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Recent Decisions

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ordered the indictment against the defendant quashed and the prisoner himself released, a decision the Court also confirmed.

Thus the only firm ground for federal antilynching legislation appears to be the Fourteenth Amendment. The opponents do claim that it too forbids a federal bill, but their arguments are not too strong. They cite several cases in support of their view,[35] but they deal primarily with the unconstitutionality of statutes on the federal level which punish individual actions. But it has been shown, however, that this argument does not apply where state inaction and apparent acquiescence are stressed, and that in this view it is the state which is being punished.

Robert S. Olivier

RECENT DECISIONS

ARMY AND NAVY—JURISDICTION OF COURT MARTIAL.—*United States ex rel. Hirshberg v. Malanaphy, United States Navy, Commanding Officer,* 73 F. Supp. 990 (E.D.N.Y. 1947). This case came before the court as a habeas corpus proceeding. The relator, Harold E. Hirshberg, was convicted by a Navy General Court Martial on August 2, 1947, for offenses alleged to have been committed by him in violation of Article 82 of the Articles for the Government of the Navy of the United States, REV. STAT. § 1624 (1862), 34 U.S.C. § 1200 (1941), at various times from November 10, 1942, to March 1, 1944. During that time he was a Japanese prisoner of war in the Philippine Islands. His offense consisted of wilfully maltreating two fellow prisoners while serving as a petty officer in charge of a work section at a war camp, pursuant to appointment by the Japanese authorities thereof.

The court martial was convened by the Secretary of the Navy and sat at the Navy Yard in Brooklyn, N. Y. between July 21, 1947, and August 12, 1947. Hirshberg was found guilty of two of the nine charges of which he was accused, and was subsequently surrendered to the custody of the respondent, Captain M. J. Malanaphy, U.S.N., to await his sentence.

At present the relator is a chief signalman in the United States Navy. He first enlisted in the Navy on March 24, 1936, and continued on in its service during re-enlistments, and was still in the Navy on or about May 6, 1942, when he was captured in the Philippine Islands by the Japanese and made a prisoner of war. Eventually he was released, and on September 19, 1945, he reported to naval authorities for reprocessing and subsistence. His then current enlistment expired at midnight of March 26, 1946, at which time he received an honorable discharge and mustering out pay. On the afternoon of March 27, 1946, he re-enlisted in the Navy. Following this he was arrested and tried for the charges committed during his previous enlistment.

In the petition for this writ of habeas corpus the relator vigorously assailed the jurisdiction of the court martial that convicted him. The critical question presented by his arguments is whether the charges and specifications survived the honorable discharge, and whether the relator was amenable to arrest therefor.

35 See for example, Barney v. New York, 193 U. S. 430, 24 S. Ct. 502, 48 L. Ed. 737 (1904); Corrigan V. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969 (1926); Oyama v. California, ... U. S. ...., 68 S. Ct. 269 (1948).

In advancing his first argument, the relator contended that, since he was a prisoner of war at the time of his alleged offenses, his acts were those of the Imperial Japanese Army and in no wise was he performing any duties as personnel of the Navy, or of the United States, and that, therefore, they could not be violations of the Articles for the Government of the Navy. His deduction was, the court held, erroneously based on the assumption that he could not be a prisoner of war and a member of the Navy at the same time. He attempted to bolster his point by the contention that the Hague Convention of 1899, and the Geneva Conventions of 1929, setting forth regulations for the conduct of prisoners of war, being subsequent to the enactment of Article 8 (2) of the Articles for the Government of the Navy, in effect repealed the Articles. The argument was unsupported by any authority and the court decided that it could not prevail against the assumption of jurisdiction by the court martial.

Failing in this first point, the relator also failed in urging that he was not within the exception in the Fifth Amendment to the Constitution of the United States, which provides for indictment by grand jury of those accused of infamous and culpable crimes "except . . . in the land or naval forces", because, as had been found, he was in the Navy at the time he committed the crimes of which he was convicted.

In attempting to refute the relator's prevailing contention that the charges embraced in his conviction did not survive his honorable discharge from the Navy on March 26, 1946, nor his enlistment on March 27, 1946—the respondent attempted to establish the two contracts of enlistment as merging into one Indeed, an enlistment in the naval service of the United States has been held to constitute a contract. In re *Grimley,* 137 U. S. 147, 11 S. Ct. 54, 34 L. Ed. 636 (1890). But the respondent's contention that such contracts could be merged was based only on statutes relating to the continuity of pay, allowances, longevity and accumulation of retirement benefits over subsequent enlistments. 58 STAT. 729 (1944), 37 U.S.C. § 109 (Supp. 1946); Naval Reserve Act of 1938 as amended, 60 STAT. 993 (1946), 34 U.S.C.A. § 854c (Supp. 1947); 56 STAT. 369 (1942), 34 U.S.C. § 431 (Supp. 1946). This argument was weak against the actual contract of enlistment made by the relator in which he agreed, quoted by the court:

> " 'First: to *enter* the service of the Navy * * * to report to such station * * * as I may be ordered to join and to the utmost of my power and ability discharge my several services or duties and be in everything conformable and obedient * * * to the lawful commands of the officers who may be placed above me.
>
> " 'Second: I oblige and subject myself to serve four years from March 27, 1946 * * * on the conditions provided by the Act of Congress of March 3, 1875 [REV. STAT.§1422, 18 STAT. 848 (1875), 34 U.S.C.§201 (1940), (Disposition of enlisted men at expiration of term of enlistment)] * * * I also oblige myself during such service to comply with and be subject to such laws, regulations and Articles for the Government of the Navy as are or shall be established by the Congress of the United States or other competent authority, and to submit etc'." (Italics the court's.)

The court held that these pertinent provisions of the contract could neither explicitly nor by implication be read as an extension of the contract which expired the day before.

It was conceded that, if the relator had not re-enlisted, the Navy would have been powerless legally to institute the court martial proceedings. The alleged offenses over which Article 8 of the Articles for the Government of the Navy gives courts martial jurisdiction

> Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy . . .
>
> Second (Cruelty). Who . . . is guilty of cruelty toward, or oppression or maltreatment of any person subject to his orders;

are not covered by any saving clause as are those enumerated in Article 14 which provides:

> And if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence in a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

Article 14 describes more serious offenses than does Article 8. There is no other provision in the Articles for the Government of the Navy which would confer jurisdiction on a court martial to review such offenses at any time after discharge whether the offender acquired civilian status or had again enlisted in the Navy. Neither does Article 61 (the statute of limitations) create jurisdiction; it merely preserves a jurisdiction if it exists. REV. STAT. 1624, 28 STAT. 680 (1895), 34 U.S.C. §1200 (1941).

There were only two cases to support the respondent's contention that the relator placed himself in a position to be prosecuted for his previous acts merely by re-enlisting. The first of these, recited in Court Martial Orders for the Navy (CMO 7-1938, p. 42), held that an enlisted man, who re-enlisted, was subject to naval law at the time of an offense committed in his prior enlistment, and the fact that he was out of the service in the meantime was not sufficient reason for denying jurisdiction over his person and the same offense in his present enlistment. The second, Ex parte *Joly,* 290 Fed. 858 (S.D.N.Y. 1922), was the only judicial authority relied on to support the above case. It concerned a United States Army officer who reëntered the service after being honorably discharged. He was thereupon charged and convicted of offenses committed during his previous service. The court's opinion, regarding the jurisdiction of the court martial convicting the officer, was based on no authority, and was rejected by the court here in the light of the construction that it gave to Article 8.

A marked weight of authority, however, held in favor of the relator. It was conceded by the respondent that an honorable discharge is a formal and final judgement passed by the government on a man's entire military record. *United States v. Kelly,* 15 Wall. 34, 21 L.Ed. 106 (1873); *United States v. Landers,* 92 U.S. 77, 23 L.Ed. 603 (1876). Naval courts martial are courts of special and limited jurisdiction conferred by Act of Congress. *Rosborough v. Rossell,* 150 F. (2d) 809 (C.C.A. 1st 1945). In interpreting this jurisdiction the majority of courts martial with the exception of CMO 7-1938, p. 42, have held that there is no authority of law giving jurisdiction to a court martial to try an enlisted man for an offense committed in a prior enlistment from which he had an honorable discharge, regardless of the fact that he has subsequently re-enlisted at the time the jurisdiction of the court was asserted. CMO 1-1926, p. 9; CMO 6-1926, p. 11; CMO 12-1929, p. 7.

Because of the decisions of the courts, narrowly construing the provisions of Article 8 and strictly limiting the jurisdiction of courts martial, the court held the respondent's position untenable and, "though reluctantly in the light of the particularly reprehensible conduct of the relator as found by the Court Martial", sustained the writ, determining the court martial to be without jurisdiction.

In this case there is to be found a peculiar, though familiar dilemma arising from the extremely jealous regard which courts, both civil and military, have for the jurisdictions and powers conferred upon them. This regard is not to be assailed; yet, it bears reflection. This case came before a civil tribunal under the only power of review that such courts have over military tribunals—determination of whether the military courts had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, they had exceeded their powers in the sentences pronounced. *Carter v. Roberts,* 177 U.S. 496, 20 S.Ct. 713, 44 L.Ed. 861 (1900). Morally speaking, the relator should have been convicted for his criminal acts. However, moral matters can, at best, only be dealt with inadequately by the courts, and the exemplified system of jurisdictional checks throws the balance of moral justice much more in favor of right than wrong.

William A. Adler.

CONSTITUTIONAL LAW—INTERPRETATION OF CRIMINAL STATUTES—OBSCENITY STATUTE VOID FOR INDEFINITENESS.—*Murray Winters, Appellant, v. The People of the State of New York,* ....U. S....., 68 S. Ct. 665 (1948). Murray Winters, a book dealer, was convicted of a misdemeanor for possessing, with intent to sell, certain magazines alleged to violate a New York obscenity statute. The statute prohibited the publication, distribution, or possession with intent to distribute of any "printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." N. Y. PENAL LAW, § 1141 (2).

The conviction was upheld on appeal in *People v. Winters,* 268 App. Div. 30, 48 N. Y. S. (2d) 230 (1944), and again by the New York Court of Appeals, in *People v. Winters,* 294 N. Y. 545, 63 N. E. (2d) 98 (1945). The court of appeals interpreted the statute as prohibiting the massing of stories of bloodshed, lust or crime in such a way "as to become vehicles for inciting violent and depraved crimes against the person." Under this interpretation, the case came before the United States Supreme Court.

Appellant's counsel contended that the statute was so indefinite in its provisions as to permit the violation of the right of free speech and press. Earlier cases have established the rule that a state statute which, as written and interpreted, is so vague as to permit within its scope the punishment of acts which should be protected by the constitutional guaranty of free speech, is void as violative of the Fourteenth Amendment. *Stromberg v. California,* 283 U. S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931); *Herndon v. Lowery,* 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 1066 (1937).

There is, of course, no doubt that the freedom of speech and press does not extend to statements or publications abusive of the right of freedom, such as those which are obscene, immoral, indecent or otherwise an offense against the public. See Note, 32 L. R. A. 829 (1896), 35 A. L. R. 12 (1925). The problem is in determining what statements and publications fall within the unprotected class and hence may be made the target of punitive legislation.

The majority of the Supreme Court found that in this case the statute failed to define its target with sufficient clarity. Since this was so, the administration of the statute might bring innocent matter wrongfully within the prohibited class, in violation of the due process clause of the Fourteenth Amendment. Accordingly, the statute was declared unconstitutional.

It did not fall alone. Nineteen other states (Connecticut, Illinois, Iowa, Kansas Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, Oregon, Pennsylvania, Washington and Wisconsin) had statutes so similar to New York's as to be invalidated by the decision, and statutes of four additional states (Colorado, Indiana, South Dakota and Texas) are at least jeopardized. The decision also limits Congressional authority to deal with the problem under the due process clause of the Fifth Amendment. For all the states involved, the majority opinion had words of apparent encouragement:

> To say that a state may not punish by such a vague statute carries no implication that it may not punish circulation of objectionable printed matter, assuming that it is not protected by the principles of the First Amendment. Section 1141, subsection 1 . . . is an example.

That section of the New York Penal Law prohibits the distribution, offer of distribution or possession with intent to distribute of written or printed matter characterized as "obscene, lewd, lascivious, filthy, indecent or disgusting . . ." It differs from section 1141 (2) in prohibiting matter offensive to sexual purity rather than matter inciting to crimes against the person. The Court stated here that these adjectives, being "well understood through long usuage in criminal law," caused only "permissible uncertainty" in the standard of guilt intended, but that the new expression "so massed as to incite to crime" could "become meaningful only by concrete instances." It observed that one example was not enough.

The effect of that observation would seem to be to cast doubt on the reality of the encouragement offered by the Court, in view of the difficulty of stating more precisely what publications were intended to be affected by such legislation. The Court's line of reasoning could place severe limitations on the development of new legal concepts to replace that voided by the decision. Even the "long use" of the adjectives approved in this case by the Court could have been prevented by a similar refusal to allow a first instance of their application.

The line between the "permissible uncertainty" of section 1141 (1) and the "unconstitutional uncertainty" of section 1141 (2) seems nebulous indeed. Mr. Justice Frankfurter, dissenting in the case, suggested that the majority confused "want of certainty as to the outcome of different prosecutions for similar conduct, with want of definiteness in what the law prohibits."

Only two prior cases interpreting legislation similar to the statute here voided ever reached the highest state courts. The first of these was *Strohm v. Illinois,* 160 Ill. 582, 43 N. E. 622 (1896) which upheld a conviction under a statute forbidding the exhibition of publications of the type under discussion here to minors. No doubt was raised as to the statute's validity in relation to freedom of speech or the definiteness requirement of the due process clause. The second case, *State v. McKee,* 73 Conn. 18, 46 Atl. 409 (1900), reversed a conviction under a law couched in the terms of the New York statute. However, the grounds of reversal, far from undermining such legislation, are significant as showing that such indefiniteness as may inhere in it need not expose innocent acts to punishment. The Connecticut court expressed the interpretation reiterated by the New York Court of Appeals in the principal case, holding that the statute was intended to prevent circulation of massed immorality. Under this interpretation, the court held that the publication involved did not fall within the prohibited class. The constitutionality of the statute was confirmed in relation to the state constitution's protection of freedom of speech and press. The question of validity under the due process clause of the Fourteenth Amendment did not arise, and the Court in the *Winters* case did not comment on the decision as a guide in limiting the controverted statute.

The standard of certainty required of criminal statutes has been discussed in a good many federal cases. It has been said that a penal statute creating a new

offense violates the Fourteenth Amendment if it is so vague that ordinary men must guess at its meaning and differ as to its application. *Connally v. General Construction Co.*, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926); *Lanzetta v. New Jersey*, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939). But great weight must be given the state's determination of what exercise of its police power is required, and its statutes should be upheld unless arbitrary and unreasonable. *Gitlow v. New York*, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925). Such general terminology illustrates the difficulty of formulating a definite rule as to definiteness; as Mr. Justice Frankfurter stated in his dissent in the *Winters* case,

> [Indefiniteness] is itself an indefinite concept . . . the requirement is fair notice that conduct may entail punishment. But whether notice is or is not "fair" depends upon the subject matter to which it is related.

Did section 1141 (2) give fair warning as to what conduct would be punished by it? There would seem to be much justification for stating that it did. Certainly not every murder mystery or account of criminal deeds incites to crimes against the person. That publications exist which do incite to such crimes, however, hardly admits of doubt. The problem is one of definition by example, and quibbling in the abstract as to whether or not the terminology will support such definition should not determine the statute's legality, without practical tests. The obvious test is to examine the magazines attacked as violative of the statute, to ascertain whether they appear to be such as would incite to crimes against the person; yet, as pointed out in the dissent, the majority opinion completely failed to consider that question. Three New York courts had previously determined that the publications involved did fall within the prohibited class.

The possibility that these or other courts might have felt differently would not be a valid objection to the definiteness of the statute. The application of abstract terms to concrete situations is always likely to result in disagreement. The dissent contains a reminder that the due process clause "does not preclude such fallibilities of judgment in the administration of justice by men."

Although examination of the cases cited in both the majority and dissenting opinions reveals some statutes that have been held sufficiently definite and others that have been held too vague, no handy measure of definiteness appears. The total effect is to confirm the necessity of judging each doubtful statute in the terms of its subject matter.

Certainly on the basis of public policy it would have been more desirable to uphold the statute in question. Persons not attempting to strain the boundaries of Constitutional protection would have nothing to fear from its enforcement; and that definite ill effects result to society from the distribution of publications appealing to the baser instincts is widely recognized. Publishers and sellers of such objectionable material can hardly fail to realize that they are approaching the limits of the protection of freedom of speech and press. That they may judge the degree of objectionableness to be within the protected zone will not protect them if it is decided otherwise. The dissenting opinion cited Mr. Justice Holmes' observation that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash v. United States*, 229 U. S. 373, 377, 33 S. Ct. 780, 57 L. Ed. 1232 (1913).

There would appear to be no good reason for exempting the publisher and seller of degrading printed matter from this risk, whether the product is termed obscene, lewd and lascivious, as in section 1141 (1), or characterized as inciting to violent and depraved crimes against the person, as in section 1141 (2). In either case, one degree of conduct will be within the shadow of the law, yet escape its operation, while another degree will be on the other side of the wavering boundary of guilt. It does not appear that injustice is more likely to occur in the second case than in the first.

John F. Bodle

INTERSTATE COMMERCE ACT—CONFLICT OF LAWS.—*Seaboard Air Line R. R. Co. v. Daniel, Attorney General of South Carolina, et al.*, ...U. S....., 68 S. Ct. 426, 92 L. Ed. 409 (1948). This case came to the Supreme Court of the United States on appeal by the plaintiff from a decision of the South Carolina Supreme Court. In addition to the conflict of laws question involved the court considered some interesting procedural aspects which will be discussed first.

The plaintiff railroad company began an action to prevent the defendant, Attorney General of South Carolina, from attempting to enforce a state law against the corporation. The law in question provided penalties against any railroad corporation which operated in South Carolina but which was not incorporated in South Carolina.

Prior to operating in South Carolina the plaintiff operated a railroad system in other southern states. The I. C. C. granted the plaintiff permission to purchase the railroad system in South Carolina. Included in its findings on the purchase was the fact that compliance with the state railroad law would result in delay and expense and would not be consistent with the public interest. When the defendant threatened to enforce the state law, the plaintiff brought this action in the Supreme Court of South Carolina to enjoin him. The state court held that the Commission's order was void because it lacked the power to override the state law. The plaintiff appealed to the Supreme Court of The United States which reversed the decision of the state court.

One issue raised was the authority of the Supreme Court of The United States to review the action. The court ruled it had authority on appeal under section 237(a) of the Judicial Code as amended, 28 U. S. C. A. § 344(a). This section provides that the Court may review any action by the highest court of any state in which there is a conflict of laws question involving a United States law or statute. This, of course, was the very reason why the action was brought. However the point raised was that the action should have been brought in the federal district court rather than in the original state court. The federal district court, by statute, has jurisdiction over any suit to enjoin, annul or set aside any I. C. C. order. In addition, the United States is an indispensable party to any such action. Here, however, the Court held that the action was not brought to set aside any order of the I. C. C. but rather to prevent the enforcement of a statute which conflicts with the order. Thus it would not be within the district court's jurisdiction, nor would the United States be an indispensable party. In a similar case, *Illinois Central R. R. Co. v. Public Utilities Comm.*, 245 U. S. 493, 502-503, 38 S. Ct. 170, 173-174, 62 L. Ed. 671 (1917), it was held that an action of this sort involving a conflict between a federal and state law concerning interstate commerce is not an action to set aside an I. C. C. order. As no other statutory jurisdiction was given the district courts the objection was held to be without merit. The procedure followed was the proper way to challenge the state law because the railroad company should not be forced to await an action to annul the I. C. C. order in the federal district court. To make the company wait would place it in a position of being subject to penalties either under state or federal laws with no judicial interpretation as to which it should obey. In support of this position *Central New England R. Co. v. Boston & A. R. Co.*, 279 U. S. 415, 420, 421, 49 S. Ct. 358, 359, 360, 73 L. Ed. 770 (1928) is cited. It was there held that the state courts have jurisdiction since the federal district courts have no statutory jurisdiction.

Thus, in spite of the fact that the state court's ruling went to the validity of the order, jurisdiction did not thereby vest in the federal district courts.

Another objection not going to the validity of the order was that the Commission's order was not intended to exempt the corporation from the state law.

This contention was rejected and the court held that the order was intended to exempt the corporation and that, if within the Commission's power, it did exempt them.

The I. C. C. gave its approval to the consolidation under the broad powers granted to it in interstate commerce. By section 5 (11) of the I. C. Act of 1940, 54 STAT. 908, 49 U. S. C. A., the Commission is granted power to approve or refuse mergers or consolidations. The power is given to exempt such consolidations from state or municipal laws which would interfere with the objects sought to be obtained in interstate commerce. This dominance of the federal laws over the local laws has long been a principle in interstate commerce control. Thus, any federal law or order will override a local law which interferes with the federal control of interstate commerce. Thus in *California v. Central Pacific R. Co.*, 127 U. S. 38, 8 S. Ct. 1073, 32 L. Ed. 150 (1888), it was held that the federal authority was dominant and would sweep aside any local hindrance. This is a necessary rule to give any practical effect to the control of interstate commerce granted in the Federal Constitution.

The decision upheld the order and in effect enjoined the enforcement of the state law. The justice of the procedural aspect is that it gives the railroad company a way of extracting itself when caught between the two fires of the I. C. C. order and the state laws. Once again the plenary power of the federal government in interstate commerce is reaffirmed by the court decision.

John J. Cauley

TORT LIABILITY OF CHARITABLE ORGANIZATIONS—VIOLATION OF A STATUTE.—*Esposito v. Henry H. Stambaugh Auditorium Ass'n, Inc.*, ...Ohio App..... 77 N.E. (2d) 111 (1946). This was an appeal by the defendant association on questions of law from a judgment of the court of common pleas. The lower court overruled the defendant's motion for judgment in its favor notwithstanding the verdict of the jury.

The defendant, a non-profit auditorium association, rented its facilities to a private individual for a hillbilly show performance. In addition to the renting, the association agreed to furnish a ticket collector and attendants. The plaintiff paid the required admission fee to the hillbilly show and had presented herself for admission. To avoid congestion between shows, an attendant employee of the defendant directed the plaintiff to go to a rear entrance. There a ticket collector, also an employee of the defendant, directed her to go elsewhere, which necessitated her descending a three step stairway leading to another part of the auditorium. While descending that stairway the plaintiff stumbled and fell fracturing her arm. There was a break about three inches long in the nosing of the steps on which the plaintiff stumbled and fell.

In showing that there was a duty on the part of the defendant toward her, the plaintiff relied on sections 1006, 12600-21, and 12600-35, of the Ohio General Code, intended to protect the citizens against the risk of injuries similar to the type that had in fact occurred. The above named statutes, in part, state:
PAGE'S OHIO GEN. CODE, 1937 § 1006.

> In tenement houses, apartments, manufactories, mills, shops, stores, churches, hotels, halls for public meetings, lecture rooms, restaurants, public library rooms, business offices of professional men and others doing business for or with the public, all public buildings and other rooms or

> places of public resort or use, whether for the transaction of business or social enjoyment, the owners, directors, trustees, lessees, managers, controllers, or proprietors thereof shall provide and maintain for all stairs or stairways for ingress or egress, a substantial hand-rail . . .

PAGE'S OHIO GEN. CODE, 1937 § 12600-21.

> . . . stairways used by the general public shall have a uniform rise of not more than seven (7) inches and a uniform tread of less than ten and one-half (10½) inches . . . stair treads shall be provided with approved non-slip treads or shall be carpeted or covered with other material to prevent slipping or tripping . . .

PAGE'S OHIO GEN. CODE, 1937, § 12600-35,

> Every portion of the theater or assembly hall used or occupied by the public including all courts, passageways, corridors, stairways, exits and outlets from the building to streets, alleys or other public ground and necessary means of egress for performers and stage employes shall be adequately lighted during each performance and shall remain lighted until the entire audience has left the premises.

In addition to the violation of the above statutes the plaintiff contends that the defendant failed to select or retain employees to properly direct her to her seat.

In the instant case the court held that the defendant was a charitable institution and that the plaintiff was a beneficiary of this charitable institution at the time she received her injuries, and that in this case it, the charitable institution, was not liable in tort to the plaintiff.

The courts of the United States have mumbled volumes of verbiage in an effort to explain the basis of a general immunity in cases involving tort claims against charitable institutions. Five general theories have evolved from the process. Excellent material on these theories may be found in *Prosser on Torts*, 1080-1082, from which source the following has been summarized. The first is the trust fund theory. Its main contention is that the charity, if it were to be subjected to the payment of tort claims, would necessarily divert funds from the purpose intended by the donor. However, the general rule is contrary to this in that trust funds are not exempt from liability for torts committed in administering the trust, and since the funds would not be exempt in the hands of the donor himself, the donor can scarcely confer such immunity upon them. The second theory denies that charities are subject to the rule of respondeat superior because the agents and employees of the charity derive no benefit from the service rendered. Vicarious liability of a master depends upon control over the acts of the servant and not on the criterion of profit to the master. The New York courts have adopted a third theory holding that a charity merely furnishes the facilities for services rendered by individuals, assuming no responsibility except for the selection of competent persons. Here again the theory does not fit the facts, since the servant of the charitable institution is not only paid for his services, but is as much under orders and a representative of his employer as any employee of a private corporation. That the recipient of the benefits of a charity accepts the charity as it is given and assumes the risk of negligence is the fourth theory. Here it is implied that the beneficiary waives the tort claim against the benefactor. Even in this theory the benefactor is held to a standard of reasonable conduct. The last is the theory of public policy in which it is presumed that if charitable institutions were liable for tort claims, donors would be discouraged in contributing when they saw their donations expended in the payment of claims.

It cannot be denied that giving for the love of God and the love of neighbor without any personal, private or selfish consideration is most admirable. The

courts of the United States have been extremely vigilant in protecting charitable institutions from possible financial destruction resulting from court judgments. However, is it equitable that charitable organizations, whose primary purpose is aid to mankind, be allowed to circumvent those acts of the legislature passed to promote the general safety? An affirmative answer involves many contradictions. One who goes to a hospital believes that the stay will result in an improvement and not in an added injury due to a condition of the hospital. In the instant case the beneficiary of an entertainment surely could not have been said to partake of that benefit subject to a condition which resulted in a broken arm.

Previous cases decided in the courts of Ohio do not support the general immunity of charitable organizations from tort liability. In a leading case, *Sisters of Charity of Cincinnati v. Duvelius,* 123 Ohio St. 52, 173 N.E. 737 (1930), the court said:

> No valid reason is apparent for granting immunity to a charitable institution for the negligence of its servants, and for placing the entire responsibility for an injury upon innocent third persons and their families. Charitable institutions are frequently conducted upon a large scale, with all modern conveniences and appliances of a highly complicated nature, which enormously increase the risk of injury to operatives and strangers, and any doctrine of complete exemption would lead to carelessness, neglect, and injury to both person and property. While such institutions should be encouraged, . . . this encouragement should not be carried to the point where injustice will be done to others.

The above case has been supported by *Walsh v. Sisters of Charity,* 47 Ohio App. 228, 191 N.E. 791 (1933) and *City Hospital v. Lewis,* 47 Ohio App. 465, 192 N.E. 140 (1934). A charitable hospital was held liable for an injury where it was shown that the hospital failed to use due care in the selection or retention of a nurse who caused the injury. *Lakeside Hospital v. Kovar,* 131 Ohio St. 333, 2 N.E. (2d) 857 (1936).

In *Howard v. Children's Hospital of the Protestant Episcopal Church,* 37 Ohio App. 144, 174 N.E. 166 (1930), a charitable hospital was held liable for violating a statute respecting the unlawful possession of a deceased person's body. The court stated:

> . . . charitable institutions, such as hospitals, are held responsible to those injured through lack of care in the selection of employees, through whose negligence patients have been injured, when the unskillfulness and unfitness of such employees were known or should have been known . . . The second defense is predicated upon the theory that, simply because the defendant is a charitable organization, not for profit, there is no liability upon it for any of its acts in violation of the statute. We cannot indorse this proposition.

From the above cases we have seen that in the State of Ohio charitable organizations have a duty to use reasonable care in the selection of employees; they can not place the entire responsibility for an injury upon innocent third persons, and they are not exempt from liability for an injury that is a direct result of a violation of a statute. The court in *Doster v. Murr,* 57 Ohio App. 157, 12 N.E. (2d) 781 (1937) ruled that section 1006 of the Ohio Gen. Code, (1937), imposes upon the owner of such building a duty and "imposes a liability upon the person charged with the duty in favor of anyone injured as a direct result of such violation."

The above cited statutes place a duty on the owners of buildings containing stairways used by the general public. The auditorium in the instant case was es-

.tablished and maintained for the people of Mahoning Valley. It can not be denied that the people of Mahoning Valley are general public. The defendant violated the statute and as a direct result of the violation the plaintiff was injured. There was no reasonable basis for the reversal by the court of appeals of the lower court's judgment.

George B. Kashmer.

HUSBAND AND WIFE—COMMUNITY PROPERTY—LIABILITY OF MARITAL COMMUNITY FOR TORTS OF SPOUSE—*McHenry v. Short et ux.*, ...Wash...., 186 P. (2d) 900 (1947). This was an action against one Fred Short and Geneva Short, husband and wife, to recover against the defendant husband and the marital community of which he was a member for an assault which he committed. The plaintiff seeks recovery against the marital community on the ground that the defendant, Fred Short, when he assaulted the plaintiff's husband, causing his death, was allegedly acting in behalf of the community.

The facts disclose that the defendants, as a community, owned land abutting a canal. A boathouse was located on the bank of the canal immediately adjacent to the defendants' property. The owner of the boathouse paid defendants three dollars a month for their services in storing a speed boat in the house and for their keeping a general watch over the premises. The plaintiff's deceased husband, upon being hired by the owner to paint and repair the boat, went to the boathouse and started to work. It was at this time that the defendant, Fred Short, after altercations with the plaintiff's husband and, in words of the complaint, "under the guise and pretext of ejecting" him from the premises, inflicted the injury that caused his death.

Upon appeal by the defendants, solely in behalf of the marital community, it was found that the facts were sufficient to find that the defendant was acting as an agent of the community, and therefore, the community was liable for the tort committed while he was so acting. In the decision by the Supreme Court of the State of Washington, Justice Steinert reiterated a rule of law that has long prevailed in that state:

> . . . if the tortious acts of the husband be committed in the management of community property or for the benefit of the marital community, such community is thereby rendered liable for the act, under the doctrine of respondeat superior. *Bergman v. State,* 187 Wash. 622, 60 P. (2d) 699, 701, 106 A. L. R. 1007 (1936) and cases therein cited; *Furoheim v. Floe,* 188 Wash. 368, 62 P (2d) 706. *Mountain v. Price,* 20 Wash. (2d) 129, 146 P. (2d) 327.

Under the Spanish community property system, it will be noted that the property of one spouse, whether it be separate property or a respective share of the common property, was not liable for torts committed by the other spouse. I DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, § 181. By statutes and judicial interpretation, the community property states in this country have not adopted this principle in its entirety. As seen in the instant case, liability is imposed upon the entire community property when it is established that the spouse was acting as an agent in behalf of the community upon committing the tort. This rule has been followed in Arizona, *McFadden v. Watson, et ux.* 51 Ariz. 110, 74 P. (2d) 1181 (1938), and it was explicitly incorporated in the recently enacted community property laws of the Territory of Hawaii:

> The community property shall be liable for debts contracted by the husband or by the wife or by both, and for liabilities of the husband or the wife or both, arising out of tort or otherwise, in any transaction entered into or action taken by the husband or the wife or both relating to the management or control or disposition of or other dealing with or for the protection or benefit of the community property . . . REV. LAWS OF HAWAII 1945, c. 301A, 12391.13(c).

A more liberal rule is followed in Texas and California. By statutory construction the courts there have held the marital community liable for torts of a husband or wife without regard as to whether he or she was acting in behalf of the community. In *Crim et al. v. Austin* (Tex. Com. App.) 6 S. W. (2d) 348 (1928), construing REV. STAT. OF TEX. (1925) articles 4613 and 4623, it was held that the marital community would be liable for torts committed by the wife before marriage. In California the statutes have been interpreted so as to make the entire community property liable for torts committed by the husband. CIV. CODE OF CALIF. (Deering, 1937) §§ 168 and 171, *Grolemund v. Cafferata et al.*, 17 Cal. (2d) 679, 111 P. (2d) 641 (1941). de Funiak, in his treatise, PRINCIPLES OF COMMUNITY PROPERTY, § 182, criticizes these statutes and the judicial interpretations placed upon them as being completely out of line with the basic principles of the community property system. It is unjust, de Funiak says, to deprive the innocent spouse of his or her share of the common property because of a wrong committed by the other spouse.

Of particular interest at this time are the statutes of the states which have only recently adopted the community property system: Oklahoma, Oregon, Nebraska and Michigan. After repeal of earlier acts, ineffective for purposes of income tax reduction, Oklahoma and Oregon reenacted community property laws in 1945 and 1947, respectively. Okla. Laws 1945, H. B. No. 218; Ore. Laws 1947, c. 525. Nebraska and Michigan adopted the community property system in 1947. Neb. Sess. Laws 1947, c. 156; Mich. Sess. Laws 1947, Pub. Act 317.

In drafting the sections of the statutes pertaining to the tort liability of the community, the Michigan Legislature seemed to incorporate elements of both views expressed by the Washington and California Courts. Subdivision (1) of Section 29.216(9) (c), MICH. REV. STAT. (1947), being similar to the Hawaii statute cited above, imposes liability upon the community for liabilities incurred by the husband or wife in any action "relating to the management or control or disposition of or dealing with or for the protection or benefit of the community property for furthering the interests of the community . . ." In subdivision (2) of the same section, the community property is also rendered answerable for liabilities *otherwise* incurred by or imposed upon the husband. By paragraph (d) of Section 29.216(9), however, it is provided that in the event that community property is applied to satisfy liabilities incurred by the husband as outlined in subdivision (2), such amount is to be charged against his interest of the community property upon any division thereof by reason of death, divorce, or other termination of the community.

The Oregon and Nebraska community property acts are patterned after the earlier act that was adopted by the Oklahoma Legislature. Identical sections in each act impose limitations on the liability of the community for torts of the husband or wife. In Oklahoma only that portion of the community property, record title to which is in the name of the offending spouse, or which that spouse controls or manages, shall be liable for his or her torts. OKLA. STAT. ANN., PERM. ED. title 32, § 72. Seemingly, the intent of the legislatures in enacting these statutes, was to create a community property system but at the same time not to create a marital community. Separate estates of each spouse exist even in the

common property regardless of Section 3 of the Oklahoma Act which provides that the husband and wife shall be vested with an undivided one half interest in all property acquired by either spouse. The innocent spouse would also seem to suffer in the event that all or the greater portion of the community property is in the name or control of the tortious acting spouse. See I DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, p. 525.

Based on justice and equal property rights as between the husband and wife, it is a fundamental concept of the community property system that, in the same manner as the man and wife share the profits and gains, so also are the losses and expenses incurred by reason of the conjugal partnership to be shared. As the rule followed in the *McHenry* case and the statutes patterned thereafter provide, the liability for torts committed by either spouse while acting with the intention to benefit the community or while in the management of the community business should rightfully be imposed upon the marital community.

Richard H. Keoughan

LANDLORD AND TENANT—DISTRICT OF COLUMBIA EMERGENCY RENT ACT—CO-OPERATIVE APARTMENTS—*Hicks v. Bigelow*, D. C. Mun App. 55 A. (2d) 924 (1947). The question before the court was whether or not the purchaser of a co-operative apartment, desiring it for her personal occupancy, is entitled to evict a tenant in possession under the District of Columbia Emergency Rent Act.

In 1941 the tenant, June Hicks, had a one-year lease with the owner of the premises, Real Estate Mortgage and Guaranty Corporation. Subsequently the apartment building was sold to Gilpin Properties, Inc., and the Hicks lease was assigned to the new owner. A few months later the property was conveyed to the corporation formed upon a cooperative plan, "1702 Summit Pl., N. W., Owners, Inc."

Shares of stock in the new corporation were first offered for sale to the then present tenants of the apartments and later to the general public. Bigelow acquired 67 1/2 shares of stock in the co-operative venture and, with such stock, a "proprietary lease" purporting to give her the right to possession of the Hicks apartment for ninety-nine years with a right of one-hundred year renewals. A thirty-day notice to quit was served upon Hicks, in accordance with statute, and upon her noncompliance with the eviction notice a landlord and tenant suit was commenced. Plaintiff prevailed in a jury trial in the lower court and defendant brought the case for review.

The tenant's contention that the entire transaction was in violation of the District of Columbia Emergency Rent Act was based upon the assumption that the large profit secured by the Gilpin Company by its sale of the dwelling to the co-operative group bespeaks bad faith and indicates an intent to circumvent the Rent Act. It was not the purpose of the Rent Act, however, to regulate profits or the sale of property, nor was there any express or implied clause conducive to this finding. There was nothing in the record to overcome the claim that the apartment was purchased in complete good faith and in expectation of occupying it for her own use. Purchaser, Bigelow, by her actions came within the express terms of the Rent Act. The pertinent section of the Rent Act reads as follows:

> No action or proceeding to recover possession of housing accommodations shall be maintainable by any landlord against any tenant, notwith-

> standing that the tenant has no lease or that his lease has expired, so long as the tenant continues to pay the rent to which the landlord is entitled, unless—2. The landlord seeks in good faith to recover possession of the property for his immediate and personal use and occupancy as a dwelling, . . . D. C. CODE (Supp. V 1946) § 45-1605 (b).

"Immediate" as used in the foregoing section does not mean "desperate". *Gould v. Butler et al.,* D. C. Mun. App. 31 A.(2d) 867 (1943). An interpretation and determination of a landlord's "good faith" with reference to the Rent Act was reviewed in the same litigation. As expressed by the Court, the state of mind, intent and purposes of landlord as reflected in the evidence may be considered.

The case of *Heindrich v. Dimas-Arute et al.,* D. C. Mun. App., 42 A. (2d) 138 (1945) gave further support to the purchaser's position. It was held that where substantial evidence supported a finding that owners of leased premises, suing for possession, were seeking to occupy their own property as a dwelling, owners' good faith as affecting their rights under this section was an issue of fact for the trial judge. There was nothing detrimental to the claimant as the facts appeared in the record and the evidence was deemed to justify a conclusion of disregarding the plaintiff's contention of bad faith.

The tenant, in her petition for review, also states that Bigelow was not an owner or landlord entitled to maintain the suit under the Rent Act. Section 45-1611 (g) defines the term "landlord" as "any owner, lessor, sublessor, or other person entitled to receive rent for the use or occupancy of any housing accommodations." In the original agreement of purchase between the co-operative apartment corporation and the Gilpin Company, the former was referred to as "buyer" and the latter as "seller". However, the "proprietary lease" issued to Bigelow extending to December 31, 2047 referred to her as lessee and her right to permanently occupy the apartment was fixed.

The tenant possessed a ninety-nine year lease with the right of one-hundred year renewals. In form this was a landlord and tenant relationship, but in substance it purported to be a permanent acquisition. The money paid by the stockholders as "rent" was used to defray the cost of operation and maintenance. The court regarded this expenditure as being much more closely related to that of a landlord than to that of a tenant. Bigelow also had more privileges and a wider authority than a tenant in an apartment dwelling. She had a voice in the management, operation, selection of tenant-owners, proposed sale or mortgaging of the property. Although she did not own a fee simple title, this was not a condition precedent under the Rent Act. From a survey of the evidence presented, it was quite clear that she possessed most of the attributes of a landlord and many more than a tenant.

The most convincing reasoning upon this subject was set forth in *Tompkins v. Hale et al.,* 15 N. Y. S. (2d) 854, 30 N. E. (2d) 721 (1940). In this instance a similar situation arose. An apartment building was purchased by a co-operative movement and it was to be controlled and operated by the members. The court held the corporation to be in effect "a partnership" for the mutual benefit of the tenants.

Recent cases have tended to lend a helping hand to the landlord in conflicts of this nature. The decision in *Arsenault v. Angle,* D. C. Mun. App., 43 A. (2d) 709 (1945) exemplifies this tendency:

> Though the Rent Act was enacted primarily for the benefit of the tenant, owners have rights too, and the act did not intend that the rights given the tenant be used to frustrate the rights reserved to the landlord. And

when owners rights are clearly established, a tenant must yield regardless of the hardships involved.

The court in the instant case not only interpreted the position of a co-operative owner but also exemplified the fact that the laws and legislative acts were written for the protection of the landlord as well as the tenant.

James W. Oberfell

POSTMASTER GENERAL—JUDICIAL REVIEW OF FRAUD ORDER—*Donaldson v. Read Magazine, Inc., et al.*, ... U. S. ...., 68 S. Ct. 591 (1948). Respondents in the present case, publishers and editors of the magazines *Read* and *Facts*, in April of 1945, published and nationally advertised a rebus puzzle contest known as the Hall of Fame Puzzle Contest. On October 1, 1945 the Postmaster General, acting under authority of 39 U. S. C. A. sections 259 and 732, after proper hearing and upon evidence satisfactory to him, issued a "fraud order". The effect of this order was to deny the respondents the right to receive mail, and to direct that all mail addressed to them be stamped fraudulent and returned to the sender. Upon petition to the district court the respondents were awarded a permanent injunction restraining the enforcement of this "fraud order" on the ground that the determination of the Postmaster General was not based upon substantial evidence. *Read Magazine, Inc., et al. v. Hannegan*, 63 F. Supp. 318 (D. C. D. C. 1946). On appeal to the United States Court of Appeals for the District of Columbia this decision was affirmed. *Hannegan v. Read Magazine, Inc., et al.*, 158 F. (2d) 542 (App. D. C. 1946). Petitioner, the present Postmaster General, brings certiorari to review this judgment and to obtain a reversal of the ruling in the lower court.

The Postmaster General found that the representations contained in the advertisements were false and fraudulent for two reasons. First, that prospective contestants were falsely led to believe that they might be eligible to win prizes upon payment of three dollars as a maximum sum when in reality the minimum requirement was nine dollars. Second, that though the contest was emphasized as a puzzle contest, it was apparent and well known to the respondents that the ultimate prizes would be awarded upon the basis of a letter essay contest; and that contestants were deliberately misled concerning all these facts by artfully composed advertisements. The original fraud order was extensive enough to bar receipt of mail which did not concern the contest; however, as later modified its scope was limited to mail relative to the contest only. The advertisement offered for solution a group of eighty puzzles, divided into twenty series of four each. Contestants were required to enclose fifteen cents upon submission of each series. In the event of a tie an additional group of eighty puzzles was to be provided on the same basis. In case of a tie resulting from the second group, however, each contestant would be required to submit, in addition to his solution of a third group of puzzles, a letter on the subject "The Puzzle I Found Most Interesting and Educational in this Contest". If a tie still persisted the prizes, totalling $17,500, were to be awarded on the basis of the merits of the letters. The purpose of the contest was to advertise a series of reprints of well-known classics published by Literary Classics, Inc. At each stage of the contest the successful contestants received one of these reprints, said to be worth three dollars. The entire advertisement, including its name, was obviously calculated to convey the impression that it was a rebus puzzle contest. The only reference to essays appeared in the second sentence of the ninth of ten rules. Yet, all contestants were directed to read the rules and there was no evidence offered to show that the contest was

not being conducted according to these same rules. The action taken by the Postmaster General was not prompted by complaint from any of the contestants.

The single policy of the statute under which the Postmaster General acted is to protect the public from fraudulent practices committed through the use of the mails. Its efficacy is found in the fact that it can be used to suppress such schemes summarily and expeditiously by barring the guilty party from the use of the mails. It is not the purpose of this statute to impose personal punishment on violators. This must be done according to criminal procedure and trial. *Commissioner of Internal Revenue v. Heininger,* 320 U. S. 467, 474, 64 S. Ct. 249, 251, 88 L. Ed. 171 (1943). The statute commits primarily to the Postmaster General the duty of determining whether, from all the evidence, the law has been violated. It is of no consequence that the artifice may have gone undetected and may have even met with complete success. *Farley v. Simmons,* 99 F. (2d) 343 (App. D. C. 1938), certiorari denied, 305 U. S. 651, 59 S. Ct. 244, 83 L. Ed. 422 (1939). It is well settled in respect of fraud order cases that the conclusion of the head of an executive department on such a question, when committed to him by law, will not be reviewed by the courts where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary. *Leach v. Carlile,* 258 U. S. 138, 140, 42 S. Ct. 227, 66 L. Ed. 511 (1922), *Bates & Guild Co. v. Payne,* 194 U. S. 106, 24 S. Ct. 595, 48 L. Ed. 894 (1904). The conclusion of the Postmaster General is presumptively correct and will not be reviewed by the courts where it is fairly arrived at and has substantial evidence to support it. *Farley v. Heininger, et al.,* 105 F. (2d) 79 (App. D. C. 1939), certiorari denied, 308 U. S. 587, 60 S. Ct. 110, 84 L. Ed. 491 (1939).

Despite this imposing array of precedents and in the absence of any irregularity at the original hearing the district court did review and reverse the decision of fraud found by the Postmaster General on the ground that there was not substantial evidence to support the finding:

> Indeed, the advertisement is by no means a model of clarity and lucidity. It is diffuse and prolix, and at times somewhat obscure. Many of its salient provisions are printed in rather small type. An intensive and concentrated reading of the entire text is indispensable in order to arrive at an understanding of the entire scheme. Nevertheless, a close analysis of this material discloses the complete plan. Nothing is omitted, concealed or misrepresented. There is no deception. The well-founded criticisms of the plaintiff's literature are a far cry from justifying a conclusion that the announcement was a fraud on the public . . . Similar animadversions may be directed against the typical insurance policy, bill of lading, or express receipt . . . The conclusion is inevitable that there is no evidence to support the finding of fact on which the fraud order is based. *Read Magazine, Inc., et al. v. Hannegan,* 63 F. Supp. 318, 322 (D. C. D. C. 1945).

The Court of Appeals further found:

> . . . the fraud order is not premised upon specific or affirmative misstatements, or upon failure to perform as promised, but it is premised upon an impression which appellant says is conveyed by the advertisements as a whole . . . We think that the advertisements before us fairly urged contestants to read the Rules and that the Rules stated fairly, in style of type, placement, and terms, what was proposed. That being so, and there being no ambiguity in or departure from the proposals stated, a finding of false pretenses, representations, or promises could not properly be made. *Hannegan v. Read Magazine, Inc., et al.,* 158 F. (2d) 542, 544, 545 (App. D. C. 1946).

The present case, however, holds that sufficient evidence to support the "fraud order" did exist, and refuses to disturb the finding of the Postmaster General. The test applied to determine the validity of the finding does not permit the court to substitute its own judgment for that of the administrative officer ,nor does it require a weighing of the evidence. Rather, the sole question to be determined upon judicial review is whether or not substantial evidence exists to justify a possible conclusion that the scheme is fraudulent. Findings of the Postmaster General in cases of this sort will not be disturbed by the court when they are fairly arrived at. Even though the advertisement contains no express misstatement, nevertheless, if it is artfully designed to mislead those responding to it, the mail fraud statutes are applicable. *Oesting v. United States,* 234 Fed. 304 (C. C. A. 9th 1916), certiorari denied, 242 U. S. 647, 37 S. Ct. 241, 61 L. Ed. 544 (1917).

The constitutionality of the statutes in question, 39 U. S. C. A. §§ 259 and 732, was first determined in 1904 in the case of *Public Clearing House v. Coyne,* 194 U. S. 497, 24 S. Ct. 789, 48 L. Ed. 1092. In that case the Court upheld the power of Congress to pass these laws and rejected the contentions that the action authorized thereby was in conflict with the constitutional guarantees of freedom of speech and freedom of the press. The Court refused to depart from the principles laid down in the *Coyne* case and reiterated its stand that it was within the power of Congress to deny the use of the mails whenever it was deemed to be injurious to the public.

William V. Phelan

CONSTITUTIONAL LAW—PUBLIC UTILITIES—RIGHT OF EMPLOYEES OF PUBLIC UTILITY TO STRIKE.—*State of Wisconsin ex* rel. *Dairyland Power Cooperative v. Wisconsin Employment Relations Board,* C. C. of Dane County, Wis., March 13, 1948. This case arose upon petition by Dairyland Power Cooperative for a writ of prohibition against the Wisconsin Employment Relations Board to stop that state board from going ahead with compulsory arbitration in a dispute apparently existing between Dairyland and the union of its electrical workers at Eau Claire, Wis. (The nature of the dispute and its merits are not considered.) The Board had appointed arbitrators under a new 1947 law, which amounts to a compulsory arbitration and anti-strike law in public utilities.

Summary judgement was granted to petitioner Dairyland, even though Dairyland had not moved for it, as permitted by Section 270.635 (3) of the Wisconsin Statutes. A writ of prohibition was issued to stop the Employment Board from proceeding further in the controversy between Dairyland and its union.

Dairyland's basic objection to the Board's purported exercise of jurisdiction was that Dairyland Power Cooperative is not a public utility. This objection the court overruled by looking to Dairyland's vast scope of operation within Wisconsin's public utility laws. This determination did not fix Dairyland's rights.

Having definitely established the status of Dairyland as a public utility, the court nevertheless awarded judgment to it, on the basis that the compulsory arbitration and anti-strike law in public utilities was unconstitutional.

The court pointed out that Wisconsin is not entitled to make "slaves" out of the servants of public utilities. Every man has a legal right under the Federal Constitution, and a natural right as a human being, to work or not to do so. Every American has the inalienable right to be free.

According to the court, workingmen have a constitutional right to strike for an assumedly lawful purpose. In explanation of this, the court pointed out that American law always has proclaimed that strikes may be lawful or unlawful, depending upon the purpose. There is a host of decisions built up over decades that a strike to obtain, for example, a fair wage or reasonable hours, is perfectly lawful. On the other hand, it has been held that a strike to prevent others from obtaining work and the denominated "sympathetic" strike are unlawful. Scores of decisions and illustrations are set down in the annotation to the second case of *Dorchy v. Kansas,* 272 U. S. 306, 47 S. Ct. 86 (1926), as reported in 71 L. Ed. 248, 249, *et seq.* There is no decision of the highest court of the United States that men must submit to arbitration and that they cannot strike for a lawful purpose, either before or after arbitration or at any time, no matter whether they are in or are not in utility employment.

But the court explained that the Wisconsin law flatly orders that every strike shall be a crime because it happens to occur in a public utility. Such a law is invalid, whether it is designed to function inside utilities or outside utilities, or both. It is absolutely void.

The Employment Relations Board, describing Mr. Justice Brandeis as "one of the staunchest advocates of the rights of labor in the country's judicial history," referred to the last sentence by this great judge in the *Dorchy* opinion: "Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike." 272 U. S. 306, 311; 47 S. Ct. 86, 87; 71 L. Ed. 248, 269 (1926). The court agreed with the Board in disavowing any absolute right to strike, but at the same time pointed out that the Wisconsin statute prohibited all strikes for any purpose, legitimate or otherwise. Men at the gas plant could be fairly suffocating from fumes or employees could be working in a plant having no ventilating devices or suction fans or dust-preventing apparatus, but that would be wholly immaterial under Wisconsin's 1947 statute.

The examples just given are extreme and perhaps farcical. They show, however, just how extreme this 1947 Wisconsin law was, because, under that law, such conditions would have to be put up with, except for arbitration. There would be no alternative.

There are several arguments against the holding of the court in the instant case. One of these is that we are dealing with public utilities—business "affected with a public interest"—which is different from operating a grocery store or a butcher shop. What difference, however, does it make that we are dealing with public utilities, so far as the constitutional rights of the workers are concerned? A utility company may be classified and dealt with separately. That utility ordinarily is not even allowed to exist without a franchise from the state. But a human being needs no franchise from the state. He is the creation of God. Government cannot chain him.

The second probable argument is the following: The Wisconsin statute carefully pointed out in several subsections that it was not prohibiting one individual from quitting his job. The law meticulously said: "It shall be unlawful for any group of employees of a public utility employer acting in concert . . . to go out on strike. . . . Nothing in this subchapter shall be construed to require any individual to render labor . . . It is the intent . . . only to forbid employees of a public utility employer to engage in a strike . . ." WIS. STAT. §§ 111.62, 111.64 (Supp. 1947).

Here we have the whole question: Can the government, by mandatory arbitration, make criminals of those who exercise their lawful right to strike? This the court answered in the negative.

The strongest language that can be located in the books to knock out the present decision is perhaps Wilson v. New, 243 U. S. 332, 37 S. Ct. 298, 61 L. Ed. 755 (1917). But it is not strong enough; and the actual decision there is meaningless, as it affects this case. The Court, in *Wilson v. New* states that

> Whatever would be the right of an employee engaged in a private business *to demand such wages as he desires,* to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to *limitation* when employment is accepted in a business charged with a public interest as to which the power to regulate commerce possessed by Congress applied and the resulting fight to fix in case of disagreement and dispute a standard of wages as we have seen necessarily obtained. (Italics supplied.)

First, observe (as to this quotation) that only the one item of wages is covered by the act of Congress. The Wisconsin law covered "the whole back yard" and prohibited a strike about anything. Second, the quotation suggests that labor's right on a railroad is subject to "limitation." Wisconsin's 1947 law is not a limitation. It is a positive and unequivocal *prohibition.*

Several other states passed utility compulsory arbitration and anti-strike laws in 1947 but some of them, at least, went only to the extent of calling for a "cooling-off" period—that is, requiring arbitration but, if at the end of sixty days or a like period, the arbitrator's decision is distasteful to the workers, then they may strike, assuming, as always, a legal purpose inherent in the strike. The hotly contested Taft-Hartley law has a clause in respect to a "waiting period" before there may be a strike. However, this same law states that it is not intended to impede the *right* to strike. 61 STAT. 155-156, 29 U. S. C. A. §§ 178-180 (Supp. 1947).

A typical states statute is cited in *People v. United Mine Workers,* 70 Colo. 269, 201 Pac. 54 (1921), which upholds "a statute prohibiting strikes in industries affected with a public interest." The Colorado court quotes the statute: "It shall be unlawful . . . for any employee to go on strike, on account of any dispute *prior to or during an investigation, hearing, or arbitration* of such dispute by the commission." (Italics supplied). The court proceeded to point out what is obvious: "There is not even prohibition of strikes. The only thing forbidden is a strike before or during the commission's action.

Wisconsin's 1947 compulsory arbitration and anti-strike law provided for a court review. WIS. STAT. § 111.60 (Supp. 1947). The court explained that this was just so much "poppycock", as far as meaning anything for the constitutional rights of the workers. If it is unconstitutional to require laborers to present their wage and hour requests to an arbitrator and be tied hand and foot by that arbitrator's decision and be prohibited from striking, regardless of the arbitrator's decision, it surely does not add one iota to the constitutional rights of the workers to say that they can take the matter to court but, if the court affirms the arbitrator, still they must be forbidden to strike. They still are denied their constitutional right to strike for an assumedly lawful purpose, before, pending, and after the court decision, and forever.

This case is by no means the same as the recent John L. Lewis contempt case, *United States v. International Union, United Mine Workers of America,* 16 L. W. 2515 (D. C. D. C. 1948). The court injunction in the coal strike action was the exercise of that which is tantamount to a war power. The President directed the Attorney General to take steps under the Taft-Hartley Act to halt the strike, because, if permitted to continue, it "would imperil the national safety." Peril to national safety means only one thing: Peril to the nation as a nation. It does

not mean that it would be convenient if one had an extra ton of coal to heat one's apartment or to go into steel so that the public might enjoy a more elaborate quantity of automobiles. Peril to national safety means that we need coal; we must have it, not for personal comfort or luxury, but to preserve the republic.

Wisconsin's public utility anti-strike enactment was not made under a power in the nature of a war power. It was an all-time measure. It differed greatly from the Taft-Hartley Act, which deals with strikes affecting the national health or safety.

This case also differs from the 1947 John L. Lewis case, *United States v. United Mine Workers of America,* 330 U. S. 258, 67 S. Ct. 677, 91 L. Ed. 595 (1947), noted in 22 NOTRE DAME LAWYER, 432. First, Mr. Lewis incited and activated the strike. The law can make it a criminal offense for a union official to use the power of his office to impel or compel a strike. *Dorchy v. Kansas,* 272 U. S. 306, 47 S. Ct. 86, 71 L. Ed. 248 (1926). This is a different thing from six or a dozen workers concertedly refusing to continue work at a gas plant until obnoxious fumes are removed. The state of Wisconsin had made even that a crime. *Wilson v. New* merely dealt with a law making it unlawful for railroad union officials, by concert, to call a strike throughout the nation.

Second, Mr. Lewis was in contempt of court. He violated the federal court's injunction. The law is clear that an injunction may be erroneous, but even if it is wrong, the remedy of the person enjoined is to appeal. He cannot simply ignore the injunction. *Howat v. Kansas,* 258 U. S. 181, 42 S. Ct. 277, 66 L. Ed. 550 (1922).

Third, the coal mines at that time were under government control, and the miners themselves virtually were in military service. The recent Taft-Hartley law provides for similar circumstances: "It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strike." 61 STAT. 160, 29 U. S. C. 188.

This decision may be condemned by many. People do not want a strike in a public utility which may cut them off from electricity, gas, or water. There is a limit, however, to what the law can do to human beings. Balanced against one person's desire and need for electricity and gas may be the positive legal right of another man—the utility worker—to stop working, and to combine with others to do so, for a lawful purpose. Workers in public utilities cannot be forced to work any more than can farmers, steelworkers, school teachers, or newspaper reporters. All have the same natural and identical constitutional rights.

George Ratterman

STATUTES—INTERPRETATION OF INTERNAL REVENUE CODE.—*Jones v. Liberty Glass Co.* ....U.S....., 68 S.Ct. 229 (1948). This was an action by the Liberty Glass Company, a corporate taxpayer, against H. C. Jones, collector of internal revenue, to recover an overpayment of income taxes. A judgment for the plaintiff was upheld by the circuit court of appeals and the defendant brought certiorari. The Supreme Court reversed the circuit court's decision in favor of the petitioner.

The respondent corporation filed its 1938 income and excess-profits tax return in 1938 and paid it, plus a small additional amount in 1939. Later, a revenue agent, after an investigation, levied an additional assessment which was paid March 8, 1941. Over three years later, on March 30, 1944, the corporation filed a claim for refund on the grounds that the revenue agent had erroneously failed to allow certain credits for sums used by the taxpayer in 1939 to reduce his indebtedness.

The question involved here was whether the claim for refund has been filed within the proper statutory period after filing of return on payment of the tax. The dispute concerned which of two sections of the Internal Revenue Code should be applied. The respondent relied on the Internal Revenue Code as amended, REV. STAT. § 3228 (a), 45 STAT. 878 (1932); 26 U. S. C. A. § 3313 (1940), which allows a period of four years to elapse between payment and filing of claim. It reads as follows:

> All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund.

The petitioner claimed that the Internal Revenue Code, 52 STAT. 544 (1938), 26 U. S. C. A. § 322 (b) (1940), should be applied. The period allowed in this section is two years between payment and filing of claims or three years between filing of returns and the filing of the claim. The section deals with income tax overpayment which, it was argued, is one exception in section 3313 of the code, where it is stated, ". . . except as otherwise provided by the law . . ." Mr. Justice Murphy, in delivering the opinion of the Court said:

> § 3312 of the Code establishes a four year period for all internal revenue taxes, except as otherwise provided by law in the case of specific taxes. Among the latter is the income tax, as to which § 322 (b) (1) makes provision otherwise by requiring that refund claims be presented within two years of payment or within three years from the filing of the return.

It was claimed by the respondent however, that section 322, in referring to overpayments of income tax, refers only to excess payments made due to error of the taxpayer and not to income taxes erroneously or illegally assessed or collected which are due to inaccuracies of revenue agents. In deciding this point Mr. Justice Murphy said:

> In the absence of some contrary indication, we must assume that the framers of these statutory provisions intended to convey the ordinary meaning which is attached to the language used.

He then cited *Rosenman v. U. S.*, 323 U. S. 661, 65 S. Ct. 536, 89 L. Ed. 531 (1945) in which the court said:

> Since no extraneous relevant aids to construction have been called to our attention, Congress has evidently meant what these words ordinarily convey.

The Court said that the word "overpayment" means any excess payment over the amount due regardless of what factor caused it to be made. It will be found, noted Mr. Justice Murphy, that overpayment was first used in U. S. statutes to rerplace the words "in excess of that properly due" used in former statutes. § 281, Revenue Act of 1924. It is an exact substitute and was written in merely as a simplification of phraseology.

The Court reasoned further that if the legislature had intended that all the taxes fall under section 3313 they would not have written separate laws en-

compassing income and profit taxes into the statute. The fact that they segregate the miscellaneous taxes from the income and profits taxes is an indication that there must be a point of demarcation in section 3313 which deals with taxes in general. This point is already clear and can only be confused by reading overpayment so as to divide income tax claims according to their origin.

It was further argued that since 1939 various lower federal courts have ruled that income tax claims for income taxes alleged to have been erroneously or illegally assessed or collected fell under section 3313 and that since Congress while in session has not amended the section so as to change this interpretation, the interpretation must be correct. Mr. Justice Murphy answered:

> We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation. In short, the original legislative language speaks louder than such judicial action.

An investigation of the lower cases referred to by respondent does not show them to have been firmly entrenched in the law. In many recent cases concerning income tax claims of the type under consideration the court placed them under section 322 (b) with no objection from the litigants. Therefore, the number of judicial decisions does not seem so overwhelming as to create a legislative acquiescence.

In view of the argument stated above, the Court decided that all income tax refund claims, regardless of the reason for their existence, must be filed within three years from the time the return was filed or another two years from the time the tax was paid as provided in the Internal Revenue Code, 52 STAT. 544 (1938), 26 U. S. C. A. 322 (b) (1940).

It is of the greatest importance that statutes be interpreted as nearly as possible in the light intended by their writers. If this course is not pursued by the courts, the judiciary will tend to supplant the legislature as the primary maker of the law and the statutes will become meaningless. The result would be a usurpation of the powers of legislature as laid down in the Constitution of the United States. U. S. CONST. Art I § 3, Cl, 18. The framers of the Constitution recognized formally the need for complete segregation between the legislative and the judiciary. To accomplish this end, the statutes must be jealously guarded in their originally intended form. This end is achieved by Mr. Justice Murphy in the case herein discussed.

John G. Smith

IMPAIRMENT OF THE OBLIGATION OF CONTRACTS—TIME OF CONTRACT PERFORMANCE.—*Kilpatrick v. Lefkowitz*, ... N. J. Eq. ...., 55 A. (2d) 824 (1947). The case involves a contract for the sale of real estate where time was made of the essence of the contract. When the contract was entered into, wherein a certain time was designated for settlement under the contract, standard time prevailed. Subsequently, when it came time for performance under the contract, the system of time computation had been changed to daylight saving time by an act of the legislature. The vendor (defendant in the action) presented himself to perform at the designated place, and at the designated time as measured by the daylight saving time then in effect. Since the vendee (plaintiff) was not present, the vendor left, and thereafter refused to convey, claiming default by the vendee. An hour later the purchaser presented himself at the proper time as measured by standard time, and was then and thereafter ready to make settlement under the contract. In a suit in equity by the purchaser, the New Jersey Chancery Court awarded specific performance of the contract to the plaintiff.

After an examination of the reasoning involved in the decision, it does not appear, as at first glance, that the holding of the Court is in conflict with the established rule that in a contract for the sale of real estate where time is of the essence, and in the absence of other controlling factors, the failure of the vendee to tender performance under the contract at the designated time will result in the vendee's forfeiture of all rights under the contract. *Doctorman v. Schroeer,* 92 N. J. Eq. 676, 114 Atl. 810 (1921). Nor, more particularly, does the decision disturb the traditional rule that specific performance will not be granted to the vendee who fails to perform under the facts set out above, where time is held to be of the essence. *Barry v. Ruskin,* 99 N. J. Eq. 730, 133 Atl. 528 (1926); *affirmed,* Err. & App., 100 N. J. Eq. 557, 135 Atl. 914 (1927).

It is fundamental in our constitutional system of government that no state shall pass any law impairing the obligation of contracts. U. S. CONST. ART. I, § 10; N. J. S. A. CONST. ART. IV, § 7. It was on this constitutional provision that the Court based its decision. The court held that the change in time, as affecting the parties to this contract, came within the definition of an impairment of contract obligation. The theory of the court in applying the provision to the set of facts involved in *Kilpatrick v. Lefkowitz* seems well supported in principle, although there was no previous case in the jurisdiction which had expressly considered the problem of a change in time computation as affecting the obligation of contracts. In the comparatively early case of *Baldwin v. Flagg,* 43 N. J. L. 495 (1881), the court stated that the obligation of a contract is synonomous with the ability to enforce its performance. And in *Trader v. Jester,* 1 Terry 66, 1 A. (2d) 609 (1938), it was decided that the obligation of a contract is impaired by a statute which alters its terms by imposing new conditions or releases or lessens any part of the contract obligation and the extent of the impairment is immaterial.

Where the question of time as related to the impairment of contract obligations has been raised in other jurisdictions, it has been said that any deviation from the terms of a contract by postponing or accelerating the performance, however minute or apparently immaterial is their effect on the contract, "impairs the obligation of contract." *Federal Land Bank of Columbia v. Garrison,* 185 S. C. 255, 193 S. E. 308 (1937); and whatever legislation lessens efficacy of means of enforcement of an obligation or tends to postpone or retard enforcement of a contract is an "impairment" of the obligation of contract, contrary to constitutional prohibitions. *State* ex rel. *Woman's Ben. Ass'n. v. Port of Palm Beach Dist.,* 121 Fla. 746, 164 So. 851 (1935); *State* ex rel. *Sovereign Camp, W. O. W. v. Boring,* 121 Fla. 781, 164 So. 859 (1935).

In *Kilpatrick v. Lefkowitz,* the court did not fully develop in their opinion the theory of their decision. They did not emphasize the general proposition, which, it appears, would have clarified the decision considerably, that ordinarily, statutory enactments affecting contract obligations, although they may have a grave effect on a contract subsequently entered into, have no effect on the obligations of a contract entered into prior to the enactment of the statute; that the obligations of a contract must be measured in the light of the laws which existed at the time and place of the making of the contract, and that performance under such a contract is to be regulated, thus, in the light of such laws as were in effect at that time. *W. B. Worthen Co. v. Kavanaugh,* 295 U. S. 56, 55 S. Ct. 555, 79 L. Ed. 1298, (1935).

The holding of the court in *Kilpatrick v. Lefkowitz* that the change in time, as affecting the parties to this contract, was an impairment of the obligation of contract is of considerable practical importance. Business customarily operates, when a change is made in the system of time computation, according to the new standards, even with respect to contracts entered into prior to the change, and

even though the terms of such contracts are technically to be construed according to the laws which were in effect at the time of the making of the contract. The resultant confusion to the parties to such contracts, in view of this decision, may have the effect of increasing litigation.

Few would question, however, that the decision in *Kilpatrick v. Lefkowitz* was, on the facts, just; few would deny, finally, that the decision was in keeping with an appreciation of the high importance the makers of our Federal Constitution placed on protecting the obligations of contract from all legislative action tending to its impairment by altering the contract to the prejudice of either party.

E. A. Steffen, Jr.

INTERSTATE COMMERCE—CIVIL RIGHTS—*Vashti Brown v. Southern Railway Company,* I. C. C., No. 29607, Third Division, February 25, 1948. Vashti Brown, a Negro traveling on one of the defendants trains between New York, New York, and Atlanta, Georgia, complained of unjust charges in violation of Section 1, undue prejudice in violation of Section 3, and unjust discrimination in violation of Section 2 of the Interstate Commerce Act, 24 STAT. 379 (1887) as amended, 49 U. S. C. A. §§ 1, 2, 3, (1, 3) (Supp. 1947). The complainant asked for $5,000 damages and an order directing the defendant to cease and desist from the alleged violations in the future.

The Commission found: (1) That defendant's employees did subject the complainant to undue prejudice and disadvantage by requiring her to move, in the middle of the night, from the car and seat reserved to her for the entire trip to another seat in a car at the other end of the train, solely because she was a Negro and the train was entering Virginia. (2) That no basis for damages was shown since all seats on the train were reserved and at the same cost. The Commission consistently has held that it has authority to award reparation only for actual monetary damage suffered as a direct result of a violation of the Act, and that it has no jurisdiction to award punitive or exemplary damages. *Henderson v. Southern Railway Company,* 258 I. C. C. 413. (3) That observance by the defendant's employees of its rules would prevent similar violations of the Act and that no order for the future would be necessary. The rules relied on for this conclusion are the defendant's instructions to its ticket sellers not to sell Negroes any reserved seats in that section of the train reserved for whites.

The Commission distinguished the present case from *Morgan v. Virginia,* 328 U. S. 373, 66 S. Ct. 485, 90 L. Ed. 1317 (1946), wherein a Virginia statute requiring segregation was held unconstitutional, by saying that the latter case did not declare segregation unconstitutional *per se* but only where there was inequality of treatment. This distinction was evidently drawn from the minority opinion of Mr. Justice Burton since the majority opinion expressed the view that a forced change of seats was an undue burden on interstate commerce *and that such regulation, by segregation on interstate carriers, hampers freedom of choice in selecting accommodations.*

Also considered as controlling was the decision in *Hall v. DeCuir,* 95 U. S. 485, 24 L. Ed. 547 (1878), where the United States Supreme Court said that, in the absence of congressional legislation, a common carrier is at liberty to adopt such reasonable regulations for segregation as seems to it best for all concerned, and that the test of reasonableness is the established usages, customs, and traditions of the people carried by it. A fair criticism of that reasoning can be culled

from the *Morgan* case in that the express enactment of the Virginia legislature supposedly following these usages, customs, and traditions of the people was held unconstitutional as a violation of the ultimate power of Congress to legislate for interstate commerce. Can it be that the I. C. C. is now saying that what has been denied the States acting under their sovereign power is to be accomplished indirectly by funneling it through a railroad corporation?

A discussion of the *Morgan* case in 22 NOTRE DAME LAWYER 132, shows a definite trend away from segregation on interstate carriers and toward not only equality of accommodation but also equality of choice. Mr. Justice Reed, speaking for the majority in the *Morgan* case, pointed out that travel by people of all races has increased extensively since 1878 and that today segregation increases the problems of interstate commerce even more so than did the statute in the *DeCuir* case, which required commingling. As each year passes, the problems of segregation are bound to become more burdensome to interstate commerce. The trend would seem to indicate that had the *Brown* case been tried before the United States Supreme Court, a different and more justifiable decision would have been handed down based on present day volume of travel and demand for convenience on interstate carriers.

James K. Sugnet.

CONFLICTS OF LAWS—SHADES OF SWIFT V. TYSON—INCORPORATION OF A JUDICIALLY CONSTRUCTED LAW INTO THE HEPBURN ACT.—*Francis et al. v. Southern Pac. Co.*, ... U. S. ....., 68 S. Ct. 611 (1948). In this recently decided case the Supreme Court of the United States upheld the rule enunciated in *Northern Pacific R. Co. v. Adams*, 192 U. S. 440, 24 S. Ct. 408, 48 L. Ed. 513 (1904), as part of the warp and woof of the Hepburn Act and therefore decisive of the issue before it. The Court, in arriving at this decision held that *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938), was not applicable.

Briefly, the facts are as follows: Jack Francis, an employee of the respondent railroad company, lived in Carlin, Nevada, with his wife and three children. During Christmas week of 1944, the family took a trip to Ogden, Utah, to visit Jack's father and mother. After staying there a few days the family boarded one of the respondent's trains to return to Carlin. Before leaving Utah, an accident occurred to the train and as a result, Jack and his wife were killed. This action was brought in Utah by the grandparents of the children as their guardians. The action was brought under a Utah wrongful death statute, since Congress has never provided any law under which a similar action could be brought even as affecting interstate carriers. The family was riding on free passes issued by the respondent pursuant to the provisions of the Hepburn Act of 1906. On the pass was the stipulation that the railroad was to be exempt from any liability due to negligence and that the user assumed "all risk of injury to person."

The lower court, relying on previous decisions of the United States Supreme Court, refused to submit to the jury the issue of ordinary negligence and submitted merely the issue of gross negligence. There was judgment for the respondent and the case was brought to the Supreme Court on writ of certiorari to reexamine the relationship between local law and federal law respecting the liability of interstate carriers under free passes. The Court reexamined *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, 24 S. Ct. 408, 48 L. Ed. 513 (1904), in which a federal court in the absence of an Idaho statute decided on a similar provision in

a pass. The Court in that case held that as a matter of general law the plaintiff was precluded from recovering from the railroad. In arriving at that decision the Court applied the old doctrine of *Swift v Tyson*, 16 Pet. 1, 10 L. Ed. 865 (1842), whereby federal courts in passing upon questions of state law upon which there was no controlling state legislative enactment declared the "general commercial law" of a state on the federal court's notion of wise public policy, independently of state court decisions.

The *Adams* case was followed in the same year by *Boering v. Chesapeake Beach R. Co.*, 193 U. S. 442, 24 S. Ct. 515, 48 L. Ed. 742 (1904). That case applied and reaffirmed the *Adams* case. In 1906 came the Hepburn Act, 34 STAT. 584, 49 U. S. C. § 1(7), which prohibited common carriers engaged in interstate commerce from issuing free passes to all but excepted classes, among which were employees of the common carrier. In 1914 came the *Charleston & W. C. R. Co. v. Thompson*, 234 U. S. 576, 34 S. Ct. 964, 58 L. Ed. 1476 (1914), which decided that the *Adams* case was law under the Hepburn Act and that the "free pass" was nonetheless a gratuity though issued to an employee of the carrier. In 1923 the case of *Kansas City So. R. Co. v. Van Zant*, 260 U. S. 459, 43 S. Ct. 176, 67 L. Ed. 348 (1923), held that the liability of an interstate carrier to one riding on a free pass was determined not by state law but by the Hepburn Act. The Court in that case went on to say that all phases of the pass issuing were to be governed by federal law and that the Hepburn Act was to be interpreted as exercising broad and exclusive power over the subject of passes. In that case also the Court fully incorporated the *Adams* case into the Act, declaring it to be federal law and binding on the decisions of the state courts.

After reexamining those cases, the Court in the present case concluded that the *Adams, Thompson,* and *Van Zant* cases were part of the warp and woof of federal legislation and any state law which conflicts must give way by virtue of the supremacy clause. Hence, they concluded there was no ground for the application of *Erie R. Co. v. Tompkins.*

Mr. Justice Black, with whom Mr. Justice Murphy and Mr. Justice Rutledge joined, dissented on the ground that the Utah law should govern. But he believed affirmance of the judgment is equally wrong if it were to be governed by federal law because the *Adams* case in his opinion is not good law. The "general commercial law" rule of *Swift v. Tyson* is emphasized by Mr. Justice Black as the basis for the decision of the *Adams* case, upon which decision, the present controversy depends. Several cases are cited, decided by this Court in the interim between *Swift v. Tyson* in 1842 and the *Adams* case in 1904. In those cases the Court refused to concede that a public carrier could exempt itself from liability even to a free passenger, by contract. *New York Cent. R. Co. v. Lockwood,* 17 Wall. 357, 21 L. Ed. 627 (1873); *Grand Trunk R. Co. of Canada v. Stevens,* 95 U. S. 655, 24 L. Ed. 535 (1878).

Mr. Justice Black claims that the *Adams* case was influenced by the political pass situation of that period which culminated two years later in the Hepburn Act. He also contends that the *Adams* case, if law at all, should be narrowly restricted to strictly free passengers, and in that respect, the Hepburn Act, although it outlawed the giving of free passes to certain classes of people, did not by implication mean that the passes permitted to be distributed by the railroad were in the literal and strict sense of the word, free. In the *Adams* case the passenger was a lawyer and riding on what Mr. Justice Black would term, a "strictly free pass". He would argue that passes issued to employees and their families are a part of the employee's compensation. In the *Thompson* case the action was brought by the wife of a railroad employee for injuries sustained while riding on defendant's interstate railroad on a free pass with similar provisions. The

lower state court made the distinction between free and strictly free and distinguished it from the *Adams* case, but the Supreme Court of the United States reversed the decision of the state court and in giving judgment for the defendant applied the *Adams* case under the Hepburn Act. Mr. Justice Black's criticism of the majority opinion in the principal case is as follows:

> The Court then went further and upheld the pass stipulations for railroad exemption from liability for negligence. But the Court did not all rely on the Hepburn Act for this latter holding. Instead it was said that "As the pass was free under the statute * * * the validity of its stipulations" was "established by the decisions of this court," relying completely upon the *Adams* and *Boering* cases. Thus the *Charleston & W. C. R. Co.* case did not discover the Adams rule in an act of Congress; the rule it relied on had been judicially created in 1904 by an exercise of the Court's "transcendental" law power.

The *Van Zant* case followed the *Thompson* case and further declared that the issuance of a pass raised a federal question to be decided by federal law, and since the *Adams* case was federal law under the Hepburn Act, it must be followed.

Mr. Justice Black goes on to say that the *Van Zant* case could not be questioned at that time if you went along with the general commercial law doctrine as set out in the *Swift v Tyson* and *Adams* cases, but he claims that, in 1938, *Erie R. Co. v. Tompkins* overruled the whole doctrine. The only way a court could get around the case without overruling the same would be to declare the *Adams, Thompson,* and *Van Zant* cases part of the warp and woof of the Hepburn Act. This, he claims, is what the present Court did in the majority opinion.

Several strong arguments were brought out by Mr. Justice Black against the incorporation of the *Adams* case into the Hepburn Act. He claims that though Congress, under the commerce clause, has the power to enact a federal wrongful death statute for injuries incurred in interstate commerce, the fact that they had not done so should be an indication that they intended the states to exercise that power. Nor can it be assumed that Congress, by its silence, accepted the incorporation of the *Adams* case into the Hepburn Act. Such an intention on the part of Congress would be directly contrary to the trend of social reforms as evidenced by congressional legislation throughout that whole period.

If the *Adams* case is law under the Hepburn Act, it is a manifestly unjust extension of the federal power in interstate commerce by the judicial branch of the federal government. Under the framework of our Constitution, one of the enumerated powers of Congress is to regulate commerce among the several states and foreign countries. Only Congress can make the laws pursuant to these enumerated powers. When the judicial branch invests itself with power to go beyond a legislative enactment into a power not fully exercised by Congress, it is overstepping its bounds. Congress has the sole power over interstate commerce and it may or may not make laws pursuant thereto. The people through their representatives decided on the extent of the exercised power and it was never intended that the Supreme Court should extend a law beyond the scope intended by its framers.

The incorporation of the *Adams* case into the Hepburn Act was accomplished by two decisions of the United States Supreme Court. In the first, the *Thompson* case, the Court threw out the distinction as to "free" and "strictly free" and held that since the Hepburn Act said *free,* it meant just that. The Court then decided the issue as to the validity of the pass stipulation. Without bothering to declare that an exclusive federal question was being decided, the Court passed it all off with a mere reference to the previous decisions of the Court, meaning the *Adams* and *Boering* cases, and decided accordingly. The *Van Zant* case, was