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. 73.

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.

George K. Tozer was indicted for a violation of the interstate commerce act, (section 3,) prohibiting undue preferences. The court sustained a demurrer to the fourth count. 37 Fed. Rep. 635. Defendant was convicted under the second and third counts. For charge to jury, see 39 Fed. Rep. 369. The court subsequently denied defendant's motions for a new trial and in arrest of judgment. 39 Fed. Rep. 904. From the judgment of conviction, defendant brings error. Reversed.

Thomas J. Portis, (*Aldace F. Walker*, of counsel,) for plaintiff in error.

George D. Reynolds, U. S. Atty., for the United States.

Charles Claflin Allen, special counsel, for the United States.

Before BREWER, Circuit Justice, and CALDWELL, Circuit Judge.

BREWER, Circuit Justice. Plaintiff in error was indicted in the district court for an alleged violation of the interstate commerce act. There were five counts in the indictment. The court sustained a demurrer to the fourth, and the defendant was found not guilty under the first and fifth, but guilty under the second and third, counts. The judgment of conviction rendered thereon was brought to this court for review by writ of error.

The facts in the case are these: Tozer was agent of the Missouri Pacific Railway Company at Hannibal, Mo. That company operated a line of road extending from Hannibal to Hepler, Kan. At Hannibal it connected with the road of the Chicago, Burlington & Quincy Railroad Company. The two companies, by agreement, established a joint tariff. By that joint tariff sugar was shipped from Chicago to Hepler at 51 cents a hundred pounds. The local tariff of the Missouri Pacific Railway Company from Hannibal to Hepler was 46 cents per hundred. The joint tariff was divided between the two companies by giving to the Missouri Pacific Company 34 and to the Chicago, Burlington & Quincy Company 17 cents. The Hayward Grocer Company, a firm doing business at Hannibal, shipped sugars from that place to Hepler, upon which shipment the regular local rate of 46 cents was charged and collected. They also ordered a Chicago firm to ship sugar from Chicago to the same point. This shipment was made over the Chicago, Burlington & Quincy Railroad, and upon it the joint rate, 51 cents, was charged and paid. It was argued in the trial court that the Chicago, Burlington & Quincy Railroad Company made a contract to carry the sugars from Chicago to Hepler, and that, after carrying them over its own line from Chicago to Hannibal, it employed the Missouri Pacific Company to carry for it the balance of the way, and paid it 34 cents; or, to state it in another way, the Missouri Pacific Company charged the Chicago, Burlington & Quincy Company only 34 cents for carrying the sugars from Hannibal to Hepler, while it charged the Hayward Grocer Company, and others living in Hannibal, 46 cents for doing a like work; and it was held that this constituted a giving to one person an undue and unreasonable advantage, and subjected one to unjust and unreasonable disadvantage, within the denunciation of section 3 of the interstate commerce act. In other words,

a comparison was drawn between the local rate of the one company and the share which it received by agreement of the joint through rate of the two companies, and, the two being unequal, the agent was found guilty of violating the act.

The decision of the court of appeals of this circuit, just announced in the case of *Railroad Co.* v. *Osborne*, 52 Fed. Rep. 912, precludes the necessity of any extended discussion. It was there held that each company established its own tariff, and that the reasonableness of the tariff of one is not determined by that of any other. It was also held that two connecting companies, forming by agreement a joint through tariff, create thereby, as it were, a line new and independent of that of either of the connecting companies; and hence that such joint tariff, or the share which either takes of such tariff, is not the basis by which the reasonableness of its local tariff is to be determined. It is true that in that case the question arose under section 4, with reference to long and short hauls, while in this it arises under section 3, prohibiting undue and unreasonable preferences or advantages; but still the questions there decided are controlling here. If the joint through tariff of two connecting roads is not a standard by which the local tariff of either can be declared in violation of section 4, neither can it be a standard by which the question of undue preferences is determined under section 3. Because the local rate is in excess of the share of the joint rate, it does not follow that an undue preference or advantage has been given. The trial court seemed to recognize this proposition, for it charged:

"Now, conceding that some difference between the local rate and the Missouri Pacific Railway Company's proportion of the through rate is permissible, owing to the different conditions affecting the two shipments, the question that I submit to you under the second and third counts is whether the difference shown in this case between the two rates of 12 cents per 100 pounds is, under all the circumstances of the case, a reasonable difference, or an undue and unreasonable difference, not justified by the different circumstances under which through shipments from Chicago and local shipments from Hannibal are made. If you find that the difference in rate of 12 cents per 100 pounds is an undue and unreasonable difference, and, as before explained, that defendant, as agent of the Missouri Pacific Railway Company, knowingly and willfully gave the Chicago, Burlington & Quincy Railroad the advantage of such difference in the shipment of the two barrels of sugar mentioned in the indictment, then you may return a verdict of guilty on the second and third counts, although you acquit on the first count. * * * In determining the last question submitted to you as to the reasonableness or unreasonableness of the difference between the local rate and the Missouri Pacific Company's proportion of the through rate, I give you full liberty to consider all the facts, circumstances, and reasons adduced by the various witnesses in justification of the difference shown, and I ask you to consider the same carefully and fairly, without any prejudice or bias whatsoever."

But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of *Railway Co.* v. *Dey*, 35 Fed. Rep. 866, 876, I had occasion to discuss this matter, and I quote therefrom as follows:

"Now, the contention of complainant is that the substance of these provisions is that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and un-

certain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable rate. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it. In Dwar. St. 652, it is laid down 'that it is impossible to dissent from the doctrine of Lord Coke that the acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters.' See, also, *U. S.* v. *Sharp*, Pet. C. C. 122; *The Enterprise*, 1 Paine, 34; Bish. St. Crimes, § 41; Lieb. Herm. 156. In this the author quotes the law of the Chinese Penal Code, which reads as follows: 'Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows.' There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate. See another illustration in *Ex parte Jackson*, 45 Ark. 158."

Applying that doctrine in this case, and eliminating the idea that the through rate is a standard of comparison of the local rate, there is nothing to justify a verdict of guilty against the defendant. Judgment will therefore be reversed, and the case remanded for further proceedings.

CYCLONE STEAM SNOWPLOW CO. *et al.* v. VULCAN IRON WORKS.

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

No. 126.

1. CONTRACTS—MANUFACTURER'S WARRANTY.
   Where a contractor agrees to build an experimental machine, the first under a new patent, on plans to be approved by the patentee, with warranty for the workmanship and materials of his own shop, but expressly excepting from the warranty the boiler and other parts bought outside, and the working of the machine as a whole, the relative capacity of the boiler and engines is not a matter of the contractor's workmanship, nor is he liable for an error therein.
2. ACTION ON BOND—VALUATION.
   In Illinois, when an experimental machine, nearly complete, is replevied from the person under contract to make it, at a valuation of $10,000 by the replevisor, such valuation is conclusive upon him in an action on the replevin bond, in the absence of evidence that he was misled, and made it in ignorance of the actual condition of the property. 48 Fed. Rep. 652, affirmed.
3. SAME.
   In any event, where the replevisor removed the property to a distant place, thus making a fair valuation impossible, and sold it and the patent right for $16,000, the value of the royalty, wholly in the control of the replevisor, having been unknown at the time of replevin, his own valuation is conclusive upon the replevisor.

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

Action on a replevin bond by the Vulcan Iron Works against the Cyclone Steam Snowplow Company and C. P. Jones. Judgment for plaintiff. Motion for a new trial denied. 48 Fed. Rep. 652. Defendants bring error. Affirmed.