of San Francisco, 16 Cal. 591. It is true that the decision is limited in this case to the possession maintained under color of title. But I am unable to find any difference upon this point as to whether a person enters under color of title or without. Perhaps a better way of stating the nature of claim as to title that should be made by one claiming adversely land is that he should claim as owner. The fact that he admits that another is owner, or does not claim title against all others, would generally be insufficient. There is no doubt that in the answer defendant admits ownership of the property in the United States. Is there any exception as to the general rule I have stated? I think in all of the western states there is an exception thereto. If a party claims title to land here against all persons but the United States, that is sufficient. This view is recognized in the cases of *Francoeur* v. *Newhouse*, 43 Fed. Rep. 236; *Hayes* v. *Martim*, 45 Cal. 563; *McManus* v. *O'Sullivan*, 48 Cal. 15.

In this state I am satisfied the rule is well established not to allow, as a plea of title in a third party, a plea of title in the United States. For many years no one in Montana held title to real property against the United States. The admission, then, that the title to the property was in the United States was not at all inconsistent with the plea of the statute of limitations by defendant as against plaintiff, and the two defenses are not inconsistent. For these reasons the motion of plaintiff to strike out is overruled.

CHICAGO & N. W. RY. CO. *v.* OSBORNE.

SAME *v.* JUNOD *et al.*

(Circuit Court of Appeals, Eighth Circuit. October 17, 1892.)

Nos. 67, 68.

1. CARRIERS—INTERSTATE COMMERCE—LONG AND SHORT HAULS—JOINT TARIFF RATES.
   Where two railroad companies owning connecting lines of road unite in a joint through tariff, they form for the connected roads a new and independent line, and the through tariff on the joint line is not the standard by which the separate tariff of either company is to be measured in determining whether such separate tariff violates Act Feb. 4, 1887, § 4, which forbids greater compensation for a shorter than for a longer haul. 48 Fed. Rep. 49, reversed.
2. SAME—PUBLICATION OF JOINT TARIFF RATE—NONCOMPETING POINT.
   Under section 6 of the interstate commerce law, (Act Feb. 4, 1887,) and the order of the commission of June 21, 1887, relating to the publication of joint tariffs, it is not necessary for either of the connecting lines to publish their joint tariff at a noncompeting point, or to volunteer information of such tariff to shippers.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

At Law. Actions by John Osborne and H. A. Junod and another against the Chicago & Northwestern Railway Company for damages for

violation of the long and short haul clause of the interstate commerce law. Verdicts and judgments for plaintiffs in both cases. The charge of the court to the jury is reported in 48 Fed. Rep. 49. Defendant brings error. Reversed.

Statement by BREWER, Circuit Justice:

The defendant in error, plaintiff below, recovered a judgment in the circuit court of the United States for the southern district of Iowa for the sum of $225 for alleged overcharges on corn shipped from Scranton, Iowa, to Chicago. The action was brought under the interstate commerce act of February 4, 1887, (24 St. p. 379.) The facts material to the inquiry are as follows:

The defendant owns and operates a railroad from Missouri Valley, a town on the western border of Iowa, to Chicago, Ill. Scranton is a town in Iowa on the line of this road, 88 miles east of Missouri Valley, and therefore so much nearer Chicago. The Fremont, Elkhorn & Missouri Valley Railroad Company owns a railroad running east and west through Nebraska, and connecting with the defendant's road at the town of Missouri Valley. Blair, Neb., is a point on that road, 13 miles west of Missouri Valley. While the Fremont, Elkhorn & Missouri Valley Railroad Company is an independent corporation, a majority of its stock belongs to the defendant company, and thus the defendant company controls its operations.

During the month of January, 1888, there was in force a local tariff of rates charged on the defendant's road. This local tariff was duly published in Scranton. In accordance with it, the rate from Scranton to Chicago on corn was 18 cents per 100 pounds. All shippers shipping simply to Chicago paid that rate. The plaintiff, among others, made sundry shipments, and was charged and paid such sum. There was, so far as appears, absolute uniformity of rate as to all such local shipments. At the same time the tariff on corn shipped through from Blair, Neb., to New York city was 38½ cents; to Boston, Philadelphia, and Baltimore, sums slightly above and below this figure. This through rate was made up in this way: By agreement between the defendant and eastern companies, corn was shipped through to New York from Turner and Rochelle, two small stations on the defendant's road, one 30 and the other 70 miles west of Chicago, for 27½ cents, 3½ cents of which went to defendant, and the balance to the eastern companies; and by agreement between the defendant and the Fremont, Elkhorn & Missouri Valley Railroad Company, the rate from Blair to Turner and Rochelle, on corn shipped to New York, Boston, Philadelphia, or Baltimore, was 11 cents. In other words, by these agreements of the several companies a through rate was fixed on corn shipped from Blair to New York and other eastern cities; and of that through rate the defendant company received, for carrying the whole line of its road, less than the local tariff of 18 cents, charged from Scranton to Chicago. This joint tariff was not published at Scranton, and no knowledge of it was given to or possessed by the plaintiff until February 24th; and until that time he made no application for shipment beyond Chicago. Thereafter he shipped to Boston, and received the benefit of the through tariff.

W. C. Goudy and *N. M. Hubbard*, for plaintiff in error.

C. C. Nourse and *C. L. Nourse*, for defendants in error.

Before BREWER, Circuit Justice, and CALDWELL and SANBORN, Circuit Judges.

BREWER, Circuit Justice, (*after stating the facts.*) This case must be determined exclusively by the provisions of the interstate commerce law, as it was originally passed and before any amendment. No question was submitted to the jury, and no evidence was offered, as to whether 18 cents was or was not in fact a reasonable rate for carrying corn from Scranton to Chicago. The theory of the plaintiff's case was that the defendant company had violated the fourth section of the act, by charging more for a short than for a long haul; and, of course, if it had, it is liable to the plaintiff.

We do not care to enter into any extended discussion of the interstate commerce act. It was the first effort of the general government to regulate the great transportation business of the country. That business, though of a quasi public nature, and therefore subject to governmental regulation, has, as a matter of fact, been carried on by private capital through corporations. The fact that it was a quasi public business always prevented the owners of capital invested in it from charging, like owners of other property, any price they saw fit for its use. A reasonable compensation was all that they could exact, and he who felt aggrieved by a charge could always invoke the aid of the courts to protect himself against it. With him, however, lay the burden of proving the fact that the charge was unreasonable; a burden which all experience shows was onerous, and therefore seldom undertaken; the party aggrieved preferring to submit to the overcharge, rather than go to the expense and time of contesting it. Hence the efforts by state and nation to establish limits of charges, and means of evidence of easy and accurate ascertainment. While it is the duty of the courts to see that the provisions established by congress are not frittered away on technical or trifling grounds, yet it is also equally their duty to see that such a legislation is not carried beyond its clear scope, and that the owners of private capital invested in the business of transportation be not deprived of their liberty of contract and right of control any further than the lawmaking power has intended that they should be.

With these preliminary observations, we remark:

First. That congress has not attempted to require that the tariffs on all roads be uniform; nor has it attempted to place a limit in figures beyond which no company may go in its charges. The laws of business and of competition have, as yet, been deemed sufficient restraints in that direction. The Rock Island is, between Chicago and the Missouri river, a parallel and competing road with the defendant company; yet there is nothing in the commerce act which compels either company to charge for through or local transportation the same as its competitor. Either company may reduce its rates as far as it pleases below what is reasonable and a fair compensation for the service without violating the act; and such reduction compels no change by its competitor or any other company. This is obvious from a mere reading of the act.

Secondly. That, where two companies owning connecting lines of road unite in a joint through tariff, they form for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other, nor compellable to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its line. If, therefore, the two companies by agreement make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the basis by which the reasonableness of the local tariff of either line is determined. To illustrate: On the defendant's road, the distance from Turner to Chicago is 30 miles; on the Lake Shore line, from Chicago to Cleveland it is two or three hundred miles. The defendant company may charge 15 cents for transporting grain the 30

miles from Turner to Chicago, providing that be in fact only a reasonable charge for the service, although the Lake Shore Company charges no more for transporting it from Chicago to Cleveland; and the fact that the rate on each line is 15 cents for the distance named will not prevent the two companies from making a joint tariff for grain shipped from Turner to Cleveland of 12 cents; less than the local tariff of either. That we may not be misunderstood, we do not mean to intimate that the two companies, with a joint line, can make a tariff from Turner to Cleveland higher than from Turner to Buffalo, or any other intermediate point between Cleveland and Buffalo; for when the two companies, by their joint tariff, make a new and independent line, that new and independent line may become subject to the long and short haul clause. But what we mean to decide is that a through tariff on a joint line is not the standard by which the separate tariff of either company is to be measured or condemned.

This proposition may not be as obvious as the former, and yet a careful study of the act leaves no doubt of its correctness. In the first section a definition is given of the term "railroad," which, in addition to bridges and ferries, includes "also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease." A joint tariff does not bind road to road in the sense that the two are used or operated by either corporation. There is neither unity of ownership nor unity of operation, but only a singleness of charge, and a continuity of transportation over connecting roads. Neither is there any mandate to connecting companies to surrender any control over their own roads, or to unite in a joint tariff. "Reasonable, proper, and equal facilities for the interchange of traffic" are commanded by the third section; but with the proviso: "This shall not be construed as requiring any such common carrier to give the use of its track or terminal facilities to another carrier engaged in like business." No power existed at common law, and none is given by the act to court or commission, to compel connecting companies to contract with each other, to abandon full control of their separate roads, or to unite in a joint tariff. *Express Cases*, 117 U S. 1, 6 Sup. Ct. Rep. 542, 628; *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.*, 37 Fed. Rep. 567; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 41 Fed. Rep. 559. The whole matter is left to the voluntary action of the companies; and, in forming by agreement any joint tariff, the basis of division and the proportion of moneys each shall take is also a matter left to their determination.

The denunciation of the fourth section is against each separate common carrier, for its violation of the "long and short haul" clause on its own line. The language is:

"That it shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction; the shorter being included within the longer distance."

The use of the word "line" is significant. Two carriers may use the same road, but each has its separate line. The defendant may lease trackage rights to any other railroad company, but the joint use of the same track does not create the "same line," so as to compel either company to graduate its tariff by that of the other.

Further, by section 6, every common carrier is required to print and publish at every depot along its own road schedules showing its rates and fares and charges. There is a prohibition against advancing rates without giving notice, and, in case of a reduction, notice thereof must be immediately posted; whereas, in reference to joint tariffs, the requisition is simply that each common carrier furnish to the commission a copy of all contracts therefor, as well as copies of the joint tariffs; and power is given to the commission to determine the amount of publication that shall be required.

Again, at the time of the passage of this act joint through tariffs were well known, as well as the fact that they were generally less than the sum of the local tariffs, and not distributed between the several companies making them according to the mere matter of mileage. In this act joint tariffs are recognized; and, if congress had intended to make the local tariff subordinate to or measured by the joint tariff, its language would have been clear and specific.

It is worthy of note that in the debates which attended the passage of this bill through the two houses, and while this matter was under discussion, it was again and again said by those participating in the debates that the line formed under the joint tariff of connecting companies was one separate and independent from that of either of the connecting companies; and also worthy of note that in the actual administration of affairs by the interstate commerce commission the same thing has been constantly recognized.

Applying these propositions to the case at bar, a conclusion is easily reached. There is no pretense that any shipper at Scranton, or other point on the defendant's line further from Chicago than that, was charged less for shipping grain to Chicago than the plaintiff. In other words, there was no violation of the "long and short haul" clause by the defendant, in respect to its own line; nor did the defendant, acting with eastern companies, on the line made by its road in connection with theirs, charge or receive for grain shipped from Scranton or any point west, to any eastern point, less than the through tariff. In other words, the defendant did not, separately or in connection with other companies, violate section 4. It avails the plaintiff nothing that he was unaware of this through joint tariff at the time he made the shipments which are the basis of his cause of action. No false statement was made to him. He made no inquiry in respect to its existence. The matter of publication was by the act, as it then stood, left to be determined by the commission. The provision of the statute, section 6, is as follows:

"Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said commission, in so far as may, in the judgment of the commission, be deemed prac-

ticable; and said commission shall, from time to time, prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published."

And the order of the commission made June 21, 1887, provided that—

"Such joint tariffs shall be so published by plainly printing the same in large type of at least the size of ordinary 'pica,' copies of which shall be kept for the use of the public in such places and in such form that they can be conveniently inspected, at every depot or station upon the line of the carriers uniting in such joint tariff, where any business is transacted in competition with the business of a carrier whose schedules are required by law to be made public as aforesaid."

Scranton was no competing point. No other line, so far as appears, touched the place; and hence no publication of the joint tariff was there required. Of course the defendant was under no common-law or statute obligation to advise the plaintiff where or how he had better ship his grain. It fulfilled its legal obligation when it published its local tariff, and advised him truthfully in respect to any rates in respect to which he made special inquiry.

For the reasons above stated, on the facts as they appeared in evidence, the jury should have been instructed to find a verdict for the defendant. The judgment of the court below will be reversed, and the case remanded for further proceedings in accordance with this opinion.

Case No. 68. *Chicago & Northwestern Railway Company, Plaintiff in Error*, v. *H. A. Junod and R. Y. Culbertson, Defendants in Error*, involves the same questions, and the same judgment of reversal will be entered.

TOZER *v.* UNITED STATES.

(*Circuit Court, E. D. Missouri, N. D.* November 15, 1892.)

No. 78.

1. INTERSTATE COMMERCE ACT — UNDUE PREFERENCES—JOINT THROUGH TARIFFS.
   Where two connecting lines agree on a joint through tariff, such joint tariff, or the share of it which either takes, is not the standard by which to determine whether either line violates, by its local rates, section 3 of the interstate commerce act, forbidding undue preferences. *Railroad Co.* v. *Osborne*, 52 Fed. Rep. 912, followed.
2. SAME—VIOLATION OF "UNDUE PREFERENCES" CLAUSE—INDEFINITENESS AND UNCERTAINTY.
   The "undue preferences" clause of the interstate commerce act is indefinite and uncertain, and a conviction for its violation cannot be sustained where the criminality of the act is made to depend on whether the jury think a preference reasonable or unreasonable.

In Error to the District Court of the United States for the Northern Division of the Eastern District of Missouri.