Decision No. 780

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BEFORE THE RAILROAD COMMISSION
OF THE STATE OF CALIFORNIA.

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J. H. MILLER and E. DONALDSON, Partners, doing business under the firm name and style of MILLER and DONALDSON,

Complainants,

-vs.-

THE WILMINGTON TRANSPORTATION COMPANY, a corporation,

Defendant.

ORIGINAL

Case No. 381.

Karl L. Ratzer for complainants.
James A. Gibson for defendant.

THELEN, Commissioner.

ORDER DENYING MOTION TO DISMISS.

This is a motion to dismiss the complaint on the ground that this Commission has no jurisdiction to entertain the same. The defendant contends that this Commission has no authority over the rates of transportation for persons or property over the lines of defendant steamship company between San Pedro on the mainland and Avalon on Santa Catalina Island. Both points are located within the county of Los Angeles, State of California. They are twenty-seven miles apart, of which distance twenty-one miles are on the high seas. Defendant bases its contentions solely on the claim that the commerce affected is commerce "with foreign nations."

The complaint in this case was filed on March 25, 1913. It alleges, in effect, that the complainants are engaged in the sale of groceries, meats, hardware and provisions at Avalon, Santa Catalina Island, County of Los Angeles, State of California; that defendant is a California corporation engaged in the business of a common carrier of persons and property between San Pedro and Avalon, both of said places being located within the County of Los Angeles,

State of California; that the distance from San Pedro to Avalon is about twenty-seven miles; that the defendant is the only common carrier of persons or property whose vessels ply between the said two ports; that the rates charged by defendant for the transportation of persons and property are as specifically set out in the complaint, and that they are unjust and unreasonable and contrary to the provisions of Section 13 (a) of the Public Utilities Act; that complainants have for the last four years shipped freight over the defendant's line and have paid freightage amounting to about $2500 per year and that they have been damaged by reason of excessive freightage in the sum of $1000 per year, and that if defendant is permitted to continue to charge its said rates, complainants will suffer irreparable injury. The complainants ask that this Commission adjust the rates charged by the defendant for the transportation of persons and property and that it reduce said rates to a just and reasonable basis.

On the 21st day of April, 1913, the defendant filed its motion to dismiss the complaint, on the ground that this Commission does not have jurisdiction to entertain the same, and on the particular ground that it appears from the complaint that the defendant is engaged in interstate commerce between ports upon the Pacific Ocean, across one of the great arms thereof, viz., Gulf of Catalina, and, also, that it does not appear from the complaint that the defendant is engaged in intrastate traffic within the State of California.

Thereafter, on June 4, 1913, argument on the motion to dismiss was had before the Commission. At the argument it was stipulated between the parties that all the vessels employed by the defendant in its transportation between San Pedro and Avalon are enrolled and licensed to carry on the coasting trade under the acts of the Federal Congress.

Upon request of the parties, each side was given permission to file briefs, these briefs have now been filed and have been carefully considered.

The issue in the present proceeding is whether the Railroad Commission has the authority to establish rates of charges for the transportation of persons and property between two points, both of which are located in Los Angeles County, in this State, the transportation being conducted by means of vessels which, in plying directly between these two ports, traverse 21 miles of high seas, but do not touch at any port either in any other state of this Union or of any foreign nation and do not transfer their passengers or freight to any other vessel or receive the same from any other vessel in their course and which use the high seas simply for the purpose of navigating from one of said points to the other of said points in Los Angeles County. The question at issue is not concerned with passengers or freight which come from or go to points in other states or other nations, but is confined to purely local traffic between points within the State of California.

The defendant contends that the transportation at issue is subject exclusively to the authority of the Federal government, on the ground that it is "commerce with foreign nations", under the provisions of Section 8 of Article 1 of the Constitution of the United States.

Before examining the constitutional questions involved, I desire to draw attention to the fact that if this Commission does not have power over the rates in question, no governmental authority has such power, with the result that the defendant, although a common carrier plying exclusively between points in this State, will be entirely free from governmental regulation as to its rates. This conclusion, if defendant's contentions are correct, follows from the fact that the Federal government has never enacted a statute which affects the commerce concerned in this proceeding, as will hereinafter appear in greater detail. It goes without saying

that the conclusion that the defendant is subject to no governmental regulation as to its rates will not be reached unless it is necessary to do so.

I shall now consider the provisions of the Constitution and Statutes of this State bearing on the question at issue.

Section 17 of Article XII of the Constitution of this State reads in part as follows:

> "All railroad, canal and other transportation companies are declared to be common carriers, and subject to legislative control."

Section 22 of Article XII of the Constitution of this State, as amended on October 10, 1911, reads in part as follows:

> "There is hereby created a railroad commission which shall consist of five members and which shall be known as the Railroad Commission of the State of California. ********Said commission shall have the power to establish rates of charges for transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in the tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff."

The Commission is given power, among other things, "to hear and determine complaints against railroad and other transportation companies."

Section 23 of Article XII of the Constitution of this State, as amended on October 10, 1911, provides in part that

> "Every common carrier is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the legislature, and every class of private corporations, individuals or associations of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulation."

The section further provides as follows:

> "The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

Acting under the authority conferred by these various

constitutional provisions, the Legislature of this State at its extraordinary session in 1911, enacted the Public Utilities Act, which became effective on March 23, 1912. This act provides in part as follows:

> Sec. 2 (1). "The term 'common carrier', when used in this act, includes every railroad corporation;******** and every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling operating or managing <u>any vessel regularly engaged in the transportation of persons or property for compensation upon the waters of this state or upon the high seas, over regular routes between points within this state.</u>"

It will be particularly noted that the term "common carrier" as used in the Public Utilities Act, includes corporations and persons operating vessels regularly engaged in the transportation of persons or property for compensation "upon the waters of this state <u>or upon the high seas</u>" over regular routes "between points within this state." It is obvious that this language completely covers the facts of the present proceeding.

Section 2 (bb) provides in part as follows:

> "The term 'public utility', when used in this act, includes every common carrier ****** as those terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this act."

There can be no doubt that under these constitutional and statutory provisions, the State of California has given to this Commission the unquestioned power, in so far as the State could do so, to exercise jurisdiction in the present proceeding. Under these provisions, it has not merely the power but it is also the duty of this Commission to take jurisdiction over complaints such as the one which has been filed in this proceeding, unless said provisions of the Constitution and Statutes of this State violate the Federal Constitution. If such violation exists, the Courts and not this Commission should so declare.

In analyzing the Federal Constitutional questions involved, I shall consider first the power of the states over this subject matter prior to the adoption of the Federal Constitution; then the

question whether or not the power of the states in this respect has been delegated to the Federal government; and then the question whether, assuming that this power has been delegated to the Federal government, the states may, nevertheless, exercise the same until the Federal government acts in the matter.

That the original thirteen colonies, after the Declaration of Independence in 1776, assumed all the powers of independent sovereignties and exercised many thereof, is well known to students of American constitutional history. An examination of the constitutions of those states, adopted between 1776 and 1787, and an investigation into the acts of these states under such constitutions, shows that they claimed the power to declare war and make peace, to enter into treaties with each other and foreign nations, to impose and collect customs duties and taxes, to send and receive ambassadors, to maintain armies and navies, to grant letters of marque and reprisal, to establish admiralty courts, and to do other acts which distinctively characterize sovereign nations. These powers were claimed and in part exercised by the thirteen original states prior to 1787, except in so far as by the Articles of Confederation they were delegated to the "Confederacy" known as the "United States of America." That each of these states claimed to be sovereign and independent and to have all the powers belonging to independent nations appears from Article 2 of the Articles of Confederation, adopted on July 9, 1778, reading as follows:

> "Each state retains its sovereignty, freedom and independence and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

While it is true that many of the most important attributes of sovereignty were delegated by the respective states to the Confederacy under certain limitations; it is important to observe that two powers much needed by the central authority, viz., the power to raise money and to regulate commerce, were retained by the states.

The power over commerce was one of the most important which was claimed and exercised by these states. Each state claimed complete sovereignty concerning this power. The existence of this power in the several states was one of the main reasons for the creation of the Federal government. The records of the Congress under the Articles of Confederation for April 30, 1784, show that on said day a resolution was adopted, which resolution, after reciting that

> "The situation of commerce at this time claims the attention of the several states, and few objects of greater importance can present themselves to their notice"

continues as follows:

> "Resolved, that it be, and it is hereby recommended to the legislatures of the several states to vest in the United States in Congress assembled, for the term of fifteen years, with power to prohibit any goods, wares or merchandise, from being imported into or exported from any of the states, in vessels belonging to or navigated by the subjects of any power with whom these states shall not have framed treaties of commerce." (Law of the United States, Vol.1, p. 45)

From a report made to the Congress on October 23, 1786, it appeared that none of the states except Delaware had acted in full compliance therewith, although most of them had passed resolutions granting the desired power to Congress, with varying conditions and limitations attached thereto. Nothing further was done as to the matter. The necessity for securing the permission of the states shows that at this time the states had complete power over commerce.

The records of the Congress further show that on July 13, 1785, James Monroe presented to Congress a motion to amend paragraph 9 of the Articles of Confederation, so as to vest Congress with the power to regulate trade "of the states as well with foreign nations, as with each other." This resolution was never adopted.

On January 21, 1786, Virginia proposed to the other states a convention of commissioners from the several states to consider measures necessary to enable Congress to regulate commerce. The resolution adopted by the House of Delegates of Virginia recites

first and foremost that the commissioners shall take into consideration "the trade of the United States." In response to the invitation of Virginia, five states sent their commissioners to a convention which met in Annapolis on September 11, 1786. While this convention itself accomplished but little, it is well known that it was the precursor of the convention which thereafter met in Philadelphia on the second Monday in May, 1787, and framed the present Federal Constitution.

It is clear that prior to the adoption of the present Federal Constitution, the individual states had complete control over commerce, not only within their borders, but also upon the high seas between ports within their respective limits, and also with foreign nations. It is significant that in the discussions concerning this matter in the period between 1776 and 1787, attention was directed almost solely to navigation as a vehicle of commerce. No railroads had as yet been constructed and the commerce on land between state and state did not call for the regulation which was demanded in connection with commerce by sea, either with foreign nations or between the states or between the ports of each individual state.

That the State of California has all the powers over commerce which the original states had, except in so far as these powers may have been delegated to the Federal government by the Federal Constitution, appears from Section 1 of the Act of September 9, 1850, admitting California to the Union, (9 Stat. 452) reading as follows:

> Sec. 1. "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the State of California shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatsoever."

It thus appears that California at the present time has the power to regulate the commerce involved in this proceeding, unless

the power over such commerce has been conferred upon the Federal government and unless such delegation in and of itself has taken from the states the right to exercise the power which was unquestionably theirs.

In discussing the question whether or not power over the commerce involved in this proceeding has been delegated to the Federal government, it will be necessary to distinguish clearly between the admiralty and maritime jurisdiction on the one hand and the so-called commerce clause of the Federal Constitution on the other. That these two powers are entirely distinct and should not be confused with each other appears from the case of the "Belfast," 74 U.S. (7 Wall.) 624, in which case Mr. Justice Clifford says at page 640:

> "Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power to regulate commerce, as conferred by the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants."

The power of the Federal government with reference to admiralty and maritime matters is conferred by Article III, Section 2, Subsection 1 of the Federal Constitution, reading in part as follows:

> "The judicial power shall extend.....to all cases of admiralty and maritime jurisdiction."

By this clause the Federal Constitution conferred upon the Federal judiciary jurisdiction over all matters which, at the time the Constitution was adopted, were comprehended under the general head of admiralty and maritime matters. This jurisdiction is limited to such contracts, claims and services as are purely maritime. It covers such matters as collisions at sea, contracts for hire of seamen, contracts of affreightment, marine insurance policies, limitation of owners' liability in case of loss, and maritime torts and crimes. This jurisdiction is not limited to tidewaters but extends to all the navigable waters of the United States and to vessels which may be engaged in purely intrastate commerce on such waters, in so far as concerns subjects which are clearly of an admiralty or maritime nature.

Ex parte Berger, 109 U.S. 629; In re Garnett, 141 U.S. 1; The Robert W. Parsons, 191 U.S. 17.

In the present case it is not contended that the power of the Federal government, if it has any, rests on the admiralty and maritime clause of the Constitution. The matter at issue is not essentially a maritime matter. It relates to governmental control over the rates charged by a common carrier, and the essence of the matter is the same, whether the transportation by such common carrier be by land or by water. It follows that if the Federal government has power over this matter it must be under the so-called commerce clause, which we shall hereinafter examine in greater detail. This is the position taken by the defendant in this case and it is the only position which the defendant can take.

In considering this question, it should be borne in mind that the mere fact that an American vessel sails the high seas does not necessarily give to the Federal government authority over all acts in connection with such vessel while it is navigating the common highway of nations. That the state in which the vessel is enrolled and in which its owner resides continues to have important powers in connection with such vessel while on the high seas, has been clearly established by the decisions both of the United States Supreme Court and of the highest courts of different states of the Union. In the case of Crapo vs. Kelly, 83 U. S. (16 Wall.) 610, an insolvency court in Massachusetts purported to pass title to an assignee in insolvency to a vessel enrolled and owned in Massachusetts, and at the time navigating the Pacific Ocean. The title of the assignee was questioned by an attachment creditor, who attached the vessel when it returned to the state of New York. The Supreme Court of the United States held that the title of the Massachusetts assignee prevailed, and in expressing this conclusion, uses the following language at page 624:

> "We are of the opinion, for the purpose we are considering, that the ship Arctic is a part of the territory of Massachusetts, and the assignment by the insolvency court of that state passed the title to her, in the same manner and with the like effect as if she had been physically within the bounds of that state when the assignment was executed."

Likewise, in the case of Norman V. Thompson, 121 Cal. 620, the Supreme Court of California, in passing on the validity of a purported marriage of residents of California on the high seas in a California vessel, held that the law of California must govern the transaction and that as the marriage had not been solemnized as provided under the statues of California, it could not be held to be valid.

It follows from these and similar cases, that the mere fact that an American vessel navigates the high seas does not necessarily mean that the states are divested of jurisdiction with reference to all transactions affecting such vessel.

The defendant in this proceeding contends that the Federal government has control, under the provisions of Article I, Section 8, of the Federal Constitution, providing in part that

> "The Congress shall have power.....to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

It is clear that the question is not one of commerce "with the Indian tribes." It is equally evident that it is not commence "among the several states." No state other than California is concerned with this commerce. Defendant, however, contends that this is "commerce with foreign nations." This contention is made in the face of the fact that the vessel touches at no foreign port, that no persons or property are transported to or taken from any foreign vessel in the course of the journey between San Pedro and Avalon, and that the voyage is between two California ports situated within the same county in this State, and that the crossing of the high seas is merely an incident to enable the vessel to move from one California port to another. While nine out of ten laymen having an ordinary understanding of the English language, would agree that such commerce can not be "commerce with foreign nations", defendant insists that its position is correct and relies on several authorities in support thereof.

I shall now proceed to consider these authorities.

In the case of Lord vs. Goodall, Nelson & Perkins Steamship

Co., 102 U.S. 541, an action was brought against the owners of the steamship "Ventura" to recover the value of freight which was lost when that vessel sank at sea on a voyage between San Francisco and San Diego. The defendants contended that under the provisions of Section 4283 of the Revised Statutes, they were liable only for the value of their interest in the vessel and her freight then pending. As the matter was an admiralty matter, clearly under the authority of the Federal government, and completely covered by said section of the Revised Statutes, the judgment of the lower court in favor of the defendants was necessarily affirmed. The case was one arising under the Federal statute creating a limited liability for the owners of vessels, which statute was clearly enacted under the admiralty and maritime powers of the Federal government, (In re Garnet, 141 U.S. 1, 12; Butler vs. Boston & Savannah Steamship Co., 130 U.S. 527, 555), and in no way involved the commerce clause. Mr. Chief Justice Waite, however, goes out of his way to make certain observations with reference to the commerce clause. He says at page 544:

> "The Pacific Ocean belongs to no one nation, but is the common property of all. When, therefore, the Ventura went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them and consequently with them was engaged in commerce. If, in her navigation, she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress."

The logic of this reasoning should be carefully noted. The Chief Justice says, in effect, that the "Ventura", while on the ocean, was "navigating among the vessels of other nations," and that while she was not trading with such vessels, she was nevertheless "navigating" with them. He then reaches the conclusion that

she, "consequently, with them was engaged in commerce," and then reaches the final conclusion that she was necessarily "while on the ocean, engaged in commerce with foreign nations." With all due respect to this obiter opinion of the Chief Justice, I submit that it is clearly a logical fallacy. The mere fact that a vessel is sailing on the high seas, which high seas may also be navigated by foreign vessels, is to my mind absolutely inconclusive evidence to show that the vessel is engaged "in commerce with foreign nations." I am unable to understand how a vessel which touches at no foreign port and takes no persons or commodities from a foreign vessel and delivers no persons or commodities to such vessel, and which plies exclusively between two ports within the same county in this State, can be held to be engaged in "commerce with foreign nations."

The Supreme Court of the United States itself, when its attention was thereafter drawn to this reasoning, must have entertained the same views to which I have here given expression. In the case of Lehigh Valley Railroad Co. vs. The Commonwealth of Pennsylvania, 145 U.S. 192, a case involving the power of the State of Pennsylvania to impose a tax on that portion of the receipts of an interstate railroad which represented the mileage moved within the State of Pennsylvania, Mr. Chief Justice Fuller refers to the Lord case, supra. After stating that the single question in that case "was, as stated by Mr. Chief Justice Waite, delivering the opinion of the court, whether Congress had power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same state, it being conceded that the voyages of the steamship in respect of whose loss the question arose were always ocean voyages," and after quoting the dictum in the case with reference to commerce with foreign nations, which dictum has hereinbefore been set out in full, Mr. Chief Justice Fuller continues, at page 203:

> "But it was unnecessary to invoke the power to regulate commerce in order to find authority for the law in question. As stated by Mr. Justice Bradley in re Garnett, 141 U.S. 1: 'The act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments

> is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends.' In that case the limited liability act was applied to a steamer engaged in commerce on the Savannah river."

It thus appears that the United States Supreme Court, in its later decision in the Lehigh Valley case, was unwilling to follow the reasoning of Mr. Chief Justice Waite in the Lord case, in so far as concerns the dictum as to commerce with foreign nations. Nevertheless, we find that in certain other cases the dictum in the Lord case has been used without apparently any analysis of the constitutional principles at issue and in spite of the anomalous conclusion to which the dictum leads. I shall hereinafter refer to these decisions.

The defendant also relies on certain language in the Lord case referring to navigation. The authorities have established the principle that the term "commerce", as used in Section 8 of Article I of the Federal Constitution, includes the transportation of men and property, intercourse and navigation. The defendant contends that the present case is one of "navigation" with foreign nations, even if it be not strictly a case of "commerce with foreign nations." It is difficult to understand how a mere substitution of words can change the result. It is true, that under the commerce clause, the Federal government has control over such matters as properly concern navigation of vessels, both on the high seas and on the public waters of the United States within the limits of the states of this Union, even as to vessels engaged entirely in intrastate commerce, if the navigation of those vessels affects the navigation of vessels engaged in interstate commerce or in commerce with foreign nations. (Hazel Kirk, 25 Fed. 601; City of Salem, 37 Fed. 846). This principle, however, is confined to those matters which affect the safety of navigation, such as the number of lights which a vessel carries, her safety appliances, the number of passengers which she may convey, and similar matters. These matters are entirely distinct from governmental regulation of rates. If "navigation" includes governmental

regulation of rates, the control of the Federal government over navigation should logically give to that government also the power to regulate the rates of purely intrastate navigation. The fact that the Federal government does not have this power as to commodities moving in vessels entirely intrastate is conclusive against a similar power on the part of the Federal government, under the doctrine of "navigation", as to the high seas.

The next case on which the defendant relies is the case of Pacific Coast Steamship Co. vs. Board of Railroad Commissioners, 18 Fed. 10, a case decided in 1883. In that case, the Pacific Coast Steamship Company secured from the United States Circuit Court for the District of California, an injunction to restrain the Board of Railroad Commissioners from establishing rates of charges to be collected by the steamships of the plaintiff plying between ports in the State of California. The case is based on the dictum in the Lord case, hereinbefore referred to. An examination of the original records in this case shows that the complaint and answer were both printed by the same firm and that the only brief which was filed was a two-page memorandum in long hand on the part of the defendants, which memorandum fails to cite a single authority. The court itself expressed doubt as to its jurisdiction in the case, but proceeded by reason of the fact that "the Commissioners have raised no objection on that ground." The case has all the ear marks of a consent proceeding. It was decided before the Supreme Court of the United States in the Lehigh Valley case, supra, xxx had an opportunity to express its more matured views with reference to the dictum in the Lord case, and long before the State of California clearly expressed its intention to exercise the power herein ~~xxxxxx~~ questioned, as it has done in the Public Utilities Act of 1911. The decision is one of an inferior court. No appeal was ever taken. In view of all the circumstances surrounding this case, I can not recommend to the Commission that it disregard the provisions of the Constitution and Statutes of this State by reason of the decision of an inferior court,

rendered on what was clearly a superficial examination of the question.

The case of Cowden vs. Pacific Coast Steamship Company, 94 Cal. 470, was an action to recover damages for discrimination in freight rates between different merchants of San Diego. The freight was transported by the defendant's vessels between San Francisco and San Diego. The court held, on page 474, that the action arose from a maritime contract, and that consequently, in the absence of an allegation of unreasonable rates, which allegation would give to the complainants a remedy at common law in the state courts, the Federal admiralty courts would alone have jurisdiction. The case is clearly correct. The reference to the Lord case must be construed in the light of the real issue presented in the Cowden case, which was one of maritime contract and not one of the power of the state to regulate rates.

In the case of Hanley vs. Kansas City Southern Railway Co., 187 U.S. 617, the Supreme Court of the United States affirmed a decree of the Circuit Court, granting an injunction to restrain the Railroad Commissioners of Arkansas from fixing and enforcing rates for traffic moving from one point in Arkansas to another point in the same state. It appeared, however, that while the termini were both in Arkansas, the shipments passed for a distance of 64 miles through the Indian Territory. The court very properly held that the movement came within that clause in Section 8 of Article I of the Federal Constitution which gives to the Federal government the power to regulate commerce "among the several states." It is obvious that this was a movement "among the several states." The decision is undoubtedly correct, but it has no material bearing on the case now pending before this Commission, for the reason that it can not possibly be held that the present case is one of commerce "among the several states."

In the Abby Dodge, 223 U.S. 166, a libel was brought against the vessel "Abby Dodge" to forfeit her, or to enforce a money penalty, for a violation of an act of Congress of June 20, 1906, making it unlawful to land sponges in ports of the United States during

certain seasons of the year. The libel charged that the "Abby Dodge" had landed at Tarpon Springs, Florida, 1229 bunches of sponges taken from the waters of the Gulf of Mexico and the straits of Florida at a time of the year which was unlawful under the statute. The libel did not say whether the sponges were taken within or without the waters of the state of Florida. Mr. Chief Justice White, in delivering the opinion of the court, accordingly reversed a decree imposing the forfeiture. The court intimated that the libel would be sustained if the sponges were taken on the high seas beyond the limits of the state of Florida. Referring to this point, the court says at page 176:

> "Undoubtedly (Lord vs. Steamship Company, 102 U.S. 541) whether the Abby Dodge was a vessel of the United States or of a foreign nation, even though it be conceded that she was solely engaged in taking or gathering sponges in the waters which by the law of nations would be regarded as the common property of all and was transporting the sponges so gathered to the United States, the vessel was engaged in foreign commerce, and was therefore amenable to the regulating power of Congress over that subject. This not being open to discussion, the want of merit of the contention is shown, since the practices from the beginning, sanctioned by the decisions of this court, establish that Congress by an exertion of its power to regulate foreign commerce has the authority to forbid merchandise carried in such commerce from entering the United States."

The decision in this case does not apply to the case now pending before this Commission. If the "Abby Dodge" secured the sponges from the high seas, she did so by sailing out beyond the three mile limit, and then taking from a locality which in a sense might be regarded as foreign, definite articles of commerce, which she thereupon transported to a Florida port. Such navigation to what may be regarded as foreign territory and the transportation from such locality of articles of commerce, furnishes no analogy to a case in which no commodities whatsoever are taken on board at any points other than points located within the same county in this State, and in which the sole object in navigating the high seas is to move California commodities from one point in California to another point in the same State. It should be noted, also, that the "Abby Dodge" case by inference limits the power of Congress to cases in which Congress has "exerted" its power to regulate foreign commerce. The effect of the failure of Congress to

act in the case now before this Commission will hereinafter be considered.

I have now considered all the cases of any moment on which the defendant relies. These cases, to my mind, leave unchanged the simple logic of the situation. As I have heretofore shown, the states of this Union originally had the power to regulate commerce between points within their limits, even if that commerce in a portion of its course traversed the high seas. The states of the Union at present still have that power, unless it has been delegated to the Federal government. The Federal government has the power only if it is commerce "with the Indian tribes" or "among the several states" or "with foreign nations." That the commerce in question comes within none of these classes seems too clear for further argument. Accordingly, in my opinion, the power to regulate the rates of transporation in this proceeding vests exclusively in the State of California.

I shall now consider this case on the assumption that my conclusion on the first part of the case is incorrect and that the Federal government may, if it desires to do so, regulate the commerce in question as being commerce "with foreign nations." It becomes necessary in that connection to consider the effect which the failure of Congress to act in the premises has on the State's power. In many cases arising under the commerce clause, the courts have held that the states have the undoubted right, in the absence of legislation by Congress, to enact legislation more or less directly affecting the commerce over which the Federal government may, if it so desires, exert its authority. That the Federal Government has not acted in the matter of regulating commerce wholly by water is clear. The Interstate Commerce Act in no way affects such commerce except in cases of common arrangement or control between a water carrier and a rail carrier. The case before the Commission is not such a case. With reference to the failure of the Federal Congress to act in this field, see <u>In the Matter of</u>

Jurisdiction Over Water Carriers, 15 I.C.C. Reports, 205, and Mutual Transit Company vs. United States, 178 Fed. 664, 666. The Act approved August 24, 1912, known as the Panama Canal Act, amends Section 5 of the Interstate Commerce Act so as to give to the Interstate Commerce Commission the power with reference to combined movements by rail and water to establish physical connections, through routes and maximum joint rates, and maximum proportional rates by rail. No power, however, was conferred with reference to movements by water only. No attempt has ever been made by the Federal Congress to enter this field.

While the line between the cases in which non-action by the Federal government with reference to commerce is to be taken as an indication of a desire that there shall be no regulation in the particular field affected and the other cases in which the states may act in such field until Congress acts has been drawn with some accuracy, it is not always easy to apply the principles to the facts of a given case. The principles governing the matter were laid down by the Supreme Court of the United States in the case of Covington & Cincinnati Bridge Co. vs. Commonwealth of Kentucky, 154 U.S. 204. It was held in that case that the state of Kentucky has no power to establish rates of toll over a bridge built over the Ohio river between the states of Kentucky and Ohio. At page 209, Mr. Justice Brown uses the following language:

> "The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states can not interfere at all.
>
> "The first class, including all those wherein the states have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the state. While the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference."

Mr. Justice Brown then gives a large number of classes of cases as to which the states have exclusive power. He then, at page 211, refers to another large class of cases of concurrent

jurisdiction, in which cases the state governments may act until the Federal government legislates in the field. Referring to the third class of cases in which the action of Congress is exclusive and in which a failure of Congress to act is equivalent to a declaration that there shall be no regulation in such field, Mr. Justice Brown says, at page 212:

> "But wherever such laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the third class of those laws wherein the jurisdiction of Congress is exclusive."

The test seems to be whether the matter is of a local nature or national in its character. In the former case, the states may act until Congress enters the field, while in the latter case the states may not act at all. In a large number of cases the courts have held that the states have the right to act in the absence of action by Congress, even though the action be within a field as to which the Federal government, if it so desired, might exercise exclusive jurisdiction. State legislation has been sustained in such cases with reference to the regulation of pilots--Cooley vs. Philadelphia Port Wardens, 53 U.S. (12 How.) 298; Pacific Mail Steamship Co. vs. Joliffe, 69 U.S. (2 Wal.) 450.

The regulation of wharves, piers and docks--Ouachita Packet Company vs. Aiken, 121 U.S. 444; the construction of dams and bridges across the navigable waters of a state--Escanaba Company vs. Chicago, 107 U.S. 678; the regulation of the delivery of interstate telegraph messages--Western Union Telegraph Company vs. James, 162 U.S. 650, Western Union Telegraph Company vs. Crovo, 220 U.S. 364; the examination of railroad engineers engaged on interstate runs--Smith vs. Alabama, 124 U.S. 465; the heating of steam cars engaged in interstate commerce--New York, New Haven & Hartford Railroad Co. vs. New York, 165 U.S. 622; quarantine and inspection laws--Missouri, Kansas & Texas Railway Co. vs. Haber, 169 U.S. 613; and the prevention of discriminations in switching privileges--Missouri Pacific Railway Co. vs. Larabee Flour Mills Co., 211 U.S. 612. For an

extended reference to other cases to the same effect, see the Covington & Cincinnati Bridge Company case, supra, where Mr. Justice Brown collects the leading cases which had been decided up to 1894.

Within the last year or two the Supreme Court of the United States has again announced these principles and applied them in a number of important decisions.

In the Second Employer's Liability Cases, 223 U.S. 1, it was held that until Congress acted upon the subject, the several states had the right to determine the liability of interstate carriers for injuries to their employes while engaged in such commerce, but that after Congress had acted, its regulations superseded those of the states in so far as the same subject was covered. Referring to this point, Mr. Justice Van Devanter, in delivering the opinion of the court, says at page 54:

> "True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress (citing numerous authorities)".

In the case of Southern Railway Company vs. Reid, 224 U.S. 424, the question at issue was the validity of a statute of North Carolina requiring the agents and officers of railroads and other transportation companies to receive freight for transportation whenever tendered at a regular station and to forward the same promptly by a route selected by the person tendering the same, with a penalty of $50.00 for each day of refusal, together with damages. The action in the court below was to recover penalties by reason of the failure of the defendant railway company for four days to receive and transport North Carolina goods destined to West Virginia. Judgment for the plaintiff was reversed by the Supreme Court in its decision rendered on January 9, 1912, but only for the reason that the court found that Congress, by enacting the Interstate Commerce Law, had covered the field. After referring with approval to the case of

Missouri Pacific Railway Co. vs. Larabee Mills, supra, Mr. Justice McKenna, in delivering the opinion of the court, says at page 437:

> "The principle of that case, therefore, requires us to find specific action either by Congress in the Interstate Commerce Act/ or by the Commission covering the matters which the statute of North Carolina attemps to regulate. There is no contention that the Commission has acted, so we must look to the act. Does it as contended by plaintiff in error, take control of the subject matter and impose affirmative duties upon the carriers which the state cannot even supplement? In other words, has Congress taken possession of the field?"

The court found that Congress had taken possession of the field, and consequently declared the North Carolina statute unconstitutional in so far as it might be construed to apply to interstate commerce.

In the case of Savage vs. Jones, State Chemist of Indiana, 225 U.S. 501, the Supreme Court of the United States considered the validity of the Indiana Pure Food and Drug Act, in so far as it seeks to compel the publication of the ingredients of foods and druge sold in Indiana, even though the same might come into the state by interstate commerce. Mr. Justice Hughes, in delivering the opinion of the court,on June 7, 1912, points out at page 531, that the Federal Pure Food and Drug Act does not require the disclosure of the ingredients of food or drugs, except in special cases, but that its penalties apply only to the misbranding or adulteration of food or drugs. At page 534, Mr. Justice Hughes uses the following language with reference to the relative powers of the Federal and State governments over this subject matter:

> "Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a state law enacted for this purpose. But it did not so declare.---- Is, then, a denial to the state of the exercise of its power for the purpose in question necessarily implied in the federal statute? For when the question is whether a federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished- if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect- the state law must yield to the regulation by congress within the sphere of its delegated power (citing cases)."

Mr. Justice Hughes then continues as follows:

"But the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of congress, fairly interpreted is in actual conflict with the law of the state (citing numerous cases)."

In the case of Adams Express Company vs. Croninger, 226 U.S. 491, in which the decision of the supreme court was rendered on January 6, 1913, it was held that until congress has acted upon the subject, the liability of a carrier, although engaged in interstate commerce, for loss or damage to property may be regulated by state laws. The court held, however, that section 20 of the Interstate Commerce Act as amended on June 29, 1906, had covered the field and that consequently the Kentucky statute in question was no longer applicable to loss or damage on interstate shipments. At page 503 of the opinion, Mr. Justice Lurton expresses the conclusion that the state law would have governed if it had not been for the amendment of the Interstate Commerce Act of June 29, 1906, generally known as the Carmack amendment.

Finally, in the so-called Minnesota Rate Cases, in which the decision of the Supreme Court was announced on June 9, 1913, Mr. Justice Hughes reviews at length all the authorities on this question, and in holding that until Congress acts, if it has the right to act, the states may continue to fix intrastate rates even if interstate rates are affected thereby, uses the following language:

"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."

It was contended in these cases that the action of the state of Minnesota in establishing intrastate rates which had a direct effect

on interstate rates was an invasion by the state of the field of interstate commerce, which field had been covered by Congress when it enacted the Interstate Commerce Act. Mr. Justice Hughes, however, holds that the existence of the power in the federal government is not sufficient to bar the states, but that they may continue to act until the "actual exercise of the federal control in such manner as to exclude this action by the state which otherwise would clearly be within its province".

The distinction running through all these cases, as has hereinbefore been said, is that between such regulations as are local in their character and such as are necessarily national. It seems clear that the regulation of the rates of the defendant in this case is a matter purely local in its character and that consequently the state may continue to act, even if this be deemed "commerce with foreign nations", at least until the federal government has covered the field. The commerce affected concerns no state of this Union other than California, nor does it concern any foreign nation. This is not a case of commerce between a point in one state and a point in another state, in which case, if one state has the right to fix the rate, the other state has the same right, thereby producing endless confusion. Such a case is clearly one for the national government and it is accordingly undoubted law that no state has the power to fix an interstate rate. This conclusion, however, does not apply to a case in which one state alone is involved and in which the regulation of rates by that state can have no effect on any other state. While a portion of the voyage is on the high seas, the navigation thereof is merely incidental to the real purpose of the voyage, which is to ply between two ports both of which are located in the same county in this State. The matter is one purely local to the State of California. Accordingly, under the principles which have been abundantly established, as hereinbefore indicated, the State of California, in my opinion, clearly has the right to regulate the rates for such commerce,

at least until the federal government sees fit to act.

While I have fully examined this second point, I do not wish to be understood as believing that it is necessary to do so to decide this motion.

In the absence of language in the decisions, I would say unhesitatingly that it would not have been necessary to examine this point, for the reason that it seems impossible to understand how the commerce affected may by any proper use of the English language be said to be "commerce with foreign nations."

I accordingly recommend that the motion to dismiss the complaint be denied xxxx and that this Commission proceed in the exercise of its authority, clearly granted by the Constitution and statutes of this State, to call upon the defendant to satisfy the complaint or to answer within ten (10) days.

I submit herewith the following form of order:

O R D E R .

Defendant's motion to dismiss the complaint in the above entitled proceeding having come on duly for hearing and argument having been had thereon, and said motion having been submitted,

IT IS HEREBY ORDERED that said motion be and the same is hereby denied and that the defendant be and he is hereby directed to satisfy the complaint or to answer within ten days.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 9th day of July, 1913.

John M. Eshleman
Alex Gordon
Max Thelen
H. D. Loveland

Commissioners.