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Injunction--By One State Against Municipal Corporation in Another State--Enforcement

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sioner dissenting.[13] Upon reargument before the full Commission this finding was affirmed, but there were four Commissioners dissenting.[14] On appeal the Supreme Court, in affirming the judgment of the Interstate Commerce Commission, said:

> "That body professed to follow the decision in the Colorado case and we think it did so. The court there held that in the issuance of a certificate the public convenience and necessity the Commission need not determine with mathematical exactness the extent of the burden imposed upon interstate commerce by the operation of a branch line; that such burden might involve various elements, and if upon the whole proof the conclusion was warranted that continued operation would in fact unreasonably burden the interstate commerce of the carrier the Commission was justified in authorizing abandonment."

The question as to whether public convenience and necessity permit an abandonment therefore appears to be one of fact. The discretion of the Commission accordingly would play a great part in the determination of this question. The writer feels that in the Long Island case the Commission may well have refused to issue the certificate In that event there can be little doubt that a finding that public convenience and necessity did not permit abandonment would have not been disturbed by the Supreme Court.

SIDNEY BRANDES.

INJUNCTION—BY ONE STATE AGAINST MUNICIPAL CORPORATION IN ANOTHER STATE—ENFORCEMENT.

The state of New Jersey seeks a decree *in personam* praying for an injunction restraining the city of New York from dumping garbage into the ocean off the coast of New Jersey.[1] This resulted in interference with the fishing industry of New Jersey, destroying and tearing nets. The garbage carried in suspension by the sea made bathing unpleasant, and that of greater bulk, carried upon the surface, was washed up on the beaches, necessitating its removal. The action is brought in a court of equity. The injuries are continuing. There is no adequate remedy at law. The federal courts have jurisdiction.[2]

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[13] Long Island Railway Co. abandonment, 162 Interstate Commerce Rep. 363 (1930).

[14] 166 Interstate Commerce Rep. 671 (1930).

[1] New Jersey v. City of New York, 283 U. S. 473, 51 Sup. Ct. 519 (1931).

[2] U. S. Const., Art. III, Sec. 2: "The judicial power shall extend to all Cases, in Law and Equity, to all Cases of Admiralty and Maritime Jurisdiction; to controversies between a state and citizens of another state."

In cases of nuisance or trespass, the place where the act occurs, which makes possible the nuisance or trespass, is the *situs* of the tort.[3] The act complained of, the dumping of garbage, took place eight, twelve and twenty miles out from the coast of New Jersey. The territory subject to the jurisdiction of the United States includes land areas under its dominion and control, ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coastline outward a marine league or three geographical miles.[4] When the *situs* of the tort is outside the territorial limits of the United States the matter of its abatement likewise is outside the jurisdiction of the federal courts.[5] However, the *situs* of this tort is not the controlling factor. Both parties to the controversy have submitted themselves to the jurisdiction of the court. A court of equity which has control of the person of the defendant has jurisdiction of an action to restrain him from violating the rights of plaintiff in regard to property not within its jurisdiction and may compel obedience to its decree.[6] This is based on the principle that courts of equity have authority to control all persons within their own territorial limits. Without regard to the *situs* of the acts creating the nuisance, the equities between the parties are considered, and decrees *in personam* according to these equities are entered.[7]

Article III, Section 2 of the Constitution used the work "controversies" only to express the subject matter of its jurisdiction. The Judiciary Act of 1789 embodied in Section 687 of the Revised Statutes limited "controversies" to those of a civil nature.[8] Such construction is indicative of an intention not to confer on the federal courts jurisdiction of a suit by one state which could not be entertained in the courts of the other state at all. Chief Justice Marshall condensed the reason for this in the statement: "The courts of no country execute the penal laws of another."[9] This case is justiciable under the above section since it is of a civil nature.[10]

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[3] McGowan v. Columbia River Packer's Assn., 245 U. S. 352, 38 Sup. Ct. 129 (1917); Laedew v. Tennessee Copper Co., 179 Fed. 245 (C. C. S. D. Tenn. 1910).

[4] Manchester v. Mass., 139 U. S. 240, 257, 258, 11 Sup. Ct. 559, 562 (1891); La. v. Miss., 202 U. S. 1, 26 Sup. Ct. 408 (1906); Cunard S. S. Co. v. Mellon, 262 U. S. 100, 122, 123, 43 Sup. Ct. 504, 507 (1923).

[5] Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 8, 8 Sup. Ct. 811, 816 (1887); N. J. v. Sargent, 269 U. S. 328, 337, 46 Sup. Ct. 122, 124 (1926); U. S. v. Newark Meadows Imp. Co., 173 Fed. 426 (C. C. S. D. N. Y. 1909).

[6] Phelps v. McDonald, 99 U. S. 298 (1878); Hart v. Sansom, 110 U. S. 151, 154, 3 Sup. Ct. 586, 588 (1884); Cole v. Cunningham, 133 U. S. 107, 116, 10 Sup. Ct. 269, 272 (1890); Philadelphia Co. v. Stimson, 223 U. S. 605, 622, 623, 32 Sup. Ct. 340, 345 (1912).

[7] STORY, EQUITY JURISPRUDENCE (14th ed. 1918) §§899, 900.

[8] 36 Stat. 1156 (1911), 28 U. S. C. §341 (1928) Rev. Stat. §687: "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party * * *."

[9] The Antelope, 10 Wheat. 66, 123 (U. S. 1825).

[10] R. I. v. Mass., 12 Pet. 657, 722, 731 (U. S. 1838); Ames v. Kansas, 111 U. S. 449, 463, 464, 4 Sup. Ct. 437, 447 (1883).

In vesting in the courts of the United States the jurisdiction of suits by one state against the citizens of another, the object is to have the controversy determined by a national tribunal in order to avoid any possible suspicion of partiality which might exist if the plaintiff were obliged to sue in the courts of the state of which the defendant was a citizen. This controversy could not have been presided over either by the courts of New York or by the courts of New Jersey. The jurisdiction of the courts of a state is co-extensive with the boundaries of that state. So it has been held that the courts of New York have no jurisdiction to restrain the erection or order the removal of structures extending into the bay or river from New Jersey.[11] To be cognizable, the cause of action must arise within the territorial limits of the state.[12]

The Statutes [13] under which the defendant carried on the dumping operations were a lawful and valid exercise of the federal authority. This permission carries with it the obligation to perform the dumping in such a manner as not to harm the property of anyone else. Nothing in the Act gives the defendant immunity from liability for injury to others committed in furtherance thereof, nor deprives the injured party of the relief to which he is entitled. The Act permitted the defendant to dump garbage into the Atlantic Ocean under the supervision of the Supervisor of the Harbor of New York in accordance with permits issued by him at points eight, twelve and twenty miles southeast from Scotland Lightship and about ten, twelve and one-half, and twenty-two miles from the New Jersey shore. The Supervisor is designated by the President from line officers of the Navy to act under the direction of the Secretary of War in enforcing the provisions of the Act and detecting offenders against the same.[14] The Act further provides the penalties for failure to obtain the necessary permit and for disposal of material elsewhere than permitted.[15]

It is a recognized principle that a court of equity will not issue a vain decree. Having jurisdiction of the person of the defendants, the decree can be enforced by contempt proceedings or in some other personal manner. Judgments or decrees entered against municipal corporations may not be enforced by levy on property held by the corporation for public uses.[16] This arises out of the public nature of their duties and the necessity that protects property required for the exercise of governmental powers. Exemption may be withdrawn or bargained away by giving the federal authority the power to control certain acts and situations.[17] This implies the right to proper enforce-

[11] People v. Central R. R. Co., 42 N. Y. 283 (1870).
[12] Brisbane v. Penna. R. R. Co., 205 N. Y. 431, 98 N. E. 752 (1912).
[13] 25 Stat. 209, 210 (1888), U. S. C. §§441, 443, 449, 451 (1928).
[14] 25 Stat. 210 (1888), 33 U. S. C. §450 (1928).
[15] 25 Stat. 209 (1888), 28 Stat. 360 (1894), 35 Stat. 426 (1908), 33 U. S. C. §§443, 444 (1928).
[16] Meriwether v. Garrett, 102 U. S. 472 (1880); Workman v. City of New York, Mayor, etc., 179 U. S. 552, 565, 21 Sup. Ct. 212, 217 (1900).
[17] U. S. v. The Gov. Rob't McLane, 31 Fed. 763, 766 (D. C. Md. 1887).

ment of laws enacted necessarily incidental to such control. There is no exemption in this case because the Federal Government has no jurisdiction over the *situs* of the tort and therefore can pass no laws controlling such territory. The statutes of the United States give the federal courts the power to punish contempts of their authority.[18] Thus it has been held that a corporation may be fined for breach of an injunction.[19] The penalty is not more than six months' imprisonment nor more than one thousand dollars fine or both.[20]

The controversy could have been arbitrated had the parties been of such a mind. In its broad sense, arbitration is the substitution, by the consent of the parties, of another tribunal for the tribunals provided by the ordinary processes of law. The judges are of their own selection. This form of settlement is favored because it is more expeditious, less expensive and is a method of the choice of the disputants themselves. From the very fact of submission, the law implies a promise to abide by the award when made. Any award made would be specifically enforced by a court of equity.[21]

The power to enforce its decrees is a necessary incident to the jurisdiction of the court.[22] A final decree granting relief has been entered. The decree restrains the defendant from dumping. It is not altogether impossible that the defendant might refuse to obey the decree. The sole penalty for failure to obey it is punishment by fine for contempt. For each successive act of disobedience the plaintiff would be compelled to bring a new action to punish the contempt. This is far from satisfactory from the viewpoint of the plaintiff, who after all, is the one seeking the redress. This question of disobedience is not an idle one. It merits our attention because the defendant urged strongly that a decree *in personam* could not be enforced and therefore the action should not have been entertained. In reply to this I maintain that ancillary to the final relief already given a decree should be issued[23] to restrain the Supervisor of the Harbor of New York from granting permits to the city of New York for the purpose of dumping the garbage. As a general rule, the judicial power will not interfere with departmental officers of the Federal Government in respect of matters within their jurisdiction and control[24] for the reason that the action is in effect brought against the sovereign which can only be sued with its consent and in a court of its own choice.[25] However, the exemption of the United States

[18] 1 Stat. 83 (1789), 4 Stat. 487 (1831), 28 U. S. C. §385 (1928).
[19] U. S. v. Memphis & Little Rock R. R. Co., 6 Fed. 237 (C. C. W. D. Tenn. 1881).
[20] 38 Stat. 738 (1914), 28 U. S. C. §387 (1928).
[21] Perkins v. Giles, 50 N. Y. 228, 235 (1872).
[22] Root v. Woolworth, 150 U. S. 401, 410, 14 Sup. Ct. 136, 138 (1893).
[23] POMEROY, EQUITY JURISPRUDENCE (2d ed. 1919) §1337; STORY, EQUITY PLEADING (10th ed. 1892) §338; Root v. Woolworth, *ibid.*
[24] U. S. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698 (1903); U. S. v. Fisher, 223 U. S. 683, 32 Sup. Ct. 356 (1911).
[25] State v. Wisconsin Tel. Co., 168 Wisc. 198, 203, 172 N. W. 225, 227 (1919).

from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded, even by authority of the United States.[26] For disposing of material elsewhere than permitted there is a fine of five dollars per cubic yard.[27] To tow or move any loaded scow without a permit shall be a misdemeanor, with a fine of not more than one thousand dollars nor less than five hundred dollars and revocation of the license of the master of the scow.[28] Such an injunction would result in making Section 450 of no effect, but it would provide for the execution of the decree in a manner most satisfactory to the plaintiff.

HARRY B. SAMES.

EASEMENTS BY IMPLICATION—WHEN ENFORCEABLE.

It is ancient learning that an easement is a liberty, privilege, or advantage without profit which the owner of one parcel of land may have in the land of another.[1] The land so benefited is called the dominant estate and the land so burdened is termed the servient estate. This interest is created usually by deed or adverse use for the prescriptive period.[2] Since an easement is an incorporeal hereditament it may only be created by grant,[3] prescription,[4] or by express reservation. In the latter case the grantor reserves an easement in the land conveyed for the benefit of land retained by him. The easement comes into being by virtue of the reservation.[5] Where the easement is created by grant the grant must contain all the formal requisites of a grant of land.[6] Under the statute of frauds easements cannot be created by parol.[7] For an easement to arise by prescription there must be an adverse user, open and notorious for twenty years.[8]

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[26] U. S. v. Lee, 106 U. S. 196, 220, 221, 1 Sup. Ct. 240, 256 (1882); Belknap v. Schild, 161 U. S. 10, 18, 16 Sup. Ct. 443, 445 (1895); Philadelphia Co. v. Stimson, *supra* note 6.

[27] *Supra* note 13, §449.

[28] *Ibid.* §443.

[1] Pierce v. Keator, 70 N. Y. 419, 421 (1877).

[2] Scanlon v. Manhattan R. R. Co., 185 N. Y. 359, 363, 78 N. E. 284, 285 (1906).

[3] Canfield v. Ford, 28 Barb. 336 (N. Y. 1858).

[4] WILLIAMS, REAL PROPERTY (17th ed.) 31.

[5] Phoenix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400 (1882). The reservation must be to the grantor. It cannot be created in favor of a stranger to the transaction. Beardslee v. New Berlin L. & P. Co., 207 N. Y. 34, 100 N. E. 434 (1912).

[6] Sweeney v. St. John, 28 Hun 634 (1st Dept. 1883).

[7] Conkhite v. Conkhite, 94 N. Y. 323, 327 (1884).

[8] *Supra* note 2 at 363, 78 N. E. 285. "Easements by grant or reservation, express or implied, and easements arising by prescriptive user, are protected in equity by injunction in practically all cases, the remedy at law being inadequate