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We are in receipt of a letter from Mr. Burton A. Konkle, Secretary of the James Wilson Memorial Committee, announcing that the January issue of the REGISTER has become the only official account of the Wilson Memorial Ceremonies, the Committee having decided to issue no memorial volume. Mr. Konkle asks us to publish this fact, as corrective of his prediction in his report that such a volume would be issued, and he also desires us to say that the text of the addresses, as printed in the REGISTER, is the only published text which has been corrected by the speakers themselves and approved by the Secretary.

Copies of the issue may be obtained by addressing the Business Manager.

CIVIL LIABILITY OF BANK DIRECTORS.—"The directors of a bank or other corporation, are, and always were, personally liable at common law for (1) unauthorized acts, as well as for a failure to exercise proper care and diligence in the discharge of their office, when such acts of (2) misfeasance or (3) nonfeasance are productive of damage to the corporation."[1] This liability has not been superceded by a statutory one. The performance of an act prohibited by Statute may subject the corporation to a forfeiture of its charter, and the directors to a criminal action, but this would not render them civilly liable. The statutes merely restrict and define the powers delegated.[2] It is still a common law liability. It arises out of the contractual relation of principal and agent, and therefore there is a liability for all losses resulting from (1) ultra vires acts, (2) frauds, and (3) negligence. Since the duty assumed is entirely gratuitous, it is governed by the common law doctrine applying to mandataries.[3] A refusal to execute the agreement incurs no liability, because of the absence of consideration, but if entered upon, it must be carried out in conformity to the terms of the request.

The scope of the director's authority is defined by the common-law, the charter and by-laws of the bank, and the statutes of the U. S. Ignorance is no defense,[4] but an ultra vires act is excusable, if it were due to a bona fide mistake of (1) law or (2) fact, *i.e.*, as to the legal extent of the authority, or as to the circumstances in regard to which he was exercising it, even though it was due to incompetence. "However ridiculous and absurd their conduct might seem, ... it is the misfortune of the company, that they chose such unwise directors."[5]

Although frequently called trustees, directors are not such in the technical sense of the word. They are not parties or privies to any express declaration of trust or agreement with the stockholders. But they do stand unquestionably in a fiduciary relation to the stockholders, and accordingly in defining what constitutes an act of misfeasance on the part of the directors, the rigid rule governing the affirmative acts of trustees is applied. What would be fraudulent, on the part of a trustee, is considered so, on the part of a director. The integrity of his intentions is not material. "Like a trustee he is absolutely prohibited from the performance of those questionable acts wherein his conduct may be wholly

[1] *Cockrill* v. *Cooper*, 86 Fed., 7 (1898).
[2] *Briggs* v. *Spaulding*, 141 U. S., 132 (1891).
[3] Spering's App., 71 Pa., 11 (1872).
[4] *Cooper* v. *Hill*, 94 Fed., 582 (1899).
[5] Spering's App., 71 Pa., 11 (1872). *Contra Hun* v. *Cary*, 82 N. Y., 65 (1880).

free from blame, but where the bias of self-interest is strong, and may influence him without his own recognition of the fact."[6]

Three factors enter into the question as to how much abstention is required to make directors liable for nonfeasance. By the (1) statutes of the U. S. a director is allowed to delegate all the immediate management of the bank, together with all the discretionary power appertaining. Only in case of a loss resulting from an attempt to delegate the duty of "general supervision and control" is there any liability.[7] The agents appointed, to whom the above duties are delegated, become the agents of the bank. The directors are not insurers of their fidelity, and if the directors are liable for their acts, it is not on the ground of agency, but because of a neglect of the above duty of general supervision and control.[2] Because of the (2) voluntary nature of the duty assumed, the utmost degree of care is not required. A mandatary need exercise only ordinary care and diligence, and is only liable for *crassa negligentia*—gross negligence.[8] And lastly (3) the courts are under a "perplexing restraint lest they should by severity of their rulings, make directorships repulsive to the class of men whose services are most needed, or by laxity in dealing with glaring negligence, render worthless the supervision of directors over national banks, and leave these institutions a prey to dishonest executive officers."[9]

Accordingly it has been ruled,[2] that when the directors have delegated all their powers, except those of general supervision and control; and an attempt is made to hold them liable for the acts of the appointed officers, the neglect which would render them liable must depend upon all the circumstances. "If nothing has come to their knowledge, to awake suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient."[2] Whenever ordinary attention is sufficient to acquaint them with suspicious facts, they must act. But there is no duty to cause an examination of the books of the bank, as long as there is no suspicion, although it would have taken but little time, and would have shown the true state of affairs.[2] The practical result of this, is to exempt the directors from all liability except in case of gross and supine negligence. Upon the authority of this case, it has been held that directors were not liable, when the exercise of ordinary care and diligence did not discover, that the examining committee were not doing their duty, but were relying upon the statements prepared by

[6] *Munson* v. *Syracuse*, 103 N. Y., 58 (1886).

[7] *Warner* v. *Penoyer*, 91 Fed., 587 (1898).

[8] *Charitable Corporation* v. *Sutton*, 2 Atk., 400 (1742).

[9] *Robinson* v. *Hall*, 63 Fed., 222 (1894).

the cashier, because there was no affirmative duty on their part to cause an examination of the books to be made.[7] In the same case it was held, that non-attending directors were not liable, because the loss was not due to their neglect, since those who did attend, did not know.[7] In view of the above, the case of *Rankin* v. *Cooper*, 149 Fed., 1010 (1907) seems to be inaccurate, when, in summing up the duties of the directors, it states "that a part of their duty of general supervision, is to cause an examination of the conditions and resources of the bank to be made with reasonable frequency."

DYING DECLARATIONS.—The long accepted rule that a dying declaration receives a sanction equivalent to that conferred by an oath because of the positive expectation by the declarant that his death is imminent, and the consequent presumption that he will speak only the truth, is one from which the courts have been slow to depart. In England the adherence to it is absolute; not only will a statement made by one who has been informed that recovery is barely within the range of possibility, be excluded,[1] but the courts maintain that the knowledge of approaching dissolution must be affirmatively shown.[2] This doctrine, long regarded as the only safe limitation of an exception to a rule against hearsay which many judges have considered of doubtful propriety, has been followed without alteration in many American jurisdictions. Accordingly a Massachusetts,[3] and a New Jersey[4] case have held, that where a decedent was told that his only hope of recovery lay in an operation, and that such hope was exceedingly slight, the declarations made thereafter were inadmissible, since the court was not convinced that the declarant had abandoned all expectation of surviving.

The American courts do not, however, generally require an affirmative statement from the *declarant* that he has given up all hope of getting well, provided the circumstances are such as to raise a strong presumption that such is his mental attitude.[5] This presumption may be strengthened by significant acts on his part, such as a willingness to receive the last sacraments of the Catholic Church,[6] or the hasty execution of a will.[7] In this latter case the presumption was held not to be rebutted by the fact that the testator asked whether the will would be of any effect in case he recovered, nor did

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[1] *Rex* v. *Christie*, O. B., 182.
[2] *Queen* v. *Dalmas*, 1 Cox C. C., 95 (1844).
[3] *Com.* v. *Roberts*, 108 Mass., 302 (1871).
[4] *Peak* v. *State*, 50 N. J. L., 179 (1888).
[5] *Kilpatrick* v. *Commonwealth*, 31 Pa., 198 (1858).
[6] *Carver* v. *U. S.* 164 U. S., 694 (1896).
[7] *Allison* v. *Commonwealth*, 99 Pa., 17 (1881).

a similar restriction placed by a declarant upon her statement —that in case she got well she did not want it published— operate to defeat its admissibility.[8]

Thus the tendency seems to be to consider rather the natural state of mind resulting from an overwhelming force of circumstances, than to require a total exclusion of all suggestions holding out any hope of recovery. The distinct departure from the old hard and fast rule was made by a Georgia case in 1887,[9] in which the court admitted the declaration despite the fact that a physician told the declarant that there was "one chance in a hundred" for his recovery. This freer, and, it is submitted, more common sense doctrine has been adopted by the Supreme Court of Oregon in the recent case of *State* v. *Thompson*—88 Pac. Rep., 583 (1907). The facts show a warning to the deceased by his physician that his only chance lay in an operation, and that he would probably never come out from under the influence of the anæsthetic. Deceased then made the statement and died fifteen or twenty minutes afterwards, while the anæsthetic was being administered. The court held that, under all the circumstances, considering the nature of the wound and the grave character of the surgeon's warning, the mere fact that deceased was willing to take the only chance held out to him for his recovery did not invalidate his declaration.

THE XI AMENDMENT AND THE RIGHT OF THE FEDERAL COURTS TO ENJOIN STATE OFFICERS FROM ENFORCING IN STATE COURTS A STATE LAW REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.—Amendment XI. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

No difference of opinion or doubt seems ever to have existed that a State officer is amenable to suit if he takes possession of the property of an individual by virtue of an unconstitutional law. In such cases a suit against the officer is not a violation of the Eleventh Amendment. *Tindal* v. *Wesley*, 167 U. S. 204, 212 (1897): *Scott* v. *Donald* 165 U. S. 58, 68 (1897): *In re Tyler*, 149 U. S. 164, (1893).

Where, however, the wrong has not been consummated by a physical taking of property, but is merely a threatened violation of the rights of property the Federal Supreme Court has by no means adhered consistently to any one test of the meaning of the Amendment.

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[8] *Peoples* v. *Commonwealth*, 87 Ky., 487 (1888).
Walton v. *State*, 79 Ga., 446 (1887).

Does the XI Amendment prohibit only those suits where the State is made, by name, a party defendant to the suit? Such was the interpretative test advanced by Chief Justice Marshall in 1824, who remarked,

"the 11th Amendment which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party to the record."

Osborn v. *U. S. Bank*, 9 Wheat. at p. 857 (1824). In that case the fact that the Bank of the United States—an agency of the National Government—was threatened with paralysis in the State of Ohio by an enactment of that State was plainly not the least persuasive argument in forming Marshall's theory of interpretation. (See pp. 847–8).

This test based upon the mere record, having enjoyed Judicial popularity for some years, became (as late as 1872, in *Davis* v. *Gray*, 16 Wall 220.) finally utterly discarded though adhered to still in a dissentient opinion by Mr. Justice Bradley in *In re Ayers* 123 *U. S.* 443 (1887) and the Court has repeatedly regarded the Amendment as having been violated where the State, though not a party by name on the record, is in reality a party in interest.

Though the Supreme Court has recognized in later years that a State though not in name a party to the record may yet be so affected by the result of the suit against its officers as to be in reality a party, the Court has expressly and consistently held that in a suit against the Railroad Commissioners of a State brought by a carrier or its stockholder to enjoin the enforcement of a confiscatory schedule of rates the State is not in reality a party to the suit. The decision and the language of Mr. Justice Brewer in rendering the opinion in *Reagan* v. *Farmers Loan & Trust Co.* 154 *U. S.* at page 390 (1894) is directly in point here:

"So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers. . . . . Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, state and Federal, is in restraining the collection of taxes, illegal in whole or in part."

Has the same lack of interest been held to exist where the State is entitled to a penalty? An affirmative answer is given by such cases as *Smyth* v. *Ames*, 196 U. S. 466.

What is the true position of The Repudiation Cases at the present day? Inasmuch as the cases against Railroad Commissioners of a state have been repeatedly and uniformly decided in favor of the jurisdiction down to the present day no argument whatever can be drawn from such cases as *In re Ayers*, 123 *U. S.* 443, 491 (1887) and other cases known as the Repudiation cases in denial of the proposition, that a suit against Railroad Commissioners to enjoin them from putting into force an unconstitutional schedule of rates is not a suit against the State in violation of the XI Amendment.

We have only to compare the grounds upon which the Repudiation cases were decided to see that the reasoning has been rendered obsolete by the later opinions of the Supreme Court.

The refusal of the Supreme Court to enjoin state officials from bringing actions designed to obstruct the bondholders of the state was declared in the Ayers case to be the inability of the Federal Judiciary under the Constitution to compel a state to specifically perform its contracts. Such, it was said would be the practical effect of such an injunction as was sought in the Ayers case. . "A bill," said Mr. Justice Matthews, (in delivering the opinion in the Ayers case at p. 502–3),

> "the object of which is by injunction indirectly to compel the specific performance of the contract by forbidding all those acts and doings which constitute breaches of the contract must also necessarily be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of contract, the suit is still, in substance, though not in form, a suit against the State."

The Ayers case was also decided upon the further ground (pp. 501–502) that there was no individual liability of the officer sought to be enjoined and that in the prior cases injunctions had been granted against state officers only in those cases where the officer had been individually liable.

Four years after the decision of *In re Ayers* a case arose in 1891 which presented the same question, which is indistinguishable upon its facts from the Ayers case but which did not involve the question of state repudiation of bonds. In *Pennoyer* v. *McConnaughy*, 140 *U. S.* 1 (1891) the Supreme Court held that an injunction should be granted against a Governor, Secretary of State and Treasurer of State, comprising the board of Land Commissioners of a state to enjoin them from selling and conveying land under a statute of the state which was in violation of the complainant's prior contract with the state.

Mr. Justice Lamar realizing the necessity of explaining in 1891 why these state officials of Oregon could be enjoined from reselling land which had already been contracted for by the complainant, although the Attorney-General of Virginia in 1887 had been held exempt from injunction on the ground that the suit was an indirect attempt to make the state of Virginia perform its contracts, adopted the theory of "specific performance" as a test and line of classification and made an effort to distribute the cases according to this theory of interpreting the XI Amendment. But the weakness and inadequacy of the opinion as a reconciliation of precedents is apparent when we look for an explanation why this Oregon case was not in effect a suit to compel the state to perform its contracts. In neither this nor the Ayers case was the suit a technical one for specific performance. Why was the ultimate effect upon the State of Oregon by enjoining its officers from selling Pennoyer's land in violation of his contract with the state any less a decree compelling the state to perform its contract with him than a decree against the Attorney-General of Virginia would have been a decree compelling the State of Virginia to perform its contract if Ayers had been enjoined from assisting the state to repudiate its debts?

The opinion of Mr. Justice Lamar in the Pennoyer case must be treated as an effort to do the best that could be done with the Repudiation case of *In re Ayers* and to harmonize its conclusions with the subsequent and prior attitude of the court.

We have only to read the theory of "specific performance" as a test of interpretation of the XI Amendment in the words that Mr. Justice Lamar has used on p. 10 of the Pennoyer case 140 U. S. 10 (1891) to realize how inapplicable such a test is. We have only to glance at the earlier and later decisions of the court to see that such a test has never been thought of or applied. The learned Justice remarks that the XI Amendment is not violated

> "in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty purely ministerial."

But is not such injunction or mandamus often tantamount to compelling the state to perform its contract?

The very cases which Mr. Justice Lamar attempts to classify negative the theory of classification employed. Is not an injunction forbidding the reissue by a state officer of land patented to the complainant as in *Davis* v. *Gray*, 16 Wall. p. 215 tantamount to compelling specific performance of its contract by a state?

Again, what is the true nature and effect of granting an injunction against a state auditor from collecting a state tax where a railroad by its charter has been exempted from such taxation? Was not the decree to this effect in *Tomlison* v. *Branch*, 15 Wall. 460 (1872).

The celebrated case, *Smyth* v. *Ames*, 169 U. S. 466, otherwise known as "The Nebraska Maximum Rate Case" was decided in 1898.

The Nebraska rate statute which was ultimately declared to be unconstitutional as depriving the complainants of their property was passed April 12, 1893. The suits in question were brought July 28, 1893.

The eighth section of the statute gave an action for damages to any person injured by the carrier's violation of the act.

The ninth section of the act prescribed penalties as follows:

"Sec. 9. That in case any common carrier subject to the provisions of this act shall do or cause to be done or permit to be done any act matter or thing in the act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall upon conviction thereof be fined in any sum &c.

The Attorney-General of Nebraska was a defendant to the bill, and the injunction was also directed against him;

" . . . and that the Board of Transportation of said state and the members and secretaries of said Board be in like manner perpetually enjoined and restrained from entertaining, hearing or determining any complaint to it against said railroad companies, or any or either of them . . . for or on account of any act or thing by either of said companies . . . done or suffered or omitted, which may be forbidden or commanded by said act, and particularly from reducing its present rates of charges for transportation of freight to those prescribed in said act, and that the Attorney-General of this state be in like manner enjoined from bringing, aiding in bringing or causing to be brought, any proceeding by way of injunction, mandamus, civil action or indictment against said companies or either of them or their receivers for or on account of any action or omission on their part commanded or forbidden by the said act. . . . "

The Attorney-General was a member of the state Transportation Commission.

The act of April 12, 1893, otherwise known as "House Roll 33," fixed the maximum schedules of charges and in sections 8 and 9 as above stated prescribed the remedy and the penalties.

This act contains no provision for its enforcement other than as mentioned above, and in the preceding general law.

The petitioning stockholders represented three roads: The Union Pacific, The Chicago & Northwestern and the Chicago Burlington & Quincy.

In the case of *Fitts* v. *McGhee*, 172 U. S. 516 (1899) the facts may be thus summarized:

1. The state of Alabama by statute had prescribed a confiscatory rate of toll to be charged by the plaintiff on the Florence Bridge.

2. The penalty for a violation of the act was twenty dollars to be forfeited to any person as to whom the act fixing the rate was violated.

3. The suit was brought against the Attorney-General of Alabama, Fitts, and the solicitor of one of the Judicial Circuits of the State to enjoin them from proceeding under any indictment or by any criminal proceeding for violating the provisions of the act.

4. The Attorney-General and the Solicitor were not specifically authorized by the act to enforce it.

The Supreme Court held that the XI Amendment prohibited the suit.

Mr. Justice Harlan who delivered the opinion in *Smyth* v. *Ames* also delivered the opinion in *Fitts* v. *McGhee*.

The points of similarity and contrast between the two cases should be noted.

1. In both cases the confiscatory rate was established by the direct action of the legislature.

2. In *Fitts* v. *McGhee* the penalty was to be paid to any person in respect of whom the act was violated.

In *Smyth* v. *Ames* there was no provision as to whom the penalty should be paid, but presumably to the state.

3. The suits in both cases were brought against the Attorney-Generals of the state.

4. In *Smyth* v. *Ames* the Attorney-General was a member of the state board of transportation. To what extent that fact is significant has been previously shown in stating the facts of *Smyth* v. *Ames*.

In *Fitts* v. *McGhee* the Attorney-General was the member of no commission and the act declared or admitted to be unconstitutional did not impose upon him the duty expressly to enforce it.

The foregoing differences were seized upon by the court in the decision holding that the injunction could not be granted in the Fitts case, as the suit was said to be in reality one against the state.

Mr. Justice Harlan in the first part of his opinion used the Ayers case as the *deus ex machina*, saying,

"if these principles be applied in the present case there is no escape from the conclusion that . . . this suit against its officers is really one against the state." (p. 528–9).

The opinion further proceeds upon the supposed distinction between a suit against the officer who has wrongfully obtained possession of property under color of an unconstitutional statute and a suit against an officer who is about to obstruct the enforcement of rights respecting property or openly to disregard and violate those rights. (see p. 529.)

The distinction based upon a tortious taking of property appears to have originated in the Ayers case but the test of a personal liability of the officer as essential to the right to enjoin him would not be consistent with the decision of *Smyth* v. *Ames*.

The attempt of Mr. Justice Harlan to distinguish between the Fitts case and the Smyth case is difficult to follow.

The attempt to distinguish between the cases on the ground that in the Fitts case there was no express authority given to the Attorney-General to enforce the penalty, whereas Mr. Justice Harlan states the contrary to be the fact in *Smyth* v. *Ames*, is not satisfactory.

It is noteworthy that in *In re Ayers* the Attorney-General was expressly authorized by the unconstitutional statute to carry it into execution. But Mr. Justice Harlan thinks that the empowering of the officer of the state in addition to his general authority to enforce the criminal law is a fact of deep significance.

He therefore observes in *Fitts* v. *McGhee* (p. 529) that:

"It is to be observed that neither the Attorney-General of Alabama nor the Solicitor of the Eleventh Judicial Circuit of that State appear to have been charged by law with any special duty in connection with the act . . In support of the contention that the present suit is not one against the state reference was made by counsel to several cases . . . *Smyth* v *Ames* . . Upon examination it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a state enactment alleged to be unconstitutional but under the authority of which it was averred they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights." (p. 529).

Undoubtedly the controlling reason operating in the mind of Mr. Justice Harlan was the fear that the granting of an injunction in *Fitts* v. *McGhee* would invite infinite litigation for testing the constitutionality of all State statutes. His fear on this subject is thus expressed:

"If because they were law officers of the State a case could be made for the purpose of testing the Constitutionality of the Statute by means of an injunction suit brought against them, then the Constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney-General based upon the theory that the former as the Executive of the State was, in a

general sense charged with the Execution of all its laws, and the latter as Attorney-General, might represent the State in litigation involving the enforcement of its Statutes."

But to this alarm which was entertained by Mr. Justice Harlan there would seem to be a prompt answer and one thoroughly satisfactory to be found in the Limitations which would necessarily restrict all injunction suits against the Attorney-General of a State to those in which there is an allegation of either expected or actual depredation of property if a statute which that officer has power to enforce be actually put into effect.

Nothing shows more clearly the unsatisfactory and untenable nature of Mr. Justice Harlan's own distinction than the ambiguous words in which he has himself expressed it:

"Upon examination it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals, holding positions under a State, to prevent them, under the sanction of an unconstitutional statute from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement."

In the Ayers' case, which Mr. Justice Harlan does not attempt to reconcile with the test which he advances to distinguish *Smyth* v. *Ames* from *Fitts* v. *McGhee*, Attorney-General Ayers had been expressly authorized by the Statute of Virginia to bring the very suit which the Court held he could not be enjoined from bringing. Yet in *Fitts* v. *McGhee* Mr. Justice Harlan seized upon the fact that Attorney-General Fitts of Alabama was *not* specifically directed to enforce the confiscatory rate in relation to the Florence Bridge as a valid distinguishing fact to enable the Court to escape from granting an injunction which was logically and inexorably demanded if the principle of *Smyth* v. *Ames* should be enforced.

We fail to see why from the standpoint of reason and justice the answer to the question, when is a suit against an Attorney-General of a State a suit against the State itself, should vary accordingly as, (a) he is expressly empowered by an unconstitutional act to put that act into force, or, (b) he is not authorized by the act itself but has a general authority from the

State to put all its statutes into force which belong to the same class as the unconstitutional statute in question.

A priori we might fairly suppose on theoretical grounds that the State itself was rather a party in interest where the statute expressly provided for its enforcement by the Attorney General. At all events, the distinction invented by Mr. Justice Harlan does not commend itself to reason and as a working theory is wholly inadequate to explain and reconcile the decisions of the Supreme Court.

Of much significance upon the question of the judicial interpretation of the eleventh amendment is the language of Mr. Justice Shiras in the case of *Prout* v. *Starr*, 188 U. S. page 544 (1903). The suit was brought for an injunction against one of the Attorney-Generals of Nebraska, Prout, who after the decision in *Smyth* v. *Ames* had succeeded to the office of Attorney-General, and therefore, undertook to carry on certain suits for penalties amounting to $310,000.00, instituted by Smyth when Attorney-General. The injunction was sustained by the Supreme Court, Mr. Justice Shiras saying that

"as the substantial merits of the case are concerned, we are not called upon to consider them. They have been concluded by the reasoning and opinion of this Court in the other cases. *Smyth* v. *Ames*, 169 U. S. page 456."

The significant language is the following:

"It would be indeed most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which conferred powers on Congress to regulate commerce among the several states, which forbid the States from entering into any treaty, alliance, or confederation, or from passing any bill of attainder, *ex post facto* law or law impairing the obligation of contracts, . . . all of which provisions existed before the adoption of the Eleventh Amendment, which still exists, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of State Law disregarding these Constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial enquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by State enactments . . . . . It is further argued by the appellant, as one of the grounds of his demurrer, that he was complained against in his official capacity as Attorney-General of the State of Nebraska, and not in his individual capacity as a citizen thereof, and that the Attorney-General of a State cannot be restrained by an injunction of a United States court from enforcing the criminal laws of the State.

"This, we think, is only another phase of the same question. It is true that the defendant was included in the bill as the Attorney-General of the State, but that was because he was one of the board of transportation, which was directed to enforce the provisions of the act. The bill did not seek to interfere with the acts of the Attorney-

General in prosecuting offenders against the *valid* criminal laws of the State, but its object was to prevent him from collecting penalties that had accrued under the provisions of a statute judicially determined to be void. The injunction must be so read and understood."

DUTY OF CARRIERS TO PASSENGERS.—A common carrier is under a duty to its passengers both those in transit and those who are upon its premises for the purpose of taking passage, to take care to protect them from any danger which it knows is impending from the conduct either of its agents, of its other passengers, or of strangers. But since it owes, not an absolute duty of protection from harm, but only a duty to take reasonable precautions for their safety, knowledge of the existence of danger, actual or probable, is necessary before it is bound to take action to avert it. It is not bound therefore to employ sufficient servants to protect its passengers from mob violence where there is no reason to anticipate its occurance. *P. F. W. & C. R. R. Co.* v. *Heines*, 53 Pennsylvania, 513. But in *Kuhlen* v. *Boston B. & N. Street Railway*, 79 N. E., 815, the Supreme Judicial Court of Massachusetts decided that where the crowding of the platforms and cars of a carrier at certain hours of the day was unavoidable in carrying on its business, the questions whether the carrier was bound to employ an increased number of men to prevent such crowd as involved danger to passengers, and whether it was reasonable to require such precaution, were for the jury. This being a dangerous condition due to the habitual behavior of the carrier's patrons and therefore (one that may be expected to recur constantly), the action of the Court appears correct.[1] And the case while close to the line appears clearly distinguishable from those cases which hold a carrier under no duty to protect its passengers from merely casual acts of discourtesy or bad manners.[2] So too the agents of the carrier in charge of its business are bound to protect, so far as lies in their power, the passenger from peril, due to the acts of their fellow passengers, of other agents of the Company, or of strangers, when they know of the actual or probable existence of danger from such a source. *R. R.* v. *Heines*, 53 Pa., 513. But the carrier is not liable unless its agent knew of the threatened danger and took no precaution, after such notice, to avert the injury. So in *Putnam* v. *R. R. Co.* 55 N. Y. App., 108, it was properly held that the Company was not liable for the death of a passenger caused by an assault suddenly committed upon

[1] *Mulhause* v. *R. R.* 201 Pa., 237.

[2] *Ellinger* v. *P. W. & B. R. R.* 153 *Pa.* 213. *Fritz* v. *Southern R. R.*, 132 N. C., 29. *Madden* v. *N. Y. C. & H. R. R.*, 90 N. Y. Supp., 260.

him by a drunken passenger, whose condition did not require his ejection, without any warning of his intention. It has been generally held throughout the United States that the carrier owes to its passengers a duty of protection against the misconduct of its own servants,[3] and this is so even though the servant's act is wilful and done for a purpose of his own and does not tend to the furtherance of the carrier's business, *Chicago R. R. Co.* v. *Fleckman*, 103, Ill., 543, where a brakesman struck a passenger when accused of having stolen his watch; and *Croker* v. *R. R.* 36 Wis., 657, where a conductor took personal liberties with a female passenger. This rule is criticised in "Bevan on Negligence," 2nd Edition, vol. i, p. 707. "This," he says, "is absolutely irreconcilable with the English cases, where the obligation is not to insure the fitness of servants morally but to use all reasonable precautions to obtain a servant in all respects suitable." In *M. K. & T. R. R.*, v. *Raney*, 99 S. W. Texas, 589, the Court of Civil Appeals holds that where the Railway ticket-agent knowing he had small-pox, exposed himself to contact with and infected a passenger, the Railroad is liable to the passenger's husband who contracted the disease from him. While it may be doubtful whether the act of the agent can be properly considered the proximate cause of the plaintiff's illness, knowledge on the part of the agent of his condition, was of course essential to recovery. Had the agent himself been ignorant of his condition he would have been under no duty to refrain from coming in contact with passengers. On the other hand, if the American view of a carrier's duty to its passengers be accepted, notice to the Company of this agent's condition would appear unnecessary. For, if the agent knew he was infected, his act in exposing the passengers to peril by contact with him was a wrong from which the carrier owed the passenger a duty of protection. The case of *Long* v. *C. K. & W. R. R.*, 28 Pacific Reports, 977, where on identical facts the Supreme Court of Kansas refused to hold the Railroad liable because it did not appear that any of the agent's superiors knew of his condition, can only be supported on the English doctrine that the carrier's liability is to use only reasonable precautions to obtain servants in all respects suitable. Had an agent of a Company admitted into contact with the passengers a person known by him to be infected with small-pox, there can be no doubt that the Company would have been liable. This decision appears directly contrary to the American rule that the Company is liable where the agent himself does an injurious act which it is his duty to prevent others from doing.

[3] *S. S. Co.* v. *Brockett*, 121 U. S., 637.