

F. C. FISHER, PLAINTIFF, VS. YANGCO STEAMSHIP COMPANY, J. S. STANLEY, AS ACTING COLLECTOR OF CUSTOMS OF THE PHILIPPINE ISLANDS, IGNACIO VILLAMOE, AS ATTORNEY-GENERAL OF THE PHIL...*G.R. No. 8095. November 05, 1914*

Ponente: CARSON, J.

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The real question involved in these proceedings is whether the refusal of the owners and officers of a steam vessel, duly licensed to engage in the coastwise trade of the Philippine Islands and engaged in that trade as a common carrier, to accept for carriage "dynamite, powder or other explosives" from any and all shippers who may offer such explosives for carriage can be held to be a lawful act without regard to any question as to the conditions under which such explosives are offered for carriage, or as to the suitability of the vessel for the transportation of such explosives, or as to the possibility that the refusal to accept such articles of commerce in a particular case may have the effect of subjecting any person or locality or the traffic in such explosives to an undue, unreasonable or unnecessary prejudice or discrimination.

Summarized briefly, the complaint alleges that plaintiff is a stockholder in the Yangco Steamship Company, the owner of a large number of steam vessels, duly licensed to engage in the coastwise trade of the Philippine Islands; that on or about June 10, 1912, the directors of the company adopted a resolution which was thereafter ratified and affirmed by the shareholders of the company, "expressly declaring and providing that the classes of merchandise to be carried by the company in its business as a common carrier do not include dynamite, powder or other explosives, and expressly prohibiting the officers, agents and servants of the company from offering to carry, accepting for carriage or carrying said dynamite, powder or other explosives;" that thereafter the respondent Acting Collector of Customs demanded and required of the company the acceptance and carriage of such explosives; that he has refused and suspended the issuance of the necessary clearance documents of the vessels of the company unless and until the company consents to accept such explosives for carriage; that plaintiff is advised and believes that should the company decline to accept such explosives for carriage, the respondent Attorney-General of the Philippine Islands and the respondent prosecuting attorney of the city of Manila intend to institute proceedings under the penal provisions of sections 4, 5, and 6 of Act No. 98 of the Philippine Commission against the company, its managers, agents and servants, to enforce the requirements of the Acting Collector of Customs as to the acceptance of such explosives for carriage; that notwithstanding the demands of the plaintiff stockholder, the manager, agents and servants of the company decline and refuse to cease the carriage of such explosives, on the ground that by reason of the severity of the penalties with which they are threatened upon failure to carry such explosives, they cannot subject themselves to "the ruinous consequences which would inevitably result" from failure on their part to obey the demands and requirements of the Acting Collector of Customs as to the acceptance for carriage of explosives; that plaintiff believes that the Acting Collector of Customs erroneously construes the provisions of Act No. 98 in holding that they require the company to accept

such explosives for carriage notwithstanding the above mentioned resolution of the directors and stockholders of the company, and that if the Act does in fact require the company to carry such explosives it is to that extent unconstitutional and void; that notwithstanding this belief of complainant as to the true meaning of the Act, the questions involved cannot be raised by the refusal of the company or its agents to comply with the demands of the Acting Collector of Customs, without the risk of irreparable loss and damage resulting from his refusal to facilitate the documentation of the company's vessels, and without assuming a risk of pains and penalties under the drastic provisions of the Act which prohibit any attempt on the part of the company to test the questions involved by refusing to accept such explosives for carriage.

The prayer of the complaint is as follows:

"Wherefore your petitioner prays to this honorable court as follows:

"First. That to the due hearing of the above entitled action be issued a writ of prohibition perpetually restraining the respondent Yangco Steamship Company, its appraisers, agents, servants or other representatives from accepting to carry and from carrying, in steamers of said company dynamite, powder or other explosive substance, in accordance with the resolution of the board of directors and of the shareholders of said company.

"Second. That a writ of prohibition be issued perpetually enjoining the respondent J. S. Stanley as Acting Collector of Customs of the Philippine Islands, his successors, deputies, servants or other representatives, from obligating the said Yangco Steamship Company, by any means whatever, to carry dynamite, powder or other explosive substance.

"Third. That a writ of prohibition be issued perpetually enjoining the respondent Ignacio Villamor as Attorney-General of the Philippine Islands, and W. H. Bishop as prosecuting attorney of the city of Manila, their deputies, representatives or employees, from accusing the said Yangco Steamship Company, its officers, agents or servants, of the violation of Act No. 98 by reason of the failure or omission of the said company to accept for carriage or to carry dynamite, powder or other explosive.

"Fourth. That the petitioner be granted such other remedy as may be meet and proper."

To this complaint the respondents demurred, and we are of opinion that the demurrer must be sustained, on the ground that the complaint does not set forth facts sufficient to constitute a cause of action.

It will readily be seen that plaintiff seeks in these proceedings to enjoin the steamship company from accepting for carriage on any of its vessels, dynamite, powder or other explosives, under any conditions whatsoever; to prohibit the Collector of Customs and the prosecuting officers of the government from all attempts to compel the company to accept such explosives for carriage on any of its vessels under any conditions whatsoever; and to prohibit these officials from any attempt to invoke the penal provisions of Act No. 98, in any case of a refusal by the company or its officers so to do; and this without regard to the conditions as to safety and so forth under which such explosives are offered for carriage, and without regard also to any question as to the suitability for the transportation of such explosives of the particular vessel upon which the shipper offers them for carriage; and further without regard to any question as to whether such conduct on the part of the steamship company and its officers involves in any instance an undue, unnecessary or unreasonable discrimination to the prejudice of any person, locality or particular kind of traffic.

There are no allegations in the complaint that for some special and sufficient reasons all or indeed any of the company's vessels are unsuitable for the business of transporting explosives; or that shippers have declined or will in future decline to comply with such reasonable regulations and to take such reasonable precautions as may be necessary and proper to secure the 'safety of the vessels of the company in transporting such explosives. Indeed the contention of petitioner is that a common carrier in the Philippine Islands may decline to accept for carriage

any shipment of merchandise of a class which it expressly or impliedly declines to accept from all shippers alike, because, as he contends "the duty of a common carrier to carry for all who offer arises from the public profession he has made, and is limited by it."

In support of this contention counsel cites a number of English and American authorities, discussing and applying the doctrine of the common law with reference to common carriers. But it is unnecessary now to decide whether, in the absence of statute, the principles on which the American and English cases were decided would be applicable in this jurisdiction. The duties and liabilities of common carriers in this jurisdiction are defined and fully set forth in Act No. 98 of the Philippine Commission, and, until and unless that statute be declared invalid or unconstitutional, we are bound by its provisions.

Sections 2, 3 and 4 of the Act are as follows:

"SEC. 2. It shall be unlawful for any common carrier engaged in the transportation of passengers or property as above set forth to make or give any unnecessary or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular kind of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular kind of traffic, to any undue or unreasonable prejudice or discrimination whatsoever, and such unjust preference or discrimination is also hereby prohibited and declared to be unlawful.

"SEC. 3. No common carrier engaged in the carriage of passengers or property as aforesaid shall, under any pretense whatsoever, fail or refuse to receive for carriage, and as promptly as it is able to do so without discrimination, to carry any person or property offering for carriage, and in the order in which such persons or property are offered for carriage, nor shall any such common carrier enter into any arrangement, contract or agreement with any other person or corporation whereby the latter is given an exclusive or preferential privilege over any other person or persons to control or monopolize the carriage of any class or kind of property to the exclusion or partial exclusion of any other person or persons, and the entering into any such arrangement, contract or agreement, under any form or pretense whatsoever, is hereby prohibited and declared to be unlawful.

"SEC. 4. Any willful violation of the provisions of this Act by any common carrier engaged in the transportation of passengers or property as hereinbefore set forth is hereby declared to be punishable by a fine not exceeding five thousand dollars money of the United States, or by imprisonment not exceeding two years, or both, within the discretion of the court."

The validity of this Act has been questioned on various grounds, and it is vigorously contended that in so far as it imposes any obligation on a common carrier to accept for carriage merchandise of a class which he makes no public profession to carry, or which he has expressly or impliedly announced his intention to decline to accept for carriage from all shippers alike, it is ultra vires, unconstitutional and void.

We may dismiss without extended discussion any argument or contention as to the invalidity of the statute based on alleged absurdities inherent in its provisions or on alleged unreasonable or impossible requirements which may be read into it by a strained construction of its terms.

We agree with counsel for petitioner that the provision of the Act which prescribes that, "No common carrier * * * shall, under any pretense whatsoever, fail or refuse to receive for carriage, and * * * to carry any person or property offering for carriage," is not to be construed in its literal sense and without regard to the context, so as to impose an imperative duty on all common carriers to accept for carriage, and to carry all and any kind of freight which may be offered for carriage without regard to the facilities which they may have at their disposal. The legislator could not have intended and did not intend to prescribe that a common carrier running passenger automobiles for hire must transport coal in his machines; nor that the owner of a tank steamer, expressly

constructed in small watertight compartments for the carriage of crude oil must accept a load of cattle or of logs in the rough; nor that any common carrier must accept and carry contraband articles, such as opium, morphine, cocaine, or the like, the mere possession of which is declared to be a criminal offense; nor that common carriers must accept eggs offered for transportation in paper parcels or any merchandise whatever so defectively packed as to entail upon the company unreasonable and unnecessary care or risks.

Read in connection with its context this, as well as all the other mandatory and prohibitory provisions of the statute, was clearly intended merely to forbid failures or refusals to receive persons or property for carriage involving any "unnecessary or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular kind of traffic in any respect whatsoever," or which would "subject any particular person, company, firm, corporation or locality, or any particular kind of traffic to any undue or unreasonable prejudice or discrimination whatsoever."

The question, then, of construing and applying the statute, in cases of alleged violations of its provisions, always involves a consideration as to whether the acts complained of had the effect of making or giving an "unreasonable or unnecessary preference or advantage" to any person, locality or particular kind of traffic, or of subjecting any person, locality, or particular kind of traffic to any undue or unreasonable prejudice or discrimination. It is very clear therefore that the language of the statute itself refutes any contention as to its invalidity based on the alleged unreasonableness of its mandatory or prohibitory provisions.

So also we may dismiss without much discussion the contentions as to the invalidity of the statute, which are based on the alleged excessive severity of the penalties prescribed for violation of its provisions. Upon general principles it is peculiarly and exclusively within the province of the legislator to prescribe the pains and penalties which may be imposed upon persons convicted of violations of the laws in force within his territorial jurisdiction. With the exercise of his discretion in this regard the courts have nothing to do, save only in cases where it is alleged that excessive fines or cruel and unusual punishments have been prescribed, and even in such cases the courts will not presume to interfere in the absence of the clearest and most convincing argument and proof in support of such contentions. (*Weems vs. United States*, 217 U. S., 349; *U. S. vs. Pico*, 18 Phil. Rep., 386.) We need hardly add that there is no ground upon which to rest a contention that the penalties prescribed in the statute under consideration are either excessive or cruel and unusual, in the sense in which these terms are used in the organic legislation in force in the Philippine Islands.

But it is contended that on account of the penalties prescribed the statute should be held invalid upon the principles announced in *Ex parte Young* (209 U. S., 123, 147, 148) ; *Cotting vs. Godard* (183 U. S., 79, 102) ; *Mercantile Trust Co. vs. Texas Co.* (5.1 Fed., 529) ; *Louisville Ry. vs. McCord* (103 Fed., 216) ; *Cons. Gas Co. vs. Mayer* (416 Fed., 150). We are satisfied however that the reasoning of those cases is not applicable to the statute under consideration. The principles announced in those decisions are fairly indicated in the following citations found in petitioner's brief:

"But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws. (*Cotting vs. Godard*, 183 U. S., 79, 102.)

"It may therefore be said that when the penalties for dis-obedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

"It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute

at least once, for the purpose of testing its validity, without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event.

"We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates. (Ex parte Young, 209 U. S., 123, 147, 148.)"

An examination of the general provisions of our statute, of the circumstances under which it was enacted, the mischief which it sought to remedy and of the nature of the penalties prescribed for violations of its terms convinces us that, unlike the statutes under consideration in the above cited cases, its enactment involved no attempt to prevent common carriers "from resorting to the courts to test the validity of the legislation;" no "effort to prevent any inquiry" as to its validity. It imposes no arbitrary obligation upon the company to do or to refrain from doing anything. It makes no attempt to compel such carriers to do business at a fixed or arbitrarily designated rate, at the risk of separate criminal prosecutions for every demand of a higher or a different rate. Its penalties can be imposed only upon proof of "unreasonable," "unnecessary" and "unjust" discriminations, and range from a maximum which is certainly not excessive for willful, deliberate and contumacious violations of its provisions by a great and powerful corporation, to a minimum which may be a merely nominal fine. With so wide a range of discretion conferred upon the courts, there is no substantial basis for a contention on the part of any common carrier that it or its officers are "intimidated from resorting to the courts to test the validity" of the provisions of the statute prohibiting such "unreasonable," "unnecessary" and "unjust" discriminations, or to test in any particular case whether a given course of conduct does in fact involve such discrimination. We will not presume, for the purpose of declaring the statute invalid, that there is so real a danger that the Courts of First Instance and this court on appeal will abuse the discretion thus conferred upon us, as to intimidate any common carrier, acting in good faith, from resorting to the courts to test the validity of the statute. Legislative enactments, penalizing unreasonable discriminations, unreasonable restraints of trade, and unreasonable conduct in various forms of human activity are so familiar and have been so frequently sustained in the courts, as to render extended discussion unnecessary to refute any contention as to the invalidity of the statute under consideration, merely because it imposes upon the carrier the obligation of adopting one of various courses of conduct open to it, at the risk of incurring a prescribed penalty in the event that the course of conduct actually adopted by it should be held to have involved an unreasonable, unnecessary or unjust discrimination. Applying the test announced in *Ex parte Young*, supra, it will be seen that the validity of the Act does not depend upon "the existence of a fact which can be determined only after investigation of a very complicated and technical character," and that "the jurisdiction of the legislature" over the subject with which the statute deals "is complete in any event." There can be no real question as to the plenary power of the legislature to prohibit and to penalize the making of undue, unreasonable

and unjust discriminations by common carriers to the prejudice of any person, locality or particular kind of traffic. (See *Munn vs. Illinois*, 94 U. S., 113, and other cases hereinafter cited in support of this proposition.)

Counsel for petitioner contends also that the statute, if construed so as to deny the right of the steamship company to elect at will whether or not it will engage in a particular business, such as that of carrying explosives, is unconstitutional "because it is a confiscation of property, a taking of the carrier's property without due process of law," and because it deprives him of his liberty by compelling him to engage in business against his will. The argument continues as follows:

"To require of a carrier, as a condition to his continuing in said business, that he must carry anything and everything is to render useless the facilities he may have for the carriage of certain lines of freight. It would be almost as complete a confiscation of such facilities as if the same were destroyed. Their value as a means of livelihood would be utterly taken away. The law is a prohibition to him to continue in business; the alternative is to get out or to go into some other business—the same alternative as was offered in the case of the *Chicago & N. W. Ry. vs. Dey* (35 Fed. Rep., 866, 880), and which was there commented on as follows:

" 'Whatever of force there may be in such arguments, as applied to mere personal property capable of removal and use elsewhere, or in other business, it is wholly without force as against railroad corporations, so large a proportion of whose investment is in the soil and fixtures appertaining thereto, which cannot be removed. For a government, whether that government be a single sovereign or one of the majority, to say to an individual who has invested his means in so laudable an enterprise as the construction of a railroad, one which tends so much to the wealth and prosperity of the community, that, if he finds that the rates imposed will cause him to do business at a loss, he may quit business, and abandon that road, is the very irony of despotism. Apples of Sodom were fruit of joy in comparison. Reading, as I do, in the preamble of the Federal Constitution, that it was ordained to "establish justice," I can never believe that it is within the power of state or nation thus practically to confiscate the property of an individual invested in and used for a purpose in which even the Argus eyes of the police power can see nothing injurious to public morals, public health, or the general welfare. I read also in the first section of the bill of rights of this state that "all men are by nature free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness;" and I know that, while that remains as the supreme law of the state, no legislature can directly or indirectly lay its withering or destroying hand on a single dollar invested in the legitimate business of transportation.' " (*Chicago & N. W. Ry. vs. Dey*, 35 Fed. Rep., 866, 880.)

It is manifest, however, that this contention is directed against a construction of the statute, which, as we have said, is not warranted by its terms. As we have already indicated, the statute does not "require of a carrier, as a condition to his continuing in said business, that he must carry anything and everything," and thereby "render useless the facilities he may have for the carriage of certain lines of freight." It merely forbids failures or refusals to receive persons or property for carriage which have the effect of giving an "unreasonable or unnecessary preference or advantage" to any person, locality or particular kind of traffic, or of subjecting any person, locality or particular kind of traffic to any undue or unreasonable prejudice or discrimination.

Counsel expressly admits that the statute, "as a prohibition against discrimination is a fair, reasonable and valid exercise of government," and that "it is necessary and proper that such discrimination be prohibited and prevented," but he contends that "on the other hand there is no reasonable warrant nor valid excuse for depriving a person of his liberty by requiring him to engage in business against his will. If he has a rolling boat, unsuitable and unprofitable for passenger trade, he may devote it to lumber carrying. To prohibit him from using it unless it is fitted out with doctors and stewards and staterooms to carry passengers would be an invalid confiscation of his property. A carrier may limit his business to the branches thereof that suit his convenience. If his wagon be old, or

the route dangerous, he may avoid liability for loss of passengers' lives and limbs by carrying freight only. If his vehicles require expensive pneumatic tires, unsuitable for freight transportation, he may nevertheless carry passengers. The only limitation upon his action that it is competent for the governing authority to impose is to require him to treat all alike. His limitations must apply to all, and they must be established limitations. He cannot refuse to carry a case of red jusi on the ground that he has carried for others only jusi that was green, or blue, or black. But he can refuse to carry red jusi, if he has publicly professed such a limitation upon his business and held himself out as unwilling to carry the same for anyone."

To this it is sufficient answer to say that there is nothing in the statute which would deprive any person of his liberty "by requiring him to engage in business against his will." The prohibitions of the statute against undue, unnecessary or unreasonable preferences and discriminations are merely the reasonable regulations which the legislator has seen fit to prescribe (for the conduct of the business in which the carrier is engaged of his own free will and accord. In so far as the self-imposed limitations by the carrier upon the business conducted by him, in the various examples given by counsel, do not involve an unreasonable or unnecessary discrimination the statute would not control his action in any wise whatever. It operates only in cases involving such unreasonable or unnecessary preferences or discriminations. Thus in the hypothetical case suggested by the petitioner, a carrier engaged in the carriage of green, blue or black jusi, and duly equipped therefor would manifestly be guilty of "giving an unnecessary and unreasonable preference to a particular kind of traffic" and of subjecting to "an undue and unreasonable prejudice a particular kind of traffic," should he decline to carry red jusi, to the prejudice of a particular shipper or of those engaged in the manufacture of that kind of jusi, basing his refusal on the ground of "mere whim or caprice" or of mere personal convenience. So a public carrier of passengers would not be permitted under this statute to absolve himself from liability for a refusal to carry a Chinaman, a Spaniard, an American, a Filipino, or a mestizo by proof that from "mere whim or caprice or personal scruple," or to suit his own convenience, or in the hope of increasing his business and thus making larger profits, he had publicly announced his intention not to carry one or other of these classes of passengers.

The nature of the business of a common carrier as a public employment is such that it is clearly within the power of the state to impose such just and reasonable regulations thereon in the interest of the public as the legislator' may deem proper. Of course such regulations must not have the effect of depriving an owner of his property without due process of law, nor of confiscating or appropriating private property without just compensation, nor of limiting or prescribing irrevocably vested rights or privileges lawfully acquired under a charter or franchise. But aside from such constitutional limitations, the determination of the nature and extent of the regulations which should be prescribed rests in the hands of the legislator.

Common carriers exercise a sort of public office', and have duties to perform in which the public is interested. Their business is, therefore, affected with a public interest, and is subject of public regulation. (New Jersey Steam Nav. Co. vs. Merchants Bank, 6 How., 344, 382; Munn vs. Illinois, 94 U. S., 113, 130.) Indeed, this right of regulation is so far beyond question that it is well settled that the power of the state to exercise legislative control over railroad companies and other carriers "in all respects necessary to protect the public against danger, injustice and oppression" may be exercised through boards of commissioners. (New York etc. R. Co. vs. Bristol, 151 U. S., 556, 571; Connecticut etc. R. Co. vs. Woodruff, 153 U. S., 689.)

Regulations limiting the number of passengers that may be carried in a particular vehicle or steam vessel, or forbidding the loading of a vessel beyond a certain point, or prescribing the number and qualifications of the personnel in the employ of a common carrier, or forbidding unjust discrimination as to rates, all tend to limit and restrict his liberty and to control to some degree the free exercise of his discretion in the conduct of his business. But since the Granger cases were decided by the Supreme Court of the United States no one questions the power

of the legislator to prescribe such reasonable regulations upon property clothed with a public interest as he may deem expedient or necessary to protect the public against danger, injustice or oppression. (*Munn vs. Illinois*, 94 U. S., 113, 130; *Chicago etc. R. Co. vs. Cutts*, 94 U. S., 155; *Budd vs. New York*, 143 U. S., 517; *Cotting vs. Godard*, 183 U. S., 79.) The right to enter the public employment as a common carrier and to offer one's services to the public for hire does not carry with it the right to conduct that business as one pleases, without regard to the interests of the public and free from such reasonable and just regulations as may be prescribed for the protection of the public from the reckless or careless indifference of the carrier as to the public welfare and for the prevention of unjust and unreasonable discrimination of any kind whatsoever in the performance of the carrier's duties as a servant of the public.

Business of certain kinds, including the business of a common carrier, holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation. (*Budd vs. New York*, 143 U. S., 517, 533.) When private property is "affected with a public interest it ceases to be *juris privati* only." Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to control." (*Munn vs. Illinois*, 94 U. S., 113; *Georgia R. & Bkg. Co. vs. Smith*, 128 U. S., 174; *Budd vs. New York*, 143 U. S., 517; *Louisville etc. Ry. Co. vs. Kentucky*, 161 U. S., 677, 695.)

Of course this power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freight the state can not require a railroad corporation to carry persons or property without reward. Nor can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. (*Chicago etc. R. Co. vs. Minnesota*, 134 U. S., 418; *Minneapolis Eastern R. Co. vs. Minnesota*, 134 U. S., 467.) But the judiciary ought not to interfere with regulations established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public, that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the regulation in question will have the effect to deny just compensation for private property taken for the public use. (*Chicago etc. R. Co. vs. Wellman*, 143 U. S., 339; *Smyth vs. Ames*, 169 U. S., 466, 524; *Henderson Bridge Co. vs. Henderson City*, 173 U. S., 592, 614.)

Under the common law of England it was early recognized that common carriers owe to the public the duty, of carrying indifferently for all who may employ them, and in the order in which application is made, and without discrimination as to terms. True, they were allowed to restrict their business so as to exclude particular classes of goods, but as to the kinds of property which the carrier was in the habit of carrying in the prosecution of his business he was bound to serve all customers alike (*State vs. Cincinnati etc. R. Co.*, 47 Ohio St., 130, 134, 138; *Louisville etc. Ry. Co. vs. Queen City Coal Co.*, 13 Ky. L. Rep., 832); and it is to be observed in passing that these common law rules are themselves regulations controlling, limiting and prescribing the conditions under which common carriers were permitted to conduct their business. (*Munn vs. Illinois*, 94 U. S., 113, 133.)

It was found, in the course of time, that the correction of abuses which had grown up with the enormously increasing business of common carriers necessitated the adoption of statutory regulations controlling the business of common carriers, and imposing severe and drastic penalties for violations of their terms. In England, the Railway Clauses Consolidation Act was enacted in 1845, the Railway and Canal Traffic Act in 1854, and since

the passage of those Acts much additional legislation has been adopted tending to limit and control the conduct of their business by common carriers. In the United States, the business of common carriers has been subjected to a great variety of statutory regulations. Among others Congress enacted "The Interstate Commerce Act" (1887) and its amendments, and the Elkins Act as amended (1906) ; and most if not all of the States of the Union have adopted similar legislation regulating the business of common carriers within their respective jurisdictions. Unending litigation has arisen under these statutes and their amendments, but nowhere has the right of the state to prescribe just and reasonable regulations controlling and limiting the conduct of the business of common carriers in the public interest and for the general welfare been successfully challenged, though of course there has been wide divergence of opinion as to the reasonableness, the validity and legality of many of the regulations actually adopted.

The power of the Philippine legislator to prohibit and to penalize all and any unnecessary or unreasonable dis-criminations by common carriers may be maintained upon the same reasoning which justified the enactment by the Parliament of England and the Congress of the United States of the above mentioned statutes prohibiting and penalizing the granting of certain preferences and dis-criminations in those countries. As we have said before, we find nothing confiscatory or unreasonable in the conditions imposed in the Philippine statute" upon the business of common carriers. Correctly construed they do not force him to engage in any business against his will or to make use of his facilities in a manner or for a purpose for which they are not reasonably adapted. It is only when he offers his facilities as a common carrier to the public for hire, that the statute steps in and prescribes that he must treat all alike, that he may not pick and choose which customer he will serve, and, specifically, that he shall not make any undue or unreasonable preferences or discriminations whatsoever to the prejudice not only of any person or locality but also of any particular kind of traffic.

The legislator having enacted a regulation prohibiting common carriers from giving unnecessary or unreasonable preferences or advantages to any particular kind of traffic or subjecting any particular kind of traffic to any undue or unreasonable prejudice or discrimination whatsoever, it is clear that whatever may have been the rule at the common law, common carriers in this jurisdiction cannot lawfully decline to accept a particular class of goods for carriage, to the prejudice of the traffic in those goods, unless it appears that for some sufficient reason the discrimination against the traffic in .such goods is reasonable and necessary. Mere whim or prejudice will not suffice. The grounds for the discrimination must be substantial ones, such as will justify the courts in holding the discrimination to have been reasonable and necessary under all the circumstances of the case.

The prayer of the petition in the case at bar cannot be granted unless we hold that the refusal of the defendant steamship company to accept for carriage on any of its vessels "dynamite, gunpowder or other explosives" would in no instance involve a violation of the provisions of this statute. There can be little doubt, however, that cases may and will arise wherein the refusal of a vessel "engaged in the coastwise trade of the Philippine Islands as a common carrier" to accept such explosives for carriage would subject some person, company, firm or corporation, or locality, or particular kind of traffic to a certain prejudice or dis-crimination. Indeed it cannot be doubted that the refusal of a "steamship company, the owner of a large number of vessels" engaged in that trade to receive for carriage any such explosives on any of its vessels would subject the traffic in such explosives to a manifest prejudice and discrimination. The only question to be determined therefore is whether such prejudice or discrimination might in any case prove to be undue, unnecessary or unreasonable.

This of course is, in each case, a question of fact, and we are of opinion that the facts alleged in the complaint are not sufficient to sustain a finding in favor of the contentions of the petitioner. It is not alleged in the complaint that "dynamite, gunpowder and other explosives" can in no event be transported with reasonable safety on board steam vessels engaged in the business of common carriers. It is not alleged that all, or indeed any of the defendant

steamship company's vessels are unsuited for the carriage of such explosives. It is not alleged that the nature of the business in which the steamship company is engaged is such, as to preclude a finding that a refusal to accept such explosives on any of its vessels would subject the traffic in such explosives to an undue and unreasonable prejudice and discrimination.

Plaintiff's contention in this regard is as follows:

"In the present case, the respondent company has expressly and publicly renounced the carriage of explosives, and expressly excluded the same in terms from the business it conducts. This in itself were sufficient, even though such exclusion of explosives were based on no other ground than the mere whim, caprice or personal scruple of the carrier. It is unnecessary, however, to indulge in academic discussion of a moot question, for the decision not to carry explosives rests on substantial grounds which are self-evident."

We think however that the answer to the question whether such a refusal to carry explosives involves an unnecessary or unreasonable preference or advantage to any person, locality or particular kind of traffic or subjects any person, locality or particular kind of traffic to an undue or unreasonable prejudice or discrimination is by no means "self-evident," and that it is a question of fact to be determined by the particular circumstances of each case.

The words "dynamite, powder or other explosives" are broad enough to include matches, and other articles of like nature, and may fairly be held to include also kerosene oil, gasoline and similar products of a highly inflammable and explosive character. Many of these articles of merchandise are in the nature of necessities in any country open to modern progress and advancement. We are not fully advised as to the methods of transportation by which they are made commercially available throughout the world, but certain it is that dynamite, gunpowder, matches, kerosene oil and gasoline are transported on many vessels sailing the high seas. Indeed it is matter of common knowledge that common carriers throughout the world transport enormous quantities of these explosives, on both land and sea, and there can be little doubt that a general refusal of the common carriers in any country to accept such explosives for carriage would involve many persons, firms and enterprises in utter ruin, and would disastrously affect the interests of the public and the general welfare of the community.

It would be going far to say that a refusal by a steam vessel engaged in the business of transporting general merchandise as a common carrier to accept for carriage a shipment of matches, solely on the ground of the dangers incident to the explosive quality of this class of merchandise, would not subject the traffic in matches to an unnecessary, undue or unreasonable prejudice or discrimination without proof that for some special reason the particular vessel is not fitted to carry articles of that nature. There may be and doubtless are some vessels engaged in business as common carriers of merchandise, which for lack of suitable deck space or storage rooms might be justified in declining to carry kerosene oil, gasoline, and similar products, even when offered for carriage securely packed in cases; and few vessels are equipped to transport those products in bulk. But in any case of a refusal to carry such products which would subject any person, locality or the traffic in such products to any prejudice or discrimination whatsoever, it would be necessary to hear evidence before making an affirmative finding that such prejudice or discrimination was or was not unnecessary, undue or unreasonable. The making of such a finding would involve a consideration of the suitability of the vessel for the transportation of such products; the reasonable possibility of danger or disaster resulting from their transportation in the form and under the conditions in which they are offered for carriage; the general nature of the business done by the carrier and, in a word, all the attendant circumstances which might affect the question of the reasonable necessity for the refusal by the carrier to undertake the transportation of this class of merchandise.

But it is contended that whatever the rule may be as to other explosives, the exceptional power and violence of dynamite and gunpowder in explosion will always furnish the owner of a vessel with a reasonable excuse for his

failure or refusal to accept them for carriage or to carry them on board his boat. We think however that even as to dynamite and gunpowder we would not be justified in making such a holding unaided by evidence sustaining the proposition that these articles can never be carried with reasonable safety on any vessel engaged in the business of a common carrier. It is said that dynamite is so erratic and uncontrollable in its action that it is impossible to assert that it can be handled with safety in any given case. On the other hand it is contended that while this may be true of some kinds of dynamite, it is a fact that dynamite can be and is manufactured so as to eliminate any real danger from explosion during transportation. These are of course questions of fact upon which we are not qualified to pass judgment without the assistance of expert witnesses who have made special studies as to the chemical composition and reactions of the different kinds of dynamite, or attained a thorough knowledge of its properties as a result of wide experience in its manufacture and transportation.

As we construe the Philippine statute, the mere fact that violent and destructive explosions can be obtained by the use of dynamite under certain conditions would not be sufficient in itself to justify the refusal of a vessel, duly licensed as a common carrier of merchandise, to accept it for carriage, if it can be proven that in the condition in which it is offered for carriage there is no real danger to the carrier, nor reasonable ground to fear that his vessel or those on board his vessel will be exposed to unnecessary and unreasonable risk in transporting it, having in mind the nature of his business as a common carrier engaged in the coastwise trade in the Philippine Islands, and his duty as a servant of the public engaged in a public employment. So also, if by the exercise of due diligence and the taking of reasonable precautions the danger of explosions can be practically eliminated, the carrier would not be justified in subjecting the traffic in this commodity to prejudice or discrimination by proof that there would be a possibility of danger from explosion when no such precautions are taken.

The traffic in dynamite, gunpowder and other explosives is vitally essential to the material and general welfare of the people of these Islands. If dynamite, gunpowder and other explosives are to continue in general use throughout the Philippines, they must be transported by water from port to port in the various islands which make up the Archipelago. We are satisfied therefore that the refusal by a particular vessel, engaged as a common carrier of merchandise in the coastwise trade of the Philippine Islands, to accept any or all of these explosives for carriage would constitute a violation of the prohibitions against discriminations penalized under the statute, unless it can be shown by affirmative evidence that there is so real and substantial a danger of disaster necessarily involved in the carriage of any or all of these articles of merchandise as to render such refusal a due or a necessary or a reasonable exercise of prudence and discretion on the part of the shipowner.

The complaint in the case at bar lacking the necessary allegations under this ruling, the demurrer must be sustained on the ground that the facts alleged do not constitute a cause of action.

A number of interesting questions of procedure are raised and discussed in the briefs of counsel. As to all of these questions we expressly reserve our opinion, believing as we do that in sustaining the demurrer on the grounds indicated in this opinion we are able to dispose of the real issue involved in the proceedings without entering upon the discussion of the nice questions which it might have been necessary to pass upon had it appeared that the facts alleged in the complaint constitute a cause of action.

We think, however, that we should not finally dispose of the case without indicating that since the institution of these proceedings the enactment of Acts No. 2307 and No. 2362 (creating a Board of Public Utility Commissioners and for other purposes) may have materially modified the right to institute and maintain such proceedings in this jurisdiction. But the demurrer having been formally submitted for judgment before the enactment of these statutes, counsel have not been heard in this connection. We therefore refrain from any comment upon any questions which might be raised as to whether or not there may be another adequate and appropriate remedy for the alleged wrong set forth in the complaint. Our disposition of the question raised by the

demurrer renders that unnecessary at this time, though it may not be improper to observe that a careful examination of those acts confirms us in the holding upon which we base our ruling on this demurrer, that is to say "That whatever may have been the rule at the common law, common carriers in this jurisdiction cannot lawfully decline to accept a particular class of goods for carriage, to the prejudice of the traffic in those goods, unless it appears that for some sufficient reason the discrimination against the traffic in such goods is reasonable and necessary. Mere prejudice or whim will not suffice. The grounds of the discrimination must be substantial ones, such as will justify the courts in holding the discrimination to have been reasonable and necessary under all the circumstances of the case."

Unless an amended complaint be filed in the meantime, let judgment be entered ten days hereafter sustaining the demurrer and dismissing the complaint with costs against the complainant, and twenty days thereafter let the record be filed in the archives of original actions in this court. So ordered.

Arellano, C. J., and Trent, J. concur.

Torres and Johnson, JJ., concur in the result.

CONCURRING

MORELAND, J.,

I may briefly say, although the nature of the action is stated at length in the foregoing opinion, that it is an action by a shareholder of the Yangco Steamship Co. against the company itself and certain officials of the Insular Government for an injunction against the company prohibiting it from carrying dynamite on its ships and preventing the defendant officials from compelling the company to do so under Act No. 98.

A demurrer was filed to the complaint raising the question not only of its sufficiency in general, but putting in issue also the right of the plaintiff to maintain the action under the allegations of his complaint.

It should be noted that all of the boats of the defendant company, under the allegations of the complaint, are boats which carry passengers as well as freight, and that the holding of the opinion which I am discussing compels passenger ships to carry dynamite and all other high explosives when offered for shipment. (See paragraph 3 of the complaint.)

I base my opinion for a dismissal of the complaint on the ground that the plaintiff has not alleged in his complaint a single one of the grounds, apart from that of being a stockholder, necessary for him to allege to maintain a share-holder's action.

In the case of *Hawes vs. Oakland* (104 U. S., 450), it was said relative to the right of a stockholder to bring an action which should regularly be brought by the company of which he is a stockholder:

"We understand that doctrine to be that, to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit:

"Some action or threatened action of the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by their charter or other source of organization;

"Or such a fraudulent transaction, completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interest of the other shareholders; "Or where the board of directors, or a majority of them, are acting

for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

"Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity." It was also said: "In this country the cases outside of the Federal Courts are not numerous, and while they admit the right of a stockholder to sue in cases where the corporation is the proper party to bring the suit, they limit this right to cases where the directors are guilty of a fraud or a breach of trust, or are proceeding ultra vires."

Further on in the same case we find: "Conceding appellant's construction of the company's charter to be correct, there is nothing which forbids the corporation from dealing with the city in the manner it has done. That city conferred on the company valuable rights by special ordinance; namely, the use of the streets for the laying of its pipes, and the privilege of furnishing water to the whole population. It may be the exercise of the highest wisdom, to let the city use the water in the manner complained of. The directors are better able to act understanding on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California may take this view of it, and be content to abide by the action of their directors."

This case is conclusive of the right of the plaintiff in the case at bar to maintain the action. The complaint is devoid of allegations necessary to sustain a complaint by a shareholder.

The contention of the plaintiff based upon the case of *Ex parte Young* (209 U. S. 123) is not sustained by that case. The decision there requires precisely the same allegations in the complaint as does the case of *Hawes vs. Oakland*. Not one of those allegations appears in the complaint in the case at bar except the allegation that the plaintiff is a stockholder.

Indeed, not only does the complaint lack allegations essential to its sufficiency, but it contains allegations which affirmatively show the plaintiff is not entitled to maintain the action. I do not stop to enumerate them all. I call attention to one only, namely the allegation that the company, by its authorized officials, has acted in strict conformity with the plaintiff's wishes and has refused to accept dynamite for carriage. This allegation shows that the plaintiff has been able to obtain his remedy and accomplish his purpose within the corporation itself, and it is sufficient, therefore, under the case of *Hawes vs. Oakland* and that of *Ex parte Young*, to require that the demurrer be sustained.

I am opposed to a decision of this case on the merits.

In the first place, there has been no adequate discussion of the merits by the parties. Substantially all of the brief of the government was devoted to what may be called the technical defects of the complaint, such as I have referred to above. Indeed, it is doubtful if any portion of the brief can be said to be directly a discussion of the merits.

In the second place, there is no real case pending in this court. It is clear from the complaint that the case is a collusive one (not in any improper sense) between the plaintiff and defendant company. There is no reason found in the complaint why the company should not have brought the action itself, every member of the board of directors and every stockholder, according to the allegations of the complaint, being in absolute accord with the contentions of the plaintiff on the proposition that the company should not carry dynamite, and having passed unanimously resolutions to that effect. Moreover, there has been no violation of Act No. 98. No shipper, or any other person, has offered dynamite to the defendant company for shipment, and, accordingly, the defendant company has not refused to accept dynamite for carriage. Nor have the defendant government officials begun proceedings, or threatened to bring proceedings, against the defendant company in any given case. According to

the allegations of the complaint, the parties are straw parties and the case a straw case.

In the third place, Act No. 98, under which this proceeding is brought and under which, it is, alleged, the defendant public officers are threatening to enforce, has been repealed, in so far as it affects public service corporations, by Act No. 2307, as amended by Act No. 2362. More than that; not only has the law been repealed, but proceedings of this character have been placed, in the first instance, under the exclusive jurisdiction of the Board of Public Utilities. I am unable to see why this court should, under the facts of this case, undertake to render a decision on the merits when the Act under which it is brought has been repealed and the jurisdiction to render a decision on the subject matter involved has been turned over to another body. As I have said before, it was unnecessary to a decision of this case to touch the merits in any way; and I am opposed to an attempt to lay down a doctrine on a subject which is within the exclusive jurisdiction of another body created by law expressly for the purpose of removing such cases as this from the jurisdiction of the courts.

I am of the opinion that the complaint should be dismissed, but upon grounds apart from the merits. If the merits of the case were alone to govern, I should be distinctly in favor of the plaintiff's contention so far as it relates to the carriage of dynamite on ships carrying passengers; and, while I am opposed to a decision on the merits of this case, nevertheless, the merits having been brought into the case by the opinion of some of my brethren, I desire to refer briefly to the jurisprudence of the subject.

So far as my researches go, the proposition that passenger boats must carry dynamite and other high explosives is without support in the decisions of any English speaking country. I have been unable to find a case anywhere which lays down such a doctrine. Indeed, I have been unable to find a case which holds that freight boats must carry dynamite or other high explosives. Every case that I have been able to find states a contrary doctrine; and neither in courts nor in text books is there even a hint supporting the contention of my brethren. The opinion cites no authorities to support it; and I am constrained to believe that, in an opinion so elaborately written, cases to support its thesis would have been cited if any such existed.

On page 372, Vol. 6 of Cyc, will be found the following: "Common carriers owe to the public the duty of carrying indifferently for all who may employ them, and in the order in which the application is made, and without discrimination as to terms. They may, however, restrict their business so as to exclude particular classes of goods, and they are not bound to receive dangerous articles, such as nitroglycerine, dynamite, gunpowder, oil of vitriol, matches, etc."

In the case of *California Powder Works vs. Atlantic and Pacific U. R. Co.* (113 Cal., 329), it was said: "Nor are the exemptions contained in the contract of the shipping order void for lack of consideration. The defendant was not obliged to receive and transport the powder at all. A common carrier is not bound to receive * * * dangerous articles, as nitro-glycerine, dynamite, gunpowder, aqua fortis, oil of vitriol, matches, etc."

This, so far as I can learn, is the universal doctrine. The California case is reproduced in 36 L. R. A., 648 and has appended to it a note. It is well known that the L. R. A. cites in its notes all of the cases reasonably obtainable relative to the subject matter of the case which it annotates. The note in L. R. A. with reference to the California case cites a considerable number of authorities holding that a carrier of goods is not obliged to receive dynamite or other dangerous explosives for carriage. It does not cite or refer to a case which holds the contrary.

The reporter of L. R. A., at the beginning of the note with reference to the California case, says: "The law upon this question is to be drawn from inference or from dicta rather than from decided cases. *California Powder Works vs. Atlantic & Pacific R. R. Co.* seems to be the first case to have squarely decided that the carrier is not bound to transport dangerous articles, although there has been what may be regarded as a general understanding that such is the fact."

In *Hutchinson on Carriers* (sec. 145), it is said, relative to the necessity of a carrier receiving for carriage dynamite or other dangerous explosives: "He may, for instance, lawfully refuse to receive them (the goods) if they are improperly packed or if they are otherwise in an unfit condition for carriage. Or he may show that the goods offered were of a dangerous character, which might subject him or his vehicle, or strangers or his passengers, or his other freight, to the risk of injury."

In a note to the text the author says: "Nor is he bound to accept such articles as nitro-glycerine, dynamite, gun-powder, oil of vitriol and the like."

In *Elliott on Railroads* (vol. 4, p. 151), appears the following: "Again, goods may properly be refused which are tendered in an unfit condition for transportation, or which are dangerous, or which are reasonably believed to be dangerous."

In the case of *Boston & Albany Railroad Co. vs. Shanly* (107 Mass., 568), the court said at page 576: "Both the dualin and the exploders are thus alleged to be explosive and dangerous articles. Each of them was sent without giving notice of its character to the plaintiffs, and they were ignorant in respect to it. The rule of law on this subject is in conformity with the dictates of common sense and justice, and is well established. One who has in his possession a dangerous article, which he desires to send to another, may send it by a common carrier if he will take it; but it is his duty to give him notice of its character, so that he may either refuse to take it, or be enabled, if he takes it, to make suitable provision against the danger."

This case cites three English cases as follows, *Williams vs. East India Co.* (3 East, 192) ; *Brass vs. Maitland* (6 El. & Bl. 470) ; *Farrant vs. Barnes* (11 C. B. [N. S.], 553).

In the case of *Porcher vs. Northeastern R. Co.* (14 Rich. L., 181), the court quoted with approval the following from *Story on Bailments*: "If he (the carrier) refuses to take charge of the goods because his coach is full or because they are of a nature which will at the time expose them to extraordinary danger or to popular rage, or because he has no convenient means of carrying such goods with security, etc., these will furnish reasonable grounds for his refusal, and will, if true, be a sufficient legal defense to a suit for the noncarriage of the goods."

In the case of *Fish vs. Chapman* (2 Ga., 349), the court said: "A common carrier is bound to convey the goods of any person offering to pay his hire, unless his carriage be already full, or the risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey or is not in the habit of conveying."

In the case of *Farrant vs. Barnes*, above cited, the court said that the shipper "knowing the dangerous character of the article and omitting to give notice of it to the carrier so that he might exercise his discretion as to whether he would take it or not was guilty of a clear breach of duty."

To the same effect, generally, are *Jackson vs. Rogers* (2 Show., 327); *Riley vs. Home* (5 Bing., 217) ; *Lane vs. Cotton* (1 Ld. Raym., 646); *Edwards vs. Sherratt* (1 East, 604) ; *Batson vs. Donovan* (1 Barn. & Aid., 32; 2 Kent, 598); *Elsee vs. Gatward* (5 T. R., 143) ; *Dwight vs. Brewster* (1 Pick., 50) ; *Jencks vs. Coleman* (2 Sumn., 221) ; *Story on Bail.*, 322, 323; *Patton vs. Magrath* (31 Am. Dec, 552).

In *Story on Bailments* (sec. 508), is found the following: "If a carrier refuses to take charge of goods because his coach is full; or because the goods are of a nature which will at the time expose them to extraordinary danger; * * * these will furnish reasonable grounds for his refusal; and will, if true, be a sufficient legal defense to a suit for the noncarriage of the goods."

It will be noted that all of these cases holding that a common carrier is not obliged to receive a dangerous substance, such as dynamite and other high explosives, refer exclusively to carriers of merchandise and not to

carriers of passengers. If the authorities are uniform in holding that companies carrying freight are not obliged to accept dangerous explosives for carriage, there can be no question as to what the rule would be with reference to a carrier of passengers.

Far from requiring passenger boats to accept dynamite and other high explosives for carriage, the attitude of the people of the United States and of various States is shown by their statutes. The laws of the United States and of many of the States prohibit passenger boats and passenger trains from carrying dangerous explosives. Sections 232, 233, 234, 235 and 236 of the Criminal Code of the United States (Compiled Stat., 1901), read:

"SEC. 232. It shall be unlawful to transport, carry, or convey, any dynamite, gunpowder, or other explosive, between a place in a foreign country and a place within or subject to the jurisdiction of the United States, or between a place in any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, and a place in any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, on any vessel or vehicle of any description operated by a common carrier, which vessel or vehicle is carrying passengers for hire: * * *.

"SEC. 233. The Interstate Commerce Commission shall formulate regulations for the safe transportation of explosives, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives by land. Said commission, of its own motion, or upon application made by any interested party, may make changes or modifications in such regulations, made desirable by new information or altered conditions. Such regulations shall be in accord with the best known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit, and the precautions necessary to determine whether the material when offered is in proper condition to transport.

"Such regulations, as well as all changes or modifications thereof, shall take effect ninety days after their formulation and publication by said commission and shall be in effect until reversed, set aside, or modified.

"SEC. 234. It shall be unlawful to transport, carry, or convey, liquid nitroglycerin, fulminate in bulk in dry condition, or other like explosive, between a place in a foreign country and a place within or subject to the jurisdiction of the United States, or between a place in one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, and a place in any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, on any vessel or vehicle of any description operated by a common carrier in the transportation of passengers or articles of commerce by land or water.

"SEC. 235. Every package containing explosives or other dangerous articles when presented to a common carrier for shipment shall have plainly marked on the outside thereof the contents thereof; and it shall be unlawful for any person to deliver, or cause to be delivered, to any common carrier engaged in interstate or foreign commerce by land or water, for interstate or foreign transportation, or to carry upon any vessel or vehicle engaged in interstate or foreign transportation, any explosive, or other dangerous article, under any false or deceptive marking, description, invoice, shipping order, or other declaration, or without informing the agent of such carrier of the true character thereof, at or before the time such delivery or carriage is made. Whoever shall knowingly violate, or cause to be violated, any provision of this section, or of the three sections last preceding, or any regulation made by the Interstate Commerce Commission in pursuance thereof, shall be fined not more than two thousand dollars, or imprisoned not more than eighteen months, or both.

"SEC. 236. When the death or bodily injury of any person is caused by the explosion of any article named in the four sections last preceding, while the same is being placed upon any vessel or vehicle to be transported in violation thereof, or while the same is being so transported, or while the same is being removed from such vessel or vehicle, the person knowingly placing, or aiding or permitting the placing, of such articles upon any such vessel or vehicle, to be so transported, shall be imprisoned not more than ten years."

Human ingenuity has been continuously exercised for ages to make sea travel safe, that men might sail the seas with as little risk as possible; that they might rely upon the quality of the ship and the character and experience of the sailors who manned her; that they might feel that the dangers of the deep had been reduced to the minimum. Not only this; the abilities of legislators have been taxed to the same end; to frame laws that would ensure seaworthy ships, safe appliances, and reliable officers and crews; to curb the avarice of those who would subordinate the safety of passengers to a desire for freight; and to so regulate travel by sea that all might safely confide their property and their lives to the ships sailing under the flag of their country. Can a decision which requires passenger ships to carry dynamite and all high explosives be made to harmonize with this purpose? What is there in the Philippine Islands to justify the requirement that passenger ships carry dynamite, while in the United States the carrying of dynamite by passenger ships is a crime? Why should passengers in the Philippine Islands be subjected to conditions which are abhorrent in the United States? Why compel shipowners in the Philippine Islands to perform acts which, if done in the United States, would send them to the penitentiary?

I do not believe that we should require passengers to travel on ships carrying, perhaps, many tons of nitroglycerine, dynamite or gunpowder in their holds; nor do I believe that any public official should do anything calculated to add to the calamity of fire, collision, or shipwreck the horrors of explosion.

DISSENTING

ARAULLO, J.,

I do not agree with the decision of the majority of this court in this case, first, because one of the grounds of the demurrer to the complaint—the first one—is that of lack of legal capacity to sue on the part of the plaintiff and nothing is said in the decision regarding this very important point. It is one which ought to have received special attention, even before the other alleged in the demurrer that the complaint does not state facts sufficient to constitute a cause of action, and the only one that received any consideration in the decision in question. Second, because notwithstanding that in the decision no consideration was paid to the alleged lack of legal capacity on the part of the plaintiff, he is, by reason of the demurrer being sustained, authorized to present an amended complaint within ten been given without an express finding that such capacity on the part of said plaintiff was not lacking.

Demurrer sustained and complaint ordered dismissed unless an amended complaint be filed.

DECISION OF MARCH 31, 1915.

CARSON, J.:

This case is again before us upon a demurrer interposed by the respondent officials of the Philippine Government to an amended complaint filed after publication of our decision sustaining the demurrer to the original complaint.

In our former opinion, entered November 5, 1914, we sustained the demurrer on the ground that the original complaint did not set forth facts sufficient to constitute a cause of action. In that decision we held that the statute (Act No. 98) the validity of which was attacked by counsel for plaintiff was, when rightly construed, a valid and constitutional enactment, and ruled:

"That whatever may have been the rule at the common law, common carriers in this jurisdiction cannot lawfully decline to accept a particular class of goods for carriage, to the prejudice of the traffic in those goods, unless it appears that for some sufficient reason the discrimination against the traffic in such goods is

reasonable and necessary. Mere prejudice or whim will not suffice. The grounds of the discrimination must be substantial ones, such as will justify the courts in holding the discrimination to have been reasonable and necessary under all the circumstances of the case.

* * * * *

"The traffic in dynamite, gunpowder and other explosives is vitally essential to the material and general welfare of the people of these Islands. If dynamite, gunpowder and other explosives are to continue in general use throughout the Philippines, they must be transported by water from port to port in the various islands which make' up the Archipelago. We are satisfied therefore that the refusal by a particular vessel, engaged as a common carrier of merchandise in the coastwise trade of the Philippine Islands, to accept any or all of these explosives for carriage would constitute a violation of the prohibitions against discriminations penalized under the statute, unless it can be shown by affirmative evidence that there is so real and substantial a danger of disaster necessarily involved in the carriage of any or all of these articles of merchandise as to render such refusal a due or a necessary or a reasonable exercise of prudence and discretion on the part of the ship owner."

Resting our judgment on these rulings we held that the allegations of the complaint, which in substance alleged merely that the respondent officials were coercing the respondent steamship company to carry explosives upon some of their vessels, under authority of, and in reliance upon the provisions of the Act, did not set forth facts constituting a cause of action; or in other words, that the allegations of the complaint even if true, would not sustain a finding that the respondent officials were acting "without or in excess of their jurisdiction" and lawful authority in the premises.

The amended complaint filed on November 14, 1914, is substantially identical with the original complaint, except that it charges the respondent officials, as of the date of the amended complaint, with the unlawful exercise of authority or intent to exercise unlawful authority which should be restrained, and substitutes the names of the officers now holding the offices of Collector of Customs, Attorney-General and prosecuting attorney for those of the officials holding those offices at the date of the filing of the original complaint ; and except further that it adds the following allegations:

"That each and every one of the vessels of the defendant company is dedicated and devoted to the carriage of passengers between various ports in the Philippine Islands, and each of said vessels, on all of said voyages between the said ports, usually and ordinarily does carry a large number of such passengers.

"That dynamite, powder, and other explosives are dangerous commodities that cannot be handled and transported in the manner and form in which ordinary commodities are handled and transported. That no degree of care, preparation and special arrangement in the handling and transportation of dynamite, powder and other explosives will wholly eliminate the risk and danger of grave peril and loss therefrom, and that the highest possible degree of care, preparation and special arrangement in the handling and transportation of said commodities is only capable of reducing the degree of said danger and peril. That each and every one of the vessels of the defendant company is wholly without special means for the handling, carriage, or transportation of dynamite, powder and other explosives and such special means therefor which would appreciably and materially reduce the danger and peril therefrom cannot be installed in said vessels without a cost and expense unto said company that is unreasonable and prohibitive."

As we read them, the allegations of the original complaint were intended to raise and did in fact raise, upon demurrer, a single question which, if ruled upon favorably to the contention of plaintiff, would, doubtless, have put an end to this litigation and to the dispute between the plaintiff stockholder of the steamship company and the officials of the Philippine Government out of which it has arisen.

In their brief, counsel for plaintiff, in discussing their right to maintain an action for a writ of prohibition, relied

upon the authority of *Ex parte Young* (209 U. S. [123] 163, 165), and asserted that:

"Upon the authority, therefore, of *Ex parte Young*, supra, the merits of the question pending between petitioner and respondents in this action is duly presented to this court by the complaint of petitioner and general demurrer of respondents thereto. That question, in plain terms, is as follows:

"Is the respondent Yangco Steamship Company legally required to accept for carriage and carry 'any person or Property offering for carriage?'

"The petitioner contends that the respondent company is a common carrier of only such articles of freight as they profess to carry and hold themselves out as carrying;" and in discussing the legal capacity of plaintiff to maintain this action, counsel in their printed brief asserted that "here we have no address to the court to determine whether a minority or a majority shall prevail in the corporate affairs; here we ask plainly and unmistakably who shall fix the limits of the corporate business—the shareholders and directors of the corporation, or certain officials of the government armed with an unconstitutional statute?"

Counsel for plaintiff contended that under the guaranties of the Philippine Bill of Rights a common carrier in the Philippine Islands may arbitrarily decline to accept for carriage any shipment of merchandise of a class which it expressly or impliedly declines to accept from all shippers alike; that "the duty of a common carrier to carry for all who offer arises from the public profession he has made, and is limited by it;" that under this doctrine the respondent steamship company might lawfully decline to accept for carriage "dynamite, powder or other explosives," without regard to any question as to the conditions under which such explosives are offered for carriage, or as to the suitability of its vessels for the transportation of such explosives, or as to the possibility that the refusal to accept such articles of commerce in a particular case might have the effect of subjecting any person, locality or the traffic in such explosives to an undue, unreasonable or unnecessary prejudice or discrimination: and in line with these contentions counsel boldly asserted that Act No. 98 of the Philippine Commission is invalid and unconstitutional in so far as it announces a contrary doctrine or lays down a different rule. The pleader who drew up the original complaint appears to have studiously avoided the inclusion in that complaint of any allegation which might raise any other question. In doing so he was strictly within his rights, and having in mind the object sought to be attained, the original complaint is a model of skillful pleading, well calculated to secure the end in view, that is to say, a judgment on the precise legal issue which the pleader desired to raise as to the construction and validity of the statute, which would put an end to the controversy, if that issue were decided in his favor.

Had the contentions of plaintiff as to the unconstitutionality of the statute been well founded, a writ of prohibition from this court would have furnished an effective and appropriate remedy for the alleged wrong. The issue presented by the pleadings on the original complaint, involving a question as to the validity of a statute and affecting, as it did, the shipping and public interests of the whole Islands, and submitting no complicated question or series of questions of fact, was of such a nature that this court could not properly deny the right of the plaintiff to invoke its jurisdiction in original proceedings. We deemed it our duty therefore to resolve the real issue raised by the demurrer, and since we were of opinion that the contentions of counsel for the plaintiff were not well founded, and since a ruling to that effect necessarily resulted in an order sustaining the demurrer, we did not deem it necessary or profitable to consider questions of practice or procedure which it might have been necessary to decide under a contrary ruling as to the principal question raised by the pleadings; nor did we stop to consider whether the "subject matter involved" in the controversy might properly be submitted to the Board of Public Utility Commissioners, because upon the authority of *Ex parte Young* (supra) we were satisfied as to the jurisdiction and competency of this court to deal with the real issues raised by the pleadings on the original complaint, and because, furthermore, the Act of the Philippine Legislature creating the Board of Public Utility Commissioners could not deprive this court of jurisdiction already invoked in prohibition proceedings instituted

for the purpose of restraining the respondent officials of the Government from the alleged unlawful exercise of authority under color of an invalid statute and without jurisdiction in the premises.

The amended complaint, however, presents for adjudication in original prohibition proceedings in this court questions of a wholly different character from those submitted in the original complaint.

In so far as it reiterates the allegations of the former complaint to the effect that the respondent officials are unlawfully coercing the steamship company by virtue and under color of the provisions of an invalid or unconstitutional statute, it is manifest, of course, that the amended complaint is no less subject to criticism than was the original complaint. If, therefore, the action can be maintained upon the amended complaint it must be maintained upon its allegations that those officials are coercing the company to carry explosives on vessels which, as a matter of fact, are not suitably equipped for that purpose, and which from the nature of the business in which they are engaged should not be required to carry explosives.

It will readily be seen, under our former opinion, that these allegations raise no question as to the validity or constitutionality of any statute; that the real question which plaintiff seeks to submit to this court in original prohibition proceedings is whether the respondent officials of the Government are correctly exercising the discretion and authority with which they have been clothed; and that his contention in the amended complaint is not, as it was in the original complaint, that these officials are acting without authority and in reliance upon an invalid and unconstitutional statute, but rather that they are exercising their authority improvidently, unwisely or mistakenly.

Under the provisions of sections 226 and 516 of the Code of Civil Procedure jurisdiction in prohibition proceedings is conferred upon the courts when the complaint alleges "the proceedings of any inferior tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, were without or in excess of the jurisdiction of such tribunal, corporation, board or person." It is manifest therefore that the allegations of the amended complaint, even if true, will not sustain the issuance of a writ of prohibition without further amendment unless they be construed to be in effect a charge that the respondent officials are abusing the discretion conferred upon them in the exercise of their authority in such manner that the acts complained of should be held to be without or in excess of their jurisdiction.

It may well be doubted whether the doctrine of the case *Ex parte Young* (supra), relied upon by the plaintiff in his argument in support of the original complaint, can properly be invoked in support of a right of action predicated upon such premises; so also, since the acts complained of in the amended complaint are alleged to have been done at a date subsequent to the enactment of the statutes creating the Board of Public Utility Commissioners, it may well be doubted whether the courts should entertain prohibition proceedings seeking to restrain alleged abuses of discretion on the part of officers and officials of the Government, and of public service corporations with regard to the rules under which such corporations are operated, until and unless redress for the alleged wrong has been sought at the hands of the Board.

We do not deem it expedient or necessary, however, to consider or decide any of these questions at this time, because we are of opinion that we should not permit our original jurisdiction to be set in motion upon the allegations of the amended complaint.

It is true that this court is clothed with original jurisdiction in prohibition proceedings (sec. 516, Act No. 190). But this jurisdiction is concurrent with the original jurisdiction of the various Courts of First Instance throughout the Islands, except in cases where the writ runs to restrain those courts themselves, when of course it is exclusive; and we are satisfied that it could not have been the intention of the legislator to require this court to assume original jurisdiction in all cases wherein the plaintiff elects to invoke it. Such a practice might result in overwhelming this

court with the duty of entertaining and deciding original proceedings which from their nature could much better be adjudicated in the trial courts; and in unnecessarily diverting the time and attention of the court from its important appellate functions to the settlement of controversies of no especial interest to the public at large, in the course of which it might become necessary to take testimony and to make findings touching complicated and hotly contested issues of fact.

We are of opinion and so hold that unless special reasons appear therefor, this court should decline to permit its original jurisdiction to be invoked in prohibition proceedings, and this especially when the adjudication of the issues raised involves the taking of evidence and the making of findings touching controverted facts, which, as a rule, can be done so much better in the first instance by a trial court than an appellate court organized as is ours.

Spelling on Injunctions and Other Extraordinary Remedies (vol. 2, p. 1493), in discussing the cases in which the appellate courts in the United States permit their original jurisdiction to be invoked where that jurisdiction is concurrent with that of some inferior court, says:

"Of the plan of concurrent jurisdiction West Virginia may be taken as an illustration. The Supreme Court of Appeals of that State has concurrent original jurisdiction with the circuit courts in cases of prohibition, but by a rule adopted by the former court it will not take such original jurisdiction unless special reasons appear therefor."

We deemed it proper to assume jurisdiction to adjudicate and decide the issues raised by the rulings on the original complaint, involving as they did a question as to the validity of a public statute of vital interest to shippers and ship owners generally as also to the public at large, and presenting for determination no difficult or complicated questions of fact: but we are satisfied that we should decline to take jurisdiction of the matters relied upon in the amended complaint in support of plaintiff's prayer for the writ.

The question of the construction and validity of the statute having been disposed of in our ruling on the demurrer to the original complaint, it must be apparent that if the allegations of the amended complaint are sufficient to maintain the plaintiff's action for a writ of prohibition, a question as to which we expressly reserve our opinion, the action should be brought in one of the Courts of First Instance.

Twenty days hereafter let the complaint be dismissed at the costs of the plaintiff, unless in the meantime it is amended so as to disclose a right upon the part of the plaintiff to invoke the original jurisdiction of this court without first proceeding in one of the Courts of First Instance. So ordered.

Arellano, C. J., Torres, and Trent, JJ., concur.

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