

ant. Notice was in fact given. And it was admitted at the bar that the defendant had, at all times, actual knowledge and the opportunity to defend. The cases cited by the Court as holding that he could deliberately disregard that notice and opportunity and yet insist upon a defect in the statute as drawn, although he was in no way prejudiced thereby, seem hardly reconcilable with a long line of authorities. *Louisville & Nashville R. R. Co. v. Schmidt*, 177 U. S. 230, 238-239; *Simon v. Craft*, 182 U. S. 427, 436-437; *Harris v. Balk*, 198 U. S. 215, 227-228; *Baltimore & Ohio R. R. Co. v. Hostetter*, 240 U. S. 620; *Aikens v. Kingsbury*, 247 U. S. 484, 489. For the reasons stated, I do not need to attempt to reconcile them.

MR. JUSTICE STONE, dissenting.

I agree that the judgment should be reversed and the cause remanded, but with leave to the state court to determine whether the notice given to the plaintiff in error by the Secretary of State was required by the statute.

LINSTEAD, EXECUTRIX, *v.* CHESAPEAKE & OHIO
RAILWAY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SIXTH CIRCUIT.

No. 171. Submitted January 11, 1928.—Decided February 20, 1928.

Train crews of the Big Four Railroad, operating under a reciprocal arrangement for freight exchange between it and the C. & O. Railroad, ran Big Four locomotives and cabooses from the common terminal over a twelve-mile stretch of C. & O. track, on which were several stations, to a point on the C. & O. where they picked up trains of freight cars destined for the Big Four and returned with them to its line. Though the men were paid by the Big Four and subject to discharge or suspension only by it, the traffic was C. & O. traffic, paid for under its tariffs, and the work was done under the rules of that railroad and under the immediate supervision of its trainmaster.

Held that a member of such a crew, injured while so engaged, was *pro hac vice* an employee of the C. & O. Railroad, within the Employers' Liability Act. P. 32.

14 F. (2d) 1021, reversed.

CERTIORARI, 273 U. S. 690, to a judgment of the Circuit Court of Appeals, reversing a judgment recovered by the above-named petitioner in an action under the Federal Employers' Liability Act, for the death of her husband in an accident on the Chesapeake & Ohio Railway.

Mr. John W. Cowell was on the brief for petitioner.

Mr. Frank M. Tracy was on the brief for respondent.

Linstead was not an employee of The Chesapeake & Ohio Railway Company within the meaning of the Federal Employers' Liability Act. *Hull v. Philadelphia & Reading Rwy.*, 252 U. S. 475; *Wagner v. C. & A. R. R.*, 265 Ill. 250; *M. K. & T. Rwy. v. West*, 38 Okla. 581; *M. K. & T. Rwy. v. Blalack*, 105 Tex. 296; *Drago v. Central R. R.*, 93 N. J. L. 176.

The case at bar can not be distinguished from the *Hull* case, either upon the ground that the Big Four did not retain control over Linstead after he went upon the lines of the Chesapeake and Ohio Railway Company, or upon the ground that Linstead, when on the lines of the Chesapeake and Ohio Railway Company, was doing the work of that Company and not work of the Big Four Company.

Linstead's service was for his own company, as was *Hull's*. In each case the employee is subject to the rules and regulations of the connecting carrier when on its lines.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This was an action under the Federal Employers' Liability Act against the Chesapeake and Ohio Railway Com-

pany, of Virginia, by Katherine Linstead, as executrix, to recover damages for the death of her husband, who was a conductor in the employ of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, known as the Big Four, but who was working upon a freight train running upon the Chesapeake & Ohio Railway Company's tracks between Stevens, Kentucky, and Riverside, Ohio, near Cincinnati. The question in the case is, for whom he was working when he was killed, whether for the Chesapeake & Ohio Railway Company, the respondent, or the Big Four Company. He was one of a train crew of the Big Four Company composed of an engineer, a conductor and two brakemen. The Chesapeake & Ohio Company comes from the east to Cincinnati along the southern bank of the Ohio River and crosses that river at Cincinnati. The Big Four Company has no line in Kentucky but receives traffic and business from the Chesapeake & Ohio Company at Cincinnati, or near thereto on the north side of the river, delivering the traffic to the northwest. The terminal yard, so-called, of the Chesapeake & Ohio reaches from a station called Stevens, in Kentucky, for some twelve or thirteen miles to Riverside, near Cincinnati on the Ohio side, and in this twelve or thirteen miles the Chesapeake & Ohio line passes five stations, called Brent, Altamont, Newport Waterworks, Brick House and Cold Haven, and over an Ohio River bridge. It is convenient for both railroads in the interchange of traffic to make an arrangement by which the Big Four lends to the Chesapeake & Ohio a locomotive and caboose and a train crew to take the freight trains that come into Stevens, Kentucky, from the east to the Big Four Company at Riverside, Ohio, over the rails of the Chesapeake & Ohio. The Chesapeake & Ohio does not pay the Big Four Company any rental for the lending of its locomotive and caboose and crew in this matter, but it pays the consideration by a reciprocal service rendered to the Big Four by a train

crew and locomotive and caboose of the Chesapeake & Ohio. When the Big Four train crew and locomotive and caboose run on the track of the Chesapeake & Ohio between Stevens and Riverside, near Cincinnati, they are furnished with time-tables and rule books of the Chesapeake & Ohio Railway. They are under the supervision and control, so far as their work is concerned, of the train master of the Chesapeake & Ohio Company, whose jurisdiction reaches from Stevens to Riverside in the operation of the Chesapeake & Ohio road. The Big Four crew is not subject to discharge by any officer of the Chesapeake & Ohio road. In the operation of the train over the Chesapeake & Ohio line, they obey the signals of the switch tenders of that company and comply with the rules for operation on its line. The Big Four crew attends to nothing while on the Chesapeake & Ohio line but the train which it is sent over to Stevens to bring to the junction point at Riverside on the Ohio side. All of the members of the train crew, including the deceased, were paid by the Big Four Company.

On the morning of the accident, Linstead, the deceased, as conductor, had brought over his crew with the Big Four locomotive and caboose to Stevens, had attached the locomotive and caboose to a train of cars containing twenty-two loads and eighteen empties, and was proceeding to take them to Cincinnati and the junction with the Big Four load. The train had proceeded only a few miles on the Chesapeake & Ohio track when it was overtaken and run into by a commutation passenger train of the Chesapeake & Ohio Company running from Stevens to Cincinnati and back again. It was a train operated by the Chesapeake & Ohio Railway for the convenience of early morning passengers, and was not on the time-table. It was called the "Chippy." Linstead was in the caboose at the rear of his freight train. The caboose was shattered to pieces and Linstead was killed.

The trial was had in the District Court in Kentucky, held at Covington, and in the charge the Court used this language, which was duly excepted to:

"First, under the evidence here, you are authorized to believe, you couldn't find otherwise, that the Chesapeake and Ohio Railway is a common carrier engaged in interstate commerce, carrying freight and passengers between the states.

"Second, under the evidence you would be authorized to find, you couldn't find otherwise, that the defendant, her husband, on the occasion of the injury was in the employ of the Chesapeake & Ohio Railway Company and engaged in interstate commerce work."

The result of the trial was a verdict for \$16,500, upon which judgment was entered.

By writ of error, the case was carried to the Circuit Court of Appeals. That Court, by *per curiam*, reversed the judgment and remanded the case for further proceedings. The language of the Court was:

"We are unable effectively to distinguish the facts of this case from those of *Hull v. Philadelphia, etc., Ry.*, 252 U. S. 475,—an opinion which apparently was not brought to the attention of the trial court." The judgment of the Circuit Court of Appeals was brought here by certiorari. 273 U. S. 690.

The legal consequences of the relation between one in the general service of another who is in the special service of a third person are set forth in the case of the *Standard Oil Company v. Anderson*, 212 U. S. 215, 221. In that case the plaintiff was employed as a longshoreman by a master stevedore, who under contract with the defendant was engaged in loading a ship. The plaintiff was working in the hold, where, without fault on his part, he was struck and injured by a draft or load of cases containing oil, which was unexpectedly lowered from a winch, and the question presented was whether the winchman whose negligence

probably produced the injury was the servant of the owner of the ship or of the stevedore. After reference to the opinion of Chief Justice Shaw in the case of *Farwell v. Boston & Worcester Railroad Corporation*, 4 Metcalf, 49, this Court said that the master was answerable for the wrongs of his servant, not because he had authorized them nor because the servant in his negligent conduct represented the master, but because he was conducting the master's affairs, and the master was bound to see that his affairs were so conducted that others were not injured, and that this principle rested on the great principle of social duty adopted from general considerations of policy and security. The opinion continues:

"The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it.

"It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men became *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is

done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary coöperation, where the work furnished is part of a larger undertaking."

Now the work which was being done here by Linstead and his crew was the work of the Chesapeake & Ohio Railway. It was the transportation of cars, loaded and empty, on the Chesapeake & Ohio Railway between Stevens and Cincinnati. It was work for which the Chesapeake and Ohio road was paid according to the tariff approved by the Interstate Commerce Commission; it was work done under the rules adopted by the Chesapeake & Ohio Railway Company; and it was done under the immediate supervision and direction of the trainmaster in charge of the trains running from Stevens to Cincinnati, and that trainmaster was a superior employee of the Chesapeake & Ohio road. We do not think that the fact that the Big Four road paid the wages of Linstead and his crew or that they could only be discharged or suspended by the Big Four, prevented their being the servants of the Chesapeake & Ohio Company for the performance of this particular job.

The case of *Hull v. Philadelphia & Reading Railway Company*, 252 U. S. 475, which controlled the view of the Circuit Court of Appeals, is to be distinguished from this. In that case, Hull, the plaintiff's deceased, was in the employ of the Western Maryland Railway Company as a brakeman and was killed. The Western Maryland Company was an interstate carrier operating a railway from Hagerstown, Maryland, to Lurgan, Pennsylvania,

at which point it connected with a railway owned and operated by the defendant, the Philadelphia & Reading Railway Company, which extended from Lurgan to Rutherford in Pennsylvania. By arrangement between the two companies, through freight trains were operated from Hagerstown to Rutherford, one-half over one line, and one-half over the other, and each company ran its own locomotives and freight trains over the united line from Hagerstown to Rutherford, observing the rules of each company on its respective line. It was held that Hull was not a servant of the Philadelphia & Reading Company, by which he was killed, but only the servant of the Western Maryland Company. That was because the work which Hull was doing was the work of the Western Maryland Company, even though it was carried on for a part of the way over the rails of the Philadelphia & Reading Company. The locomotive belonged to the Western Maryland Company, the cars belonged to the Western Maryland Company and the loads that were carried were being carried for the Western Maryland Company, and presumably the rates which were received for the transportation were the receipts of the Western Maryland Company. In other words, the whole line between Hagerstown and Rutherford was exactly as if it had been jointly owned by the two companies, and jointly used by them for their freight trains. Therefore the work was done by the Western Maryland for itself and the mere transfer of the train owned by the Western Maryland and operated by it on to the rails of the Philadelphia & Reading Railway did not transfer the relation of the deceased from the general employment of the Western Maryland to a special employment by the Philadelphia and Reading as another master.

In the present case there was such a transfer and the line over which the transportation was effected and on which the work of transportation was done by the de-

ceased was the line of the Chesapeake & Ohio, which was master and remained in charge of the operation, with the immediate supervision of the Big Four crew which was lent for the very purpose of doing the work of the Chesapeake & Ohio.

For these reasons, the judgment of the Circuit Court of Appeals must be reversed and the judgment of the District Court of Kentucky restored.

Reversed.

HARKIN ET AL., RECEIVERS, v. BRUNDAGE,
RECEIVER, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

No. 117. Argued December 5, 6, 1927.—Decided February 20, 1928.

1. As between two courts of concurrent and coördinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by the filing of a bill is entitled to retain it without interference and can not be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute; but where the jurisdiction is not the same or concurrent, and the subject matter in litigation in the one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill, it is the date of the actual possession of the receiver that determines the priority of jurisdiction. P. 43.
2. A stockholders' suit having been brought in a state court to protect the assets of a corporation from wasteful and dishonest management and to restore them, when in safe condition, to the corporation after election of a new management, the attorney for the corporation fraudulently procured a postponement of a motion for receivers by agreeing in the state court that nothing would be done in the interim to affect the *status quo*, the real intention being to secure a prior receivership in the federal court. To this end, during the continuance, a collusive creditors' suit was begun against the corporation by a non-resident, a receiver was appointed with the corporation's consent, the bill, answer and consent being filed simultaneously, and the receiver took custody of the corporate property.