

Michigan Law Review

Volume 19 | Issue 3

1921

Note and Comment

G L. Canfield

University of Michigan Law School

Edson R. Sunderland

University of Michigan Law School

Horace LaFayette Wilgus

University of Michigan Law School

George D. Clapperton

University of Michigan Law School

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Recommended Citation

G L. Canfield, Edson R. Sunderland, Horace L. Wilgus & George D. Clapperton, *Note and Comment*, 19 MICH. L. REV. 324 (1921).

Available at: <https://repository.law.umich.edu/mlr/vol19/iss3/3>

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MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW SCHOOL OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE \$2.50 PER YEAR.

50 CENTS PER NUMBER

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NOTE AND COMMENT

MARITIME LIENS—PERSONALITY OF SHIP.—In *Coal Company v. Fisheries Company* (Advanced Sheets, Nov. 15, 1920), the Supreme Court denies a lien for supplies of coal furnished the owner of a fleet of vessels for use thereon and, incidentally, brings into stronger relief the admiralty doctrine of the personality of the ship as distinguished from that of the owner. At the time the arrangement was made, the shipowner was without money or credit and could not enter upon its operations without a supply of coal for its ships and factories. The Coal Company agreed to supply its requirements on the understanding that, while some of the fuel would be used on shore, the greater part would be consumed by the vessels and that it would have a maritime lien therefor. All deliveries were made at the shipowner's factories and the ships were fueled from its bins in quantities of which accurate accounts were kept. Towards the close of the season of navigation, the vessels were sold under a foreclosure of mortgage and the Coal Company asserted its lien by proceedings *in rem* against them. In affirming the decree of the Court of Appeals dismissing the libels, the Supreme Court points out that the maritime lien provided by the Act of June 23, 1910, rests upon a furnishing of supplies to the vessel and not to the owner for such appropriation to the vessel as he

may subsequently make. The implication is that the relations requisite for such liens as the statute mentions must be between the creditor and the ship, not between the creditor and the shipowner, since the ship is "an entity capable of entering into relations with others, of acting independently, and of becoming responsible for her acts." Here the material man had furnished coal to the shipowner but it was the shipowner which had furnished the ship, so that no maritime lien was created.

Detroit Mich.

G. L. CANFIELD.

THE RIGHT OF A JURY IN A CRIMINAL CASE TO RENDER A VERDICT AGAINST THE LAW AND THE EVIDENCE.—One George D. Horning was convicted of the criminal offense of doing business as a pawnbroker in the District of Columbia without a license. The jury, which rendered the verdict of guilty, were told by the court, in the course of the charge, that there really was no issue of fact for them to decide; that the evidence showed a course of dealing constituting a breach of the law, and that they were not warranted in capriciously saying that the witnesses for the government and for the defendant were not telling the truth; that it was their duty to accept the exposition of the law given them by the court; and that while, in a criminal case, the court could not peremptorily instruct them to find the defendant guilty, if the law permitted it he would do so in this case. The judge concluded his charge as follows:

"In conclusion I will say that a failure to bring in a verdict in this case can arise only from a wilful and flagrant disregard of the evidence and the law as I have given it to you and a violation of your obligation as jurors. Of course, gentlemen, I cannot tell you in so many words to find defendant guilty, but what I say amounts to that."

On a writ of certiorari to the Supreme Court of the United States, it was held by Justices Holmes and four concurring judges that there was no error in these instructions. Justice Brandeis and three other judges dissented. This was the case of *Horning v. District of Columbia*, 41 Sup. Ct. Rep. 53, decided November 22, 1920.

Justice Holmes said that the judge could not direct a verdict of guilty, for "the jury has the *power* to bring in a verdict in the teeth of both law and facts", but that he had not really done so in this case, for "the jury were allowed the *technical right*, if it can be so called, to decide against the law and the facts."

Justice Brandeis said that in his opinion the charge of the court amounted to a "moral command", and was as much the direction of a verdict as though made "in so many words."

What the trial judge did in this case was, in effect, to inform the jury that it was their *duty* as jurors, under the oath which they had taken, to find the defendant guilty on the undisputed facts and on the law which he had laid down, but that he could not take any steps to compel them to do their duty further than to urge them to do it. Here was a duty, then, which could not be enforced, and a breach of which could not be punished. Did it fol-

low that the duty to find the defendant guilty was only a moral, not a legal, duty, and that therefore the jury, while morally bound, were legally free?

In the leading case of *Sparf and Hansen v. United States*, 156 U. S. 51, it was admitted by all the judges that the jury had the *power* to go against the law as laid down by the court, but the majority held that they had no *legal right* to do this, while the minority argued with great skill and learning that they had both the power and the legal right. In the *Horning* case the majority held that the jury had the *power* and were allowed the *technical right* to go against the law and the evidence, and therefore there was no error. Is it to be concluded from this that the court has shifted away from the rule so laboriously worked out in the *Sparf and Hansen* case, and has come to recognize the right of the jury to decide the law?

If Justice Holmes meant by "technical right" a real legal right, his view is not in accord with the *Sparf and Hansen* case. But he does not seem to have meant this. He says "the jury were allowed the technical right, *if it can be so called*, to decide against the law and the facts." What happened was that the jury were given the opportunity to use their power to do this, but were told that they *ought not* to do it. They were not told that they *could not* do it. The judge made it clear that while their duty was to convict, there was no agency for enforcing that duty except their own consciences. This might seem to indicate that the duty was a merely moral duty, and that while they had a legal right to ignore the judge's instructions they had no moral right to do so. But the law deals with legal, not moral concepts, and if the court, as a court of law, could properly say that it was their duty to follow his views, that duty must have been a legal duty. There is nothing incongruous in a legal duty which the law does not or cannot enforce. Its unenforceable character does not relegate it to the realm of morality. There are many instances of imperfect legal rights, where the customary union between the right and its enforcement by legal action has been for some special reason severed, and where the maxim *ubi jus ibi remedium* does not apply. SALMOND, JURISPRUDENCE, Sec. 78. Claims against sovereign states are outstanding examples. One may perhaps get a judgment against the state, but there is usually no means of positive enforcement of that judgment. But the claims should properly be deemed legal, not merely moral.

Holland says that jurisprudence is specifically concerned only with such rights as are recognized by law and enforced by the power of the state. JURISPRUDENCE [12th ed.], 82. But this is too broad a statement. As Dicey points out, "The distinction between the recognition and the enforcement of a right deserves notice. A court recognizes a right when for *any purpose* the court treats the right as existing. * * * But our courts constantly recognize rights which they do not enforce." CONFLICT OF LAWS [2nd ed.], 31. 32. The statute of limitations, as shown by Salmond, does not extinguish a debt, thereby destroying the right, but merely prevents an action for its recovery. The right remains "for all purposes save that of enforcement." JURISPRUDENCE. Sec. 78.

Now, the court held in the *Sparf and Hansen* case that the legal right to

determine the law was in the court. But while the judiciary recognizes this right it does not enforce it. It recognizes it as a means for influencing, not for controlling, the action of the jury. The right exists for a legitimate legal purpose, but that purpose is not enforcement. The right is therefore an imperfect legal right, or a right subject to a procedural limitation. And when Justice Holmes, in *Horning's* case, says that the jury have a "technical right" to go against the law and the facts, he seems to be merely pointing out this imperfection which the law recognizes in the right of the court to determine the law. The "technical right" of the jury is only the restriction placed upon the right of the court. To say that the court has the right to determine the law but that the jury have the technical right to disregard it, appears to be only another way of saying that the court has the right to determine the law but has no means of enforcing its right against the jury.

If this was the situation in which the law placed the judge and the jury, it was incumbent upon the trial judge to explain it to the jury and not to mislead them by claiming not only the right to determine the law, which he had, but also the right of enforcement, which he did not have. The judge did explain this to the jury. He told them that it was their legal duty to find the defendant guilty, but that he was not permitted by the law to compel them to perform that duty. He made it sufficiently clear that their duty was imperfect in its obligation and was unenforceable by the court. This was entirely consistent with the case of *Sparf and Hansen*.

Justice Brandeis disapproved of the action of the trial court because he believed it amounted to a moral command to convict the defendant. If there was error here, the fault lay, not in telling the jury that they ought to convict, but in failing to make it perfectly clear that the law left the performance or non-performance of this legal duty wholly to the conscience of the jury. In other words, the moral command, if there was one, consisted in the failure to disclose the unenforceable and imperfect character of the duty to follow the law as given by the court. It was at most a moral advantage taken by the court resulting from an incomplete and misleading statement of the nature of the legal duty resting upon the jury,—the same sort of moral compulsion which frequently flows from incomplete instructions. But there is nothing in this dissenting opinion, any more than in the prevailing opinion, which conflicts with the *Sparf and Hansen* case. E. R. S.

CITY PLANNING—LOCATION OF STREETS AND ESTABLISHMENT OF BUILDING LINES.—In 1917, Connecticut, by law authorized Windsor to create a town planning commission "to make surveys and maps, section by section * * * showing locations for any public buildings, highways, or streets, including street building and veranda lines." Such map was to be filed in the town clerk's office, and notice given to the owners for a hearing; after such hearing, the commission was to decide, and file a map in accord with its decision; a right of appeal to court was reserved to an aggrieved party; and no street was to be opened until the land necessary was appropriated under eminent domain proceedings. A town planning commission was appointed, and made

plans, under this statute. The defendant, in developing a tract of land for residential purposes, in Windsor, laid out streets, fixed building lines, and began selling lots, without conforming to the commission plans. The city sued to restrain him from proceeding according to his own plans. He demurred on the ground that the act authorized a taking of his property without due process of law. The trial court so held. On appeal, reversed. *Town of Windsor v. Whitney*, (Conn., Aug. 5, 1920), 111 Atl. 354.

Wheeler, J., speaking for the majority, says: "This does not physically take the land, but it regulates its use, and hence deprives the owner of a part of his dominion over his land. The owner may not lay out streets through this land where he chooses and of the width he chooses. Nor may he establish the building lines where he wills. There is no provision in the act for compensation. * * * Unless this regulation can be supported as a legitimate exercise of the police power the act must fall. A town commission plan * * * is distinctly for the public welfare. * * * In such a plan each street will be properly related to every other street. Building lines will be established where the demands of the public require. Adequate space for light and air will be given. Such a plan is a wise provision for the future. It betters the safety and health of the community; it betters the transportation facilities; and it adds to the appearance and wholesomeness of the place, and as a consequence it reacts upon the morals and spiritual power of the people who live under such surroundings."

Gager, J., dissented, holding that the establishment of a building line was a taking of property for which compensation must be made, relying on and citing *City of St. Louis v. Hill*, 116 Mo. 527; *Northrop v. Waterbury*, 81 Conn. 309; *Benedict v. Pettes*, 85 Conn. 537. And this seems to be according to the weight of authority: *Eubank v. Richmond*, (1912), 226 U. S. 137, Ann. Cas. 1914B, 192, with note; *Fruth v. Board of Affairs*, (1915), 75 W. Va. 456.

It was only in reference to the building line provisions that Judge Gager dissented. The case therefore stands for the rule that a city may lay out streets over or across the land of another, and the land owner must conform to such lay-out, in disposing of his lots, although the city has not opened the street, and may not do so for a long time. In this particular it resembles the early case of *In the Matter of Furman Street* (1836), 17 Wend., N. Y., 649. Here the legislature of New York authorized the village of Brooklyn to lay out streets and file a map thereof. It did so in 1819. In 1833, one of the streets so laid out was first opened; in the meantime buildings had been erected within the street as originally mapped, and it was held the owner was not entitled to any compensation for the destruction of his building when the street was actually opened seventeen years after its location. This case, however, was overruled by the Court of Appeals, in *Forster v. Scott*, (1882) 136 N. Y. 577, 583, and this was followed on a similar state of facts in *Edwards v. Bruorton*, (1904), 184 Mass. 529, 532.

Pennsylvania, on the other hand, early followed the *Furman St.* case, and continues to do so: *In Forbes Street*, (1871), 70 Pa. St. 125, 137; *Bush v. McKeesport*, (1895), 166 Pa. 57; *Harrison's Estate*, (1915), 250 Pa. 129;

Philadelphia Parkway, (1915), 250 Pa. 257; *Dintman v. City of Harrisburg*, (1919), — Pa. —, 108 Atl. 724, 725.

See for full discussion of recent cases on zoning, 19 MICH. L. REV. 191.
H. L. W.

CONCURRENT POWER UNDER THE EIGHTEENTH AMENDMENT.—The two main questions which have been considered in making the decisions under the Eighteenth Amendment are whether or not state provisions for referendum of legislative action can be applied to ratification of proposed amendments to the Federal Constitution, *Hawke v. Smith*, (1920), 251 U. S. —, 40 Sup. Ct. 495, and what the interpretation of the second section of the amendment is to be, in giving the states 'concurrent power' to enforce the Amendment by legislation, along with Congress. *State of Rhode Island v. Palmer*, (1920), 40 Sup. Ct. 486. *Hawke v. Smith* reversed the decision (below) in the Ohio Supreme Court, 126 N. E. 400, which had held that the referendum applied. See note on the decision in the Ohio court in 18 MICH. L. REV. 698. The Supreme Court decided that the fifth Article of the Constitution, providing for methods of amendment, is a grant of authority by the people to Congress; hence, the authority given to the state legislatures to ratify is given to specific bodies as an expression of assent, rather than legislative action, so that the referendum cannot apply. See a forecast of this view in a Note and Comment in 18 MICH. L. REV. 51. *Davis v. Hildebrant*, 241 U. S. 565, which held that the referendum provision of the state constitution applied to a law redistricting the state with a view to representation in Congress was distinguished on the ground that that was legislative action by the state, to which the referendum properly applied. For an exposition of the cases of *Hawke v. Smith* and *Rhode Island v. Palmer*, *supra*, see article by Thomas R. Powell, "Constitutional Law in 1919-1920," 19 MICH. L. REV., pp. 2-8. On the Eighteenth Amendment as a whole, see article by George D. Skinner, "Intrinsic Limitations on the Power of Constitutional Amendment," 18 MICH. L. REV. 213.

In *Rhode Island v. Palmer*, the opinion of the Court gave no reasons for the decision, setting a new precedent in giving practically a memorandum opinion in a case of wide importance. It held that the words 'concurrent power' do not mean joint power, nor that legislation by Congress must be approved by the states, nor that the power should be divided between Congress and the several states along the lines of activity in inter and intra-state commerce regulations.

Justice McKenna, in a separate opinion, interprets section 2 of the Amendment to mean 'coincident or united action'; there must be concordant action in Congress and the states, and he looks hopefully to the sentiment which produced the Amendment to give harmonious legislation in Congress and the states. The giving of concurrent power to both Congress and the states expressly is entirely new in the Constitution. Any argument must necessarily be based on more or less remote analogy. Perhaps concordant action as demanded by Justice McKenna is possible. In *Ex parte Siebold*, 100 U. S. 371, at page 391, Justice Bradley, in discussing the power given to the states

to prescribe election laws, and that of Congress to make or alter them, says "the more general reason assigned, to-wit, that the nature of sovereignty is such as to preclude the joint cooperation of two sovereigns even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the national and state governments in the election of representatives. It is at most an argument *ab inconvenienti*." Of course, the provision that Congress can alter regulations makes it paramount over the states. And see *Sowles v. Witters*, 46 Fed. 499, where a United States statute authorized Federal Courts to adopt judgment remedies of the state in which it is located, and that such then become United States Laws. A difficulty of adjustment, however, if concordant action is required, is indicated in *Boston & M. R. R. v. U. S.*, 265 Fed. 578, in which it was contended that a Federal statute on taxing of corporations should get its interpretation of certain words from the state statute on the subject. It was said that if this principle were accepted, "the general government would be forced to adopt different standards and differing rules of taxation among the states, varying in accordance with the differing statutes." The objection of Justice White, however, that to require concurrent action is to practically nullify the Amendment, since until such action is taken prohibition is a dead letter, seems unanswerable.

The Chief Justice, objecting both to a requirement of concordant action and to Congress' being paramount, where they both act, seems to hold that Congress and the states have independent powers. The cases before the Court in the Rhode Island decision were cases of injunctions against the enforcement of the Volstead Act, passed by Congress in accordance with section 2. Two cases came up subsequently to the Rhode Island decision, one in a Federal District Court, *Ex parte Ramsay*, 265 Fed. 950 (Fla.); and *Commonwealth v. Nickerson*, 128 N. E. 273 (Mass.), on indictments under state statutes which had been passed before the Volstead Act. In both cases it was held that the fact that the state statutes antedated the Volstead Act made no difference in the situation, and in both cases the indictments were sustained. In *Ex parte Ramsay*, *supra*, the indictments were under a statute passed to enforce a state constitutional prohibition provision. It was held that since the state statute made substantially the same thing unlawful that the Volstead Act did, there was no conflict, although the penalties provided by the state act were more severe than those provided by the Federal Act. "Surely a state could pass legislation for the purpose of carrying out the Amendment under the authority given in the Amendment itself, which was not in violation of any provisions of the Volstead Act." It would seem to follow that if the statute had been in violation of the Volstead Act, it would have fallen. In *Commonwealth v. Nickerson*, *supra*, Chief Justice Rugg gives an exhaustive discussion of the possibilities of concurrent action. The defendant was charged with selling liquor without a license, contrary to the provisions of the state statute. The question was as to the validity of the statute since the Eighteenth Amendment and the Volstead Act. It was held that so much of it as allowed sales under a license fell after the Amendment, but that the rest of the statute was enforceable, since it did not conflict with the Volstead

Act; that powers of the state and of Congress may be given different manifestations if not in collision with one another, in which case state legislation must yield; and a state statute could not authorize what Congress forbids. These decisions seem sound, and seem to avoid any suggestion of a 'states' rights' interpretation. Justice Rugg discards the meaning of 'concurrent' as given in cases between states exercising concurrent jurisdiction over the river running between them; *Wedding v. Meyler*, 192 U. S. 573; *Neilson v. Oregon*, 212 U. S. 315. The latter case held that an act done on the river within the boundaries of one state and allowed by that state cannot be prosecuted by the other state. Justice McKenna found an analogy here for action under the Eighteenth Amendment; but one outstanding difficulty seems to be that states are equal powers, while the United States and any one state can scarcely be held to be equal sovereignties. Moreover, Justice Brewer in the latter case said that the object of giving concurrent jurisdiction was to avoid nice questions as to whether a criminal act sought to be prosecuted was committed on one side or the other of the river; it was expressly not decided whether, in the entire absence of legislation by one state the other could enforce its statute anywhere on the river, nor whether prosecution must be by both states jointly.

The Rhode Island decision expressly held that 'concurrent power' did not mean that power divided between Congress and the states along lines which separate interstate commerce from intrastate affairs; yet cases concerning this division furnish a helpful analogy, in concurrent power. *Chicago, Milwaukee & St. Paul R. Co. v. Solan*, 169 U. S. 133; *Lake Shore & Mich. Southern R. Co. v. Ohio*, 173 U. S. 285; see *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.*, 169 U. S. 311. In *Lake Shore & M. S. R. Co. v. Ohio*, *supra*, Justice Harlan said, "This power in the states is entirely distinct from any power granted to the general government, although, when exercised, it may sometimes reach subjects over which national legislation can be constitutionally extended." *Gilman v. Philadelphia*, 3 Wall. 713, recognizes concurrent power in the states in all cases except where power is exclusively in the Federal Constitution, expressly prohibited to the states, and where in the nature of things it must be exercised by the national government exclusively. The building of a bridge across a navigable river was held to be within this reserved power of the state. Where Congress has not controlled state legislation in this field, the state, within certain limits, is supreme. *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245. Where the powers clash, Congress is paramount, *Sinnot v. Davenport*, 22 How. 227. It would seem that the Eighteenth amendment has given the states further power than they have in their reserved police powers touching interstate commerce; in that they have power over importations. But this seems to be more a difference of degree than of kind, and an analogy seems possible.

One difficulty seems to lie in the fact that 'concurrent' is assumed to mean the same thing as 'equal.' That it does not mean that is tacitly recognized in *Ex parte Ramsay* and *Commonwealth v. Nickerson*, *supra*. To waive completely the analogy found in the cases where states have exercised their reserve powers, 'concurrent' at least in a sense, simply because the analogy is not perfect, seems a species of legalistic reasoning. It was undoubtedly meant

by the second section of the Amendment to make the enforcement of it as effective as possible, by giving the states concurrent power. It is not conceivable that it was intended to assert anew a 'states' rights' doctrine. In cases in which, heretofore, the states have had reserved powers, Congress, where it invades those powers, where permitted to enter the field, has been considered paramount, and it is doubtful if the framers of the Amendment intended to break away from this precedent and make the power of the states equal to that of Congress, although independent. It would seem that there must be a clear repugnancy where the principle of supremacy is applied; see *Simmon v. Davenport*, *supra*, at page 243. Not to hold Congress supreme in case of a clash would certainly nullify the amendment. The two decisions *supra* of *Ex parte Ramsey* and *Commonwealth v. Nickerson* seem to have pointed the way which interpretation is bound to take. G. D. C.