

North Western Ry. Co. v. Lindell, 281 U. S. 14, 17. We see no reason to doubt the constitutionality of the present application of the state law. The policy of it is embodied in equity rule 30. See *Aldrich v. Blatchford*, 175 Mass. 369; 56 N. E. 700.

The case is within the jurisdiction of the District Court in all other respects if the respondent has been served with process effectively. We are of opinion that the service was good and that the case should not have been dismissed.

Judgment reversed.

ATLANTIC COAST LINE RAILROAD CO. v. POWE,
ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 600. Argued May 1, 1931.—Decided May 18, 1931.

1. In an action under the Employers' Liability Act for death of a switchman, killed while on the outside of a moving car by being brought into contact with a semaphore near the track, there is no ground to charge negligence in placing the semaphore too near the track when the distance exceeds the minimum permitted by the state railroad commission, and when it does not appear that to make the place safe by increasing the distance would have been practicable for the railroad company. P. 402.
2. The question in such cases is not whether a reasonable insurance of employees against injury should be thrown upon the traveling public through the railroads, but whether the railroad is liable under the statute according to the principles of the common law regarding tort. P. 403.
3. The denial of a writ of certiorari imports no expression of opinion upon the merits of the case. *Id.*
159 S. E. 473, reversed.

CERTIORARI, 282 U. S. 836, to review a judgment affirming a judgment for the present respondent in an action under the Federal Employers' Liability Act.

Mr. Arthur R. Young, with whom *Messrs. Thomas W. Davis* and *V. E. Phelps* were on the brief, for petitioner.

Mr. John P. Grace, with whom *Mr. W. Turner Logan* was on the brief, for respondent. *Mr. Lionel K. Legge* also submitted a brief for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action under the Federal Employers' Liability Act for causing the death of Marshall, the respondent's deceased. It has been before the Court after an earlier trial, *Atlantic Coast Line R. Co. v. Tyner*, 278 U. S. 565, and now is brought here again to review a judgment of the Supreme Court of South Carolina affirming a judgment for the plaintiff. 159 S. E. 473. The petitioner contends that it was entitled to have a verdict directed in its favor on the grounds that there was no evidence that it was negligent and that Marshall must be taken to have assumed the risk of the supposed cause of his death.

It may be assumed that Marshall, a switchman, was killed while on the outside of a moving car by being brought into contact with a semaphore near the railroad track. The only ground for charging the Company with negligence that we regard as material is the suggestion that the semaphore was too near the track. The general principles laid down with regard to mail cranes in *Southern Pacific Co. v. Berkshire*, 254 U. S. 415, and *Chesapeake & Ohio Ry. Co. v. Leitch*, 276 U. S. 429, apply equally to semaphores. It is impracticable always to set such structures so far away as to leave no danger to one leaning out, and in dealing with a well known incident of the employment, adopted in the interest of the public and of the employees, it is unreasonable to throw the risks of it upon those who were compelled to adopt it.

The semaphore in this instance was four feet and ten inches at its base from the outer edge of the track and probably a little more at four feet above the top of the rail. An order of the South Carolina Railroad Commission, made, as it states, in consideration of the safety of the public and employees of the road and of the necessity for employees to give and receive signals, provides that no structure be allowed nearer than four feet from the outer edge of the main or side track, measurement being made four feet above the top of the rail. It will be seen that the Railroad Company in this case more than complied with the order. It is true that four feet was a minimum distance, but it satisfied the requirement of the Commission, and it would be going far to say that the Railroad Company was not warranted in supposing that it had done its duty, so far as the Commission was concerned, when it put the semaphore four feet and ten inches away. Marshall from his previous experience probably knew of the semaphore as he was required to do by the rules of the road. It was shown that some other semaphores were farther from the track, but the circumstances do not appear, and there is nothing to show that in this case the petitioner could have made the position safer than it was, except by changing the place of the track. As remarked in *Southern Pacific Co. v. Berkshire*, 254 U. S. 415, 417, the question is not whether a reasonable insurance against such misfortunes should be thrown upon the travelling public through the railroads, but whether the railroad is liable under the statute according to the principles of the common law regarding tort. No negligence is proved against the petitioner. It is urged that a certiorari was denied in *Central of Georgia Ry. Co. v. Davis*, 7 F. (2d) 269, which seemed to qualify the doctrine of the *Berkshire* case. But "The denial of a writ of certiorari imports no expression of opinion upon the merits of the

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case, as the bar has been told many times." *United States v. Carver*, 260 U. S. 482, 490.

Judgment reversed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* LOGAN.

SAME *v.* BRUCE.

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

Nos. 521 and 522. Argued April 29, 1931.—Decided May 18, 1931.

1. Prior to March, 1913, the taxpayer held shares in one of several steel companies, owners of the stock of a company engaged in mining ore under a long term lease. The lease did not require production of maximum or minimum tonnage or any definite payments. By agreement among themselves, the steel companies were entitled to share the ore extracted according to their stock holdings in the mining company. In 1916, the taxpayer and her co-shareholders sold their shares to another steel company, which thus became entitled to participate in the ores thereafter taken from the leased mine. The consideration for the sale was part cash and in part the purchaser's agreement to pay annually thereafter for distribution among the selling stockholders 60 cents for each ton of ore apportioned to it. *Held*, that until the receipts by the taxpayer under this contract shall have equalled the value of her shares in March, 1913, they are return of capital and are not taxable in part as income. P. 412.
 2. Another of the vendor stockholders died in 1917, bequeathing her interest in the payments to be made by the purchaser. *Held* that, prior to return of the amount at which the bequest was valued for federal estate tax purposes, the payments received by the legatee are not income. P. 413.
- 42 F. (2d) 193; *id.* 197, affirmed.

CERTIORARI, 282 U. S. 833, to review judgments reversing orders of the Board of Tax Appeals determining income tax deficiencies. 12 B. T. A. 586.