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Current Conflicts between the Commerce Clause and State Police Power, 1922-1927

Thomas Reed Powell

CURRENT CONFLICTS BETWEEN THE COMMERCE CLAUSE AND STATE POLICE POWER, 1922-1927†

By THOMAS REED POWELL*

II. STATE POLICE POWER AFTER CONGRESSIONAL ACTION

BEFORE the Supreme Court worked out its elastic formulae to clothe conclusions as to the validity of state interferences with interstate commerce in the absence of congressional action, the Great Chief Justice had strained hard to find in congressional action a barrier to the application to interstate navigation of a state-granted monopoly in the use of steam on vessels[65] and a negative on a state tax on the occupation of selling imported goods in the original package in which they had been received from abroad.[66] From the beginning there was no doubt that state regulation in conflict with congressional regulation is to be denied application. Marshall's astuteness in finding such conflicts need no longer be emulated now that his successors have established that state legislation consistent with national regulation is still void if the national government is deemed to have intended to occupy the whole field within which the state legislation operates. Whether Congress means merely to command what it commands or means to go further and enjoin any state additions to its commands is seldom to be gathered from explicit language in federal statute. The answer usually is derived from a process called inference. Formally the enterprise is one of the interpretation of the Act of Congress to discover its scope. Actually it is often the enterprise of reaching a judgment whether the situation is so adequately handled by national prescription that the impediment of further state requirements is to be deemed a bane rather than a blessing.

The process is not different from that practiced in passing on state laws in the absence of federal action. The difference lies in the data to which the process is applied. When national power has not been exerted, the court faces the alternative of allowing the state restraint or leaving the commerce in question unfettered.

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†Continued from 12 MINNESOTA LAW REVIEW 321, 470.

[65]Gibbons v. Ogden, (1824) 9 Wheat. (U.S.) 1, 6 L. Ed. 23.

[66]Brown v. Maryland, (1827) 12 Wheat. (U.S.) 419, 6 L. Ed. 678.

After Congress has imposed a partial restraint, the issue is changed to one of whether this partial restraint has sufficiently safeguarded the situation so that further restraints have less justification. Some restraint may be thought sufficient where no restraint would be deemed undesirable. This way of putting the problem assumes that we always have a defined subject matter involved, such as bridges, trains, rates, liabilities, etc. Often, however, there is question as to what subject Congress has regulated, e. g., whether trains or merely rear cars on trains,[67] whether rates alone or liabilities as well,[68] etc. The state may claim that its law deals with a different subject from that regulated by Congress. If its claim were accepted, the court would be choosing between the state's regulation of that subject and no regulation. The claim may be rejected by the judicial process of choosing to find that Congress meant to legislate about genera when its prescriptions touched only species. In such cases a decision that the state law must be denied application because Congress has entered the field may often be more realistically expressed as a judgment that the state regulation is worse than no regulation. The Act of Congress may be the peg on which the court hangs the decision, but the process of finding in the Act of Congress a negative that is not there expressed must often be much the same as the process of finding in the constitution a negative that is not there expressed.

These ruminations will, I am sure, be as clear to my readers as they are to me. If the effort shows that generalization is difficult and precarious, it will not have been in vain. It may be better and simpler to suggest as a psychological consideration that the local need for regulation is likely to appeal less strongly after Congress has turned its attention in the general direction of the situation than before Congress has noted the existence of evils at all. While no member of the national legislature may have thought of the particular problem presented by state additions to national regulations and have desired that the national prescriptions be the sole ones in the field, it may often be a reasonable assumption that Congress would itself have gone farther if there had been any

[67]See the difference of opinion in Pennsylvania R. Co. v. Public Service Commission, (1919) 250 U. S. 566, 40 Sup. Ct. 36, 63 L. Ed. 1142, reviewed in 19 Mich. L. Rev. 27, and commented on in 5 Va. L. Reg. n. s. 719 and 29 Yale L. J. 456.

[68]See Postal Telegraph-Cable Co. v. Warren-Goodwin Lumber Co., (1919) 251 U. S. 27, 40 Sup. Ct. 69, 64 L. Ed. 118, reviewed in 19 Mich. L. Rev. 27-28 and discussed in 33 Harv. L. Rev. 988; 14 Ill.. L. Rev. 525; 5 Iowa L. B. 280; 18 Mich. L. Rev. 418; 4 MINNESOTA LAW REVIEW 293; 68 U. Pa. L. Rev. 259; and 29 Yale J. L. 566.

serious need for something more. Still stronger presumptions are legitimate when Congress has vested an administrative authority with power in the premises. New administrative regulations come more easily than additional legislation. Local needs have less claim to protection from state regulation when they may present those claims to a federal board than when they must rely on Congress if state comfort is denied. Most of the cases to be catalogued relate to matters over which some federal administrative agency has been vested with some degree of control. Sometimes the question involved in this section as in its predecessor is whether the commerce involved is intrastate or interstate. This, however, is not coterminous with the question whether Congress has validly regulated the subject-matter, since the Transportation Act has spread its wings or fangs to a considerable extent over intrastate commerce.

Of the thirty-one cases to be presented, all but five deal with interstate carriers by rail. The remainder have to do with navigable waters, quarantine, daylight saving, and title to ships.

1. Carriers

Rates. The Transportation Act of 1920, in dealing with the cessation of the federal control of carriers which had been exercised under the war power, provided that all rates, classifications, regulations and practices in effect on February 20, 1920, "shall continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law," with a proviso against changes prior to September 1, 1920, which should reduce any rate, fare or charge. The question in *Missouri Pacific R. Co. v. Boone*[69] was whether a state statute passed prior to the assumption of federal control, concededly suspended even as to intrastate commerce by the filing of tariffs by the director general during federal control, became operative again as to intrastate commerce without re-enactment after the limitation in the Transportation Act had expired. In holding that it did, Mr. Justice Brandeis had to hold that the tariff instituted by the director general had been "changed" by the "mere cessation of the suspension, which had been effected through federal control," of the state statute in force and applicable to intrastate commerce prior to the assumption of federal control. Such a change was said to be one made "thereafter" in the language of the Trans-

[69](1926) 270 U. S. 466, 46 Sup. Ct. 341, 70 L. Ed. 688.

portation Act, i. e., after the termination of federal control. This verbal tour de force was plainly dictated by considerations of policy and of constitutional canons. Concededly the state might by a new statute or by fresh administrative action after September 1, 1920, restore the statutory liability for loss of baggage in intrastate commerce which had been in force prior to federal control. Yet if the state administrative authority were not vested with appropriate authority and if the state legislature were not in session, the restoration of earlier state regulation would necessarily be deferred. This point is made in answer to the contention of the carrier that Congress intended the tariffs of the director general to remain in force until new affirmative state action, so as to present an obstacle to any change which might reduce the carrier's revenue. "It is not to be assumed," says Mr. Justice Brandeis, "that Congress intended to adopt a means of protection which would have been indirect, fortuitous, and largely futile, and which would obviously have produced such inequalities among the states, when direct, certain and better means of protection were available." On the question of constitutional power, it was argued by the shipper that the contention of the carrier meant that Congress had repealed state laws applicable to intrastate commerce at the termination of federal control and then given to the states permission to legislate anew on the subject. Such regulation by Congress of intrastate commerce would, it was urged, go beyond the limited congressional power to regulate intrastate commerce only so far as is necessary and proper in order adequately to regulate interstate commerce. Without definitely passing on the issue, Mr. Justice Brandeis declared that such a construction of the Transportation Act would "raise a grave and doubtful constitutional question" and that "under the settled practice, a construction which does so will not be adopted, where some other is open to us." Thus did the Supreme Court supplement the work of the congressional draftsman and make it clear that Congress meant state laws to apply to intrastate commerce as soon as the transition period after federal control had elapsed. The case at bar sustained the state court in applying to intrastate commerce a state statute forbidding limitation of liability for loss of baggage when the loss is due to a failure to deliver which the state law deems a conversion.

The same provision of the Transportation Act was successfully invoked in *New York Central R. Co. v. New York & Penn-*

sylvania Co.[70] to defeat what was in effect a state reduction of intrastate rates during the six months period ending September 1, 1920, in defiance of the explicit proviso in the federal Act. The carrier had exacted the rates in force when the Transportation Act was passed. It had not appealed from an order of the state commission establishing a lower rate, but it now resists a judgment on a reparation order issued by the state commission. The state court held that the carrier had waived its rights by its failure to appeal from the rate order. In reversing the state judgment, Mr. Justice Holmes says:

"In our opinion the failure to appeal from the former order is no bar. We do not undertake to review the decision of the supreme court as to state procedure, but if the railroads were too late to argue their case before that court, they are not too late to argue it here. There was no order in the former hearing before the state commission that the railroads could have brought before us. This is the first moment when they have had a chance to raise what we regard as a perfectly clear point, as it is the first moment when their rights have been infringed. There now is an order which is in the teeth of the statute. It would not be reasonable to hold that they are precluded from getting the protection that this court owes them, by their having failed to go as far as they now learn that they might have gone in a previous state proceeding which did not infringe their rights and which could not be brought here."

The familiar question whether a shipment is a single interstate one or a combination of an interstate and an intrastate one arose in *Baltimore & O. S. W. R. Co. v. Settle*[71] in which it was conceded by the shipper that his intention from the beginning was to ship to the ultimate destination. Mr. Justice Brandeis recognized that, if the shipper's intention had been in doubt, the facts that he had taken possession of the cars at an intermediate point to which they were billed and that they were not rebilled for several days thereafter might have justified the jury in finding that the intention was to end the original journey at the first billing point and that the later rebilling was an afterthought. There may be instances "where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even

[70](1926) 271 U. S. 124, 46 Sup. Ct. 447, 70 L. Ed. 865. Mr. Justice Sutherland did not sit.

[71](1922) 260 U. S. 166, 43 Sup. Ct. 28, 67 L. Ed. 189, noted in 23 Colum. L. Rev. 308; 36 Harv. L. Rev. 339; and 71 U. Pa. L. Rev. 132. In 6 Boston U. L. Rev. 278 is a consideration of rates when intrastate transportation follows an interstate movement, and in 74 U. Pa. L. Rev. 390 a discussion of when stoppage breaks the continuity of interstate transit.

though some further shipment was contemplated when the original movement began." Here, however, the "essential nature of the traffic as a through movement to the point of ultimate destination is shown by the original and persisting intention of the shippers, which was carried out." This as a matter of law determines that the movement was a single interstate shipment, to which "neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk is an essential." This case, more clearly than any other, makes intention the controlling factor in determining whether shipments formally bisected are to be treated as nevertheless single shipments. Mr. Justice Brandeis insists that previous decisions are consistent with this, though the opinions may contain expressions which must be qualified. That the issue was not free from doubt may be inferred from the fact that the circuit court of appeals and Mr. Justice McReynolds differed from the majority of the Supreme Court. With the shipment authoritatively determined to be a single interstate one, it followed that the shipper was not entitled to the lower rates which he had paid for an initial interstate shipment and a subsequent local one and that he may be compelled to pay to the carrier the excess required to meet the established interstate charge from the point of origin to the ultimate destination. While presumably the result might have been the same had the Interstate Commerce Commission not regulated the interstate rate, since the state cannot regulate interstate rates even in the absence of federal regulation, Mr. Justice Brandeis rests the case on conflict between state and federal regulation when he says that "to permit carriers' revenues from intrastate rates the carrier should get the Commission to remove intermediate rates would be no less inconsistent with the provisions and purposes of the Act to Regulate Commerce than to permit them to be used as a means of discrimination."

An order of a state railroad commission suspending a tariff for intrastate rates which the carrier had filed was contested in *Arkansas Railroad Commission v. Chicago, R. I. & P. R. Co.*[72] on the assumption that the Interstate Commerce Commission had in effect found that these intrastate rates were prejudicial to interstate commerce, but the Supreme Court through Mr. Justice Brandeis found that the assumption was unwarranted and therefore reversed an injunction decree obtained by the carrier against the state commission. The intrastate rates had earlier been raised

[72](1927) 274 U. S. 597, 47 Sup. Ct. 724, 71 L. Ed. 1224.

to comply with an order of the Interstate Commerce Commission which had directed that certain interstate rates should not be higher for equal distance than the intrastate rates over the distance in question. Later in another proceeding these interstate rates had been raised by the Interstate Commerce Commission. Thereupon the carrier sought to raise again its intrastate rates on the assumption that the previous order that the interstate rates should not be higher than the intrastate rates required the local rates to ascend pari passu with any ordered raise of interstate rates. The trouble with this assumption was that in the proceedings in which the Interstate Commerce Commission ordered the raising of the interstate rates it expressly refused to order the raising of these intrastate rates while ordering such a raise of some intrastate rates in other states. Mr. Justice Brandeis told the carrier that in cases of doubt as to the bearing of the Commission's order on intrastate rates the carrier should get the Commission to remove the doubt before proceeding to raise such rates.

Concededly confiscatory intrastate rates on logs which had been sustained by the state court on the ground that they should be considered not by themselves but in connection with the interstate rates on the lumber manufactured from the logs were declared offensive to the due process clause of the fourteenth amendment in *Chicago, M. & St. P. Ry. Co. v. Public Service Commission*[73] in which Mr. Justice Butler observed that "the carriers cannot maintain interstate lumber rates higher than otherwise justified by showing that they suffer loss or have inadequate returns from the intrastate transportation of logs" and that "the state has no power to require petitioners to haul the logs at a loss, or without compensation that is reasonable and just, even if they receive adequate revenues from the intrastate log haul and the interstate lumber haul taken together." The Interstate Commerce Commission had authorized but not ordered a reduction of interstate log rates, whereupon the state commission first authorized and then ordered the reduction of corresponding intrastate log rates on the assumption that this order was "in accordance with the findings of the Interstate Commerce Commission." In finding this assumption erroneous and in holding the rate reduction an offense against the fourteenth amendment, Mr. Justice Butler indicates that the same result might have been reached under the commerce clause when he says:

[73](1927) 274 U. S. 344, 47 Sup. Ct. 604, 71 L. Ed. 1085.

"As the findings of the Interstate Commerce Commission in 1922 do not expressly relate to intrastate rates, they are to be deemed to apply exclusively to interstate commerce . . . . The findings of the Interstate Commerce Commission permitting reductions of interstate rates did not justify respondent in declining to proceed to a hearing or in adopting such findings as the basis of its order. And, as no reduction of the corresponding interstate log rates has been made by the Interstate Commerce Commission, the respondent's order destroys the relation between the intrastate and the interstate log rates in the same territory."[74]

Facilities and Service. Powers vested by the Transportation Act in the Interstate Commerce Commission to order joint use by several carriers of the existing terminal facilities of one of them, to control the extension and acquisition of new lines and the issue of new securities were held in *Railroad Commission of California v. Southern Pacific Co.*[75] to deprive a state commission of power to order three systems of interstate railroads to construct in Los Angeles, California, a wholly new union station and connecting tracks which would cost in excess of $25,000,000. It is recognized that the Act still leaves the states with power to order local rearrangements and minor track modifications for the promotion of local safety and convenience provided the expense involved will not impair the ability of the carriers to perform their duty to the public.

Such local arrangements were involved in the order of a state commission to continue to furnish switching service on an industrial siding which was sustained in *Western & Atlantic R. v. Georgia Public Service Commission*[76] in which Mr. Chief Justice Taft pointed out that the Transportation Act provides that the authority of the Interstate Commerce Commission "over the ex-

[74]For other considerations of state power over rates, see S. S. Gregory, "Some Phases of Public Utility Law," 45 Rep. Am. Bar. Ass'n 447; Hugh Gordon, "Preservation of Balance Between Federal and State Powers of Public Utility Regulation," 47 Rep. Am. Bar. Ass'n 661; and notes in 36 Harv. L. Rev. 757 on power of state court over rates prior to action by the Interstate Commerce Commission, in 3 Tex. L. Rev. 204 and 73 U. Pa. L. Rev. 210 on case holding state rates cannot apply to a telegram between points in the same state over a route partly in another state, and in 73 U. Pa. L. Rev. 441 on case holding that state cannot regulate rates for use of an interstate bridge.

[75](1923) 264 U. S. 331, 44 Sup. Ct. 376, 68 L. Ed. 713. The decision in the state court is treated in 12 Calif. L. Rev. 221, and a decision sanctioning the power of the state to compel interstate roads to construct a union station is noted in 10 Va. L. Rev. 238. Power of the state to order interstate roads to construct passenger sheds is considered in 37 Harv. L. Rev. 888, 919.

[76](1925) 267 U. S. 493, 45 Sup. Ct. 409, 69 L. Ed. 753.

tension or abandonment of interstate railway lines shall not extend to the construction of spur, industrial or side tracks." This express caveat in the federal statute rendered it immaterial that eighty-five per cent of the traffic over the industrial track in question was interstate. To the complaint that the continuance of the service would violate the Interstate Commerce Act as unduly discriminatory, the Chief Justice answered that such a complaint must first be made to the Interstate Commerce Commission which may, if it finds discrimination, designate some other remedy than the discontinuance of the service in issue.[77]

On the other hand, the requirement or approval of physical connections between different interstate railroads was held in *Alabama & V. R. Co. v. Jackson & E. R. Co.*[78] to have been taken from the states and vested in the Interstate Commerce Commission by the Transportation Act of 1920. The paragraphs relied on by Mr. Justice Brandeis in support of this conclusion were ones vesting in the Commission power to authorize constructions or extensions of lines and power to require a carrier to extend its line or lines or to require one such carrier to permit another to use its terminal facilities "including main-line track or tracks for a reasonable distance outside such terminal." The limitation on the Commission's power with respect to "spur, industrial, team, switching or side tracks" was held not to cover such a junction between two main lines as that here involved. Mr. Justice Brandeis refers to an earlier case sanctioning such state power as was here exercised, but points out that since then the powers of the Interstate Commerce Commission have been greatly enlarged. He concedes that "none of the amendments in specific terms confer upon the Commission exclusive power over physical connections between railroads engaged in interstate commerce," but nevertheless insists that "it is clear

[77]In Lawrence v. St. Louis-San Francisco Ry. Co., (1927) 274 U. S. 588, 595, 47 Sup. Ct. 720, 71 L. Ed. 1219, considered in note 80 infra, it is stated that "it was said in Western & A. R. Co. v. Georgia Pub. Serv. Commission, supra, that a law of a state may be valid which prohibits an important change in local transportation conditions without application to the state commission, although the ultimate authority to determine whether the change could or should be made may rest with the federal commission." This appears to go beyond anything said in the case with explicit reference to interstate commerce, but presumably it may be taken as an indication that the court or some of its members sanction state laws forbidding interstate carriers to do of their own initiative and without sanction of the Interstate Commerce Commission what they may do without leave of the state if they first secure the consent of the federal Commission.

[78](1926) 271 U. S. 244, 46 Sup. Ct. 535, 70 L. Ed. 928.

that the comprehensive powers conferred extend to junctions between main lines like those here in question." The decision reversed the judgment of a state court which had approved the order of a state commission authorizing one carrier to exercise the right of eminent domain to secure a connection with the tracks of another.

A contention by the state of Colorado that the Interstate Commerce Commission is without authority to issue a certificate permitting the abandonment of a branch line wholly within the state and physically detached from the interstate lines of the owning interstate carrier was rejected in *Colorado v. United States*[79] in a proceeding brought by the state to set aside the order of the Commission. In the case at bar the state had not itself issued any order to the carrier but had confined itself to protesting against the order of the Interstate Commerce Commission; but the decision sustaining the order of the Commission necessarily involves the conclusion that the state power to compel continuance of intrastate service on such a branch line is subordinate to the power of the Commission to permit abandonment. The details of the situation before the court are more appropriately considered in a review of cases on the power of Congress, but it may be noted that Mr. Justice Brandeis lays down that the power of the federal Commission to sanction abandonment is not conditioned upon findings that continued operation would result in discrimination against interstate commerce or in a denial of just compensation for the use of the carrier's property in intrastate commerce or in interstate and intrastate commerce combined. "The sole test prescribed is that abandonment be consistent with public necessity and convenience."[80]

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[79](1926) 271 U. S. 153, 46 Sup. Ct. 452, 70 L. Ed. 878, noted in 15 Georg. L. J. 63. The Transportation Act had earlier been construed not to apply to the abandonment of the intrastate service on a road not connected with any interstate road by common ownership. See Texas v. Eastern Texas R. Co., (1922) 258 U. S. 204, 42 Sup. Ct. 281, 66 L. Ed. 566, stated in 21 Mich. L. Rev. 179 and considered in 1 Tex. L. Rev. 97 and 2 Tex. L. Rev. 374. On the power to abandon unprofitable lines as a right under the Fourteenth Amendment see Brooks-Scanlon Co. v. Railroad Commission, (1920) 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323, and Railroad Commission v. Eastern Texas R. Co., (1924) 264 U. S. 79, 44 Sup. Ct. 247, 68 L. Ed. 569. Discussions of the problem appear in Charles Willis Needham, "The Rights of the States and Adjacent Owners of Property in the Maintenance and Operation of a Railroad," 32 Yale L. J. 247, and a note in 32 Yale L. J. 35.

[80]A decree of the district court enjoining a state Corporation Commission from making or enforcing any order restraining an interstate railroad from removing its shops to another location or changing

State laws prescribing cab curtains and automatic doors to the firebox of locomotives were held in *Napier v. Atlantic Coast Line R. Co.*[81] to be precluded from applying to locomotives on highways of interstate commerce because Congress by the Boiler Inspection Act had conferred upon the Interstate Commerce Commission full power to prescribe the equipment of locomotives on such highways and this legislation was thought to manifest an intention to occupy the entire field of regulating locomotive equipment. To the argument that the federal regulation was aimed to prevent accidents from the operation of trains while the state laws sought to prevent sickness and disease due to exposure, Mr. Justice Brandeis answered:

"The federal and state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so, and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing on the construction of

its division point was reversed in Lawrence v. St. Louis-San Francisco Ry. Co., (1927) 274 U. S. 588, 47 Sup. Ct. 720, 71 L. Ed. 1219, chiefly for the reason that there appeared to be no danger of irreparable injury and thus no reason why an injunction should issue. The state statute forbade the removal of the shops without the consent of the state commission. Just what the court thought of this must be gathered from the following extract from the opinion of Mr. Justice Brandeis:

"We have no occasion to determine whether the Oklahoma Act is obnoxious to the federal constitution. But, as bearing upon the propriety of issuing the temporary injunction, the fact is important that the controversy concerns the respective powers of the nation and of the states over railroads engaged in interstate commerce. Such railroads are subject to regulation by both the state and the United States. The delimitation of the respective powers of the two governments requires often nice adjustments. The federal power is paramount. But public interest demands that, whenever possible, conflict between the two authorities and irritation be avoided. To this end it is important that the federal power be not exerted unnecessarily, hastily, or harshly. It is important, also, that the demands of comity and courtesy, as well as of the law, be deferred to. . . . To require that the regulating body of the state be advised of a proposed change seriously affecting transportation conditions is not such an obvious interference with interstate commerce that, on application for a preliminary injunction, the Act should lightly be assumed to be beyond the power of the state."

[81](1927) 272 U. S. 605, 47 Sup. Ct. 207, 71 L. Ed. 432, noted in 21 Ill. L. Rev. 815. A state case on state power over locomotive equipment is considered in 39 Harv. L. Rev. 395.

the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the states are precluded, however commendable or different their purpose."[82]

Actions and Liabilities. A cause of action under the Carmack Amendment for damages to an interstate shipment may be brought in a state court, since Congress merely created the rule of liability and did not make the jurisdiction of the federal courts exclusive. One of the questions in *Missouri ex rel. St. Louis, Brownsville & Mexico Railway Co. v. Taylor*[83] was whether a state action could be maintained when the federal court of that district could not have been used because the defendant could not be served with process. The reasons for the affirmative answer were stated by Mr. Justice Brandeis as follows:

"The origin of the right does not affect the manner of administering the remedy. The grant of concurrent jurisdiction implies that, in the first instance, the plaintiff shall have the choice of the court. As an incident, he is entitled to whatever remedial advantage inheres in the particular forum . . . . No peculiarity of state procedure will be permitted to enlarge or to abridge a substantive federal right . . . . But to enforce a claim by subjecting property within the state to its satisfaction, through attachment proceeding, does not enlarge the substantive right.

"The practice of obtaining in this way satisfaction of a claim in personam against an absent defendant is not one abhorrent to, or uncommon in, federal courts. In admiralty, district courts take original jurisdiction under such circumstances . . . . At law, they do so on removal. When the case is removed, it proceeds to judgment in the federal court and the judgment is enforced there as against the attached property with the same effect as if the cause had remained in the state court."

A question as to the liability of an interstate carrier as garnishee in proceedings served after the interstate transit was

[82]The opinion pointed out that the laws of the state had not been rendered inapplicable by the Safety Appliance Act, since its requirements are specific, nor by the original Boiler Inspection Act, since its provisions are limited to the boiler. Earlier Mr. Justice Brandeis had said that there was no physical conflict between the devices required by the state and those prescribed by federal authority and that the state interference with interstate commerce would be only incidental, and he added that "the intention of Congress to exclude states from exerting their police power must be clearly manifested."

For want of a better place, mention may here be made of a note in 9 MINNESOTA LAW REVIEW 473 on a case holding that the states have lost the power to supervise the issue of securities by interstate carriers.

[83](1924) 266 U. S. 200, 45 Sup. Ct. 47, 69 L. Ed. 247.

over and after surrender of the bill of lading and payment of the freight and while the car was being unloaded by the consignee arose in *Chicago & N. W. R. Co. v. Durham Co.*[84] in which the state court had held the carrier liable for the reason that the federal Act regulating liabilities under bills of lading continued the liability for forty-eight hours after notice to the consignee of the arrival of the car. In reversing the state court Mr. Justice Brandeis pointed out that the federal Act was confined to the liability of the carrier to the consignee or persons privy to him and had nothing to do with liabilities to strangers. Neither did the bill of lading apply in any way to garnishment of the consignment by strangers. The case was therefore sent back to the state court to determine whether under the law of the state the garnishment proceedings were proper and bound the carrier to satisfy the plaintiff for its failure to stop the unloading of the car upon service of the garnishment or attachment process.

While Congress has from time to time set limits to the stipulations which carriers may impose on the bringing of actions against them, Mr. Justice McReynolds in *Louisiana & W. R. Co. v. Gardiner*[85] declares that it has not itself passed any general statute of limitations for actions against carriers. The state court had thought that state laws limiting the time within which actions may be brought had been superseded by the Carmack Amendment and so had denied to the carrier the benefit of the state statute. The carrier who thus unsuccessfully relied on state law took the case to the Supreme Court on certiorari. The carrier could not rely on its stipulation in the bill of lading, because the action was brought within the time therein specified. Moreover the Supreme Court held the stipulation invalid because more drastic than that permitted by the Transportation Act. Apparently, however, the stipulation had lured the shipper to sleep on his rights longer than the state law allowed and the state court was told by the Supreme Court that there was no federal bar to the application of the state statute.

A state cause of action against an interstate carrier, completely barred by a state statute of limitations prior to the federal Transportation Act, which declared that the period of federal control should not be computed as part of the periods of limitation in actions against carriers, was held in *Fullerton-Krueger Lumber*

[84](1926) 271 U. S. 251, 46 Sup. Ct. 509, 70 L. Ed. 931.
[85](1927) 273 U. S. 280, 47 Sup. Ct. 386, 71 L. Ed. 644, discussed in 26 Mich. L. Rev. 201.

Co. v. Northern Pacific Railway Co.[86] not to be revived by the Transportation Act, since its provision is to be construed prospectively as merely an extension of periods not yet fully run and not as a reviver of barred claims.

So where an action is barred by a valid stipulation in a bill of lading, *Leigh Ellis & Co. v. Davis*[87] holds that this valid stipulation is not overridden by the Transportation Act, the general purpose of which "was to limit, not to extend, rights of action." With the Transportation Act out of the way, the two-year limitation in the stipulation was held a reasonable one that must be given effect to, since the application of state statutes to the validity of such stipulations has been precluded by the Carmack Amendment.

The provision in the Transportation Act fixing a two-year limitation to the bringing of suits against the agent designated by the president on causes of action arising during the operation of the road under federal control was successfully adduced in *Davis v. Cohen & Co.*[88] to defeat an amendment allowed by the Massachusetts court which substituted the federal agent as defendant in place of the carrier who was the original party defendant. The amendment sanctioned by the state court was said by Mr. Justice Sanford to be "in effect, the commencement of a new and independent proceeding to enforce" the liability of the federal agent and to be void because not within the period during which the government had consented to be sued after the termination of federal control. Technically the case goes on the ground that the government cannot be sued without its consent, but it shows how a federal statute passed in the exercise of a combination of war power and commerce power may defeat the application of state power over amendments to causes of action.

In several cases the question was whether an attempted or desired application of state rules of liability was precluded because Congress had taken the subject matter under federal control.

The previously established rule that the liability for loss of interstate shipments is now subject to federal law[89] found appli-

[86](1925) 266 U. S. 435, 45 Sup. Ct. 143, 69 L. Ed. 367.
[87](1923) 260 U. S. 682, 43 Sup. Ct. 243, 67 L. Ed. 460.
[88](1925) 268 U. S. 638, 45 Sup. Ct. 633, 69 L. Ed. 1129.
[89]This was first laid down in Adams Express Co. v. Croninger, (1913) 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, reviewed in 22 Colum. L. Rev. 31-32, and discussed in 1 Georg. L. J. 169; 26 Harv. L. Rev. 456; 8 Ill. L. Rev. 123; 11 Mich. L. Rev. 460; 61 U. Pa. L. Rev. 501; and 18 Va. L. Reg. 705. The federal law is not prescribed

cation in *American Railway Express Co v. Levee*[90] in which a limitation of liability sanctioned by such federal law was held not subject to be defeated by the application by the state court of a state statute imposing on the carrier the burden of proving that the damage had been occasioned by accidental and uncontrollable events. For failure to offer such proof the carrier had been treated by the state court as though it had conceded that it had converted the property to its own use. This, declared Mr. Justice Holmes, narrowed the protection that the defendant had secured by a stipulation valid by federal law and therefore contravened the federal law.

Similarly in *American Railway Express Co. v. Lindenburg*[91] an interstate shipper who had recovered in the state court his full loss, notwithstanding a provision in a receipt limiting liability except when the value was declared and excess charges paid, learned from the Supreme Court that his case was governed by the Cummins Amendment to the Interstate Commerce Act. The only question debated by the court was whether the applicable federal rule rendered the stipulation valid. The receipt was not in the precise words authorized by the Interstate Commerce Commission and it was on an old form that contained some stipulations concededly invalid. These, however, were declared by Mr. Justice Sutherland to be separable and to have no effect on the valid stipulation involved in the case. The absence of proof that the petitioner had been required or authorized to establish rates dependent upon declared or agreed values was found not controlling in view of the fact that such rates had been duly filed with the Commission and of the presumption that this was done under the authority of the Commission. The point relied on by the state court that the shipper had not signed the receipt given him was held not material since neither the federal statute nor the order of the Commission required such signature. The shipper by receiving and acting upon the receipt was declared to have assented to its terms and by accepting the lower

in detail by Congress but consists to a large extent of those principles of general jurisprudence pleasing to the Supreme Court of the United States, but not of course to be confounded with the non-existent common law of the United States.

[90](1923) 263 U. S. 19, 44 Sup. Ct. 11, 68 L. Ed. 140, discussed in 23 Mich. L. Rev. 160 and 33 Yale L. J. 308.

[91](1923) 260 U. S. 584, 43 Sup. Ct. 206, 67 L. Ed. 414, considered in 32 Yale L. J. 500 and cited in a note in 12 Va. L. Rev. 235.

rate dependent upon the specified valuation was said to be estopped from asserting a higher value.[92]

The Carmack Amendment, making carriers liable for delivery without surrender of the bill of lading was unsuccessfully relied on by a shipper in *City National Bank v. El Paso & Northeastern Railway Co.*[93] because the Supreme Court held that it had no application to a situation where the jury was justified in finding that the shipper had authorized delivery to some one other than the consignee named in the bill of lading. While Mr. Justice Butler says that "the provisions of the Carmack Amendment have no application," this should very likely be taken to mean that those provisions were in substance duly complied with, since he declared that under the circumstances the "delivery to the commission company was delivery to the consignee bank." It certainly must be federal rather than state law which forgave a technical non-compliance with the interstate bill of lading.

A state statute forbidding limitation of liability was held in *Lancaster v. McCarty*[94] to be inapplicable to an intrastate shipment in the territory covered by the *Shreveport Rate Case*[95] under which the carriers put into effect the federal rates and classifications as a permitted method of complying with the mandate of that case to bring intrastate and interstate rates to the same level in order to prevent discrimination against interstate com-

[92]A lady who had recovered in a state court a judgment against an initial carrier for an assault on her by an employee of a subsequent connecting carrier, notwithstanding a stipulation on the ticket that the selling carrier acts only as agent and is not responsible beyond its own lines, suffered a reversal of the judgment in Missouri Pacific Railroad Co. v. Prude, (1924) 265 U. S. 99, 44 Sup. Ct. 450, 67 L. Ed. 919, on the ground that the stipulation was valid and that mere failure to read it cannot overcome the presumption of assent. Mr. Justice McReynolds refers to no Act of Congress in deciding the point, but some federal right must have been in issue or certiorari to the state court would not have been granted. Presumably the case means that Congress is silent as to the responsibility of the initial carrier to passengers injured by connecting carriers, but has taken sufficient control of the general subject matter to permit the Supreme Court to pick what it regards as the appropriate rule of liability.

[93](1923) 262 U. S. 695, 43 Sup. Ct. 640, 67 L. Ed. 1184.

[94](1925) 267 U. S. 427, 45 Sup. Ct. 342, 69 L. Ed. 696, discussed in 9 Mich. L. Rev. 571 and 3 Tex. L. Rev. 472.

[95]Houston, East & West Texas Railway Co. v. United States, (1914) 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341, reviewed in 22 Colum. L. Rev. 37 and 6 MINNESOTA LAW REVIEW 3, and discussed in Henry Wolf Biklé, "Federal Control of Intrastate Railroad Rates," 63 U. Pa. L. Rev. 69; William C. Coleman, "The Evolution of Federal Regulation of Intrastate Rates," 28 Harv. L. Rev. 34; John S. Sheppard, Jr., "Another Word About the Evolution of the Federal

merce in favor of intrastate commerce competing against it because of the competition between communities in Texas and communities across the line in Louisiana. Mr. Chief Justice Taft observes that such an order to end the discrimination against extra-state points "of course included classification as well as rates," since "the two are so bound together in the regulation of interstate commerce that the effect of both must be reasonable and without undue discrimination." Thus an important point of law was settled in a suit in which the shipper who had recovered $198 under the state statute prohibiting limitation of liability learned from the United States Supreme Court that the federal rules permitting limitation when there is a choice of rates applied to intrastate shipments in his particular portion of Texas so that he would have to be satisfied with something around $60. The state court had also allowed an attorney's fee of $20 for the delay of the carrier in paying the claim, but this is not considered in the opinion of the Chief Justice. The significance of the case is greatly enhanced by the fact that the Transportation Act of 1920 puts intrastate rates under federal control to the extent necessary to prevent discrimination generally against interstate commerce in favor of intrastate commerce and not merely against special localities.[96]

Regulation of Intrastate Rates and the Shreveport Cases," 28 Harv. L. Rev. 294; and notes in 79 Cent. L. J. 1; 2 Calif. L. Rev. 482; 14 Colum. L. Rev. 583, 607; 28 Harv. L. Rev. 113; 9 Ill. L. Rev. 276; and 1 St. Louis L. Rev. 267. The decision in the Commerce Court is discussed in William C. Coleman, "The Vanishing Rate-making Power of the States," 14 Colum. L. Rev. 122; and a note in 26 Harv. L. Rev. 757. National power over intrastate rates is discussed also in Henry C. Flannery, "Constitutional and Practical Objections to the Exclusive Federal Regulation of Intrastate Railroad Rates," 2 MINNESOTA LAW REVIEW 339; William E. Lamb, "Legal Questions Involved in Nationalization of Rate Regulation," 76 Ann. Amer. Acad. Pol. and Soc. Science (No. 165) 239 (March, 1918); J. A. Little, "The Point Now Reached in the Federal Regulation of Intrastate Rates," 76 Ann. Amer. Acad. Pol. and Soc. Science (No. 165) 202 (March, 1918); Charles Willis Needham, "Exclusive Regulation of Railroad Rates by the Federal Government," 2 MINNESOTA LAW REVIEW 163.

[96]For the power of the Interstate Commerce Commission over intrastate rates under the Transportation Act see Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., (1922) 257 U. S. 563, 42 Sup. Ct. 232, 66 L. Ed. 371, reviewed in 21 Mich. L. Rev. 177 and discussed in 10 Georg. L. J. 78; 35 Harv. L. Rev. 864, 886; 20 Mich. L. Rev. 675; 6 MINNESOTA LAW REVIEW 520; 8 Va. L. Rev. 615; and 31 Yale L. J. 870. The case is followed in New York v. United States, (1922) 257 U. S. 591, 42 Sup. Ct. 239; 66 L. Ed. 385. Prior to the decisions in the Supreme Court the problem was treated in Minor Bronough, "Federal Control of Intrastate Rates," 24 Law Notes 187; and notes in 6 Cornell L. Q. 412; 21 Colum. L. Rev. 352; and 69 U. Pa. L. Rev. 262.

A stipulation in a bill of lading exempting the carrier from liability for loss by fire was held in *Missouri Pacific R. Co. v. Porter*[97] to be immune from condemnation by a state statute for the reason that Congress had taken the general matter of liability under federal control and no federal action required the stipulation to be disregarded. The shipment was to a non-adjacent foreign country in presumably a foreign vessel and was not within the provisions of any federal enactment specifically referring to bills of lading or liabilities thereunder. The carriers were, however, under the jurisdiction of the Interstate Commerce Commission which was empowered when of opinion that any of their regulations or practices are unjust or unreasonable to determine and prescribe what is just, fair and reasonable. Apparently the Commission had taken no notice of such a stipulation with regard to loss by fire, for Mr. Justice Butler makes no mention of any Commission action. In reversing the judgment of the state court which held the stipulation invalid under state law he says:

"Section 1 (6) extends to all carriers and to all transportation subject to the act; it prescribes a general rule applicable to all regulations and practices affecting the form or substance of bills of lading in order that they may be just and reasonable. And the commission is empowered and directed to enforce the rule.

"The general regulation of the 'issuance, form, and substance' of bills of lading is broad enough to cover contractual provisions like the one involved in this case, exempting railroads from liability for loss of shippers' property by fire. Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to or in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

A lady who rode on a free pass from a point in Kansas to her destination in Missouri was injured and secured a judgment against the railroad in the Missouri court notwithstanding a

[97](1927) 273 U. S. 388, 47 Sup. Ct. 383, 71 L. Ed. 699, discussed in 25 Mich. L. Rev. 902. The case is cited in 37 Harv. L. Rev. 888, 919, in discussions of the application of the Interstate Commerce Act to foreign commerce.

On the limitation of liability on interstate telegraph messages see a note in 1 Tex. L. Rev. 326.

provision in the pass stipulating that the user assumes all risk of accident. Congress by the Hepburn Act had specifically regulated the giving of interstate passes, to the extent of prohibiting them, subject to certain exceptions of which the issue in issue was one. The Missouri court was of opinion that the Hepburn Act went no farther than its terms and did not regulate the rights and liabilities of the parties in case of travel on a permitted pass, thus leaving them subject to state law, which in the present case invalidated the stipulation. The Supreme Court, however, in *Kansas City Southern Railway Co. v. Van Zant*[98] thought differently and held that the whole subject of interstate passes was taken over by the federal statute, thus leaving the Supreme Court free to apply its preferred rules of liability to the exclusion of rules of state statutes or state courts. Its choice was for a rule that bound the recipient of the gift to its terms. As Mr. Justice McKenna puts it:

"The provision for passes, with its sanction in penalties, is a regulation of interstate commerce, to the completion of which the determination of the effect of the passes is necessary. We think, therefore, free passes in their entirety are taken charge of, not only their permission and use, but the limitations and conditions on their use; or to put it in another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of the responsibility the railroad incurs by their issue, and the extent of the right the person to whom issued acquires, are taken charge of. And that responsibility and those rights, this court has decided, the railroad company can control by conditions in the passes."

Congressional regulation of the duty of interstate carriers to furnish cars on demand was held in *Missouri Pacific Railroad Co. v. Stroud*[99] to preclude the application of a state statute giving damages to shippers discriminated against in the matter of cars where the cars were desired for a haul between two points in the state but would have passed through part of another state en route. The company had two routes, one of which was wholly within the state. The shipper did not designate either route as the one desired. The railroad's superintendent of transportation testified that, under routing instructions in force at the time of the demand, the cars, if furnished, would have been hauled over the route partly in another state. This was the more level line

[98](1923) 260 U. S. 459, 43 Sup. Ct. 176, 67 L. Ed. 348, discussed in 23 Colum. L. Rev. 576.

[99](1925) 267 U. S. 404, 45 Sup. Ct. 243, 69 L. Ed. 683.

of the two and was preferred as a matter of operating convenience and ecenomy. Mr. Justice Butler observed that "the record discloses no facts which would impose upon petitioner any obligation to haul respondent's lumber over the intrastate route," thus leaving open the question whether the shipper might have acquired a right of action under the state statute by calling for cars for shipment over that route.

An employee of an interstate carrier who had recovered in the state court a judgment on the theory that the state law applied suffered a reversal in *Baltimore & Ohio Southwestern Railroad Co. v. Burtch*[100] because the Supreme Court found that the uncontradicted evidence was that the freight being unloaded at the time of the injury had come directly from without the state. It held that the loading and unloading is so closely connected with the transportation as to be practically a part of it. It was the carrier that contended that the action should be tried under the federal Employers' Liability Act which allowed it certain defences not open under the state law. Thus does the advance step taken by Congress on behalf of injured railway employees become in time a laggard behind the law of a state.[101]

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[100](1924) 263 U. S. 540, 44 Sup. Ct. 165, 68 L. Ed. 433.

For cases holding that state law is inapplicable to injuries within the scope of the Federal Employers' Liability Act, even though that Act gives no recovery for such injuries, see 22 Colum. L. Rev. 38-42. That the federal Act similarly precludes the application of state workmen's laws see New York Central R. R. Co. v. Winfield, (1917) 244 U. S. 147, 37 Sup. Ct. 346, 61 L. Ed. 1045, considered in 85 Cent. L. J. 37; 3 Cornell L. Q. 45; 2 MINNESOTA LAW REVIEW 49, 55; 3 Va. L. Reg. n. s. 295; and 27 Yale L. J. 135. To the same effect is Erie Railroad v. Winfield, (1917) 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057. For discussions prior to the Supreme Court decision see James Harrington Boyd, "The Conflict of Jurisdiction Between the State Legislature and the Congress of the United States in the Enactment of Workmen's Compensation Acts by the States and the Federal Employers' Liability Act of 1898," 25 Yale L. J. 548; W. W. Thornton, "Interstate Railroad Employees and Workmen's Compensation Acts," 82 Cent. L. J. 281; and notes in 82 Cent. L. J. 43; 16 Colum. L. Rev. 254; 1 Cornell L. Q. 272; 29 Harv. L. Rev. 439, 459; 19 Law Notes 83; 14 Mich. L. Rev. 527; 1 St. Louis L. Rev. 52; and 64 U. Pa. L. Rev. 304.

[101]In Chicago, R. I. & P. R. Co. v. Schendel, (1926) 270 U. S. 611, 46 Sup. Ct. 420, 70 L. Ed. 757, a judgment obtained in a state court in an action founded on the federal Employers' Liability Law on the theory that the plaintiff's intestate had been engaged in interstate commerce at the time of the fatality was reversed by the Supreme Court on the ground that the state court had erroneously refused to hold the action barred by an award against the carrier under the Workmen's Compensation Act of another state on the theory that the deceased was engaged in intrastate commerce when he met with the accident which caused his death. It was the carrier which had

That the issue of negligence under the federal Employers' Liability Act may depend upon violation of a state statute regulating the conduct of trains at track intersections appears from *Frese v. Chicago, B. & Q. R. Co.*[102] which sustained the Missouri supreme court in the holding that violation by a deceased engineer of an Illinois statute was contributory negligence defeating the action of his representative under the Employers' Liability Act. The statute in question required engineers on trains approaching other trains at grade crossings to stop and "positively ascertain that the way is clear and that the train can safely resume its course before proceeding to pass."[103]

2. Navigable Waters

Diversion of water from the Great Lakes in excess of the amount permitted by the secretary of war under an Act of Congress forbidding diminution of navigable capacity of navigable waters without his consent was enjoined upon petition of the United States in *Sanitary District of Chicago v. United States*,[104] in reliance on the long-established principle that Congress has a paramount power to regulate diversion of water which affects the navigability of streams and lakes on which interstate transportation is possible, and that no state can authorize any diversion forbidden by Congress. The situation involved was one of tre-

initiated the Compensation proceeding after the bringing of the suit against it under the federal Act and secured a final award against itself before the rendition of the judgment in the judicial proceeding under the federal Act. It was held that each court had jurisdiction and that the first final decision is a bar to the prosecution of the other proceeding even though that decision is one that the Supreme Court might have held to be erroneous if properly before it for review. In another suit disposed of in the same opinion, the decision in the workmen's compensation proceeding had not ripened into an enforceable award and so was held not a bar to the judgment rendered under the federal Employers' Liability Act.

For a note criticizing an earlier contrary decision in another case in the circuit court of appeals, see 37 Harv. L. Rev. 778.

[102](1923) 263 U. S. 1, 44 Sup. Ct. 1, 68 L. Ed. 131, discussed in 9 Va. L. Reg. n. s. 618.

[103]For discussion of cases on the question whether the employee was engaged in interstate or intrastate commerce at the time of his injury, see 21 Mich. L. Rev. 357; 12 Minnesota Law Review 492, 499, 548; 71 U. Pa. L. Rev. 283, 292; 9 Va. L. Rev. 653; 10 Va. L. Rev. 647; 33 Yale L. J. 447.

In 8 Minnesota Law Review 252 is a discussion of the right to bring suit in Minnesota under the Employers' Liability Law against a corporation doing business in Minnesota for a death in Wisconsin; in 3 Neb. L. B. 294 a consideration of the application of state workmen's compensation laws to employees of interstate railroads.

[104](1925) 266 U. S. 405, 45 Sup. Ct. 176, 69 L. Ed. 352.

mendous practical importance, but the constitutional issue was so simple that it is amazing that Chicago succeeded so many years in doing what it should not have done. Judge Landis prolonged the wrongful diversion by keeping the case for about six years before he rendered an oral opinion in favor of the United States and against the Sanitary District. The Supreme Court heard the arguments on December 8 and 9, 1924, and handed down its opinion by Mr. Justice Holmes on January 5, 1925. The opinion deals mainly with the recital of the facts and the review of the Acts of Congress and of the secretary of war which were absurdly adduced by the District as warrant for its action. As to these Mr. Justice Holmes observed that "it appears to us that the attempt to found a defense upon the foregoing licenses is too futile to need reply." He points out that the United States could not be estopped in matters of national and international concern and that any approval given to diversion is subject to withdrawal. "The investment of property in the canal and the accompanying works took the risk that Congress might render it valueless by the exercise of paramount powers."

The ruling that New Jersey had authorized the construction of the railroad bridge across Newark Bay settled the main points of the controversy involved in *Newark v. Central Railroad Co.*,[105] but the opinion of Mr. Justice Butler declares broadly that it was within the power of the state to authorize its construction. Inquiry into the question whether the interstate navigation on the water below was unreasonably interfered with was rendered unnecessary by the fact that the secretary of war under authority from Congress had approved of the proposed structure. Possibly also the fact that the complainants were New Jersey municipalities might have been enough to hold that they would be bound by any approval of the state.[106]

3. Quarantine

A quarantine regulation of the State of Washington forbidding the introduction of hay and meal from specified areas in other states known to be entertaining the "alfalfa weevil,"

[105](1925) 267 U. S. 377, 45 Sup. Ct. 328, 69 L. Ed. 666.

[106]For discussion of issues with regard to navigable waters see Paxton Blair, "Federal Bridge Legislation and the Constitution," 36 Yale L. J. 808; Merritt Starr, "Navigable Waters of the United States—State and National Control," 35 Harv. L. Rev. 154; and a note in 2 Wis. L. Rev. 488 on interference with navigable waters of the United States by a state drainage project.

scientifically known as the "phytonomus posticus," was declared unconstitutional in *Oregon-Washington Railroad & Navigation Co. v. Washington*[107] on the ground that Congress by vesting in the secretary of agriculture the power to impose such a quarantine had taken over the field and thereby precluded the application of state laws to interstate commerce. Mr. Chief Justice Taft quotes the federal statute at length and differentiates cases relied on by the state and insists that, since "the obligation to act without respect to the states is put directly upon the secretary of agriculture whenever quarantine, in his judgment, is necessary," it follows that "when he does not act, it must be presumed that it is not necessary." In a dissent in which Mr. Justice Sutherland joined, Mr. Justice McReynolds declared:

"We cannot think Congress intended that the Act of March 4, 1917, without more, should deprive the states of power to protect themselves against threatened disaster like the one disclosed by this record.

"If the secretary of agriculture had taken some affirmative action the problem would be a very different one. Congress could have exerted all the power which this statute delegated to him by positive and direct enactment. If it had said nothing whatever certainly the state could have resorted to the quarantine; and this same right, we think, should be recognized when its agent does nothing.

"It is a serious thing to paralyze the efforts of a state to protect her people against impending calamity, and leave them to the slow charity of a far-off and perhaps supine federal bureau. No such purpose should be attributed to Congress unless indicated beyond reasonable doubt."[108]

4. Vessels

A statute of New York regulating conditional sales of goods and chattels was applied in *James Stewart & Co. v. Rivara*[109] in

[107](1926) 270 U. S. 87, 46 Sup. Ct. 279, 70 L. Ed. 482, discussed in 5 Oreg. L. Rev. 330 and 74 U. Pa. L. Rev. 852.

[108]Objectors to the Massachusetts Daylight Saving Act conceived the idea that it was unconstitutional because inconsistent with the Federal Standard Time Act which fixes the standard time of the zone in which the act is to be performed as the time specified in any federal statute relating to the time within which any act shall or shall not be performed by any person subject to the jurisdiction of the United States, but Mr. Justice Holmes told them in Massachusetts State Grange v. Benton, (1926) 272 U. S. 525, 47 Sup. Ct. 189, 71 L. Ed. 387, that "the court below found no inconsistency between the two Acts and we have seen no sufficient reason for differing from it upon that point." The rest of the opinion tells why the case was not one in which injunctive relief should be granted against the state attorney general even though in a technical sense the district court had jurisdiction. The decision in the circuit court of appeals is discussed in 30 Law Notes 64.

[109](1927) 274 U. S. 614, 47 Sup. Ct. 718, 71 L. Ed. 1234.

a suit by a defaulting conditional vendee of a vessel documented as a vessel of the United States and enrolled for the coasting trade and operated in interstate and intrastate commerce. The contract was made before the passage of the Jones Act of 1920, but the vendor contended that the earlier Enrollment Act and the Recording Act had created a form of property known as "vessels of the United States" and brought such property within exclusive federal jurisdiction under the commerce clause. Mr. Justice Butler pointed out that the Recording Act does not affect the title as between vendee and vendor and that the Enrollment Act gives the privilege of being American vessels, but has nothing in it inconsistent with the state regulation of conditional sales. The state law required that property retaken by the vendor should be retained for thirty days during which time the vendee may comply with his contract and secure the return of the property, but Mr. Justice Butler declared that the enforcement of this would not require the vessel to be withdrawn from service in interstate commerce and said that, even if it did, "the law would not for that reason be invalid." The contention that during this thirty-day period persons having claims against the vessel cannot proceed in rem to enforce their maritime liens was put to one side by saying that no such rights of third persons were in issue and that it would be time enough to consider them when they were. The vendor had previously obtained possession of the vessels in admiralty proceedings, subject to any rights of the vendee under the state statute, so that the present proceedings involved no question of state interference with the admiralty jurisdiction of the federal courts.

5. Conclusion

In the twenty-nine cases reviewed in the text, state law was allowed application ten times. In two of the ten cases the state court had modestly declined to apply state law and was reversed on certiorari. One case reversed a decree of a federal district court enjoining a state prescription of intrastate rates. The other seven cases sustained a district court, a circuit court of appeals and five decrees of state courts. There were nineteen cases in which state law was not applied, though in four or five of them the dispute seemed to be confined to the choice of the appropriate federal rule. These nineteen cases involved twenty cases from lower courts, in which there were seven affirmances and thirteen

reversals. Circuit courts of appeals were sustained once and reversed once; district courts were sustained three times; state courts were sustained three times and reversed twelve times. In the thirty cases coming from lower courts, there were sixteen reversals and fourteen affirmances. Circuit courts of appeals were reversed once and sustained twice; district courts were reversed once and affirmed four times; state courts were poor prophets in fourteen cases and good prophets in eight cases. Of the twenty-two cases coming from state courts, fourteen came up by certiorari and yielded eight reversals. This takes no account of cases in which certiorari was asked for and denied.

This disagreement between the Supreme Court and lower courts in sixteen out of thirty cases contrasts markedly with the paucity of dissent in the Supreme Court. The only important dissent was that of Justices McReynolds and Sutherland in protest against the proscription of a state quarantine law. The only other dissent was that of Mr. Justice McReynolds who found two journeys where his colleagues found but one. In these two cases the dissenters agreed with the courts below. Twenty-seven unanimous Supreme Court decisions carried with them fourteen reversals of lower courts. This suggests that Congress does not speak with stentorian voice in announcing when it means its prescriptions to be a negative on state additions or amendments. An examination of the cases in detail reveals that to a considerable degree the judicial function in determining how far Congress has gone is akin to the legislative function of deciding how far it is desirable to restrict state power when federal power is at work in the vicinage. When such issues are presented, it is not surprising that lower courts often fail to prognosticate the prospective legislative judgment of their superior. Nor is the unanimity which prevails in the superior collective mind a sure indication that the issues are free from doubt. Rumor has it that preliminary doubts expressed in conference are frequently not pressed to the point of open dissent. This deference to majority judgment may very well find most frequent expression in such a field as that here surveyed, in which the primary desideratum is to have a settled rule or dictate rather than to be sure that the legislative mind has been correctly divined.

This enterprise of pricking out the dividing line between state and national power is essentially a governmental one. The final authority in the process is a governmental agency, though not an

executive or legislative one. This agency, however, depends for stimulation and guidance upon litigants who appear before it. A roster of the litigants in the twenty-nine cases here reviewed reveals that in twenty-two cases both plaintiff and defendant were individuals or private corporations, if we include one case in which a city was seeking to protect proprietary interests. Five cases were suits between states and carriers, and two cases were between governmental agencies of the states and of the United States. To a large extent, then, our public issues in this field are settled in private litigation. The parties are striving for the rule that is favorable to their private interests in the particular controversy, and the fact that one is urging a federal rule and the other a state rule is from one aspect merely incidental. Advocates may argue in terms of statesmanship but they do not choose their positions from considerations of statesmanship. This contrast between good reasons and real reasons is not necessarily peculiar to the settlement of public issues by litigation. It may perhaps occasionally find parallels in constitutional and political advocacy which seeks solace from a legislature or an electorate.