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Note and Comment

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NOTE AND COMMENT

THE NATIONAL ARMY ACT AND THE ADMINISTRATION OF THE "DRAFT".— In *Arver* v. *U. S.*, and five similar cases attacking the validity of the so-called National Army Act of May 18, 1917, Public Statutes, No. 12, 65th Congress, c. —, — Stat. —.) the Supreme Court unanimously sustained the validity of the Act so far as attacked. The contention that compulsory military service as provided in the Act is contrary to our fundamental conception of the nature of citizenship, and that such compulsion is repugnant to a free government and in conflict with the guaranties of the Constitution as to individual liberty, the Court disposed of summarily and completely by pointing out that the power given to Congress to raise armies was plenary, subject to no limitations and co-extensive with the same powers possessed by other governments. This part of the argument runs largely upon historical grounds. As the Court says, the arguments of the objectors are clearly untenable. The contention that even though Congress possesses the power to raise armies, its members cannot be sent out of the United States without their consent is due, as the court points out, to the wholly inexcusable confusion between limitations upon the power of Congress over the organized State militia and the power of Congress over such armies as it

may raise under Art. 1, § 8, of the Constitution. The objections raised were obviously flimsy if not wholly insincere and were based upon no sound legal grounds. For this reason, and as the gist of the Court's opinion has been made widely known extended comment here is undesirable. The opinion of the Court with its marginal notes contains important historical references showing that the principle of the Act in question is quite in accord with our own colonial and national experience and policies and with that of other great nations of the world.

On the same day in the case of *Jones* v. *Perkins,* No. 738, the Court affirmed the decision in the similar case in 243 Fed. Rep. 997, in which a writ of habeas corpus, asked for on the ground of the alleged unconstitutionality of the Act, was refused, the court merely referring to its reasoning and decision in the Arver case as disposing of the contention.

On June 14th the Court handed down three other opinions touching the same act of Congress—that which attracted the greatest public attention, at the time of the occurrence involved, being the case of *Emma Goldman and Alexander Berkman* v. *U. S.,* No. 702, 38 Sup. Ct. 166. The Court reduces the numerous contentions of plaintiffs in error to three, of which the first is based upon the alleged unconstitutionality of the Selective Draft Law. Again the Court referred to the Arver case as disposing of this attack. The indictment in the *Goldman & Berkman Case* was under sections of the U. S. Criminal Code and charged the unlawful conspiring together and with others to induce persons who were under duty to register in accordance with the Selective Draft Law to disobey said law by failing to register. The second of the contentions is that as the conspiracy was not successful, no crime was committed. But inasmuch as the indictment charged not only the conspiring but also the doing of overt acts in furtherance of the conspiracy, this was in and of itself essentially and substantively a crime, punishable as such without regard to the success or failure of the criminal act. This had been established in previous decisions. *U. S.* v. *Rabinowich,* 238 U. S. 78; *U. S.* v. *Holte,* 236 U. S. 140; *Joplin Mercantile Co.* v. *U. S.,* 236 U. S. 534. The third contention of plaintiffs in error was comprised of varied assertions that the evidence did not tend to show guilt, a contention which involved inexcusable effort to induce the Supreme Court to invade the province of the jury by passing upon the questions of the credibility and the weight of evidence.

Kramer v. *U. S.,* No. 680, 38 Sup. Ct. 168, was disposed of by decisions in the *Arver* and *Goldman Cases.* In *Ruthenberg, Wagenknecht and Baker* v. *U. S.*. No. 656, 38 Sup. Ct. 168, in addition to points disposed of in the *Arver Case* the plaintiffs in error urged two objections, both of which they should have known and probably did know had been adversely disposed of by the Supreme Court in numerous earlier cases, They asserted that they were Socialists and claimed that the grand and trial jurors were made up exclusively of men of other political parties and of property owners. Precisely the same point in principle had been raised in numerous cases by negro defendants who had been tried by juries composed exclusively of white men. Such a trial had been pronounced constitutional as long ago as

1879. *Va.* v. *Rives,* 100 U. S. 313, 25 L. Ed. 667 and in a long line of cases including *Thomas* v. *Texas,* 212 U. S. 278. The other objections were even more devoid of merit and need not be noticed here.

The validity of certain methods for administering the Selective Draft Law as provided for therein was brought into question in three cases in District Courts of the U. S. In *Ex Parte Hutflis,* 245 Fed. Rep. 798, the District Court for the Western District of N. Y. sustained by implication the provision for the creation of Legal and District Boards to determine all questions of exemption and all claims for excluding or discharging individuals or classes from the draft. The relator, who was unable to read or write English, petitioned for a writ of habeas corpus to release him from the custody of the military authorities on the ground that though he was an alien, through ignorance he had failed to file his claim for exemption within the time limited, and that on learning the requirements of the law, after he had been accepted for the army, he applied to a Local Board for a form upon which to file his claim for exemption, but by mistake was given the wrong blank. It resulted from these facts that the petitioner had no hearing, that his exemption was not passed upon and that as a result he was subject to military authority though exempted by the terms of the Act and, as he claimed, by treaty rights in accordance with the treaty between the United States and Austria-Hungary. The court disposed of the treaty claim by saying that the Selective Draft Law impliedly exempts aliens who are merely denizens of the United States and, moreover, that the Draft Law makes no provision for exemption because of treaty rights. Unquestionably this is sound. A later act of Congress controls or prevails. *Taylor* v. *Morton,* 2 Curt. C. C. 454, Fed. Cas. No. 13,799; *Head Money Cases,* 112 U. S. 580; *Rainey* v. *U. S.* 232 U. S. 310, 58 L. Ed. 617. The court then made what appears to be an equitable disposition of the case by refusing to make the writ absolute at the time, retaining jurisdiction for ten days to allow an application to the Adjutant General for permission to reopen the case before the Local Board.

In *United States ex rel Troiana* v. *Heyburn, Sheriff,* 245 Fed. Rep. 360, the District Court for the Eastern District of Pa. refused to issue the writ of habeas corpus on behalf of relators who are aliens, who sought by such writ in effect to secure a review by the Court of the proceedings of the Local Board which had passed upon their claims for exemption. This Court too sustained the validity of the Selective Draft Law in providing for the Local Board and held that the courts would not review the proceedings of such tribunals except upon a showing of lack of jurisdiction, usurpation of power or arbitrary denial of rights. The court here was upon thoroughly established ground. The principle that administrative tribunals may be given finality of decision and that the courts will not review their proceedings except in the cases mentioned is too well established to require much citation. See, however, *U. S.* v. *Ju Toy,* 198 U. S. 253, 49 L. Ed. 1040; *Kendall* v. *U. S.,* 12 Peters 524; *Bates & Guild Co.* v. *Payne,* 194 U. S. 106; *Butterfield* v. *Stranahan,* 192 U. S. 470, 48 L. Ed. 525; and article by T. R. POWELL, 1 Am. Pol. Sci. Rev. 583.

In *Ex. Parte Blackington*, 245 Fed. Rep. 801, a somewhat shocking case was presented. Relator had enlisted in the National Guard and was afterward drafted into the Federal Service. His petition claims that he was below the required height and had other serious physical disqualifications. He was favorably passed upon for the National Guard Service by a medical officer who was prejudiced against him and who had declared that he would "get even" with petitioner for some prior occurrence. Petitioner knew of these facts at the time he volunteered and made no objection; but after he was drafted into the National Army he consulted other physicians who advised him that he could not safely perform military duty. Meantime he had been examined and passed upon favorably by the Federal medical officers for the National Service and though he endeavored persistently to be discharged therefrom, he failed. The Court dismissed the petition and remanded the petitioner to the military authorities, largely upon the ground that the enlistment was voluntary, that neither the party enlisting nor the military authorities occupied a fiduciary relationship with each other, and that the purpose of the examination is not to give to the applicant assurances that he is physically fit for military service, but only to prevent undesirable men from getting into the army. *U. S.* v. *Cottingham*, 1 Rob. (20 Va.) 615. Perhaps this decision was sound. Perhaps there were facts as brought out upon the petition and hearing in open court which tended to convince the Court that petitioner was endeavoring to shirk. But upon the allegations of the petition as reported by the Court it would seem that here was a case calling for a re-examination, if the law and rules permitted it.

The objections urged against the Draft Law and its administration in all the cases here noted, except the last one, are obviously trivial or worse. An examination of the names of the score or more contestants would cause one to suspect that in some cases at least their obstructing efforts were part of that treacherous hostile propaganda, with which we now know our country has been menacingly infiltrated, both before and since the beginning of the War. The patriotic and clear-visioned pronouncement of our courts in these cases is a cause for sincere appreciation and congratulation.

H. M. B.

INTERSTATE COMMERCE COMMISSION—INTRASTATE RATES.—The marvelous possibilities for collision between State and Nation involved in our dual form of government are nowhere better or more often exhibited than in commerce regulation. We have long been learning the definition of the commerce which the constitution gives Congress power to regulate. It is only recently that we are finding how this power reaches over into purely intrastate business done by a carrier also engaged in interstate commerce. That nearly all rail carriers are now engaged in such business, even when their lines are wholly intrastate, has been often illustrated under the Second Employer's Liability Act. In *Employers' Liability Cases*, 207 U. S. 463, Congress was warned off the State preserves, only to prove that the First Act was wrong, not in its sweep, but in its failure to save to the states in

words what seems lost to them in fact. The Second Act stands, *Second Employers' Liability Cases,* 223 U. S. 1, and seems to reach practically every railway employee, because however much of his time is devoted to purely intrastate business, some at least is almost sure to touch interstate traffic, and this is enough to bring him under control of Federal law. See the very recent case of *Cholerton* v. *D. J. and C. Ry.* (Mich., 1917), 165 N. W. 606, holding that a track hand of a railroad wholly in the State of Michigan is under Federal Act.

The recent case of *Illinois Central R. R. Co.* v. *Public Utilities Commission of Illinois* (1918), 38 Sup. Ct. 170, illustrates the same collision of State and Federal regulation in the field of rate making. This is merely the latest in a series of cases before that court. Evidently it is not the last. Of the cases already decided we may review a few. The leading case of *Smyth* v. *Ames* (1898), 169 U. S. 466, established the general doctrine that State Regulation of rates was so connected with interstate rates that no state could fix intrastate rates so low as to compel the railroad to recoup state losses out of interstate business. This decision might have rested solely on the Fourteenth Amendment, on the ground that low rates might amount to a practical confiscation of property. It did not even intimate that the Federal law might directly fix purely intrastate rates. The Minnesota Rate Cases, (1913), 230 U. S. 352, 397, 418, 430, raised squarely this question: "Was the State debarred from fixing reasonable rates on traffic, wholly internal, as to all state points so situated that as a practical consequence the carriers would have to reduce the rates they had made to competing points without the State, in order to maintain the volume of their interstate business, or to continue the parity of rates, or the relation between rates as it had previously existed?" The court asserted the plenary power of Congress to regulate commerce among the several states, and sweepingly held the execution by Congress of this power was "not to be denied or thwarted by the commingling of interstate and intrastate operations." The court declined to decide whether Congress might control intrastate rates if they tended to give an undue or unreasonable preference to any locality, or to unreasonably discriminate between localities in different states. There was, however, a strong affirmative inference in various paragraphs of the opinion, but the court said if such were the case it "would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the Courts".

The next year the question actually reached the Supreme Court in the *Shreveport Rate Case,* 234 U. S. 342. Interstate rates between Shreveport, La., and Texas points were higher than Texas rates between Dallas and Houston, Texas, and the same Texas points, to the evident disadvantage of Shreveport. The Interstate Commerce Commission ordered the roads to cease and desist from exacting higher rates from Shreveport to Dallas and Houston, and intermediate points, than are charged toward Shreveport for equal distances. To obey the roads might lower interstate rates, already found reasonable by the Interstate Commerce Commission, raise intrastate rates, fixed by the Texas Commission, or equalize by changes in each direction. Whether wisely or not, very naturally the roads chose to raise intra-

state rates, obeying the Interstate Commission and disobeying the Texas Commission. The Supreme Court sweepingly upheld the power of Congress, either directly or through a Commission, to control in all matters interstate commerce, even to the extent of setting aside intrastate rates fixed by state law, when such rates affect interstate commerce.

This decision was not accepted with good grace by the states. The later history of the Shreveport case may be read in *Eastern Texas R. R.* v. *Railroad Commission of Texas* (1917), 242 Fed. 300, from which it appears that the rates were still in dispute three years after the decision. The Supreme Court of South Dakota in *State* v. *American Express Co.*, 161 N. W. 132, showed its unregenerate spirit. Arkansas, however, recognized the full force of the decision as affecting Arkansas rates discriminating against Memphis, Tenn., *St. Louis, I. M. & S. Ry. Co.* v. *State* (1917), 197 S. W. 1. Meantime the South Dakota case reached the U. S. Supreme Court, *American Express Co.* v. *Colwell* (1917), 244 U. S. 617, where the Supreme Court of South Dakota was administered a mild rebuke for questioning the principle after the Shreveport case. As was to be anticipated, the carriers were busy trying out the possibilities of the Shreveport decision in relieving them from low rates imposed by the States. In South Dakota they had cheerfully raised state rates, not merely to the points named in the order of the Interstate Commerce Commission, but to other points as well. In so far as changes had been made beyond the order of the Commission the court found them unjustifiable.

One has only to reflect on the number of cities situated near state boundaries to see what a large portion of all intrastate rates might be brought under orders of the Interstate Commerce Commission. Especially is this true along the great boundary streams, the Mississippi and Missouri rivers. The carriers were not slow to look for holes through the defensive works erected by the states about the tariff schedules. The next case involved rates between Chicago and points on either side of the Mississippi, especially St. Louis, Mo., and East St. Louis, Illinois, and Keokuk, Ia., and Hamilton, Ill. Upon complaint of the Business Men's League of St. Louis, the Interstate Commerce Commission found that passenger fares between St. Louis and Illinois points tributary to St. Louis subject St. Louis to undue disadvantage as to East St. Louis and the same Illinois points in so far as the interstate mileage rate found to be reasonable, 2.4 cents per mile, exceeded the 2 cent rate fixed by the Illinois statute. A Keokuk association and numerous interested bodies in Illinois intervened. The Commission ordered that on reasonably direct lines between Chicago and St. Louis and Chicago and Keokuk, rates to Illinois points should be raised to the interstate rate, 41 I. C. C. R. 13. This order was promptly evaded by the traveling public, by the use of two tickets, one at intrastate rates to a point near St. Louis or Keokuk, and one at interstate rates for the remaining distance. The Commission accordingly enlarged the order to include such intermediate points. 40 I. C. C. R. 503. To make a thorough job the railroads concluded the only way to avoid discriminations and evasions was to raise all Illinois passenger rates to 2.4 cents a mile. This they proceeded to do. It would be but another step to

apply the same principle to freight rates and state rate regulation would be at an end.

In *Illinois Central R. R. Co.* v. *Public Utilities Commission of Illinois, supra,* the Supreme Court does not settle this question. It does decide that the order actually made by the Commission is so indefinite and uncertain as to render it inoperative as to intrastate rates established by the Illinois statute. It will never be presumed that "Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless and except so far as its purpose to do so is clearly manifested". The rule that applies to Congress governs also an order of a subordinate agency of Congress, the Commission. It now remains to be seen whether the Commission will make a rule so clear as properly to raise the question of the Federal power to supersede all state regulation of rates. The complications of language in the orders made in the instant case show the difficulties in making such an order clear and full without covering all state rates. E. C. G.

ACQUIRING JURISDICTION IN GARNISHMENT PROCEEDINGS.—Garnishment is a proceeding provided by statutes found in every state, for the purpose of laying hold of something belonging to a defendant or judgment debtor but actually in the hands of someone else, and appropriating it to pay the debt due from the defendant or judgment debtor. If the proceeding is instituted ancillary to a pending suit, and before judgment, it is a species of attachment. If it is issued ancillary to a judgment already recovered it is a species of execution. If the third person summoned as garnishee is merely bailee of property belonging to the judgment debtor or defendant the garnishment differs from an actual levy into the hands of the sheriff under an attachment or execution only in the fact that the actual custody and possession remain with the garnishee instead of passing to the hands of the sheriff. If the garnishee has nothing in his hands belonging to the principal defendant and is only indebted to him, the garnishment merely stops payment, creates a lien on the sum due, and eventually causes the garnishee to pay into court for the benefit of the plaintiff instead of paying to the defendant according to his original liability. To repeat, it is in substance a seizure of the principal defendant's goods or choses in all cases, and appropriation of them to satisfaction of his obligations.

Statement of these aphorisms is prompted by the decision of the Supreme Court of Michigan in *Katt* v. *Swartz* (1917), 165 N. W. 717, sustaining a plea of payment into court in garnishment as an absolute bar to suit against the garnishee by his creditor, and at the same time saying that the judgment against the principal debtor (the garnishee's creditor) in the proceedings to which the garnishment was ancillary was void because the summons to the debtor in that proceeding was issued and served only four days before the return day instead of from six to twelve days before, as required by the statute.

The statement of the court that the judgment against the principal defendant was void was not necessary to the decision. The question as to the

effect of that adjudication as a judgment *in personam* was not before the court. The meaning of the court may fairly be interpreted to be this: admitting for the sake of argument that the judgment against the principal debtor is void as a judgment *in personam*, it was sufficient to give the court jurisdiction *in rem* to the extent that the judgment against the garnishee and his payment under it divested the principal defendant of his right of action against the garnishee. If that was not the meaning of the court, it certainly is the effect of the judgment; for, as stated in the opening paragraph, garnishment is essentially and unavoidably *in rem* as to the principal defendant's property.

If the owner of anything is deprived of it by a judicial proceeding to which he is in no way a party, he is not bound by the decision. If he has not had his day in court the decision is either *res inter alios acta* or it is *coram non judice*. A corollary of this proposition, admitted by all courts, and often declared and applied by the Supreme Court of Michigan, is that if the proceeding against the principal defendant is void, payment by the garnishee of a judgment rendered against him is no protection to him against an action by the principal defendant. *Laidlaw* v. *Morrow*, 44 Mich. 547; *Coe* v. *Hinkley*, 109 Mich. 608; *Moore* v. *Speed*, 55 Mich. 84.

Therefore, interpreting the instant case in the only way in which it is possible to interpret it, it decided that failure to comply with the statutory form (in this case relating to the notice to the principal defendant) does not render the statutory proceeding *in rem* void, so as to expose it to collateral attack. Recognizing this fact, we impulsively rise to applause and acclamation, as we see the Supreme Court of Michigan turning away from the heresy promulgated in this state away back in 1847, in the case of *Greenvault* v. *Farmers and Mechanics' Bank*, 2 Doug. 498, and wheeling into line with the increasing procession following the lead of the Supreme Court of the United States in the case of *Voorhees* v. *The Bank of the United States*, 10 Peters 449; *Cooper* v. *Reynolds*, 77 U. S. (10 Wall.) 308; etc.

The Supreme Court of Michigan was the original sinner, the first state to go astray. She has persisted in her error started in 2 Doug. 498 for many years, and has misled others. The Supreme Court of Nebraska followed her lead for several years, but finally in *Darnell* v. *Mack* (1896), 46 Neb. 740, discovered her error and turned to the right. For review of other cases see article in 1 MICH. L. REV. 645, on "Collateral Attacks Based on Irregularities". Let us hope that the instant case marks a definite change of policy by our Supreme Court. The principal debtor in the instant case was personally served with summons in the same town in which the suit in garnishment was tried, four days before the trial. He had ample opportunity to appear and make defense if he had any on the merits or cared to raise objection to the jurisdiction; or, as suggested by Mr. Justice STEERE in his opinion, he might have appealed or sued *certiorari*. He did none of these things, but preferred collateral attack. There is no suggestion or suspicion that the length of the notice to him caused him any inconvenience or in any way embarrassed his defense. On what basis should he be allowed to make collateral attack?

J. R. R.