Roy, but no summons was issued for the infant defendants. Both the adult defendants answered before judgment was entered, and R. L. Brown, a practicing attorney of the Pulaski circuit court, was appointed guardian ad litem to defend for the infant defendants. After his appointment he filed his report, stating that he had examined the record in the case, and investigated the facts, and was unable to make a defense for the infant defendants. He further stated that in his opinion the sale of the real estate, or a sufficiency thereof to pay Roy's mortgage debt, would be of benefit to the infants. After this report judgment was entered directing a sale of the property and requiring the commissioner to report said sale at the next term of court. The commissioner advertised the sale for the 16th day of March, and on March 19th, which was during the same term, he filed his report of sale. On the same day the following order was entered: "It appearing that the commissioner of this court has made his report of land sold herein, and the same having laid over for exceptions, and none having been filed, it is ordered by the court that said report be now ratified and confirmed." The land was purchased by Lela V. Allen, the widow of decedent, for the price of $700. Appellant's debt, at the time of the sale, was about $770. Before the next term of court, notice was served on the purchaser and the plaintiff that appellant, Roy, would, on the third day of the next term, move the court to set aside the order confirming the commissioner's report, and also to treat as void all other orders and judgments of the court entered in the action. This motion was made at the time, but the court did not finally dispose of the same until the October term, 1908, when the motion was overruled. From that judgment this appeal is prosecuted.

It is insisted by appellant that the judgment ordering the sale of the property in question is void. The reason assigned is this: No summons whatever was ever issued against the infant defendants, nor was section 52 of the Civil Code of Practice complied with; that being the case, the court had no power to appoint a guardian ad litem, as section 38 of the Code provides that no appointment of a guardian ad litem shall be made until the defendant is summoned, or until a person is summoned for him, as is authorized by section 52. Undoubtedly appellant's contention is correct. The infant defendants had no statutory guardian. Therefore it was necessary to have a guardian ad litem appointed. No guardian ad litem could be appointed until service was had, in accordance with section 52. Not only was service not had, as therein provided, but no summons was issued at all against the infant defendants. They were not therefore parties to the suit. Our conclusion, then, is that the judgment of sale is absolutely void.

The next question is: Can appellant, Roy, complain of the void judgment? It appears that the sale brought less than appellant's debt, interest, and cost. As the infant defendants were not before the court, it is manifest that the only interest in the tract of land actually sold was the interest belonging to the widow of the decedent. Appellant's lien, by the judgment of the court, is extinguished and destroyed. He cannot subject the interest of the infant defendants in another action. Being a party to the action, and being interested in having the whole title to the property involved sold, we are of opinion that he has a right to complain of a judgment that is void as to the principal owners of a tract of land embraced in his mortgage and which is sought to be sold in the action. Furthermore, the record does not disclose the fact that the failure to serve process on the infant defendants was due to any fault on his part.

The next question is: Did appellant pursue the proper course? We are of opinion that he did. The judgment being void, it was proper, under section 763 of the Civil Code of Practice, to move to set it aside before taking an appeal to this court.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

(133 Ky. 652)

LOUISVILLE & N. R. CO. v. MOTTLEY et ux.

(Court of Appeals of Kentucky. May 4, 1909.)

1. STATUTES (§ 263*) — CONSTRUCTION — PROSPECTIVE CONSTRUCTION.

Statutes will not be given a retrospective construction, unless the language precludes a reasonable doubt that the Legislature intended a prospective construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 344; Dec. Dig. § 263.*]

2. CARRIERS (§ 23*) — REGULATIONS — CONSTRUCTION—RETROSPECTIVE OPERATION.

Act Cong. June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), prohibits any common carrier from directly or indirectly giving any interstate free transportation for passengers. Section 2 prohibits carriers from charging any different compensation for carrying passengers between points named in its tariff, as filed, than the fare specified therein, or from refunding any part of the fares, or from extending to any person any privileges except as specified in such tariff. *Held*, that the statute applied to the contract under which any pass, etc., was issued, and not simply to its issuance, and was not retrospective, so that it would not apply to a contract made in 1871, by which a carrier agreed to issue an annual pass to one injured, in settlement of his claim for damages, though annual passes were issued under the contract after the statute was enacted.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 23.*]

3. CONSTITUTIONAL LAW (§ 48*)—OBLIGATION OF CONTRACTS — IMPAIRMENT — POWER OF CONGRESS—PRESUMPTIONS.

The federal Constitution does not inhibit Congress from impairing the obligation of con-

tracts, but the same moral obligation not to enact such unjust laws rests upon it as upon the states, and it will be presumed that Congress did not intend to impair contract obligations, unless a clear intent to do so appears.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

4. CARRIERS (§ 35*)—STATUTORY REGULATION—FEDERAL ANTI-PASS LAW—"FREE PASSES."

Annual passes, issued pursuant to a contract by which a carrier agreed to issue an annual pass for life to one injured by it in settlement of his claim for damages, are not "free passes" within Act Cong. June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), prohibiting any common carrier from directly or indirectly giving any interstate free pass or ticket for passengers except to employés, nor did the contract violate section 2, prohibiting carriers from charging any different compensation between points named in its tariff than the fare specified therein, or from extending to any person any privileges except as specified in its tariff; it not appearing that the contract discriminated in favor of the person injured.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 94; Dec. Dig. § 35.*

For other definitions, see Words and Phrases, vol. 3, p. 2967.]

5. CARRIERS (§ 253½*)—CARRIAGE OF PASSENGERS—PASSES—LEGALITY.

A contract made in 1871, by which an interstate common carrier agreed to issue annual passes for life to one injured, in settlement of his claim for damages, was legal and valid when made.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1019; Dec. Dig. § 253½.*]

Appeal from Circuit Court, Warren County.

"To be officially reported."

Action by Erasmus L. Mottley and wife against the Louisville & Nashville Railroad Company to compel specific performance of a contract of carriage. From a judgment for plaintiffs, defendant appeals. Affirmed.

See, also, 150 Fed. 406; 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. ——.

Henry L. Stone and Sims, Du Bose & Rodes, for appellant. Clarence U. McElroy, Wright & McElroy, and G. Duncan Milliken, for appellees.

BARKER, J. In 1871 the appellees, Erasmus L. Mottley and Annie E. Mottley, his wife, were seriously injured in an accident occurring to one of appellant's passenger trains while they were being transported as passengers from their home, in Bowling Green, to Louisville, Ky. In full settlement of all claims for damages on the part of the appellees, the appellant agreed, in writing, to furnish them free transportation over its line for the remainder of their lives. The contract is as follows: "Louisville, Ky., Oct. 2, 1871. The Louisville & Nashville Railroad Company, in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released said company from all damages or claims for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the road of said company at Randolph's Station, Jefferson county, Ky., hereby agrees to issue free passes on said railroad and branches, now existing or to exist, to said E. L. Mottley and wife, Annie E. Mottley, for the remainder of the present year and thereafter to renew said passes annually during the lives of said Mottley and wife, or either of them. Thos. J. Martin, Vice President Louisville & Nashville Railroad Company. Willis Raney, Secretary. [Seal.]" This contract was faithfully carried out by the appellant until after the enactment by the Congress of the United States, on June 29, 1906, of "An act to amend an act, entitled an act to regulate commerce, approved February 4, 1887" (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]), When, becoming apprehensive lest the further issuance of passes to appellees under the contract was within the prohibition of the act of Congress, it declined to carry out its agreement any further, whereupon the appellees first instituted an action for the specific enforcement of the contract in the Circuit Court of the United States for the Western District of Kentucky, where a judgment was rendered as prayed for in the petition. Mottley v. L. & N. R. R. Co. (C. C.) 150 Fed. 406. But upon appeal to the Supreme Court of the United States this judgment was reversed upon the ground of want of jurisdiction in the federal court to entertain the cause of action. See L. & N. R. R. Co. v. Mottley, 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. ——. Whereupon the appellees instituted this action in the Warren circuit court, with the result that a judgment was rendered requiring the appellant to perform the contract. To review this judgment this appeal has been prosecuted.

The Louisville & Nashville Railroad Company is a common carrier engaged in the business of interstate and intrastate commerce, and the specific performance of the contract in question involves both interstate and intrastate commerce. Therefore one of the questions arising upon this record is whether or not the contract is specifically enforceable under the provisions of the act of Congress before referred to, and which is fully pleaded and relied upon by the appellant as a bar to appellees' cause of action. So much of the federal statute pleaded by the appellant as is deemed necessary to be herein set forth is as follows:

"Section 1. * * * No common carrier subject to the provisions of this act shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employés.

"Sec. 2. * * * No carrier, unless other-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

wise provided by this act, shall engage or participate in the transportation of passengers, or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of the act; nor shall any carrier charge, or demand, or collect, or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner, or by any device, any portion of the fares, rates and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. * * *"

The violation of these sections of the statute is punishable by heavy fine.

No question of the good faith of the parties in making the contract is raised, and the length of time it has existed prior to the enactment of the federal statute precludes the possibility of any intent to evade its provisions. The first question, then, arising upon the record is whether or not the Congress, in the enactment of the statute, intended to abrogate existing contracts such as the one in question—in other words, whether the statute was intended to be retroactive in its effect on pre-existing contracts, or whether it was intended to be prospective in its effect—and, second, whether or not the contract in question is within the purview of the federal statute at all.

The rule is well settled that statutes will always be construed to be prospective, and not retrospective in their effect, unless the language so plainly expresses a retrospective intent as to preclude a reasonable doubt that the Legislature meant it to be prospective. Cooley, in his work on Constitutional Limitations, in speaking of this rule of construction (page 529), says: "Nevertheless, legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." And Endlich, in his work on the Interpretation of Statutes (section 271), uses this language: "Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. * * * They are construed as operating only on cases or facts which come into existence after the statutes were passed, unless a retrospective effect be clearly intended." There is nothing in the language of the enactment by Congress, under discussion, which purports to give a retrospective effect to its operation; on the contrary, the intent that the statute should have a prospective effect only appears from a most cursory reading of the language used, unless it is applied to the actual issuance of the passes and not to the contract under which they are issued. We do not think it admissible to so construe the language of the statute as to hold that it applies simply to the issuance of a pass or ticket for transportation, rather than the contract under which the pass is issued. It is true that, in the execution of the contract made in 1871, it has been the custom of the railroad company to issue passes to the appellees annually, and therefore, if we fix our attention exclusively upon this annual issuance of tickets for transportation, it might seem that these fall within the letter of the statute because they are actually issued since the enactment; but this narrow view of the matter is inadmissible. The passes or tickets actually issued are in execution of the contract made in 1871, and, unless this contract is invalidated by the statute, its language cannot be applied to the mere issuance of the tickets. If the contract remains legally in force, the means by which it is executed cannot be invalid or illegal.

Passing now to the second question, we are of opinion that the contract between the appellant and the appellees does not fall at all within the meaning of the language used in the statute. The statute inhibits the issuance by common carriers doing interstate commerce of free tickets or passes for transportation, except to employés. The tickets or passes issued to the appellees in execution of the contract cannot in any real sense be called free. They are paid for in money, just as certainly as if the actual cash was handed over to the agent of the railroad by the appellees in payment for a trip ticket. The appellees had received serious bodily injuries caused by the negligence of the railroad, and the latter was liable to them for damages, which, unless the matter was settled amicably, would have to be liquidated by the verdict of a jury and the judgment of a court. It was entirely competent for the parties thus standing towards each other to settle this unliquidated claim or demand for money and agree upon its value. They did so, and it was stipulated that the amount of damages suffered by appellees was equal in value to such transportation as they should afterwards choose to make over its line during their natural lives. At the time this agreement was made, it was entirely legal and valid, and, as said before, it was made in absolute good faith by the parties. Now, suppose, instead of carrying out the contract in the manner adopted, the railroad had agreed that it was liable to appellees for the sum of $10,000, and had paid over to them that sum, and then appellees had chosen, as they might have done, to hand back the amount received, and thus purchased from the railroad with

actual cash transportation for life—would tickets issued under this agreement be called "free tickets," or "free passes"? We think not, and yet it would be difficult to find a difference in principle between the contract actually made and that supposed. It does not require more than a slight investigation to reach the conclusion that the contract made by the parties was very much to the advantage of the railroad as against the payment by it of such sum as the jury might assess in actual cash if the matter had progressed to a judgment for damages.

It may be admitted, for the purposes of this case, that Congress could have framed the statute so as to abrogate the contract under discussion. There is no constitutional inhibition upon Congress passing laws to impair the obligation of contracts as there is against the states passing such laws; but the same moral obligation against such unjust laws rests upon the general government as upon the state government, and we must presume that the general government never intends to impair the obligation of existing contracts, unless an imperative necessity exists for so doing, and a clear intent to do so is expressed. It would be a great hardship upon appellees to invalidate the contract between them and appellant. The time has long since passed under the operation of the statute of limitations, when they could institute or maintain an action against the railroad for the injuries received by them in 1871, so that if the contract is invalidated now, they would lose absolutely what remaining value it has. This property right will be taken from them without any consideration, and we would be justified in reaching the conclusion that Congress intended to invalidate the contract and thus take from appellees their property rights without remuneration only because the language used precludes any other construction.

In the case of United States v. Kirby, 74 U. S. 486, 487, 19 L. Ed. 278, the Supreme Court said: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will also therefore be presumed that the Legislature intended exceptions to its language, which would avoid results of that character. The reason of the law in such cases should prevail over the letter." In the case of Carlisle v. United States, 16 Wall. 153, 21 L. Ed. 426, the rule is thus stated: "All general terms in the statutes should be limited in their application, so as not to lead to injustice, oppression, or unconstitutional operation, if that be possible. It will be presumed that the exceptions were intended which would avoid results of that character." And in Market Co. v. Hoffman, 101 U. S. 116, 25 L. Ed. 782, it was said: "In Brewer's Lessee v. Blougher, 14 Pet. 178, 10 L. Ed. 108, it was said to be the undoubted duty of the court to ascertain the meaning of the Legislature, from the words used in the statute and the subject-matter to which it related, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of the language would extend to cases which the Legislature never designed to include in it." See, also, Chew Heong v. United States, 112 U. S. 555, 5 Sup. Ct. 255, 28 L. Ed. 770; Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; Bate Refrigerator Co. v. Sulzberger, 157 U. S. 37, 15 Sup. Ct. 508, 39 L. Ed. 601.

As we have said before, the very case we have here was decided in the Circuit Court of the United States for the Western District of Kentucky in favor of the appellees. Mottley v. L. & N. R. R. Co., supra. It is true, the judgment was reversed by the Supreme Court of the United States because of want of jurisdiction in the federal court to entertain the cause of action set up by appellees; but we think the painstaking and thorough opinion rendered by the learned federal judge upon the merits of the case is very instructive, and we rely upon it with confidence. Nor are we unmindful of the opinions in Southern Wire Co. v. St. Louis Bridge & Tunnel R. Co., 38 Mo. App. 191, and Fitzgerald v. Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76, 77, 13 L. R. A. 70, which hold that existing traffic contracts discriminating as to rates between shippers were repealed by the interstate commerce act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]). The opinions in these cases rest, in part, at least, upon the fact that the discriminating contracts by common carriers between their patrons were illegal at the common law, and could not be upheld in any event; but, without examining this phase of the case too minutely, it is sufficient to say that, in our opinion, they can be distinguished from that at bar. Those contracts were wholly executory, and fell within the precise reason for the enactment of the act of Congress prohibiting discrimination in interstate commerce. In the case at bar the appellees' part of the contract was entirely executed. They had paid over to the railroad company the whole consideration moving from them for the contract. To annul this contract now would be to confiscate the consideration paid by them. Nor was that contract in any wise illegal or questionable at the time it was made. On the contrary, as we understand it, it was entirely legal and valid. There is nothing in this record to show that the contract in any wise discriminates in favor of appellees. On the contrary, we think it highly probable that they pay for their railroad transportation under its terms a very much larger sum in money than the ordinary passengers do. In other words, judging from ordinary experience in such cases, where neither the liability nor the extent of

the damages is questioned, we think it more than probable that the verdict appellees would have received at the hands of a jury, if invested, would produce a sum which would more than pay for the transportation which they actually receive under the contract. Of course, this is somewhat problematical; but, as the railroad thought it was to its interest to make the contract, we cannot believe that our supposition is overstrained.

For these reasons we are of opinion that the contract under discussion does not fall within the terms of the federal statute, and that the judgment of the trial court should be affirmed, and it is so ordered.

DETHERAGE v. HAWN.

HAWN v. LUNSFORD et al.

(Court of Appeals of Kentucky. May 6, 1909.)

1. SALES (§ 366*)—ACTION FOR PRICE—PLEADING—CONSTRUCTION.

Where a petition in an action for the price of an engine alleged that under the original contract of sale between the seller and the buyer the engine was to be paid for in lumber, but that after sawing the lumber that the seller was to receive the buyer and his partners appropriated it to their own use and then promised to pay the price in money, plaintiff was entitled only to a money judgment, as he abandoned his right to recover the lumber and rested his case upon the ground that the first contract under which he was to receive lumber was merged in the contract under which he was to be paid in money.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1078; Dec. Dig. § 366.*]

2. SALES (§ 348*)—ACTION FOR PRICE—RIGHT TO COUNTERCLAIM.

Where an original contract for sale of an engine, which provided that it should be paid for in lumber, was modified, and it was agreed that it should be paid for in money, and that out of the money due the seller the buyer and his partners would satisfy a mortgage on the engine, paying the seller the balance, in an action for the price of the engine the buyer and his partners could not counterclaim for damages from the seller's failure to take the lumber or from decay of the lumber caused by delay in removing it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 973; Dec. Dig. § 348.*]

3. SALES (§ 348*)—ACTION FOR PRICE—COUNTERCLAIM.

Where a buyer, when purchasing an engine, knew of a defect therein, and that the engine was mortgaged, and he and his partners promised to satisfy the mortgage, they could not counterclaim, in an action for the purchase price, because of the defect or mortgage, and where, instead of paying the mortgage before sale of the engine thereunder and obtaining credit on the purchase price for the sum so paid as permitted by the contract of sale, they allowed the engine to be sold, the seller purchasing it, they could counterclaim only the amount it sold for.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 973; Dec. Dig. § 348.*]

4. SALES (§ 220*)—ACTION FOR PRICE—LIABILITY OF BUYER'S ASSIGNEES.

Where a buyer of an engine sold interests therein to other persons, who assumed as his partners to pay the seller for the engine, they were jointly and severally liable with the buyer for the amount due thereon.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 606; Dec. Dig. § 220.*]

Appeal from Circuit Court, Knox County.

"Not to be officially reported."

Action by M. W. Hawn against W. H. Detherage and others. There was a judgment for plaintiff against the mentioned defendant, and a judgment of dismissal as to the other defendants, and plaintiff and the mentioned defendant appeal, respectively, from the judgments against them. Judgment for plaintiff affirmed. Judgment of dismissal reversed, with directions.

Jas. M. Gilbert and James D. Black, for plaintiff. J. M. Robison, for defendants.

CARROLL, J. These two appeals, involving the same question of law and fact, are heard together. To present clearly the issues, we will take from the pleadings the substantial points of difference between the parties.

In April, 1905, Hawn sold to Detherage a sawmill engine for $775, which sum he alleged Detherage agreed to pay in lumber at the price of $9 per 1,000 feet for buckeye and $9.50 per 1,000 feet for other kinds, the lumber to be manufactured at the mill out of logs then at the mill or near by; and, if the lumber so manufactured amounted to more than the price of the engine, Hawn was to have the surplus at the price mentioned. He averred that soon after Detherage purchased the engine, he sold a one-third interest therein to Lunsford, another one-third interest to Lawson, retaining a third himself, and that all of them agreed to carry out the contract made by Detherage, but that in violation of the contract they manufactured the logs into lumber and refused to let him have any of it, but sold the same, promising to pay him in money the price of the engine in place of the lumber. He asked judgment against all three of them for the amount of his debt and interest. Detherage filed a separate answer and counterclaim, in which he admitted the purchase of the engine and the agreement upon his part to pay for the same in lumber at the price stated by Hawn, but denied that he or Lunsford or Lawson ever agreed with Hawn to pay him money in lieu of lumber, and set up that the lumber necessary to pay for the engine was sawed and tendered to Hawn, but he refused to accept the same and permitted it to remain in the lumber yards until it was damaged to the extent of $400, for which amount he sought judgment on his counterclaim against Hawn. He further set up that one Mason had a mortgage on the engine at the time it was sold to him by