# SHERMAN ET AL. v. UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 14. Argued October 30, 1930.—Decided November 24, 1930.

1. The penalties of the Safety Appliance Acts are imposed upon the carrier only and cannot be enforced by action against the carrier's officers and agents. P. 29.
2. The State Belt Railroad, a water-front line in the City of San Francisco connecting many industrial plants and the line of the Southern Pacific Railroad with wharves belonging to the State of California and, through the wharves, with other common carriers engaged in interstate commerce by railroad, belongs to the State and is operated by it through the Board of State Harbor Commissioners, without profit, for the purpose of facilitating the commerce of the port. Charges for haulage are collected by the State and go to expense of operation and to the credit of the San Francisco Harbor Improvement Fund. In a prosecution of the individual members of the Board for alleged breaches of the Federal Safety Appliance Act, as amended, in the operation of the line, *held* that the action could not be maintained, since, assuming that the work done by the line was interstate commerce, the statute, if it applied to any one, could apply only to the State and not the defendants, who were merely its agents. It was therefore unnecessary to decide whether the statute should be construed to embrace the State. P. 30.

District Court reversed.

Upon a certificate of questions arising in the Circuit Court of Appeals upon consideration of a judgment of the District Court inflicting penalties under the Safety Appliance Act. The whole record was brought up here by certiorari.

*Mr. Karl D. Loos*, with whom *Messrs. Leon E. Morris* and *Edward M. Jaffa* were on the brief, for Sherman et al.

*Assistant to the Attorney General O'Brian*, with whom *Solicitor General Thacher, Messrs. Charles H. Weston,*

*James Maxwell Fassett* and *William G. Davis,* Special Assistants to Attorney General, and *Paul D. Miller* were on the brief, for the United States.

The State Belt Railroad is a common carrier engaged in interstate commerce within the meaning of the Safety Appliance Act and the supplemental Act of April 14, 1910. *Belt Ry. Co.* v. *United States,* 168 Fed. 542; *United States* v. *Union Stock Yards,* 226 U. S. 286, 305; *Western Oil Refining Co.* v. *Lipscomb,* 244 U. S. 346, 349; *South Carolina* v. *United States,* 199 U. S. 437, 454, 455; *Georgia* v. *Chattanooga,* 264 U. S. 472, 481; *Mathewes* v. *Port Utilities Comm.,* 32 F. (2d) 913; *McCallum* v. *United States,* 298 Fed. 373, certiorari denied, 266 U. S. 606.

The suit is not against the State. Appellants, as the operators of the railroad, are liable for violations of the Act. *Ex parte Young,* 209 U. S. 123, 150, 155; *Truax* v. *Raich,* 239 U. S. 33, 37; *Reagan* v. *Farmers Loan & Tr. Co.,* 154 U. S. 362, 390–391; *Johnson* v. *Lankford,* 245 U. S. 541; *Hopkins* v. *Clemson College,* 221 U. S. 636, 643; *Belknap* v. *Schild,* 161 U. S. 10, 18; *McCallum* v. *United States,* 298 Fed. 373, certiorari denied, 266 U. S. 606; *Tilden* v. *United States,* 21 F. (2d) 967. Distinguishing: *Kentucky* v. *Dennison,* 24 How. 66; *In re Ayers,* 123 U. S. 443; *Smith* v. *Reeves,* 178 U. S. 436.

Appellants are within the term "common carrier" as used in the Safety Appliance Act. *United States* v. *Nixon,* 235 U. S. 231.

There seems no valid distinction here between a receiver, who operates the property of a railroad company through appropriate agents, and appellants, who operated the property of the railroad through a superintendent appointed by them and under their supervision and control.

Appellants can be held liable for violations which occurred without their personal knowledge, against their consent and contrary to their orders and instructions.

*Robertson* v. *Sichel,* 127 U. S. 507, is inapplicable because the Act imposes an absolute liability upon the carrier, which is not dependent on the common law rule of reasonable care or the common law rule of liability of the principal for the acts of his agent. *St. Louis & I. M. Ry.* v. *Taylor,* 210 U. S. 281, 294; *Chicago, B. & Q. Ry.* v. *United States,* 220 U. S. 559.

The exemption of state agencies and instrumentalities from national taxation is limited to those which are strictly of a governmental character, and does not extend to those used by the State in carrying on an ordinary private business. *South Carolina* v. *United States,* 199 U. S. 437.

If the Federal Government may tax state agencies and officers who are engaged in ordinary private business, it would seem to follow that, under its commerce power, it may fine or penalize state officers when they are engaged in interstate commerce. *Mathewes* v. *Port Utilities Comm.,* 32 F. (2d) 913.

There is no evidence, and it is not suggested, that to require the railroad to comply with the Act would interfere with the appellants in performing their functions, or hinder the efficient exercise of any governmental function of the State.

There is no reason to suppose that Congress, in enacting the Safety Appliance Act, was less solicitous of the safety of employees of a common carrier owned and operated by a State than it was of the employees of a carrier privately operated, or that it intended to withhold from the former the protection which it gave the latter. *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 17; *Chesapeake & O. Ry. Co.* v. *United States,* 249 Fed. 805, certiorari denied, 248 U. S. 580.

Assuming that this is a suit against the State, the Act applies to the operations of the railroad and gives the United States District Court jurisdiction. Distinguish-

ing: *Guarantee Title & T. Co.* v. *Title Guaranty & S. Co.,* 224 U. S. 152; *United States* v. *Herron,* 20 Wall. 251; *In re Fowble,* 213 Fed. 677; *Sullivan* v. *School District,* 179 Wis. 502. Each of these cases involved the application of a statute against the enacting sovereign. *United States* v. *Herron, supra,* and *Dollar Savings Bank* v. *United States,* 19 Wall. 227, point out that the historical basis for the principle relied upon by appellants is to be found in the English practice, where the Crown is held to be unaffected by legislation not specifically directed against it.

The Act applies to "any common carrier" engaged in interstate commerce, and a common carrier owned and operated by a State is therefore within its express terms. No rule of statutory construction calls for a different result. Considerations of the purpose of Congress in enacting this legislation, and of the liberal construction to be given it, also lead to the conclusion that the Act applies to the operators of this railroad.

Even if the suit is against the State, the United States District Court had jurisdiction. Const., Art. III, § 2, cl. 2; *Ames* v. *Kansas,* 111 U. S. 449.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case comes here on a certificate of questions of law from the judges of the Circuit Court of Appeals for the Ninth Circuit. Subsequently the entire record was brought up, but the facts sufficiently appear in the certificate and both they and the questions may be abbreviated here. The suit is brought by the United States against the appellants by name, described as 'constituting the Board of State Harbor Commissioners of the State of California, operating The State Belt Railroad,' to recover penalties for alleged breaches of the Safety Appliance Acts. March 2, 1893, c. 196, 27 Stat. 531; April 1, 1896, c. 87, 29 Stat. 85; March 2, 1903, c. 976, 32 Stat. 943; April 14, 1910, c.

160, 36 Stat. 298. U. S. Code, Tit. 45, §§ 1, 2, 6, 8, 11, 12, 13, 16. The penalties are imposed upon 'any common carrier engaged in interstate commerce by railroad,' and the broad question is whether the defendants are liable under the Acts.

The matters complained of occurred upon what is known as the State Belt Railroad. The road is about five miles long, within the City of San Francisco, runs nearly parallel with the water front of the harbor, and connects many industrial plants and the line of the Southern Pacific Railroad Company with wharves belonging to the State and through the wharves with other common carriers engaged in interstate commerce by railroad. It may be assumed that the work done upon the Belt Line was interstate commerce. But the line belongs to and is operated by the State; the work is done without profit for the purpose of facilitating the commerce of the port, and the funds received after paying expenses go to the Treasury of the State to the credit of the San Francisco Harbor Improvement Fund. California has not gone into business generally as a common carrier, but simply has constructed the Belt Line as an incident of its control of the harbor—a State prerogative. Cal. Political Code, § 2524. The defendants are officers of the State charged with the administration of the Harbor of San Francisco and of the State Belt Railroad in connection therewith. They had no hand in or knowledge of the alleged violations of law, the immediate supervision being the duty of an inspector appointed by them, and his subordinates being Civil Service employees of the State.

On these facts in our opinion the statute, if it applies to anyone, can apply only to the State. The suit is not to recover damages for a tort, which, if a wrong on the part of the master, is at least equally a wrong on the part of the servant who personally is guilty of the act or omission that caused the harm. Here the suit is for a penalty attached to an offence—and the only party on whom the

liability is imposed is the common carrier. The statute is not like the Hours of Service Act of March 4, 1907, c. 2939, § 3, 34 Stat. 1415; Code, Title 45, § 63; that in terms extends the liability to officers and agents. It seems to us plain that as between the Board of Harbor Commissioners and California the carrier here is the State, by which it is agreed that the Road was owned and operated, which received such pay as was required for the work that was done, and which did the work for the purpose of facilitating the commerce of its principal port. The principal and its agents cannot both be the common carriers aimed at. One is and the other is not subjected to the penalty. One is superior, the other inferior. The superior is the one that operated the road and the one whose commands the others were bound to obey.

The suit is brought against the appellants individually. This is conceded by the Government and sufficiently appears from the declaration and from the judgment against them by name, entered after they had ceased to be members of the Board. Manifestly if we are right in what we have said the judgment is wrong and we are relieved from the duty of considering whether the Safety Appliance Act should be construed to embrace the State.

An answer to other questions proposed is unnecessary because of our conclusion that the judgment against the defendants cannot be sustained.

*Judgment reversed.*

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## PARAMOUNT FAMOUS LASKY CORPORATION ET AL. v. UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 83. Argued October 27, 1930.—Decided November 24, 1930.

Ten corporations, competitors in the business of supplying the film prints used by exhibitors of motion pictures throughout the Union and controlling 60% of that business, agreed amongst themselves to contract with exhibitors for future exhibition of pictures