"It may be accepted as unquestioned that neither the United States nor a state can be sued as defendant in any court in this country without their consent, except, etc. Accordingly, whenever it can be clearly seen that a state is an indispensable party to enable a court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But, in the desire to do that justice which in many cases the courts can see will be defeated by an extreme extension of this principle, they have in some instances gone a long way in holding the state not to be a necessary party, though its interests may be more or less affected by the decision. Among these cases are those where an individual is sued in tort for some act injurious to another in regard to person or property in which his defense is that he has acted under the orders of the government. In those cases he is not sued as an officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defense he must show that his authority was sufficient in law to protect him. In this class of cases is included U. S. v. Lee, where the action of ejectment was held to be in its essential character an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment; and the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defense."

A case rarely arises in the courts more fully within the terms of a ruling decision than is the case at bar within the meaning and tenor of the language of the supreme court in the case of Stanley v. Schwalby, confirming and explaining the decision in Kaufman v. Lee.

We think there was no error in the action of the court below in entertaining this suit as not a suit against the state of South Carolina, and in giving judgment for the plaintiff below. The judgment of the court below is affirmed.

JONES v. NEWPORT NEWS & M. V. CO.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 173.

1. RAILROADS—SWITCH TO PRIVATE WAREHOUSE—DISCONTINUANCE.
   A railroad company, as a carrier, is not bound, at common law, by the establishment and maintenance for any length of time of a switch connection of its main line with a private warehouse, forever to maintain it.
2. SAME—ABUSE OF DISCRETION.
   Even if a railroad company may be liable for damages for an abuse of discretion in discontinuing such a switch, the person complaining must negative the dangerous character of the switch which the facts stated in regard to it in his petition suggest as a good ground for its discontinuance.
3. SAME—CONTRACT.
   An agreement by a railroad company, with one owning land adjacent to its track, that, if he would build a coal tipple and a trestle therefrom to its track, it would construct a switch thereon, and thereafter deliver coal to him there, does not contain an implication that the switch shall be perpetual.

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

Action by H. M. Jones against the Newport News & Mississippi Valley Company for injury to and discontinuance of a railroad

switch to plaintiff's warehouse. A demurrer was sustained to that part of the petition which claimed damages for discontinuance of the switch, and plaintiff brings error. Affirmed.

H. M. Jones, the plaintiff in error and the plaintiff below, filed two petitions in ordinary in the Caldwell circuit court of Kentucky against the Newport News & Mississippi Valley Company, a corporation organized under the laws of Connecticut, and a citizen of that state, engaged in operating under a lease the railroad of the Chesapeake & Ohio Southwestern Railroad Company. The plaintiff is the owner of land in the town of Princeton, lying near the junction of two streams, and within a few feet of the defendant's railroad bridge over one of them. The lot adjoins the right of way of defendant's railroad. The railroad at this point runs on a high embankment or fill. Some years before the filing of the petition, the plaintiff had built himself a coal tipple and storage bins for coal on his lot, and near the defendant's right of way, and a trestle, 15 feet high, above the ground, connecting the coal tipple with the defendant's roadbed on the high embankment. A railroad track was laid over the trestle, so that the cars could be run from the main track by a switch to the tipple. Plaintiff's first petition averred that, by the negligence of the agents of the railroad company, the switch from the main track of the railroad to the coal tipple was left open, and a regular freight train, running at a high rate of speed, left the main track, and running out upon the trestle, was precipitated over the tipple, doing much damage to the plaintiff's plant, for which he asked damages. The second petition, which, by the order of the court, was consolidated with the first, described the circumstances under which the trestle and connection track were built as follows: "That several years ago the plaintiff, desiring to go into the coal business at Princeton, Kentucky, and desiring to build for that purpose a coal tipple on said lot, and connect the same with the main line of said railroad, owned and then operated by the Chesapeake & Ohio Southwestern Railroad Company, by trestle and a railroad track, or switch, as it is sometimes called, had plans and specifications drawn for such coal tipple and trestle; and thereupon the said Chesapeake & Ohio Southwestern Railroad Company made and entered into a contract with him, this plaintiff, that, if this plaintiff would build the proposed coal tipple and trestle, it would make the necessary embankment, connect the trestle with its main line of road, and lay down the track over said embankment, trestle, and coal tipple, and connect the same with the main line of road by a switch, and thereafter deliver coal to him at said tipple, over said switch and road, on said trestle and coal tipple, and this contract was made in the early part of 1884. That, in compliance with this contract, this said plaintiff, in the summer of 1884, built said coal tipple and trestle in accordance with said plans and specifications, and the said Chesapeake & Ohio Southwestern Railroad Company built said embankment and laid said track thereon, and on said trestle and coal tipple, and connected the same with the main line of said railroad with a switch, and then it became a part of said main line of road, and so remained until the doing of the wrongs hereinafter complained of; and said last-named railroad company and the defendant delivered coal in car-load lots over said switch to said coal tipple, as was their duty, from that time until the time of the doing of the wrongs hereinafter complained of, as the business of the plaintiff required said coal to be delivered. That said coal tipple and trestle were built of heavy timber, and were about fifteen feet high, and were very expensive, and cost this plaintiff not less than $——; and, in addition thereto, he built a room under one of the bents of said coal tipple, and fitted it up for an office, bought and put up a pair of wagon scales, built a bridge across the Dallam Spring, which was necessary to get the wagons to the scales, put a roof over the coal tipple, bought a wagon and a pair of mules, and in every way fitted himself up to run a coal business, and did run a coal business, at that place and on said coal tipple, for a number of years, and until the doing of the wrongful acts hereinafter complained of. Said trestle and coal tipple is the same mentioned in the first paragraph of this petition. That afterwards the Chesapeake & Ohio Southwestern Railroad Company leased said railroad from Louisville to Paducah, Ky., through Princeton, Ky., to the defendant,