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NOTES.

THE RIGHT OF ACTION FOR MONEY HAD AND RECEIVED ON A FORGED CHECK.

It has long been recognized that, where a bank pays a check upon a forged indorsement, the bank is the loser; neither the drawer nor the payee is prejudiced by the act. And this rule is in no way altered by the fact that the bank making the payment is not the drawee of the check, but merely discounts it, and afterwards collects from the drawee. "As the non-drawee bank is under no obligation whatever to pay, it does so at its peril; this is a well-known rule."[1] The interesting

[1] 2 Bolles, Banks and Banking (1907), p. 710.

question arises when the attempt is made to fasten the loss upon the bank which dealt with the forger: is the only action that of the drawee bank to recover the money which it has paid, or has the payee of the check a remedy, either upon the instrument or collateral to it, directly against the collector bank?

The general rule may be stated to be, that in the absence of some form of acceptance by the bank, there is no action *upon the check* against it, in the name of the holder of the instrument.[2] A New York case[3] has allowed recovery under such circumstances, where the payee, before bringing suit, procured an assignment of all the rights of the drawer, but this goes rather upon the principle of assignment of a chose in action than upon any remedy under the law merchant. Another form of action was, however, suggested by the Supreme Court of the United States in the opinion in *Bank* v. *Millard*, 10 Wall. 152. *"It may be,"* reads the dictum, "if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the grounds that the rule *ex aequo et bono* would be applicable, as the bank, having assented to the order, and communicated its assent to the paymaster (the drawer) would be considered as holding the money thus appropriated to the plaintiff's use, and, therefore, under an implied promise to pay it on demand."

The quasi-contractual action here suggested has been brought in a great many cases,[4] with successful results, and it seems to be now a well-settled rule of law, that recovery will be allowed upon this form of pleading wherever it appears that the defendant may charge the payment made to the forger, to the drawee bank.[5] "If a negotiable instrument having a forged indorsement comes to the hands of a bank and is collected by it, the proceeds are held for the rightful owners of the paper, and may be recovered by them, although the bank gave value

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[2] *Bank of the Republic* v. *Millard*, 10 Wall. 152 (1869); *First National Bank of Washington* v. *Whitman*, 94 U. S. 343 (1876); *Saylor* v. *Bushong*, 100 Pa. 23 (1882).

[3] *Adler* v. *Broadway Bank of Brooklyn*, 30 N. Y. Misc. 382 (1900).

[4] *Buckley* v. *Bank of Jersey City*, 35 N. J. Law 400 (1872); *Farmer* v. *Bank*, 100 Tenn. 187 (1897); *Bobbett* v. *Pinckett*, 34 L. T. Rep. 851 (1876); *Shaffer* v. *McKee*, 19 Ohio 526 (1869); *Talbot* v. *Bank of Rochester*, 1 Hill. 295 (1841).

[5] *Clark* v. *Warren Savings Bank*, 31 Pa. Superior Ct. 647 (1906).

for the paper, or has paid over the proceeds to the party depositing the instrument for collection."[6]

The question came before the Supreme Court of Pennsylvania in the case of *Tibby Brothers Glass Co.* v. *Farmers' and Mechanics' Bank of Sharpsburg*, 220 Pa. 1. The plaintiff, who had an account with the defendant, had been in the habit of indorsing checks for deposit, though not for cashing, with a rubber stamp. A bookkeeper of plaintiff indorsed several checks drawn to plaintiff's order by customers on other banks, and defendant paid him cash for them, and collected them in due course from the drawee banks. Plaintiff, upon discovering the forgery, procured the checks from their customers, and brought assumpsit for money had and received to their use, against defendant, presenting the cancelled checks as evidence. The Court denied relief, Judge Mestrezat basing his opinion upon the grounds, first, that under the law of Pennsylvania, plaintiff would have no right of action against the drawee banks, and second, because the drawee banks can recover from the defendant the money paid it by them on the forged checks; hence it cannot be held to have been "received by defendant to the use of plaintiff."

The interesting feature about this decision is, that in *Seventh National Bank* v. *Cook*, 73 Pa. 483 (1873) the Court had allowed recovery in this action, where the transaction was confined to one bank—that is, A drew the check on the X bank to the order of B; C, B's clerk, forged B's name and drew the money from the bank, which thereupon charged the check to A. B procured the check from A and recovered against the bank.

The decisions in these two cases, arising under almost precisely similar facts, would seem to point out the test in each instance as to whether or not the quasi-contractual action may be maintained by the holder of the check. If the drawer submits to a charging of the wrongful payment against his account, the remedy reverts to the holder, and the rule of *Bank* v. *Cook* would be followed; whereas, if as in the Tibby case, there is no assurance that defendant will not be proceeded against by the drawees or the drawer as the circumstances may permit, and on the other hand every assurance that some such action will be brought, the holder will be denied relief,

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[6] 1 Morse, Banks and Banking, S. 248.
[7] *First National Bank* v. *Whitman*, 94 U. S. 343 (1876).

and sent back to his action on the original contract against the drawer, his customer or debtor.

This last remedy is always open to him, for it has been universally held that none of the transactions with respect to the forged paper amounts to a "payment" in the technical sense of the term.

THE RIGHT OF A THIRD PARTY TO SUE ON A CONTRACT.

The right of a third party to sue on a contract, made for his benefit but to which he was not a party, has been recognized so often and by so many jurisdictions, that it seems there must be some consistent principle on which to base it. The concensus of opinion of the textwriters, however, treats it as an anomaly. Certain well recognized transactions must be distinguished. Whenever property is delivered to one man with an obligation attached to the specific property conveyed or delivered, in favor of a third person, there is no difficulty in giving the latter a right to bring an action in his own name. The facts might show, either that the legal title was conveyed with an equitable obligation attached in favor of a *cestui que trust*, or that the legal title passed direct to the third party, by the transaction, and that the promisor became a bailee to deliver —as, for example, delivery of goods to a carrier in fulfillment of a contract to sell. In both of the above cases there is an obligation attached to the specific property conveyed. The right of action in the beneficiary is not based upon contract, but upon a property right. The same transaction creates a contract right in the promisee and a property right in the beneficiary. In the case of *Harrington* v. *Green*, 107 N. Y. Supp. 403 (Nov., 1907), the defendant received a check from the *promisee* for $372—$82.44 of which was for the plaintiff. No reasons were given to sustain the recovery allowed. Nor did the facts show whether the defendant was to pay the plaintiff out of the proceeds of the check. If such was the case, the defendant was clearly a trustee of an undivided moiety for the plaintiff.

The difficulty arises when the promisor receives property, with no obligations attached to the specific *res*, but upon a promise to pay out of general assets, a sum certain to a third party. The latter may or may not be the sole beneficiary—premiums are paid by an insured to an insurance company, which promises to pay a sum certain to a named beneficiary. A mortgagor conveys land to B, who promises to pay the debt

of the mortgage to the mortgagee. A corporation deposits money in a bank to meet the coupons on its bonds, and the bank promises to pay the coupon holders. A parent gives property—real or personal—*interviros* or by will—to a son upon his promise to pay certain sums to the daughter. A retiring partner assigns his interest to the remaining partners, who promise to pay the debts of the partnership. A debtor conveys his business to B, who promises to pay the creditors—in none of the above cases has the beneficiary any property right in the specific *res* conveyed, because in every case the promise is to pay out of general assets. Nor can there be any recovery based upon the doctrine of consideration and special promise, because the consideration does not move from the plaintiff. There is neither an assignment of a chose in action, nor a novation. Yet the increasingly large number of decisions permitting the beneficiary to recover[1] show, that whatever may be the apparent technical difficulties, justice requires some remedy to be given to the beneficiary. "Fair expectations should not be disappointed."[2] An exhaustive search of the early common law authorities show, that formerly, such a transaction gave rise to a debt.[3] There is a *quid pro quo* and a promise to pay a sum certain. A contract between the plaintiff and the defendant was not necessary to sustain an action of debt.[4] The action of debt has been said to be obsolete. It seems that its usefulness is still required.

But there is no principle of the common law on which to base an action by the beneficiary, where there has been no *quid pro quo*, but only a special promise.

Two fathers, whose children have intermarried, promise to each other to pay to the son a marriage portion. The son attempts to enforce the promises in his own name.[5] He has suffered no detriment, nor is there a debt. A doctrine permitting a recovery in such a case, is an anomaly. If the line is to be drawn somewhere, this seems to be the place.

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[1] The decisions for and against recovery are exhaustively treated in an article by Mr. Samuel Williston, entitled "Contracts for the Benefit of Third Persons," in XV Harvard Law Review, 767, 1902.

[2] "Law: Its Origin, Growth and Function," by James C. Carter, at bottom of page 18.

[3] See articles by Mr. Crawford D. Hening, entitled "The Limitations of the Action of Assumpsit as Affecting the Right of Action of the Beneficiary," in American Law Register, Vol. 52, p. 779; Vol. 53, p. 112, and Vol. 56, p. 73.

[4] *Starkey* v. *Mill*, Styles 296 (1651).

[5] *Tweddle* v. *Atkinson*, 1 B. & S. 393 (1861).

Section 724 Revised Statutes of the United States Authorizing Production Before Trial.

This section 724 was originally enacted September 24, 1789. The meaning of the words "books or writings * * * which contain evidence pertinent to the issue in cases and under circumstances where they might be compelled to produce the same by ordinary rules of proceeding in chancery," seems to be easily ascertainable by referring to the practice of the English High Court of Chancery upon a bill in equity for discovery of an adversary's documents in aid of an action at law.

It was a matter of common knowledge among English and American lawyers in 1789 that after an action at law was begun either plaintiff or defendant could by an auxiliary bill in chancery obtain production in advance of trial of such of the opponent's documents as tended to prove "the case" at law of the party filing the bill. Such of the documents as were not privileged were ordered to be produced by the defendant and lodged with one of "the six clerks" of chancery, with leave to the plaintiff to take copies. The answer and the documents as above produced were subsequently used in the trial at law. Chancery commonly stayed the proceedings at law by injunction until the proper discovery of documents was obtained.[1]

Production and inspection of documents in advance of the trial at law, being the familiar practice in chancery when the above statute of 1789 was enacted, the manifest intention of Congress was to economize the time of litigants at law by dispensing with the tedious and useless formality of filing an auxiliary bill in equity for discovery of documents before the Circuit Judge in his capacity of chancellor and then, after thus obtaining production and inspection of the documents, of requiring the answer and documents to be transported to the law side of the Circuit Court and there to be read in evidence.

When Congress enacted the words of the Judiciary Act of 1789: "Sec. 15. *And be it further enacted,* That all the said courts of the United States shall have power in the trial of actions at law on motions, &c.," we must assume that this body was familiar with the chancery practice of granting production *before* trial in the case of actions at law. If therefore the Congress was aware of that practice and did

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[1] *Smith* v. *Duke of Beaufort,* 1 Hare 507 (1842); ——— v. *The Corporation of Exeter,* 2 Vesey, Sr. 620 (1755); Langdell on Eq. Pr. (2nd Ed.) 242; *Reynolds* v. *Burgess Co.,* 71 N. H. 332.

not wish to adopt it we should expect that words expressly limiting the right of production to the actual date of the trial would have been substituted for the above very general language which may refer quite as readily to the entire procedure of a common law action as to the particular day of trial.

In contrast to the strong current of judicial authority interpreting this section so as to allow production before trial, a contrary view has been entertained by certain judges—by Curtis, J., in *Iasigi* v. *Brown*, 1 Curtis 402 (1853); by Clifford, J., in *Merchants' National Bank* v. *State National Bank*, 3 Clifford 201 (1868); by *Green, D. J.*, in *U. S.* v. *National Lead Co.*, 75 Fed. 94 (1896). These decisions are based upon the following reasons: Judge Curtis was impressed by the argument that "it would occupy time unnecessarily, and it might be very difficult to decide before hand, whether a paper was pertinent to the issue, and whether it was so connected with the case, that a Court of Equity would compel its production." To this reasoning the reply would appear sufficient that the Federal Court can only act after a hearing upon notice and after receiving such evidence in the form of affidavits and counter-affidavits as give the like information respecting the relevancy of the documents sought as chancery has always required and acted upon when a motion for production of documents was based upon the answer. Judge Clifford's interpretation makes much account of the provision that the penalty of disobedience is not immediate attachment for contempt, as in the case of disobedience to an order for production of documents, but is a non-suit or a default. It would seem, however, perfectly consistent with the main purpose of the statute, *viz.*, to require production of documents "under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery," that the documents could be ordered to be produced *before* the trial and, if the order is disobeyed, the statutory punishment of default or non-suit could be imposed *at* the trial. The reasoning of Green, D. J., seems to rest upon a mistaken idea of the phraseology of the act, as the Judge cites the act as containing the words, *"On the trial of any action."* But the words in reality are *"in the trial."*

In *accord* with the recent decision of *Shaefer* v. *Int. Power Co.*, 157 Fed. 896 (Circuit Court So. Dist. of New York), see *post* p. 354, and supporting the interpretation of Sec. 724 advocated in this note see: *Cent. Nat. Bank* v. *Tayloe*, 2 Crach. C. C. 427; *Jacques* v. *Collins*, 2 Blatchf. 23; *Gregory* v. *Chicago R. Co.*, 10 Fed. R. 529; *Lucher* v. *Phoenix Assur. Co.*, 67 Fed. 18;

Boede Co. v. *Bancroft and Son*, 98 Fed. 115. One of the fundamental reasons for permitting discovery in chancery was economy of time in preparing for and trying issues of fact. To give production only at the trial under Sec. 724 would defeat this fundamental object of giving production. See *Lord Montague* v. *Dudman*, 2 Ves. Sen. 398; *Brereton* v. *Gamul*, 2 Atk. 240; *Earl of Glengall* v. *Fraser*, 2 Hare 99.

"Volenti Non Fit Injuria" as Applied to Persons Riding in Exposed Places on Street Railway Cars.

The cases relating to the rights of persons occupying exposed places on street railway cars, while generally placed on the ground of contributory negligence, are more properly to be referred to the doctrine of voluntary assumption of risk. Contributory negligence involves the idea of misconduct, a failure to measure up to the standard of care of the average man. Voluntary assumption of risk may exist, although the risk would be incurred by the man of average carefulness.[1] Thus, the average man would stand on the rear platform of a car, although in so doing he may well be held to take the risks of certain dangers that are necessarily incident to that position, such as injuries caused by the normal swaying of the car. Adopting therefore the principle of *"volenti non fit injuria"* in this class of cases we should expect in general to find that a plaintiff is not barred because of his exposed position on a car unless (1) he has voluntarily taken such position, and (2) the injury which he has suffered is one that is peculiarly incidental to that position.

The necessity of transportation has in general been held sufficient to render the taking of the exposed position not voluntary. Thus, it is universally held that a passenger may occupy the platform or runningboard (of an open car) when the inside of the car is crowded;[2] and in the latter case the company owes him a duty of protection from the negligence of their servants,

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[1] For a full discussion of the doctrine of voluntary assumption of risk, see article by Francis H. Bohlen, Esq., 20 Harvard Law Review, p. 14.

[2] For reference to Pennsylvania cases, see P. & L. Dig. of Decis. Col. 22515.

for example, from a collision with another car, or from collision with a wagon standing in the street which was seen by the motorman,[3] but not from collisions with wagons where there was no negligence on the part of the motorman.[4]

The urgency of transportation, however, is not sufficient to prevent the occupation being voluntary when the place is so dangerous that injury must almost necessarily result; thus, where a person standing on the bumper of a car was struck in a rear-end collision,[5] or where a person took his position outside the guard-rail of an open summer car and was struck by a crowd of persons occupying a similar position on a car going in the other direction.[6]

The cases that present greater difficulty and in which there is some divergence of authority are those where a passenger occupies the platform of a car when there is sitting or standing room inside. According to the current of authority such a person is not barred from recovery,[7] although the intimation is that if there were a rule of the company prohibiting persons riding on the platform, notice of which was brought home to the passenger, the result would be otherwise.[8] This result seems in harmony with the principles governing the doctrine of assumption of risk. It would seem that the doctrine should prevent recovery when the injury results from the mere normal swaying of the cars, or even from negligence of persons getting on and off the cars. The Pennsylvania cases, however, have developed a rule which is contrary to the general current of authority. It is held that to ride on the platform of an electric car is negligence *per se*, which bars recovery for an injury received through the negligence of the company.[9] Several reasons may be assigned for this conclusion. (1) The courts of this State have distinguished between the case of persons riding on the platform of a horse car and that of persons riding on the platform of an electric car;[10] this distinction seems

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[3] *Bumbear* v. *United Traction Co.*, 198 Pa. 198.
[4] See *infra*, report of the recent case.
[5] *Bard* v. *Pa. Traction Co.*, 176 Pa. 97. (There being no evidence that he was seen by the motorman of the following car.)
[6] *Harding* v. *Phila. Rapid Transit Co.*, 217 Pa. 69.
[7] *Dolan* v. *Ry.*, 87 N. Y. 63; *Upham* v. *Detroit Ry.*, 85 Mich. 12.
[8] *North Chicago Ry.* v. *Brown*, 179 Ill. 126.
[9] *Thayne* v. *Traction Co.*, 191 Pa. 251.
[10] See language of Chief Justice Mitchell in the last cited case, and *Ry.* v. *Boudron*, 92 Pa. 475.

anomalous. (2) It is an unconscious application of a tendency that exists in the Pennsylvania courts in negligence cases to lay down artificial standards of care,[11] and to select some physical fact as conclusively indicative of absence of care.[12] (3) It is submitted that the result reached by the courts of this State results in part from a misunderstanding of the doctrine of voluntary assumption in risk. The real question under the doctrine of voluntary assumption of risk is, what is the danger that is normally to be anticipated from the position taken up. Manifestly a man in standing on the back platform of a car does not take "upon himself the risk of his position from *any cause.*"[9]

Certainly, no court would hold that where a car fell through a bridge whose defective condition was due to the negligence of the trolley company, and all persons on board were overwhelmed in the common disaster, that the plaintiff could not recover because he was standing on the platform. So, in lesser degree, while a person in taking his position on the platform may be held to assume the risk of injuries due to the swaying and jolting of the car, and the crowding of passengers, he should not, it is submitted, be held to take the risk of a rear-end collision.

In the recent case of *Hyde* v. *Seattle Electric Co.* (93 Pac. 903) the plaintiff descended to the step of an open summer car when less than a block from home. A wagon which was proceeding parallel to the car suddenly swerved aside and injured the plaintiff. The decision in favor of the defendant seems in accord with the principles developed above, for conceding the plaintiff was rightfully on the runningboard of the car, there was no evidence of negligence on the part of the company. Thus, the case is distinguished from the case cited above when a wagon was standing in the street and where the collision could have been averted by care on the part of the motorman.[8]

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[11] *I. e.*, not the standard of the average man, but a standard imposed by the court.

[12] Cf. necessity of "stopping" in level crossing accidents; also that the stopping of a car is a prerequisite to recovery in case of an injury sustained by a person leaving a car. The reason for this tendency is to require evidence which is easy of ascertainment by witnesses.

WHETHER IN ESTIMATING THE REASONABLENESS OF RATES PRESCRIBED FOR PASSENGER TRAFFIC THE COURT SHOULD TAKE INTO CONSIDERATION THE EARNINGS DERIVED FROM PASSENGER TRAFFIC ONLY, OR SHOULD TAKE INTO CONSIDERATION THE EARNINGS FROM BOTH FREIGHT AND PASSENGER TRAFFIC.

The Supreme Court of Pennsylvania, in declaring unconstitutional an act of the Legislature fixing two cents as the maximum fare per mile for transportation of passengers on railroads in that State, so far as it relates to the plaintiff company, holds that a carrier is entitled to earn a net income not less than the legal rate of interest, plus a sum sufficient to pay fixed charges, operating expenses, cost of maintaining the plant, and providing for a sinking fund for the payment of debts, besides a fair profit to the owners; and that in determining whether passenger rates are unreasonable or unjust, the passenger traffic of the road should be considered separate and distinct from the freight traffic.[1] There are strong dissenting opinions, which take the view that the earnings from all the branches of the business should be considered as a basis of fixing a rate for passenger traffic which would conform to the test of reasonableness above laid down.

It is well settled that a State may regulate the rates of a business affected with a public use;[2] and this may be done either through the medium of the Legislature or of a commission.[3] Such regulation, however, is subject to review by the courts, and whether the rates are so unreasonable as to operate to deprive the carrier of its property without due process of law, becomes a judicial question ultimately, although it may be primarily a legislative question.[4]

The test of reasonableness applied by the United States Supreme Court has been whether or not the rate permits a fair return on all the property of the carrier used for the convenience of the public,[5] and while the cases have arisen chiefly upon

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[1] *P. R. R. Co.* v. *Phil. County*, 68 Atl. Rep. 676 (1908).

[2] *Munn v. Ill.*, 94 U. S. 113 (1876); *Atl. Coast Line* v. *N. C. Corp. Com.*, 206 U. S. 1 (1906).

[3] *R. R. Com. Cas.*, 116 U. S. 307 (1886); *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. at 393 (1893); *M. & St. L. R. R. Co.* v. *Minn.*, 186 U. S. 257 (1902).

[4] *M., St. P. & Chicago Ry. Co.* v. *Minn.*, 134 U. S. 418 (1890).

[5] *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362 (1893); *Smyth* v. *Ames*, 169 U. S. 466 (1897).

questions involving freight rates,[6] still the most positive declarations of the Supreme Court upon the subject have been in cases which involved passenger as well as freight rates.[7] The same test has been adopted by the Interstate Commerce Commission.[8]

It has been held, also, that a carrier is not justified in charging an unduly high rate over a particular line which is a part of a great system, merely because that particular line fails to pay expenses,[9] and the right of a State to compel a railroad company to run a particular train for the convenience of the public, even though it entailed a pecuniary loss upon the company, has been sustained by the Supreme Court of the United States.[10]

On the other hand, the Supreme Court has held that in determining the reasonableness of a State regulation of intrastate traffic, all consideration of interstate traffic should be excluded, and that the intrastate rate should be so fixed as to afford a fair return to the carrier upon the capital invested in that branch of its business regardless of the income from interstate traffic.[11] The bald question of separating the freight and passenger rates and the right of the carrier to secure a fair return upon each without regard to the return upon the other, seems, however, not to have been as yet presented to the Supreme Court for adjudication. The attitude of that court toward the question cannot be anticipated with certainty, but the cases cited incline, upon principle, toward the minority view in the principal case.

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[6] *M., St. P. & Chicago Ry. Co.* v. *Minn.*, 134 U. S. 418 (1890); *C. & N. W. R. R. Co.* v. *Dey*, 35 Fed. Rep. 866 (1888); *Ames* v. *U. Pac. Ry. Co.*, 64 Fed. Rep. 165 (1894); *No. Dakota Rate Cas.*, 91 Fed. Rep. 47 (1898).

[7] *C. M., etc., Ry. Co.* v. *Tompkins*, 176 U. S. 180 (1899); *Ga. R. R., etc., Co.* v. *Smith*, 128 U. S. 174 (1888); *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362 (1893); *Smyth* v. *Ames*, 169 U. S. 466 (1897).

[8] *Brabham* v. *Atl. Coast Line*, 11 Interst. Com. Rep. 464 (1905); *Artz* v. *Seaboard Air Line Ry. Co.*, 11 Interst. Com. Rep. 458 (1905).

[9] *Interst. Com. Com.* v. *R. R. Co.*, 118 Fed. Rep. 613 (1902).

[10] *At. Coast Line* v. *N. C. Corp. Com.*, 206 U. S., 1 (1906).

[11] *Smyth* v. *Ames*, 169 U. S. 466 (1897); *No. Dakota Rate Cas.*, 91 Fed. Rep. 47 (1898).