

DAVIS, FEDERAL AGENT, ET AL. *v.* PRESTON,
ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 188. Argued January 23, 1930.—Decided February 24, 1930.

1. One who, as Federal Agent, suffered judgment in an action under the Employers' Liability Act for death of a railroad employee occurring during federal control, ceased to be liable and was without standing to invoke a review of the judgment when he ceased to be Federal Agent. *P. 407.*
2. When, in such a case, a writ of certiorari to a state supreme court was petitioned for by both the retired Federal Agent and the surety on his appeal bonds below, who had been adjudged to pay costs, and the certiorari was granted, *held*:
 - (1) That the writ must be dismissed as to the main petitioner. *P. 408.*
 - (2) That the adjudication of liability for costs, which had not been made a ground of complaint, did not enable the surety to complain of the judgment in other particulars. *Id.*
 - (3) That the Federal Agent's successor in office could not be substituted in this court upon motion made after the statutory time within which he might have invoked a review of the judgment by certiorari had expired. *Id.*
3. The provisions relating to substitution, which were added to § 206 of the Transportation Act by Act of March 3, 1923, do not enable a former Federal Agent to invoke a review by this Court of a judgment which is of no legal concern to him, nor do they modify or enlarge the statutory period for invoking the reviewing powers of this Court. *Id.*

Certiorari to 118 Tex. 303, dismissed.

CERTIORARI, *post*, p. 539, to review a judgment of the Supreme Court of Texas affirming a judgment against the Federal Agent in an action under the Federal Employers' Liability Act.

Mr. W. L. Cook, with whom *Mr. Sidney F. Andrews* was on the brief, for petitioners.

Mr. Robert L. Cole, with whom *Mr. James W. Wayman* was on the brief, for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This proceeding relates to an action brought in a state court of Texas to recover for the death of a railroad employee occurring during federal control,—while the railroad was being operated by the Director General. The action was begun by the deceased's widow, in her personal right, against Walker D. Hines, as Director General; but by amendments and substitutions the action came to be one prosecuted under the Federal Employers' Act of 1908, c. 149, 35 Stat. 65, by the widow, as administratrix of the deceased's estate, against James C. Davis, as Federal Agent. Judgment went against the latter, and on successive appeals there was an affirmance by the Court of Civil Appeals and the Supreme Court of the State. The final affirmance included a provision adjudging the corporate surety on the appeal bond jointly liable with Davis, as Federal Agent, for the costs in the two appellate courts.

Within the allotted three months Davis, describing himself as Federal Agent, and the surety company petitioned this Court for a review on certiorari, and the petition was granted.

It now appears that when the petition was presented Davis had ceased to be Federal Agent and had been succeeded in that office by Andrew W. Mellon,—thereby making the judgment unenforceable against Davis and possible of satisfaction only after the substitution of his successor, Mellon. Therefore Davis was not then in a position to complain of the judgment or to invoke a review of it by this Court. All right and discretion to do either had passed to his successor in office. *Florida ex*

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rel. Wailes v. Croom, 226 U. S. 309; *Taylor v. Savage*, 1 How. 282, 286; *Dolan v. Jennings*, 139 U. S. 385, 387; *McClane v. Boon*, 6 Wall. 244.

It follows that the writ of certiorari granted on the petition of Davis was improvidently allowed and must be dismissed. The fact that the surety company joined in the petition can not alter the result. While the company was adjudged liable for the costs in the two appellate courts, that feature of the judgment of affirmance is not made a ground of complaint. Nor does it enable the company to complain of the judgment in other particulars. *Smith v. Indiana*, 191 U. S. 138, 149-150.

A motion is now made by Andrew W. Mellon, as Federal Agent, for his substitution in the present proceeding in the place of Davis. But the motion must be denied. The succession in office, as now appears, occurred before there was any effort to obtain a review in this Court. After the succession Davis was completely separated from the office and without right to invoke such a review or exercise any authority or discretion in that regard. Therefore his petition must be disregarded. The time within which such a review may be invoked is limited by statute and that time has long since expired. To grant the motion in these circumstances would be to put aside the statutory limitation and to subject the party prevailing in the state court to uncertainty and vexation which the limitation is intended to prevent.

The provisions relating to substitution which were added to section 206 of the Transportation Act of 1920 by the act of March 3, 1923, c. 233, 42 Stat. 1443, are cited in support of the motion. But, even when they are liberally construed, as they probably should be, they disclose no purpose either (a) to enable a former Federal Agent to invoke a review by this Court of a judgment which is of no legal concern to him, or (b) to modify or

enlarge the prescribed statutory period for invoking the reviewing power of this Court.

Motion for Substitution denied.
Writ of Certiorari dismissed.

COOPER *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 93. Argued January 15, 1930.—Decided February 24, 1930.

The Revenue Act of November 23, 1921, effective from the beginning of that calendar year, provides, § 202 (a) (2), that, in ascertaining the gain from a sale of property acquired after February 28, 1913, the basis shall be the cost, and that in case of property acquired by gift after December 31, 1920, "the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift." In November, 1921, A gave to B shares which A had bought in 1918 and which had increased in value. B sold them at that increased value within a week and was taxed on the basis of the difference between the price paid by A and the price received by B. *Held:*

1. The statute intends to reach the transaction retroactively. *P. 411.*
2. As so applied it is not invalid under the due process clause of the Fifth Amendment. *Id.*

Affirmed.

CERTIORARI, *post*, p. 537, to review a judgment of the Court of Claims rejecting a claim for recovery of money exacted as an income tax.

Mr. Wayne Johnson for petitioner.

Solicitor General Hughes, with whom *Assistant Attorneys General Youngquist and Galloway*, *Messrs. Sewall Key, J. Louis Monarch, and John Vaughan Groner*, Spe-