 360, 361, 362, 363, 364, 369, 370, 371, 372. Argued April 1, 2, 3, 1912.—Decided June 16, 1913.

Stipulations having been made that these suits should abide by the order, judgment and decree entered in other suits, no questions

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[1] Fourteen other cases were argued simultaneously with this case and disposed of by this opinion. They are as follows.

No. 353. Knott, Railroad and Warehouse Commissioners, *v.* Missouri Pacific Railway Co.

No. 354. Missouri Pacific Railway Co. *v.* Knott.

No. 355. Knott *v.* St. Louis, Iron Mountain & Southern Railway Co.

No. 356. St. Louis, Iron Mountain & Southern Railway Co. *v.* Knott.

are presented for the consideration of this court by the records; and the appeals are dismissed.

Under such conditions the parties should apply to the court below in accordance with the stipulations to have decrees entered in these suits similar to those which this court has directed to be entered in the suits to which the stipulations refer.

THE facts are stated in the opinion.

These cases were argued simultaneously with the other *Missouri Rate Cases*, *ante*, p. 474 by the same counsel and on the same briefs.

Memorandum opinion by direction of the court.

By MR. JUSTICE HUGHES.—These suits, with ten others, were brought to restrain the enforcement of the freight-rate and passenger-fare acts of the State of Missouri passed in the years 1905 and 1907, as violative of the Federal Constitution. (See *Missouri Rate Cases*, decided this day, *ante*, p. 474).

Upon the hearing below, a stipulation was made in each of these eight suits, and orders were entered thereon, that it should abide "by the orders, judgment and decree that may be made and entered" in one of the other suits named, as follows:

The suit of the St. Louis Southwestern Railway Company was to abide that of the St. Louis, Iron Mountain & Southern Railway Company; the suits of the Missouri

No. 359. Knott *v.* Quincy, Omaha & Kansas City Railroad Co.
No. 360. Quincy, Omaha & Kansas City Railroad Co. *v.* Knott.
No. 361. Knott *v.* Wabash Railroad Company.
No. 362. Wabash Railroad Company *v.* Knott.
No. 363. Knott *v.* St. Joseph & Grand Island Railway Co.
No. 364. St. Joseph & Grand Island Railway Co. *v.* Knott.
No. 369. Knott *v.* Chicago, Milwaukee & St. Paul Railway Co.
No. 370. Chicago, Milwaukee & St. Paul Railway Co. *v.* Knott.
No. 371. Knott *v.* Chicago & Alton Railway Co.
No. 372. Chicago & Alton Railway Co. *v.* Knott.

Pacific Railway Company, the St. Louis, Iron Mountain & Southern Railway Company, and the Chicago, Milwaukee & St. Paul Railway Company, that of the St. Louis & San Francisco Railroad Company; the suits of the Wabash Railroad Company and the Chicago & Alton Railway Company, that of the Chicago, Burlington & Quincy Railroad Company; and the suits of the Quincy, Omaha & Kansas City Railroad Company and the St. Joseph & Grand Island Railway Company, that of the Chicago Great Western Railway Company.

The decrees below were entered in accordance with these stipulations. No questions for our consideration are presented by the appeals and cross-appeals in these cases. The remedy of the parties is to apply to the court below in accordance with the stipulations to have decrees entered in the respective suits similar to those which we have directed to be entered in the cases to which the stipulations refer. The appeals and cross-appeals are therefore dismissed.

It is so ordered.

KNOTT ET AL., RAILROAD AND WAREHOUSE COMMISSIONERS, *v.* ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD CO.

ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD CO. *v.* KNOTT ET AL., RAILROAD AND WAREHOUSE COMMISSIONERS.

APPEAL AND CROSS-APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Nos. 347, 348. Argued April 1, 2, 3, 1912.—Decided June 16, 1913.

These suits having been consolidated with other similar suits disposed of by the decision in the *Missouri Rate Cases, ante*, p. 474, the same disposition is made of these suits.

THE facts are stated in the opinion.

These cases were argued simultaneously with the other *Missouri Rate Cases, ante*, p. 474 by the same counsel and on the same briefs.

Memorandum opinion by direction of the court.

By MR. JUSTICE HUGHES.—This suit was one of the eighteen suits described in the *Missouri Rate Cases, ante*, p. 474, decided this day. Upon the hearing below, as it appeared that the property of the St. Louis, Kansas City & Colorado Railroad Company had been acquired by the Chicago, Rock Island & Pacific Railway Company, it was ordered, by consent of the parties, that the suits of the two companies should be consolidated and that

the "findings, statements and figures as to both companies" should be put "in consolidated form as those of the Chicago, Rock Island & Pacific Railway Company."

Separate decrees were entered in the two cases, and separate appeals and cross-appeals have been taken.

The same disposition must be made of both. (See *Knott* v. *Chicago, Rock Island & Pacific Railway Company*, No. 345, *sub Missouri Rate Cases*, note p. 474, *ante*.) The decree below is therefore reversed and the cause is remanded with directions to dismiss the bill without prejudice.

It is so ordered.

CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* CONLEY, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

No. 111. Argued April 8, 1912.—Decided June 16, 1913.

Where the state court has held that the carrier is exempted from the operation of the penalty clause of a rate-making statute during prosecution by it in good faith of a suit to determine the constitutionality of such statute, the carrier cannot attack the validity of the statute on the ground of its penal provisions.

Classification in a rate-making statute of railroads less than fifty miles in length is not unreasonable and does not render the statute unconstitutional as violating the equal protection provision of the Fourteenth Amendment. *Dow* v. *Beidelman*, 125 U. S. 680.

As construed by the state court, the statute of West Virginia of 1907 is not unconstitutional because the classification of railroads under fifty miles in length only applies to such roads as are not under the control, management or operation of other railroads.

A classification excepting electric lines and street railways from a rail-

road rate statute is reasonable and proper and does not offend the equal protection clause of the Fourteenth Amendment. *Omaha & Council Bluffs Railway Co.* v. *Int. Comm. Comm.*, *ante*, p. 324.

Minnesota Rate Cases, *ante*, p. 352, followed to effect that a state statute prescribing rates exclusively for intrastate traffic is within the power of the State to enact.

THE facts, which involve the constitutionality of the two cent rate act of West Virginia of 1907, are stated in the opinion.

Mr. F. B. Enslow, with whom *Mr. H. Fitzpatrick*, *Mr. H. T. Wickham* and *Mr. W. E. Chilton* were on the brief, for plaintiff in error:

The West Virginia two-cent fare statute is unconstitutional because the penalties pronounced by the statute against any railway which shall fail to comply with the same are so excessive as to bring the act within the inhibition of Art. VIII of the Constitution; and, under the Fourteenth Amendment, the act deprives the plaintiff of its property without due process of law, and denies to it the equal protection of the law.

The entire act is unconstitutional, because the classification thereby made of the railways makes the act applicable to railroads of a certain class, and such classification as set out is unfair and unjust, and a mere arbitrary selection imposed by the legislature without any relation to the alleged purpose of the act and not based on any reasonable grounds.

The act is also unconstitutional because it necessarily imposes a burden upon the plaintiff as an interstate carrier, and denies it the right to transact and carry on interstate commerce free from the burdens and restrictions imposed by the West Virginia two-cent fare act.

The act is unconstitutional by reason of the classification by length of roads. Many States afflicted with the "two-cent fare fad of 1907" passed such statutes in 1907;

but every statute has general application, makes no discriminations, treats every railroad alike; and in the few cases where classifications are made, those classifications are founded upon a good reason, every road in each class is treated as are all others in that class, and there is no difficulty in assigning a railroad to its proper class from a physical examination of its property.

Alabama has a straight 2½¢ rate, and has not an exception in it. General Acts Ala. 1907, p. 104. Illinois has a straight two-cent rate, without an exception in it. Laws of Ill. 1907, p. 476. Pennsylvania has a straight two-cent rate, without an exception. Laws of Penn. 1907, p. 59. North Carolina has a straight 2¼¢ act which has the proviso that the Corporation Commission is authorized to permit "all independently owned and operated railroad companies in North Carolina, whose mileage of road in said State is sixty (60) miles or under, to charge a rate for transporting passengers not in excess of the present rate fixed and prescribed for said road." Public Laws of Nor. Car. Session 1907, c. 216, p. 250.

Iowa classifies railroads according to gross earnings per mile without any exception whatever with rates from 2¢ to 3¢. Laws of Iowa, 1907, c. 102.

Minnesota has a straight 2¢ rate with a half rate for children under 12 years of age. Laws of Minn. 1907, c. 97, p. 109.

Missouri divides railroads into four classes, to-wit: A, B, C and D, of which D includes all roads less than 45 miles in length, not owned, leased, controlled or occupied by any trunk line company or corporation. This classification includes and embraces every class of railroad in the State, and there is no chance, by construction or otherwise, to put one short railroad in one class to-day and in another to-morrow. The rate is fixed at 2¢ per mile for classes A, B and C; and at 4¢ per mile for class D. Laws of Mo. 1907, p. 171.

Nebraska has a straight 2¢ fare law applying to all railroads without exception. Laws of Neb. 1907, c. 92, p. 341.

North Dakota has a straight 2½¢ rate for distances exceeding six miles with a reduced rate for children, the only exception being that the act "shall not apply to the transportation of passengers within the boundaries of any city by street railways." Laws of N. D. 1907, c. 199, p. 327.

Ohio has a straight 2¢ per mile rate without any exception whatever. Laws of Ohio, 1906, p. 4.

South Carolina has a straight rate of 3¢. Laws of So. Car., 1902, § 2165. This act was subsequently amended by the single proviso that any railroad not over 5 miles in length may be permitted by the Railroad Commission to charge 5¢ per mile. See Acts of So. Car., 1908, No. 469, p. 1047.

South Dakota has a straight 2¢ rate without a single exception. Sess. Laws of So. Dak., 1909, c. 6, p. 8.

The act of West Virginia makes an unreasonable, arbitrary, unjust and totally indefensible classification of railroads, or it so exempts certain railroads as to make it repugnant to the rules laid down by this court. More, it is a classification which is one thing in one part of the statute and another thing in another part.

A railroad under fifty miles in length is excepted, provided it be not a part of, or under the control, management or operation of any other railroad over fifty miles in length. If a railroad should be exactly fifty miles in length it is in a peculiar situation.

An assessment, no matter how made, which adopts a different method and fixes a different rate for certain corporations which results in enormous disparity and discrimination denies equal protection of the laws. *Raymond* v. *Chicago Un. Traction Co.*, 207 U. S. 20.

While the State can classify, and may make a difference in classes, the basis upon which any classification is made is always subject to review by the courts. *Nicholas* v.

Walter, 37 Minnesota, 264; *Bluejacket* v. *Scherr*, 50 W. Va. 533; *Missouri* v. *Lewis*, 101 U. S. 22.

The Fourteenth Amendment requires the same means and methods to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. *Brannon*, 323; *Kentucky R. R. Tax Cases*, 115 U. S. 321; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Atchison* v. *Mathews*, 174 U. S. 105; *State* v. *Broodbelt*, 89 Maryland, 565; *New York* v. *Clearing House*, 179 U. S. 287; *Am. Sugar Co.* v. *Louisiana*, 179 U. S. 89; *Railway* v. *Mackey*, 127 U. S. 205; *Pembina* v. *Pennsylvania*, 125 U. S. 188.

Recognizing the right of classification of industries and occupations, it must nevertheless always be remembered that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. *Richards* v. *Harmon*, 42 N. J. L. 435; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 85; *Fertig* v. *Patton*, 88 Pa. St. 258; *Edmondson* v. *Herbrandson*, 14 L. R. A. 725; *State ex rel.* v. *Mitchell*, 31 Oh. St. 592; *People* v. *Chatauqua*, 43 N. Y. 10; *Smith* v. *L. & N. R. R.*, 75 Alabama, 449; *State ex rel.* v. *Ramsey Co.*, 48 Minnesota, 236.

The classification is based not only on length but also on control and management, and this renders it a denial of equal protection of the law.

Dow v. *Beidelman*, 125 U. S. 180, distinguished. And see Cooley, Con. Lim., 5th ed., 484; *State* v. *Haun*, 61 Kansas, 146; *Railway Co.* v. *Medaris*, 60 Kansas, 155; *Levalle* v. *Railroad*, 40 Minnesota, 249; *Deppe* v. *Railway Co.*, 36 Iowa, 55; *Ballard* v. *Cotton Oil Co.*, 81 Mississippi, 507; *Bedford Quarries Co.* v. *Bough*, 80 N. E. Rep. 529.

An exception to the statute cannot take one business and favor it when other corporations and other individ-

uals, doing the same kind of business, are not so favored, nor can the statute permit a small corporation to engage in the same business with a larger corporation, the latter having burdens which the former has not, or the former having privileges which the latter has not. *Connolly* v. *Sewer Pipe Co.*, 184 U. S. 558; *State* v. *Petroleum Co.*, 58 W. Va. 109; *Re Grice*, 79 Fed. Rep. 628; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 85.

A state railroad statute which imposes such excessive penalties that the parties affected are deterred from testing its validity in the courts, denies the carrier the equal protection of the law, without regard to the question of insufficiency of the rates prescribed. *Ex parte Young*, 209 U. S. 123; *Willcox* v. *Consol. Gas Co.*, 212 U. S. 19.

While the length of the road may furnish in some instances a proper basis for classification, such classification must be called for by facts justifying it, and if it has the effect of denying equal protection to parties engaged in the same kind of business, and is so worded that it applies to some corporations in the class, and excludes others, it is invalid. *Kentucky R. R. Tax Cases*, 115 U. S. 321; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *St. Louis Coal Co.* v. *Illinois*, 185 U. S. 203; *Louis. & Nash. R. R. Co.* v. *Melton*, 218 U. S. 36; *Mo., Kans. & Tex. Ry. Co.* v. *May*, 194 U. S. 267; *Ozan Lumber Co.* v. *Union National Bank*, 207 U. S. 251; *McLean* v. *Arkansas*, 211 U. S. 539; *N. Y., N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628; *Chi., R. I. & Pac. Ry. Co.* v. *Arkansas*, 219 U. S. 453, distinguished; *Heath & Milligan Mfg. Co.* v. *Worst*, 207 U. S. 338; *Engel* v. *O'Malley*, 219 U. S. 128, are all inapplicable to this case.

The Two-Cent Fare Act of West Virginia imposes burdens and restrictions upon interstate commerce, and is for that reason also invalid.

Congress having, under authority of the Constitution, prescribed rates and regulations governing the charges of interstate carriers, no State can impose burdens upon or

enact statutes that actually do conflict with and nullify the regulations of the Interstate Commerce Commission. *Hall* v. *DeCuir*, 95 U. S. 489; *Gulf, Colo. & Santa Fe Ry. Co.* v. *Hefley*, 158 U. S. 99; *Wabash &c. Ry.* v. *Illinois*, 118 U. S. 557; *Cleveland &c. Ry.* v. *Illinois*, 177 U. S. 514; *Employers' Liability Cases*, 207 U. S. 463.

The statute, by reason of the extreme penalties pronounced, is in violation of the constitution of West Virginia.

It makes a distinction that should not be upheld; and no case passed upon by this court has ever sustained such an arbitrary statute as the one in question.

It is a clear effort on the part of the legislature of West Virginia to make the statute applicable to the trunk lines engaged in interstate commerce, and thereby affect and control the rates published and approved under the regulation of the Interstate Commerce Commission.

Mr. William G. Conley, Attorney General of West Virginia, for defendants in error.

Mr. Justice Hughes delivered the opinion of the court.

This suit was brought by the Chesapeake & Ohio Railway Company in the Circuit Court for Kanawha County, West Virginia, against William G. Conley, Attorney General of the State of West Virginia, and the prosecuting attorneys of several counties in the State, to enjoin the enforcement of the act of the legislature of West Virginia passed February 24, 1907 (Acts, 1907, chapter 41, p. 226), fixing the maximum fare for passengers on railroads, as described, at two cents a mile.

The state court sustained the act and this writ of error is brought.

The act provides:

"Sec. 1. That all railroad corporations organized or

doing business in this state under the laws or authority thereof shall be limited in their charges for the transportation of any person with ordinary baggage, not exceeding one hundred pounds in weight, to the sum of two cents per mile, or fractional part of a mile, but the fare shall always be made the multiple of five nearest reached by multiplying the rate by the distance, and if for any one passenger the rates herein provided shall be less than five cents, the said sum of five cents may be charged as a minimum; children under twelve years of age shall be carried for one-half fare above prescribed; *provided*, that any passenger boarding a train at a station where tickets are sold, without having procured a ticket, may be charged an additional fare of ten cents, for which sum a rebate slip, redeemable in money, upon presentation to any ticket agent of the company, shall be issued and delivered to such passenger; and *provided, further*, that nothing in this act shall apply to any railroad in this state under fifty miles in length and not a part of, or under the control, management or operation of any other railroad, over fifty miles in length, operated wholly or in part in the state.

"SEC. 2. Any railroad company which shall charge, demand or receive any greater compensation for the transportation of any passenger than is authorized by this act, shall be fined for each offence not less than fifty dollars nor more than five hundred dollars; *provided*, that nothing contained in this act shall apply to electric lines and street railways owned or operated in this state."

The questions presented are thus stated by the plaintiff in error:

"First: The statute in question is unconstitutional because of the fact that the penalties pronounced by the statute against any railway which shall fail to comply with the same, are so excessive as to bring the act within the inhibition of Article Eight of the Constitution of the

United States, and under the Fourteenth Amendment to the Constitution of the United States deprives the plaintiff of its property without due process of law, and denies to it the equal protection of the law.

"Second: The entire act is unconstitutional, because the classification thereby made of the railways makes the act applicable to certain railroads of a certain class, and such classification as set out is unfair and unjust, and a mere arbitrary selection imposed by the Legislature without any relation to the alleged purpose of the act, and not based on any reasonable grounds.

"Third: Because the act necessarily imposes a burden upon the plaintiff as an interstate carrier, and denies it the right to transact and carry on interstate commerce free from the burdens and restrictions imposed by the West Virginia two cent rate act."

While the plaintiff in error was entitled to a fair opportunity to test the constitutional validity of the prescribed rate, and penal provisions operating to preclude such an opportunity would be invalid (*Ex parte Young*, 209 U. S. 123), it is clear that the provisions for penalties of the statute in question, aside from their separable character, are not open to this objection, in the light of the construction placed upon them by the state court. In construing the act, the Supreme Court of Appeals of West Virginia held:

"By the institution of a suit to determine whether such a statute is confiscatory in its operation in a particular case, such corporation alters its status from that of a mere corporation engaged in the public service, to that of a contestant of the legislative claim of right to take its property without due process of law; and, in the absence of expression of intent to the contrary, it is presumed the legislature did not intend to affect, or interfere with, the assumption or maintenance of such status, nor to legislate upon the subject of such remedy; and the penal clause of

such a statute, silent on the subject of remedy, has no application, while suit is pending, in good faith, for the determination of such question. . . . By the application of these rules and principles, a railroad company is excepted from the operation of the penalty clause of chapter 41 of the Acts of 1907, during the prosecution by it, in good faith, of a suit to determine whether said statute is confiscatory in its operation and effect, as applied to such company." *Coal & Coke Railway Co.* v. *Conley and Avis*, 67 W. Va. 129, 133, 134.

Under this ruling, it does not appear that the company is in a position to attack the validity of the act by reason of its penal provisions. It has had its opportunity in court, and if the act be otherwise valid it may avoid penalties hereafter by complying with it. Further, as was said in *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160, 172: "If an oppressive application of them should be attempted, it will be time enough then for the appellant to file its bill."

Nor can it be said that the classification of the act is an unreasonable or arbitrary one. In *Dow* v. *Beidelman*, 125 U. S. 680, the statute under consideration classified railroads with respect to passenger fares, as follows: "On lines of railroad fifteen miles or less in length, eight cents per mile. On lines over fifteen miles in length, and less than seventy-five miles in length, five cents. On lines over seventy-five miles in length, three cents per mile." The court in sustaining the statute said: "The legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the

legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws." (p. 691.)

Again, in *Chicago, Rock Island & Pacific Railway Co.* v. *Arkansas*, 219 U. S. 453, the court sustained the statute of that State, which, in providing for the number of men to be employed in the operation of freight trains, excluded from its application railroads less than fifty miles in length. The principles governing the decision of a question of this sort have been so frequently stated that repetition is unnecessary. *Magoun* v. *Illinois T. & S. Bank*, 170 U. S. 283, 294; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36, 52–55; *Engel* v. *O'Malley*, 219 U. S. 128; *Lindsley* v. *Natural Carbonic Gas Company*, 220 U. S. 61, 78; *Mutual Loan Co.* v. *Martel*, 222 U. S. 225, 232; *Chicago Dock* v. *Fraley*, 228 U. S. 680.

It is urged, however, that "control, management or operation" is made the basis of classification for rate purposes, so that, if a railroad under fifty miles in length be controlled by a railroad of greater length, it would be taken out of the exception although operated wholly independently and not in connection with the longer line. This contention is fully met by the construction which the state court has given to the statute. Upon this point that court said that the meaning of the words "under the control, management or operation" "is to be ascertained from the connection in which they are used, the act in which they are found, its context, and the mass of legislation of which they form a part. In form, the expressions are alternative, but, in meaning, they are appositive, signifying the same as the words 'part of.' . . . The suggestion that ownership or control of one railroad by another, when they are not connected and operated together, nor susceptible of such connection and operation, makes them one within the meaning of the act, is like-

wise contrary to the spirit and beyond the scope thereof. Such an interpretation is not within its reason or purpose, and, therefore, not within its meaning. The legislature must be regarded as having passed the act, in view of existing conditions and methods of railroad operation, and with the intent that it should operate in harmony with the spirit and general principles of existing railroad rate legislation, except in so far as the contrary is expressed in terms or by necessary implication. There is not a word here signifying any intent to depart from the general principle embodied in the act of 1873, concerning the entity of a railroad for the purposes of the act. It made into one only such railroads as were operated 'in connection' with one another. Intent to change this settled policy must rest upon something more, in an amendatory act, than mere inference, surmise or unnecessary implication." *Coal & Coke Railway Co.* v. *Conley and Avis*, 67 W. Va. 129, 177, 178, 179.

The exception of "electric lines and street railways" is also made the ground of criticism, but this classification rests upon reasonable and familiar distinctions, long recognized as proper in railroad legislation. *Omaha & Council Bluffs Street Railway Co.* v. *Interstate Commerce Commission*, *ante*, p. 324.

The final objection to the statute is that it constitutes an unconstitutional interference with interstate commerce. It must be regarded, however, as prescribing rates exclusively for intrastate traffic, and, as thus construed, it was within the power of the State to enact. The questions presented are substantially the same as those which were considered in the *Minnesota Rate Cases*, *ante*, p. 352.

Judgment affirmed.

OREGON RAILROAD & NAVIGATION COMPANY *v.* CAMPBELL, ET AL., CONSTITUTING THE RAILROAD COMMISSION OF OREGON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

No. 159. Argued April 8, 9, 1912.—Decided June 16, 1913.

A state railroad commission has no power to fix interstate rates, and as in this case the state court has not construed an order of the state commission as relating to or affecting interstate rates this court does not so construe it.

Whether an order of the state commission governs particular shipments depends upon whether the traffic is interstate or intrastate, which must be determined by the facts in each case. The question cannot be determined in advance by general decree.

Minnesota Rate Cases, ante, p. 352, followed to effect that an order of a state railroad commission relating wholly to rates on intrastate shipments is not an unconstitutional interference with interstate commerce.

177 Fed. Rep. 318, affirmed.

THE facts, which involve the validity and constitutionality of an order made by the Railroad Commission of Oregon on April 22, 1908, prescribing maximum freight rates on railroads, are stated in the opinion.

Mr. Maxwell Evarts, with whom *Mr. W. W. Cotton* was on the brief, for appellant.

Mr. Joseph N. Teal, with whom *Mr. A. M. Crawford*, Attorney General of Oregon, and *Mr. Clyde B. Aitchison* were on the brief, for appellees:

The State has exclusive jurisdiction over its internal commerce. *Howard* v. *Ill. Cent. R. Co.*, 207 U. S. 463; *Milnor* v. *New Jersey Ry. Co.*, 17 Fed. Cas. 412; *Ex parte*

Koehler, 30 Fed. Rep. 867; *Allen* v. *O. R. & N. Co.*, 106 Fed. Rep. 265; *St. Louis & S. F. R. Co.* v. *Hadley*, 168 Fed. Rep. 317; *Woodside* v. *Tonopah & G. R. Co.*, 184 Fed. Rep. 358; *Louisville & N. R. Co.* v. *Siler*, 186 Fed. Rep. 176; *Arkansas Rate Cases*, 187 Fed. Rep. 290; *Sou. Pac. Co.* v. *Campbell*, 189 Fed. Rep. 182; *Gibbons* v. *Ogden*, 9 Wheat. 195; *United States* v. *Chicago R. Co.*, 149 Fed. Rep. 486; *Ex parte Plessy*, 45 La. Ann. 80, 87; *Sands* v. *Manistee Imp. Co.*, 123 U. S. 288; *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1; *Wabash, St. L. & P. Co.* v. *Illinois*, 118 U. S. 557; *Luxton* v. *North Bridge Co.*, 153 U. S. 525, 532; *Geer* v. *Connecticut*, 161 U. S. 519, 531; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 247; *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148; *Atlantic Coast Line* v. *Nor. Car. Com.*, 206 U. S. 1; *People* v. *Butler Street Foundry*, 201 Illinois, 236, 250; *Attorney General* v. *Old Colony R. R. Co.*, 160 Massachusetts, 62; *Chicago Ry. Co.* v. *R. R. Comm.*, 173 Indiana, 469; *Central Trust Co.* v. *Railroad Co.*, 101 N. Y. Supp. 837; *Larabee* v. *Mo. Pac. R. Co.*, 74 Kansas, 808; *State* v. *Jack*, 69 Kansas, 387; *Beardsley* v. *New York, L. E. & W. R. Co.*, 15 App. Div. 251; *Purdy* v. *Erie R. Co.*, 162 N. Y. 42; *N. J. Fruit Exch.* v. *Railroad Co.*, 2 I. C. C. 84, 86; *Hastings* v. *Railroad Co.*, 11 I. C. C. 675, 682; *Farmers' Club* v. *Railroad Co.*, 12 I. C. C. 351.

Railroads are subject as to their state business to state regulation which may be exerted directly by the legislative authority or by administrative bodies, endowed with power to that end. Calvert, Regulation of Commerce, p. 75; Beale & Wyman, Railroad Rates, § 1307; Noyes, American Railroad Rates, 206; Cooke on Commerce Clause, § 23; *Chicago R. Co.* v. *Iowa*, 94 U. S. 155; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557; *Georgia R. R. Co.* v. *Smith*, 128 U. S. 174; *C., M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418; *Chicago Ry. Co.* v. *Wellman*, 143 U. S. 339; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204;

Reagan v. *Mercantile Trust Co.*, 154 U. S. 413; *St. Louis* v. *Gill*, 156 U. S. 649; *Smyth* v. *Ames*, 169 U. S. 466; *Dinsmore* v. *Southern Exp. Co.*, 183 U. S. 115; *McLean* v. *Denver & R. G. Ry. Co.*, 203 U. S. 38, 49; *Ware* v. *Mobile Co.*, 209 U. S. 405; *Gulf, Col. & S. F. Ry. Co.* v. *Texas*, 204 U. S. 403; *Atlantic Coast Line* v. *Nor. Car. Corp. Com.*, 206 U. S. 1, 19; *General Oil Co.* v. *Crain*, 209 U. S. 211; *State* v. *Mo. Pac. Ry. Co.*, 76 Kansas, 467 (aff'd 216 U. S. 262); *Southern Ry. Co.* v. *Hunt*, 42 Ind. App. 90; *Commissioner* v. *Wabash Ry. Co.*, 123 Michigan, 669 (aff'd 126 Michigan, 113); *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 393; *Stone* v. *Farmers' L. & T. Co.*, 116 U. S. 307; *Houston & T. C. R. Co.* v. *Mayes*, 201 U. S. 321; *McNeill* v. *Southern R. Co.*, 202 U. S. 543; *Mo., K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 635; *Chicago &c. R. Co.* v. *Solan*, 169 U. S. 133; *Penna. R. Co.* v. *Hughes*, 191 U. S. 477; *Northern Securities Case*, 193 U. S. 394; *Oklahoma* v. *Atchison, T. & S. F. R. Co.*, 220 U. S. 277; *Oklahoma* v. *Chicago & Rock Island Ry.*, 220 U. S. 302.

A state law regulating a subject of Federal jurisdiction would be void and a Federal law regulating a subject of state jurisdiction is also void. *Trade Mark Cases*, 100 U. S. 82; *Ill. Cent. R. Co.* v. *McKendree*, 203 U. S. 514; *Howard* v. *Illinois Cent. R. Co.*, 207 U. S. 463.

The Federal Government has no authority over transportation which begins and ends in a particular State. *Baer Bros.* v. *Mo. Pac. R. Co.*, 13 I. C. C. 329; *Hussey* v. *C., R. I. & P. Ry. Co.*, 13 I. C. C. 366; *Haines* v. *C., R. I. & P. Ry. Co.*, 13 I. C. C. 214; *Chandler Cotton Co.* v. *Fort Smith Ry. Co.*, 13 I. C. C. 473; *Morgan* v. *M., K. & T. Ry. Co.*, 12 I. C. C. 525; *Montgomery Freight Bureau* v. *Western Ry.*, 14 I. C. C. 150; *Marshall Oil Co.* v. *C. & N. W. R. Co.*, 14 I. C. C. 210; *Lincoln Commercial Club* v. *C., R. I. & P. Co.*, 13 I. C. C. 319; *Saunders & Co.* v. *Southern Exp. Co.*, 18 I. C. C. 415, 422; *Gulf, Colo. & S. F. R. Co.* v. *Texas*, 204 U. S. 403; *Coe* v. *Errol*, 116 U. S. 525; *Michigan*

Buggy Co. v. *G. R. & I. Ry. Co.*, 15 I. C. C. 297; *Howard* v. *Ill. Cent. R. Co.*, 207 U. S. 463, 502; *Wells-Higman Co.* v. *Grand Rapids & R. Co.*, 19 I. C. C. 487.

The interference with interstate commerce that is forbidden is direct, not that which is remote or indirect. *Munn* v. *Illinois*, 94 U. S. 113; *Stone* v. *Farmers' L. & T. Co.*, 116 U. S. 307; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557; *Budd* v. *New York*, 143 U. S. 517; *N. Y., L. E. & W. R. Co.* v. *Pennsylvania*, 158 U. S. 439; *Louisville & N. R. Co.* v. *Kentucky*, 161 U. S. 677; *West. Un. Tel. Co.* v. *James*, 162 U. S. 650; *Hennington* v. *Georgia*, 163 U. S. 299; *Chicago Ry. Co.* v. *Solan*, 169 U. S. 133; *Lake Shore Ry. Co.* v. *Ohio*, 173 U. S. 285; *Wisconsin Ry. Co.* v. *Jacobson*, 179 U. S. 287; *Louis. & Nash. R. R. Co.* v. *Kentucky*, 183 U. S. 503; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543; *Gulf, Colo. & S. F. Ry. Co.* v. *Texas*, 204 U. S. 403; *Ware* v. *Mobile Co.*, 209 U. S. 405; *New York* v. *Hesterberg*, 211 U. S. 31; *Mo. Pac. Ry. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612; *Louis. & Nash. R. R. Co.* v. *Kentucky*, 183 U. S. 503, 518; *Alabama & V. Railway Co.* v. *Mississippi R. R. Comm.*, 203 U. S. 496; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, 209; *Houston & Tex. Cent. Ry. Co.* v. *Mayes*, 201 U. S. 321, 328; *Penna. R. Co.* v. *Hughes*, 191 U. S. 477, 488.

Interference by the State with interstate commerce being unlawful will not be presumed. *Chicago I. & L. Ry. Co.* v. *Railroad Commission*, 95 N. E. Rep. (Ind.) 364, 368; *N. Y. Cent. R. R. Co.* v. *Int. Comm. Comm.*, 168 Fed. Rep. 131; *Pittsburg R. R. Co.* v. *Railroad Comm.*, 171 Indiana, 189; *Chicago R. R. Co.* v. *Railroad Comm.*, 173 Indiana, 469; *Stone* v. *Farmers' L. & T. Co.*, 116 U. S. 307; *Burlington C. R. & N. R. Co.* v. *Dey*, 82 Iowa, 312, 339; *Howard* v. *Ill. Cent. R. Co.*, 207 U. S. 463, 509.

When the charge and the actual transportation are confined to the limits of the territory of the State it is not interstate commerce and is subject to state control. *Mor-*

gan v. *M., K. & T. Ry. Co.*, 12 I. C. C. 525, 528; *Montgomery Freight Bureau* v. *Western Ry. of Ala.*, 14 I. C. C. 150; *Marshall Oil Co.* v. *C. & N. W. Ry. Co.*, 14 I. C. C. 210; *Kurtz* v. *Penna. Co.*, 16 I. C. C. 410; *Savannah Bureau* v. *Charleston & Savannah R. R. Co.*, 7 I. C. C. 601; *Gulf, Colo. & S. F. R. Co.* v. *Texas*, 204 U. S. 403; *Dobbs* v. *L. & N. R. Co.*, 18 I. C. C. 210; *Southern Ry. Co.* v. *Hunt*, 83 N. E. Rep. (Ind.) 721; *Wabash, St. L. & Pac. R. Co.* v. *Illinois*, 118 U. S. 557; *Coe* v. *Errol*, 116 U. S. 517; *Brown* v. *Houston*, 114 U. S. 622; *State* v. *Engle*, 34 N. J. L. 425; *State* v. *Carrigan*, 39 N. J. L. 35; *The Daniel Ball*, 10 Wall. 557; *General Oil Co.* v. *Crain*, 209 U. S. 211, 228.

The law requires all rates to be reasonable, state as well as interstate, and if a carrier uses a local rate in any way as a factor in arriving at an interstate rate it does so knowingly and subject to state control. *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Ames* v. *Un. Pac. R. R. Co.*, 64 Fed. Rep. 165, 171; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 82; Beale & Wyman, R. R. Rate Regulation, § 661.

The reasonableness of a local rate ought not to be measured by an interstate rate over the same line where part of the haul was within and part was without the State. *Louis. & Nash. R. Co.* v. *Eubank*, 184 U. S. 27.

A rate is a definite charge for a whole service. *Gulf, Colo. & S. F. R. Co.* v. *Texas*, 204 U. S. 403; *Southern Ry. Co.* v. *Hunt*, 42 Ind. App. 90; *State* v. *Mo. Pac. Ry. Co.*, 76 Kansas, 467; *Coe* v. *Errol*, 116 U. S. 517; *Texas &c. R. Co.* v. *Sabine Tram. Co.*, 121 S. W. Rep. 256; *State* v. *Southern Pacific Co.*, 23 Oregon, 424; *Augusta Brokerage Co.* v. *Cent. of Ga. R. R. Co.*, 5 Ga. App. 187.

Traffic is either state or interstate. *Trammel* v. *Clyde Steamship Co.*, 4 I. C. C. 120, 139; *Wells-Higman Co.* v. *Grand Rapids &c. I. Ry. Co.*, 19 I. C. C. 487; *Dobbs* v. *L. & N. R. Co.*, 18 I. C. C. 210.

A rate fixed by a State which indirectly affects an interstate rate is not an unconstitutional interference with interstate commerce. *Mo. Pac. R. Co.* v. *Kansas*, 216 U. S. 262, 283; *Louisville & N. R. Co.* v. *Siler*, 186 Fed. Rep. 176, 200; *Arkansas Rate Cases*, 187 Fed. Rep. 290, 302; *Gibbons* v. *Ogden*, 6 Wheat. 448; *Employers' Liability Cases*, 207 U. S. 463, 493; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 231; *State* v. *Nor. Pac. Ry. Co.*, 120 N. W. Rep. (N. D.) 869; *Nor. Pac. Ry. Co.* v. *North Dakota*, 216 U. S. 579; *L. & N. R. Co.* v. *Kentucky*, 183 U. S. 503; *Perkins* v. *Nor. Pac. Ry. Co.*, 155 Fed. Rep. 453; *Woodside* v. *Tonopah & G. R. Co.*, 184 Fed. Rep. 358; *So. Pac. Co.* v. *Campbell*, 189 Fed. Rep. 182; *Shepard* v. *Nor. Pac. Ry. Co.*, 184 Fed. Rep. 765.

A through rate may properly be lower than the sum of the locals. *Minn. & St. L. R. Co.* v. *Minnesota*, 186 U. S. 257; *Brabham* v. *Atlantic C. L. R. Co.*, 11 I. C. C. 464; *Morgan* v. *M., K. & T. Ry. Co.*, 12 I. C. C. 525; *Montgomery Freight Bureau* v. *Western Ry.*, 14 I. C. C. 150; *Marshall Oil Co.* v. *C. & N. W. R. Co.*, 14 I. C. C. 210.

Courts in cases of doubt will not declare a law unconstitutional. *Fletcher* v. *Peck*, 6 Cranch, 87, 128; *United States* v. *Coombs*, 12 Pet. 72, 76; *Sinking Fund Cases*, 99 U. S. 700, 718; *Nicol* v. *Ames*, 173 U. S. 509, 514; *Buttfield* v. *Stranahan*, 192 U. S. 470, 492; *Interstate Ry. Co.* v. *Massachusetts*, 207 U. S. 79, 88.

Other state acts have been held constitutional. *Railroad Commissioners* v. *Pensacola & A. R. Co.*, 24 Florida, 417, 472; *Storrs* v. *Pensacola & A. R. Co.*, 29 Florida, 617; *Georgia R. Co.* v. *Smith*, 70 Georgia, 694; *S. C.*, 71 Georgia, 863; *Sou. Ind. Ry. Co.* v. *Hunt*, 42 Ind. App. 90; *Sou. Ind. Ry. Co.* v. *Railroad Commission*, 172 Indiana, 113; *Chicago I. & L. R. Co.* v. *Railroad Commission*, 95 N. E. Rep. (Ind.) 364; *State* v. *Mo. Pac. R. Co.*, 76 Kansas, 467, 481; *Michigan C. R. Co.* v. *Railroad Commission*, 160 Michigan, 355, 366; *State* v. *Chicago, M. & St. P. R. Co.*, 38

Minnesota, 281; *State* v. *Great Nor. Ry. Co.*, 100 Minnesota, 445, 476; *Stone* v. *Yazoo & M. V. R. Co.*, 62 Mississippi, 607, 645; *In re Railroad Commission*, 16 Nebraska, 679; *Trustees* v. *Saratoga Gas Co.*, 191 N. Y. 123, 131; *Atlantic Exp. Co.* v. *Wilmington R. R. Co.*, 111 Nor. Car. 463, 472; *Minn. &c. Co.* v. *Railroad Commission*, 136 Wisconsin, 146; *State* v. *Railroad Commission*, 52 Washington, 17, 32.

Legislative power is not unconstitutionally delegated by similar acts. *Miller* v. *New York*, 109 U. S. 385; *Field* v. *Clark*, 143 U. S. 649, 680, 691, 692; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 371; *St. Louis, I. M. & S. R. Co.* v. *Taylor*, 210 U. S. 281, 287; *Oceanic Steam Nav. Co.* v. *Stranahan*, 214 U. S. 320, 339; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 192; *United States* v. *Grimaud*, 220 U. S. 506; *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194; *Int. Comm. Comm.* v. *Brimson*, 154 U. S. 447, 474; *Int. Comm. Comm.* v. *Cincinnati &c. R. Co.*, 167 U. S. 479, 494, 506; *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 438, 448; *Int. Comm. Comm.* v. *Ill. Cent. R. Co.*, 215 U. S. 452; *Balt. & Ohio R. R. Co.* v. *United States*, 215 U. S. 481; *Int. Com. Comm.* v. *C., R. I. & P. Ry. Co.*, 218 U. S. 88; *Int. Com. Comm.* v. *C., B. & Q. Ry. Co.*, 218 U. S. 113; *Sou. Pac. Co.* v. *Int. Com. Comm.*, 219 U. S. 433; *Del., L. & W. R. Co.* v. *Int. Com. Comm.*, 220 U. S. 235.

The action of the commission has the effect of law. *Knoxville* v. *Water Co.*, 212 U. S. 1; *Prentis* v. *Southern R. Co.*, 211 U. S. 210; *Honolulu Rapid Transit Co.* v. *Hawaii*, 211 U. S. 282; *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Atlantic Coast Line* v. *Nor. Car. Corp. Comm.*, 206 U. S. 1; *Tex. & Pac. Ry. Co.* v. *Mugg*, 202 U. S. 242; *Tex. & Pac. Ry. Co.* v. *Cisco Oil Co.*, 204 U. S. 449.

The power of the legislature is absolute within the limits of the Federal and state constitutions. Cooley, Const. Lim., 7th ed. 236, 241, 257; *St. L., I. M. & S. R. Co.*

v. *Taylor*, 210 U. S. 281, 295; *Int. Comm. Comm.* v. *Ill. Cent. R. Co.*, 215 U. S. 452, 470.

A rate made under legislative authority is presumptively lawful. *Munn* v. *Illinois*, 94 U. S. 113, 123; *Ruggles* v. *Illinois*, 108 U. S. 536, 541; *Sweet* v. *Rechel*, 159 U. S. 380, 392; *Chicago &c. R. Co.* v. *Wellman*, 143 U. S. 339, 344; *San Diego Land Co.* v. *National City*, 174 U. S. 739, 754; *Chicago &c. R. Co.* v. *Tompkins*, 176 U. S. 167, 173; *Louis. & Nash. R. R. Co.* v. *Kentucky*, 183 U. S. 503, 511; *Knoxville* v. *Water Co.*, 212 U. S. 1, 8; *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19.

The legislature may exercise its rate-making power through a commission. Noyes, Am. Railroad Rates, p. 206; 2 Redfield, Railways, 6th ed., p. 606; *Railroad Co.* v. *Cent. of Ga. Ry. Co.*, 170 Fed. Rep. 225.

No rate can be said, as a matter of law, to be unreasonable of itself. *Ill. Cent. R. Co.* v. *Int. Com. Comm.*, 206 U. S. 441; *Tex. & Pac. R. Co.* v. *Int. Com. Comm.*, 162 U. S. 197; *C., N. O. & T. P. R. Co.* v. *Int. Com. Comm.*, 162 U. S. 184.

The commission is an expert body. *Smyth* v. *Ames*, 169 U. S. 466, 527; *East Tenn. V. & G. R. Co.* v. *Int. Comm. Comm.*, 99 Fed. Rep. 52, 64; *Steenerson* v. *G. Nor. Ry. Co.*, 69 Minnesota, 353, 377; *Minn., St. P. &c. Ry. Co.* v. *Railroad Comm.*, 136 Wisconsin, 146.

In passing upon the reasonableness and justice of a rate the conclusions of fact by the commission are conclusive. *Ill. Cent. R. R. Co.* v. *Int. Comm. Comm.*, 215 U. S. 452; *Balt. & Ohio R. R. Co.* v. *United States*, 215 U. S. 481; *So. Pac. Co.* v. *Int. Comm. Comm.*, 219 U. S. 433; *Del., L. & W. R. Co.* v. *Int. Comm. Comm.*, 220 U. S. 235; *Int. Comm. Comm.* v. *Chicago &c. R. Co.*, 218 U. S. 88, 110; *Knoxville* v. *Water Co.*, 212 U. S. 1; *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177; *Ill. Cent. R. R. Co.* v. *Int. Comm. Comm.*, 206 U. S. 441, 454; *Cincinnati, H. & D. R. Co.* v.

Int. Comm. Comm., 206 U. S. 142, 154; *Cincinnati, N. O. & T. P. R. Co.* v. *Int. Comm. Comm.*, 162 U. S. 184; *Louis. & Nash. R. Co.* v. *Behlmer*, 175 U. S. 648; *Steenerson* v. *Gt. Nor. Ry. Co.*, 69 Minnesota, 353, 375; *State* v. *C., M. & St. P. Ry. Co.*, 38 Minnesota, 281, 298; *Foreman* v. *Board*, 64 Minnesota, 371; *State* v. *Young*, 29 Minnesota, 474; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Minn., St. P. &c. Ry. Co.* v. *Railroad Comm.*, 136 Wisconsin, 146; *Chi., R. I. & P. R. Co.* v. *Railway Comm.*, 85 Nebraska, 818, 824; *Spring Valley Water Works* v. *San Francisco*, 82 California, 286, 306; *Jacobson* v. *Wisconsin Ry. Co.*, 71 Minnesota, 519, 529; *Morgan's Ry. Co.* v. *Railroad Comm.*, 109 Louisiana, 247, 265; *In re Amsterdam*, 33 N. Y. Supp. 1009; *People* v. *Railroad Comm.*, 53 App. Div. (N. Y.) 61; *Pensacola R. R. Co.* v. *State*, 25 Florida, 310; *Storrs* v. *Pensacola Ry. Co.*, 29 Florida, 617; *Railroad Comm.* v. *Seaboard Air Line*, 48 Florida, 129.

It is presumed the commission acted lawfully. *Atlantic Coast Line* v. *Florida*, 203 U. S. 256; *Cumberland Co.* v. *Railroad Comm.*, 156 Fed. Rep. 834; *Railroad Tax Cases*, 92 U. S. 575; *State* v. *Savage*, 65 Nebraska, 714, 768; *Re Cruger*, 84 N. Y. 619; *San Jose Gas Co.* v. *January*, 57 California, 614; *Chicago, B. & Q. R. Co.* v. *Babcock*, 204 U. S. 585, 598.

Confiscation cannot be predicated of a single rate or group of rates, but must be judged from the effect on the entire business done within the State. *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19; *Atlantic Coast Line* v. *Nor. Car. Corp. Comm.*, 206 U. S. 1; *Minn. & St. L. R. Co.* v. *Minnesota*, 186 U. S. 257; *St. Louis & S. F. Ry. Co.* v. *Gill*, 156 U. S. 649, 665; *Southern Ry. Co.* v. *Atlanta Stove Co.*, 128 Georgia, 207, 233; *Wisconsin &c. R. Co.* v. *Jacobson*, 71 Minnesota, 519; *State* v. *Mo. Pac. R. Co.*, 76 Kansas, 467; *Pensacola &c. R. Co.* v. *Florida*, 25 Florida, 310; *Morgan's R. Co.* v. *Railroad Comm.*, 109 Louisiana, 247; *People* v. *Railroad Co.*, 176 Illinois, 512; *Union Traction Co.* v. *Chicago*, 199

Illinois, 579; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 412; *Smyth* v. *Ames*, 169 U. S. 466, 544; *San Diego Land Co.* v. *National City*, 174 U. S. 739; *Covington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 596; *Jerome Hill Cotton Co.* v. *M., K. & T. Ry. Co.*, 6 I. C. C. 601; *So. Pac. Co.* v. *Bartine*, 170 Fed. Rep. 725.

Many elements are to be taken into account in determining the reasonableness of a rate. *Int. Comm. Comm.* v. *Chic. G. W. Ry. Co.*, 141 Fed. Rep. 1003, 1015; Beale & Wyman, R. R. Rate Regulation, c. XI, § 314; *Imperial Coal Co.* v. *P. & L. E. R. Co.*, 2 I. C. C. 618; *New Orleans Cotton Exch.* v. *I. C. R. Co.*, 3 *id.* 534; *Thompson Lumber Co.* v. *I. C. R. Co.*, 13 *id.* 657; *Dallas Freight Bureau* v. *G., C. & S. F. Ry. Co.*, 12 *id.* 223; Noyes, Am. R. R. Rates, 25.

A carrier may complain of a reduction of rates by the commission so far as it affects its revenues; but cannot complain that discrimination results to shippers or trade centres from such reduction. *Int. Comm. Comm.* v. *C., R. I. & P. R. Co.*, 218 U. S. 88, 109; *Clark* v. *Kansas City*, 176 U. S. 114; *Smiley* v. *Kansas*, 196 U. S. 447.

Mr. Justice Hughes delivered the opinion of the court.

This suit was brought to restrain the enforcement of an order of the Railroad Commission of Oregon, made April 22, 1908, prescribing maximum freight rates between Portland and other points on the complainant's lines, within the State, east of The Dalles. Demurrers to the bill, and to the amended bill, were sustained. 173 Fed. Rep. 957; 177 Fed. Rep. 318. And from the final decree dismissing the bill the complainant brings this appeal.

The arguments in support of the appeal are addressed to the question whether the order of the commission was an unconstitutional interference with interstate commerce.

It appears from the bill, and from the order of the commission which was made a part of the bill, that the Portland Chamber of Commerce had complained of the complainant's freight tariff and had petitioned the commission to establish reasonable rates for transportation from Portland to points in Oregon. After hearing, the commission found that the existing rates were unreasonably high, ordered their discontinuance and determined the just and reasonable rates to be charged in their stead.

It is insisted that the order applied to interstate traffic, that is, to traffic originating outside the State and still moving, on its transportation from Portland to other points in the State, in interstate commerce. The court below did not so construe the order, and we do not so construe it. The Railroad Commission of Oregon had no power to fix rates for interstate transportation, or any part of it, and we find no ground for the conclusion that it attempted to do so. The order must be taken as applicable solely to intrastate transportation. And, in this view, so far as the averments of the bill attack the order as one which by its terms relates to property transported in interstate commerce, they are insufficient to entitle the complainant to relief.

Whether the order governs particular shipments must depend on the facts of each case, that is, upon the question whether the traffic is interstate or intrastate. If it were sought to compel the application of the intrastate rate to goods which were properly to be regarded as moving in interstate commerce, the complainant would have its remedy. But it would be necessary to show the actual conditions and that the order, although valid in its proper operation, was being misapplied with respect to particular transactions. The bill failed to make a case of this sort. Upon this point the court below said: "If the order be valid, as it is held to be, then all shipments or commerce which are intrastate in character must be controlled by

the order; all that are not are not affected by it. If question arises as to any particular shipment or any particular commodity to be moved, or in process of transportation, it might be settled by carrying the matter to the commission; or, if the commission unlawfully exacts the state rate upon interstate traffic, I see no reason why it may not be enjoined in any court of competent jurisdiction. These special cases must necessarily be determined as they arise, as it is impossible, by a general decree, to determine in advance what specific commodities and the transportation thereof constitute interstate and what intrastate commerce." 177 Fed. Rep. 318, 320.

We are of the opinion that the ruling was right.

Assuming that the order applies exclusively to intrastate transportation, the question with respect to asserted interference with interstate commerce by reason of the relation of intrastate rates to interstate rates is essentially the same as that presented in the *Minnesota Rate Cases*, *ante*, p. 352, and the same conclusion must be reached.

Other questions are raised by the assignments of error, but they are not pressed in argument and require no discussion.

Decree affirmed.

SOUTHERN PACIFIC COMPANY AND OREGON & CALIFORNIA RAILROAD COMPANY *v.* CAMPBELL ET AL., CONSTITUTING THE RAILROAD COMMISSION OF OREGON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

No. 428. Argued April 9, 1912.—Decided June 16, 1913.

The enforcement of an order of the State Railroad Commission prescribing rates of intrastate transportation will not be restrained at the instance of a carrier on the ground that the rates are confiscatory where the allegations of the bill are insufficient to show that the carrier would be deprived of just compensation in the business of intrastate transportation by virtue of the operation of the order.

A general charter provision, giving power to charge and collect tolls, necessarily implies that the charges shall be reasonable, and does not detract from the power of the State to prescribe reasonable rates.

The court should only override the decision of the body which has been given legislative authority to establish rates of transportation where the action of such body is of such an arbitrary character as to constitute an abuse of powers.

This court follows the decision of the state court as to the constitutionality of a state statute conferring power on a Railroad Commission to establish intrastate rates.

Penal provisions of a state statute regulating railroad rates which are separable furnish no ground for the courts denying effect to the rates if the statute is otherwise valid.

189 Fed. Rep. 182, affirmed.

THE facts, which involve the constitutionality of an order of the Railroad Commission of Oregon of September 21, 1910, prescribing railroad freight rates, are stated in the opinion.

Mr. Maxwell Evarts for appellants submitted.

Mr. Joseph N. Teal, with whom *Mr. A. M. Crawford*,

Attorney General of Oregon, and *Mr. Clyde B. Aitchison* were on the brief, for appellees:

The constitutionality of the Railroad Commission Act having been sustained by the Supreme Court of Oregon, *State* v. *Corvallis R. R. Co.*, 117 Pac. Rep. 980, that construction is binding upon this court. *Mo. Pac. Ry. Co.* v. *Taylor*, 216 U. S. 262; *Jack* v. *Kansas*, 199 U. S. 372, 379; *Smiley* v. *Kansas*, 196 U. S. 447; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461.

The Supreme Court of Oregon has sustained orders of the present Railroad Commission in *Portland Ry. Co.* v. *Railroad Comm.*, 57 Oregon, 126; 56 Oregon, 468; *Martin* v. *Oregon R. & N. Co.*, 58 Oregon, 198; *So. Pac. Co.* v. *Railroad Comm.*, 119 Pac. Rep. 727.

The constitutionality of the Oregon act has been also sustained in the Circuit Court of the United States. *Oregon Nav. Co.* v. *Campbell*, 173 Fed. Rep. 957; *So. Pac. Co.* v. *Campbell*, 189 Fed. Rep. 182.

The severity of the penalty is a matter for legislative and not for judicial discretion. *Southern Exp. Co.* v. *Commonwealth*, 92 Virginia, 59; 168 U. S. 705; *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339; *Burlington, C. R. & N. Co.* v. *Dey*, 82 Iowa, 312, 341.

Section 32 of the act, conferring jurisdiction of suits against the commission on the state circuit court for Marion county, is not unconstitutional. *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Oregon Railroad & Navigation Co.* v. *Campbell*, 173 Fed. Rep. 957.

When the legislature adopts general rules and delegates power to a commission to apply them to specific facts and to exercise its discretion in respect thereto, the ultimate act is legislative. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1; *Prentis* v. *Atlantic Coast Line R. Co.*, 211 U. S. 210; *Honolulu Rapid Transit & Land Co.* v. *Hawaii*, 211 U. S. 282; *Atlantic Coast Line Ry. Co.* v. *North Carolina*, 206 U. S. 1; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*,

204 U. S. 426; *Texas & Pac. Ry. Co.* v. *Mugg*, 202 U. S. 242; *Texas & Pac. Ry. Co.* v. *Cisco Oil Co.*, 204 U. S. 449.

"Unreasonable" as used by courts in passing on reasonableness of rates fixed by legislative authority means confiscatory. *Spring Valley Water Works* v. *San Francisco*, 82 California, 286; *Chicago & Grand Trunk Railway Co.* v. *Wellman*, 143 U. S. 339, 344; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 399; *Smyth* v. *Ames*, 169 U. S. 466; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614, 615; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 754; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439; *Covington &c. Turnpike Co.* v. *Sandford*, 164 U. S. 578; *Stanislaus County* v. *San Joaquin Co.*, 192 U. S. 201; *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19; *Ex parte Young*, 209 U. S. 123.

The power of the judiciary to control the legislature extends only to declaring legislation unconstitutional, when it conflicts with Federal or state constitutions. Cooley, Constitutional Limitations (7th ed.), 326, 241, 257; *St. Louis, I. M. & S. R. Co.* v. *Taylor*, 210 U. S. 281, 295; *Int. Comm. Comm.* v. *Illinois Central R. Co.*, 215 U. S. 452, 470.

The commission's order is presumptively lawful. *Munn* v. *Illinois*, 94 U. S. 113; *Ruggles* v. *Illinois*, 108 U. S. 536, 541; *Sweet* v. *Rechel*, 159 U. S. 380, 392; *Chicago &c. R. Co.* v. *Wellman*, 143 U. S. 339, 344; *San Diego &c. Co.* v. *National City*, 174 U. S. 739, 754; *Chicago &c. R. Co.* v. *Tompkins*, 176 U. S. 167, 173; *Louisville &c. R. Co.* v. *Kentucky*, 183 U. S. 503, 511; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1. 8; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 41.

There is no standard by which the reasonableness of a rate can be tested purely as matter of law. *Illinois Central R. Co.* v. *Int. Comm. Comm.*, 206 U. S. 441; *Texas & Pac. R. Co.* v. *Int. Comm. Comm.*, 162 U. S. 197; *Cincinnati, N. O. & T. P. R. Co.* v. *Int. Comm. Comm.*, 162 U. S. 184.

The commission is an expert body. *Smyth* v. *Ames*, 169 U. S. 466, 527; *Southern Pacific Co.* v. *Railroad Comm. of Oregon*, 119 Pac. Rep. 927; *Or., East Tenn., V. & G. R. Co.* v. *Int. Comm. Comm.*, 99 Fed. Rep. 52, 64; *Steenerson* v. *Great Northern R. Co.*, 69 Minnesota, 353, 377; Noyes, Amer. Railroad Rates, p. 206; 2 Redfield, Railways (6th ed.), p. 606; *Railroad Comm.* v. *Cent. of Ga. Ry. Co.*, 170 Fed. Rep. 225; *Minneapolis &c. R. Co.* v. *Railroad Comm.*, 136 Wisconsin, 146.

Determinations of fact by the commission upon the reasonableness of a rate are conclusive and may not be reëxamined by the courts. *Int. Comm. Comm.* v. *Illinois Central R. Co.*, 215 U. S. 452; *Int. Comm. Comm.* v. *Chicago, R. I. & P. R. Co.*, 218 U. S. 88, 110; *So. Pac. Co.* v. *Int. Comm. Comm.*, 219 U. S. 433, 442; *Int. Comm. Comm.* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Baltimore & O. R. Co.* v. *United States ex rel. Pitcairn*, 215 U. S. 481; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177; *Illinois Central R. Co.* v. *Int. Comm. Comm.*, 206 U. S. 441, 454; *Cincinnati, H. & D. R. Co.* v. *Int. Comm. Comm.*, 206 U. S. 142, 154; *Cincinnati, N. O. & T. P. R. Co.* v. *Int. Comm. Comm.*, 162 U. S. 184; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 648.

State courts have construed the powers of state commissions similarly. *Steenerson* v. *Great Northern Ry. Co.*, 69 Minnesota, 353, 375, 376; *State* v. *C., M. & St. P. Ry. Co.*, 38 Minnesota, 281, 298; *Foreman* v. *Board*, 64 Minnesota, 371; *State* v. *Young*, 29 Minnesota, 474; *Reagan* v. *Farmers' &c. Co.*, 154 U. S. 362; *So. Pac. Co.* v. *Railroad Comm. of Oregon*, 119 Pac. Rep. (Or.) 727; *Minneapolis, St. P. & S. Ste. M. R. Co.* v. *Railroad Comm.*, 136 Wisconsin, 146; *Chicago, Rock Island & P. R. Co.* v. *Railway Comm.*, 85 Nebraska, 818, 824–5; *Spring Valley Water Works* v. *San Francisco*, 82 California, 286, 306; *Jacobson* v. *Wisconsin Ry. Co.*, 71 Minnesota, 519, 529; 179 U. S. 287; *Morgan's &c. R. Co.* v. *Railroad Comm. of Louisiana*, 109 Louisiana,

247, 265; *In re Amsterdam*, 33 N. Y. Supp. 1009; *People* v. *Board of R. R. Comm.*, 53 App. Div. (N. Y.) 61; *Pensacola &c. R. Co.* v. *State*, 25 Florida, 310; *Storrs* v. *Pensacola Ry. Co.*, 29 Florida, 617; *State ex rel. R. R. Comm.* v. *Seaboard Air Line R. Co.*, 48 Florida, 129.

Courts will not supervise the administrative functions of the commission. *Minneapolis, St. P. &c. R. Co.* v. *Railroad Comm. of Wisconsin*, 136 Wisconsin, 146, 169.

The commission act and the order complained of do not impair the alleged contract right of appellants to prescribe their own rates in Oregon. *Wells, Fargo & Co.* v. *Oregon Railroad & Navigation Co.*, 8 Sawy. 600; 15 Fed. Rep. 561; *State* v. *S. P. Co.*, 23 Oregon, 424, 432; *Ex parte Koehler*, 23 Fed. Rep. 529; *Portland Ry., L. & P. Co.* v. *Railroad Comm. of Oregon*, 56 Oregon, 468, 478, 479; *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307; *Missouri P. R. Co.* v. *Kansas*, 216 U. S. 262.

The commission act does not violate the commerce clause of the Federal Constitution. *Oregon R. & Navigation Co.* v. *Campbell*, 173 Fed. Rep. 957; *People* v. *Draper*, 15 N. Y. 532, 543; *Thorpe* v. *Rutland & Burlington Railroad Co.*, 27 Vermont, 140, 142; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447.

The authority of the State over its internal commerce is sovereign.

Remote or indirect interference with interstate commerce by State is not inhibited by Federal Constitution.

Congress is without authority directly to regulate the purely internal commerce of the States. See authorities cited in brief in preceding case, p. 525, *ante*.

The Interstate Commerce Commission had declined to assume jurisdiction of commerce which begins and ends in a single State, even when it appeared that the local rates touched upon or interfered with interstate commerce. *Michigan Buggy Co.* v. *G. R. & I. Ry. Co.*, 15 I. C. C. Rep. 297; *Kurtz* v. *Pennsylvania Co.*, 16 I. C. C. Rep.

410; *Saunders & Co.* v. *Southern Express Co.*, 18 I. C. C. Rep. 415, 422; *Wells-Higman Co.* v. *Grand Rapids & I. Ry. Co.*, 19 I. C. C. Rep. 487, 490; *Hope Cotton Oil Co.* v. *T. P. R. Co.*, 12 I. C. C. Rep. 265, 269.

An allegation that a rate is unreasonable and if enforced will result in large loss of revenue is not admitted by demurrer. *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 401; *Central of Ga. Ry. Co.* v. *McLendon*, 157 Fed. Rep. 961, 977; *B., C. R. & N. Ry. Co.* v. *Dey*, 82 Iowa, 312, 343; *Missouri Pac. R. Co.* v. *Smith*, 60 Arkansas, 221; *Cincinnati &c. Packet Co.* v. *Catlettsburg*, 105 U. S. 559.

Where an order of the commission by its terms explicitly declared it referred only to intrastate commerce there is no presumption that the order constituted an unlawful interference with interstate commerce. *Railroad Commission* v. *Symns Grocer Co.*, 53 Kansas, 207, 216; *Burlington, C. R. & N. R. Co.* v. *Dey*, 82 Iowa, 312, 339; *O. R. & N. Co.* v. *Campbell*, 173 Fed. Rep. 957; *Chicago, I. & L. R. Co.* v. *Railroad Commission*, 95 N. E. Rep. (Ind.) 364, 368; *New York Central &c. R. Co.* v. *Interstate Commerce Commission*, 168 Fed. Rep. 131; *Pittsburg &c. R. Co.* v. *Railroad Com.*, 171 Indiana, 189; *Chicago &c. R. Co.* v. *Railroad Com.*, 173 Indiana, 469; *Stone* v. *Farmers' L. & T. Co.*, 116 U. S. 307.

The order complained of is a valid regulation of state rates only and does not constitute a burden upon interstate commerce. *Gulf, Col. & Santa Fe R. Co.* v. *Texas*, 204 U. S. 403; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *Coe* v. *Errol*, 116 U. S. 517; *Morgan* v. *M., K. & T. Ry. Co.*, 12 I. C. C. Rep. 525, 528; *Montgomery Freight Bureau* v. *Western Ry. of Alabama*, 14 I. C. C. Rep. 150; *Marshall Oil Co.* v. *Chicago & N. W. R. Co.*, 14 I. C. C. Rep. 210; *Kurtz* v. *Pennsylvania Co.*, 16 I. C. C. Rep. 410, 412, 413; *Dobbs* v. *Louisville & N. R. Co.*, 18 I. C. C. Rep. 210; *Wabash, St. Louis & Pacific R. Co.* v. *Illinois*, 118 U. S.

557; *General Oil Co.* v. *Crain*, 209 U. S. 211, 228, 229; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 509; *Southern R. Co.* v. *Hunt*, 42 Ind. App. 90.

A carrier using a local rate as part of a through interstate rate does so knowing it to be subject to state control. *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *Ames* v. *Union Pacific Railroad Company*, 64 Fed. Rep. 165; *Armour Packing Company* v. *United States*, 209 U. S. 56, 82.

A rate is a definite charge for a whole service. Beale & Wyman, Railroad Rate Regulation, § 661.

The control of intrastate rates by the State may not be defeated by the carrier's expedient of using a local rate as one of the factors in framing an interstate rate. *Trammel* v. *Clyde Steamship Company*, 4 I. C. C. Rep. 120, 139; *Wells-Higman Company* v. *Grand Rapids & Indiana Railway Co.*, 19 I. C. C. Rep. 487; *Dobbs* v. *L. & N. R. Co.*, 18 I. C. C. Rep. 210; *Wabash, St. Louis & P. R. Co.* v. *Illinois*, 118 U. S. 557; *Gulf, Colorado & Santa Fe Railroad Company* v. *Texas*, 204 U. S. 403; *General Oil Co.* v. *Crain*, 209 U. S. 211; *Ames* v. *Union Pacific R. Co.*, 64 Fed. Rep. 165, 171; *St. Louis & S. F. R. Co.* v. *Hadley*, 168 Fed. Rep. 317; *Southern Ry. Co.* v. *Hunt*, 42 Ind. App. 90; *State* v. *Missouri Pac. Ry. Co.*, 76 Kansas, 467; *Morgan* v. *M., K. & T. Ry. Co.*, 12 I. C. C. Rep. 525, 528; *Lincoln Commercial Club*, v. *C., R. I. & P. R. Co.*, 13 I. C. C. Rep. 319; *Montgomery Freight Bureau* v. *Western Ry. of Ala.*, 14 I. C. C. Rep. 150; *Marshall Oil Co.* v. *C. & N. W. Ry. Co.*, 14 I. C. C. Rep. 210; *Woodside* v. *Tonopah & G. R. Co.*, 184 Fed. Rep. 360; *Oregon R. & N. Co.* v. *Campbell*, 173 Fed. Rep. 957, 982; *Missouri Pac. R. Co.* v. *Kansas*, 216 U. S. 262, 283; *Louisville & N. R. Co.* v. *Siler*, 186 Fed. Rep. 176, 200; *Arkansas Rate Cases*, 187 Fed. Rep. 290, 302; *Gibbons* v. *Ogden*, 6 Wheat. 448; *Employers' Liability Cases*, 207 U. S. 463, 493; *Addyston Pipe & Steel Co.* v.

United States, 175 U. S. 211, 231; *State* v. *Northern Pacific Ry. Co.*, 120 N. W. Rep. (N. D.) 869; *Northern Pac. Ry. Co.* v. *North Dakota*, 216 U. S. 579; *Louisville & N. R. Co.* v. *Kentucky*, 183 U. S. 503; *Perkins* v. *Northern Pacific R. Co.*, 155 Fed. Rep. 453; *Shepard* v. *Northern Pac. Ry. Co.*, 184 Fed. Rep. 765.

General allegations in a bill of the unreasonableness and confiscatory character of rates established by order of the commission are but conclusions of law and are not sufficient to raise an issue. *Central of Ga. R. Co.* v. *McLendon*, 157 Fed. Rep. 961.

A reduction in rates does not necessarily decrease earnings. *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19, 51; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 18; *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339.

The public does not guarantee that every investment made by a railroad shall be profitable. *Matthews* v. *Board of Corp. Comm.*, 106 Fed. Rep. 7, 9, 10; *Steenerson* v. *Great Northern R. Co.*, 69 Minnesota, 353.

There is no particular rate of compensation which must in all cases be regarded as sufficient for capital invested in business enterprises. *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19, 50; *San Diego Land Co.* v. *National City*, 174 U. S. 739, 757.

A carrier's property as a unit has one value, which in any consideration of the question of confiscation is to be divided equitably into the value of the property for the interstate use to which it is put and to the state use. *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167, 175.

Allegations that a rate is unreasonable and if enforced will result in large loss of revenue are not admitted by demurrer. *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 401; *Mo. Pac. R. Co.* v. *Smith*, 60 Arkansas, 221; *So. Pac. Co.* v. *Int. Comm. Comm.*, 177 Fed. Rep. 963; *B., C. R. & N. R. Co.* v. *Dey*, 82 Iowa, 312, 343; *Quimby* v. *Clyde S. S. Co.*, 12 I. C. C. 392, 396; *Brewer* v. *Louisville & N. R. Co.*,

7 I. C. C. 227, 238; *Central of Ga. R. Co.* v. *McLendon*, 157 Fed. Rep. 961, 978.

A reasonable actual trial is the test of the confiscatory character of rates. *Ex parte Young*, 209 U. S. 123; *Knoxville Water* and *Consolidated Gas Cases*, *supra*.

Confiscation cannot be predicated of a single rate or group of rates, but must be judged from the effect on the entire business done within the State. *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19; *Atlantic Coast Line R. Co.* v. *North Carolina Corp. Comm.*, 206 U. S. 1; *Minneapolis & St. L. R. Co.* v. *Minnesota*, 186 U. S. 257; *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649, 665; *Southern Railway Co.* v. *Atlanta Stove Co.*, 128 Georgia, 207, 233, 234; *Wisconsin &c. R. Co.* v. *Jacobson*, 71 Minnesota, 519; 179 U. S. 287, 302; *State* v. *Missouri Pac. R. Co.*, 76 Kansas, 467; *Pensacola &c. R. Co.* v. *Florida*, 25 Florida, 310; *Morgan's R. Co.* v. *Railroad Comm.*, 109 Louisiana, 247; *People* v. *Railroad Co.*, 176 Illinois, 512; *Chicago Union Traction Co.* v. *Chicago*, 199 Illinois, 579; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 412; *Smyth* v. *Ames*, 169 U. S. 466, 544, 547; *San Diego Land Co.* v. *National City*, 174 U. S. 739; *Covington & Lexington Turnpike Road Co.* v. *Sandford*, 164 U. S. 578, 596, 597; *Jerome Hill Cotton Co.* v. *M., K. & T. Ry. Co.*, 6 I. C. C. 601; *So. Pac. Co.* v. *Bartine*, 170 Fed. Rep. 725; Noyes, Amer. Railroad Rates, 25.

Reasonable rates may be unjustly discriminatory or unlawfully preferential. Beale & Wyman, Railroad Rate Regulation, §§ 724, 839; *Int. Comm. Comm.* v. *Cincinnati &c. Ry. Co.*, 167 U. S. 479, 511; *Kinnavey* v. *T. Ry. Assn.*, 81 Fed. Rep. 802, 804; *Board of Trade* v. *Ry. Co.*, 6 I. C. C. 632, 645; *Portland R. L. & P. Co.* v. *Railroad Comm. of Oregon*, 56 Oregon, 468, 484; *Portland R. L. & P. Co.* v. *Railroad Comm. of Oregon*, 109 Pac. Rep. 274.

The scale adopted by the commission in its order has been employed in numerous cases. *Portland Chamber of Commerce* v. *Oregon R. & N. Co.*, 21 I. C. C. Rep. 640; *City*

of Spokane v. *Northern Pacific Railway Co.*, 15 I. C. C. Rep. 376; *Traffic Bureau of The Merchants' Exchange* v. *So. Pac. Co.*, 19 I. C. C. Rep. 259; *Commercial Club of Salt Lake* v. *A., T. & S. F. Ry. Co.*, 19 I. C. C. Rep. 218.

The test of the reasonableness of a rate is not the amount of profit in the business of a shipper, but whether the rate yields a reasonable compensation for the service rendered. *Smyth* v. *Ames*, 169 U. S. 466; *C. & N. W. R. Co.* v. *Osborne*, 52 Fed. Rep. 914.

Under the law the commission's order is *prima facie* lawful and reasonable. *Atlantic Coast Line R. Co.* v. *Florida*, 203 U. S. 256; *Steenerson* v. *Great Northern R. Co.*, 69 Minnesota, 353; *Int. Comm. Comm.* v. *Louisville & N. R. Co.*, 118 Fed. Rep. 616; *Cumberland &c. Co.* v. *Railroad Comm.*, 156 Fed. Rep. 834, 837; *Railroad Comm.* v. *Cumberland &c. Co.*, 212 U. S. 414, 422; *Railroad Tax Cases*, 92 U. S. 575; *State* v. *Savage*, 65 Nebraska, 714, 768, 769; *In re Cruger*, 84 N. Y. 619, 621; *San Jose Gas Co.* v. *January*, 57 California, 614, 616; *Chicago, B. & Q. R. Co.* v. *Babcock*, 204 U. S. 585, 598; *State* v. *Houser*, 122 Wisconsin, 534, 570; *Int. Comm. Comm.* v. *L. & N. R. Co.*, 102 Fed. Rep. 709.

The return from the whole line must be considered. *Portland Ry., L. & P. Co.* v. *Railroad Comm. of Oregon*, 56 Oregon, 468, 482; *Int. Comm. Comm.* v. *Louisville & N. R. Co.*, 118 Fed. Rep. 613; *Traffic Bureau of Merchants' Exchange* v. *S. P. Co.*, 19 I. C. C. 261; *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649, 665, 666.

Findings of fact made by the Interstate Commerce Commission as to preferences and discriminations in railway rates are beyond the competency of the courts to re-examine. *Baltimore & O. R. Co.* v. *United States*, 215 U. S. 481; *Illinois C. R. Co.* v. *Int. Comm. Comm.*, 206 U. S. 441; *Int. Comm. Comm.* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235.

A carrier may complain of a reduction of rates by the

commission so far as it affects its revenues, but cannot complain that discrimination results to shippers or trade centers from such reduction. *Int. Comm. Comm.* v. *C., R. I. & P. R. Co.*, 218 U. S. 88, 109; *Clark* v. *Kansas City*, 176 U. S. 114, 118; *Smiley* v. *Kansas*, 196 U. S. 447.

MR. JUSTICE HUGHES delivered the opinion of the Court.

This is an appeal from a decree of the Circuit Court entered July 18, 1911, dismissing the bill, on demurrer, for want of equity. 189 Fed. Rep. 182.

The bill was filed by the complainants, the Southern Pacific Company and the Oregon & California Railroad Company, to set aside an order made by the Railroad Commission of Oregon under date of September 21, 1910, and to enjoin the defendants, the members of the commission and the Attorney-General of the State, from enforcing it. By this order, the commission found, after hearing, that certain freight rates maintained by the Southern Pacific Company between Portland and other places on its lines in Oregon were unreasonable, excessive and discriminatory, and the commission required the company, in lieu of the rates thus disapproved, to put into effect the "just and reasonable and non-discriminatory charges" set forth in the order.

The first, and principal, contention of the appellants, is that this requirement was invalid as constituting a regulation of interstate commerce. The order, however, related solely to intrastate traffic, and the question raised by the bill, so far as its allegations bear upon the conditions of interstate transportation, does not differ in its essential features from that which was passed upon in the Minnesota rate cases. *Minnesota Rate Cases*, *ante*, p. 352. This objection to the order cannot be sustained.

It is further insisted that the order was confiscatory.

The railroad property in question was that of the Oregon & California Railroad Company which was operated by the Southern Pacific Company under lease made in 1887. It was provided by the lease that the Southern Pacific Company should keep the property in good condition, "operate, maintain, add to, and better the same at its own expense," and should pay over annually to the lessor company the amount remaining of the net earnings, after all charges and expenses incurred by the Southern Pacific Company under the lease, and all taxes and interest, current fixed charges and all indebtedness of the lessor to the Southern Pacific Company, had been paid, save that if such amount should exceed specified percentages of the preferred and common stock of the lessor, the excess might be retained by the lessee.

It was alleged that after payment of operating expenses, taxes, interest, and other reasonable and legitimate expenses, a deficit had accumulated representing an indebtedness to the Southern Pacific Company and amounting on June 30, 1906, to the sum of $6,222,037; but it also appeared that this deficit was reduced in the following years so that on June 30, 1909, it amounted to $3,207,008.37.

The capital stock consisted of preferred stock of the par value of $12,000,000, and common stock of the par value of $7,000,000, and the bonded indebtedness amounted to $17,745,000, making in the aggregate $36,745,000. In one part of the bill it was alleged, without particulars showing the constituent items, that the total value of the property in Oregon, held under the lease, consisting of approximately 670 miles of road with rolling stock, stations, terminals and appurtenances, amounted to $43,594,886.73. But a later averment, in connection with the allegations as to outlays and return, was that "the properties of the Oregon & California Railroad Company are of the reasonable value of a sum representing the out-

standing bonded indebtedness and the deficit, as aforesaid and the capital stock of the company"; and so valued, the total would be $39,952,008.37.

The receipts from the entire property and the disbursements for several years were stated. It was averred that for the fiscal year ending June 30, 1909, the total receipts were $7,104,081 and the disbursements, $5,839,698. As the court below pointed out, the bill was silent as to what was embraced in the aggregate expenditures, and the court thought it fair to assume that the total disbursements, as alleged, included not only the expenses of operation, but also interest on bonds and on open accounts and thus, that the averment showed, for the fiscal year ending June 30, 1909, a net balance of $1,264,383 as a return on the investment represented by $19,000,000 in par value of capital stock. It was alleged that the "annual loss of interstate and intrastate business combined," which would result if the order in question were enforced, would amount to $156,072.48. The court below concluded that on this showing it could not be said in advance of actual experience, that the rates fixed by the commission would not afford a fair return upon the value of the property.

The order, as already noted, was made in September, 1910, and the bill was brought in October, 1910, but the receipts and disbursements for the fiscal year ending June 30, 1910, were not given. In addition to this omission, the bill was destitute of any allegation showing the expenses incurred in the conduct of the intrastate business as distinguished from the interstate business, or the share of the value of the property which was assignable to the former. In short, the allegations of the bill were wholly insufficient to show that the complainants would be deprived of just compensation in their business of intrastate transportation by virtue of the operation of the order.

In sustaining the demurrer, the court gave to the com-

plainants thirty days in which to plead further; and they thus had opportunity for amending their bill so as to present additional averments which would correct deficiencies in the original allegations and remove any possible misapprehension as to the facts intended to be set forth. But the complainants informed the court that they did not desire to avail themselves of this opportunity and accordingly the bill was dismissed. We think that it cannot be said that any error was committed in thus disposing of the contention as to confiscation.

It is also urged that the railroad commission act of Oregon (February 18, 1907 Laws of 1907, chap. 53, p. 67), and the order in question, were void as against the Oregon & California Railroad Company, and the lessee of its property, upon the ground that the act and order impaired the obligation of the contract contained in the charter of the first-mentioned company. That company was incorporated in 1870, under the general incorporation act of Oregon, approved October 14, 1862, which, in § 34, provided: "Every corporation formed under this act for the construction of a railroad, as to such road shall be deemed common carriers, and shall have power to collect and receive such tolls or freight for transportation of persons or property thereon as it may prescribe." Reference is also made to the following provision of the constitution of Oregon pursuant to which this incorporation act was enacted: "Corporations may be formed under general laws, but shall not be created by special laws except for municipal purposes. All laws passed pursuant to this section may be altered, amended or repealed but not so as to alter or destroy any vested corporate rights." (Art. XI, § 2.) The sole question presented on this branch of the case, it is said by counsel for the appellants, "is whether the judgment of the carrier in fixing rates for transportation of persons or property shall be supervised,

regulated and supplanted by the judgment of the State exercised through a Railroad Commission, or shall it remain as it was at common law, within the exclusive power and jurisdiction of the carrier to fix these rates, subject only to the power of the courts upon judicial inquiry, to denounce and decline to enforce rates that are excessive and unreasonable?"

As to this question, it is sufficient to say that it is well established that a general charter provision such as the one quoted, giving power to charge and collect tolls, necessarily implies that the charges shall be reasonable and does not detract from the power of the State through its legislature, or the agency lawfully constituted thereby, to prescribe reasonable rates to be observed by the carrier. *State* v. *Southern Pacific Co.*, 23 Oregon, 424, 432, 433; *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, 330; *Dow* v. *Beidelman*, 125 U. S. 680, 688; *Georgia R. R. & Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Chicago, M. & St. P. Railway Co.* v. *Minnesota*, 134 U. S. 418, 455; *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 215; *Louisville & Nashville Railroad* v. *Kentucky*, 161 U. S. 677, 696; *Owensboro* v. *Owensboro Waterworks Co.*, 191 U. S. 358, 370. In the case of *Stone* v. *Farmers' Loan & Trust Co.*, *supra*, where the charter empowered the railroad company "from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation of persons or property on their railroad," and it was insisted that a subsequent statute creating a railroad commission with authority to fix maximum rates was an impairment of contract obligation, the court said (p. 330): "The claim now is that by § 12" (the provision referred to) "the State has surrendered the power to fix a maximum for this company, and has declared that the courts shall be left to determine what is reasonable, free of all legislative control. We see no evidence of any such intention. Power is granted to fix reasonable charges,

but what shall be deemed reasonable in law is nowhere indicated. . . . Consequently, all the power which the State had in the matter before the charter it retained afterwards. The power to charge being coupled with the condition that the charge shall be reasonable, the State is left free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered."

The remaining questions may be briefly disposed of. The complainants were not entitled to have the court below substitute its judgment for that of the commission or determine the matters which properly fell within the province of that body. The conditions of traffic, the adjustment of rates with respect to the different commodities transported, and the appropriate basis for classification, were subjects for the consideration of the commission, and there was nothing shown which would have warranted the court in overriding the decision of the commission upon the ground that its action was of such an arbitrary character as to constitute an abuse of power.

The criticism made in the bill that the railroad commission act violated the state constitution in conferring upon the commission authority to exercise legislative, executive and judicial powers, has been answered by the decision of the state court, sustaining the statute. *State* v. *Corvallis & Eastern R. R. Co.*, 59 Oregon, 450; 117 Pac. Rep. 980. The provision of the statute that suit might be brought in the state court to set aside orders of the commission upon the ground that the rates fixed were unlawful, or that the regulation or practice prescribed was unreasonable, did not infringe the rights of the complainants. The procedure permitted by the statute is consistent with the Fourteenth Amendment. *Portland*

Railway, Light & Power Co. v. *Railroad Commission of Oregon*, 229 U. S. 397. And, finally, the penal provisions, of which complaint is made, are separable; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 395; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53, 54; *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160, 172; they furnish no ground for denying effect to the rates, if otherwise valid.

Our conclusion is that the demurrer was properly sustained.

Decree affirmed.

ALLEN ET AL., RAILROAD COMMISSIONERS OF THE STATE OF ARKANSAS, *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

SAME *v.* ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

Nos. 440, 441. Argued April 12, 15, 1912.—Decided June 16, 1913.

Minnesota Rate Cases, *ante*, p. 352, followed to effect that an intrastate rate fixed by State Railroad Commission is not an unconstitutional interference with interstate commerce.

A carrier has the right to contest the validity of rates prescribed by a body clothed by the legislature with power to establish rates on the ground they are confiscatory, and this right is not impaired by putting the rates into effect if they prove to be confiscatory.

Minnesota Rate Cases, *ante*, p. 352, also followed to effect that where the proofs submitted by a carrier attacking rates as confiscatory are

not sufficient to justify a finding that the rates are confiscatory, the bill should be dismissed.

187 Fed. Rep. 290, reversed.

THESE two suits were brought to restrain the enforcement of the act of the legislature passed February 9, 1907, fixing the maximum fare for passengers at two cents a mile, and also the orders of the Railroad Commission made June 4, 1908, prescribing maximum freight and passenger rates. The facts involved in both cases are stated in the opinion.

Mr. Joseph M. Hill for appellants.

Mr. John M. Moore, with whom *Mr. Martin S. Clardy* and *Mr. Samuel H. West* were on the brief, for appellees.

MR. JUSTICE HUGHES delivered the opinion of the court.

The legislature of Arkansas, on February 9, 1907, passed an act fixing the maximum passenger fare within the State, on railroads over eighty-five miles in length, at two cents a mile. On June 4, 1908, the Railroad Commission of the State adopted Standard Distance Tariff No. 3, which superseded the former freight tariff and established maximum intrastate freight rates for all classes and commodities. The requirement with respect to maximum passenger fares as provided by the legislature was also promulgated by the commission.

In July, 1908, the appellees, the St. Louis, Iron Mountain & Southern Railway Company and the St. Louis Southwestern Railway Company, respectively, filed their bills in the Circuit Court, alleging that the action of the legislature and the commission, in fixing these rates, was unreasonable and confiscatory, and also that it amounted

to an unconstitutional interference with interstate commerce. Answers were filed by the defendants, the members of the railroad commission, and voluminous evidence was taken. The court found the rates to be confiscatory and a decree was entered enjoining their enforcement. 187 Fed. Rep. 290. The railroad commissioners appeal.

The contention of the complainants based upon the asserted interference with interstate commerce was rightly overruled by the court below (*Minnesota Rate Cases*, *ante*, p. 352), and the only question which remains for our consideration is whether the proof was sufficient to sustain the finding of confiscation.

It is said on the part of the commissioners, that the freight tariff No. 3, adopted in 1908, was substantially similar to that which had been prescribed in 1904, and that the latter was in substance a repetition of the first tariff of the commission which had been put into effect in 1900; that is to say, that, while changes had been made from time to time to provide suitable adjustments, there were no substantial differences in the rates imposed by the last tariff, of which complaint was made, as compared with those of the earlier years when considered with respect to the effect upon the freight revenue in its entirety. It is urged, however, by the companies that there were reductions in fact and that, apart from this, there had been a continuous increase in the expenses incident to operation in the State and in the burdens imposed upon the companies; and also that the passenger fare act of 1907 (February 9, 1907, Acts 1907, Act No. 8, p. 9) had largely reduced the revenues of the roads. We deem it to be clear that the right of the complainants to contest the validity of the rates, if, as applied to changed conditions, they were found to be confiscatory, was not impaired by their action in putting them into effect. When these suits were brought, the passenger fare act had been in force for more than a year, but this gave opportunity to

ascertain the actual results, and, even if it were assumed that the new freight tariff of 1908 did not greatly reduce the former rates, the complainants were certainly not barred from presenting to the court their contention that the operation of the rates as a whole deprived them of a fair return from their entire intrastate business.

No question is presented as to the value of the properties within the State which were used by the companies in the public service. This was the subject of a formal stipulation by which it was conceded that the assessments made by the state tax commission, multiplied by two, should represent the value of these properties, respectively, for the purpose of these suits. Upon this basis, the value of the property of the St. Louis, Iron Mountain & Southern Railway Company was found to be $39,986,564; and that of the St. Louis Southwestern Railway Company, $14,029,634.

In the case of the Iron Mountain road, the period taken for the purpose of calculation was the six months ending December 31, 1907. According to the statement of the company, the total earnings from the business in Arkansas, interstate and intrastate, for this period, were $6,675,076.79. The total operating expenses, together with taxes and rentals, amounted, for the same period, to $5,175,301.44. The net earnings for the six months were thus $1,499,775.35; and this amount was equivalent to a return at the annual rate of 7.5 per cent upon the entire value of the property.

The statement submitted by the St. Louis Southwestern company for the six months ending December 31, 1907, showed operating revenues within the State, from both interstate and intrastate business, amounting to $2,288,173.40; and operating expenses, taxes and rentals, aggregating $1,388,075.94, leaving as net earnings for the six months, $900,097,46. We have also, in the case of this company, its statement for the entire fiscal year ending

June 30, 1908, which gives the total operating revenues within the State, interstate and intrastate, as $4,130,011.45, and operating expenses, together with taxes and rentals, amounting to $2,691,287.44, thus leaving net earnings of $1,438,724.01, or more than 10 per cent. upon the value of the property.

The showing thus made, of the returns from the combined business, makes it entirely clear that the ultimate conclusion must depend upon the certainty of the proof with respect to the segregation of the results of the intrastate operations. That is, the controlling questions concern the division of the expenses between interstate and intrastate transportation, and the determination of the share of the total value of the property which is assignable to the latter and upon which the rate of net return is to be computed.

As to the apportionment of value, it appears that the method adopted below was to divide the value of the entire property, as found, between the interstate and intrastate business according to the relation of gross revenue. In view of the fundamental objections to this method, which were considered in *Minnesota Rate Cases*, *ante*, p. 352, the results that have been obtained by resort to it in these cases cannot be accepted as affording a sufficient basis for the conclusion that the State has confiscated the property of the company.

In dividing the expenses of operation, the defendants undertook definitely to establish the cost of intrastate traffic as compared with that which was interstate. For this purpose, it was endeavored to attribute to the local and through train services, respectively, their proper shares of expense and in each case to divide the amount of the ascertained share according to the traffic carried. In the case of the Iron Mountain company, traffic statistics were taken for the month of October, 1907; these were analyzed and a division of expenses was made in accordance with

a plan devised by expert accountants. The computations, with respect to the St. Louis Southwestern company, were based upon the operations of October, 1908, as the company had compiled data for that month in making a test of comparative cost. According to these calculations of the defendants, the net return from the entire intrastate business was at the annual rate of 7.09 per cent. for the Iron Mountain road, and 9.16 per cent. for that of the St. Louis Southwestern.

It was objected, however, that the periods selected for these tests were not representative; that the month of October, 1907, in particular, was abnormal because of an unusual congestion of traffic, and that the use of the statistics for October, 1908, was also open to objection as they did not show such a fair average of the business as would enable the court to reach a correct conclusion. The court below took this view, but it was of the opinion that proper allowances might be made which would equalize these conditions. In this view, and for the purpose of correcting assumptions deemed to be erroneous, the court defined the basis of apportionment of the various items of outlay in accordance with which new computations were made. The effect of these calculations was to charge the intrastate freight traffic on the Iron Mountain road with an extra cost of 201.5 per cent. per ton mile. The court, concluding that certain items of the extra cost of local traffic had been omitted, decided that an additional charge of 8.5 per cent. would be reasonable, and that the total extra cost of the intrastate traffic should be placed at 210 per cent. In the case of the St Louis Southwestern company, the extra cost of the intrastate freight traffic was fixed at 250 per cent., this being, it is understood, per ton-mile. With respect to the passenger traffic, the court was of the opinion that the intrastate service should be charged with ten per cent. additional cost in the case of the Iron Mountain company, but that no allowance for extra cost was

necessary in that of the St. Louis Southwestern Company. From the computations on these bases the conclusion was derived that the net return from the entire intrastate business of the Iron Mountain company was at the annual rate of less than one per cent., and from that of the St. Louis Southwestern company, 2.6 per cent., upon the shares of the total property value assigned respectively to the intrastate business.

We shall not attempt to review in detail these calculations upon which the decree is based. While they represent a most serious effort to effect a reasonable apportionment, we are convinced, from our examination of the evidence, that they have the same infirmity which was found to exist in the computations in the *Minnesota* and *Missouri rate cases*. *Minnesota Rate Cases*, *ante*, p. 352; *Missouri Rate Cases*, *ante*, p. 474, decided this day, *ante*, p. 474. On finding, in the present cases, that the periods selected for the purposes of test could not be regarded as fairly representative, the court was left without sufficient data upon which to compute the extra cost of intrastate transportation with such a degree of certainty as would justify the annullment of the State's requirements. Controlling factors, used in the computations, represent general estimates of the conditions of transportation, which may or may not be accurate, and there was an absence of satisfactory evidence, to take the place of the rejected tests, giving with requisite particularity the actual movement of traffic at the times in question and affording a proper basis for the determination of relative cost. The wide variation in results obtained on the different hypotheses, each of which is earnestly supported in argument, illustrates the necessity for the keeping of suitable accounts, at least during typical periods, which will furnish correct statistical information bearing upon the cost of intrastate transportation as compared with interstate, instead of leaving a matter of such in-

tricacy to general expressions of judgment. It was not sufficient for the complainants to criticise the tests relied upon by the defendants, but in seeking to override the action of the State upon constitutional grounds it was incumbent upon them to establish the invalidating facts by definite and convincing proof.

We are of the opinion that the evidence failed to show confiscation.

The decrees are reversed and the cases remanded with directions to dismiss the bills, respectively, without prejudice.

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CASES FOLLOWED.

Atlantic Coast Line v. *North Carolina Commission*, 206 U. S. 1, followed in *Missouri Pacific Ry. Co.* v. *Tucker*, 340.

Bedford v. *United States*, 192 U. S. 225, followed in *Jackson* v. *United States*, 1.

Civil Rights Cases, 109 U. S. 3, followed in *Butts* v. *Merchants' & Miners' Transportation Co.*, 126.

Dow v. *Beidelman*, 125 U. S. 680, followed in *Chesapeake & Ohio Ry. Co.* v. *Conley*, 513.

Ex parte Young, 209 U. S. 123, followed in *Missouri Pacific Ry. Co.* v. *Tucker*, 340.

Georgia v. *Tennessee Copper Co.*, 206 U. S. 230, followed in *Arizona Copper Co.* v. *Gillespie*, 46.

Jackson v. *United States*, 230 U. S. 1, followed in *Hughes* v. *United States*, 24.

Minnesota Rate Cases, 230 U. S. 352, followed in *Missouri Rate Cases*, 474; *Chesapeake & Ohio Ry. Co.* v. *Conley*, 513; *Oregon R. R. & N. Co.* v. *Campbell*, 525; *Allen* v. *St. Louis, I. M. & S. Ry. Co.*, 553.

Missouri Rate Cases, 230 U. S. 474, followed in *Knott* v. *St. Louis, K. C. & C. R. R. Co.*, 512.

Omaha & Council Bluffs Ry. Co. v. *Interstate Com. Comm.*, 230 U. S. 324, followed in *Chesapeake & Ohio Ry. Co.* v. *Conley*, 513.

Pennsylvania R. R. Co. v. *International Coal Co.*, 230 U. S. 184, followed in *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 247.

Rosaly v. *Graham*, 227 U. S. 584, followed in *Ochoa* v. *Hernandez*, 139.

Smyth v. *Ames*, 169 U. S. 466, followed in *Minnesota Rate Cases*, 352.

Southern Pacific Railroad v. *United States*, 168 U. S. 1, followed in *Nalle* v. *Oyster*, 165.

Southern Railway v. *Tift*, 206 U. S. 434, followed in *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 304.

Trade Mark Cases, 100 U. S. 82, followed in *Butts* v. *Merchants' & Miners' Transportation Co.*, 126.
White v. *Nichols*, 3 How. 266, followed in *Nalle* v. *Oyster*, 165.

CIRCUIT COURTS.

See JURISDICTION, C.

CIRCUIT COURTS OF APPEALS.

See JURISDICTION, A 3, B.

CIVIL RIGHTS ACT.

1. *Intent of Congress as to uniform operation.*

This court holds that it was the evident intent of Congress in enacting the Civil Rights Act to provide for its uniform operation in all places in the States as well as the Territories within the jurisdiction of the United States, and that it was not the intent of Congress that the provisions of the statute should be applicable only to such places as are under the exclusive jurisdiction of the National Government. *Butts* v. *Merchants' Transportation Co.*, 126.

2. *Separableness of provisions; operation in places under exclusive jurisdiction of National Government.*

The provisions of the Civil Rights Act having been declared unconstitutional as to their operation within the States, *Civil Rights Cases*, 109 U. S. 3, they are not separable as to their operation in such places as are under the exclusive jurisdiction of the National Government and the statute is therefore unconstitutional in its entirety. (*The Trade Mark Cases*, 100 U. S. 82). *Ib.*

3. *Enforcement in one jurisdiction although invalid in another; remedial statutes distinguished.*

The enforcement of a remedial statute, such as the Employers' Liability Act, in Territories of the United States, although unconstitutional as to the States, is distinguishable from the similar enforcement of a highly penal statute such as the Civil Rights Act. *El Paso &c. Railway Co.* v. *Gutierrez*, 215 U. S. 87, distinguished. *Ib.*

CLASSIFICATION FOR REGULATION.

See RATE REGULATION, 24, 25, 26.

COMMERCE.

State control of.

The commerce that is confined within one State, and does not affect other States, is reserved to the State. This reservation is only of

that power which is consistent with the grant to Congress. *The Minnesota Rate Cases*, 352.

See INTERSTATE COMMERCE;
RATE REGULATION.

COMMON CARRIERS.

See CARRIERS;
INTERSTATE COMMERCE;
RATE REGULATION.

CONCLUSIONS OF LAW.

See QUESTIONS OF LAW AND FACT.

CONFISCATION.

See RATE REGULATION.

CONFLICT OF LAWS.

See CONGRESS, POWERS OF;
STATES, 1.

CONGRESS, POWERS OF.

Paramount authority; displacement of local laws.

The paramount authority of Congress enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, Congress may displace local laws by substituting laws of its own. *The Minnesota Rate Cases*, 352.

See INTERSTATE COMMERCE, 10, 11; RATE REGULATION, 2, 3, 4, 5, 7;
LEVEES, 2; STATES, 1, 3.

CONSPIRACY.

1. *Civil action for; when maintainable.*

No civil action lies for a conspiracy, unless there be an overt act that results in damage to the plaintiff. *Nalle* v. *Oyster*, 165.

2. *Civil action for; overt act; what constitutes.*

Publication of a privileged statement in an action as an essential part of a pleading by several defendants members of an official body *held* in this case not to be an overt act of a conspiracy. *Ib.*

CONSTITUTIONAL LAW.

Commerce clause. *See* INTERSTATE COMMERCE, 9;
RATE REGULATION.

1. *Contract impairment; effect of municipal ordinance abrogating street rights granted to public service corporation.*

An ordinance requiring a telephone corporation to remove from the streets its poles and wires which had been placed there under a former ordinance granting permission so to do without specifying any period, or else pay a rental not prescribed in the original ordinance, *held* unconstitutional under the contract clause of the Federal Constitution. *Greenwood* v. *Freight Co.*, 105 U. S. 13, distinguished. *Owensboro* v. *Cumberland Telephone Co.*, 58.

2. *Contract impairment; municipal grants within protection against.*

There is a distinction between a definite grant for a period longer than the law of the State permits and an indefinite grant; while the former may be altogether void as an effort to obtain that which is illegal, the latter is simply limited in duration to the period established by law, and during that time it is protected from impairment by the contract clause of the Constitution of the United States. *Boise Water Co.* v. *Boise City*, 84.

3. *Contract impairment; effect of municipal ordinance imposing additional obligations on assignee of grantee of easement in streets.*

The municipal ordinance of a town in Idaho imposing additional obligations on a corporation holding by assignment an easement granted by a former municipal ordinance within fifty years for use of the streets for water mains *held* an unconstitutional impairment of the obligation of the contract of the former ordinance. *Ib.*

4. *Contract impairment; rights protected against; street rights granted to public service corporation.*

Rights acquired under an ordinance granting the right to a water company to lay and maintain pipes in the streets is a substantial property right, with all the attributes of property; and the obligation of the contract in the ordinance on which it is based is protected against impairment by the contract clause of the Constitution of United States. *Ib.*

5. *Contract impairment; rights protected against; street rights granted to public service corporation; status of successor.*

Where, under the statutes of the State, a corporation formed by consolidation of several previously existing corporations becomes by express terms vested with all the assets of such constituent corporations, rights in the streets under municipal ordinances pass to the new corporation, and such rights are protected against im-

pairment by the contract clause of the Federal Constitution. *Owensboro* v. *Cumberland Telephone Co.*, 58.

6. *Contract impairment; effect of municipal ordinance requiring electric company to remove wires and poles from streets.*

An ordinance, not based upon necessities of the municipality, requiring an electric light company to remove its poles and wires *held*, in this case, to be an arbitrary impairment of the contract of the original ordinance granting the right in perpetuity and therefore void because unconstitutional under the contract clause of the Constitution of the United States. *Old Colony Trust Co.* v. *Omaha*, 100.

7. *Contract impairment; effect of municipal ordinance requiring public service corporation to discontinue service theretofore acquiesced in by municipality.*

Acquiescence by the municipality in the extension of a franchise for electric light to distribution of electricity for power and heat evidenced, as in this case, by collection of taxes imposed on receipts therefrom and the purchase by the city of current for power, *held*, to entitle those who had advanced money on the security of the franchise to insist upon the recognition and continuation of the right of the corporation to supply electricity for power and heat as well as light; and an ordinance requiring the corporation to discontinue such distribution of heat and power is void under the contract clause of the Constitution of the United States. *Ib.*

See MUNICIPAL CORPORATIONS, 12, 13.

8. *Due process of law defined.*

While the exact definition of the term "due process of law" may be uncertain, it is certain that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity to be heard. *Ochoa* v. *Hernandez*, 139.

9. *Due process of law; deprivation of property without; effect of military order reducing period for title to real estate in Porto Rico.*

The provision in the judicial order of General Henry published April 7, 1899, during the military occupation of Porto Rico by the United States, reducing the period for prescriptive title to real estate in that island from the periods previously established by law down to six years with retroactive effect and without any opportunity for third parties to be heard, amounted to a deprivation of property of the actual owners without due process of law and was beyond the

power of the Military Governor; nor was this provision ratified by any subsequent action of Congress. *Ib.*

10. *Due process of law; deprivation of property without; effect of shortening period for acquisition of title by prescription.*

To shorten the period for acquisition of title by prescription and give the order a retroactive effect so that the period has elapsed at the time the order is made without giving those who have interests in the property an opportunity to be heard and saving no existing rights, amounts to taking property without due process of law. *Ib.*

11. *Due process of law; deprivation of property without; power of commanding officer in territory occupied by military forces.*

Even if the commanding officer in territory occupied by military forces of the United States has all the legislative power as to such territory possessed by Congress, he is still subject, as Congress is, to the provisions of the Fifth Amendment and cannot by military orders deprive persons of their property without due process of law. *Ib.*

12. *Due process of law; deprivation of property without; effect of railroad rate regulation.*

To require a railroad company to charge such rates for transportation as prevent it from obtaining a reasonable return for the service rendered amounts to deprivation of property without due process of law in violation of the Fourteenth Amendment and is beyond the power of the State. (*Atlantic Coast Line* v. *North Carolina Commission*, 206 U. S. 1.) *Missouri Pacific Ry. Co.* v. *Tucker*, 340.

See RATE REGULATION, 28, 41, 42.

Equal protection of the law. *See* RATE REGULATION, 24, 25, 26.

Legislative power. *See* CIVIL RIGHTS ACT, 2, 3;
INTERSTATE COMMERCE, 10.

Property rights. *See* LEVEES, 3, 4, 6;
RATE REGULATION.

CONSTRUCTION.

See CONTRACTS;
STATUTES, A.

CONTAMINATION OF WATERS.

See EQUITY, 2.

CONTRACTS.

Interpretation by parties; influence of.

The practical interpretation of a contract by the parties thereto for a considerable period before a controversy arises is of great, if not

controlling, influence; and this rule is applicable in Nebraska as in the nature of estoppel. *Old Colony Trust Co.* v. *Omaha*, 100.

See CONSTITUTIONAL LAW, 1–7;
MUNICIPAL CORPORATIONS, 2, 8.

CONVEYANCES.

See PORTO RICO, 1.

CORPORATIONS.

1. *Public utility corporations; presumption as to inducement for investment of capital.*

There is a presumption that investments of large amounts of capital in a public utility enterprise will not be made on a franchise for necessary use of the streets which is a mere license revocable at will. *Boise Water Co.* v. *Boise City*, 84.

2. *Franchise to use streets; power to take for term longer than that of corporate existence.*

A corporation is capable of taking a grant of street rights of longer duration than its own corporate existence if the grant expressly inures to the benefit of the grantees, assigns and successors. *St. Clair Turnpike Co.* v. *Illinois*, 96 U. S. 63, distinguished. *Owensboro* v. *Cumberland Telephone Co.*, 58.

See CONSTITUTIONAL LAW, 3, 5;
MUNICIPAL CORPORATIONS.

COURTS.

1. *Disqualification of judge; application of § 21, Judicial Code.*

The proceeding to retire for personal bias or prejudice a trial judge of a United States court from further hearing a case of which he has jurisdiction had its origin in the new Judicial Code, § 21, and is only applicable in rare instances in which not merely adverse, but biased and prejudiced, rulings are shown and facts and reasons given. *Ex parte American Steel Barrel Co.*, 35.

2. *Disqualification of judge; application of § 21, Judicial Code.*

Section 21 of the Judicial Code is not intended as a means for a discontented litigant ousting a judge because of adverse rulings, or as a method of paralyzing the action of a judge who has heard the case by disqualifying him between the hearing and the determination of the matter heard. *Ib.*

3. *Disqualification of judge under § 21, Judicial Code; quære as to sufficiency of affidavit of bias.*

Quære and not decided whether under § 21, Judicial Code, any affidavit

of bias and prejudice is sufficient or whether the judge can pass upon its sufficiency. *Ib.*

4. *Functions of this court in respect of legislative judgment.*
This court does not sit as a board of review to substitute its judgment for that of the legislature or of the commission lawfully constituted by it, as to matters within the province of either. *The Minnesota Rate Cases*, 352.

5. *Conclusions of law; error to include in findings of fact.*
This court considers it a grave error for the court charged with the duty of making findings of fact to include mere conclusions of law. *Jackson* v. *United States*, 1.

See APPEAL AND ERROR;
INTERSTATE COMMERCE, 2, 14, 20, 22, 26;
JURISDICTION;
MANDAMUS, 2;
RATE REGULATION, 28, 29, 30;
STATUTES, A 1.

DAMAGES.

See INTERSTATE COMMERCE, 6, 12, 13, 20, 25, 26;
LEVEES, 2, 3, 5, 6;
RATE REGULATION, 41, 42.

DEBATES IN CONGRESS.

See STATUTES, A 2.

DELEGATED POWER.

See MUNICIPAL CORPORATIONS, 3, 16.

DISQUALIFICATION OF JUDGES.

See COURTS, 1, 2, 3.

DISTRICT OF COLUMBIA.

1. *Bills of exceptions; law governing practice of.*
The practice of bills of exceptions is statutory under the Statute of Westminster, 2, 13 Edw. I, c. 31, which prevailed in Maryland and was continued in force in the District of Columbia by the act of March 3, 1901, except as superseded by the Code established by that act. *Nalle* v. *Oyster*, 165.

2. *Bills of exceptions; practice; effect of Code and rules of court; necessity for exception.*
This practice was not modified by the Code, nor has it been by any

rules of practice established under it; there is no provision giving the right to take exceptions on rulings other than those made in the course of the trial, except as based on the Statute of Westminster; nor does any rule of court require an exception to be taken in order to preserve rights of a plaintiff against whose declaration a demurrer has been sustained. *Ib.*

3. *Pleading; application of § 1533, Code.*

Section 1533 of the Code applies only where the demurrer has been overruled; it has no bearing upon a case where the demurrer has been sustained. *Ib.*

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 8–12;
PORTO RICO, 2;
RATE REGULATION, 28, 41, 42.

EASEMENTS.

See CONSTITUTIONAL LAW, 3;
MUNICIPAL CORPORATIONS, 9, 11.

ELECTION OF REMEDIES.

See JURISDICTION, A 3.

ELECTRIC COMPANIES.

"General electric light business"; quære as to meaning of phrase as used in municipal ordinance.

Quære what is the exact meaning of the phrase "general electric light business" as used in an ordinance granting a franchise to a corporation for that purpose, and whether it includes distribution of electricity for power and heat. *Old Colony Trust Co.* v. *Omaha*, 100.

See CONSTITUTIONAL LAW, 6, 7.

EQUAL PROTECTION OF THE LAW

See RATE REGULATION, 24, 25, 26.

EQUITY.

1. *Nuisance; public; who may maintain action to abate.*

Although the nuisance may be a public one and others may be damaged thereby, one who shows that he suffers a special grievance not borne by the public, may maintain a separate action for equitable relief. *Arizona Copper Co.* v. *Gillespie*, 46.

2. *Nuisance; contamination of waters; injunction to abate properly granted.*

In this case *held*, that the contamination of waters in Arizona by a copper plant constituted a nuisance as to the lower appropriators and, under the circumstances, an injunction was properly granted, the Supreme Court of the Territory having provided in the decree that the defendant might have the injunction modified on constructing remedial works to prevent contamination. (*Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230.) *Ib.*

3. *Nuisance; abatement of; power of equity.*

Where, as in this case, the record does not show the damage which the injunction might cause the defendant, but does show that the interests of complainant and others of his class might be irreparably injured by a continuance of the nuisance, equity may grant relief. *Ib.*

ESTOPPEL.

See CONSTITUTIONAL LAW, 7; CONTRACTS; JURISDICTION, A 1; RATE REGULATION, 33.

EVIDENCE.

See LIBEL, 1; RATE REGULATION, 20, 21, 23.

EXCEPTIONS.

See BILL OF EXCEPTIONS; DISTRICT OF COLUMBIA, 1, 2.

FACTS.

See COURTS, 5; QUESTIONS OF LAW AND FACT.

FEDERAL QUESTION.

See JURISDICTION.

FIFTH AMENDMENT.

See CONSTITUTIONAL LAW, 11; LEVEES, 3, 6.

FINDINGS OF FACT.

See COURTS, 5; QUESTIONS OF LAW AND FACT.

FORAKER ACT.

See JURISDICTION, A 4;
PORTO RICO, 3.

FOURTEENTH AMENDMENT.

See CONSTITUTIONAL LAW;
RATE REGULATION, 24, 26, 41, 42.

FRANCHISES.

See CORPORATIONS, 2;
MUNICIPAL CORPORATIONS

GOVERNMENTAL FUNCTIONS.

See COURTS, 4.

GOVERNMENTAL POWERS.

Limitations on; effect of order beyond authority of person making it.
Where the limitations on a person exercising authority are notorious and are simply in accord with national and international law, there is no hardship in applying the rule that rights cannot be acquired under orders made by such person which are wholly beyond his authority. *Ochoa* v. *Hernandez*, 139.

See INTERSTATE COMMERCE, 2;
PORTO RICO.

GRANTOR AND GRANTEE.

See PORTO RICO, 1.

GRANTS.

See CONSTITUTIONAL LAW, 2–7;
CORPORATIONS, 1, 2;
MUNICIPAL CORPORATIONS.

HEPBURN ACT.

See INTERSTATE COMMERCE, 16.

IMPAIRMENT OF CONTRACT OBLIGATION.

See CONSTITUTIONAL LAW, 1–7.

INJUNCTION.

See EQUITY, 2, 3;
RATE REGULATION, 19, 32.

INTERSTATE COMMERCE.

1. *Act to Regulate; scope of.*

Congress in the Act to Regulate Commerce expressly provided that the provisions of the act should not extend to transportation wholly within one State. *The Minnesota Rate Cases*, 352.

2. *Act to Regulate; functions of court as to.*

It is the function of the court to interpret and apply the law already enacted, but not, under the guise of construction, to provide a more comprehensive scheme of regulation than Congress has decided upon. *Ib.*

3. *Carriers embraced by Act to Regulate; how determined.*

In terms the Act applies to all carriers engaged in the transportation of passengers or property by railroad, and the scope of the Act depends on the definition of the word "railroad" as used in 1887 when the Act was originally passed. *Omaha Street Ry. Co.* v. *Interstate Com. Comm.*, 324.

4. *Carriers embraced by Act to Regulate; street passenger railways not within.*

Street railways for passengers only, as they existed in 1887, were not within the contemplation of Congress in passing the Act to Regulate Commerce, such railroads are not subject to its provisions or under the jurisdiction of the Interstate Commerce Commission even though they carry passengers across the state line. *Ib.*

5. *Carriers embraced by Act to Regulate; quære as to effect of act of June 18, 1910.*

Quære to what extent since the passage of the act of June 18, 1910, interstate railways doing passenger, freight and express business are now under the jurisdiction of the Interstate Commerce Commission, and if so, to what extent. *Ib.*

6. *Car distribution; discrimination in; preliminary action by Commission prerequisite to resort to courts.*

Without preliminary action by the Interstate Commerce Commission declaring that the carrier had, by the rule adopted in regard to distribution of cars, discriminated against a shipper in such distribution, the Federal courts have no jurisdiction of a suit by such shipper for damages alleged to be occasioned by undue discrimination against him and undue preference in favor of his competitor. *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 304.

7. *Car distribution; reasonableness for determination of Commission.*
The question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Interstate Commerce Commission. *Ib.*

8. *Car distribution; discrimination in; limitation of actions for.*
Where the alleged discriminations in distribution of cars occurred more than two years before its commencement, the action cannot be stayed to permit an application to the Interstate Commerce Commission as under the act of June 29, 1906, all of such claims are barred after two years. (*Southern Railway* v. *Tift*, 206 U. S. 434.) *Ib.*

9. *Constitutional provision; automatic operation to secure against state interference.*
Even without action by Congress, the commerce clause of the Constitution necessarily excludes the States from direct control of subjects embraced within the clause which are of such a nature that, if regulated at all, their regulation should be prescribed by a single authority. There is thus secured the essential immunity of interstate intercourse from the imposition by the States of direct burdens and restraints. *The Minnesota Rate Cases.* 352.

10. *Federal control to exclusion of state interference.*
The Federal Constitution gives Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control and to provide effective regulation of that intercourse as the National interest may demand. *Ib.*

11. *Federal control over; effect of commingling interstate and intrastate operations.*
The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress over the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. *Ib.*

12. *Penal nature of Act to Regulate; measure of damage for private injury not determined by.*
While the Act to Regulate Commerce is in many respects highly penal there is no fixed measure of damages in favor of a shipper compelled to pay the published tariff rate while his favored competitors are given a lesser rate by means of rebates. Neither the American nor

English decisions are authority for such a rule as to the measure of damages. *Pennsylvania R. R. Co.* v. *International Coal Co.*, 184.

13. *Penal nature of Act to Regulate; measure of damage for private injury.*
The Act to Regulate Commerce imposes on the carrier heavy penalties for its violations payable to Government and independent of the amount of rebates paid, and is thus a terror to evil doers; but for private wrongs by which private injury is inflicted the compensation recoverable by the injured shipper is measured by the damages actually sustained and proved. *Ib.*

14. *Rates; when question as to, one for Commission and when one for courts.*
Under the Act to Regulate Commerce while reasonableness of rates and permissible discriminations based upon differences in conditions are administrative matters for the Commission, the courts have jurisdiction to determine whether differentials in rates can be allowed for the same commodity under similar conditions of traffic, on account of differences in the disposition of the commodity. *Ib.*

15. *Rates and allowances; Commission as tribunal to determine reasonableness.*
There is a necessity, which is recognized by the Act to Regulate Commerce, of having questions as to reasonableness of rates and allowances settled by a single tribunal in order to avoid the conflicting decisions which would result if several different tribunals could pass upon the same question; and the act itself has designated the Interstate Commerce Commission as that tribunal. *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 247.

16. *Rebates; effect of Hepburn Act on arrangements made prior thereto.*
A carrier can only charge the published rate for the same article and when collected cannot pay back any part thereof under any pretense, however equitable, to any shipper or to every shipper; and so *held* that carriers could not after the passage of the Hepburn Act continue to give rebates to shippers pursuant to arrangements made prior to the act on merchandise which the shippers had contracted to sell before that time. *Pennsylvania R. R. Co.* v. *International Coal Co.*, 184.

17. *Rebating; purchase of land by; prohibited.*
Carriers, whether saw-mill companies or railroads or both combined, cannot purchase land by rebating to the grantor a part of the

freight rate on interstate shipments over the road built on the right of way. *Fourche River Lumber Co.* v. *Bryant Lumber Co.*, 316.

18. *Rebating; purchase of land by; illegality.*
A rebate made for purchase of land is illegal even though much less than the value of the land acquired. *Ib.*

19. *Rebating; evasion of prohibitions against.*
The prohibitions of the Act to Regulate Commerce against rebates cannot be evaded by calling them differentials or concessions, nor by taking the money from a corporation that is the same as the rebating carrier. *Ib.*

20. *Services by shipper; recovery for discrimination resulting from unreasonable payment for; jurisdiction of courts.*
The courts have not jurisdiction of a suit brought by a shipper against a carrier for damages by reason of paying other shippers of similar goods an unreasonable amount for services in connection with such transportation unless and until there has been a finding by the Interstate Commerce Commission that the payments so made to the other shippers were unreasonably large. *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 247.

21. *Services of shipper; payment for; right of carrier as to.*
A carrier has the right under the Act to Regulate Commerce to pay shippers a reasonable allowance for services in connection with transportation of goods shipped by them, and the allowance paid must be treated by the courts as *prima facie* reasonable until the Interstate Commerce Commission has determined otherwise. *Ib.*

22. *Services of shipper; allowances for lateral hauling; jurisdiction to determine reasonableness.*
Allowances for lateral hauling may be lawfully paid, as they become unlawful only when unreasonable; whether unreasonable either past or future is a rate-making question over which the courts have no jurisdiction, even if the parties attempt to give it by consent. *Ib.*

23. *Services of shipper; allowances for lateral hauling; determination of reasonableness for Commission as prerequisite to resort to courts.*
This action, having been commenced without any application having been made to the Interstate Commerce Commission to declare unreasonable the allowances paid by the carrier for lateral hauling, the case must be remanded for dismissal, but the dismissal is

stayed to give plaintiff an opportunity to make such application with the right to the carrier to be heard on the defense of limitations as well as other defenses. *Ib.*

24. *Tariff; published; effect as statute.*
A published tariff, so long as it is in force, has the effect of a statute and is binding alike on carrier and shipper. *Pennsylvania R. R. Co.* v. *International Coal Co.*, 184.

25. *Tariff; published; departure from; liability of carrier to person injured thereby.*
While departure from a published tariff is forbidden by the Act to Regulate Commerce and by §§ 7 and 8 thereof, the carrier is liable to the person injured for the damages sustained, such damages must be proved and are not to be merely measured by the difference between the published rate paid by the complaining shipper and the lower rate given to a more favored shipper. *Ib.*

26. *Tariff; discrimination in rates; jurisdiction of suit to recover damages resulting from; measure of damages.*
Pennsylvania Railroad Co. v. *International Coal Co.*, *ante*, p. 511, followed to effect that the courts have jurisdiction of a case brought by a shipper against a carrier for the amount of damages actually sustained by him for charging him the full tariff when it was carrying the same goods the same distance for other shippers at lower rates but that such damages must be sustained by proof as to the amount thereof. *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 247.

See RATE REGULATION;
STATES, 2, 3;
STATUTES, A 2.

INTERSTATE COMMERCE COMMISSION.

See INTERSTATE COMMERCE, 4–8, 14, 15, 20, 21, 22.

JUDGMENTS AND DECREES.

See APPEAL AND ERROR; PLEADING, 1;
JURISDICTION, A 1, B; PRACTICE AND PROCEDURE, 3;
RES JUDICATA.

JUDICIAL CODE.

See APPEAL AND ERROR;
COURTS, 1, 2, 3;
MANDAMUS, 2.

JUDICIAL DISCRETION.

See PRACTICE AND PROCEDURE, 1.

JURISDICTION.

A. OF THIS COURT.

1. *Of appeal from Circuit Court of Appeals; when case not one arising under Constitution and judgment of that court final.*

Where diverse citizenship exists and the complainant plants its right to relief on the doctrine of estoppel, the case is not one arising under the Constitution of the United States, even though recovery might have been sought on the ground of impairment of the contract, and the judgment of the Circuit Court of Appeals is final. *Omaha Electric Co.* v. *Omaha*, 123.

2. *Of direct appeal under § 5 of Judiciary Act of 1891; scope of review.*

Where appellants' direct appeal to this court under § 5 of the Judiciary Act of 1891 is taken on the claim that the ordinance on which the Circuit Court based its decision is in contravention of the Constitution of the United States, this court has jurisdiction to review not only the constitutional question but every other question properly arising in the case including error assigned by the other party on its cross writ for failure to allow its counterclaim under the contract. *Boise Water Co.* v. *Boise City*, 84.

3. *Of direct appeal from Circuit Court; election to carry case to Circuit Court of Appeals.*

Where jurisdiction of the Circuit Court is invoked wholly on diverse citizenship but in the course of the case a constitutional question arises, the unsuccessful party may bring the case direct to this court under § 5 of the Judiciary Act of 1891 or, at his election, he may carry it to the Circuit Court of Appeals which may either certify the question to this court or decide it. *Boise Water Co.* v. *Boise City* (*No. 2*), 98.

4. *Of appeals from District Court of United States for Porto Rico; scope of review.*

Under § 35 of the Foraker Act, appeals from the District Court of the United States for Porto Rico are subject to the provisions applicable to appeals from the Supreme Courts of the Territories under the act of April 7, 1874, under which the jurisdiction of this court is confined, in a case where there are no errors assigned upon questions of evidence, to determining whether the findings of the

court below support the judgment. (*Rosaly* v. *Graham*, 227 U. S. 584.) *Ochoa* v. *Hernandez*, 139.

See APPEAL AND ERROR;
COURTS, 4;
JURISDICTION, B.

B. OF CIRCUIT COURT OF APPEALS.

Finality of judgment.

The Judiciary Act of 1891 does not contemplate two reviews in cases in which jurisdiction of the Circuit Court is invoked wholly on diverse citizenship even as to the constitutional questions which may arise, and the judgment of the Circuit Court of Appeals deciding such a case is final. *Boise Water Co.* v. *Boise City* (*No. 2*), 98.

See JURISDICTION, A 1, 3.

C. OF CIRCUIT COURTS.

Sufficiency of involution of constitutional ground.

As a basis of jurisdiction of the Circuit Court it is not enough that recovery might be sought upon a constitutional ground; it must clearly appear that it is actually so sought. *Omaha Electric Co.* v. *Omaha*, 123.

D. OF FEDERAL COURTS GENERALLY.

Of action to determine constitutionality of state rate regulation; effect of substitution of rates.

Where the Federal court already has jurisdiction of an action to determine the constitutionality of a state statute fixing rates, that jurisdiction is not ousted by a substitution of rates by the legislature, because the State files a bill to enforce the new rates; the Federal court retains jurisdiction under a supplemental bill. *Missouri Rate Cases*, 474.

See INTERSTATE COMMERCE, 6.

E. OF INTERSTATE COMMERCE COMMISSION.

See INTERSTATE COMMERCE, 4–7.

F. GENERALLY.

See COURTS.

LAW GOVERNING.

See DISTRICT OF COLUMBIA, 1, 2.

LEGISLATIVE POWER.

See CIVIL RIGHTS ACT;
LEVEES, 2;
RATE REGULATION, 27.

LEVEES.

1. *Control by Congress; effect of creation of Mississippi River Commission.*

Congress did not, by the creation of the Mississippi River Commission, assume entire control of the levee work to the displacement of state or local authorities who continued to construct levees for protection from overflow which combined with those constructed by the United States for improvement of navigation, so that eventually a complete system would be evolved. *Jackson* v. *United States*, 1.

2. *Damage occasioned by construction of; liability of United States.*

The rule that the United States has plenary power to legislate for the benefit of navigation and is not liable for remote or consequential damages caused by works constructed to that end has already been directly applied to the work of the Mississippi River Commission. (*Bedford* v. *United States*, 192 U. S. 225.) *Ib.*

3. *Damage occasioned by construction of; liability of United States.*

Jackson v. *United States*, *ante*, p. 599, followed to effect that the United States is not liable for damages caused by overflow of lands in the Mississippi valley caused by the levees constructed by state and Federal authority for protection from overflow and improvement of navigation, and that such overflow does not amount to a taking of property within the Fifth Amendment. *Hughes* v. *United States*, 24.

4. *Act of officer as act of United States; liability of latter for act of former in destroying levee.*

The wrongful act of an officer of the United States to meet an emergency, such as dynamiting a levee to allow water interfering with other work under construction is not the act of the United States and does not amount to taking for public use the property overflowed as a result of the dynamiting. *Ib.*

5. *Overflow occasioned by; liability for damages suffered.*

Damages, if any, by overflowing adjacent lands, occasioned by the levee system of the Mississippi River Valley could only result from concurrent action of the United States, the States and their sub-

ordinate agencies and individuals all impelled by different considerations, but all working towards the common end of having an efficient and continuous line of levees. *Jackson* v. *United States*, 1.

6. *Overflows; liability of United States for damages occasioned by.*
The United States is not responsible for damages by overflow or for failure to construct additional levees along the Mississippi River Valley, so as to afford increased protection from increased overflow caused by the levees that were constructed by state and Federal authority at other points; nor do such damages amount to taking the land overflowed for public use within the meaning of the Fifth Amendment. *Ib.*

LIBEL.

1. *Malice; implication from publication; privileged communications; burden of proof.*
Ordinarily malice is to be implied from the mere publication of a libel, and justification or extenuation must proceed from the defendant; but where the communication is privileged, the burden is on the plaintiff to prove malice. (*White* v. *Nichols*, 3 How. 266.) *Nalle* v. *Oyster*, 165.

2. *Privileged communications; statement in pleading as.*
A statement as to the qualifications of a teacher in the public schools made by members of the Board of Education in their answer to a petition for mandamus to reinstate her after dismissal is privileged; and if made without malice and with probable cause is not actionable. *Ib.*

3. *Probable cause for statement on which action based; effect of prior judicial decision.*
Such a statement cannot be held in an action for libel to have been made without probable cause if the court has held in another proceeding that the defendants were justified in making it. *Ib.*

4. *Pleading; admissions by demurrer.*
Allegations of malice, falsehood and want of probable cause in issuing a libel are of fact and are necessarily admitted by a demurrer. *Ib.*

LICENSES.

See CORPORATIONS, 1;
MUNICIPAL CORPORATIONS.

LIMITATION OF ACTIONS.
See INTERSTATE COMMERCE, 8;
STATUTE OF LIMITATIONS.

LIQUIDATED DAMAGES.
See RATE REGULATION, 41, 42.

LOCAL LAW.

Arizona. Riparian rights (see Riparian Rights, 1, 2, 5). *Arizona Copper Co.* v. *Gillespie*, 46.

District of Columbia. Bills of exceptions; act of March 3, 1901, establishing Code (see District of Columbia). *Nalle* v. *Oyster*, 165. Code, § 1533 (see District of Columbia, 3). *Ib.*

Idaho. Grants to corporations, Rev. Stat., § 2710; Rev. Codes, § 2838 (see Municipal Corporations, 10). *Boise Water Co.* v. *Boise City*, 84.

Water companies; compensation for water furnished municipalities (see Municipal Corporations, 17). *Ib.*

Kansas. Rate regulation statute of 1905 (see Rate Regulation, 42). *Missouri Pacific Ry. Co.* v. *Tucker*, 340.

Kentucky. Municipal corporations; licenses in streets (see Municipal Corporations, 6). *Owensboro* v. *Cumberland Telephone Co.*, 58.

Minnesota. Rate regulation (see Rate Regulation, 8, 45). *Minnesota Rate Cases*, 352.

Missouri. Freight and passenger fare acts of 1907 (see Rate Regulation, 10, 11). *Missouri Rate Cases*, 474.

Nebraska. Municipal power to grant licenses in streets (see Municipal Corporations, 12). *Old Colony Trust Co.* v. *Omaha*, 100.

Porto Rico. Registry law (see Porto Rico, 1). *Ochoa* v. *Hernandez*, 139.

West Virginia. Rate regulation statute of 1907 (see Rate Regulation, 25). *Chesapeake & Ohio Ry. Co.* v. *Conley*, 513.

Generally. See Congress, Powers of.

MALICE.

See LIBEL, 1.

MANDAMUS.

1. *Availability of writ.*

The writ of mandamus will be granted by this court only when it is clear and indisputable that there is no other legal remedy. *Ex parte American Steel Barrel Co.*, 35.

2. *Not available to correct mistake of circuit judge acting under § 14, Judicial Code.*

Where a senior circuit judge in designating under § 14 of the Judicial Code a judge to act in place of one retired under § 21 of the Judicial Code acts in the exercise of his legitimate jurisdiction, this court cannot correct a mistake, if he makes one, by the writ of mandamus. *Ib.*

MAXIMS.

See RIPARIAN RIGHTS, 5.

MEASURE OF DAMAGES.

See INTERSTATE COMMERCE, 12, 13, 25.

MILITARY OCCUPANCY.

See CONSTITUTIONAL LAW, 9, 11;
PORTO RICO, 2, 4.

MILITARY ORDERS.

See CONSTITUTIONAL LAW, 9, 11;
PORTO RICO, 2.

MISSISSIPPI RIVER COMMISSION.

See LEVEES, 1, 2.

MUNICIPAL CORPORATIONS.

1. *Character as instrumentality of State.*

Municipal corporations are mere emanations from the State, exercising such public power as the State chooses to grant. *Boise Water Co.* v. *Boise City*, 84.

2. *Contracts with; what constitute; power of State to relieve public service corporation from obligation imposed by general law.*

A statutory provision that all water companies must furnish free water to the municipalities in which they are situated does not constitute

a contract to which the municipalities are parties; it is within the power of the State to relieve the water companies of the obligation and permit them to furnish water at reasonable cost. *Ib.*

3. *Delegated powers; source of rights conferred on public service corporations.*

Rights conferred by a municipal ordinance on a corporation qualified to conduct a public business come from the State through delegated power to the city. *Owensboro* v. *Cumberland Telephone Co.*, 58.

4. *Grants by, of right to use streets; nature and extent of.*

A municipal ordinance granting to a corporation qualified to carry on a public business, such as a telephone system, the right to use the streets for that purpose, is more than a mere revocable license; it is the granting of a property right, assignable, taxable and alienable, an asset of value and a basis of credit. *Ib.*

5. *Grants by, of right to use streets; duration of.*

Such a grant is one of property rights in perpetuity unless limited in duration by the grant itself or by a limitation imposed by the general law of the State or by the corporate powers of the municipality. *Ib.*

6. *Grant by, to use streets; powers in Kentucky.*

The powers of municipalities of Kentucky to grant licenses in the streets for telephones were not limited in 1889 as to time; and, under a charter provision giving power to regulate streets and alleys, a municipality had ample power to grant a franchise to a telephone company to place and maintain poles and wires thereon. *Ib.*

7. *Grants of street rights; effect of reservation to alter or amend.*

A reservation to alter or amend in a municipal ordinance, granting rights in the streets to a corporation to carry on a public utility, as the necessities of the city demand, is simply a reservation of police control incidental to the unabridgeable police power and does not reserve a right to revoke or repeal the ordinance itself. *Ib.*

8. *Grants of street rights; power to destroy.*

While the power to destroy contract rights may be reserved by a municipality in the ordinance granting them, the reservation must be clear and explicit. *Ib.*

9. *Grants of franchises for public utilities; duration of.*

Where there is no limitation in the general law of the State, nor in the charter of the city, as to duration of franchises for public utilities in the streets, the grant of an easement for that purpose not specifying a period of duration, is in perpetuity. *Boise Water Co.* v. *Boise City*, 84.

10. *Grants of franchises for public utilities; duration of; quære as to application of local general law.*

Quære whether the limitation of fifty years in § 2710, Rev. Stat., and § 2838, Rev. Codes of Idaho, on grants to corporations applies to a grant made by a municipality to an individual and afterwards assigned to a corporation. *Ib.*

11. *Grants of easements in streets; duration under law of State.*

Where there is a limitation in the law of the State of duration for which easements in streets can be granted by municipalities, an easement granted for an indefinite period continues for the specified period. *Ib.*

12. *Grants of right to use streets; law of Nebraska; duration of licenses; contract impairment.*

Under the laws of Nebraska, as construed by the highest courts of that State, municipalities had the power in 1884 of granting licenses to use the streets for public business; and, in the absence of specific limitation of duration, such licenses were in perpetuity and conveyed rights of property within the protection of the contract clause of the Constitution of the United States. *Old Colony Trust Co.* v. *Omaha*, 100.

13. *Grants of right to use streets; application of state police power; impairment of rights.*

Such grants are subject to reasonable police power of the State and forfeitable for acts of abuse or non-user: but they cannot be taken away or impaired arbitrarily. *Ib.*

14. *Grants of use of streets; duration; franchise construed as to.*

A provision in an ordinance that the grantee of a franchise to use the streets of a municipality may be required to remove therefrom what it has placed therein under the franchise when necessity demands, *held*, in this case, not to be an intention to limit the franchise to the corporate existence of the grantee. *Ib.*

15. *Liability for use of commodity furnished after notice that payment therefor will be discontinued.*

A municipality, which continues to use water furnished by a water com-

pany after giving notice that it will pay no further bills for such water, is not relieved by such notice from the obligation to pay therefor according to the reasonable rates which have been fixed pursuant to statute. *Boise Water Co.* v. *Boise City*, 84.

16. *Powers; derivation of; effect of decisions of highest state court.*
A municipality, being a creature of the State, derives its powers from the laws thereof, and is within the influence of the decisions of the State's court of last resort. *Old Colony Trust Co.* v. *Omaha*, 100.

17. *Public utilities; compensation to which entitled at hands of municipality; local law of Idaho.*
A water company under the laws of the State of Idaho is entitled to compensation for water furnished and which it is ready to furnish to the municipality, even if the report of commissioners fixing reasonable rates in pursuance of the statute has not been adopted by municipal ordinance. *Boise Water Co.* v. *Boise City*, 84.

18. *State action in changing general law; right of municipality to object to.*
A municipality may not object to the State relieving a grantee of franchise rights from obligations formerly imposed by a general law of the State. *Ib.*

See CONSTITUTIONAL LAW, 1–7.

MUNICIPAL ORDINANCES.

See CONSTITUTIONAL LAW, 1–7;
MUNICIPAL CORPORATIONS, 3–8.

NAVIGATION.

See LEVEES, 2, 3.

NOTICE.

See MUNICIPAL CORPORATIONS, 15.

NUISANCE.

See EQUITY.

ORDINANCES.

See CONSTITUTIONAL LAW, 1–7;
MUNICIPAL CORPORATIONS.

PARTIES.

See EQUITY, 1.

PENAL STATUTES.

See CIVIL RIGHTS ACT, 3;
INTERSTATE COMMERCE, 12, 13.

PLEADING.

1. *Counts of declaration; effect of issue joined on demurrer to one of several counts.*

The issue joined upon a demurrer to one count of a declaration is legally distinct and separate from the issue joined upon a demurrer to another count; nothing can be imported from one count to the other, nor can a judgment be based upon surmise that a matter referred to in one count is the same as that referred to in another. *Nalle* v. *Oyster*, 165.

2. *Supplemental bill; allowance, in action to determine constitutionality of state rate regulation where statute repealed but penalties saved and other rates substituted.*

Where an act fixing rates and imposing penalties for violation is repealed by a subsequent act which saves the penalties and simply substitutes other rates, the essential features of a controversy involving the constitutionality of the statute are the same; and, under the circumstances of this case, a supplemental bill may be filed setting up the new and additional legislation and praying relief in regard thereto. *Missouri Rate Cases*, 474.

See DISTRICT OF COLUMBIA, 3;
LIBEL, 2, 3, 4.

POLICE POWER.

See MUNICIPAL CORPORATIONS, 7;
STATES, 2.

PORTO RICO.

1. *Registry law; rights of third parties under.*

Under the registry law of Porto Rico rights of third parties were preserved and a mortgagee or grantee acquired no better right before the expiration of the period of prescription than the grantor, but took subject to the rights of infants who owned property the title to which had been fraudulently registered in the name of the grantor. *Ochoa* v. *Hernandez*, 139.

2. *Military government; limitation of; protection of property rights.*

During the entire period General Orders No. 101 relating to Cuba and reiterated *mutatis mutandi* as to Porto Rico by General Miles continued in force as the recognized declaration of principles by which

the Military Government was limited, and under this the Governor was without authority to make any order that would deprive any person of his property without due process of law. *Ib.*

3. *Provisional government; duration of.*

From the exchange of ratifications until Congress acted by the passage of the Foraker Act the provisional government established in Porto Rico continued as before the peace. *Ib.*

4. *Status during military occupancy.*

The status of Porto Rico during the military occupancy and before the exchange of ratifications of the treaty of peace, was the same as that of the Philippine Islands during the same period. *Ib.*

See CONSTITUTIONAL LAW, 9;
JURISDICTION, A 4.

PRACTICE AND PROCEDURE.

1. *Discretion of trial judge in matter of practice; non-interference with.*

Where the ends of justice are advanced and no substantial rights of the objectors are violated, this court will not interfere with the reasonable discretion of the trial judge in a matter of practice. *Missouri Rate Cases*, 474.

2. *Disposition of appeals in which stipulations to abide by action of courts in other suits.*

Stipulations having been made that these suits should abide by the order, judgment and decree entered in other suits no questions are presented for the consideration of this court by the records; and the appeals are dismissed. *Knott* v. *St. Louis Southwestern Ry.*, 509.

3. *Same; course of parties in lower court.*

Under such conditions the parties should apply to the court below in accordance with the stipulations to have decrees entered in these suits similar to those which this court has directed to be entered in the suits to which the stipulations refer. *Ib.*

4. *Controlling effect of state court's construction of syllabus of officially reported decision of state court.*

In the absence of any controlling statute, this court will not give any greater effect to the syllabus of a case decided by the highest court of a State and reported in the official reports of that court than is given thereto in the courts of the State. *Old Colony Trust Co.* v. *Omaha*, 100.

5. *Controlling effect of state court's construction of state statute.*
Decisions of the highest court of the State relating to such matters of local law as the construction of the constitution and statutes of the State and the powers of its municipalities, are controlling upon this court, so long as their application involves no infraction of rights secured by the Constitution of the United States. *Ib.*

6. *Following state court's construction of state statute as to constitutionality.*
This court follows the decision of the state court as to the constitutionality of a state statute conferring power on a Railroad Commission to establish intrastate rates. *Southern Pacific Co.* v. *Campbell*, 537.

7. *Scope of review when case up on question of jurisdiction only.*
When the case is here on a question of jurisdiction only, this court cannot pass upon questions which go to the merits. *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 247.

8. *As to showing unconstitutionality of law attacked.*
Where a statute is valid on its face, each person attacking it as depriving him of his property without due process of law must show it does so deprive him; he cannot rely on the fact that it deprives others of their property without due process of law. *Missouri Rate Cases*, 474.

See DISTRICT OF COLUMBIA, 2;
INTERSTATE COMMERCE, 23;
RATE REGULATION, 18, 19.

PRESCRIPTION.

See CONSTITUTIONAL LAW, 9, 10;
PORTO RICO, 1.

PRESUMPTIONS.

See CORPORATIONS, 1;
LIBEL, 1;
RATE REGULATION, 43.

PRINCIPAL AND AGENT.

See LEVEES, 4.

PRIVILEGED COMMUNICATIONS.

See CONSPIRACY, 2;
LIBEL, 1, 2, 3.

PROPERTY RIGHTS.

1. *Right of individual owner to obstruct progress and development.*

An individual owner has no right to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible. *Jackson* v. *United States*, 1.

2. *Right of individual owner in protecting property from common natural danger to insist upon uniformity of methods by others.*

An individual owner protecting his own property from a common natural danger acquires no right thereby to insist that other owners or the Government shall adopt the same method or that they shall not adopt different methods for the protection of their respective properties or for the public good. *Ib.*

See CONSTITUTIONAL LAW, 8–12;
LEVEES, 3, 4, 6;
MUNICIPAL CORPORATIONS, 4, 5, 12;
PORTO RICO, 2;
RATE REGULATION, 28, 41, 42.

PUBLIC NUISANCE.

See EQUITY.

PUBLIC OFFICERS.

See LEVEES, 4.

PUBLIC SCHOOLS.

See LIBEL, 2, 3.

PUBLIC UTILITY CORPORATIONS.

See CORPORATIONS, 1;
MUNICIPAL CORPORATIONS, 4–7, 9, 17.

QUESTIONS OF LAW AND FACT.

When question one of law and not of fact.

Statements as to what the relation of the United States is to levee work on the Mississippi River and what the power of the Mississippi River Commission over all such work is by whomsoever performed are conclusions of law and not of fact. *Jackson* v. *United States*, 1.

See COURTS, 5.

RAILROADS.

See CARRIERS;
CONSTITUTIONAL LAW, 12;
INTERSTATE COMMERCE;
RATE REGULATION.

RATE REGULATION.

1. *Origin of.*

Regulation of railroad rates by the State began with railroad transportation. *The Minnesota Rate Cases*, 352.

2. *Federal powers in respect of relation of interstate to intrastate rates.*

The interblending of operations in the conduct of interstate and local business by interstate carriers, and the exigencies that are said to arise with respect to the maintenance of interstate rates by reason of their relation to intrastate rates, are considerations for the practical judgment of Congress. *Ib.*

3. *Federal powers in respect of relation of interstate to intrastate rates.*

When the situation becomes such that adequate regulation of interstate rates cannot be maintained without imposing requirements with respect to such intrastate rates of interstate carriers as substantially affect interstate rates, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments, the measure of the regulation it should supply. *Ib.*

4. *Federal control; effect of Interstate Commerce Act on rates for intrastate traffic.*

Neither by the original act nor by its amendment, has Congress sought to establish a unified control over interstate and intrastate rates; it has not set up a standard for intrastate rates or prescribed, or authorized the Federal commission to prescribe, either maximum or minimum rates for intrastate traffic. *Ib.*

5. *State power as to; scope of; limitation by Congress; necessity for actual exercise of Federal power.*

The authority of the State to prescribe what shall be reasonable charges for intrastate transportation is state-wide, unless it be limited by the exertion of the constitutional power of Congress with respect to interstate commerce and its instruments. As a power appropriate to the territorial jurisdiction of the State it is not confined to a part of the State, but extends throughout the State—to its cities adjacent to its boundaries as well as to those in the interior of the State. If this authority of the State be restricted, it must be by virtue of the actual exercise of Federal control and not by reason merely of a dormant Federal power, that is, one which has not been exerted. *Ib.*

6. *State power as to; effect of Interstate Commerce Act.*

Having regard to the terms of the Federal statute, the familiar range

of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court recognizing and upholding such authority, this court finds no foundation for the proposition that the Act to Regulate Commerce contemplated interference with the authority of the State to prescribe reasonable rates for the exclusively internal traffic throughout the extent of its territory. *Ib.*

7. *State power as to; effect of Interstate Commerce Act.*

The fixing of reasonable rates for intrastate transportation was left by the act where it had been found, that is, with the States and the agencies created by the States to deal with that subject. *Ib.*

8. *State power as to; validity of action by Minnesota.*

Under the established principles governing state action, Minnesota did not transcend the limits of its authority in prescribing the rates here involved, assuming them to be reasonable intrastate rates. It exercised an authority appropriate to its territorial jurisdiction and not opposed to any action thus far taken by Congress. *Ib.*

9. *State power as to intrastate traffic; constitutional validity determinative of.*

The question involved is whether, in prescribing a general schedule of rates involving the profitableness of the intrastate operations of the carrier, taken as a whole, the State has superseded the constitutional limit by making the rates confiscatory. *Ib.*

10. *State power as to; interference with interstate commerce; validity of Missouri acts.*

These suits were brought to restrain the enforcement of the freight-rate and passenger-fare acts of the State of Missouri, passed in 1907. The question of interference with interstate commerce is the same as that presented in the *Minnesota Rate Cases*, *ante*, p. 352, and the decision is the same. *Missouri Rate Cases*, 474.

11. *State power as to; interference with interstate commerce; validity of Missouri acts.*

Minnesota Rate Cases, *ante*, p. 352, followed to effect that the legislative acts of Missouri establishing maximum rates for transportation wholly intrastate are not unconstitutional as an unwarranted interference with interstate commerce. *Ib.*

12. *State power as to intrastate rates.*

Minnesota Rate Cases, ante, p. 352, followed to effect that a state statute prescribing rates exclusively for intrastate traffic is within the power of the State to enact. *Chesapeake & Ohio Ry. Co.* v. *Conley*, 513.

13. *State power as to interstate rates.*

A state railroad commission has no power to fix interstate rates, and as in this case the state court has not construed an order of the state commission as relating to or affecting interstate rates this court does not so construe it. *Oregon R. R. & N. Co.* v. *Campbell*, 525.

14. *State power as to; interference with interstate commerce.*

Minnesota Rate Cases, ante, p. 352, followed to effect that an order of a state railroad commission relating wholly to rates on intrastate shipments is not an unconstitutional interference with interstate commerce. *Ib.*

15. *State power as to; effect of general charter provision to lay and collect tolls.*

A general charter provision, giving power to charge and collect tolls, necessarily implies that the charges shall be reasonable, and does not detract from the power of the State to prescribe reasonable rates. *Southern Pacific Co.* v. *Campbell*, 537.

16. *State power as to; validity of exercise under Constitution.*

Minnesota Rate Cases, ante, p. 352, followed to effect that an intrastate rate fixed by State Railroad Commission is not an unconstitutional interference with interstate commerce. *Allen* v. *St. Louis, I. M. & S. Ry. Co.*, 553.

17. *Confiscation; right of carrier to contest validity of rates on ground of.*

A carrier has the right to contest the validity of rates prescribed by a body clothed by the legislature with power to establish rates on the ground they are confiscatory, and this right is not impaired by putting the rates into effect if they prove to be confiscatory. *Ib.*

18. *Confiscation; effect of insufficiency of showing of.*

Minnesota Rate Cases, ante, p. 352, also followed to effect that where the proofs submitted by a carrier attacking rates as confiscatory are not sufficient to justify a finding that the rates are confiscatory, the bill should be dismissed. *Ib.*

19. *Confiscation; sufficiency of showing; enjoining enforcement of rates.*
The enforcement of an order of the State Railroad Commission prescribing rates for intrastate transportation will not be restrained at the instance of a carrier on the ground that the rates are confiscatory where the allegations of the bill are insufficient to show that the carrier would be deprived of just compensation in the business of intrastate transportation by virtue of the operation of the order. *Southern Pacific Co.* v. *Campbell*, 537.

20. *Confiscation; sufficiency of showing.*
Where the constitutional validity of state action is involved general estimates of division between interstate and intrastate business cannot be accepted as adequate proof to sustain a charge of confiscation. *The Minnesota Rate Cases*, 352.

21. *Confiscation; sufficiency of showing.*
In the cases of the Northern Pacific and Great Northern companies on the examination of estimates of value, and methods of apportionment, *held* that the proof is insufficient to justify a finding that the rates were confiscatory; and in each of those cases the decrees are reversed with instructions to dismiss the bill without prejudice. *Ib.*

22. *Confiscation; sufficiency of showing.*
In the case of the Minneapolis and St. Louis Railroad Company, *held*, in view of the special facts appearing, that the margin of error in the estimates and calculations was not sufficient to affect the result. The decree in that case, adjudging the rates to be confiscatory, is therefore affirmed with the modification that the State may apply to the court by bill or otherwise, as advised, for a further order or decree whenever it shall appear that by reason of a change in circumstances the rates fixed by the State's acts and orders are sufficient to yield to this company reasonable compensation for the services rendered. *Ib.*

23. *Confiscation; sufficiency of showing.*
Legislative acts of a State establishing maximum freight and passenger rates for wholly intrastate commerce will not be declared unconstitutional under the Fourteenth Amendment as confiscatory in the absence of clear and convincing proof as to the value of the property used by the carrier and on which returns are based. General evidence as to assessed valuations without showing the method of appraisement are insufficient, either as to value of property or apportionment of expenses between interstate and intrastate business. *Missouri Rate Cases*, 474.

24. *Classification of railroads; constitutionality.*
Classification in a rate-making statute of railroads less than fifty miles in length is not unreasonable and does not render the statute unconstitutional as violating the equal protection provision of the Fourteenth Amendment. (*Dow* v. *Beidelman*, 125 U. S. 680.) *Chesapeake & Ohio Ry. Co.* v. *Conley*, 513.

25. *Classification of railroads; constitutionality.*
As construed by the state court the statute of West Virginia of 1907 is not unconstitutional because the classification of railroads under fifty miles in length only applies to such roads as are not under the control, management or operation of other railroads. *Ib.*

26. *Classification of railroads; constitutionality.*
A classification excepting electric lines and street railways from a railroad rate statute is reasonable and proper and does not offend the equal protection clause of the Fourteenth Amendment. (*Omaha & Council Bluffs Railway Co.* v. *Int. Com. Comm.*, *ante*, p. 324.) *Ib.*

27. *Legislative discretion in.*
The rate-making power is a legislative power and necessarily implies a range of legislative discretion. *The Minnesota Rate Cases*, 352.

28. *Judicial determination of sufficiency of rates; right of carrier to.*
A state statute which does not permit a carrier to have the question of sufficiency of rates determined by a court of competent jurisdiction, and which imposes such conditions upon the appeal for judicial relief as works an abandonment of the right rather than face those conditions, is unconstitutional as depriving the carrier of its property without due process of law. (*Ex parte Young*, 209 U. S. 123, 147.) *Missouri Pacific Ry. Co.* v. *Tucker*, 340.

29. *Judicial interference with; when justified.*
The court should only override the decision of the body which has been given legislative authority to establish rates of transportation where the action of such body is of such an arbitrary character as to constitute an abuse of powers. *Southern Pacific Co.* v. *Campbell*, 537.

30. *Judicial interference with; separableness of penal and other provisions.*
Penal provisions of a state statute regulating railroad rates which are separable furnish no ground for the courts denying effect to the rates if the statute is otherwise valid. *Ib.*

31. *Carriers' rights against legislative caprice; constitutional protection.*

While the property of railroad corporations has been devoted to a public use, the State has not seen fit to undertake the service itself and the private property embarked in it is not placed at the mercy of legislative caprice, but rests secure under the constitutional protection which extends not merely to the title, but to the right to receive just compensation for the services given to the public. *The Minnesota Rate Cases*, 352.

32. *Suits to enjoin enforcement of rates; when some sustained and others dismissed.*

Where a number of different carriers bring separate suits to enjoin the enforcement of railway rates established by a state statute on the ground that the rates are unconstitutional as confiscatory, the bills can be sustained as to those carriers which actually prove that the rates are confiscatory as not yielding a return on their property, although dismissed as to other carriers which fail to offer clear and convincing proof to that effect. *Missouri Rate Cases*, 474.

33. *Estoppel of carrier to attack constitutionality of penal provisions of statute suspended during litigation.*

Where the state court has held that the carrier is exempted from the operation of the penalty clause of a rate-making statute during prosecution by it in good faith of a suit to determine the constitutionality of such statute, the carrier cannot attack the validity of the statute on the ground of its penal provisions. *Chesapeake & Ohio Ry. Co.* v. *Conley*, 513.

34. *Reasonableness of intrastate rates; determination where carrier does both interstate and intrastate business.*

Where a carrier does both interstate and intrastate business, to determine whether a scheme of maximum intrastate rates affords a fair return the value of the property employed in intrastate business and the rates prescribed must be considered separately, and profits and losses on interstate business cannot be offset. *The Minnesota Rate Cases*, 352.

35. *Valuation; basis of calculation in fixing rates.*

For fixing rates the basis of calculation of value is the fair value of the property of the carrier used for the convenience of the public. (*Smyth* v. *Ames*, 169 U. S. 466.) *Ib.*

36. *Valuation; basis of calculation in fixing rates.*

There is no formula for the ascertainment of the fair value of property

used for convenience of the public, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. *Ib.*

37. *Valuation; basis of calculation in fixing rates.*
Assets and property of a carrier not used in the transportation business cannot be included in the valuation as a basis for rate making. *Ib.*

38. *Valuation; basis of calculation in fixing rates.*
Property of a railroad company cannot be valued for a basis of rate making at a price above other similar property solely by reason of the fact that it is used as a railroad, and increases in value over cost cannot be allowed beyond the normal increase of other similar property. *Ib.*

39. *Valuation for purposes of; considerations.*
In valuing the plant of a carrier for purpose of fixing rates there should be proper deductions for depreciation. *Ib.*

40. *Valuation for purposes of; apportionment where both interstate and intrastate business.*
Minnesota Rate Cases, ante, p. 352, followed, disapproving the establishment of values of property used in interstate and intrastate business by apportionment based on the gross revenue received from each class of business. *Missouri Rate Cases,* 474.

41. *Overcharging; penalties for; power of State to fix amount of liquidated damages.*
While it may be within the power of the State to impose double or treble damages on a carrier for overcharging transportation rates, it is beyond its power to impose a fixed amount as liquidated damages in every case regardless of, and as a general rule many times in excess of, the actual damages. To do so would deprive the carrier of its property without due process of law in violation of the Fourteenth Amendment. *Missouri Pacific Ry. Co.* v. *Tucker,* 340.

42. *Overcharging; penalties for; invalidity of Kansas law of 1905, fixing amount of liquidated damages for.*
That part of the statute of Kansas of 1905 establishing maximum rates for transportation of oil, gasoline, etc., which fixes $500 as liquidated damages in favor of the shipper for any excess charge regardless of the amount thereof is so arbitrary and oppressive as to render it unconstitutional under the Fourteenth Amendment as taking the property of the carriers without due process of law. *Ib.*

43. *Presumption as to validity; right of carriers to resort to courts to determine validity.*

Rates that a railroad company may charge for transportation as fixed by the legislation of a State are presumptively valid, but not conclusively so; and the company is entitled to have the question of whether the prescribed rates are confiscatory and therefore deprive it of its property without due process of law in appropriate judicial proceedings. *Ib.*

44. *Operation of order of state commission; determination of.*

Whether an order of the state commission governs particular shipments depends upon whether the traffic is interstate or intrastate, which must be determined by the facts in each case. The question cannot be determined in advance by general decree. *Oregon R. R. & N. Co.* v. *Campbell*, 525.

45. *Minnesota acts; validity determined.*

These appeals involve the validity of the orders of the Railroad and Warehouse Commission, and the legislative acts, of the State of Minnesota prescribing maximum rates for freight, and a maximum fare of two cents a mile for passengers. The rates relate to traffic exclusively between points within the State. It was contended, however, that as applied to cities on the State's boundary, or to places within competitive districts crossed by the state line, the rates disturbed the relation previously existing between interstate and intrastate rates, thus imposing a direct burden upon interstate commerce and creating discriminations as against localities in other States. The rates were also assailed as confiscatory. The rates are sustained as to the Northern Pacific and Great Northern companies. In the case of the Minneapolis and St. Louis Railroad Company, the rates are held to be confiscatory in view of the particular facts shown with respect to that road. *The Minnesota Rate Cases*, 352.

See CONSTITUTIONAL LAW, 12; JURISDICTION, D; INTERSTATE COMMERCE; PLEADING, 2; PRACTICE AND PROCEDURE, 6.

RATES.

See CARRIERS; INTERSTATE COMMERCE, 14, 15, 16, 25; RATE REGULATION.

REAL PROPERTY.

Record title; purchaser bound by defects and infirmities in.

Wherever registry laws are in force, the rule is that a purchaser takes

subject to any defects and infirmities that may be ascertained by reference to the chain of title as spread on the record, and this includes invalidity of an order on which title is based. *Ochoa* v. *Hernandez*, 139.

See CONSTITUTIONAL LAW, 9, 10, 11.

REBATES.

See INTERSTATE COMMERCE, 13, 16–19.

REGISTRATION OF INSTRUMENTS.

See PORTO RICO, 1;
REAL PROPERTY.

REMEDIAL STATUTES.

See CIVIL RIGHTS ACT, 3.

REMEDIES.

See RIPARIAN RIGHTS, 3.

REPORTS.

See PRACTICE AND PROCEDURE, 4.

RESERVED POWERS.

See COMMERCE;
STATES, 1, 2;

RES JUDICATA.

1. *Scope of bar.*

If the parties in the former action be the same as in the present, every matter and question of fact necessarily involved in the consideration and determination of the former issue is conclusive upon the present.. (*Southern Pacific Railroad* v. *United States*, 168 U. S. 1, 48.) *Nalle* v. *Oyster*, 165.

2. *Effect of judgment in action for mandamus as bar to same question in action of libel between same parties.*

A judgment denying the petition in an action for mandamus to compel reinstatement of a public school teacher in which the defendants, members of the Board of Education, pleaded that the petitioner was not sufficiently qualified as a teacher and the court held this was justification of the dismissal is *res judicata* as to that question in a suit for libel subsequently brought by the petitioner against the same defendants for the statement made in such pleading. *Ib.*

3. *Effect of judgment as, against one not party to suit.*
A judgment against a corporation construing its franchise is not *res judicata* as against a mortgagee who was not a party to the suit and whose rights were acquired prior to the commencement of the suit in which the judgment was entered. *Old Colony Trust Co.* v. *Omaha*, 100.

4. *Limitation of bar where judgment makes opinion part of record.*
Where the judgment itself makes the opinion a part of the record, the bar of the judgment is confined to those questions to which the opinion expressly declares the litigation was limited. *Owensboro* v. *Cumberland Telephone Co.*, 58.

RIPARIAN RIGHTS.

1. *Use of running waters under law of Arizona; relative rights of appropriators.*
In Arizona, by statute, all rivers, streams, and running waters are declared public, and may be used for purposes of milling, mining and irrigation. The first appropriator is first in right to the extent necessary for his purposes; and neither the user for mining purposes nor the user for agricultural purposes is placed upon a higher plane than the other. *Arizona Copper Co.* v. *Gillespie*, 46.

2. *Use of running waters; relative rights of users; effect of magnitude or importance of conflicting interests.*
Where users of waters are placed, as in Arizona, upon the same plane, the rights of lesser users are not subordinated to those of greater users; nor is a wrong done by one to the other condoned because of the magnitude or importance either of the public or the private interests of the former. *Ib.*

3. *Remedies for wrongful injury to.*
Where one of several users of waters is wrongfully injuring the others there is a remedy either at law or in equity; the latter depending upon circumstances including the comparative injury of granting or refusing an injunction. *Ib.*

4. *Limitation on right of appropriator of water as to quantity and quality.*
The limitation of necessary use on the right of an appropriator of water applies to quality as well as quantity; and the right to use necessary water does not include the right to so destroy the quality of all the water not used as to continuously injure the property of the other appropriators. *Ib.*

5. *Application of maxim sic utere tuo ut alienum non lædas.*
The maxim *sic utere tuo ut alienum non lædas* applies in Arizona and elsewhere to the use of waters by one appropriator as against another. *Ib.*

RIVERS.

See LEVEES;
RIPARIAN RIGHTS.

STATES.

1. *Effectiveness of laws; effect of paramount power of Congress.*
In the absence of Federal action, effect may not be denied to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power. *The Minnesota Rate Cases*, 352.

2. *Powers reserved to; effect of incidental involution of interstate commerce.*
There remains to the States the exercise of the power appropriate to their territorial jurisdiction in making suitable provision for local needs. The State may provide local improvements, create and regulate local facilities, and adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. *Ib.*

3. *Powers reserved to; when power of Congress paramount.*
Where matters falling within the state power, as above described, are also by reason of their relation to interstate commerce within the reach of the Federal power, Congress must be the judge of the necessity of Federal action; until Congress does act, the States may act. *Ib.*

See COMMERCE;
INTERSTATE COMMERCE;
LEVEES;
MUNICIPAL CORPORATIONS, 1, 2, 3, 18;
RATE REGULATION.

STATUTE OF LIMITATIONS.

Modification of; to what extent permissible.
Statutes of limitation may be modified by shortening the time which is still running but only so that a reasonable time still remains for commencement of an action before the bar takes effect. *Ochoa* v. *Hernandez*, 139.

See CONSTITUTIONAL LAW, 9, 10;
MUNICIPAL CORPORATIONS, 9–12, 14.

STATUTE OF WESTMINSTER.

See DISTRICT OF COLUMBIA, 1, 2.

STATUTES.

A. Construction of.

1. *Constitutionality; intent of Congress as to separableness of provisions.*

Where the greater part of a statute is unconstitutional as beyond the power of Congress, the question for the court to determine as to the part which is constitutional is whether it was the intent of Congress to have that part stand by itself—if not, the whole statute falls. *Butts* v. *Merchants' Transportation Co.*, 126.

2. *Debates in Congress not available in construing act.*

The meaning of the Act to Regulate Commerce and whether it applies to street railways carrying passengers over a state line cannot be determined from statements made in Congress during the debates on the bill; the act must be interpreted by its own terms as looked at in the whole. *Omaha Street Ry. Co.* v. *Interstate Com. Comm.*, 324.

3. *Reports of committees and language of members; availability for purpose of construction.*

While they may be looked at to explain doubtful expressions in a statute, not even formal reports, much less the language of a member of the committee can be resorted to for the purpose of construing a statute contrary to its plain terms. *Pennsylvania R. R. Co.* v. *International Coal Co.*, 184.

See Civil Rights Act;
Interstate Commerce, 2, 3, 4;
Practice and Procedure, 5, 6.

B. Statutes of the United States.

See Acts of Congress.

C. Statutes of the States and Territories.

See Local Law.

STIPULATION OF COUNSEL.

See Practice and Procedure, 2, 3.

STREET RAILWAYS.

See Interstate Commerce, 4;
Rate Regulation, 26.

STREETS AND HIGHWAYS.

See Constitutional Law, 3, 4, 5;
Corporations, 1, 2.
Municipal Corporations, 4–7, 11–14.

SUPPLEMENTAL BILL.
See PLEADING, 2.

TELEPHONE COMPANIES.
See CONSTITUTIONAL LAW, 1;
MUNICIPAL CORPORATIONS, 4, 5, 6.

TITLE.
See CONSTITUTIONAL LAW, 9, 10, 11;
PORTO RICO, 1;
REAL PROPERTY.

TRANSPORTATION.
See CARRIERS;
CONSTITUTIONAL LAW, 12;
INTERSTATE COMMERCE: RATE REGULATION.

UNITED STATES.
See LEVEES.

WATER COMPANIES.
See CONSTITUTIONAL LAW, 4;
MUNICIPAL CORPORATIONS, 2, 15, 17.

WATERS.
See EQUITY, 1;
LEVEES;
RIPARIAN RIGHTS.

WORDS AND PHRASES.
"*Due process of law*" (see Constitutional Law, 8). *Ochoa* v. *Hernandez*, 139.

"*General electric light business*" as used in municipal franchise (see Electric Light Companies). *Old Colony Trust Co.* v. *Omaha*, 100.

"*Railroad*" as used in Interstate Commerce Act of 1887 (see Interstate Commerce, 3). *Omaha Street Ry. Co.* v. *Interstate Com. Comm.*, 324.

WRIT AND PROCESS.
See APPEAL AND ERROR;
JURISDICTION;
MANDAMUS.