1922

Supreme Court Decisions on Federal Power over Commerce, 1910-1914 - II

Thomas Reed Powell

SUPREME COURT DECISIONS ON FEDERAL POWER OVER COMMERCE, 1910-1914. II°

BY THOMAS REED POWELL*

I. COMMERCE AMONG THE SEVERAL STATES (Continued)

2. EMPLOYERS' LIABILITY ACT

AFTER the first federal Employers' Liability Law had been held to exceed the commerce power of Congress because, as construed by the court, it regulated the liability of interstate carriers for injuries incurred in the course of intra-state as well as of interstate commerce, Congress passed a second statute which was confined to injuries suffered by employees while engaged in interstate commerce. This was sustained as a proper exercise of the commerce power in *Second Employers' Liability Cases* (*Mondou v. New York N. H. & H. R. Co*).[1] Mr. Justice Van Devanter cited the commerce cause and the "necessary and proper" clause and said that the following propositions had become so firmly settled as to be no longer open to dispute:

"1. The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

2. The phrase 'among the several states' marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more states and commerce which is confined to a single state and does not affect other states,—the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the states severally.

3. 'To regulate,' in the sense intended, is to foster, protect, control, and restrain, with appropriate regard for the welfare of

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°The preceding installment in 6 MINNESOTA LAW REVIEW 1 has reviewed the decisions of the Supreme Court from October, 1910, to June, 1914, on the validity and effect of the Interstate Commerce Act of 1887 and its later amendments. The present paper covers the decisions of the same period on other acts of Congress specifically directed to the regulation of interstate carriers.

[1](1912) 223 U. S. 1, 56 L. Ed. 327, 32 S. C. R. 168. See 12 Colum. L. Rev. 252, 272, 25 Harv. L. Rev. 548, 565, 10 Mich. L. Rev. 478, 491, 60 U. Pa. L. Rev. 501, and 18 Va. L. Reg. 491. For discussions prior to the Supreme Court decision see John L. Hall, "The Federal Employers' Liability Act," 20 Yale L. J. 122; and a note in 24 Harv. L. Rev. 156.

those who are immediately concerned and of the public at large.

4. This power over commerce among the states, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

5. Among the instruments and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees.

6. The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the states, and liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power."[2]

Having thus sustained the act as within the general scope of federal power, Mr. Justice Van Devanter proceeded to consider certain specific objections. He declared that so long as the injury in question is to an employee engaged in interstate commerce, "it is not a valid objection that the act embraces instances where the causal negligence is that of an employee engaged in intra-state commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein." Earlier he had said that it is a mistake to treat "the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power."

The objections to the rules of liability set forth in the act were founded on the commerce clause as well as on the due-process clause of the fifth amendment. These rules deprived the carrier of the defense that the injury is caused by a fellow servant, made the contributory negligence of the injured employee not a complete defense but only a ground for reducing the damages on the theory of comparative negligence, abrogated the defense of assumption of risk whenever the employer's violation of any statute enacted for the safety of employees contributes to the injury, and gave an action to the personal representative of employees whose death results from their injury. As to the due process objection,

[2](1912) 223 U. S. 1, 46-47, 56 L. Ed. 327, 32 S. C. R. 169.

Mr. Justice Van Devanter contented himself with quoting an earlier opinion to the effect that "a person has no property, no vested interest in any rule of the common law." The contention that the rules of liability prescribed "have no tendency to promote the safety of the employees, or to advance the commerce in which they are engaged" was answered by saying:

"The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the constitution....

"We are not unmindful that the end was being measurably attained through the remedial legislation of the several states, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the states, upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce."[3]

It was further held that the act of Congress supersedes all state laws in the same field and that "rights arising under the congressional act may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion." One of the cases before the court had been brought in a state court of Connecticut and Chief Justice Baldwin had held that the state court may decline to exercise jurisdiction because the act of Congress is not in harmony with the policy of the state. Such a suggestion, said Mr. Justice Van Devanter, "is quite inadmissible, because it presupposes what in legal contemplation does not exist." This he reinforced by adding:

"When Congress, in the exertion of the power confided to it by the constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state."[4]

It was pointed out that the prescription of the rule of liability to be applied in cases where the state courts under their own laws have jurisdiction of the controversy is not an "attempt to enlarge or regulate the jurisdiction of state courts, or to control or affect

[3]Ibid., 50-51.
[4]Ibid., 57.

their modes of procedure." After reminding the supreme court of Connecticut that it is accustomed to entertain tort actions in which the rule of liability applied is that of another state in which the injury occurred, even under circumstances where the laws of Connecticut give no right of recovery, Mr. Justice Van Devanter added:

"We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be that as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee, or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases."[5]

Further objections to the act were confined to the due-process clause of the fifth amendment. It was held that the possession by Congress of the power to impose the liability in question necessarily carries with it "the power to insure its efficacy by prohibiting any contract, rule, regulation, or device in evasion of it." The complaint against the discrimination caused by the act in applying only to carriers by railroads and not to other interstate carriers and the criticism of the lack of discrimination in not making a distinction between employees subject to the peculiar hazards of trains and others engaged in interstate commerce but not directly employed on trains or tracks were answered by saying:

"But it does not follow that this classification is violative of the 'due process of law' clause of the fifth amendment. Even if it be assumed that that clause is equivalent to the 'equal protection of the laws' clause of the fourteenth amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exercises of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary. . . . Tested by these standards, this

[5]Ibid., 58-59.

classification is not objectionable. Like classifications of railroad carriers and employees for like purposes, when assailed under the equal-protection clause, have been sustained by repeated decisions of this court."[6]

The provision of the act which prohibits any contract or regulation in evasion of the liability imposed came before the court again in *Philadelphia, B. & W. R. Co. v. Schubert*[7] which sustained the prescription that the acceptance of benefits under relief contracts or funds shall not defeat liability under the act but shall merely entitle the carrier to a deduction of what it has paid towards the fund or as indemnity. This was construed to be applicable to contracts made prior to the enactment of the statute, and the constitutional complaint was disposed of by Mr. Justice Hughes as follows:

"Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the federal authority to the continuing operation of previous contracts would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of Congress so much of the field as they might choose, by prophetic discernment, to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which, as to future action, should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority."[8]

Northern Pacific R. Co. v. Babcock,[9] which was one of the suits disposed of in the opinion in *Second Employers' Liability Cases*,[10] was an action under the federal law brought in the lower federal court by the personal representative of an employee killed while engaged in interstate commerce. Under the federal law the sum recovered by the representative would go exclusively for the benefit of the surviving widow, while under the statutes of Mon-

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[6]Ibid., 52-53.
[7](1912) 223 U. S. 1, 46-47, 56 L. Ed. 327, 32 S. C. R. 169.
[8]Ibid., 613-614. For notes on other cases sustaining the prohibition against contracts in derogation of rights under the act, see 26 Harv. L. Rev. 273 and 20 Yale L. J. 392.
[9]Note 1, supra.
[10]Note 1, supra.

tana which would have controlled in the absence of the federal statute, the widow and a surviving sister would have shared equally. The judgment for the benefit of the widow alone was sustained with no discussion of the question of the disposition of the proceeds other than the general statement that the federal act supersedes all laws of the states so far as they cover the same field.

This was applied in *Taylor v. Taylor*[11] in which a surviving widow who was also the personal representative of the deceased had with the consent of the state surrogate compromised with the railroad and accepted $5,000 in settlement of her claim under the federal statute. Thereupon the father of the deceased sued the widow for half of the amount received by her. The state court found for the father under the state law of distributions and held that the commerce power of Congress "must end with the death of the employee" and that an attempt by Congress to distribute funds recovered for his death is "invalid and unauthorized." The Supreme Court reversed the judgment of the state court, again with no discussion of the constitutional issue other than that to be implied from a review of previous cases which had applied to various situations the principle that the federal act supersedes all state legislation in the same field.

Though the opinions in these previous cases proceed mainly on the path of statutory interpretation, they necessarily involve the decision of constitutional issues. Among a number of cases to the same effect, *North Carolina R. Co. v. Zachary*[12] and *Missouri, K. & T. R. Co. v. Wulf*[13] may be cited for the point that, if the injury

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[11](1914) 232 U. S. 363, 58 L. Ed. 638, 34 S. C. R. 350. For comment on the decision in the state court see 25 Harv. L. Rev. 565.

[12](1914) 232 U. S. 248, 58 L. Ed. 591, 34 S. C. R. 305. See 27 Harv. L. Rev. 591. In interpreting the federal statute this case held that the lessor of an intra-state railroad to an interstate railroad is a "common carrier by railroad engaging in commerce between the states" within the meaning of the federal act when by the local law the lessor is responsible for the negligence of the lessee. An employee of the lessee who was killed while engaged in interstate commerce was held not entitled to sue under state law.

[13](1913) 226 U. S. 570, 57 L. Ed. 335, 33 S. C. R. 135. See 18 Va. L. Reg. 785. This was an action brought in a state court by a person who was sole beneficiary under the federal statute. The question was whether an amendment stating that the plaintiff is the personal representative of the deceased stated a new cause of action. Such amendment was necessary in order to show that the plaintiff was entitled to sue under the federal law. It was held that the amendment was a matter of form and not of substance and that it could be made although the two-year limitation in the federal act had expired between the original petition and the amendment. The facts that the original petition referred to a state statute

arises while the employed is engaged in interstate commerce, the only action is one under the federal statute. In the former case a judgment recovered in a state court in a suit brought under state law was set aside because it appeared that the employee was engaged in interstate commerce. In the latter case, where it appeared that the employee was engaged in interstate commerce, the action brought in the federal court was sustained as one under the federal law although the act of Congress was not referred to in the pleadings. *St. Louis, S. F. & T. R. Co. v. Seale*[14] holds that, if the suit is for the death of an employee killed in interstate commerce, it cannot be maintained by any person other than the personal representative to whom the right of action is given by the federal law.[15] That the damages recovered by such personal representative must be limited to the pecuniary loss sustained by the persons named as beneficiaries in the federal act and may not include compensation that they or others might recover if state laws were applicable was held in *Michigan Central R. Co. v. Vreeland*,[16] *American Railroad Co. v. Didricksen*,[17] *Gulf, C. & St. F. R. Co. v. McGinnis*,[18] *St.*

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and that neither it nor the amendment referred to the federal act were held not to defeat the right of action as one under the federal law when the facts as shown make it one necessarily arising under that law. Mr. Justice Lurton stated that he "entertains doubts as to whether the two years' limitation does not apply."

The question when suit is brought under the federal act is considered in 62 U. Pa. L. Rev. 376.

[14](1913) 229 U. S. 156, 57 L. Ed. 1129, 33 S. C. R. 751. See 19 Va. L. Reg. 224. This was a suit brought in a state court by the widow and parents of the deceased. The facts showed that the case was one arising under the federal statute and the judgment was reversed both because not one in a suit brought by the personal representative and because recovery had been allowed in favor of persons not beneficiaries under the federal act. Mr. Justice Lamar dissented.

[15]This had been held previously in American R. Co. v. Birch, (1912) 224 U. S. 547, 56 L. Ed. 879, 32 S. C. R. 603, in a case coming from Porto Rico where of course the power of Congress is not dependent on the commerce clause. The act of Congress was here held to supersede any local law and to preclude an action brought by others than the personal representative.

[16](1913) 227 U. S. 59, 57 L. Ed. 417, 33 S. C. R. 192. See 26 Harv. L. Rev. 551. This was an action brought in the federal court under the federal statute in which there was a reversal because the trial court had charged that the damages may include compensation for deprivation by the widow of the care and advice of her deceased spouse. Damages for such loss were held not be to allowable under the federal statute. Mr. Justice Holmes confined his concurrence to the result. The case held also that the act of April 22, 1908, did not provide for the survival of the right of action of a deceased employee. For the later amendment of April 5, 1910, allowing such survival, see St. Louis, I. M. & S. R. Co. v. Hesterly, note 19, infra.

[17](1913) 227 U. S. 145, 57 L. Ed. 456, 33 S. C. R. 224. This was an action brought in Porto Rico, in which the Supreme Court held that the

Louis, I. M. & S. R. Co. v. Hesterly,[19] and *North Carolina R. Co. v. Zachary*.[20]

court below had wrongly allowed compensation to parents for the loss of the society and companionship of their son.

[18](1913) 228 U. S. 173, 57 L. Ed. 785, 33 S. C. R. 426. See 27 Harv. L. Rev. 87. This was a suit in a state court under the federal law, in which the damages allowed to the personal representative included compensation to a married child on equal terms with that given to children dependent on the deceased father. The court held that this was not in accord with the limitation in the federal act to actual pecuniary loss.

In 1 Va. L. Rev. 490 is a note on a case denying an action by a father who had no expectation of support from a deceased son.

[19](1913) 228 U. S. 702, 57 L. Ed. 1031, 33 S. C. R. 703. This was an action in a state court in which the personal representative had recovered damages for the injury and pain suffered by the deceased prior to his death. The injury occurred prior to the amendment of April 5, 1910, which provided for survival of the action of the deceased. This amendment was held not to be retroactive and the judgment was reversed for the wrongful allowance of damages not recoverable under the original federal act. The state court had treated the action as one under state law and had held the federal act to be only supplementary. This of course was erroneous under the decisions of the Supreme Court, as it was conceded that the injury occurred in interstate commerce. The action however was maintainable under the federal act and the defendant did not object to that part of the judgment which was for pecuniary loss to the next of kin. The court held, therefore, that it was not called upon to say whether the defendant could have defeated this part of the judgment on the ground that the suit was brought under the statute of one jurisdiction while it was maintainable only under that of another. But it held that the defendant was not estopped from objecting to the recovery not permissible under the federal act on the ground that it had pleaded contributory negligence which was a defense only under the state law, since "the plaintiff, not the defendant, had the election how the suit should be brought, and as he relied upon the state law, the defendant had no choice, if it was to defend upon the facts."

[20]Note 12, supra. This was an action brought in a state court which the Supreme Court held wrongly brought under state law. Among the reasons why it could not be sustained as one under the federal act, was that the damages recovered were not confined to the pecuniary loss sustained by the beneficiaries named in that act.

A state case holding that the federal act controls the distribution of the proceeds is discussed in 26 Harv. L. Rev. 375.

The question whether the federal act applies to a Pullman porter is considered in 26 Harv. L. Rev. 375.

For general articles on the federal statute see H. D. Minor, "The Federal Employers' Liability Act," 1 Va. L. Rev. 169 and Homer Richie, "The Federal Employers' Liability Act," 19 Va. L. Reg. 171, 248, 234, 405, 502, 594.

In Winfree v. Northern Pacific R. Co., (1913) 227 U. S. 296, 57 L. Ed. 518, 33 S. C. R. 273, it was held that the federal act is not retroactive and so does not permit recovery in a cause of action that accrued prior to its passage.

Troxell v. Delaware, etc., R. Co., (1913) 227 U. S. 434, 57 L. Ed. 586, 33 S. C. R. 274, allowed an action under the federal act based on the negligence of a fellow servant, notwithstanding a prior action unsuccessfully brought under state law based on failure to provide proper facilities. The original action was brought by the surviving widow and children, and the second by the widow in her capacity as personal representative. Mr. Justice Lurton concurred on the question of res adjudicata

The first federal Employers' Liability Act was held unconstitutional because construed to apply to injuries received by employees who might have no connection with interstate commerce The second statute was confined to injuries received by the employee while engaged in interstate commerce. In *Illinois Central R. Co. v. Behrens*[21] this language was held to restrict the act more than would be necessary under the constitution. From this it follows that a holding that an employee is not within the federal act does not necessarily involve a decision as to the power of Congress under the combination of the commerce clause and the "necessary and proper" clause. The *Behrens Case* involved a suit brought under the federal act by the representative of an employee who was killed when, as a fireman, he was engaged in switching several cars loaded wholly with intra-state freight. In general the switching crew "handled interstate and intra-state traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other." In declaring that accidents suffered by members of such a crew would be within the regulatory power of Congress without inquiry as to the precise work on which an employee was engaged at the time of his injury, Mr. Justice Van Devanter said:

"Considering the status of the railroad as a highway for both interstate and intra-state commerce, the interdependence of the two classes of traffic in point of movement and safety, and the nature and extent of the power confided to Congress by the commerce clause of the constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intra-state commerce."[22]

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solely because of the lack of identity of the parties in the two actions.

Seaboard Air Line R. Co. v. Horton (1914) 233 U. S. 492, 58 L. Ed. 1062, 34 S. C. R. 635, contains a discussion of the difference between contributory negligence and assumption of risk as worked out by the Supreme Court in interpreting the rules of liability imposed by the federal act. See Edward P. Buford, "The Assumption of Risk Under the Federal Employers' Liability Act," 28 Harv. L. Rev. 163, and Irwin E. Richter, "The Application of State Safety Statutes to Actions Under the Federal Employers' Liability Act," 15 Colum. L. Rev. 649. In 27 Harv. 765 is a note on a case holding that the question whether the employee's assumption of risk is voluntary is one for the jury.

[21](1914) 233 U. S. 473, 58 L. Ed. 1051, 34 S. C. R. 646. See 25 Harv. L. Rev. 741 and 18 Law Notes 85.

[22](1914) 233 U. S. 473, 477, 58 L. Ed. 1051, 34 S. C. R. 646.

Passing then "from the question of power to that of its exercise," the court decided that the particular movement of freight from one part of the city to another was not in itself interstate commerce and that the fact that the employee "was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

In the other cases in which suit was brought under the federal act, the injuries were held to be within its terms. There was no contest with regard to employees on trains actually moving in interstate commerce who were held within the federal act in *Missouri, K. & T. R. Co. v. Wulf*,[23] *Gulf, C. & St. F. R. Co. v. McGinnis*,[24] *and St. Louis, I. M. & S. R. Co. v. Hesterly*,[25] nor with regard to a switchman whose arms were crushed between two cars moving in interstate commerce in *Grand Trunk W. R Co. v. Lindsay*.[26] In *Pedersen v. Delaware, L. & W. R. Co.*[27] the issue was fully fought out and produced disagreement among the judges. Here an employee carrying bolts to be used in repairing a railroad bridge used in interstate commerce was held to be engaged in such commerce. The carrying of the bolt was called a minor part of the larger task of inserting it "as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars which he is to haul in interstate commerce." Interstate commerce was said to be dependent upon the good condition of the instrumentalities by which it is carried on, and the work of keeping such instrumentalities in repair to be "so closely related to such commerce as to be in practice and in legal contemplation a part of it." It was declared that the bridge is none the less an instrumentality of interstate commerce because used also for intra-state transportation, "nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce." Mr.

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[23]Note 13, supra. [24]Note 18, supra. [25]Note 19, supra.

[26](1914) 233 U. S. 42, 58 L. Ed. 838, 34 S. C. R. 581. In this case it was held that an action is controlled by the provisions of the federal act when the allegations and proof bring it within the act although the provisions of the act are not expressly referred to in the pleadings or pressed at the trial.

[27](1913) 229 U. S. 146, 57 L. Ed. 1125, 33 S. C. R. 648. See 2 Georgetown L. J. 38, 26 Harv. L. Rev. 354, 375, 19 Va. L. Reg. 224, and 1 Va. L. Rev. 73, 83.

Justice Van Devanter pointed out that the decision does not apply to the original construction of instrumentalities which have not yet been used for interstate commerce. Mr. Justice Lamar wrote a dissenting opinion in which Justices Holmes and Lurton concurred. This apparently contents itself with the position that the injury was not within the act of Congress without considering whether it might under the constitution have been made so, though this is not absolutely certain. Mr. Justice Lamar's comments are as follows:

"The defendant, though engaged in both interstate and intrastate commerce, was also engaged in many other incidental activities which were not commerce in any sense.

"The railroad had to be surveyed and built, bridges had to be constructed and renewed, cars had to be manufactured and repaired, warehouses had to be built and painted, wages had to be paid and books kept; but these transactions, though incident to it, were not transportation, and, therefore, not within the purview of the statute limited to persons employed in commerce. Otherwise the law would embrace 'all of the activities in any way connected with trade between the states, and exclude state control over matters purely domestic in their nature.'... Acts burdening interstate commerce can, of course, be prohibited by Congress. But when Congress itself limits the operation of the statute to persons injured while employed in interstate commerce, the statute does not extend to its incidents, and is confined to transportation. It does not include manufacturing, building, repairing, for they are not commerce, whether performed by a private person, a railroad, or its agents." [28]

Cases in which suits were held to be wrongly brought under state law because the injuries were within the federal act belong properly under the head of state police power and interstate commerce, but it is convenient to group together all decisions on the scope of the federal act. *St. Louis, S. F. & T. R. Co. v. Seale*[29] denied an action under state law for an injury to a yard clerk who was on his way to take the numbers on the cars of an incoming interstate train. His duty was declared to be connected with the interstate movement, "not indirectly or remotely, but directly and immediately." *North Carolina R. Co. v. Zachary*[30] reached the same conclusion with regard to a fireman who had prepared his locomotive to attach to a train that was going to another point in

[28] (1913) 229 U. S. 146, 154, 57 L. Ed. 1125, 33 S. C. R. 648. In 1 Calif. L. Rev. 196 is a note on what employees are within the federal statute.

[29] Note 14, supra.

[30] Note 12, supra.

the same state but to which two cars which had come from another state were to be attached. The fact that these two cars had come in empty and were going on empty was held not material, and the fireman was held still on duty even though he had left his engine and gone towards his boarding house when struck by another train in the railroad yard. Mr. Justice Pitney remarked that "there is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer."

3. Safety Appliance Acts

The first federal safety appliance act of March 2, 1893, was confined to locomotives, cars, etc., "used in moving interstate traffic." In *Delk v. St. Louis & S. F. R. Co.*[31] this was held applicable to a car loaded with lumber consigned to another state which while awaiting a repair piece was being moved about on a switching track in connection with other cars. The suit in question was by an injured employee against the railroad. The duty of the railroad to have the required appliances on all cars used in interstate traffic was held to be an absolute one, in accordance with the ruling in *Chicago, Burlington & Quincy R. Co. v. United States*,[32] decided at the same time. This was an action by the government for the penalty provided in the act. The contention of the road that "it cannot be held guilty of a crime when it had no thought or purpose to commit a crime, and endeavored with due diligence to obey the act of Congress" was held to be "unsound, because the present action is a civil one." Later in the opinion, however, Mr. Justice Harlan declared:

"If the statute upon which the present action is based had expressly or by implication declared that the penalty prescribed may only be recovered by a criminal proceeding, that direction must have been followed. The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned."[33]

The second safety appliance act of March 2, 1903, applied to locomotives, cars, etc., "used on any railroad engaged in interstate commerce." The constitutionality of applying the statute to cars hauling only intra-state freight was sustained in *Southern*

[31](1911) 220 U. S. 580, 55 L. Ed. 590, 31 S. C. R. 617.
[32](1911) 220 U. S. 559, 55 L. Ed. 582, 31 S. C. R. 612.
[33]Ibid., 578.

R. Co. v. United States,[34] in which Mr. Justice Van Devanter said:

"We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intra-state traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by the acts in respect of vehicles used in moving intra-state traffic, and the objects which the acts obviously are designed to obtain; namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation and connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intra-state as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intra-state commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intra-state transportation.

"Speaking only of railroads which are highways of both interstate and intra-state commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others.

[34](1911) 222 U. S. 20, 56 L. Ed. 72, 32 S. C. R. 2. See 12 Colum. L. Rev. 174 and 10 Mich. L. Rev. 212.

"These practical considerations make it plain, as we think, that the questions before stated must be answered in the affirmative."[35]

4. HOURS OF SERVICE ACT

The constitutionality of the federal Hours of Service Act was sustained in *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*,[36] after being interpreted to apply only to employees engaged in interstate commerce. The fact that many employees are necessarily engaged in both intra-state and interstate commerce at the same time was held to lend no support to the contention that the act goes beyond interstate commerce. Mr. Justice Hughes covers both the commerce question and the due-process question when he says:

"The fundamental question here is whether a restriction upon the hours of labor of employees who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. The question admits of but one answer. The length of hours of service has a direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employees and travellers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors,

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[35](1911) 222 U .S. 20, 26-27, 56 L. Ed. 72, 32 S. C. R. 2. In Schlemmer v. Buffalo, R. & P. R. Co., (1911) 220 U. S., 390, 55 L. Ed. 596, 31 S. C. R. 561, commented on in 17 Va. L. Reg. 322, it was held that Congress in providing in the first and second safety appliance acts that defendants using unlawful appliances could not have the defense of assumption of risk against plaintiffs suing for injuries did not preclude the states from enforcing their law of contributory negligence in such actions.

By the Second Employers' Liability Act of April 22, 1908, it was provided the defense of contributory negligence could not be made in any case where the violation by the carrier of an statute enacted for the safety of employees contributed to the injury which gave rise to the cause of action.

In American R. Co. v. Didricksen, (1913) 227 U. S. 145, 57 L. Ed. 456, 33 S. C. R. 224, the federal safety appliance act of March 2, 1903, was held to apply in Porto Rico, since Porto Rico is a "territory" within the meaning of the statute, although not for all purposes incorporated into the United States.

In Pennell v. Philadelphia & R. R. Co., (1914) 231 U. S. 675, 58 L. Ed. 430, 34 S. C. R. 220, commented on in 12 Mich. L. Rev. 220, the safety appliance acts of 1893 and 1903 were held not to require automatic coupling devices between the locomotive and the tender.

In 11 Mich. L. Rev. 141, is a note on a case in the lower federal courts on an issue raised by the safety appliance act.

train despatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the constitution."[37]

It was further held that the statute is not void for indefiniteness and that the requirement of reports is not an unwarranted search and seizure. The complaint that this requirement imposes self-incrimination was answered by saying that this objection is not open to a corporation. No specific attention was given to the question whether the particular limitations imposed are reasonable. The most drastic provision forbade certain classes of employees to remain on duty more than nine hours in any twenty-four hour period.[38]

The question whether an employee who was worked overtime was employed in interstate commerce arose in *Northern Pacific R. Co. v. Washington*[39] which held that the federal act superseded state regulations immediately even though the requirements of the federal act were not operative until a year after its enactment. On the character of the employment in question Chief Justice White said:

"The train although moving from one point to another in the state of Washington, was hauling merchandise from points outside of the state, destined to points within the state, and from points within the state to points in British Columbia, as well as in carrying merchandise which had originated outside the state, and was in transit through the state to a foreign destination. This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may have been carrying some local freight. In view of the unity and indivisibility of the service of

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[36](1911) 221 U. S. 612, 55 L. Ed. 878, 31 S. C. R. 621.

[37]Ibid., 618-619.

[38]This provision was held in United States v. Atchison, etc., R. Co., (1911) 220 U. S. 37, 55 L. Ed. 361, 31 S. C. R. 362, not to be violated by work from 6:30 A. M. to noon and from 3 P. M. to 6:30 P. M.

Missouri, etc., R. Co. v. United States, (1913) 231 U. S. 112, 58 L. Ed. 144, 34 S. C. R. 26, noticed in 12 Mich. L. Rev. 612, held that a separate penalty is due for each employee kept overtime, and that no deduction can be made of time spent by employees waiting idle while an engine was sent off for water and repairs, since they were on duty and subject to call. As the well-read writer of the opinion put it: "Their duty was to stand and wait."

In St. Louis, etc., R. Co. v. McWhirter, (1913) 229 U. S. 265, 57 L. Ed. 1179, 33 S. C. R. 858, it was held that a violation of the hours of service act by the carrier does not create an unconditional liability for injuries occurring during work beyond the statutory limit without proof of a connection between the injury and the working overtime. Another aspect of this case is considered in 27 Harv. L. Rev. 88.

[39](1912) 222 U. S. 370, 56 L. Ed. 237, 32 S. C. R. 160. See 12 Colum. L. Rev. 374 and 10 Mich. L. Rev. 555.

the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling."[40]

So also in *Erie R. C. v. New York*[41] in which the application of state law was held to be precluded by the fact that Congress had taken possession of the field, the employee whose labor was in question was found to be engaged in interstate commerce. He was a telegraph operator engaged in spacing and reporting trains from a signal tower. The facts disclose that a majority of the trains spaced and reported by him were engaged in interstate commerce, but do not tell us whether the trains themselves went beyond the limits of the state. A distinction which the state court had sought to draw between the particular duties of the employee and the interstate business of the railroad was declared to be untenable.

5. Live Stock Transportation Act

The federal live stock act of June 29, 1906, called "the act to prevent cruelty to animals while in transit" forbids the confinement of animals in interstate transit for a period of longer than twenty-eight consecutive hours without unloading them for a period of at least five hours for rest, water and feeding. The constitutionality of the statute was assumed in *Baltimore & Ohio S. S. R. Co. v. United States*[42] which, however, dealt only with its construction and held that penalties accrue at the expiration of the period of lawful confinement of the cattle first loaded and that distinct penalties accrue at the expiration of the period of lawful confinement of any other cattle, but that the number of penalties is not dependent upon the number of owners or the number of cattle or the number of cars in which they are shipped.

6. Live Stock Quarantine Act

The animal quarantine act of March 3, 1905, which authorizes the secretary of the interior to designate districts as quarantined and prohibits transportation from the quarantined portion of any state to any other state was held in *United States v. Baltimore & Ohio S. W. R. Co.*[43] not to apply to a connecting carrier which

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[40](1912) 222 U. S. 370, 375, 56 L. Ed. 237, 32 S. C. R. 160.

[41](1914) 233 U. S. 671, 58 L. Ed. 1155, 34 S. C. R. 756. The decision in the court below is discussed in 10 Colum. L. Rev. 667.

[42](1911) 220 U. S. 94, 55 L. Ed. 384, 31 S. C. R. 368. The decision in the court below is considered in F. Granville Munson, "The Unit of Offense in Federal Statutes," 20 Yale L. J. 28.

[43](1911) 222 U. S. 8, 56 L. Ed. 68, 32 S. C. R. 6.

continues the shipment to another point in the same state in which it received it from the carrier who had brought it in from another state. The decision is based entirely on the construction of the language of the statute with no suggestion that Congress could not have applied it to any and every carrier participating in a through interstate shipment.

(To be concluded)