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## EDWIN BAKER GAGER

Edwin Baker Gager graduated from Yale College in 1877. He was admitted to the bar in 1881 and became a member of the firm of Wooster & Torrance in Derby. On the appointment of Judge Torrance to the Superior Court the name of the firm was changed to Wooster, Williams & Gager and on the death of the senior partner to Williams & Gager. Judge Gager was appointed to the Superior Court in 1901, and after seventeen years of service as a trial judge he became in 1918 an associate justice of the Supreme Court of Errors. From 1892 to 1903 he was an instructor in law and jurisprudence in the Yale School of Law, and in 1903 was appointed Professor of General Jurisprudence. As a lawyer he soon gained the confidence of the large business interests located in the Naugatuck Valley, and in the later years of his practice his counsel and advocacy were claimed chiefly by street railway, gas, and electric companies.

He brought to the office of trial judge the poise of a man of affairs, the experience of an extensive practice, the learning of a widely read

lawyer and an unfailing patience, courtesy, and dignity. These qualities with his accurate sense of proportion, his quick appreciation of the decisive points of the cause, and above all his kindly and forceful personality endeared him to the profession as a judge and as a man. In charging the jury he possessed to an uncommon degree the art of confining them to the underlying issues of fact. His judicial opinions were notable for their exhaustiveness and finality. His teaching was accurate in principle and practical in detail. One of his most distinctive qualities was a passion for going to the root of things. It was this, no doubt, which first led him to the study of jurisprudence though immersed in the practical applications of the law; and it gave him the power of seeing things as they were, with the clear vision of intellectual honesty undimmed by indolence, sympathy, or opportunism. He had a singular directness and vigor of statement.

The combination of intellectual and personal qualities I have attempted to outline was crowned by a simplicity of manner and a personal charm enhanced by the background of his long and distinguished public service.

JOHN K. BEACH

Connecticut Supreme Court of Errors

#### REGULATION OF INTRASTATE COMMERCE UNDER THE COMMERCE CLAUSE

The two recent decisions of the United States Supreme Court, *Railroad Commission of Wisconsin v. C. B. & Q. Ry.* (1922) 42 Sup. Ct. 232, and *State of New York v. United States* (1922) 42 Sup. Ct. 239, represent what is in many ways the most significant development in that phase of our law having to do with the relation between the power of the Federal Government and the power of the states to regulate the instrumentalities of commerce since *Gibbons v. Ogden*.<sup>1</sup> The Supreme Court has construed the Transportation Act of 1920 as conferring upon the Interstate Commerce Commission authority to prescribe a general level of railroad rates for traffic entirely within a state as a part of its duty of preventing an undue burden being placed upon interstate commerce and has upheld the statute, as so construed, as within the power of Congress under the commerce clause.

The fundamental principles which are involved have long been free from doubt. Thus by *Gibbons v. Ogden* it was settled that the power of Congress to regulate commerce among the several states is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."<sup>2</sup> The Supreme Court frequently has declared that on subjects which require uniformity of regulation throughout the country the power of Congress

<sup>1</sup> (1824, U. S.) 9 Wheat. 1.

<sup>2</sup> *Ibid.* at p. 196.

is exclusive and the non-action of Congress confers upon the states no power to act. On the other hand, it is recognized that there are matters affecting interstate commerce admitting of diversity of treatment according to the requirements of local conditions and that as to these a state may act until Congress sees fit to do so, but that when Congress does act, the exercise of its authority over-rides all conflicting state legislation.<sup>3</sup> However, a state may under no circumstances impose direct burdens upon interstate commerce.<sup>4</sup>

Although these general principles have long been recognized, the fact that the same carriers are engaged in transportation both among and within the several states and that interstate and intrastate commerce are to a greater or lesser extent related has made difficult the application of the principles and has given rise to many interesting questions as to where the line is to be drawn between federal and state authority. A brief review of a few of the leading cases in which the question has been presented will serve to indicate the development of the law prior to the time of the passage of the Transportation Act of 1920.

The case of *Louisville & Nashville Co. v. Eubank*<sup>5</sup> presented the question of the validity of a provision of the constitution of Kentucky adopted in 1891 making it unlawful for a carrier to receive a greater compensation for the transportation of passengers or property for a shorter than for a longer distance over the same line—the shorter being included within the longer. The state court had construed this provision as applying not only to transportation entirely within the state but also to transportation from a point in another state so as to make it unlawful for a carrier to charge less for transportation from that point to a destination in Kentucky than from an intermediate point in Kentucky to the same destination. The Supreme Court held this provision

<sup>3</sup> *Cooley v. Board of Wardens* (1851, U. S.) 12 How. 299, 319; *Ex parte McNeil* (1872, U. S.) 13 Wall. 236, 240; *Welton v. Missouri* (1875) 91 U. S. 275, 280; *County of Mobile v. Kimball* (1880) 102 U. S. 691, 697; *Gloucester Ferry Co. v. Pennsylvania* (1885) 114 U. S. 196, 204, 5 Sup. Ct. 826, 828; *Bowman v. Chicago, etc. Ry.* (1888) 125 U. S. 465, 481, 485, 8 Sup. Ct. 689, 696, 698; *Gulf, Colo., & S. F. Ry. v. Hefley* (1895) 158 U. S. 98, 103, 104, 15 Sup. Ct. 802, 803, 804; *Northern Pac. Ry. v. Washington* (1912) 222 U. S. 370, 378, 32 Sup. Ct. 160, 161; *So. Ry. v. Reid* (1912) 222 U. S. 424, 436, 32 Sup. Ct. 140, 142.

<sup>4</sup> Thus, a state may not tax interstate commerce as such. *State Freight Tax Cases* (1872, U. S.) 15 Wall. 232; *Western Union Tel. Co. v. Kansas* (1910) 216 U. S. 1, 30 Sup. Ct. 190. See also Powell, *supra* p. 799, *et seq.* It may not prohibit interstate trade in legitimate articles of commerce. *L. & N. Ry. v. Cook Brewing Co.* (1912) 223 U. S. 70, 32 Sup. Ct. 189. A state may not impose penalties for failure of a telegraph company to make prompt delivery of interstate messages. *Western Union Tel. Co. v. Boegli* (1920) 251 U. S. 315, 40 Sup. Ct. 167. It may not require an interstate railroad to detour its passenger trains in order to serve a small community also served by local trains. *St. L. & S. F. Ry. v. Public Service Com. of Missouri* (1921) 254 U. S. 535, 41 Sup. Ct. 192. A state may not prescribe rates to be charged for transportation from one state to another. *Wabash v. Illinois* (1886) 118 U. S. 557, 7 Sup. Ct. 4.

<sup>5</sup> (1902) 184 U. S. 27, 22 Sup. Ct. 277.

invalid as being a regulation of interstate commerce because it so linked the interstate rate with the rate for the shorter haul that the interstate charge was directly controlled by the state law. In other words, it held that a state, under the guise of regulating rates within its borders, could not make the validity of interstate rates depend upon the level of rates prescribed for intrastate traffic.

In the *Minnesota Rate Cases*<sup>6</sup> the court was again called upon to determine the validity of the action of a state in prescribing a general basis of rates for traffic within the state. This time the state action was limited strictly to intrastate transportation, but it was assailed upon the ground that since the rates prescribed were on a lower basis than the rates applying between points in the state and points in other states, they resulted in a direct burden upon interstate traffic and in discrimination against localities in other states.<sup>7</sup> An important feature of this case was that the interstate rates had not been prescribed or approved by federal authority. It was held that in the absence of federal action the power of the state to prescribe reasonable intrastate rates was not restricted by the effect which these rates might have upon the interstate rates of the carriers.<sup>8</sup>

Next came the *Shreveport* case.<sup>9</sup> The state of Texas had prescribed rates for transportation over the lines of the various carriers between points within its borders. These rates were lower than the interstate rates of the same carriers applying from points in Louisiana to destinations in Texas. The Interstate Commerce Commission found that the lower intrastate rates resulted in discrimination against Shreveport, Louisiana, located near the Texas border, and in favor of nearby competing points in Texas. Although the Commission found that some of the interstate rates were reasonable, it ordered that the discrimination be removed by reducing all the rates from Shreveport. The carriers attacked this order as beyond the power of the Commission, it being contended that "so far as the interstate rates were sustained by the Commission as reasonable, the Commission was without authority to compel their reduction in order to equalize them with the lower intrastate rates." The Supreme Court held: first, that the federal authority being supreme, Congress had the power to deal with intrastate rates if necessary to remove discrimination against interstate commerce;<sup>10</sup>

<sup>6</sup> (1913) 230 U. S. 352, 33 Sup. Ct. 729.

<sup>7</sup> See 230 U. S. at p. 397, 33 Sup. Ct. at p. 739.

<sup>8</sup> See the opinion of Mr. Justice Hughes 230 U. S. at pp. 417, 432, 33 Sup. Ct. at pp. 747, 754.

<sup>9</sup> *Houston & Texas Ry. v. United States* (1914) 234 U. S. 342, 34 Sup. Ct. 833.

<sup>10</sup> "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field." 234 U. S. at p. 351, 34 Sup. Ct. at p. 836.

second, that under section 3 of the Act to Regulate Commerce<sup>11</sup> Congress had conferred authority upon the Interstate Commerce Commission to prevent discrimination in rates against shippers and localities in interstate commerce and that this authority extended to the removal of discrimination caused by intrastate rates; and finally, that since in the case before it the interstate rates were found by the Interstate Commerce Commission to be reasonable the Commission could not order them to be reduced and it was within the rights of the carriers to remove the discrimination by increasing the intrastate rates, any state regulation to the contrary notwithstanding.

It should be observed that in the *Shreveport* case the discrimination found to exist was against a particular locality and because of specific intrastate rates. There was, therefore, no question presented as to the power of the federal government to require the general basis of rates throughout a state to be made the same as that of the interstate rates or of its power to deal with intrastate rates, except to remove discrimination against particular shippers or localities.

*Illinois Central Ry. v. Public Utilities Commission*<sup>12</sup> was similar to the *Shreveport* case<sup>13</sup> and is worthy of comment only because it suggests that even under section 3 of the Act to Regulate Commerce, as it then read, the Interstate Commerce Commission might have power to prescribe a general basis of rates throughout a state.<sup>14</sup>

Briefly summarized these cases established the following principles:

1. A state might not make the level of interstate rates dependent upon intrastate rates.
2. It might, on the other hand, prescribe reasonable rates for intrastate transportation and its action in so doing was not rendered invalid because these rates might discriminate against localities or shippers engaged in interstate commerce, provided the interstate rates had not been prescribed or approved by the Interstate Commerce Commission.

<sup>11</sup> Section 3 of the Act to Regulate Commerce provides: "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Act of February 4, 1887 (24 Stat. at L. 379, 380) ch. 104, sec. 3.

<sup>12</sup> (1918) 245 U. S. 493, 38 Sup. Ct. 170.

<sup>13</sup> See 245 U. S. at p. 506, 38 Sup. Ct. at p. 174.

<sup>14</sup> "Had the Commission regarded the discrimination as state-wide it is but reasonable to believe that it would have said so in its findings. And had it intended to require or authorize a state-wide readjustment of the intrastate rates it doubtless would have given direct expression to that purpose, which easily could have been done in a few lines." 245 U. S. at p. 508, 38 Sup. Ct. at p. 175.

The Commission had, however, found that the discrimination against interstate commerce was caused by intrastate rates from particularly named border points and, therefore, the court held its order void because it did not clearly specify that these were the rates to be changed.

3. The Interstate Commerce Commission, however, had the power to prevent such discrimination and if it had prescribed or approved the interstate rates<sup>15</sup> it could order the discrimination removed and the particular intrastate rates causing the discrimination adjusted to the basis of the interstate rates. (*Sed quare*, whether it could prescribe a general basis of intrastate rates if it found this necessary to remove the discrimination against the localities or shippers engaged in interstate commerce.)

Such was the state of the law when by congressional and executive action the railroads of the country were taken over by the Federal Government.<sup>16</sup> Since the Federal Government was acting under its war power, the railroads were not subject to state regulation even as to intrastate traffic.<sup>17</sup> The President, acting through the Director-General of Railroads, increased all freight rates, both interstate and intrastate, and established a general basis of passenger fares which was higher than permitted under the statutes of a number of states.

When, after the conclusion of the war, it became necessary to provide for the termination of federal control, Congress was faced with the fact that the costs of railroad operation had so increased that if the railroads were to be financially able to carry on their business, and in a position to attract needed capital, their revenues must be protected. Accordingly Congress included in those portions of the Transportation Act of 1920 having to do with the return of the railroads to their owners, a provision that after September 1, 1920, the Government should guarantee them certain revenue and that prior to that date their rates should not be reduced without the approval of the Interstate Commerce Commission. By other portions of the Transportation Act Congress made various changes in the Act to Regulate Interstate Commerce (now called the Interstate Commerce Act), among others, adding thereto Section 15(a) which provided in substance that the Interstate Commerce Commission should divide the railroads of the country into groups and prescribe rates such that the carriers as a whole, or in each group, should earn an aggregate annual net operating income equal to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation, and provided further that for the period of two years subsequent to March 1, 1920, such fair return should be five and one-half per cent.

Acting under this section, the Interstate Commerce Commission, upon the application of the carriers, entered upon an investigation<sup>18</sup> in which

<sup>15</sup> This, of course, is the distinction between the *Shreveport* case and the *Minnesota Rate Cases*. The question was expressly reserved in Mr. Justice Hughes' opinion in the latter. (1913) 230 U. S. 352, at p. 419, 33 Sup. Ct. 729, at p. 748.

<sup>16</sup> Federal Possession and Control Act of Aug. 29, 1916 (39 Stat. at L. 619, 645); Federal Control Act of March 21, 1918 (40 Stat. at L. 451).

<sup>17</sup> *Northern Pacific Ry. v. North Dakota* (1919) 250 U. S. 135, 39 Sup. Ct. 502.

<sup>18</sup> *Ex Parte 74* (1920) 58 I. C. C. 220.

it found that in order to earn the return specified in the Act the carriers should increase their freight and passenger rates to certain bases specified therein and authorized the carriers to make such increases.

The carriers thereupon proceeded to file tariffs with the Interstate Commerce Commission and with the various state commissions, putting into effect both interstate and within the several states the advanced rates authorized. With a few exceptions no objection was made by state authorities to the intrastate freight rates. The increased passenger fares were, however, in a number of instances higher than the fares allowed by various state laws or orders of the state public service commissions, and, therefore, the state authorities, among them those of Wisconsin and New York, refused to permit the fares to become effective for intrastate business.

At the time of the passage of the Transportation Act Congress had added to section 13 of the Act to Regulate Commerce paragraph 3, expressly authorizing a carrier to petition the Interstate Commerce Commission to institute an investigation into "any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State," and authorizing the Commission to enter upon such an investigation. Paragraph 4 was also added to this section; it provides as follows:

"Whenever the Commission, after full hearing, finds that any such rate, . . . causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, . . . thereafter to be charged . . . in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, . . . shall be observed while in effect, by the carriers parties to such proceeding affected thereby, the law of any State of the decision or order of any State authority to the contrary notwithstanding."

Proceeding under this section the carriers in Wisconsin and in New York filed petitions with the Interstate Commerce Commission asking it to institute investigations with respect to the passenger fares required by the state authorities to be maintained within those states.<sup>19</sup> The interested states were notified of these proceedings, as required by section 13 of the Interstate Commerce Act, and took part therein. In both of these investigations the Interstate Commerce Commission found that the operating and transportation conditions were substantially the same for intrastate as for interstate passenger service; that intrastate passengers paying lower rates rode on the same trains and in the same cars with interstate passengers paying higher rates; that the maintenance

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<sup>19</sup> Similar cases were instituted by carriers with respect to the rates in many other states.

of intrastate fares lower than the interstate fares authorized in *Ex Parte* 74<sup>20</sup> would result in serious financial loss to the carriers; and concluded that this situation resulted in undue prejudice to a person traveling in interstate commerce and in unjust discrimination against interstate commerce. The Commission found further that the prejudice and discrimination should be removed by making effective in intrastate commerce the rates of fare authorized by it in *Ex Parte* 74 and ordered the carriers so to do.<sup>21</sup>

Following the issuance of the Commission's order in the *Wisconsin* case, the carriers, parties thereto, filed bills in equity in the District Court to prevent the State Railroad Commissioners and other state officers from interfering in the maintenance of the fares thus ordered and published. The case came to the United States Supreme Court on appeal from the decision of three judges under section 366 of the Judicial Code granting an interlocutory injunction. In New York, however, the court proceedings were not instituted by the carriers but by the state which brought a bill in equity against the United States and the Interstate Commerce Commission to annul and enjoin the enforcement of the order of the Interstate Commerce Commission. The *New York* case being a direct proceeding to set aside an order of the Interstate Commerce Commission, the state was entitled to rely upon the absence of any substantial evidence to sustain a material finding as a basis for attacking the order; while in the *Wisconsin* case, since the defence of the State authorities was a collateral attack upon the Commission's order, they were obliged to show that the order was void on its face whether supported by the evidence or not. The court held, however, that this circumstance did not require a different conclusion in the two cases.

In both of these cases, as in the *Shreveport* case, there existed, what was lacking in the *Minnesota Rate Cases*, action by the federal authorities finding discrimination and prescribing interstate rates. A question, however, which was not involved in the *Shreveport* case and was only suggested in the *Illinois Central* case was presented by reason of the fact that the Commission's orders purported to apply to all intrastate rates throughout New York and Wisconsin and were not limited to the rates from particular borderline points.<sup>22</sup> The court held that there was not

<sup>20</sup> *Supra* note 18.

<sup>21</sup> *Wisconsin Passenger Fares* (1920) 59 I. C. C. 391; *In the matter of Rates, Fares and Charges of the New York Central Ry. and other railroad companies in the State of New York* (1920) 59 I. C. C. 290.

<sup>22</sup> "The order in this case, however, is much wider than the orders made in the proceedings following the *Shreveport* and *Illinois Central* cases. There, as here, the report of the Commission showed discrimination against persons and localities at border points, and the orders were extended to include all rates or fares from all points in the state to border points. But this order is not so restricted. It includes fares between all interior points although neither may be near the border



a sufficient showing that all local state rates discriminated against persons or places in interstate commerce to justify an order requiring all of the state rates to be increased on this ground alone.<sup>23</sup> In other words, the court concluded that under section 3 of the Interstate Commerce Act, which was the foundation of the *Shreveport* case, the Interstate Commerce Commission had no power to order a general revision of all state rates, but had the power to deal only with such state rates as caused unjust discrimination to particular persons or localities engaged in interstate commerce, and that the power of the Interstate Commerce Commission to make the orders which it did in the *Wisconsin* and the *New York* cases must be found, if at all, in the provisions added to the Interstate Commerce Act by the Transportation Act of 1920.

The court had, therefore, to consider two questions: first, whether by the Transportation Act and the amendments made by it to the Interstate Commerce Act Congress had intended to confer upon the Interstate Commerce Commission the power to deal generally with intrastate rates, and second, whether, if it had done so, its action was constitutional.

Obviously the intention of Congress is to be found first in the amendments made to section 13. It was contended by the states that the provisions which were added to section 13 did not enlarge the powers of the Interstate Commerce Commission to deal with intrastate rates, but merely put in statutory form the principles of the *Shreveport* case. It would have been difficult to escape this conclusion had the amendment to section 13 given to the Interstate Commerce Commission the power to prevent discrimination only "as between persons and localities in intrastate commerce on the one hand and interstate or foreign commerce on the other," but paragraph 4 of section 13 contained the further clause declaring unlawful "any undue, unreasonable or unjust discrimination against interstate or foreign commerce" as the result of state rates, and giving the Commission the power to prevent such discrimination. The court said that this indicated that what Congress was trying to prevent was not alone discrimination against particular persons or localities in interstate commerce, but against interstate commerce as a whole.<sup>24</sup> The court pointed out further that in enacting the Transportation Act of 1920 Congress intended to make such general provisions as would render it

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and the fares between them may not work a discrimination against interstate travellers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case, the saving clause by which exceptions are permitted can not give the order validity. As said by the court in the *Illinois Central* case, 'it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute, otherwise valid unless, and except so far as, it conforms to a high standard of certainty.' (1922) 42 Sup. Ct. 232, at p. 234. See also *American Express Co. v. Caldwell* (1917) 244 U. S. 617, 627, 37 Sup. Ct. 656, 661.

<sup>23</sup> (1922) 42 Sup. Ct. 232, at p. 234.

<sup>24</sup> *Ibid.* at p. 237.

possible for the carriers to furnish competent service in interstate commerce; that, as part of this scheme, it had directed the Interstate Commerce Commission to establish a general basis of rates which would bring adequate revenue to the carriers; that the enforcement of the state restrictions would result in a serious financial loss to the carriers and would increase the financial burden upon interstate commerce, thereby interfering with its purpose and with the efficient regulation of interstate commerce by the Federal Government; and that it must have been the purpose of Congress to prevent such interference. The court, therefore, held that Congress had not limited the power of the Interstate Commerce Commission to the prevention of discrimination between particular persons or localities, but had conferred upon it the power to prescribe a general basis of intrastate rates when necessary to prevent an undue financial burden upon interstate commerce.

On the question of the constitutionality of such action by Congress, the court held that the regulation of state rates was merely incidental to the regulation of interstate commerce; that since interstate and intrastate commerce were performed by the same agencies and were so intermingled that the Federal Government could not exercise complete and effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation was not unconstitutional.<sup>25</sup>

This conclusion, far-reaching as it appears to be, must inevitably follow from the logical application to the realities of the situation of the fundamental principles relating to the subject. It is a recognition of the truth, that the transportation systems of the country are not divided by the boundaries of the states but are nation-wide institutions to be dealt with in the interest of the country as a whole.

The *New York* case presents one question which is not raised in the *Wisconsin* case. An early charter of the New York Central Railroad Company bound the company to charge not more than two cents a mile for passenger carriage between Buffalo and Albany. It was objected by the state that this charter was a contract with the state and that if the Transportation Act permitted the Interstate Commerce Commission, by an order, to enable the railroad company to charge more than two cents a mile, it impaired the obligation of a contract in violation of art. I, section 10, of the Federal Constitution. The court dismissed this contention on the obvious ground that the constitutional provision referred to was a restriction upon the powers of a state but did not restrict Congress or the United States. The fact of this charter provision, however, suggests another question which apparently was not raised when the case was before the court, namely, whether a charter provision with respect to the rate of fare which a railroad may charge is a limitation upon its corporate powers, and whether Congress in estab-

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<sup>25</sup> See opinion 42 Sup. Ct. at p. 238.

lishing a general basis of rates throughout the country, can confer upon a state corporation the power to charge on intrastate traffic a rate of fare which, under the law creating the corporation, it has no power to charge.<sup>26</sup>

PARKER McCOLLESTER

New York City

# CAN AN INJURY BY A GOVERNMENT VESSEL CREATE A MARITIME LIEN?

Mr. Justice Holmes in a recent decision of the United States Supreme Court, *United States v. Thompson* (1922) 42 Sup. Ct. 159, has upset a long established doctrine of maritime law—justifying the revolution on the ground that he was doing away with a fiction. The importance of the case warrants an examination of the soundness of his logic and of the public policy involved.

It had been deemed a settled rule that when a vessel owned or requisitioned and operated by the Government collided with a private vessel, a maritime lien against the former for the damage caused could not be enforced while it was under government control but could be enforced as soon as it reached private hands.<sup>1</sup> A British admiralty court has in fact so decided within the last few weeks.<sup>2</sup> In the decision under discussion, the Supreme Court dealt with three ships, each of which while under government ownership or control had collided with a private vessel, the owners of which libelled the offending vessels after they had passed out of government control into private hands. In each case the Supreme Court issued a writ of prohibition preventing the United States District Courts from exercising jurisdiction.

Perhaps the most noteworthy feature of the decision—five judges against three—is the ground upon which Justice Holmes, speaking for the majority, supports it. He addresses himself not to the policy or expediency of the rule denying redress to the victim of the collision, but derives his conclusion from the application of pure logic—a mode of judicial reasoning to which Justice Holmes has been known to object.<sup>3</sup> He asserts that no lien could arise against a vessel operated by

<sup>26</sup> It seems that Congress may confer upon a state corporation powers which it does not possess under its state charter. *Cherokee Nation v. So. Kansas Ry.* (1890) 135 U. S. 641, 657, 10 Sup. Ct. 965, 971. Whether Congress has done this in the present instance may be more doubtful, though sec. 13, as amended, seems to be sufficient for this purpose.

<sup>1</sup> *The Siren* (1868, U. S.) 7 Wall. 152; *The Athol* (1842) 1 Wm. Rob. 374; *Workman v. New York* (1899) 179 U. S. 552, 566, 21 Sup. Ct. 212, 217; *The Florence H.* (1918, S. D. N. Y.) 248 Fed. 1012.

<sup>2</sup> *The Tervæte* (1922) 38 T. L. R. 460, by Sir Henry Duke, President of the Probate and Admiralty Division.

<sup>3</sup> Holmes, *Collected Legal Papers* (1920) 181; see also the dissenting opinion of Mr. Justice Holmes in *Vegeahn v. Guntner* (1896) 167 Mass. 92, 106, 44 N. E. 1077, 1080: "The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes."

the Government, even for future enforcement against a private vendee, because the "United States has not consented to be sued for torts and therefore it cannot be said that, in a legal sense, the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so." That is, because there is no immediate remedy, there is no legal injury. There never having been a "tort" creating a lien, there was none to revive or enforce against the vessel when it came within private control. "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp." And he justifies his assumption that the Government could not commit a "tort" on the absolutist theory of Hobbes, to which Justice Holmes has given expression on a number of occasions,<sup>4</sup> "that the authority that makes the law is itself superior to it, and that, if it consents to apply to itself the rules that it applies to others, the consent is free and may be withheld."

It is believed that there are several fallacies in this reasoning which account for a decision involving an undesirable overturn of the law contrary to good public policy. Maritime liens and the convenience of bringing the defendant into court by permitting the plaintiff to attach the *res* lie at the foundation of maritime enterprise, insuring that security which it is one of the functions of the law to promote. It should not be lightly abandoned.

Does Justice Holmes aid the solution of the legal problem by saying that as the United States has not consented to be sued for torts, therefore "in a legal sense the United States has not been guilty of a tort?" The immunity of the King from suit, derived from history, convenience, or expediency, was primarily jurisdictional in character, and the resulting dictum that in substantive law the King could do no wrong was an inaccurate fiction. The injury at all events gave rise to a legal right, usually against the officer.<sup>5</sup> While it may be true that as a matter of private law, the absence of an enforceable remedy justifies the conclusion that there was no breach of duty, still it seems like a *non sequitur* to assert that because the Government cannot commit a "tort" in a "legal

<sup>4</sup> *Kawananakoa v. Polyblank* (1906) 205 U. S. 349, 353, 27 Sup. Ct. 526, 527.

<sup>5</sup> Among the various grounds advanced to sustain the immunity of the King from the jurisdiction of the courts were these: that the King cannot issue a writ to himself: *United States v. Lee* (1882) 106 U. S. 196, 206, 1 Sup. Ct. 240, 248; that there is an inconsistency in the idea of supreme executive power and subjection to suit: *Briggs v. Light Boats* (1865, Mass.) 11 Allen, 157; that it would embarrass the State in the performance of its duties to be compelled to submit its instruments and property to the control of courts, to judgment and execution: John Marshall in the Virginia Convention, 3 Elliott's Debates quoted in *Hans v. Louisiana* (1890) 134 U. S. 1, 10 Sup. Ct. 504; also Matthews, J., in *In re Ayers* (1887) 123 U. S. 443, 8 Sup. Ct. 164; that states should not be coerced to pay debts which for various reasons they might not be willing or conveniently able to pay, thus suggesting the main reason for the adoption of the Eleventh Amendment: Marshall, C. J., in *Cohens v. Virginia* (1821, U. S.) 6 Wheat. 264, 406.

sense"—a conception of private and not of public law—therefore it cannot commit an injury which may give rise to a maritime lien "against the vessel"—admitting for the moment this cryptic concept of maritime law. If it is true that there was no initial maritime wrong, as Justice Holmes says, why could the resulting damages be set off or recouped when the Government instituted an action against the vessel injured?<sup>6</sup> It will be conceded that the Government is capable of waiving its immunity from suit;<sup>7</sup> and if it does so, the jurisdictional bar being thus removed, is there any doubt what law is to be applied? The maritime law in fact permits the enforcement of various liens even against Government property where the Government's possession is not disturbed.<sup>8</sup> The collision endows the owner of the injured vessel with certain rights enforceable against the Government itself, according to settled rules of law—provided the Government waives its jurisdictional immunity by entering an appearance<sup>9</sup>—and enforceable against any future private owner of the vessel. In this respect the victim may be said to have a future conditional right, and it rests upon the fact that he was injured and that sound policy requires compensation, except at direct government expense. The inability to enforce the "lien" against the Government—the owner can of course sue the wrongdoing officer *in personam*—is not an indication that there was no legally operative fact creating a cause of action, future and conditional though it may be. A foreign ambassador committing a common-law crime is immune from prosecution by virtue of his official position, but when his diplomatic immunity ceases and he becomes a private citizen within the jurisdiction is there any doubt as to his liability to punishment or as to the law applicable?<sup>10</sup> Justice McKenna, dissenting in the instant case, must therefore be supported when he says: "I reject absolutely that because the Government is exempt from suit, that it cannot be accused of fault." Whether or not the United States was "guilty of a tort" in a "legal sense," seems altogether immaterial.

Equally open to question, in the judgment of the writer, is the concep-

<sup>6</sup> *The Siren*, *supra* note 1. Mr. Justice Holmes makes an unconvincing effort to distinguish this case, which seems to contradict his theory that there never was a "tort" *ab initio*. See *United States v. Ringgold* (1834, U. S.) 8 Pet. 150. Before international tribunals, there is no doubt of the Government's liability for negligent collisions by its public vessels. *The Sidra* (Great Britain) *v. United States*, tribunal under Treaty of August 18, 1910, decided Nov. 29, 1921. (1922) 16 AM. JOUR. INT. LAW, 110.

<sup>7</sup> *De Simone v. Transportes Maritimos do Estado* (1922, App. Div.) 192 N. Y. Supp. 815, 816, and cases there cited.

<sup>8</sup> *The St. Jago de Cuba* (1824, U. S.) 9 Wheat. 409 (lien for seaman's wages); *United States v. Wilder* (1838, U. S. C. C.) 3 Sumner, 308 (lien for general average); *The Davis* (1869, U. S.) 10 Wall. 15; *United States v. Morgan* (1900, C. C. A. 4th) 99 Fed. 570, 572 (lien for salvage).

<sup>9</sup> *The Athol*, *supra* note 1; Act of Sept. 7, 1916 (39 Stat. at L. 728, 730) ch. 451, sec. 9; Act of March 9, 1920 (41 Stat. at L. 526) ch. 95, sec. 4.

<sup>10</sup> *Re Suarez* [1918, C. A.] 1 Ch. 176.

tion that the authority that makes the law is superior to it. The thesis may involve a restricted definition of law, to which all persons may not be willing to subscribe. Regarding law, however, as the body of rules of conduct which express the moral sense or conceptions of convenience of the organized community as to human relations, whether derived from custom or statute, and whose violation<sup>11</sup> is visited with social disapproval, courts constituting but one of several agencies for this purpose—it may still be true that while the rules of private law may be inapplicable to many of the activities of the Government, nevertheless the Government cannot be said to be above the rule of law—usually public law. Because the judgments of the Court of Claims cannot be enforced without a voluntary appropriation by Congress, can it be said that the rules of conduct laid down by that court as to the relation between the Government and the individual are not law? And even if the individual must still suffer many injuries at the hands of the Government without compensation, does it follow that the Government is thereby superior to the law? Is not its very immunity from suit or responsibility the rule of public law governing the individual's relation to the state in many (not all) of the state's activities? The alleged superiority of the state to the law may have been consistent with the theory of the autocratic king and state which Hobbes and Austin had in mind, but it seems inconsistent with constitutional self-government. It may be consistent with the *Machtstaat* which prevailed in political theory during the seventeenth and eighteenth centuries, but it is inconsistent with the *Rechtstaat* which has received almost universal support in Europe since the middle of the nineteenth century.<sup>12</sup> Is not the state the aggregate, the associated people?<sup>13</sup> Why assume that the group intends to regard itself as above all law, or has endowed any of its agencies, legislative or judicial, with the power to assert such superiority? The courts of other countries, such as France and Germany, find no sacrilege in subjecting the state to law—in many instances applying the rules of private law—and in holding the state primarily or secondarily responsible for the tortious acts of its officers, often without the aid of statute.<sup>14</sup> Writers like Dicey<sup>15</sup> and Vinogradoff<sup>16</sup> deny any superiority or irresponsibility of the state to law.

<sup>11</sup> There are, of course, many rules of law, principally involved in the conception of privilege, which are incapable of violation.

<sup>12</sup> Duguit, *Law in the Modern State* (1919) ch. 1; Krabbé, *Die Moderne Staats-Idee* (2d ed. 1919) chs. 1 and 2.

<sup>13</sup> Carré de Malberg, *Contribution à la Théorie Générale de l'Etat* (1920) 31.

<sup>14</sup> See citations in Hauriou, *Les Actions en Indemnité contre l'Etat pour Préjudices Causés dans l'Administration Publique* (1896) 6 REV. DE DROIT PUBLIC, 51-65; Bernegg, *Über die Entschädigungspflicht des Staates bei Ausübung der Oeffentlichen Gewalt* (1921). The numerous qualifications of the doctrine in continental Europe will be reserved for subsequent discussion.

<sup>15</sup> Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed. 1915) 179 et seq., 402 et seq.

<sup>16</sup> Vinogradoff, *Outlines of Historical Jurisprudence* (1920) 85.

Apart from the dangerous public policy of regarding groups in the community, political, social, or industrial, even the group of the whole, as above the law, and the injustice done in the instant case to the innocent victim of official carelessness, the theory relied upon by the court manifests a tendency to enlarge the scope of governmental immunity from suit and responsibility. This is directly opposed to that of the rest of the world and even to that found in our law of municipal corporations. It but indicates the need in this country of further legislative protection for the individual against the injuries inflicted upon him in the operation of the social enterprise known as the state.

E. M. B.

LIABILITY FOR PAYMENTS ON STOCK ISSUED FOR OVERVALUED PROPERTY  
OR FOR PROPERTY NOT LEGAL PAYMENT

Under modern statutes payment for the issue<sup>1</sup> of stock by a corporation is often expressly limited to money or property actually received, or labor done, other forms of payment being forbidden. Furthermore the property or labor must not be overvalued.<sup>2</sup> Some statutes also provide that no issue can be made until the stock is full-paid.<sup>3</sup> In cases where stock has been issued, or a contract made for its issue, in violation

<sup>1</sup> The term "issue" in the phrase "issue of stock," as it is used in the cases, is metaphorical, and perhaps derived from the actual issue of certificates. The phrase "issue of stock" seems to be used by the courts to signify corporate recognition of a subscriber as owning a share, or proportional interest, in the capital assets of the corporation.

<sup>2</sup> The methods of determining sufficiency of value are outside the strict scope of this comment. One of two rules is usually used. The first is the true-value rule. This in effect is that the received property is sufficient to authorize a given issue of stock when the true value of the property is equal to the nominal value of the issue, or to the value authorized by charter to be received in return for the issue. For purposes of applying this rule, the value of the property seems to consist in its actual purchasing power in terms of dollars at the time of the transaction. The true-value rule was applied in *Tramp v. Marquesen*, *infra*, note 6; *Lavell v. Bullock*, *infra* note 15; *Detroit-Kentucky Coal Co. v. Bickett Coal and Coke Co.*, *infra* note 10. The second method is the good-faith rule, which briefly is that the property is sufficient when the appraisal of its value, made in good faith by the directors of the corporation, is equal to the nominal value of the issue, or to the value authorized by charter to be received in return for the issue. This test of value substitutes for a determination of actual purchasing power an estimated purchasing power. *Caldwell v. Robinson* (1920) 179 N. C. 518, 103 S. E. 75; *Conley v. Hunt* (1920) 94 Conn. 551, 109 Atl. 887. The good faith rule was applied in *Scully v. Automobile Finance Co.*, and *Winters v. Lindsay*, *infra* note 5.

<sup>3</sup> Where a statute is of this kind, the issue of stock at a discount, payment being made in money, is analogous to an issue for overvalued property, and is so treated in this comment. The corporation accepts \$20, and issues stock of \$100 par value. It thus receives property worth only \$20 and makes an issue that is only authorized to be made for \$100.

of the provisions of such statutes, what is the position of the various parties involved in the transaction?

Take first the position of the corporation. The corporation may consist in just those persons who assented to the illegal issue. Or it may consist in those persons, plus other innocent shareholders who have paid full value for their shares. In the former case it seems clear that the corporation should have no remedy against the subscriber. In the latter case may these innocent shareholders, either in their own name or in that of the corporation, maintain an action to cancel the issue? It seems just that they should be able to do so. Both common law and statutes should be designed to give the maximum protection to innocent shareholders. Accordingly it is held that such an action may be maintained.<sup>4</sup> Some courts, however, do not permit cancellation when the defective contract is executed, regarding it as more just to consider the contract of issue as at least partially valid, and full payment of the shares enforceable.<sup>5</sup> This result seems somewhat hard on legally uninformed members of the public who have subscribed for stock issued for less than its nominal value. Perhaps those courts are fairer which hold that the defendant subscriber is not liable.<sup>6</sup> Where the subscriber is also a promoter, courts may be liberal in their remedy to the corporation,<sup>7</sup> and harsh to the subscriber.<sup>8</sup>

Another problem is presented in case the defendant is not a subscriber, but a subscriber's transferee. Of course if he is a transferee with notice, actual or constructive, of the true state of the transaction, he should be in no better position than his transferor, and such is one part of the holding in the recent case of *Bowen v. Imperial Theatres, Inc.* (1922, Del. Ch.) 115 Atl.918. But if he is an innocent purchaser of a certificate as for full-paid and non-assessable shares, the corporation should not be allowed to bring an action of any sort against him.<sup>9</sup> As

<sup>4</sup> *Frame v. Mahoney* (1920) 21 Ariz. 282, 187 Pac. 584, under Const. 1910, art. 14, sec. 6.

<sup>5</sup> *Scully v. Automobile Finance Co.* (1920, Del. Ch.) 109 Atl. 49, under Const. 1897, art. 9, sec. 3, and Rev. Code, 1915, ch. 65, secs. 1928 and 1934-1937; *Whitewater Tile & Brick Co. v. Johnson* (1920) 171 Wis. 82, 175 N. W. 786; *Winters v. Lindsay* (1921, Calif. App.) 198 Pac. 43 (hearing denied by Supreme Court).

<sup>6</sup> *Kanamani v. Gahagan* (1921, Tex.) 230 S. W. 141, under Rev. Sts. 1911, art. 1146, and Const. 1876, art. 12, sec. 6; *Tramp v. Marquesen* (1920) 188 Iowa, 968, 176 N. W. 977, under Supp. Code, 1913, secs. 1641 b, d, and f. The situation is altered when a creditor, and not the corporation, is plaintiff. See *infra* at p. 886.

<sup>7</sup> *Whitewater Tile & Brick Co. v. Johnson*, *supra* note 5. From the language of this case, however, it looks as though the same result would have been reached had the defendant been an ordinary subscriber rather than a promoter. The case was decided under Sts. 1898, ch. 85, sec. 1753, as amended by Laws, 1907, ch. 576, sec. 2.

<sup>8</sup> *Cahall v. Lofland* (1921, Del. Ch.) 114 Atl. 224, under Const. 1897, art. 9, sec. 3, and Rev. Code, 1915, ch. 65, sec. 1928.

<sup>9</sup> *Rhode v. Dock-Hop Co.*, *infra* note 16; see *Lavell v. Bullock* *infra* note 15. Those were actions on behalf of creditors. *A fortiori* the defence would be good against the corporation.



between him and the shareholders of the corporation, the protection of the law should be on his side. There has usually been a greater degree of neglect on the part of the shareholders than on that of the *bona fide* transferee.

But suppose the position of the parties is reversed, and it is the corporation that is defendant. The subscriber may here, in the case of an unexecuted promise of the corporation to recognize him as a stockholder, be bringing an action to be recognized as such, that is, "to have stock issued" to him, or to obtain damages for failure to do so. In either of these cases judgment should be for the defendant.<sup>10</sup> The contract is illegal, and the public and the innocent shareholders are best served by not forcing the corporation to perform. If the subscriber has executed his part of the contract, and furnished property of real, though insufficient, value to the corporation, it seems equitable to let him have some remedy.<sup>11</sup> If the corporation has issued the stock, and the subscriber is resisting its cancellation, judgment again should be against the subscriber in cases where his payment has been nugatory. But here again if he has paid in overvalued property and is willing to pay further assessments, it would perhaps be best not to hold the transaction void, but to require that all certificates and records be made to show the exact state of the transaction.<sup>12</sup> If it is not the subscriber, but the subscriber's *bona fide* transferee, who is resisting cancellation of his shares, he should win, for the same reasons that he should not be liable to assessment.<sup>13</sup> Here again, however, those courts that consider the issue void could give the transferee no protection against cancellation, though perhaps there would be a remedy against the transferor who represented that the issue was full-paid. If the subscriber is seeking to cancel his own promissory notes, on the ground that they were illegal payment for the issue of stock, it is submitted that he should not be allowed to do so. But of course in those jurisdictions where the statutes are held to make an issue for illegal payment void, the cancellation of the notes will be permitted.<sup>14</sup>

<sup>10</sup> *Detroit-Kentucky Coal Co. v. Bickett Coal & Coke Co.* (1918, C. C. A. 6th) 251 Fed. 542, under Ky. Const. 1891, sec. 193, (suit by subscriber to compel specific performance); *Kirkup v. Anaconda Amusement Co.* (1921) 59 Mont. 469, 197 Pac. 1005, under Const. 1889, art. 15, sec. 10, and Rev. Code, 1907, sec. 3894, as amended by Laws, 1917, ch. 89 (action for damages for refusal to perform contract).

<sup>11</sup> *Brockway v. Ready Built House Co.* (1920) 95 Or. 386, 187 Pac. 1038. In this case it looks as though the remedy would have to be in a separate action. For the rule of stockholders' liability in Oregon, see Const. 1859, art. 11, sec. 3, as amended Nov. 5, 1912, and Olson's Or. Laws, 1920, tit. 43, ch. 3, sec. 7792.

<sup>12</sup> Cf. *Scully v. Automobile Finance Co.*, *supra* note 5. In that case it was said that the records must be made to show what had actually been paid on the stock, and that the shares would be assessable for the purposes of the corporation.

<sup>13</sup> Discussed *infra* p. 886.

<sup>14</sup> *Pruett v. Cattlemen's Trust Co.* (1920, Tex. Com. of App.) 222 S. W. 533, under Rev. Sts. 1911, art. 1146, and Const. 1876, art. 12, sec. 6.

Take next the position of a creditor of the corporation, or one representing a creditor. A creditor-plaintiff at least stands in the shoes of the corporation as far as unpaid amounts upon shares are concerned, where the stock has been improperly issued for overvalued property, or for property not legal payment. The amount of any debts due the corporation in such a case should *a fortiori* be at the disposal of a *bona fide* creditor. It would seem just that, even in a jurisdiction which gave to the corporation no remedy of obtaining payment to the par value of the shares issued for improper consideration, the creditor should not be denied such remedy. A creditor can not be protected by cancellation of the shares; the remedy he wants is to have the stock full-paid in accordance with the corporate records. But in a jurisdiction that holds the issue *void*, the creditor is deprived of this remedy.<sup>15</sup>

If the creditor is acting not against a subscriber, but against a subscriber's transferee—provided he be not chargeable with actual or constructive notice of the true state of the transaction—an interesting issue is raised. Here both the creditor and the shareholder have acted in good faith. Which one should bear the loss with which both are threatened on account of their having trusted the representations of the corporation? Apparently the creditor must suffer.<sup>16</sup> He is perhaps more at fault than the transferee. Further he might properly be given a recovery against the officials of the corporation.<sup>17</sup> But so also, if the transferee were held liable, it would seem that he might recover against the transferor.

In any of these cases, in determining the wisdom of statutes or decisions, the criteria must be the protection of the public, the creditors, and the innocent shareholders. Certainly those jurisdictions which bluntly hold void the issue of stock for overvalued property, or for property that is not legal payment, do not in many situations seem to serve best the interest of any one of these three groups.

<sup>15</sup> *Lavell v. Bullock* (1919, N. D.) 174 N. W. 764, under Const. 1889, art. 7, sec. 138, and Comp. Laws, 1913, secs. 4527, 4528; cf. *Terrell v. Warten* (1921, Ala.) 89 So. 297, under Const. 1901, art. 12, sec. 234.

<sup>16</sup> *Rhode v. Dock-Hop Co.* (1920, Calif.) 194 Pac. 11, under Civil Code, 1872, sec. 323, as amended by Sts. 1907, ch. 279, sec. 1; 12 A. L. R. 449, note.

<sup>17</sup> Cf. *Lavell v. Bullock*, *supra* note 15.