IN THE

Supreme Court of the United States

OCTOBER TERM, 1896.

No. 446.

E. ALLGEYER AND CO., A COMMERCIAL PARTNERSHIP COMPOSED OF CHARLES E. ALLGEYER, ERNEST SIEGFRIED, RENE BLOCK, CHARLES A. MARANDE, AND OLIVIER SERA, PLAINTIFFS IN ERROR,

vs.

THE STATE OF LOUISIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

STATEMENT OF PLEADINGS AND FACTS.

Plaintiffs in error are sued for three thousand dollars, the amount of certain civil penalties, which the state of Louisiana charges to have been incurred, by three certain violations of a statute, known as Act No. 66 of the session of the General Assembly of the state of Louisiana of the year 1894; the statute is as follows:

"AN ACT, to prevent persons, corporations, or firms, from dealing with marine insurance companies, that have not complied with law.

"SECTION 1. *Be it enacted by the General Assembly of the state of Louisiana,* That any person, firm or corporation who shall fill up, sign or issue, in this state, any certificate of insurance under an open marine policy, or who in any manner whatever, does any act in this state, to effect, for himself or for another, insurance on property, then in this state, in any marine insurance company which has not complied in all respects with the laws of this state, shall be subject to a fine of one thousand dollars for each offense, which shall be sued for in any competent court by the Attorney General, for the use and benefit of the charity hospitals in New Orleans and Shreveport.

"SECTION 2. *Be it enacted, etc.,* That all laws or parts of laws in conflict herewith are hereby repealed."

The acts relied upon to sustain the charge of the State, are:

First. That plaintiffs in error, on the 27th of October, 1894, effected insurance for themselves, on property situated in the state of Louisiana, in the Atlantic Mutual Insurance Company, of New York, a corporation organized and doing business in the state of New York, and not domiciled or doing business in the state of Louisiana.

Second. That the plaintiffs in error mailed and issued a letter of advice, or a certificate of marine insurance, on the date given, advising the said insurance company of the shipment of one hundred bales of cotton to foreign ports, in accordance with the terms of an open marine policy, made between plaintiffs in error and the company, the cotton at the time being located in the city of New Orleans, state of Louisiana.

Third. That under the terms of the open policy, no in-

surance was effected on the said cotton until the letter or certificate was mailed.

Fourth. That the company had no authorized agent in the state of Louisiana, and had not complied with the laws thereof, and especially with article 236 of the Constitution, which is as follows:

"No foreign corporation shall do any business in this State, without having one or more known places of business and an authorized agent or agents in the State upon whom process may be served."

Two transactions of a like nature, between plaintiffs in error and the insurance company are alleged to have taken place on two other several dates; the three are claimed to have been violations of the act of 1894, and the statutory penalty of one thousand dollars for each offense is sued for.

In the court of first instance, defendants, after pleading the general issue, set up that Act No. 66 of 1894 was unconstitutional, null and void, being in violation of the Constitution of the United States, in that it deprived defendants of their property without due process of law, and denied to them the equal protection of the laws; that the business concerning which the penalty was sought to be enforced, and the contracts made in reference thereto, were beyond the jurisdiction of the State of Louisiana, and not amenable to any penalties imposed by its laws; that the contracts of insurance were made in the State of New York, where the premiums were paid, and where the losses, if any, were also to be paid; that they were New York contracts, and that under the Federal Constitution, the defendants had the right to do and perform any acts in the State of Louisiana, which were necessary and proper for the execution of its contracts made elsewhere, and so far as Act No. 66 of 1894 might be construed so as to prevent or interfere with the execution of such contract, it was violative of the Federal Constitution.

In the Civil District Court for the Parish of Orleans, in which the suit was instituted, the case was tried upon an agreed statement of facts, which is as follows:

That the defendants made with the Atlantic Mutual Insurance Company, a corporation created by the laws of the state of New York, and domiciled and carrying on business in the city of New York, in said state, the contract evidenced by the policy of insurance attached to the agreement as part hereof as Exhibit "A."

That the Atlantic Mutual Insurance Company is engaged in the business of marine insurance, has appointed no agent in the state of Louisiana, and has not complied with the conditions required by the laws of this state for the doing of business within the same, by insurance companies incorporated and domiciled out of the state.

That on October 23rd, 1894, the defendants mailed to said company a communication the tenor and form of which is shown by Exhibit "B" attached to and made part of the agreement. At the time of the mailing of the said communication the cotton referred to by it, to wit, one hundred bales, was within the state of Louisiana.

That the premiums to be paid under said contract of insurance and the loss or losses under the same are payable in the city of New York, the said premiums being remitted by defendants from New Orleans by exchange.

That defendants are exporters of cotton from the port of New Orleans to ports in Great Britain and on the continent of Europe; they sell cotton in New Orleans to purchasers at said ports. For the price of every sale of cotton made by them they, in accordance with the general custom of business, draw a bill of exchange against the purchaser for the price, attaching to the same bill of lading for the cotton and an order of the Atlantic Mutual Insurance Company for a new and separate policy of insurance, spoken of in the policy marked Exhibit "A," the form of said order being that

shown by Exhibit "C," attached as part hereof. This bill of exchange, with the bill of lading attached, is sometimes negotiated with banks in the city of New York; sometimes it is not negotiated at all, but forwarded direct for collection from the purchaser of the cotton. The bill of exchange, with the bill of lading, and order for insurance attached, in either case is sent from New Orleans first to New York, where, after its negotiation, or before being forwarded from thence for collection, the order for insurance is presented to the Atlantic Mutual Insurance Company. Upon this showing the insurance company in New York issues and delivers to the holder of the exchange and bill of lading, when the former has been negotiated, or to the agent of defendants when the exchange has not been negotiated, a new and a separate policy of insurance for the cotton, in accordance with the contract made with the defendants and evidenced by the policy attached to this statement as part hereof as Exhibit "A." This new and separate policy, when received, is attached to the bill of exchange. The exchange cannot be negotiated in New York unless it is accompanied by both the bill of lading and order for insurance, and unless the new and separate policy issued by the company is attached to it the purchaser of the cotton is under no obligation to pay the bill drawn on him for the price of the cotton. The new and separate policy delivered to the holder of the exchange and bill of lading in New York, or to defendants' agent there, as the case may be, is for the benefit of the holder of the latter, or of defendants, according as the exchange has been negotiated or not. The holder of the exchange becomes the owner of the cotton covered by the bill of lading attached, and is the owner of the policy of insurance covering the same, in the event of a loss within the terms of the policy.

The business thus described is conducted as above by the general custom and agreement of all parties concerned.

EXHIBIT "A."

Policy of Insurance.

By the Atlantic Mutual Insurance Company.

(Cargo.) (No. 26474.)

E. Allgeyer & Co., on account of themselves; and to cover cotton in bales, purchased and shipped by them, on which drafts are drawn for the purchase, upon whom it may concern—

(327,671.)

New Orleans.

Loss, if any, to be paid in gold to E. Allgeyer & Co.

Do make insurance, and cause to be insured, lost or not lost, at and from ports and places in Texas, Louisiana, Mississippi, Alabama, Georgia, Arkansas, Missouri, or Tennessee, to the mills in the New England or Middle states when destined to such mills, with liberty to transship one or more times; or to port or ports in the United Kingdom of Great Britain or on the Continent of Europe between Hamburg and Trieste both inclusive, direct or by steamers only via New York, Boston, Philadelphia or Baltimore, for transshipment; or to Gothenburg, direct, or by steamers only via New York, Boston, Philadelphia, or Baltimore, for transshipment by the usual routes, including the risk of fire prior to shipment, the risk to attach upon the cotton becoming the property of E. Allgeyer and Company, and at their risk, and to attach on or after September 1st, 1893, and prior to September 1st, 1894—

Shipments applicable to this policy to be reported to this company by mail or telegraph on day of purchase—

Warranted not to cover cotton in charge of carriers on shore or during inland transportation.—

On cotton in bales.

(Matter enclosed between rules erased in copy.)

No risk is to be insured by this policy until a letter signed by —— —— and addressed to the president of this company, detailing name of vessel, particulars of shipment, with description of the property and amount to be insured, is deposited in the post-office at ——, which must be done while the property is in good safety, and in all cases prior to the departure of the risk from ——; a duplicate of such letter to be sent by the following mail.

(Written across the face:) W. H. H. M. V. P.

A new and separate policy to be issued for each risk, the premium on which is to be paid in cash upon the delivery of such policy in New York to E. Allgeyer & Co.—

Risks endorsed hereon and subsequently taken off, and new and separate policies issued, are not to exhaust this policy.

Vessel or vessels and conveyances upon all kinds of lawful goods and merchandise, laden or to be laden upon the good shipments —— to be made on or after September 1st, 1893 and prior to September 1st, 1894, whereof is master for the present voyage —— ——, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

Sum insured $200,000. Each ten bales cotton, successive numbers in the order of invoice, subject to their own particular average as if separately insured, and when not numbered,

Beginning the adventure upon the said goods and merchandises, from and immediately following the loading thereof on board of the said vessel, at as aforesaid, and so shall continue and endure until the said goods and mer-

then each mark of not less than ten bales subject to its own particular average as if separately insured.

Premium....	$2,000.00
Policy	1.25
	$2,001.25

Warranted free from claims for country damage, or damage from exposure during inland transportation or previous to loading. It is by the assured expressly stipulated in respect to land carriers, that no right of subrogation is or is to be, abrogated or impaired by or through any agreement intended to relieve a carrier from duties or obligations imposed or recognized by the common law or otherwise.

In case of loss prior to issue of certificate or policy and negotiation of exchange for purchase of cotton, the liability under this insurance is not to exceed the cost of the cotton and charges added; except in cases where the assured is compelled by his contract to replace the cotton destroyed; in which cases the actual cost — the new cotton and of placing chandises shall be safely landed at as aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance.

The said goods and merchandises, hereby insured are valued including premiums at the sums expressed in the letter of advice as provided for herein not to exceed the invoice cost and fifteen per cent.

Touching the adventures and perils which the said Atlantic Mutual Insurance Company is contented to bear, and takes upon itself in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of marque and counter-marque, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes or people, of what nation, condition or quality soever, barratry of the master and mariners, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises or any part thereof. And in case of any loss or misfortune it shall be lawful and necessary to and for the assured, — factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safeguard and recovery of the said goods and mer-

it where the old cotton was lost, shall be the limit of claim, provided it does not exceed the sum insured.

chandises or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said insurance company will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance, by the assured or — assigns at and after the rate of one per cent. on the subscribed amount of this policy on account. Payable in gold.

The amount of risk under this policy is not — exceed $100,000 by any one steamer at one time, nor more than $50,000 against the risk of fire in any depots, yards, presses, on wharf, pier or in railroad depot, at any one time.

The company are to be entitled to premium on all shipments reported as provided for above. The rate of premium shall be fixed by the president or the vice-president of the company, when the vessel and nature of the risks are known and understood, charges and expenses in currency to be reduced to the standard of gold. Each party at liberty to cancel this policy upon giving the other ten days' notice of intention so to do. An approved note to be given for the premium note on this policy.

The amount of risk under this policy is not to exceed $—— by any one vessel.

(11.) Warranted by the assured free from claim on account of capture, seizure, detention or destruction, by or arising from any belligerent nation, or by or from any officer, civil or military, or other person claiming to act in their name, or

And in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the said — (the amount of the note given for the premium, if unpaid, being first deducted), but no partial loss or particular average shall in any case be paid, unless amounting to five per cent. Provided always, and it is hereby fur-

under their authority, or in their behalf.

(18.) Proof of loss to be authenticated by the agent of the company, if there be one at the place such proofs are taken.

(19.) Charges and expenses in currency to be reduced to the standard of gold.

(25.) Dividend of profits, if any, may be declared on the amount of premium terminated and marked off by the company, the same as if the premium was in currency, and for such purpose a dollar in gold will be treated as a dollar in currency, and this insurance is accepted on these terms.

ther agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in the day of date to this policy, then the said Atlantic Mutual Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said Atlantic Mutual Insurance Company shall return the premium upon so much of the sum by them assured, as they shall be by such prior assurance exonerated from. And in case of any insurance upon the said premises, subsequent in day of date to this policy, the said Atlantic Mutual Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith and the said Atlantic Mutual Insurance Company shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. It is also agreed, that the property be warranted by the assured free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

Warranted not to abandon in case of capture, seizure or

detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to this company. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade; but in the event of blockade, to be at liberty to proceed to an open port and there end the voyage.

In witness whereof the president or vice-president of the said Atlantic Mutual Insurance Company hath hereunto subscribed his name, and the sum insured, and caused the same to be attested by their secretary, in New York, the 5th day of September, one thousand eight hundred and ninety-three.

MEMORANDUM—It is also agreed, that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wicker-ware and willow, (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits, (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under twenty per cent., unless general; and sugar, flax, flaxseed and bread, are warranted by the assured free from average under seven per cent., unless general; and coffee, in bags or bulk, pepper in bags or bulk, and rice free from average under ten per cent., unless general.

Warranted by the insured free from damage or injury, from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by seam damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the

contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise as far as practicable. Not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel.

If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

In all cases of return of premium, in whole or in part, one-half per cent. upon the sum insured, is to be retained by assurers.

$200,000. Two hundred thousand dollars.

W. H. H. M. V. P. J. L. L.

Communication, dated October 3rd, 1894, to insurance company, attached to agreement, marked Exhibit "B."

"Insurance is wanted by E. Allgeyer & Co., for account of same, loss, if any, payable at Paris, in French currency, computed at the rate of twenty cents, United States currency, to the franc, to —— —— or order by J. S. Morgan & Co. upon surrender to them, in London, of this policy with an adjustment of the loss made by Frederick Wood, of Havre, France.

For $3,400.00, on one hundred b. c. on board of steamer ——, —— —— master, and to be insured at and from L. Rock to N. Orleans per R. R., and thence per steamer to Havre.

Fast: 100 b. c. for thirty-four hundred dollars.

Charges and expenses in currency to be reduced to the standard of gold; bill of lading dated ——; premium, — per cent., payable in gold; time of sailing, ——.

Binding.

189 (Signed) E. ALLGEYER, *Applicant*,
Per P. ROUBELOT.

N. ORLEANS, *October 22nd*, 1894."

And on the face of said communication appears the following inscription:

"Warranted by the assured that vessels to be loaded with grain from the ports of New York, Philadelphia, or Baltimore, for foreign ports, are to be loaded under the inspection of the surveyor of the board of underwriters and his certificate as to their proper loading and seaworthiness obtained."

And it further appears:

"Warranted by the assured free from claim on account of capture, seizure, detention, or destruction by or arising from any belligerent nation or by or from any officer, civil or military, or other person claiming to act in their name or under their authority or in their behalf."

Order on the Atlantic Mutual Insurance Company for a New and Separate Policy of Insurance, Attached to Agreement, Marked "C."

"Attached to draft No. — on —— —— from E. Allgeyer & Co., New Orleans, 189–, to Atlantic Mutual Insurance Company, New York.

Marks and numbers, ——.

Please deliver to —— —— or order special policy for $— on — bales cotton per —— from New Orleans to ——.

Respectfully,

(Signed) E. ALLGEYER AND Co.,

Per —— ——."

After a judgment of the District Court, sustaining the defense, the state, by appeal, carried the cause to the Supreme Court of the state; by that court, the judgment of the District Court was reversed, and a decree entered against defendants for one thousand dollars, with interest, the proof showing only a single transaction by defendants upon which could be predicated any violation of the act of 1894; the

opinion and decree of the court will be found reported in the 48th volume of the Louisiana Annual Reports, p. 104.

The conclusions of the court are based upon the following propositions, which are found in the opinion, and repeated in the syllabus thereof, to wit:

First. That Act No. 66 of 1894 does not violate the provisions of the (state and) Federal Constitution.

Second. That it is within the power of the state, to forbid a citizen of the state, from doing any act in the state, which violates the laws of the state.

Third. If a party, while in the state, takes out an open policy in a marine insurance company domiciled out of the state, and which has not complied with the laws of the state for doing business within its territory, covering property situated within the state, he is liable for the penalty imposed by Act 66 of 1894.

Fourth. The mailing of a letter, or telegraphing a communication, by which instantly each shipment of goods is insured, and the risk attached, is doing an act in the state of Louisiana to effect insurance, and comes within the act forbidden by the statute.

It is publicly known, that the *syllabi* of the opinions of the Supreme Court of the state of Louisiana, are made by the justices who render the opinions.

After the refusal of a rehearing applied for by defendants, they sued out a writ of error, returnable to this court, making the following assignments of error:

ASSIGNMENT OF ERRORS.

First. That the court erred in holding that Act No. 66 of the General Assembly of the state of Louisiana of the year 1894, approved July 6, 1894, is not in violation of the 14th Amendment of the Constitution of the United States.

Second. That the court erred in holding, that the said statute does not deprive defendant of its property, without

due process of law, and that the said statute does not deny to defendant the equal protection of the laws.

Third. That the court erred in holding that the said statute does not restrain or deprive defendant of its liberty and freedom to contract, in violation of the Constitution of the United States.

Fourth. That the court erred in holding that the said statute is not violative of the Constitution of the United States in that it deprives it of the right to use the post-office and mails, which are within the exclusive jurisdiction of Congress or of the United States, and the use and employment of which cannot be hampered or prevented by any statute of the state of Louisiana.

Fifth. That the court erred in holding that the said statute is not violative of the Constitution of the United States, by reason of its being a regulation of, or interference with, commerce with foreign nations and the several states, or commerce between persons residing within the state of Louisiana and persons residing in other states of the Union, or in foreign countries.

Sixth. That the court erred in rendering a decree and entering judgment herein in favor of plaintiff and against defendant.

ARGUMENT.

By Article 236 of the Constitution of Louisiana, foreign corporations are prohibited from doing any business in the state, without having one or more known places of business, and an authorized agent or agents in the state, upon whom process may be served.

By the general revenue act of the year 1890, the General Assembly levied a graduated license tax upon all companies, associations, corporations, firms and individuals, conducting the business of life, fire, marine, river, accident, or other insurance, within the state; see Acts of 1890, pp. 196 *et seq.;* after classifying the business with reference to gross annual

receipts, section 7, imposing this tax, concluded with the *proviso*, that no corporation, not incorporated under the laws of the state, should do any business therein, except through a duly authorized agent, with full power for all purposes connected with licenses, taxation, aud service of process, the agent to be appointed by an authentic act, a certified copy of which was required to be deposited with the secretary of state; further, that any person who should fill up or sign a policy or certificate of insurauce, on open marine policy, or otherwise, issued by a corporation not located or represented in the state by a legally authorized agent, should be considered the agent of such corporation, and should be personally liable for all licenses, taxes and penalties imposed by the act.

Under this law, the state brought suit against a party, for the recovery of a license claimed to be due by the Atlantic Mutual Insurance Company, of New York, the defendant not being an agent of the company, but an assured of the same, under a contract of like character with that which is the basis of the present suit; defendant was treated as the agent of the company, under the proviso of section 7, and as such, sought to be held personally liable for the license tax claimed to be due by the company.

That suit was defended on the ground that the company was doing no business in the state of Louisiana, and had not entered it for any purpose; that the contract of insurance with reference to which the suit was brought, was made and completed in the state of New York, and was not within the jurisdiction of the state of Louisiana, or the authority of its laws; that the only act done within the state was the mailing of a letter, advising the company of each shipment applicable to the open policy; that this was the mere incident of a contract made and to be executed beyond the state of Louisiana, and was insufficient to place the contract of the parties thereto within the power of the

state, and in no respect constituted the doing of business within the state by the company.

This defense was sustained by the District Court in which the suit was instituted; the case being carried by appeal to the Supreme Court of the state, the judgment of the lower court was affirmed; the Supreme Court held, that the contract, identical, except in immaterial particulars, with the one concerned here, must be considered as having been made in New York; that the company, having no agent in Louisiana, could not be considered as doing business in that state.

The court, however, concluded its opinion with the following *dictum:*

"The state can (therefore) prohibit its own citizens from taking out an open policy, covering contracts of insurance in a foreign insurance company which has not complied with constitutional and statutory regulations. It has the exclusive right, by virtue of its sovereignty, to regulate the condition, capacity and state of all persons within it; the validity of contracts and other acts done within its limits; the resulting rights growing out of those contracts and acts, and the remedies and modes of enforcing justice and subjection to its will."

Story's Conflict of Laws, paragraph 18.

State of Louisiana *vs.* J. Herbert Williams, 46th La. Annual Reports, pp. 922 *et seq.*

The attempt to enforce the Act of 1890 being unsuccessful, presumably encouraged by the *dictum* above quoted from the opinion of the Supreme Court of the state of Louisiana, the General Assembly adopted Act No. 66 of 1894, to consummate the purpose sought to be accomplished by the statute of 1890.

The object of the law is fully shown in its title, which is, "To prevent persons, corporations or firms from dealing

with marine insurance companies that have not complied with the law."

It is a fair inference from the legislative and judicial history of the present controversy, that the real purpose of the Act of 1894 is to increase the state's revenue, by forcing all foreign insurance companies, with whom residents of Louisiana transact business of the character shown from the present case, to appoint resident agents, and thereby become amenable to a state license tax; the first attempt, found in the Act of 1890, was to make the assured the agent of the underwriter, a condition wholly inconsistent with itself, superadded to which, was the other incongruity, of fixing upon the agent'a personal liability, for the supposed debt of his legislative principal; the expedient found in the Act of 1894 is a penalty, imposed upon the assured for doing any act within the state, to obtain insurance, in a foreign company, which has not complied with the laws of the state.

It will not be disputed that the state has no power, nor, that it is beyond the legitimate sphere of state government, to compel a foreign corporation to enter its borders for the transaction of business which can be done elsewhere; by imposing a penalty upon any assured within the state of Louisiana for the doing of any act, in order to obtain insurance outside of the state, the Act of 1896, if maintained, would compel foreign companies, either to establish local agencies, or cease doing business with the residents of the state of Louisiana.

So far as the state of Louisiana is concerned, the character and *situs* of the contract has been fixed with certainty, by the decision of the Supreme Court in the State *vs.* Williams, 46 La. An., 922; it was there declared to be a contract made in New York, and that its character was such that it did not constitute the doing of business within the state of Louisiana.

From the agreed statement of facts, it is shown, that the

contract evidenced by the open policy was made in New York; that the premiums due by the assured, and the losses, if any, payable by the underwriter, were there discharged; the two facts by which, under the theory of the state, defendants have incurred the penalty of the Act of 1894, and the conditions deemed to sustain that law, are, that the property covered by the contract is situated within the state of Louisiana, and the mailing at New Orleans, of the letter of advice of shipment, required by the policy. By this latter, the state claims that defendants have done, in the sense of the statute of 1894, an act within the state of Louisiana, to effect for themselves insurance in a foreign company which has not complied with the laws of the state.

The various grounds covered by the assignment of errors, it is apprehended, can be more conveniently argued and understood in their application, by their discussion as they are logically related, than if dealt with separately, and in the order in which they are found in the record.

The principal ground of attack upon the statute of 1894, relied upon by plaintiff in error, is that it is violative of the 14th Amendment of the Constitution of the United States, in that it deprives them of their liberty and property without due process of law; liberty, in the sense of the amendment, includes more than mere freedom from physical restraint; it includes the right to use and enjoy all the energies, physical and moral, with which man is endowed; the right to use the faculties, to engage in or follow any lawful vocation or business, by which a livelihood may be gained; property imports the idea not only of possessing and enjoying, but of acquiring, and to this end, engaging in business, and making contracts, for the purpose of emolument or gain.

If the Act of 1894, particularly its attempted application in the present case, is a constitutional exercise of the state authority, a party resident in Louisiana would be unable to make a contract of insurance with a foreign underwriter having no agent in the state; by open policy, covering

property within the state of Louisiana, since, under the statute, it would be a penal offense for him to perform within the state an act, without which the contract would not be susceptible of execution; the question, therefore is, whether property situated in Louisiana can be protected by an open marine policy issued by a foreign corporation, having no agent within the state of Louisiana; the letter of advice of shipment, which is the usual and ordinary incident of a contract by open policy, is necessarily a feature of such a contract, and if such letter cannot be lawfully mailed in the state of Louisiana, it is evident that contracts of the character in question cannot be made in that state.

It will, of course, not be questioned, that laws of the state can have no operation upon persons or contracts made outside of its territory; we are not here concerned with the case where the state is asked to recognize or enforce a foreign contract, which it conceives to be injurious to its own interests or to those of its citizens; the state of Louisiana is asked to extend no comity as to a contract made in another state, which is contrary to good morals, or to its own public policy.

The right of the parties to make a contract in New York is beyond question, but this right would be of no value, if so small an act as mailing a letter in the city of New Orleans can be made the subject of a penalty, and thus defeat the lawful intention of the parties; it has been held, that a contract, lawful in the state where it is made and to be executed, is not in any manner affected by the prohibitory laws of another State, from which the final assent is communicated by mail.

In McIntyre *vs.* Parks, 3 Metcalf, (Mass.), p. 207, a promissory note was given for the price of lottery tickets sold in New York, the laws of which state permitted such transaction; the tickets were bought by the maker of the note for resale in Massachusetts, to the knowledge of the vendor, the laws of which state prohibited the sale of lottery tickets; the

whole transaction was before the court, and its validity contested on the ground that the consideration was illegal under the laws of Massachusetts; it was claimed that the proposal to buy the tickets was *made by letter dated and mailed at Boston;* this fact, however, in the opinion of the court, had no effect upon the validity of the contract made in New York; in which state the tickets were delivered.

In Milliken *vs.* Pratt, 125 Massachusetts, p. 374, plaintiff was engaged in business in Maine. Defendant was a married woman residing in Massachusetts. The two entered into a contract, which was legal in the state of Maine, but invalid in Massachusetts. The contract, which was in writing, was drawn up and signed in Massachusetts and transmitted through the post-office to the plaintiff in Maine. The contract being sued on in Massachusetts, the liability thereunder was denied on the ground of its illegality under the laws of that state. The court said, p. 376:

"If the contract is completed in another state, it makes no difference in principle whether the citizen of this state goes in person, or sends an agent, or writes a letter across the boundary line between the two states. As was said by Lord Lyndhurst: 'If I, residing in England, send an agent down to Scotland, and he makes contracts for me there, it is the same as if I, myself, went there and made them.' Pattison *vs.* Mills, 1st Dow, C. L., pp. 342, 363; so, if a person residing in this state, sends or transmits, either by messenger or by the post-office, to a person in another state, a written contract, which requires no special forms or solemnities in its execution, and no signature of the person to whom it is addressed, and is assented to and acted upon by him, the contract is made there, just as if the writer personally took the executed contract into the other state, or wrote or signed it there, and it is no objection to the maintenance of an action thereunder here, that such contract is prohibited by the law of this commonwealth."

If by the law of New York, the contract of insurance in question is valid, there can be no doubt that a suit to enforce its liability would be allowed by the laws of Louisiana. If the statute of 1894 could be fairly considered as furnishing any obstacle to the enforcement of such a contract, based upon the making of the report of shipment, it is clear that the latter *does not effect* the insurance and for that reason alone, the statute would find no application.

The court will keep in view the act, as to which a penalty is provided by the law; it is:

"Any act in this state to effect for himself, or for another, insurance on property then within this state."

So far as the status of any contract can be fixed by judicial decision, the policy of the Atlantic Mutual Insurance Company has been determined by the decision of the state Supreme Court in the State *vs.* Williams, 46 An., p. 922. That court has declared in unmistakable terms, that it is the original contract of insurance, made and executed in New York, which establishes the contract relation between the parties, and by which the insurance is effected; that the subordinate policies of insurance, and necessarily the letters of advice contemplated by the open policy, do not effect the insurance; that they introduce no element into the transaction which is not fully supplied by the open policy; that in that policy are found all the conditions for each separate shipment and insurance of cotton which it covers; that in the separate contracts of shipment also, there is no agreement or condition that is not found in the open policy; that the contract of the defendant is a New York contract, and cannot be impaired or annulled as to any part, by the laws of the state of Louisiana. If valid in New York, it cannot be made invalid by the prohibitory laws of Louisiana.

In Lamb *vs.* Bowser, 7 Bissell, p. 315, an insurance company was domiciled in Illinois; the defendant delivered to the agent of the company in Indiana, where the defend-

ant resided, an application for insurance on certain property in that state, a note and a sum of money representing the premium on the policy; the agent forwarded the application, the note and sum of money, to the company's place of business in Illinois, and caused a policy of insurance to be delivered to the defendant in Indiana, all of which was done by the company and the agent without having first complied with the statute of Indiana respecting foreign coporations and their agents doing business in that state; the premium note not being paid, suit was brought against the maker in Indiana; it was defended on the ground that the contract was unlawful under the Indiana statute providing penalties against any person who should receive or transmit money, or should in any manner make, or cause to be made, any contract, or transact any business for, or on account of, a foreign corporation which had not complied with the state laws. The court declared (p. 318) that the case stood just as if the defendant had procured his insurance on a personal application to the company in Illinois; the defendant insisted, however, that if the contract was to be regarded as an Illinois contract, it was entered into in Indiana in violation of its statute, and therefore could not be enforced in that State. In answer to this the court said, that it might be sufficient to say that *it was not competent for the legislature of Indiana to declare, that the citizens of that state should not be allowed to make such contracts as they pleased, outside of the state, for insurance on their property, whether it was within or without the state;* that it by no means followed that because corporations have no existence beyond the boundaries of the sovereignty or state which created them, and Indiana had said that foreign corporations should be admitted to do business in that state only on certain terms, which were not complied with in the particular case, that the contract was void; that it was clearly not the intent of the legislature to apply the statute to the contracts entered into with foreign corporations out of the state; that the

class of contracts denounced by the statute were those made *within* the state, while that in question was entered into in Illinois; therefore, that it contravened no public policy of the State, to enforce by its courts a contract made in another state, the law only applying to contracts made within its territory.

The Act of 1894 having manifestly for its object, the enforcement of Article 243 of the Constitution, which fixes the conditions upon which foreign corporations may engage in business in this state, it should be limited to the purpose of its enactment. It could have no reference to the corporation of another state, which has not carried on, or attempted to carry on, any business within the state. The Atlantic Mutual Insurance Company has not entered the state of Louisiana through any of its officers or agents, to do business. It is not engaged in business there. All the business it does, is done in New York. This is not only shown by the decisions of other courts, but also by the opinion of the state Supreme Court in the Williams case.

It must be admitted that the mailing of the letter of advice, or report of shipment, is a mere mode of communication; such communication might be had as well by the assured going personally to New York, or by his sending an agent, or by his use of the telegraph to transmit a message. If mailing the letter or report in the post-office is an act within the statute, so likewise would the departure of the assured on a train or steamship, or his dispatching a messenger, or his transmitting a telegram, be such an act. The fact that communication was had by letter is a circumstance altogether accidental in its character, and merely a mode by which communication, which could have been had by other means as well, was obtained.

Suppose that the state should have ordained that boarding a train or vessel, for the purpose of going to New York to effect insurance, was an act punishable by its statute, or that the sending of a person to New York for this purpose,

or that to write out or forward a telegram for the same purpose, were acts punishable by its laws, how would such legislation stand before this court?

It is more than obvious, that if the Act of 1894 be allowed to have effect, with regard to contracts of insurance such as that in question, it would be impossible for a party within the state of Louisiana, to hold any communication with an insurance company located in another state, which had not complied with the laws of the former. A penalty being provided for such conduct, the whole power of the state stands behind the prohibition and the enforcement of the penalty. The result would be, that with reference to the matter in question, Louisiana becomes isolated from the rest of the civilized world, and its inhabitants debarred intercourse with a certain class of those with whom they stand in contract relations, beyond the territory of the state. Under such conditions, in what sense can a resident of Louisiana be considered as in the enjoyment of his liberty? What becomes of the guarantees of the Federal Constitution that no state shall make or enforce any law which would abridge the privileges or immunities of citizens of the United States, and that no state shall deprive a person of life, property or liberty, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws? The right to contract, and freedom as to the places at which, and the persons with whom contract relations may be established, is an essential part of the liberty which is guaranteed by the fourteenth amendment.

Howard *vs.* Pennsylvania, 127 U. S., pp. 678, 684.

The right to make a contract in another state carries with it all that is necessary, appropriate or useful in the performance thereof. To concede to defendants the authority to make a contract in New York, but forbid them doing any act, however insignificant, in Louisiana, in compliance with

such contract, is tantamount to a prohibition against the entering into such a contract in New York. Under the Federal Constitution defendants have a clear right to enter into contract relations with any person in New York, and to freely use the mails and the telegraph for the purpose of communicating with the one with whom they have contracted. If it is within the power of Louisiana to say, "Although you have in New York, entered into a contract which was there valid, and which you had a right to make, I forbid you from holding any communication with reference to such contract from within the state of Louisiana," it would be the same thing as though the state had, in so many words, prohibited, under such conditions, any one within its territory from entering into contract relations with any person in another state.

> Butchers' Union Co. *vs.* Crescent City Co., 111 U. S., pp. 746–757.

In the present case, the defendants are denied the right of doing in the state of Louisiana so innocent an act as the mailing of a letter to a party in New York, with whom they have made contract. It is difficult to conceive of a more naked, unauthorized invasion of liberty.

The statute of 1894 makes penal an act which may be done with impunity with reference to an insurance company, represented in Louisiana by an agent. In case the company has no agent, the identical act, unnoticed in the former case, comes within the penal law. In what sense can parties situated as are defendants be said to enjoy equal protection of the laws? The right to engage in a certain line of business is permitted to part of one class of persons, while denied to another, engaged in the same business, and such denial is based not upon any act or conduct of those falling under the ban, but upon the circumstance that an underwriter in another state, with whom they desire to have business relations, has not chosen to appoint an agent in

the state of Louisiana. The amenability of any person to the law should depend upon his own act, and not upon that of another. A party having the free right to contract in any part of the world, finds that he is prohibited from so doing by the act of a foreign corporation, with whom he desires to contract. What protection under the law is enjoyed by such a prohibited person?

While in a general sense, a policy of insurance is not an instrument of commerce, the one under consideration is such, by its conditions and surroundings; defendants are in the buying of cotton, which they resell to purchasers in the eastern or middle states and in various ports of Great Britain and on the continent of Europe; the custom observed by all persons engaged in this business in the city of New Orleans, is, on the sale of the cotton, to draw a bill of exchange on the purchaser for the price, attaching to the exchange the bill of lading covering the cotton; it is a part of the business to negotiate all exchange in the city of New York, though sometimes it is forwarded directly to the purchaser for collection for account of the seller; the exchange in New York is not negotiable, unless both draft and bill of lading are accompanied by an order on the insurance company, for insurance protecting the cotton; the purchaser is not bound to pay the draft drawn for the price of the cotton unless there comes with it, and with the bill of lading, a policy of the insurance company covering the shipment; such policy, as well as the order for insurance, which arrives with the draft and the bill of lading in New York, are all based upon the original contract of insurance by open policy. The bill of exchange is secured, first by the bill of lading, the property covered by which is protected by the contract of insurance. The evidence shows that the conduct of defendants' business is impossible without the use of all three of the instruments, that is, the exchange, the bill of lading and the contract of insurance. The bill of lading is unquestionably an instrument of com-

merce, and evidence of a commercial transaction. In case of the loss of the cotton from dangers or risks within the policy, the bill of lading alone then represents nothing in the nature of property, save in certain cases a claim against the carrier. The insurance is designed to supply the property in case of loss, by indemnity to be paid by the underwriter. It is thus seen that the part played by the policy of insurance, constitutes commerce to the same extent, as does the bill of lading. The purpose of the policy of insurance is to furnish a substitute for the bill of lading; in the event that the property covered by it is damaged or destroyed, by reason of a cause within the policy. Whatever purpose may be served by the bill of lading, is equally performed by the contract of insurance, when it comes into play. The policy is an important and essential factor in the buying and selling of cotton for shipment to other states and to foreign countries, and is used in the city of New Orleans by all cotton-buyers, as well as by defendants.

The authorities relied upon by defendant in error do not in any respect sustain its position.

The case of Hooper *vs.* California, 155 U. S., p. 648, cited by plaintiff, contributes nothing to the solution of the present case. The statute of California made it a misdemeanor for any person in that state to procure insurance for any resident thereof, from an insurance company not incorporated under its laws, and which had not filed the bond required of foreign insurance companies. The defendant had undoubtedly violated the statute, which prohibited any person from procuring, or agreeing to procure, insurance for a resident of the state, from any insurance company not incorporated under the laws of the state, unless the latter, or its agent, had filed the bond required by law relative to such companies. The facts were these: Johnson & Higgins were insurance brokers in New York. Their business was to procure insurance for other persons, of whatever state resident, on the request of such persons. Upon receipt of

the policies they were delivered to the persons for whom they were procured. Johnson & Higgins had a branch of their business in the state of California, conducted by Hooper, their agent. Mott, a resident of California, applied in California to Hooper, also such resident, for insurance, to be obtained from his principals, Johnson & Higgins. This he did. The policy was received by Hooper, and by him delivered to Mott, in San Francisco, where also the premium was to be paid. In that case, the conduct of Hooper was in direct violation of the statute, which prohibited all persons within the state from procuring insurance for a resident thereof, in any company which had not complied with the law. The case only affirms the principle intimated by the state Supreme Court in the Williams case, that the status and capacity of all persons and all acts or contracts founded or done *within the limits of the state* are subject to its laws. Hooper was a resident of California, and in violation of its statute, procured for Mott, also a resident, and delivered to him in California, a policy of insurance in a company which had not complied with the conditions fixed by law under which it could do business in the state. The entire transaction began and ended in the state. The policy was procured by Hooper, it was delivered by him, and the premiums were received by him, all within the state of California; the company in question was doing business through an agent within the territory of California in violation of its laws. What was forbidden was the procuring within the state of contracts outside the state; it was the obtaining within the state of California, of contracts outside of the state, *and not such contracts themselves*, which was prohibited; the procuring of the contract was not forbidden, except when done within the state. Here, however, the case is entirely different, the entire transaction was consummated in New York, the policy being issued there, the premiums, and losses, if any, being paid there; the mailing of the report of shipment did

not procure or effect the insurance—that was already consummated by the open policy. The Hooper case declares simply that the Fourteenth amendment of the Federal Constitution does not guarantee a citizen the right to make within his own state, either directly or indirectly, a contract, the making whereof is constitutionally forbidden, but it does not declare that the resident of the state cannot make in another state a contract which is forbidden by the laws of his own state.

The case of Pierce *vs.* People, 106 Ill., p. 11, is likewise no authority as to the present controversy; a statute of Illinois provided a penalty against the agent of a foreign insurance company, for acting for such company without a certificate of authority from the auditor, showing that it had complied with the conditions required by the state law for its doing business; it was claimed that the agent procured and delivered a policy in Illinois to a resident of that state; that the premium was paid to the agent in Illinois; attempt to evade the law was by claiming that the party procuring the insurance should be considered as the agent of the assured; the court, very properly, brushed away this contention, as being a subterfuge: the purpose of the Illinois statute was to prevent altogether within its borders the making of contracts by its citizens, with foreign insurance companies which had not complied with its laws, but it must be observed that the statute went no further than to punish parties to such contracts, as were made within the state; the act of the contracting agent which was punished, was that done in Illinois, and although the intention of the law-maker was to prevent any contract being made with any such concern by its citizens anywhere, its preventive measures were confined to contracts made within its limits, and to such acts as were properly parts and parcels of the prohibited contract; there was no effort to fix a penalty for anything done within the state, as an incident of a contract already entered into elsewhere; there was in view only such acts or

conduct as were in preparation of effecting the insurance which was forbidden. This was in aid of the object of the law, which was to do away with such contracts entirely. The opinion in the case is taken up almost entirely with combating the proposition, that the culprit was not the agent of the assured, the status attempted to be given him by the company. He was, in fact, the agent of the latter, notwithstanding the pretense to the contrary.

In Commonwealth *vs.* Biddle, 139 Penn. State, p. 609, (21st Atlantic Reporter, p. 134), the statute provided that any person or persons, or any agent, officer or member of any corporation, paying, receiving or forwarding any premiums, applications for insurance, or in any manner securing, helping or aiding in the placing of any insurance, etc., in an insurance company not of the state of Pennsylvania, which had not been authorized to do business in it, should be guilty of a misdemeanor; the decision of the court simply was that the statute had no application to a party procuring insurance on his own property in such an unauthorized company. So far from furnishing any authority against defendant, this case tends to support the propositions upon which this suit is defended. The opening sentence of the opinion is this:

"It may be readily conceded that an act which should attempt to prevent a non-resident owner of property within this state, *or a resident owner, not at the time within its territory*, from insuring his property in any manner, lawful in the place of contract, would be void, as extra-territorial; so also it may be said if a citizen of Pennsylvania has by contract, validly made out of its boundaries, incurred a liability, no law of this state, nor the Constitution of the United States, can prevent his fulfilling that obligation by an act done within the state."

That part of the opinion last quoted announces the very proposition upon which the defense in the present case in

great part depends, which is, namely, that the contract of the defendant being validly made outside of Louisiana, he can suffer no penalty prescribed by the laws of that state in fulfillment of such a contract, by any act done within its limits; the open policy being made in New York, there is no power in the state of Louisiana to prohibit the defendant from complying with any part of his contract by an act done within its borders. If under the Federal Constitution defendant was entitled to make in New York the contract in question, the right to make such a contract carried with it the right to mail a letter in Louisiana, if the contract required that this should be done.

In Slaughter *vs.* Commonwealth, 13 Grattan, p. 767, the statute provided that no agent of any insurance company, incorporated or authorized by another state, should transact business of the agency within the state of Virginia without a license; such a case presents no question at all decisive of the present controversy, the law and the facts being entirely dissimilar; the case simply declares that a foreign corporation could not pursue any business within the state, except upon conditions prescribed by the latter; this is not disputed.

The post-office and mails being established by the Federal Government, the transmission of letters is one of the means by which the General Government discharges its most important functions, the right to establish post-offices and post-roads being given by the Constitution itself. If the state of Louisiana has the right to say to a party, " You shall not use the mails for a certain designated purpose, without incurring a penalty under my laws," such a prohibition could be extended to all purposes, and thus defeat one of the powers of Congress. The conditions upon which the mails can be employed can be fixed by the Federal Government alone; they cannot be abated or enlarged by any state.

It is apparent that if defendants can be deprived of the use of the mails with reference to their contract with the in-

surance company, they could also be deprived of communication in any other mode, save by becoming amenable to a penalty fixed by the state law. By this means they could be prevented from holding any communication in any manner with a company located in another state which had not complied with its laws. They could be prohibited from departing in person for the purpose; they could be punished for sending a messenger to transact the business for them; the sending of a telegram for such a purpose could be made a misdemeanor. All these acts would be done within the state of Louisiana, and consequently punished by the act of 1894, if it be permitted to stand. See 125 Mass., 374.

It is true that it has been declared in a series of decisions by the Supreme Court of the United States, beginning with Paul *vs.* Virginia, 8 Wallace, p. 178, that a policy of insurance being only a contract of indemnity, it is neither commerce nor an instrument of commerce. This militates in no respect against the position of defendants, who are simply asserting their right to communicate with a party with whom they had made a contract in another state; it is this communication which is charged to be an act violating the statute of 1894.

The use of the telegraph to notify the company cannot be distinguished from the use of the mails for the same purpose.

It has been said in Pensacola Telegraph Co. *vs.* Western Union Telegraph Co., 96 U. S., p. 9, that:

"Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the *postal service* are placed within the power of Congress, because being national in their operation, they should be under the care of the National Government. The powers thus granted are not confined to the instruments of commerce, or to the postal service known, or in use when the

Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse and its driver to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. As they were intrusted to the General Government for the good of the nation, it is not only the right, but the duty of Congress, to see that intercourse among the states for the transmission of intelligence is not obstructed or unnecessarily encumbered by state legislation. The electric telegraph marks an epoch in the progress of the times. In a little more than a quarter of a century it has changed the habits of business and become one of the necessaries of commerce. It is indispensable as a means of intercommunication, but especially is it so to any commercial transactions.

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"Contracts are made by telegraphic correspondence, cargoes secured and the movements of ships directed. Telegraphic announcement of the markets abroad, regulates the price at home, and the prudent merchant rarely enters upon any important transaction, without using the telegraph freely to secure information."

In the case cited, the state of Florida had undertaken to confer an exclusive right upon the Pensacola Telegraph Company, a Florida corporation, to pursue the telegraph business within certain designated counties; this exclusive right was contested by the Western Union Telegraph Company, and was, mainly upon the grounds set forth, annulled; the principle that the telegraph as a means of communication was beyond the control of the states, and that the latter were in no respect entitled to hamper or interfere with its free use, was recognized and applied in Telegraph Company

vs. Texas, 105 U. S., p. 464; Leloup *vs.* Port of Mobile, 127 U. S., p. 645.

In the latter case it was declared that it was not only the right but the duty of Congress to take care that intercourse among the states by the transmission of intelligence between them be not obstructed or unnecessarily encumbered by state legislation (pp. 645 and 646).

It is respectfully submitted, that the judgment of the Supreme Court of the state of Louisiana should be *reversed*.

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