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Note and Comment

Edwin C. Goddard
University of Michigan Law School

George Seletto
University of Michigan Law School

Edson R. Sunderland
University of Michigan Law School

Victor H. Lane
University of Michigan Law School

Burke Shartel
University of Michigan Law School

See next page for additional authors

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Authors

Edwin C. Goddard, George Seletto, Edson R. Sunderland, Victor H. Lane, Burke Shartel, and George E. Longstaff

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NOTE AND COMMENT

CARRIERS—SECOND CUMMINS AMENDMENT.—It was seven years after the Carmack Amendment of the Hepburn Act of 1906 before the Supreme Court began that series of decisions, extending from *Adams Express Co. v. Croninger*, 226 U. S. 491 (1913), to *George N. Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278 (1915), which directly resulted in the First Cummins Amendment of March, 1915. One has only to read those cases, reviewed in 13 MICH. L. REV. 590, and other notes referred to in 17 MICH. L. REV. 183, to see that the language of the Cummins Amendment was framed expressly to undo the interpretations of the court on the Carmack Amendment, and make the liability of the carrier just what during the years 1906-1912 it had generally been understood the Carmack Amendment intended it to be. Indeed, from the decision of *New Jersey Steam Navigation Co. v. Merchants Bank*, 6 How. (U. S.) 344 (1848), to the present day there has been a contest between the courts and legislatures as to what should be the law of liability of common carriers, the courts through one device or another opening a way of escape for the carrier from the strict common law liability, and the legislatures, state and federal, passing statute after statute to bring the law back to its pristine simplicity and strictness.

Just what induced the passage, within little more than a year after the act of March, 1915, of the so-called Second Cummins Amendment of August, 1916, is not entirely clear, nor have we yet decisions enough to enable us to know where this last act leaves the law of liability. It is fairly clear that this act was due to a feeling that the First Cummins Amendment had gone too far in that it had made the carrier liable for the full value of the goods lost or injured, and according to the common law rule as to damages and not to any agreement or so-called agreement of the shipper, *Matter of Bills of Lading*, 52 I. C. C. 671, 709, but without giving the carriers any compensation for added liability due to the increased value of the goods, *McCaul-Dinsmore Co. v. C., M. & St. P. Ry. Co.*, 252 Fed. 664, affirmed 260 Fed. 835, 253 U. S. 97. There never had been any tariff of rates based on cost of insurance, and this act seemed to forbid making one. The shipper of goods valued at five dollars paid the same rate as a shipper of a like quantity of goods in the same classification whose value might be \$100 or \$1,000. In every case the liability for loss was the actual value of the goods. *McCormick v. Southern Express Co.*, 81 W. Va. 87 (1917), allowing recovery of \$300 for loss of a dark Cornish cock shipped in an open crate, at the rate charged for ordinary chickens; *C., M. & St. P. Ry. Co. v. McCaul-Dinsmore Co.*, 253 U. S. 97 (1920); see 20 MICH. L. REV. 348, 18 *ib.* 791, an authoritative decision on that point. In view of this, *Springfield L., H. & P. Co. v. N. & W. Ry. Co.*, 260 Fed. 254; *Bowman-Kranz Lumber Co. v. Bush*, 104 Neb. 165 (1920), and such cases, holding good stipulations that recovery shall be limited to *bona fide* invoice price, if any, or to value at time and place of shipment, cannot stand under the First Cummins Act. Some cases, like *Wallingford v. A., T. & S. F. Ry. Co.*, 101 Kan. 544, may involve shipments before June, 1915, and so fall under the Carmack Amendment, but that is not true certainly of *Caston v. M., K. & T. Ry. Co.*, 105 Kan. 487, where the facts show an interstate shipment on March 2, 1916. The decision here, however, is placed on the fact that recovery was allowed in excess of amount claimed. The Kansas court allows full actual value for two trunks lost, contents hidden from view and value neither asked nor given, in *Payne v. Adams Express Co.* (Kan. 1921), 195 Pac. 860, a shipment made August, 1915, and therefore falling under the First Cummins Act. To the same effect is *Thompson v. G. N. Ry. Co.* (Id. 1918), 174 Pac. 607. The decision of the Supreme Court in the *McCaul-Dinsmore* case, *supra*, is decisive as to all cases under the First Cummins Act.

The Second Cummins Act eliminated a provision of the first act specially applying to goods hidden from view, see 17 MICH. L. REV. 183, noting *Thompson v. Gt. Northern Ry. Co.*, *supra*; *Tribble v. So. Express Co.*, 111 S. C. 31, and substituted a long proviso clearly excluding baggage from the operation of the act, and therefore as to baggage reinstating *B. & M. R. Co. v. Hooker*, 233 U. S. 97. The proviso also leaves under the Cummins Act ordinary live stock. As such live stock is usually carried by weight, and also sold by weight, it is evident that, through weight, value and rate are reasonably connected in most cases, and the law is equitable. The same

thing may be said of other commodities in which weight is the unit of value in sale and of charge for freight. But the Second Cummins Amendment as to all other goods except baggage and live stock has a provision which has been said to have "apparently restored to a large extent the operation of the Carmack Amendment as it had been judicially construed." 10 C. J. 138. Whether this is correct will be in doubt till an authoritative decision by the United States Supreme Court, but a careful reading of the language does not seem to show that such was the intent. That could have been brought about by re-enacting the Carmack Amendment except as to ordinary live stock.

What Congress apparently did do was to provide that the rates of the Carmack Amendment should apply to cases in which there is *express authorization*, by order of the Interstate Commerce Commission, to establish and maintain rates dependent on value *declared in writing* by the shipper or *agreed upon* in writing as the released value of the property. This authorization the commission is empowered to make "where rates dependent upon and varying with declared or agreed values would, *in its opinion, be just and reasonable* under the circumstances surrounding the transportation." The words italicised indicate the more significant requirements that seem to show *George N. Pierce Co. v. Wells, Fargo & Co., supra*, is not to come back, or, if so, that the shipper is to be safeguarded. To what extent and how the Commission and the courts will provide for this cannot be fully known till there are more decisions than have yet been rendered, but there are some indications.

The Commission has several times considered the Second Cummins Act. In *the matter of Express Rates*, 43 I. C. C. 510, it was held that the act invalidated all limitations, or attempted limitations, of liability in case of ordinary live stock, "wherever or in whatever form it is found." See further, on live stock rates, *Live Stock Classification*, 47 I. C. C. 335. In *Williams v. Hartford & N. Y. Transportation Co.*, 48 I. C. C. 269, rates on soap published without the authority of the Commission were declared unlawful. It was suggested that rates properly revised might receive attention within a reasonable time. What will be the basis for rates according to value that will be approved by the Commission is not yet fully apparent. The guiding principle should be the remarkably clear and accurate opinion of Commissioner Lane in *Matter of Released Rates*, 13 I. C. C. 565, 9 MINN. L. REV. 236, to the effect that "a certain differential between rates which leave the carrier's liability unlimited and rates which provide for a limited liability is obviously proper, but the differential should exactly measure the additional insurance risk which the carrier assumes when the liability is unlimited." The cases do not reveal that any tariff based on cost of insurance has ever been scientifically worked out or attempted. Instead, we find such provisions as an increased charge of twenty per cent for insurance, or of added cost for higher valuations at so much for each hundred pounds. Household goods are not properly valued by the hundred weight. Cf. *Ostroot v. N. P. Ry. Co.*, 111 Minn. 504, with *Larsen v. O. S. L. R. Co.*, 38

Utah 130. The Second Cummins Act puts control of this in the Interstate Commerce Commission. A recent ruling on cost of transmission of "valued messages" by telegraph companies approves an addition to the repeated rate of one-tenth of one per cent of the stated values in excess of \$5,000. *Limitations of Liability in Transmitting Telegrams*, 61 I. C. C. 541 (March, 1921). This is in the direction of a charge proportioned to the liability, though far from a complete scientific table of insurance rates. Nothing could be much more unscientific than the former practice of telegraph companies to charge double, or one and a half price, for repeated, full liability messages, and then settle in full with those who pushed claims, leaving others to the recovery provided for on the telegraph blanks. See discussion in the above case. That notice of rates based on liability should not be merely in filed tariffs, but rather in bills of lading signed by the shipper and containing provisions limiting liability, is insisted upon in *Perishable Freight Investigation*, 56 I. C. C. 449, 481. The most extensive and illuminating discussion by the Commission is to be found in *Matter of Bills of Lading*, 52 I. C. C. 671, 708, 740.

A so-called "Uniform Bill of Lading" had been *approved* by the Commission as early as 1908, and, with some later modifications, had been in general use in a large part of the United States. Acting under the Second Cummins Act, the Commission now *orders* the adoption of a new Uniform Bill of Lading, Appendix B of the report, containing this stipulation as to amount of liability: "If the property covered by this bill of lading is hidden from view and the shipper has specifically stated in this bill of lading the value of the property, no carrier shall be liable beyond the amount so specifically stated, whether or not the loss or damage occurs from negligence: *Provided*, in all cases not prohibited by law, that where a lower value than actual value has been represented in writing by the shipper, or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence." Decided April 14, 1919.

This note will close with a reference to the few significant decisions already made by the courts. In *Western Assurance Co. v. Wells, Fargo & Co.* (Minn., 1919), 173 N. W. 402, the court held the express company to liability for the full value, \$1,547.99, of three fur coats, value not marked on the box nor stated to the agent, because it was not shown the company had obtained by order of the Commission the right to adopt alternative rates based on declared or stated values. *Buschow Lumber Co. v. Hines* (Mo., 1921), 229 S. W. 451, although involving a shipment under the Second Cummins Act, follows *C., M. & St. P. Ry. Co. v. McCaull-Dinsmore Co.*, 253 U. S. 97, which was decided under the First Cummins Act, and does not note that the Second Act changes the law of liability of the First. In *Wells, Fargo & Co. v. Bollin* (Tex. Civ. App., 1919), 212 S. W. 283, the court finds full value recoverable upon a shipment March 3, 1917, no receipt being issued till several weeks after, and that *never signed by the shipper*. But upon a

rehearing, and on authority of cases decided under the Carmack Amendment, the judgment was reformed to limit recovery to the amounts stated in the receipt, and presumably in the filed tariffs of the company. The requirement of the Second Cummins Act that the value be "declared in writing by the shipper, or agreed upon in writing as the released value of the property," is entirely overlooked, and, so far as appears, also the further provision that such limitation must have been "expressly authorized or required by order of the Interstate Commerce Commission." If this decision be followed, then indeed the statement in 10 C. J. 138 is correct, that the operation of the Carmack Amendment has been to a large extent restored, and the two Cummins Amendments, except in case of ordinary live stock, judicially overruled. The language of the statutes is not as clear and definite as might have been desired. But certainly there is a wide difference between a liability limited to a lower rate "unless the shipper declares a value greater," upheld in the *Bollin* case, and a "value agreed upon in writing" of the act.

The case of *Poliakoff v. Am. Ry. Express Co.* (S. C., 1921), 105 S. E. 744, differed from the *Bollin* case in that the receipt with provision for limited liability unless a greater value was declared was issued at the time of the shipment and was signed by the shipper. Verdict and judgment for full value on the ground that the shipper did not know or assent to limited liability, value being neither asked nor given, was reversed on the ground that the case was governed by federal decisions, and *American Express Co. v. U. S. Horseshoe Co.*, 244 U. S. 58, was decisive. But that case was under the Carmack Amendment and could not be decisive here, unless it be that the Carmack Amendment has indeed been restored. That such is not the case, and that decisions under the Carmack Amendment are not controlling now, is held and clearly explained in *Lindenburgh v. Am. Railway Express Co.* (W. Va., 1921), 106 S. E. 884. The statute requires the declaration or agreement as to value to be made in writing, or rather does not authorize carriage under limited liability, nor the Commission to provide for it, except upon a written declaration or agreement as to value. * * * Preparation and promulgation of regulations by the Interstate Commerce Commission, and the posting of tariffs by the carrier conforming to such regulations, do not alone limit the liability in any particular case." Strangely enough, this case refers to *American Express Co. v. U. S. Horseshoe Co.*, *supra*, as decided "under the present law," and seeks to distinguish it. If it were under the present law it would settle the question of values limited in filed tariffs in favor of the carriers' contentions and in an extreme form, for not only was there no value asked or given, but it seems the tariffs were on file only with the Commission in Washington, and not in the local office of the company. But the shipment was under the Carmack Amendment. The date does not appear, but the case was first tried in 1914, and was before the Pennsylvania Supreme Court in 1915 (see 250 Pa. 527), so that the shipment was before either Cummins Act had been passed.

The best considered case to date is *American Railway Express Co. v. Galt* (Miss., Feb. 1922), 90 So. 597, holding that even if the classification

and tariffs be treated as authorized by the Commission, and the low rate based on a \$50 valuation has been paid, yet full actual value is to be recovered where the blank space in the receipt for declaration of value has not been filled in. After quoting from the *Lindenberg* case, *supra*, the court says: "It appears from the statute that it was the purpose of Congress to afford the shipper full value for his loss, unless he chose to take the initiative in the manner laid down by the statute,—that is, by declaring a released value in writing. It is left entirely optional with the shipper; the carrier has nothing to do with the matter, other than to accept the shipper's declaration of released value in writing. The purpose of the statute is to give the shipper the active conscious choosing whether he will pay the lower rate and recover less than full value in case of loss or damage. If he so chooses he sets down in writing in the receipt the released value. On the other hand, if he is silent, either from choice or ignorance, he pays the higher rate, which carries with it the right to recover full compensation for his loss." A clearer statement of what the face of the act seems to show Congress intended could hardly be made.

The courts by construction emasculated the provisions of the Carmack Amendment as to liability of the carriers. The direct result was the two Cummins Amendments. It is to be hoped the former course will not be repeated, but that the straightforward, clear construction of the West Virginia and Mississippi cases will be approved. If so, then the shipper can reasonably demand but one thing more, viz., that the Commission will approve no rates unless they are based on a fair, properly graded charge for insurance. It should be no more difficult to make an accurate table of insurance rates for carriers than for insurance companies, and it is time it was done. Then if the shipper desires insurance, let him pay for it, at reasonable rates and after written declaration by him, not by the carrier or by force of rules or tariffs of which he has no actual knowledge. If the courts and the Commission give effect to the present law along these lines it is believed the huge volume of expensive litigation about amount of recovery will shrink to almost nothing, and further statutes will be unnecessary. Nearly all the litigation on this question that comes to courts of last resort is a protest against the injustice of the Carmack Amendment as judicially amended in *Adams Express Co. v. Croninger*, 226 U. S. 491, down to *Geo. N. Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278. The amendment was intended by Congress as a benefit to the shipper, but as interpreted by the courts it left him much worse off than he was before on this matter of the amount of his recovery. The fight between the legislatures and the courts has been profitable to the attorneys, but it has been expensive to the carrier, to the shipper and to the public, all of whom have been heavily drawn upon to pay the bills. If the carrier charges for what it furnishes, for insurance as well as for carriage; if the shipper pays a reasonable price for what he gets, by way of insurance as well as by way of carriage, if the public is relieved of added expense to maintain courts and court costs in a matter that in most cases should be readily settled out of court, it is possible attor-

neys may find other ways to earn their living, all to the very great advantage of the country. The victories of the carriers in court have been Pyrrhic victories, and their cost might far better have been used to pay shippers in full for losses suffered by the fault of the carrier. It is no hardship to require the carrier to pay insurance losses if he is allowed to charge proper prices for such insurance. His prices in the past have not been proper. The shipper has no case if, being offered insurance at proper prices, he consciously chooses to ship at his own risk. He has felt aggrieved, and will continue to do so if he is overcharged for insurance, or if he is not informed of the choice that is offered to him. The Second Cummins Act reasonably interpreted offers a sane and peaceful solution. E. C. G.

IMMUNITY OF STATE SHIPS ENGAGED IN COMMERCE.—The subject of the immunity which foreign sovereign states and the property of such states shall enjoy in our courts has always given judges a great deal of trouble. Although confronted with an almost hopeless confusion of opinion found in treatises on international law and decided cases, Judge Mack, in a recent case, *The Pesaro* (D. C., S. D., N. Y., Oct. 1, 1921, Supp. Op., Dec. 13, 1921), 277 Fed. 473, has probably made a creditable contribution to the solution of some of the difficulties. The steamship *Pesaro* was owned by the kingdom of Italy and manned by civilian officers and crew under the direction of the ministry for railway and maritime transportation. She was engaged in ordinary commercial trade carrying passengers and goods for hire, the vessel being in no way connected with the Italian navy. This action was a libel *in rem* against the ship to enforce a claim for damages to a cargo of olive oil shipped thereon. The case had already been to the Supreme Court (*The Pesaro*, 255 U. S. 216), where it was ruled that the Italian ambassador's direct suggestion that the ship was owned by the Italian government must be made through diplomatic channels of our government. Only one question remained for the district court to decide, and it was held that an ordinary merchant vessel owned, operated and in the possession of a foreign sovereign state and engaged in carrying passengers and cargo for hire is not immune from arrest on process from the admiralty courts of the United States, especially in view of the fact that a vessel of the United States in like circumstances would not be immune in the courts of that foreign state.

The leading English case dealing with this problem is *The Parlement Belge* (1880), 5 P. D. 197. The suit was *in rem* against an unarmed mail packet owned by Belgium and officered by officers of the royal Belgian navy, to recover for damages caused by collision. Besides carrying mail, the ship carried merchandise and passengers for hire. That a foreign sovereign could not be directly impleaded, in either private or official capacity, would seem clear. See *Mighell v. Sultan of Johore* [1894], 1 Q. B. 149; *Duke of Brunswick v. King of Hanover*, 6 Beav. 1; 2 H. L. 1. In the *Parlement*

Belge the court said: "The real principle on which the exemption of every sovereign from the jurisdiction of every court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority." And in holding that the court had no jurisdiction, Brett, L. J., said, "* * * as a consequence of the absolute independence of every sovereign authority and of the international comity, * * * each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use." The vice inherent in the action *in rem* was that it impleaded the sovereign indirectly so as to "call upon him to sacrifice either his property or his independence." The court considered the *Exchange*, an American case, a good precedent. See also *The Jassy* (1906), P. 270.

Before dealing with the later English cases we shall consider the *Schooner Exchange v. M'Faddon* (1812), 7 Cr. 116. This was a libel brought by American citizens against the *Exchange*, an armed public vessel of France lying in the port of Philadelphia. It was claimed on behalf of the ship that the court had no jurisdiction to inquire into the title of an armed national vessel of a foreign sovereign. Chief Justice Marshall had no decided cases to look to. The writers on international law gave practically no aid. The court reasoned that the jurisdiction of each sovereign state was absolute within its own territory, but by keeping our ports open to the public ships of foreign friendly powers we gave an implied assent to immunity from arrest. Jurisdiction was denied.

Although usually citing the *Parlement Belge* as a precedent, the later English cases have gone far beyond that decision. In *The Porto Alexandre* [1920], P. 30, the facts were substantially like those in the *Pesaro*. The *Porto Alexandre*, a lawful prize of war, was used by Portugal for ordinary trading voyages, earning freight. While on a commercial voyage she went aground and was salvaged by tug-boats of the plaintiffs. In holding that she was immune from arrest for compensation for salvage, Scrutton, L. J., remarked, "* * * no one can shut his eyes, now that the fashion of nationalization is in the air, to the fact that many states are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult; but it seems to me the remedy is not in these courts. The *Parlement Belge* excludes remedies in these courts." But it would seem that a real distinction lies in the fact that the *Parlement Belge* was serving a public purpose in carrying the mails, whereas the *Porto Alexandre* was a national ship on a purely commercial venture. The courts have sometimes expressed opinions to the effect that this may make a vital difference. These we shall now consider.

The Charkieh, L. R. 4 A. & E. 59, was decided before the *Parlement Belge*. The action was *in rem* against the ship for a tort (collision). The ship was owned by the Khedive of Egypt in the capacity of ruler, and was

engaged in a mere commercial venture. It was held that the court had jurisdiction. While the decision may be based upon the finding that the Khedive was not the ruler of a sovereign state, Sir Robert Phillimore believed the case could be decided on another ground. "I must say that if ever there was a case in which the alleged sovereign (to use the language of Bynkershoek) was 'strenue mercatorem agens,' or in which, as Lord Stowell says, he ought to 'traffick on the common principles that other traders traffick,' it is the present case." He believed that warships were immune because in a fair sense connected with the "jus coronae" of the foreign sovereign. In the *Prins Frederik* (1820), 2 Dod. 451, the action was *in rem* for the salvaging of an armed vessel of The Netherlands being used in time of peace for ordinary commerce. There was a compromise without adjudication of the jurisdictional question raised. The Advocate of the Admiralty who defended the ship pointed out that the civilians regarded immunity as extending only to things "*extra commercium*, and *quorum non est commercium*, and in a general enumeration are denominated *sacra, religiosa, publica—publicis usibus destinata*," and that ships of war were therefore exempt. *The Comus* (1816), an unreported case referred to in the *Prinz Frederik*, had already decided that there was no action against a warship for salvage. In *The Swift* (1813), 1 Dod. 320, Sir William Scott intimated that if the sovereign's vessel was used for commercial purposes there should be no immunity. "Some sovereigns have a monopoly of certain commodities, in which they traffic on the common principle that other traders traffic; and if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffic to the general rules by which all trade is regulated." But it was held that there was no violation of the Navigation Act, so the action *in rem* against government-owned army food was dismissed. In a foot-note to the *Swift* there is a shorthand writer's account of *Foster v. Herries*, decided in the Court of Exch., 24th June, 1782. In that case the cargo and goods were condemned, but it is far from clear that the goods were the property of the crown.

However, if one suffers the loss of his own ship by reason of the tort of the commander of His Majesty's ship, the injured party is not without legal redress. In *The Mentor* (1799), 1 Rob. 179, the court said that an action will lie against the officer in immediate command of the offending ship, that person being the actual wrongdoer. *The Athol*, 1 W. Rob. Rep. 374, is to the same effect. Taking cognizance of the fact that the loss is usually great and the wrongdoer often impecunious, we may doubt the efficacy of this remedy. But the *Athol* assures us that this is certainly the correct one, for Dr. Lushington was able to "recollect a case where damages were recovered against an officer in command of one of Her Majesty's ships of war, who had unjustly seized a ship in time of peace, and the officer was obliged to fly the country."

The American decisions subsequent to the *Exchange* have followed a rather devious course. In *Briggs v. The Lightships*, 11 Allen 157, the peti-

tioner brought an action against three ships owned by the United States, claiming a lien for labor and materials furnished in their construction before they became government property. The ships were to be used by the government as floating lights in the Potomac. Jurisdiction was denied, the ground being the public nature of the service to be rendered. An earlier case, *The Revenue Cutter No. 1*, 21 Law Reporter 281 (armed patrol boats), took the opposite view, the court being of the opinion that the United States fared no better than an individual if owning property subject to a lien.

Where the property of a sovereign state is not also in its possession, our courts have often held that such property may be retained by the lienor, and it is not immune from arrest by process *in rem* to enforce a lien, even though it be destined for a public use. *U. S. v. Wilder*, 3 Sumner 308 (trover by U. S., failed); *The Davis*, 10 Wall. 15 (U. S. property in carrier's possession); *Long v. Tampico*, 16 Fed. 491 (Mexican public-owned ships being delivered to that government); *The Johnson Lighterage Co. No. 24* (1916), 231 Fed. 365 (Russian munitions of war in carrier's possession arrested by process *in rem*). In *U. S. v. Wilder*, *supra*, Story expressed the view that since a sovereign state could not be directly impleaded there was good reason for holding that action *in rem* be permitted, and by allowing this remedy (with exceptions where instruments of war were involved), "the public policy will be promoted, and not impugned."

The English courts have held that ships which are not the property of a foreign sovereign state, but are chartered or requisitioned by it, or otherwise in its occupation, may not be arrested by process of the admiralty court; but proceedings *in personam* against the owner of the ship, and proceedings *in rem* are unaffected, and a maritime lien or a judgment *in rem* may be enforced as soon as the occupation of the sovereign state comes to an end. *The Broadmayne* [1916], P. 64; *Messicano* (1916), 32 T. L. R. 519; *The Crimdon* (1918), 35 T. L. R. 81. Compare *The Annette: The Dora* (1919), 88 L. J. P. 107, and see 18 MICH. L. REV. 531. The American decisions of this class have not reached uniform results. *The Attualita* (1916), 238 Fed. 909, was a ship requisitioned by the Italian government for commercial purposes, but manned by its owners. Arrest by process *in rem* for a tort was allowed, the foreign sovereign thus being effectively deprived of the use of the vessel. The facts in *Maru Nav. Co. v. Societa Commerciale Italiana Di Navigation* (1921), 271 Fed. 97, were essentially like those in the *Attualita*. The ship was attached in an action *in personam* against the real owner. See also *The Beaverton* (1919), 273 Fed. 539 (under charter of foreign sovereign). *The Roseric* (1918), 254 Fed. 154 (ship requisitioned by British government), is in conflict with the *Attualita*.

Three federal court decisions have dealt with the problem of the *Pesaro*, each holding that the ship of the foreign sovereign was immune from process *in rem*, even though engaged in a mere commercial venture. *The Maipo*, 252 Fed. 627; 259 Fed. 367 (tort); *Carlo Poma*, 259 Fed. 369.

One writer, at least, has taken the view that all property of a foreign sovereign, including his ships of war, should be liable in the courts of

another sovereign. BYNKERSHOEK, DE FORO LEGATORUM, *cap. iv*, OPERA MINORA, ed. 1752, p. 448. See MARTENS ON LAW OF NATIONS, Bk. 4, ch. 5, s. 9. Hall takes the opposite view. HALL'S INT. LAW [Ed. 7], p. 211. Numerous authorities are collected in 20 MICH. L. REV. 407, 413. Both English and American cases have long recognized certain exceptions to the general rule of immunity. If the sovereign commences suit a defensive counter-claim is permitted; and the sovereign can be made a party if it is for his benefit. *Strousberg v. Republic of Costa Rica*, 44 L. T. R. 199; *French Republic v. Island Nav. Co.*, 263 Fed. 410; *Rowan v. Sharps' Rifle Mfg. Co.*, 29 Conn. 282; *Id.*, 31 Conn. 1. See also *Manning v. Nicaragua*, 14 How. Pr. 517; *Molina v. Comision Reculadora Del Mercado De Henequen*, 104 A. 450.

The Italian courts were probably the first to recognize the distinction between acts of a foreign state of a sovereign nature and those of a private nature. The *Pesaro* would have been decided the same way in an Italian, Egyptian, or Belgian court. In the Belgian court, however, there would have been judgment but no attachment—the judgment becoming a debt against the foreign nation. The French writers express views favorable to the distinction of the *Pesaro*, regarding the acts of a sovereign state. But the French cases are still in accord with the English rule of the *Porto Alexandre* when a foreign sovereign is involved. JOURNAL OF THE SOCIETY OF COMPARATIVE LEGISLATION (1920), Series III, Vol. II, p. 258; THE AM. JOURNAL OF INT. LAW (1919), Vol. 13, p. 12 *et seq.* Our Supreme Court has never decided the question of jurisdiction in such a case, but it has said that the question of jurisdiction under such circumstances is "debatable," and "It is not plain that there is an absence of jurisdiction." *In re Hussein Lutfi Bey*, 41 Sup. Ct. 609. Now that "nationalization is in the air," the importance of the decision which our Supreme Court may be called to make is apparent. It would be carrying a legal fiction too far if we were to say that the immunity "by implied license" reasoning of the *Exchange* is applicable to a case where the foreign sovereign has engaged in an ordinary commercial venture. The argument of "convenience" is all on the side of the *Pesaro*, and it is submitted that "regal dignity" cannot be made to suffer by such a rule. We may well expect to see the doctrine of the *Pesaro* upheld.

G. S.

THE KANSAS DECLARATORY JUDGMENT ACT IN OPERATION.—Statutes of Kansas authorized cities of the first class to carry out works of internal improvement and provide for payment of the cost thereof by issuing bonds of the city running no longer than ten years and bearing interest not exceeding five per cent. When conditions following the war made the marketing of five per cent bonds impossible at a price anywhere near par, the legislature enacted a new law authorizing the issuance of internal improvement bonds at six per cent interest, but requiring every such bond to contain a privilege of prepayment after five years from date.

The city of Kansas City desired to undertake some internal improvements, but the money market had so far approached normal that five per cent bonds could be sold at a premium. The officers of the city did not know whether the effect of the new law was to repeal the old, thus making the prepayment privilege a necessary term in every bond to be issued, or whether it was an additional emergency statute applying only to bonds actually issued bearing interest above five per cent. They were anxious, if possible, to escape the prepayment restriction, for the privilege of short-time prepayment was shown to operate in the sale of bonds as a discount of one-half of one per cent, which would entail a heavy loss upon the city. The state officers, who were charged with the enforcement of the state law, were equally anxious to prevent the city from doing this if it was in fact illegal.

To ascertain the rights of the city in the premises the state applied to the district court for a declaration as to the rights of the city under the statutory restrictions imposed by the state, in an action brought against the city for that purpose, and the court promptly declared that the old law was not repealed and the city might issue five per cent bonds without inserting the provision for prepayment after five years.

Justice Burch, writing the opinion of the court, makes the following interesting comment upon the practical effectiveness of the new Declaratory Judgment law. He says:

"The proceedings in this case serve to illustrate the operation of the declaratory judgment act. Execution of the city's internal-improvement program placed it in this dilemma. If privilege of prepayment were not written in the bonds, the city and its officers were exposed to prosecution by the state for abuse of corporate power and violation of law, and the securities might not be marketable. If privilege of prepayment were written in the bonds, a heavy financial burden would be placed on the taxpayers, perhaps unnecessarily. Formerly, the city would have been compelled to choose one course or the other and abide the consequences. The law officers of the state could not give a binding interpretation of the statute, and, because of its ambiguity, could not consent to the course which the city claimed it was authorized to pursue. Therefore, a controversy existed justiciable under the declaratory judgment act. The action was commenced in the district court on February 7, 1922, and the defendant answered instantaneously. The cause was heard on the petition and answer and a stipulation that the pleadings stated the facts. The declaration of the district court was rendered on February 7, and the appeal was lodged in this court on February 10. This court was in session when the appeal was filed. Because of the public importance of the question involved, the cause was advanced for immediate hearing, and on February 10 it was submitted for final decision, on oral argument and briefs of counsel which accompanied the appeal papers. The city may now proceed with its improvements without any of the embarrassments and without any of the delay which would have been encountered if the remedy of declaration of right had not been available."

The case is *State of Kansas v. City of Kansas City*. The case was actually decided by the Supreme Court within two weeks after it was commenced in the district court. The opinion was filed February 24, 1922, but had not been published at the date of this writing. E. R. S.

PROOF OF CHARACTER—BURDEN OF PROOF ON MATTER OF JUSTIFICATION—ATTORNEY'S USE OF HIS OWN NOTES OF THE EVIDENCE IN ARGUMENT. *PEOPLE v. WILLY*, 133 N. E. 859 (ILL.).—The prosecution was for murder, and one of the contentions of defendant was that his character was that of a peaceful, law-abiding citizen, and evidence pro and con was introduced on this issue. The court of review held that character can be evidenced by general reputation only. This suggests an old contention, the history of which is well sketched by Professor Wigmore. WIGMORE ON EVIDENCE, Sec. 1981 *et seq.* The opinion in *R. v. Rowton*, Leigh & C. 520, is largely responsible for the propagation if not the initiation of the heresy, opposed not only to well-established authority but in violation of common sense, to the effect that character cannot be evidenced by the testimony of persons speaking out of intimate knowledge of the character to be evidenced. This heresy spread to this country, and the court doubtless speaks correctly when it says that the great weight of authority supports it. This doctrine is particularly pernicious in its application to the evidence of character introduced by the defendant as evidence of his innocence, since here it loses the principal prop in its support, namely, that it takes the person whose character is involved by "unfair surprise." The contrary doctrine has the better reason and more than casual authority in its support, and by reason of its "sweet reasonableness" should win general allegiance in the long run. See *Trial of Cowper et al.*, 13 How. ST. TRIALS, 1180; *Thomas Hardy's Trial*, 24 How. ST. TRIALS, 999; *People v. Wade*, 118 Calif. 672; *Stamper v. Griffin*, 12 Ga. 453; *Bowhus v. State*, 130 Ind. 227, and *State v. Sterrett*, 68 Iowa 180, among many others which might be cited.

The evidence in the case left no chance for doubt of the killing by defendant, but there was a sharp conflict on the question of whether the killing was justified. The court, while applying a modified form of it, affirmed the rule to be that the burden of proof on the question of justification is with the defendant. This again presents no new contention and illustrates anew what is sure to happen when courts brush aside logic and precedent in the interest of the individual. It may be quite true that many changes ought to be made in the rules of evidence, and something of an argument made even for plenary discretion in the trial court over all questions of admissibility. If, however, we are to have rules of evidence we should not cease to plead that they be consistent with our rules of substantive law and logical in their application. If we are going to say that one should not be found guilty until every reasonable doubt of his guilt has been removed, we must say that if there is a reasonable doubt of whether the defendant killed in self-defense he must be acquitted. And yet the

rule as stated by the court in the opinion under discussion, by putting the burden of this issue upon the defendant, would allow the jury to find guilt, though it was unable to say that the killing was not justified. We must concede great conflict in the authorities here, much of it evidently resulting from loose thinking upon what is meant by "burden of proof." The modification of the rule as applied by the court would relieve the defendant from this burden whenever the evidence of the state shows that defendant claimed to act in self-defense. The rule in each of its forms has the considerable support of courts entitled to respect. We have it, (a) a reasonable doubt as to whether defendant acted in self-defense requires an acquittal; (b) unless there is a preponderance of evidence in favor of defendant's contention that he acted in self-defense he should be convicted; and (c), where there is no reasonable doubt but that defendant did the killing the burden is on him to produce a preponderance of evidence to show that the killing was in self-defense, unless the evidence of the state discloses that the defendant claims to have acted in self-defense, when the contrary would be true. The court applied the rule as last stated upon the authority of *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200, without, singularly enough, making any reference to *Alexander v. People*, 96 Ill. 96, or *Kipley v. People*, 215 Ill. 358, both of which are precisely in point. Conflict cannot be eliminated by detailed discussion of the cases. An excellent resume of them up to the time of its publication can be found in a note to *Com. v. Palmer*, 222 Pa. 299, as reported in 19 L. R. A. (n. s.) 483. In the abstract, no rule can be right which is wrong in principle, and if it be the law that guilt cannot be found without conviction of it beyond a reasonable doubt, then the rule applied by the court, which allows it to be done, is wrong.

It may not be quite without justification to refer to the holding of the court that it was error to allow the state's attorney, in his argument to the jury, to refer to and read notes of evidence made by him during the trial. There was no contention that the attorney made any other claim than that he was giving his recollection of the evidence as refreshed by his notes. That so common, and may it be said so reasonable, a practice should vitiate a trial is but to stimulate a practice so loose as to encourage the assignment of almost any triviality as error.

V. H. L.

STREETS—STATUTORY DEDICATION—VACATION AND REVERTER.—The common law dedication of a street confers on the public a right of user in the nature of an easement. The "fee" of the street continues in the dedicatory; he may enjoy and use it in any manner not inconsistent with street uses; if the street is vacated or abandoned he enjoys it, as originally, free from the burden of public rights. TIFFANY, REAL PROPERTY (Ed. 2), § 486; DILLON, MUNICIPAL CORPORATIONS (Ed. 5), § 1076. But if the dedicatory transfers a lot or block abutting on the street, his conveyance is presumed to carry the title to the center of the street. TIFFANY, *op. cit.*, § 446; 3 KENY, COMMENTARIES, 433. "The effect thus given to conveyances * * * is based not only on the presumption that the parties intend the ownership thereof

to be vested in the person who is alone, usually, in a position to make use of it, and who probably will need to do so, but also * * * upon the ground of public policy which renders it desirable to prevent the existence of small strips of land * * * the title to which may remain in abeyance for many years, and which may then be asserted merely in order to harass the owner of the adjoining land" (TIFFANY, *op. cit.*, § 445—language used in another connection, but equally applicable here). The net result of this presumption and of the rules as to ownership above stated is that in the usual case the owners of abutting land, and not the dedicator of the street, reap the practical fruits of its vacation or abandonment. ELLIOTT, ROADS AND STREETS (Ed. 2), §§ 885, 886.

Many of our western and mid-western states have adopted legislation authorizing what is commonly called "statutory dedication." This form of dedication does not supplant the common law method, but rather furnishes a more formal way of indicating the intent to dedicate. TIFFANY, § 482. The dedication statutes usually provide that an owner may devote property to the public use for streets, alleys, parks, etc., by duly executing and recording a plat upon which are shown the strips and tracts intended for these purposes. *In most jurisdictions the statute is so phrased, Cox v. L. & N. R. R.*, 48 Ind. 178, 181; *Bradley v. Spokane, etc., R. Co.*, 79 Wash. 455; or is rather questionably construed in such a way (*Schurmeier v. R. R.* 10 Minn. 59, 77; *Betcher v. R. R.*, 110 Minn. 228; *Snoddy v. Bolen*, 122 Mo. 479, 491; *Hatton v. St. Louis*, 264 Mo. 634, 643; *Leadville v. Bohn Mining Co.*, 37 Colo. 248; *Olin v. R. R.*, 25 Colo. 177; *Sowadski v. Salt Lake Co.*, 36 Utah 177; *Donovan v. Albert*, 11 N. D. 289, 292; *Kimball v. Kenosha*, 4 Wis. 321) as to be in effect declaratory of common law principles, so that the title to streets dedicated thereunder and the reverter of the same upon vacation or abandonment are governed by the rules heretofore stated. In Iowa and Nebraska the public is held to have a fee simple absolute; there is no reverter at all when a street is vacated. *Dempsey v. Burlington*, 66 Ia. 687; *Lake City v. Fulkerson*, 122 Ia. 569; *Wahoo v. Nethaway*, 73 Neb. 54; *Carroll v. Elmwood*, 88 Neb. 352. But see *Kenwood Park v. Leonard*, 177 Ia. 337.

The Illinois statute provides that "The acknowledgment and recording of such plat shall be held * * * to be a conveyance in fee simple of such portions of the premises platted as are marked or noted on such plat as donated or granted to the public * * *. And the premises intended for any street, alley, way, common or other public use in any city, village or town, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended." Rev. Stats. 1913, Ch. 109, § 3. The Illinois supreme court has again and again held that the city has a base or determinable fee in streets dedicated under this statute. *Gebhardt v. Reeves*, 76 Ill. 301; *Prall v. Burckhardt* (Ill.), 132 N. E. 281. The same view is suggested in *Kimball v. Kenosha*, 4 Wis. 321; *Sowadski v. Salt Lake Co.*, 36 Utah 127; *Cullen v. Elec. Light Co.*, 66 Oh. St. 166. Upon this construction, the platter retains a possibility of reverter in the

street expectant upon the termination of the fee in the municipality. Such a "mere possibility" is personal to the grantor and his heirs, according to general principles, and is inalienable (TIFFANY, § 132); and even if a possibility of reverter be regarded as alienable, there is a real logical difficulty about holding a mere right of this character to be embraced by implication in a conveyance of land abutting on the street in which the contingent interest exists. Apparently we are driven to the conclusion that the original platter or his heirs, and not the abutting owner, is entitled to a vacated street. And yet, although several states have statutes similar in substance to the one quoted above, Illinois has been alone in arriving at the conclusion indicated. (Compare cases from Minnesota, Missouri, Colorado, etc., above, which escape this result by construing a statutory dedication as equivalent to a common law dedication; also *Pettingill v. Levin*, 35 Ia. 344, 355, where the public fee is held to be absolute; and *Traction Co. v. Parish*, 67 Oh. St. 181, 190, where the public is said to have a base fee (as in Illinois), but the possibility of reverter passes by implication with abutting land.) Whatever may be said for the Illinois construction, as a matter of logic, there can be no doubt of its inconvenience. Every reason for presuming that a grant of land along a common law street carries to the center thereof applies with full force here. It makes no difference, from the viewpoint of public policy, whether the objectionable "small strips of land," title to which "may remain in abeyance for many years," and which are severed in ownership from the abutting lots with which alone they can be used and enjoyed, are created under a common law dedication or under a statutory dedication.

Doubtless moved by just these considerations and by a desire to avoid a result like that reached in the early Illinois cases, the legislatures of Illinois (1851) and of other states in which statutory dedication is recognized have passed later statutes declaring that the abutter and not the original platter is entitled to a vacated street. DILLON, § 1160, p. 1845. The Illinois Vacation Act provides that when any street is vacated "the lot or tract of land immediately adjoining on either side shall extend to the center line" thereof. Rev. St. Ill. 1913, Ch. 145, sec. 2. In *Helm v. Webster*, 85 Ill. 116, this statute was held unconstitutional as applied to a street previously dedicated, for the reason that the possibility of reverter was a property right of which the legislature could not lawfully deprive the platter. The language of the court was sufficiently broad to include dedications made either before or after the passage of the Vacation Act. Expressions of similar tenor and effect were used in several earlier and several later cases (all cited and discussed in *Prall v. Burckhardt*, *supra*); these expressions have been quite generally assumed to represent the law in Illinois. DILLON, § 1160 (p. 1845, note 4); KALES, ESTATES AND FUTURE INTERESTS (Ed. 2), § 293. Such a view, if adhered to, was, however, most unfortunate, as it not only established the inconvenient rule that streets dedicated by plat revert to the platter upon being vacated, but it placed that rule beyond legislative power of correction. (For an excellent discussion of the Illinois cases see KALES, *supra*, §§ 283-293.)

It is, therefore, very interesting to find that in a recent case, *Prall v. Burckhardt*, 132 N. E. 281, the supreme court of Illinois expressly sustains the Vacation Act as to streets subsequently dedicated: "The provisions of the Plat Act and the Vacation Act heretofore referred to were both then in force and must be construed *in pari materia*, and it would seem to follow that appellee, in making and recording the plat of 1889, must be held to have done so in contemplation not only of the Plat Act but also of the Vacation Act." The court did not find it necessary in *Prall v. Burckhardt* to overrule earlier cases dealing with dedications made prior to the Vacation Act, but the whole of the opinion would indicate that the court is prepared to overrule them; it dilates upon the fact that the rule of *stare decisis* is based on expediency and should not be allowed to outweigh greater evils which will result from continuing in force an erroneous rule of law; it argues emphatically the impolicy of the view which gives the vacated street to the original platter; and says that a mere possibility of reverter is not property within the scope and meaning of the due process clause. (Compare cases sustaining statutes which alter or abolish existing inchoate dower rights, *TIFFANY*, § 230). But whether or not the earlier cases still hold in regard to dedications made before the Vacation Act, there can certainly be no objection to the decision of *Prall v. Burckhardt* on its facts; it brings the law of Illinois into harmony with the rules prevailing in all other jurisdictions.

B. S.

"UNFAIR METHODS OF COMPETITION"—THE FEDERAL TRADE COMMISSION ACT.—"Unfair methods of competition in commerce are hereby declared unlawful." 38 Stat. L. 717. This is the vital portion of the Federal Trade Commission Act. The discussions in the United States Senate attendant upon the passage of this measure reveal that there was scarcely any agreement among its supporters as to what the words "unfair methods of competition" meant. Apparently the only harmony in the expressed views was that the term used was to have a broader significance than the expression "unfair competition" had at common law. 25 YALE L. J. 20. This lack of agreement precluded a resort to the Congressional proceedings as an aid to interpreting the statute, further, perhaps, than to find an intent to broaden the conception of unfair trade at common law. Indeed, what authoritative comment there was was equally as indefinite as the final enactment. Put forth into a field where the common law was at best uncertain and still in a formative stage, there is little wonder that those authorities who ventured to express an opinion upon the meaning of the statute, quite as uncertain, should have been in marked disagreement. While the conception of what was unfair in competition for quite some time had been narrow, being limited to cases of "passing off," later cases extended the doctrine so much that it is safe to say that without the aid of the present statute the courts would soon have arrived at the stage where they now are with its assist-

ance. See *International News Service v. Associated Press*, 248 U. S. 215; 20 COL. L. REV. 328.

"The words 'unfair methods of competition in commerce' include little if anything more than the words 'attempt to monopolize' as used in section two of the Sherman Act." HARLAN AND McCANDLESS, FEDERAL TRADE COMMISSION, § 26. Another view includes this, and also unfair competition as defined in the more orthodox common law decisions. 19 COL. L. REV. 266, note 2, where both ideas are rebutted. "The law itself is mainly declaratory of a new ethical code in business dealings." HARVEY AND BRADFORD, MANUAL OF FEDERAL TRADE COMMISSION, 134. "It [this act] was intended to prohibit and prevent those classes of acts which, for want of a better term, may be described as economically unfair. In an economic sense, fair competition signifies a competition of economic and productive efficiency." STEVENS, UNFAIR COMPETITION, pp. 4 and 5. Sufficient decisions have been rendered by the federal courts to justify the statement that none of these views has been followed by them.

In 63 THE ANNALS 3, a writer advances this: "No unfair or dishonest practice will long survive the condemnation of men engaged in that trade. The men engaged in business make the rules of the game, legislatures and courts to the contrary notwithstanding. The most that legislative bodies can do is to write into statute law more or less imperfectly what the great body of business men regard as the approved rules of practice among intelligent and high-minded business men." The cases decided under the Federal Trade Commission Act indicate that the federal courts have taken cognizance—more or less unconsciously, it is true—of "what the great body of business men regard as the approved rules of practice among intelligent and high-minded business men" written into statute law more or less imperfectly by the national Congress. Confronted with a statute without ambiguity in the true sense of the term, but unquestionably vague and indefinite, and deprived of any helpful extraneous aid to interpret it, the courts have given it a meaning not differing from the natural meaning of the words "unfair methods of competition," agreeably to approved standards of statutory construction. *United States v. Col. & N. W. R. Co.*, 157 Fed. 321. If these words have a natural meaning, it would include those practices which a business man of morality and intelligence would condemn. Many practices approved by him as fair and moral would undoubtedly violate the better rules of economics, and would be denominated "economically unfair." Most practices which would naturally lead to monopoly it is believed the same individual would instinctively condemn, likewise those that were denominated unfair at common law. This conception includes, but is broader than, all those which the authorities cited above suggest, save that from STEVENS, UNFAIR COMPETITION, and HARVEY AND BRADFORD, MANUAL OF FEDERAL TRADE COMMISSION. What the business sense of the quality of any competitive act is it is of course a matter of evidence to prove; many cases are to be found in which the courts have taken judicial notice, apparently, of the moral worth of trade practices, as viewed by men of business. See *N. J.*

Asbestos Co. v. Federal Trade Commission, infra. To save from the charge of inconsistency, it should be remarked that while the statute is referred to above as being vague and indefinite, and then later it is said that it has a clear meaning, that latter statement is to be taken in the light of the decisions rendered under the act. Moreover, paradoxical as it may seem, words which are in common legal use may be both clear and indefinite—clear in the subjective sense, but incapable of any exact and comprehensive definition in other words. The terms “reasonable doubt” and “fraud” are examples.

The following decisions are not inconsistent with the views expressed. In *Federal Trade Commission v. Gratz*, 253 U. S. 421, a dealer in steel ties used for bundling bales of cotton manufactured by a certain company refused to sell them unless the purchaser bought a certain proportional amount of jute bagging, used to wrap bales of cotton, which was manufactured by another company. In refusing to classify this as an unfair method of competition, the court said: “The words ‘unfair methods of competition’ are not defined by the statute and their exact meaning is in dispute. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals, because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or created monopoly. *The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.*” In *Curtis Publishing Co. v. Federal Trade Commission*, 270 Fed. 881, the publishing company distributed its publications to the public through a selling organization composed of distributing agents and salesboys, the latter selling to the public the periodicals received from the distributing agents. These agents agreed not to wholesale the periodicals of other publishers without the consent of the Curtis Publishing Company. This was held not to be an unfair method of competition. In discussing this phrase, this language is used: “Indeed, in the nature of things, it was impossible to describe and define in advance just what constituted unfair competition, and in the final analysis it became a question of law, after the facts were ascertained, whether such facts constitute unfair competition in business, *for the test of fairness, as of fraud, is the application by the law of moral standards to the actions of men.*” (Italics in both quotations are the writer’s.) Again, in *N. J. Asbestos Co. v. Federal Trade Commission*, 264 Fed. 509, the facts were that a manufacturing company made a practice of entertaining employes of its customers with liquors, cigars, meals, theater tickets, etc. Since this method of promoting business had been an “incident of business from time immemorial,” it was concluded that it was not a method of unfair competition.

One of the latest pronouncements upon this subject is found in *Kinney-Rome Co. v. Federal Trade Commission*, 275 Fed. 665. A manufacturer gave premiums to salesmen of retailers, with their knowledge and consent, to induce their salesmen to push the sale of the manufacturer’s goods. The Federal Trade Commission conceived this to be unfair. It was held to be otherwise in the circuit court of appeals. There must be some fraud in

trade injuring a competitor or lessening competition before a trade practice can be considered as unfair. Since the retailer acquiesced in the practice, it was equivalent to his act. Competitors of the manufacturer could not complain, because any plan to advance the sale of one kind of goods and to keep back another was a matter wholly within the control of the merchant. The public's interest was in competition among merchants, not in competition among goods in any one merchant's shop. If there was any tendency on the part of clerks to take extreme measures to induce the public to purchase these particular goods, this was what the public expected of every merchant whose interest it might be to develop the sale of one class of goods in preference to another. While no attempt was made to define "unfair methods of competition," the attitude of the court seems to be that of a dealer whose competitor adopts an internal trade policy to promote the sale of a certain commodity, and who would not denounce such tactics as unfair or immoral, but would recognize in them a shrewd bit of business, to be met by increased competitive effort on his part,—a rational construction of the statute, giving the terms used their natural meaning. What was allowed here was economically unfair, in that there was no competition of productive efficiency. If effective in increasing the sales of the manufacturer's product, this practice might also tend to monopoly, if financially weaker competitors could not meet this kind of competition. This decision gives little support to the "economically unfair" and the "attempt to monopolize" constructions. In *Western Sugar Refining Co. v. Federal Trade Commission*, 275 Fed. 725, a conspiracy among jobbers to prevent manufacturers from selling directly to a wholesaler was condemned as unfair. "Unfair methods of competition" naturally embraces this method of seeking commercial advantage. In *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307, a mail order house doing an interstate business was restrained from advertising that it had obtained special price concessions and could sell much cheaper than its competitors, and that it purchased selected brands of certain commodities from abroad. Both of these representations were false. The deception practiced on the public and the discredit cast upon competitors influenced the court to make this decision. This was clearly a case where a business man of integrity (though such advertising has been not unusual) would call such tactics unfair. In commenting upon the act the court said: "On the face of the statute the legislative intent is apparent. The commissioners, representing the government as *parents patriae*, are to exercise their common sense, as informed by their general idea of unfair trade at common law, and stop all those trade practices that have a capacity or tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have been denounced in common law cases." Apparently it is not intended to limit the operation of the act to a condemnation of practices known as unfair at common law, but merely to use that as a starting point, or a minimum, and to extend the act to embrace any methods of competition that a natural construction will permit. If the orthodox

rule of the common law of unfair trade is referred to as being the standard of interpretation to be used in construing the act, the methods employed would not constitute unfair practice. NIMS, UNFAIR BUSINESS COMPETITION, § 14. If the idea of unfair competition at common law is as expressed by way of *dictum* in *Associated Press v. International News Service*, 245 Fed. 244, that an act that is immoral is usually unfair, this is in accord with the underlying theory of the cases decided under the act, but it is not in harmony with the common law understanding of unfair competition.

One decision is apparently in conflict with this view—*Winsted Hosiery Co. v. Federal Trade Commission*, 272 Fed. 957. A manufacturer of underwear, shirts and hosiery labeled these articles as composed of "wool" and "merino" when they contained much cotton. The common law conception of unfair trade was applied to these acts, and according to the court's theory there was nothing unfair practiced upon competitors, and an injunction was denied. This action might be regarded as unfair competition at common law, because it enabled the sale of the inferior as the superior article, engendering an unequal competition, since the truthful trader selling the genuine article, or the truthful trader selling the same article that the defendant sold, labeled correctly, could not attempt to compete with him on a basis of equality. It is not far removed from the practice of "passing off" and what was condemned in *International News Service v. Associated Press*, *supra*. It was also said that the act was conceived to be designed for the purpose of protecting competitors and not the public. In holding that the act was not intended to protect the public, this decision is at variance with all other decisions under the act, especially *Federal Trade Commission v. Gratz*, 258 Fed. 314, holding that the commission is to interpose only in the interest of public. As this controlled the decision, it cannot be taken as seriously opposed to the cases, *supra*, on the question as to what constitutes unfair competition within the meaning of the statute.

However the results achieved by the courts in interpreting the statute may have differed from the intention which Congress wished to express in enacting the measure, the interpretation given it by the courts is sound from a legal point of view. If the Congress is disappointed in the trend of the decisions, it must express itself more explicitly.

G. E. L.