THE INTERACTING AREAS OF REGULATORY AUTHORITY IN PUBLIC UTILITIES

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(Continued from February Issue*)

The recent growth, like Jonah's gourd, of the motor bus industry and the Supreme Court's decisions upon it in the last few years, indicate another gap for the filling of which, by the direct operation of Federal authority, demand is becoming more and more imperative. In *Buck v. Kuykendall*, and *Bush v. Maloy*, the Supreme Court held that bus lines carrying through interstate passengers only were not subject to the state commissions' authority in the matter of certificates of public utility and convenience, holding that the "direct burden" prohibition

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*Author's Note: Apropos the Narragansett Electric Light Co. case, 273 U. S. 83 (1927) with which, as a problem in the control of interstate power companies, the February installment of this paper concluded, attention is called to the Second Report on the Electrical Industry made to the United States Senate by the Federal Trade Commission, as given in the United States Daily, beginning January 23, 1928.

Chapter XIII of the Report discusses the position of companies the extent of whose service areas "transcend the boundaries of individual states" with the result that in the division of regulatory authority the line of demarcation has not been sharply defined leaving part of a public utility company's business subject to state regulation, and the remainder to no regulation at all. The growth of great interconnected systems with a rapid increase in exchanges of power across state lines, is now forcing this question to an issue.

The report closes with the substantial reiteration of these statements (issue Jan. 27, p. 9) without further suggestion.

Meanwhile, under Senate Resolution 83, introduced by Senator Walsh of Montana, the Interstate Commerce Committee of the Senate has been holding hearings. The resolution is that a committee of the Senate be appointed to inquire into the financial growth and practices of public utilities. The United States Daily from January 17, reported the progress of the matter which culminated in the vote to report the resolution, on February 1. Possibly there is here the beginning of a great matter in new Federal activity in this field. The resolution was amended by the Committee, but in a manner "not unacceptable" to its author. The text is in the issue of the Daily for February 2.

46 267 U. S. 317 (1925). The cases are noted in (1925) 10 CORN. L. Q. 519 and (1925) 25 COL. L. REV. 670. They held that the decision whether or not there were, existing, adequate facilities for interstate transportation was not for the state.

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came into play.\textsuperscript{47} The resultant gold rush into the interstate bus field impelled a prompt consideration of means of Federal control \textsuperscript{48} but the Supreme Court’s recent decisions have taught that state regulation is not wholly negligible meanwhile.

In \textit{Clark v. Poor, et al., Public Utility Commissioners},\textsuperscript{49} Clark and Riggs operated as common carrier a motor truck line exclusively in interstate commerce into Cincinnati, ignoring the \textit{Ohio Motor Transportation Act} as to certificate of utility and as to a tax graduated according to the vehicles used. The instant case arose on their suit to enjoin the Ohio Commission from enforcing the act, and they failed. Said Brandeis, J., for the Court:

"It appeared that, while the act calls the certificate one of ‘public convenience and necessity,’ the commission had recognized, before this suit was begun, that, under \textit{Buch v. Kuykendall}, 267 U. S. 307 (1925), and \textit{Bush v. Maloy}, 267 U. S. 317 (1925), it had no discretion where the carrier was engaged exclusively in interstate commerce, and was willing to grant to plaintiff a certificate upon application and compliance with other provisions of the law.

"The plaintiffs claim that, as applied to them, the act violates the commerce clause of the federal constitution. They insist that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the state; that it is without power to require that before using its highways they apply for and obtain a certificate; and that it is also without power to impose in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, under section 614-94, for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state to ensure safety and convenience and the con-


\textsuperscript{48} The Columbia article discusses at page 980 the various proposals for regulating the interstate bus business.

\textsuperscript{49} 47 Sup. Ct. 702 (1927).
servation of the highways. *Morris v. Duby*, 274 U. S. 135 (1927). Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use.

"Plaintiffs urge that the decree should be reversed because of the provision in the act concerning insurance. The act provides that no certificate shall be issued until a policy covering liability and cargo insurance has been filed with the commission. Section 614-99. The lower court held that, under *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570 (1925), this provision could not be applied to exclusively interstate carriers, *Red Ball Transit Co. v. Marshall*, 8 F. (2d) 635, 639 (D. C., 1925); and counsel for the commission stated in this court that the requirement for insurance would not be insisted upon.

"It is not clear whether the liability insurance, for which the act provides, is against loss resulting to third persons from the applicant's negligence in using the highways within the state, or is for loss to passengers resulting from such negligence or for both purposes. We have no occasion to consider whether under any suggested interpretation, liability insurance, as distinguished from insurance on the interstate cargo, may be required of a carrier engaged wholly in interstate commerce. Compare *Hess v. Pawloski*, 274 U. S. 352 (1927). The decree dismissing the bill is affirmed, but without prejudice to the right of the plaintiffs to seek appropriate relief by another suit if they should hereafter be required by the commission to comply with conditions or provisions not warranted by law."

In *Morris v. Duby, et al., Highway Commissioners,* the motor truck carrier sought to enjoin enforcement of an order reducing the permitted load from 22,000 to 16,500 pounds. The road concerned was the Columbia River Highway, built by Oregon and the United States co-operating, and one of the carrier's arguments, denied by the court, is that the Oregon acceptance of the Federal Act bound the state to the load limit in force at the time of acceptance. The twenty-two miles of road affected by the order was intrastate, but as it was part of the interstate

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highway into Washington, it was argued that it would interfere with interstate commerce on the road. Said Taft, C. J.:

"An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens. Hendrick v. Maryland, 235 U. S. 610 (1915); Kane v. New Jersey, 242 U. S. 160 (1916). Of course the state may not discriminate against interstate commerce, Buck v. Kuykendall, 267 U. S. 307 (1925). But there is no sufficient averment of such discrimination in the bill. In the Kuykendall case this court said (page 315):

"With the increase in number and size of the vehicles used upon a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject.'

"The mere fact that a truck company may not make a profit unless it can use a truck with load weighing 22,000 or more pounds does not show that a regulation forbidding it is either discriminatory or unreasonable. That it prevents competition with freight traffic on parallel steam railroads may possibly be a circumstance to be considered in determining the reasonableness of such a limitation, though that is doubtful, but it is necessarily outweighed when it appears by decision of competent authority that such weight is injurious to the highway for the use of the general public and unduly increases the cost of maintenance and repair. In the absence of any averments of specific facts to show fraud or abuse of discretion, we must accept the judgment of the highway commission upon this question which is committed to their decision as against merely general averments denying their official finding."
"Under the convention between the United States and the state in respect to these, jointly aided roads, the maintenance after construction is primarily imposed on the state. Regulation as to the method of use therefore necessarily remains with the state and cannot be interfered with unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems of the Union and facilitating the carrying of the mails over them."

In *Interstate Busses Corporation v. Holyoke Street Railway Company*, the Supreme Court dealt with the matter of state control of local intrastate traffic when undertaken by bus lines engaged in hauls between interstate termini, and declined to allow the latter traffic to "sweeten" the former when unauthorized by the states involved. The Interstate Company sought to enjoin the Holyoke Street Railway Company, various police officers and prosecuting officers of towns and of the state, from enforcing the General Laws barring the operation of motor vehicles

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*2 Sections 25, 48a and 49 of Chapter 159, General Laws, as amended by c. 280, Acts of 1925, contain the provisions attacked: "No person shall operate a motor vehicle upon a public way in any city or town for the carriage of passengers for hire so as to afford a means of transportation similar to that afforded by a railway company by indiscriminately receiving and discharging passengers along the route on which the vehicle is operated, or as a business between fixed and regular termini, without first obtaining a license. The licensing authority in a city is its council, in a town is its selectmen; and, as to public ways under its control, is the metropolitan district commission. No person shall operate a motor vehicle under such license unless he has also obtained from the department of public utilities a certificate that public convenience and necessity require such operation. Any one operating under a license from local authority and a certificate from the department is declared to be a common carrier and subject to regulation as such. Violations of sections 45-48, or of any order, rule, or regulation made under them, are punishable by fine or imprisonment or both." And the act gives to the Supreme Judicial and superior courts jurisdiction in equity to restrain any violation upon petition of the department, any licensing authority, ten citizens of a city or town affected by the violation, or any interested party. Neither license nor certificate is required in respect of such carriage as may be exclusively interstate.*
without local city or town licenses and a certificate from the State Public Utilities Department. Before the Interstate Company set up business through the same towns, the Holyoke Street Railway Company for years did the local hauling. The bus line ran from Greenfield, Mass., to Hartford, Conn., but its busses carried both interstate and local intrastate passengers along the same streets on which were laid the Holyoke Company's car tracks, and the latter's consequent losses make it a vigorous prosecutor. The injunction was refused in the District Court made up of the three judges.\footnote{11 F.(2d) 161 (D. C. Mass. 1926).}

In affirming the dismissal of the complaint, Butler, J., said for the Court:

"Appellant's principal contention is that the Act contravenes the commerce clause. . . . The Act existed in some form before interstate transportation of passengers for hire by motor vehicle was undertaken. Its purpose is to regulate local and intrastate affairs. No licenses from local authorities or certificate of public convenience and necessity is required in respect of transportation that is exclusively interstate. \textit{Cf. Buck v. Kuykendall, 267 U. S. 307 (1925); Bush Co. v. Maloy, 267 U. S. 317 (1925).} The burden is upon appellant to show that enforcement of the Act operates to prejudice interstate carriage of passengers. The stipulated facts do not so indicate. The threatened enforcement is to prevent appellant from carrying intrastate passengers without license over that part of its route which is parallel to the street railway. Its right to use the highways between Springfield and Hartford is not in controversy. While it appears that in Massachusetts both classes of passengers are carried in the same vehicles, it is not shown what part of the total number are intrastate or interstate. The record contains no information as to the number of persons, if any, traveling in interstate commerce on appellant's busses over the part of the route competing with the street railway. It is not shown that the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried efficiently and economically in busses used exclusively for that purpose, or
that appellant's interstate business is dependent in any degree upon the local business in question. Appellant may not evade the Act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalties and employees.

"There is no support for the contention that the enforcement of the Act deprives it of its property without due process of law. Undoubtedly the state has power in the public interest reasonably to control and regulate the use of its highways so long as it does not directly burden or interfere with interstate commerce. . . . The terms of the act are not arbitrary or unreasonable. Appellant has not applied for and does not show that it is entitled to have a license from the local authorities or a certificate of public necessity and convenience from the department. Plainly, it has no standing to attack the validity of the statute as a violation of the due process clause." 54

Thus the Supreme Court continues to prick out the lines as to the latest transportation on the surface of the earth while a new era of transportation above the surface comes over the horizon; and in the meantime the Interstate Commerce Commission studies the motor bus situation with a view to recommending legislation to Congress. It has held a series of preliminary hearings in various parts of the country in that behalf. At the hearing held in Boston the New England Railways showed passenger losses to busses of one-fifth of the previous traffic. The New Haven road estimated its annual passenger losses at $27,000,000 and its freight losses at $10,000,000. On January 16th, 1928, the Commission's examiner filed a report, based on the testimony taken at the various hearings throughout the country, in which he makes the following suggestions:

54 The case is noted briefly in (1927) 26 Mich. L. Rev. 115; (1927) 75 U. of Pa. L. Rev. 565. Also, the whole subject is summarized, in a note Constitutional Obstacles to State Regulation of Bus Transportation, (1927) 40 Harv. L. Rev. 882-6, which discusses possible means of regulation but considers—questionably, perhaps—that the Interstate Commerce Commission's present authority over railroads would not suffice to protect them against bus competition even under Railroad Commission of Wisconsin v. Chicago B. & Q. R. R., 257 U. S. 563 (1922); and that anyway the commission is overburdened now. It commends the now pending bill in Congress committing the regulation to the state boards (as did Messrs. Rosenbaum and Lilienthal in (1926) 26 Col. L. Rev. at p. 980).
“Original jurisdiction in the administration of regulation over motor vehicles operating in interstate or foreign commerce as common carriers over the public highways should be vested in such State regulatory bodies as notify the Interstate Commerce Commission that they will act.

“The Interstate Commerce Commission should be delegated to act with jurisdiction whenever a State board fails to notify the Commission of its acceptance of the delegation of authority to act under the Federal statute, and until such notice is received.

“Joint board composed of two or more State boards, or representatives of such State boards and of the Interstate Commerce Commission when acting for a State board, should be authorized to act where the commerce is carried on in two or more States.”

Oral argument before the Commission on the report was set down for February 10th.

In courts other than the Federal Supreme Court there are some recent decisions of interest. In *Sprout v. City of South Bend*, the bus man ran between South Bend, Indiana, and Niles, Michigan, a distance of only about ten miles, and through country considerably built up along the route. Sprout sold tickets only to some point in Michigan; but he took on in South Bend many South Bend suburbanites whom he actually let off at points on the road in Indiana before reaching the Michigan line, which was about half-way. The Indiana Court held him to be subject to a South Bend ordinance requiring the license of those "indiscriminately accepting persons for transportation from a point inside the city limits of South Bend to a point outside" and to its requirement of the filing of a bond conditioned to pay passenger injury judgments. To his argument that the ordinance burdened interstate commerce, it replied:

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64a See, however, an article by J. E. Cummings in (1927) 35 Jour. Pol. Econ. 852, which argues "The need for coordination of our transportation system" on the general thesis that the Interstate Commerce Commission should have control of all rail, water, and bus carriage.

64b 198 Ind. 563, 153 N. E. 504 (1926); 49 A. L. R. 1198 (1926) and there noted as "State Regulation of motor carriers as affected by the Interstate Commerce clause." Argument on this case, in error was heard by the Supreme Court of the United States on January 20, 1928.
"But, even if he did receive passengers only for transportation across the state line, the use of the city streets as a place for the indiscriminate solicitation and acceptance of passengers in a jitney bus brought him within the police power of the state to license and regulate both driver and vehicle by way of providing for the safety, security, and general welfare of the public, so long, at least, as Congress has not legislated on the subject. . . . And the facts that he did not have any stations or soliciting agents and did not confine his use of the streets of the city to driving on and along them in carrying interstate commerce, but went upon them with his motor vehicle, and there offered the vehicle and his services generally for the use of patrons who would take passage and pay fare to a point in Michigan using the street both for the solicitation and receipt of passengers, brought his car within the description of a 'motor driven commercial vehicle' and a 'motor driven commercial vehicle used within the limits (of the city) for public hire,' that may be charged license fees and subjected to regulations by the city, notwithstanding the certificate of registration issued by the secretary of state."

In *New York Central R. R. v. Conlin Bus Lines, Inc.* the railroad successfully petitioned that the paralleling bus line be adjudged in contempt for violation of an injunction against operating in certain towns without their consent. Despite the fact that the bus line ran into a Connecticut terminal the court said:

"The plaintiff is entitled to prevail. The findings all appear to have been justified and the order as to final decree was right. They were in conformity to the law and the statutes. . . . The governing principles of law have been amplified in recent decisions and need not be restated. These adjudications demonstrate that there is no unwarrantable interference with interstate commerce in the controlling statutes and in the decree ordered."

After the Supreme Court's decision in *Interstate Bus Corporation v. Holyoke St. Ry. Co.* we may expect that the type of case like the above will come to an end as to bus lines which

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56 155 N. E. 601 (Mass. 1927).
57 Supra note 51.
heretofore have persisted in the endeavor to make a little inter-
state leaven lighten a large lump of intrastate traffic. How
much or how little those same towns have been disarmed by the
Buck and Maloy cases, of power to lessen the noise and
noisomeness of the large volume of interstate trucks and busses
which go roaring through them, is not so clear. In those cases
the state action bottomed on criteria which the court said it was
not the function of the state to apply. "Police power," "nuis-
ance," etc., as criteria before litigation, are words of no con-
tent until content has been put into them in any particular case,
but Philadelphia has precipitated inquiry as to how far self-pro-
ective devices measured by a city's judgment of its dangers from
interstate busses may be carried. In American Transit Co. v.
City of Philadelphia, the plaintiffs operated from Philadelphia
to various cities (New York, Atlantic City, N. J., and Wilming-
ton, Del.) in other states, carrying, the court says, "passengers
in interstate commerce only but the drivers were permitted to
accept passengers at intermediate points." On receiving notice

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57a The leaveners sustained a decided dampening of hopes in Intercity Coach Co. v. Attwood, et al., 21 F. (2d) 83 (1927), noted (1927) 41 Harv. L. Rev. 260, and (1927) 26 Mich. L. Rev. 221. A Rhode Island District Court of three judges refused to enjoin the action of the state commission which had consid-
ered the interstate commerce involved as "negligible."
The haul was from Woonsocket, R. I., to Providence, R. I., but "the route
will cross the Massachusetts line into Attleboro, Mass., and proceed thence to
Woonsocket." The Attleboro section "is not thickly settled." The "busses
bore no Attleboro marking; they carried signs, reading 'Providence—Woon-
socket' and they ran through from city to city—which strongly supports the
view of the Rhode Island Commission that the journey into Massachusetts was
a subterfuge to escape state regulation." The Federal court concurred in this
view.

The Harvard note writer shows some qualms about the case if its theory
is that the Transit is not interstate, and prefers to regard the haul as inter-
state commerce which in the absence of Congressional action is left to local
regulation.

58 Supra note 45.
59 Supra note 46.
60 Buck v. Kuykendall, supra note 45: "Moreover it determines whether the
prohibition shall be applied by resort, through state officials, to a test which it
is peculiarly within the province of the federal action—the existence of ade-
quate facilities for conducting interstate commerce."
61 18 F. (2d) 991 (E. D. Pa. 1927).
62 Presumably this means that drivers picked up passengers on the streets of
Philadelphia outside the terminal in that city. The opinion does not indicate one
way or another, but it does seem clear in the context that the busses did no
"cruising" on the streets though they apparently did not follow a fixed route
through them.
that bus drivers operating on the streets without having complied with a recent ordinance and without a license, etc., would be arrested, the bus line asked the Federal Court to "enjoin the execution of the provisions of the ordinance." The familiar undue burden on interstate commerce argument was rejected and the suit dismissed. Judge Thompson handled the case realistically, saying:

"The question then is whether the exercise of the police power through the ordinances in question is such as to bring the case within the forbidden restrictions against interfering or burdening such commerce and thereby rendering the regulation invalid regardless of the fact that it was intended as a police regulation. In order to determine that question, it is necessary to take into consideration the ever-changing condition in the development of the traffic at which it is directed, common to our great cities, which has arisen, due to the extensive present use of motor vehicles. Are these ordinances necessary as police regulations, for the enforcement of good order and the protection of the safety of citizens of Philadelphia and the public generally? . . .

"In order to appreciate the necessities of the situation which induced city councils to pass the ordinances under attack and the Legislature to extend the power to cities, we must consider what we see about us. The population of the city of Philadelphia has increased to approximately 2,000,000. It has hundreds of miles of streets, many of which are narrower than those in municipalities more recently laid out, barely wide enough to accommodate the traffic of 25 years ago, when the motor vehicle was unknown, but now daily congested through the endless procession of automobiles, motor trucks, and motor busses, which also, in the exigencies of business and pleasure, occupy much of the roadways while stopping to load and unload, or while left parked along the sidewalks.

"Added to the heretofore constantly increasing number of passenger automobiles and motor trucks carrying merchandise, has now come the motor bus for the carriage

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It read that no bus running on the city streets should run without license; the application for the license had to state the driver's qualifications, the proposed routes within the city; fees were provided for. The driver had to be licensed also and was required to state residence, age, height, etc., experience, criminal record, if any, and furnish a photograph to be attached to his license; also references to two reputable citizens.
of passengers within the city limits and beyond. These motor busses are built with the design to contain as many passengers as can be profitably carried. They occupy a large part of the space upon the streets through which they travel, and their weight and size is such that, unless driven with due care by skillful operators, they become a menace to pedestrians at the street crossings and to other vehicles and their occupants in the use of the roadways.

"Is there anything unreasonable in requiring those operating vehicles of this class to do what the city ordinance prescribes?"

In the Philadelphia case the court sustained also the provisions of the ordinance imposing the license fee of $50 for each bus, which amount the court felt only approximated the costs of administering the ordinance. The average monthly income there (from 12 busses) was $18,000 to $20,000.64

In Interstate Busses Corporation v. Blodgett, Tax Commissioner of Connecticut,65 the Connecticut District Court of three judges dealt with the effort of the state to make the busses contribute directly to the maintenance of the right of way by a law66 made specifically applicable to bus lines operating between Connecticut cities and those in other states.67 In the form of a

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64 Another ordinance requiring a $5000, per bus, bond conditioned on the payment of personal and property injury claim was not pressed and the court thought "its validity as an exercise of the police power is doubtful." He did not refer to Packard v. Benton, 264 U. S. 140 (1924).

65 19 F. (2d) 256 (D. C. Conn. 1927).

66 Chapter 254 of the Public Acts of 1925, Part 2, § 4, provided that the owner of a motor vehicle which is operated over any highway in the state for the purpose of carrying passengers from a point outside the state to a point within the state (or vice versa) shall annually file a statement of miles over the roads each vehicle ran and pay to the treasurer as an excise on the use of the highway one cent for each mile so used.

67 Busses in intrastate business were subjected, separately, to a detailed supervision by the Utilities Commission of rules, routes, fares, speeds, schedules, continuity of service and convenience and safety of the public.

The court points out that there was "in no sense a discrimination against interstate commerce," but its recital of the obligations on the intrastate carrier does not include a similar "excise"; and it apparently balanced the many impositions upon the intrastate traffic against this single one. "The interstate carrier is subject only to pay the mileage tax. He selects his own routes and roads at will. He may travel them as often as he wishes as the calls of his business may require. He fixes his rates of traffic and contributes nothing to the upkeep of the roads or the buildings of new ones. He carries no insurance by regulation of law (for injury to person or property) and he is not required to report to the public officials in any manner except by the command of the present enactment."
mileage tax of one cent per mile for the use of its highways
the state took so much glitter out of the gold that the bus lines
naturally sought the reaction of the local Federal judiciary to the
familiar argument.

Writing for the court, Manton, Cir. J., relied upon Hend-
rick v. Maryland, which had pointed out the wear and tear on
roads and the state's right to compensation, and said: "The
amount of the charges and the method of collection was held to
be primarily for the determination by the state, and so long as
they are reasonable, and are fixed according to some uniform
fair, and practical standard, they constitute no burden on inter-
state commerce." Reciting similar words from Kane v. New
Jersey, he concluded that "The theory of the tax imposed by
statute here is consistent with the rulings of these cases." 

The Supreme Court heard argument in error in the case on
January 20 last, just before it recessed till February 20. Its
prior language as quoted in Clark v. Poor is no comfort to
the bus lines. Presumably, therefore, Connecticut has shown
to many money-seeking states a new source of revenue. Since
a railroad which competes with the bus lines not only buys and
maintains its right of way but pays taxes on it as well, the public
treasury's demand that the motor vehicle carriers bear a charge
something similar seems fair enough. Certainly it is imperative
that before thinking of allowing the railroad investment to go
the way the canal investment went a hundred years ago, current
society before discarding the old should experiment with the new
upon as equal a cost basis as can be arranged. If the talked-of
trunk line toll roads for heavy motor traffic come to actuality
we may have some definite financial illumination whereby to make
the comparison.

In the field which is primarily federal the state author-
ity continues to lessen. Several cases dealing with state-pre-

235 U. S. 610 (1915).
See Professor Elder's note Interstate Commerce—Motor Bus and Motor
Truck Transportation Companies—Control by State Authorities, in (1926) 21
ILL. L. REV. 166 for a short review of the cases on the topic.
Ante p. 549.
scribed rolling stock equipment were decided adversely to the state's jurisdiction in Napier, Attorney General, v. Atlantic Coast Line R. R. and Chicago Northwestern R. R. v. Railroad Commission of Wisconsin and Chicago, Milwaukee and St. Paul Ry. v. Railroad Commission of Wisconsin. As Mr. Justice Brandeis, writing for the court, stated it, all three presented the question "Whether the Boiler Inspection Act has occupied the field of regulating locomotive equipment used on a highway of inter-state commerce so as to preclude state legislation."

The Napier case involved a Georgia statute requiring an automatic firebox door; the two cases against the Wisconsin Commission involved the latter's order concerning cab curtains. Said Brandeis, J., for the court:

"Each device was prescribed by the state primarily to promote the health and comfort of engineers and firemen. Each state requirement may be assumed to be a proper exercise of its police power, unless the measure violates the commerce clause. It may be assumed, also, that there is no physical conflict between the devices required by the state and those specifically prescribed by Congress or the Interstate Commerce Commission, and that the interference with commerce resulting from the state legislation would be incidental only. The intention of Congress to exclude states from exerting their police power must be clearly manifested. Reid v. Colorado, 187 U. S. 137, 148 (1902); Savage v. Jones, 225 U. S. 501, 533 (1912). Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do so by the original Boiler Inspection Act, since its provisions were limited to the boiler. Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280 (1914). But the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances.

71 272 U. S. 605 (1927).
72 36 STAT. 913.
73 See note on case in Wisconsin Supreme Court, 188 Wis. 232, 205 N. W. 932 (1925), (1926) 39 Harv. L. Rev. 395.
"The requirements here in question are, in their nature, within the scope of the authority delegated to the Commission. The question whether the Boiler Inspection Act confers upon the Interstate Commerce Commission power to specify the sort of equipment to be used on locomotives was left open in Vandalia R. Co. v. Public Service Commission, 242 U. S. 255 (1916). We think that power was conferred. The duty of the Commission is not merely to inspect. It is also to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the Commission sets the standard. By setting the standard it imposes requirements. The power to require specific devices was exercised before the amendment of 1915, and has been extensively exercised since.

"The federal and the 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 upon the construction of 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 however different their purpose. Compare Louisville & Nashville R. Co. v. State, 16 Ala. App. 199, 76 So. 505 (1917); Whish v. Public Service Commission, 200 N. Y. Supp. 282 (1923), 240 N. Y. 677, 148 N. E. 755 (1925); Staten Island Rapid Transit Co. v. Public Service Commission, 16 F. (2d) 313 (S. D. N. Y. 1926).

"If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample. Obviously,
the rules to be prescribed for this purpose need not be uniform throughout the United States, or at all seasons, or for all classes of service."

Thus the authority of the state is read out of existence in favor, not of any direct or potentially direct action of Congress itself, but in favor of action, under delegation from Congress, of and administrative body merely, and in the actual case of only its potential action since no rule had yet been made by the Commission. To the writer the case appears therefore a particularly significant example of the court's urge toward realizing its concept of the unity of control of the railroads, as a whole, under the Interstate Commerce Commission. It had, however, swept away actual state legislation for uncovered spots in the interacting areas, which it admits need covering, in favor of the mere potentiality of federally imposed rules in other cases. Since, in *Missouri Pacific Railway Co. v. Porter* it did so by making general language in Congressional acts govern specific contrary provisions in the same statutes, the present decisions on the interpretation of general language standing alone are to be expected from the background of the court's working theory.

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74 The Buck v. Kuykendall, 267 U. S. 307 (1925), and Bush v. Maloy, 267 U. S. 317 (1925) cases are examples.

75 See the case ante, p. 412.

76 In *State ex rel. Public Utilities Commission of Ohio v. New York Central Railroad Co.*, 115 Ohio St. 477, 154 N. E. 790 (1926), the commission had made an order that pusher engines "be coupled to the last car and made a part of the train, and that all connections controlling the air or power brake system be properly made with such pusher engine," applicable to all railroads operating in Ohio. The Ohio court refused to grant mandamus to compel the Central to obey, partly on the ground that its reading of the local statute did not confer the particular authority on the commission but also: "To give effect to general order No. 16 of the Public Utilities Commission would immediately require all trains in interstate traffic to be fully equipped with power brakes with necessary couplings and attachments. We are therefore brought face to face with the recent case of Napier v. Atlantic Coast Line R. R. Co., 272 U. S. 605 (1926). It has been argued by counsel for the relator that that case does not control, because it refers only to appliances and not to the manner of operating trains. It has already been seen, however, that appliances become necessary, and inasmuch as the Interstate Commerce Commission has authority in these matters, though it has not seen fit to exercise such authority to the full extent of the power conferred, the field is regarded as fully occupied and the jurisdiction of the state commission is excluded. Upon the authority of the Napier Case, *supra*, as well as upon the lack of jurisdiction of the Public Utilities Commission of Ohio, the peremptory writ of mandamus must be denied."
In the technique of litigation, as in that of war, the selection of the site for battle is a part of the fight. Only as to legal warfare concerning land is the ground automatically selected by the nature of the litigation itself. Frequently it is set by the accident of the plaintiff's finding his adversary here or there for service; and if "here" is the plaintiff's home ground where his forces are best marshalled, while "there" is the enemy's, we may expect to find efforts to make the enemy fight away from home. It is understandable human nature that the plaintiff's home state

In Staten Island R. Transit Co. v. Public Service Commission of New York, 16 F. (2d) 313 (S. D. N. Y., 1926), a court of three judges enjoined the enforcement of state statutes which required the electrification of railroad lines operating in cities of over 1,000,000 population by January, 1926. Details were left to be prescribed by the commission. Among other objections the direct burden was advanced but Hand, Cir. J., said that "Finally we shall assume that the section imposes no direct burden . . . that is, that until Congress regulated the subject matter the state was free to direct the change. The significance of 'direct' interference . . . as opposed to 'indirect' we shall not try to define. Nevertheless, with all these things conceded the question still remains whether the section conflicts with any lawful action of Congress already taken, and is unconstitutional in that sense . . . ."

"Nor is it essential to that result that the conflict should be literal and express, in the sense in which a subsequent statute may repeal an earlier by implication. It is only necessary that Congress shall discover a purpose to occupy the field, as the phrase goes, and to exclude any further action by the states. When that appears, if the subject be interstate commerce, it will invalidate existing as well as future laws. Charleston & W. C. R. R. v. Varnville Furniture Co., 237 U. S. 597 (1915); New York Central R. R. v. Winfield, 244 U. S. 147 (1917); Penn. R. R. v. Public Service Commission, 250 U. S. 566 (1919). The doctrine is sometimes hard to apply, but the proposition is indubitable.

"The original Boiler Inspection Act of 1911 (Comp. St., § 8630 et seq.), as its name implies, did not cover all parts of the locomotive, and was necessarily limited to steam. In 1915 (Comp. St., § 8630a et seq.) it was, however, extended to cover the locomotive, its tender and their appurtenances, and thus brought into being a system of federal inspection, with an attendant organization which covered all parts of steam locomotives used by interstate railroads. The scheme went further, however, than merely to provide for inspection, because the act not only required that, but that the boiler should be 'in proper condition and safe to operate in the service to which the same is put,' and that it should 'be able to withstand such test or tests as may be prescribed in the rules or regulations,' which the Interstate Commerce Commission should from time to time promulgate. After 1915 this gave to the Interstate Commerce Commission power to prescribe the design, construction, and material of the whole locomotive, and with the Safety Appliance Act (Comp. St., § 8605 et seq.) put the supervision of all the steam rolling stock of interstate railroads into the hands of the Commission. On June 7, 1924 (Comp. St., § 8630 et seq.), more than a year after section 53a of the Public Service Commission Law of New York was passed, this act, as amended, was extended to all locomotives, electric as well as steam, and the system became complete. It is with this statute in view that we must determine the validity of the local law:"

The limitations of the general statement are set out by A. W. Scott in his "Fundamentals of Procedure," Chap. 2.
should try to stage the fight for him; and indeed some states consider that he must be a resident in order to start the legal war within its borders; others do not.

This jockeying for position has become involved with the direct burden on interstate commerce doctrine in recent cases of which Iron City Produce Co. v. American Railway Express Co.\(^7\) is an example. In the particular case the plaintiff was not from Ohio nor did the cause of action arise in that state since it involved damages to berries received in New York for transport to the plaintiffs in Pennsylvania. Service was made, however, upon the Cincinnati, Ohio, representatives of the express company in reliance upon the bald language of the Ohio General Code, Section 11290: "When the defendant is a foreign corporation having a managing agent in this state, the service may be upon such agent." The court recited the decision in Davis, Agent, v. Farmers' Co-operative Equity Company,\(^6\) where the Minnesota statute allowing suit by service upon an agent of an out-of-the-state railroad who was within the state soliciting traffic was held invalid as an unreasonable burden, and in reliance upon it decided that the service in the case before it was properly quashed. The decision seems desirable, and is covered by the reasoning of the Davis case as to the burdens laid on the carrier in marshalling forces on fields not connected with the circumstances, in any

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\(^6\) See a note in (1923) 8 Minn. L. Rev. 47 to Loftus v. P. R. R. C., 107 Ohio St. 352, 149 N. E. 94 (1923). The case sustained a statute which localized actions.

A recent note, Constitutional Right of Non-resident to Sue, (1928) 41 Harv. L. Rev. 387, discusses the Loftus and like decisions as presumably violative of the privileges and immunities clause of the Federal Constitution if applied to citizens of other states in the Union.

\(^7\) 220 Ohio App. 165, 153 N. E. 316 (1926).

\(^8\) Mr. Justice Brandeis went into the question with his usual insight, and said: "That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in states or jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations and that this impairs efficiency in operation, and causes directly and indirectly, heavy expense to the carriers; these are matters of common knowledge. Facts of which we also take judicial notice indicate that the burden upon interstate carriers imposed specifically by the statute here assailed is a heavy one, and that the resulting obstruction to commerce must be serious." 262 U. S. 312 (1923).
reasonable way, but in the *Davis* case the Atchison, Topeka and Santa Fe, the road in question, did no business in the state except the solicitation, while we may presumably take "judicial notice" that the American Railway Express Company does a general business in the state of Ohio.

In a case potentially of concern to interstate motor vehicle transportation generally, argument concerning the burden on interstate commerce was not raised. *Hess v. Pawloski,* which will probably greatly tend to localize litigation at the point of injury, of sympathy and of witnesses, upheld the Massachusetts statute of 1923 allowing personal judgment to be taken in Massachusetts courts on the theory that "the operation by a non-resident of a motor vehicle on a public way in the Commonwealth shall be deemed equivalent to an appointment by such non-resident of the (state) registrar to be his true and lawful attorney upon whom may be served all lawful processes in any action growing out of any accident or collision while (so) operating and said operation shall be a signification of his agreement (that the service be as if personal on him)," Stat. 1923 Ch. 431, section 2.

*Brandeis, J., was careful to say: "It may be that a statute like that here assailed would be valid although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the state, or if the plaintiff was, when it arose, a resident of the state. These questions are not before us, and we express no opinion upon them. But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, in which the plaintiff does not reside. . . . With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs, and unduly burdens, interstate commerce."* 

*The Wisconsin courts had already upheld a statute like that of Massachusetts. See State v. Belden, 211 N. W. 916 (1927), noted (1927) 4 Wis. L. Rev. 189.*

*274 U. S. 352 (1927). The case, while in the Massachusetts courts, was discussed in the law reviews: (1925) 5 Boston Univ. L. Rev. 46; (1925) 25 Col. L. Rev. 208; (1924) 38 Harv. L. Rev. 111; (1925) 9 Minn. L. Rev. 362; (1925) 73 U. of Pa. L. Rev. 171; (1925) 34 Yale L. J. 425; and was the subject of articles by A. W. Scott, *Jurisdiction Over Motorists,* (1925) 39 Harv. L. Rev. 563, and E. W. Hinton, *Substituted Service on Nonresidents,* (1925) 20 Ill. L. Rev. 1.

Beside the cases already adverted to, p. 401 ante, on the discontinuance of intrastate service or intrastate branch lines wherein the blending of the interstate and intrastate has substantially and effectively operated to throw the whole into the hands of the federal authority and those decisions dealing with the financial unity of the interstate-intrastate carrier, the precise doctrine of the Shreveport Rate Case, strengthened by the policy of the 1920 Act, appears in some recent decisions. The doctrine was broadly accepted in State ex rel. Railroad and Warehouse Commission v. Northern Pacific Railway, where the state court itself sided against the state commission. The Commerce Commission having found that intrastate rates in Minnesota were so low as to discriminate against Fargo, North Dakota, in interstate commerce, increased intrastate rates in Minnesota within 150 miles of the North Dakota city. Yet the Minnesota Commission's suit to enjoin the local carriers from using the rates set by Interstate Commerce Commission was dismissed.

It was argued that compliance meant a violation of the state Long and Short Haul Act since the state rates outside of the 150-mile radius were left as before and "that no order of the Interstate Commerce Commission can relieve a common carrier from its obligation to observe the laws of the state prohibiting preferences in the rates accorded to individuals or localities for intrastate transportation." The court simply replied: "The rates established affected intrastate as well as interstate traffic and the discrimination and inequalities of which the (state) commission complains are due to the acts of the carriers which the Interstate Commerce Commission has authorized. We see no escape from the conclusion that the courts of this state cannot compel the

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84 Houston E. W. Texas Railway Company v. U. S., supra note 3. It held that when the Interstate Commerce Commission found a discrimination against interstate traffic arising from the relation of intrastate to interstate rates and upheld the latter as reasonable, the carriers were free to raise the intrastate rates to the level of the interstate, despite the state's objection. It arose out of the inability of Shreveport, Louisiana, in competition with Texas cities to secure the trade of nearby Texans.

85 168 Minn. 393, 210 N. W. 399 (1926).

86 A note to the case in (1927) 36 Yale L. J. 714 asks how great the interest of the locality discriminated against must be in proportion to the intrastate commerce affected.
respondent to cease (such) rates, although as a consequence the whole structure of intrastate class rates is disturbed and glaring inequalities are created. Respondent cannot obey the state law without incurring the penalties of the Federal law and the state cannot compel obedience to its law and consequent disregard of Federal authority. "Manifestly one authority must be paramount, and when it speaks the other must be silent."

The decision seems to place a large stopper on a policy of keeping business at home.

The Federal Supreme Court itself, on the other hand, required more explicitness for the ousting of the state authority in *Arkansas Railroad Commission v. Chicago, Rock Island and Pacific Railroad Company.* There the railroad filed an intrastate tariff increasing rates to conform to interstate tariffs which the Interstate Commerce Commission had prescribed. This new intrastate tariff the Arkansas Commission suspended and the federal suit arose on the carrier's attempt to enjoin enforcement of the suspension order. After success in the District Court of three judges, it failed before the Supreme Court.

The controversy had its origin in a general inquiry arising out of alleged discrimination against Memphis, Tenn., in respect to various intrastate rates. In the former, which concerned Arkansas, southern Missouri, and Louisiana areas, there was an express finding that the Arkansas intrastate rate worked a discrimination and there issued an express order for its removal. But in the latter, though the territory involved was in part the same, it covered a much larger field, as Brandeis, J., explained:

"The Texas and Oklahoma intrastate rates were found prejudicial to interstate commerce to the extent to which they were lower than the interstate rates, for like distances, in force in those states. But the Interstate Commerce Commission made no finding or order with reference to the Arkansas intrastate rates.

"The intention to interfere with the state function of regulating intrastate rates is not to be presumed. Where there is a serious doubt whether an order of the Interstate

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87 47 Sup. Ct. 724 (1927).
Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power. If, as the railroad believed, the federal commission intended to include the intrastate Arkansas rates within its order, it should have taken action, through appropriate application, to remove the doubt by securing an expression by that commission of the intention so to do.

Laurence, et al., Corporation Commissioners of Oklahoma v. St. Louis Railway Co.,\(^8\) dealt with the provisions of the Oklahoma Statutes\(^9\) against the removal of railroad shops without the consent of the state commission. The to-be-abandoned town, Salupa, appealed to the State Commission, and the railroad filed suit in the local Federal Court asking that the State Commission be "enjoined from compelling the railroad to submit to (its) jurisdiction in the matter." The District Court of three judges duly enjoined, but delivered no opinion. Their decree was reversed. Says Mr. Justice Brandeis:

"The decree disregards the requirement of section 19 of the Act of October 15, 1914, c. 323, 38 Stat. 730, 738 (United States Code of laws, Title 28, §383, p. 909; Comp. St. §1243c). 'That every order of injunction . . . shall set forth the reasons for the issuance of the same, shall be specific in terms. . . .' It does not declare that the Oklahoma statute is unconstitutional, nor does it state any other reason why the action enjoined is a violation of plaintiff's rights. It does not recite, even in general terms, that there is danger of irreparable loss. It sets forth no fact from which such danger can be inferred. It recites merely that the case was submitted on affidavits and that . . . 'the temporary injunction prayed for . . . should be . . . granted.'

"Although proper practice demands that the provision thus prescribed by Congress be scrupulously observed, disregard of the statutory requirement concerning the form of the order did not render the interlocutory decree void. Drugan v. Anderson, 269 U. S. 36, 40 (1925). It must, however, be reversed, because the verified bill and the affidavits fail to supply that evidence of danger of irreparable injury

\(^{8}\) 47 Sup. Ct. 720 (1927).
\(^{9}\) Okla. Rev. Laws (1921), §§ 3482-85.
to plaintiff which is essential to justify issuance of a tem-
porary injunction.

"We have no occasion to determine whether the Okla-
homa act is obnoxious to the Federal Constitution. But
as bearing upon the propriety of issuing the temporary in-
junction the fact is important that the controversy con-
cerns the respective powers of the nation and of the states
over railroads engaged in interstate commerce. Such rail-
roads 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 authori-
ties 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.
It was said in Western & Atlantic R. R. v. Georgia Public
Service Commission, 267 U. S. 493, 496 (1925), 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 de-
termine whether the change could or should be made may
rest with the federal commission. And it was there said
that the 'action of the company in discontinuing the service
without a petition' to the state body was 'arbitrary and de-
fiant.' Compare Henderson Water Co. v. Corporation
Commission, 269 U. S. 278 (1925). 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 appli-
cation for a preliminary injunction, the act should lightly
be assumed to be beyond the power of the state.

"The purpose of Congress . . . was . . . in part to
insure deliberation and thus minimize the chances of error.
It was in part to allay the irritation naturally incident to
the interference by injunction with the action of the state
government . . . The importance of an opinion to litig-
ants and to this court in cases of this character was pointed
out in Virginian Ry. v. U. S., 272 U. S. 658 (1926). The
importance is even greater where the decree enjoins the
enforcement of a state law or the action of state officials
thereunder. For then the respect due to the state demands
that the need for nullifying . . . be persuasively shown."
In the matter of modification of the existing fabric of railways the Act of 1920 gives the Commerce Commission a zealous guardianship both as to its financial aspects and as to those which are of its physical appurtenances. Its control of the dropping of traffic or of rail lines has been considered. Its hand in the construction of new lines is no less firm and there are frequent recent cases.

In *Alabama and Vicksburg Railway Company v. Jackson and Eastern Railway Company*, the Jackson and Eastern, a Mississippi corporation engaged in Mississippi in commerce both interstate and intrastate, began eminent domain proceedings in the Mississippi courts in order to secure a connection with the other road similarly organized and engaged. A protesting road, the Alabama and Vicksburg, urged that the state jurisdiction did not cover the case and that the Interstate Commerce Commission had exclusive jurisdiction over the establishment of junctions between roads engaged in interstate commerce. The Mississippi Court replied that Congress had not taken full control and that the state law did not interfere with interstate commerce to any appreciable degree. It refused to enjoin the proceedings. Reversing this, Mr. Justice Brandeis for the Court, sketched the history of the physical connection and of the swing into the hands of the Commerce Commission of its control, saying:

"In *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287 (1900), this court sustained an order of a state commission which, at the instance of shippers, had directed two railroads of the state engaged in interstate and intrastate commerce to provide a physical connection between their lines. The state commission had found that the connection

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90 Ante, p. 401.
91 271 U. S. 244 (1926). The case is noted in (1927) II MINN. L. REV. 164.
92 The Jackson and Eastern Road had secured a certificate of utility, the Interstate Commerce Commission authorizing the extension of its line from Seabastopol, Miss., into Jackson in that state. It had also asked for an order on the Alabama and Vicksburg for a connection at Curran, and the joint use of its main line into Jackson, but withdrew the request and started the proceedings in the state court.
93 136 Miss. 726, 101 So. 553 (1924).
was required for intrastate commerce; and this court concluded that the connection ordered could not prejudice interstate commerce. Since then the authority of the Interstate Commerce Commission has been greatly enlarged and the power of the states over interstate carriers correspondingly restricted. Prominent among the enlarged powers of the Federal Commission is the control conferred over construction and equipment of railroads, over their use by other carriers and, generally, over the relation of carriers to one another. While none of the amendments in specific terms confer upon the Commission exclusive power over physical connections between railroads engaged in interstate commerce, it is clear that the comprehensive powers conferred extend to junctions between main lines like those here in question. . . . It was not until Transportation Act, 1920, chap. 91, 41 Stat. at L. 456, Comp. Stat. §10071/2, Fed. Stat. Anno. Supp. 1920, p. 72 conferred upon the Commission additional authority, that it acquired full power over connections between interstate carriers. By §§18-20 added to §1, it vested in the Commission power to authorize constructions or extensions of lines, although the railroad is located wholly within one state; and by §21 authorized the Commission to require the carrier 'to extend its line or lines.' By §4 of §3 it empowered the Commission to require one such carrier to permit another to use its terminal facilities 'including main-line track or tracks for a reasonable distance outside of such terminal.'

"The only limitation set by Transportation Act, 1920, upon the broad powers conferred upon the Commission

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84 He recites also: "The Act to Regulate Commerce, February 4, 1887, chap. 104, 24 Stat. at L. 379, Comp. Stat., § 8565, 4 Fed. Stat. Anno. 2d ed. p. 379, provided by what is now paragraph 3 of § 3, that carriers shall "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines"; but it did not confer upon the Commission authority to permit and to require the construction of the physical connection needed to effectuate such interchange. Paragraph 9 of §1, introduced by Act of June 18, 1910, chap. 309, § 7, 36 Stat. at L. 539, 544, Comp. Stat., § 8563 4 Fed. Stat. Anno. 2d ed. p. 337, required a carrier engaged in interstate commerce to construct a switch connection "upon application of any lateral, branch line" and empowered the Commission to enforce the duty; but that provision was held applicable only to a line already constituting a lateral branch road. United States v. Baltimore & Ohio S. W. R. Co., 226 U. S. 14 (1921). The Act of August 24, 1912, chap. 390, § 11, 37 Stat. at L. 560, 568, Comp. State., § 8569, 4 Fed. Stat. Anno. 2d ed. p. 426, amending § 6 of the Act to Regulate Commerce, empowered the Commission to require railroads to establish physical connection between their lines and the docks of water carriers; but the provision did not extend to connections between two rail lines."
over the construction, extension, and abandonment of the lines of carriers in interstate commerce, is that introduced as § 22 of §1, which excludes from its jurisdiction "spur, industrial, team, switching or side tracks, located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." It is clear that the connection here in question is not a track of this character. Compare Texas & P. R. Co. v. Gulf, C. & S. F. Co., 270 U. S. 266 (1926). The proposed junction is between the main lines of the two railroads. The point of junction is on the main line of the Alabama and Vicksburg, near its entrance into the city of Jackson. In support of the objection that a junction there would be dangerous, it was shown that the connection would be between two trestles, near a highway crossing, on a curve, on a fill, and within the flood area of Pearl River. The establishment of the junction at that point would, if the objection is well founded, obviously imperil interstate commerce. The fact that it may do so, shows that the jurisdiction of the Commission over such connections must be exclusive, if the duty imposed upon it to develop and control an adequate system of interstate rail transportation is to be effectively performed. Moreover, the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the Commission has exclusive jurisdiction."

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Texas and P. R. Co. v. Gulf etc. R. Co., 270 U. S. 266 (1926), was a suit by the Texas and Pacific to enjoin construction by the other road of the "Hale-Cement Line" which would operate to divert traffic away from the objecting company which argued that the work could not go forward without the certificate of the Commerce Commission, which had not been secured. With this argument the Supreme Court agreed, holding that the 7½-mile line into new territory was an "extension."

Much of the case is given over to the question whether or not the decision that the line is an extension is not an administrative question. Mr. Justice McReynolds assented on the ground that it was and should go first to the Interstate Commerce Commission under the doctrine of the Abiline Cotton Oil Case, 204 U. S. 426 (1907), which held that where reparation is sought on the theory that rates charged were unreasonable the question of reasonableness cannot be gone into by the court, but must first be decided by the commission. Under it a guardianship of uniformity with respect to "fact" has been committed to the Commission, as explained in Gt. Northern Ry. Co. v. Merchants Elevator Co., 239 U. S. 293 (1922).
State of Missouri ex rel. Wabash Railroad Company v. Public Service Commission involved an elaborate scheme for dealing with grade crossings, in the city of St. Louis, as to which the road and the city were at odds on method. The Commission made an order based on the city's plan, and the railroad sued to enjoin its enforcement, objecting that the "indirect adoption of the city's program calling for partial abandonment and relocation of tracks is invalid as violating" the requirement of an Interstate Commerce Commission certificate. In the State Supreme Court the order stood. The Federal Supreme Court reversed on other grounds.

Mr. Justice Stone for the Court said:

"While the Federal questions thus raised, so far as they relate to the order now before us, are not difficult of solution, in view of the complexity of the facts to which the principles announced by this court are to be applied, we cannot say that these questions are so unsubstantial as to deprive us of jurisdiction to pass upon them and to make proper disposition of the case as it is now presented. Erie R. R. v. Public Util. Comm., 254 U. S. 394 (1921); Mo. Pac. Ry. v. Omaha, 235 U. S. 121 (1914); Denver & R. G. R. R. v. Denver, 250 U. S. 241 (1919); R. R. Comm. v. Southern Pac. Co., 264 U. S. 331 (1924). But we find it unnecessary to decide these questions because of the situation which has been created since the entry of the judgment below by the enactment of the Railroad Clearance Act. Laws of Missouri of 1925, pp. 323, 324. That statute provides that clearances over railroad tracks shall not be less than 22 feet, 'except in cases in which the Public Service Commission finds that such construction is impracticable.' The state commission directed that the clearance at Delmar Boulevard crossing be 18 feet, but it made no finding that the construction of a 22-foot clearance is impracticable. There is thus presented a question of state law; the effect of this statute upon the commission's order, the judgment of the state Supreme Court, and upon action taken pursuant to them.

"Ordinarily this court on writ of error to a state court considers only federal questions and does not review questions of state law. . . . But where questions of state

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96 273 U. S. 126 (1927).
law arising after the decision below are presented here, our appellate powers are not thus restricted. Either because new facts have supervened since the judgment below . . . or because of a change in the law . . . this court in the exercise of its appellate jurisdiction, may consider the state questions thus arising and either decide them (Steamship Co. v. Joliffe, 2 Wall. 450 [1864]), or remand the cause for appropriate action by the state courts (Gulf, Col. & S. F. Ry. v. Dennis, 224 U. S. 503 [1912]; Dorchy v. Kansas, 264 U. S. 286 [1924]). The meaning and effect of the state's statute now in question are primarily for the determination of the state court. While this court may decide these questions, it is not obliged to do so, and in view of its nature, we deem it appropriate to refer the determination to the state court."

The readings by the lesser Federal courts of these cases show a complete appreciation of the policy of unity. In Southern Railway Co. v. Shealy et al., Constituting the Railroad Commission of South Carolina, the District Court of South Carolina, of three judges, enjoined the enforcement of the state commission's order directing the railway company to switch, receive and deliver over side tracks at Union, South Carolina, carload freight tendered by a twenty-mile line whose existing arrangements at Union were unsatisfactory to it. After a valuable discussion of the whole topic the court said:

"Two very recent decisions of the Supreme Court of the United States are in point and appear to us to clear up and settle beyond controversy the question at issue. In Alabama and Virginia Railroad Company v. Jackson and E. R. Co., 271 U. S. 244 (1926), it was held that the jurisdiction to determine whether a junction may be established between main lines of two railroads, both engaged in interstate commerce as well as in local commerce, is exclusively in the Interstate Commerce Commission" (etc.).

The latest case is that of United States and Interstate Commerce Commission v. New York Central Railroad Company. While the case involved the right to require the railroad com-

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97 18 F. (2d) 784 (D. C. S. C., 1927).
98 272 U. S. 457 (1926).
pany to provide transportation service between the public terminals of the Erie Barge Canal at Buffalo and shippers located along its tracks and along the lines of other railroads, with which it could interchange traffic, and the placing and removal of cars on the tracks within its terminals, the general provisions of the Transportation Act were invoked. The conclusion of the court was summed up as follows:

"The Commission having jurisdiction over the carriers and the facilities by which the transportation is carried on, the question is narrowed to whether its jurisdiction extends to the entire current of commerce flowing through this terminal although intrastate in part. When we consider the nature and extent of the commingling of interstate and intrastate commerce, and the difficulty of segregating the freight passing through the terminal, we think it clear that Congress in employing such broad language as 'the Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated' intended to confer upon the Commission power to regulate the entire stream of commerce. Where as here interstate and intrastate transactions are interwoven, the regulation of the latter is so incidental to and inseparable from the regulation of the former as properly to be deemed included in the authority over interstate commerce conferred by statute. This was the view of the state court. People ex rel. New York Central R. Co. v. Public Service Commission, supra, 198 App. Div. 436, 191 N. Y. S. 636, affirmed without opinion in 232 N. Y. 600 (132 N. E. 904). An interpretation of the statute which would in practice require the segregation of all shipments in interstate commerce would make compliance with the Commission's orders impossible and defeat the purpose of the act.

"In the instant case the order of the state Commission was comprehensive, including traffic of all kinds. No attempt was made to distinguish between intrastate and interstate commerce and under the authority last above cited, because of the intermingling of interstate and intrastate transactions, if the order be construed as applicable only to the latter, its regulation is so incidental to and inseparable from the regulation of the former as to bring the entire subject within the exclusive jurisdiction of the Interstate Commerce Commission."
The reading by the state courts is so far conformable that in the Barge Canal Case just referred to both the inferior and the ultimate New York courts were agreed in checking the state commission and in vacating its order.

The Illinois Supreme Court has gone farther than did the Federal Court in Texas and New Orleans Belt Line v. North Side Belt Railway Company, in recognition of the jurisdiction of the Interstate Commerce Commission, accepting as did that Commission itself in issuing its certificate at the time it did that the proposed construction of the road whereon interstate carriage was intended to be conducted when the road was built, presented a proper exercise of the Interstate Commerce Commission's jurisdiction. It held that a suit in the state court to enjoin the construction was in effect an attack upon the commission's certificate and consequently dismissed it.

On the whole it seems a clearly appropriate remark, in conclusion, to say that, since the Federal Government is in a meas-

9 Supra note 98.
101 Supra p. 402.
102 "The Interstate Commerce Commission authorized one of the appellees to build a railroad in this state and the other to acquire and operate it. Although the orders are permissive, the appellees have the right, under the provisions of the Interstate Commerce Act above set forth, to do the things specified in the Commission's orders. The instant suit is essentially one to annul or set aside those orders, and the superior court was without jurisdiction to entertain it. Wanting jurisdiction, the cause could not be determined upon its merits." It relied upon Venner v. Mich. Cent. R. R., 271 U. S. 127 (1926).

In St. Louis Connecting Railroad Company v. Blumberg et al., 156 N. E. 298 (1927), Blumberg sought to restrain the exercise upon his property of eminent domain proceedings for right of way for a connecting link road. Roy v. (Illinois) Commerce Commission, 322 Ill. 452, 153 N. E. 648 (1926), was relied upon as on "all fours" and it resulted in victory for the plaintiff because the court disagreed with the commission's judgment as to necessity for the new link. The court admitted that "The facts in the Roy Case are very similar to those of the present case, with, however, an important distinction, appellant's right of way is sought for use in interstate commerce and it has obtained from the Interstate Commerce Commission a certificate of necessity and convenience and an order of that body authorizing it to issue bonds, construct the road (etc.). The vital question is, therefore, what effect must be given in the state courts to the certificate and order.

It answered the objection by considering that the question of whether the property was taken for a public use was settled by the commission's order based on a finding of public use and convenience, so far as the state court was concerned.
ure the judge of its own case as between itself and the states, its field of control will continue to be extended by its legislature and its legislation will be accepted by its courts. Regulation is an established thing and the same impulse which establishes it will insist upon its authoritativeness. The logic of the situation, more than the mere urge to Federal aggrandizement, is what is driving the states out of areas they once occupied and in which indeed the Constitution seems to have imbedded them. But circumstances alter constitution readings as well as cases.