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Notes

STATE CONTROL OVER CONTRACT MOTOR CARRIERS

The overlapping of transportation facilities in the United States has long been one of the classic illustrations of the waste incident to the operation of individualistic competitive industry. Duplication of service has been the consequence of speculative overdevelopment, with results harmful to the efficiency of the service itself and disastrous to the interest of the investor in transportation securities. Destructive competition between parallel railroads serving virtually the same territory, as well as between railroads and shippers by water routes, has long been deplored by those familiar with the carriage situation. In comparatively recent years, however, this condition has been further disordered by the emergence of a new giant in the struggle, motor transportation. Enjoying competitive advantages of elasticity of operation and cheapness of cost, highway carriers have diverted a great volume of business from established railroad interests, until those interests have, with some justification, placed upon this new competitor much of the responsibility for their own financial collapse.

It is recognized that in the field of transportation the ultimate goal of regulation is a working coordination of the several transportation agencies.¹ It is with the end in view of coordinating motor transportation facilities into some comprehensive scheme that state legislatures have for some time experimented with plans of regulation of the motor carrier. With one phase of this regulation this note concerns itself.

Obviously there was little difficulty, even at the outset, in formulating a system of control for motor common carriers.

¹ Regulation of the Contract Motor Carrier under the Constitution, LaRue Brown and Stuart N. Scott (1931) 44 Harvard Law Review 530. "The question of economics which is posed is how to work out the relationship of these—and other—competing forms of transportation so as to provide the maximum of public service at the least cost to shipper and consumer and with fair compensation to the labor and capital employed."

Concepts developed in the evolution of regulation of railroad common carriers were available in treatment of these motor carriers. It may be considered an established principle that state regulation of the highway common carrier, as of the common carrier by rail, is constitutionally valid,² in so far as the question of state interference with interstate commerce is not concerned.³

The admitted power of a state to regulate intrastate motor common carriers disposed largely of the problem of equalizing competition between passenger carriers by rail and passenger carriers by motor. Passenger service lends itself, generally, only to a development of common carriage, and the private contract carrier of passengers is insignificant. In the trucking field, however, motor transportation is better suited to the conduct of business under special individual contracts than the conduct of business by common carriers with stated schedules and fixed routes. Private contract motor carriers have made greater inroads in the business of established transportation agencies than have the common or public carriers, and any attempt to impose regulation on the latter is ineffectual unless the private carrier also is submitted to reasonable regulation.

This article contemplates a consideration of state legislation of the intrastate contract motor carrier. The related problem as to what restrictions may be placed by the state upon the interstate carrier must be reserved since their consideration would involve too lengthy a discussion of the complex problems of constitutional law involved in our federal system of government. At the outset the contract motor carrier is to be distinguished: first, from the common motor carrier; and second, from the private carrier of property, that is the shipper who uses his own trucks in transporting property sold by him in carrying out his business enterprises. Differentiation is not the least of the difficulties. The avowedly common carrier cannot be distinguished precisely from an ostensible private carrier operating under several individual contracts. About all that can be said is that a private contract carrier is one conducting motor transportation for hire, and not a common carrier. Use must be made of the classic test of common carriage—whether the carrier voluntarily assumes the duty to serve all those desiring to use his facilities.⁴

² As to "business affected with a public interest" cf. *Munn v. Illinois* (1876) 94 U. S. 113 (warehousing); *Peik v. Chicago & N. W. Ry.* (1876) 94 U. S. 164 (railway common carriers); *Union Dry Goods Co. v. Georgia Public Service Corporation* (1919) 248 U. S. 372 (electricity).

³ *Buck v. Kuykendall* (1925) 267 U. S. 307; *Bush & Sons v. Maloy* (1925) 267 U. S. 317.

⁴ Universally applied is an objective test much more easily announced than scientifically determined in a particular case: whether or not the carrier in

In considering the judicial treatment which has been accorded these state experiments in control of the motor contract carrier in the cases which have delimited the power of a state's authority to regulate, the viewpoint of the writer is perhaps warped by an assumption that the cases should be considered in the light of the ultimate economic purpose which the various statutes have had in mind—the aforementioned coordination of the motor carrier into the comprehensive transportation set-up. From this point of view, it is difficult to escape the conclusion that the Supreme Court of the United States has followed an inconsistent course in passing upon the several state statutes dealing with the subject, due largely to an over-occupation with one established principle. Its attitude has been one of apparent suspicion; in its eagerness to detect a possible violation of that established concept it has lost sight both of the dangerous implications of overturning the state plans for regulation and of the clear meaning of the statutes.

The unassailable principle that a state may not by legislative fiat make a private carrier into a common carrier⁵ was applied to the field of motor transportation in the now leading case of *Michigan Public Utilities Commission v. Duke*.⁶ The transportation law of Michigan⁷ imposed on all persons carrying on motor transportation for hire over the state highways the burdens and duties of common carriers.⁸ Regulations traditionally incident to common carriage were imposed: a permit to be issued in accordance with public convenience and necessity; and indemnity bonds to secure payment of claims resulting from damage to cargo. The chief basis of the decision was the theory that it violated the commerce clause of the United States Constitution by imposing unreasonable conditions upon the right to carry on interstate com-

fact holds himself out to serve the public. "The criterion is, whether he carries for particular persons only or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him, he is a common carrier; but if he does not do it for everyone, but carries for you and me only, that is a matter of special contract." *Ingate v. Christie* (1850) 3 Car. & K. 61, 175 Eng. Repr. 463.

⁵ Cf. *Produce Transportation Company v. Railroad Commission of California* (1920) 251 U. S. 228, to the effect that the state legislature cannot convert a private carrier pipe line into a common carrier by legislative fiat.

⁶ (1925) 266 U. S. 570.

⁷ Act No. 209, Public Acts of Michigan (1923).

⁸ "Any and all persons engaged . . . in the transportation of persons or property for hire by motor vehicle, upon or over the public highways of this state . . . shall be common carriers, and, so far as applicable, all laws of this state now in force or hereafter enacted, regulating . . . transportation . . . by other common carriers, including regulation of rates, shall apply with equal force and effect to such common carriers . . . by motor vehicles."

merce,⁹ but the case is chiefly important in this investigation for its further holding that to convert property used exclusively in private carriage into a public utility, or to make the owner a public carrier by legislative fiat is beyond the power of a state; since it would be taking property for public use without just compensation in violation of the due process clause of the Fourteenth Amendment.

*Frost and Frost Trucking Company v. Railroad Commission of California*¹⁰ restated the principle of the *Duke* case with one notable advance, the view that a statute in effect requires a contract carrier to become a common carrier by the imposition upon him of duties ordinarily incident to common carriage, although there is no express statement of such an intention. The assailed California statute¹¹ required contract carriers operating over the state highways over a fixed route or between fixed termini to secure a certificate of public convenience and necessity from the Railroad Commission, and submitted such carriers to supervision by the Commission as to rates and public relations. The Supreme Court of California¹² had held that the statute placed private carriers falling within its terms under the same control by the Railroad Commission as common carriers. Accepting the state court's interpretation of the statute as binding, a majority of the court held that, even though in form the statute purported to be a mere denial of the right to use the highways without submitting to certain conditions,¹³ it in effect attempted to convert a private carrier into a common carrier by edict of the legislature and was unconstitutional. The *Duke* decision was cited as controlling. Left undecided by the decision was the question (which

⁹ The interstate commerce phase of the decision was called forth by the fact that the appellant carrier in the instant case was engaged in carriage between Detroit, Michigan, and Toledo, Ohio, pursuant to three contracts for shipment of motor bodies. The court said: "It is a burden upon interstate commerce to impose upon the plaintiff the onerous duties and strict liability of a common carrier. . . . These requirements have no relation to public safety or order in the use of motor vehicles upon the highways or to the collection of compensation for the use of the highways. The police power does not extend so far."

¹⁰ (1926) 271 U. S. 583.

¹¹ Auto, Stage, and Truck Transportation Act of California, c. 213; Statutes of California (1917) p. 330.

¹² *Frost v. Railroad Commission* (1925) 197 Cal. 230, 240 Pac. 26.

¹³ In this regard note the language in *Packard v. Banton* (1924) 264 U. S. 140: ". . . a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former."

the minority contended was the sole one presented) whether a State may exact of a private carrier a certificate of public convenience and necessity as a condition precedent to the use of its highways.

If it be conceded that the Supreme Court was bound to accept the state court's interpretation of the statute in the *Frost* case, that decision represents no great advance over the principle enunciated in the *Duke* decision. A much more doubtful decision is that in the case of *Smith v. Cahoon*,¹⁴ passing on the constitutionality of a statute of the state of Florida.¹⁵ This statute provided that all "auto transportation companies" should be restrained from carrying passengers or property for hire without first obtaining a certificate of public convenience and necessity from the Railroad Commission, and that their rates and service should be subject to the regulation of that body. Appellant, a private carrier under an exclusive contract with one firm, was convicted for operating without securing the certificate and paying the tax provided for by the statute and appealed from the state court's order affirming the validity of the statute.¹⁶ The Supreme Court held the statute unconstitutional on the ground that it subjected all carriers, private or common, to the same obligations, holding that the uncertainty of the statute as to whether the standards imposed were directed at the private carriers made it impossible to sever from the rest of the statute those provisions which might validly be applied to the appellant.¹⁷ It seems evident that the court here is unduly influenced by the *Frost* and *Duke* decisions. Neither the statute here nor the state court expressly mentions either common carriage or its distinguishing characteristic, the duty to serve all desiring the facilities. The court's position seems to be that to impose upon a private carrier characteristic common carrier regulations, as to rates and services, without imposing a duty to serve is nevertheless equivalent to actual conversion into a common carrier. The court has not the justification here which it had in the *Duke* and *Frost* decisions, in one of which by statute and in the other by interpretation of the state court, there was an express conversion of the private carrier into a common carrier. In extracting the duty to serve from the concept of common carriage, the court overlooks the fact

¹⁴ (1931) 283 U. S. 553.

¹⁵ Chapter 13,700, Acts 1929, Florida General Laws (Supp. 1930), section 1335.

¹⁶ *Cahoon v. Smith* (1930) 99 Fla. 1174, 120 So. 362.

¹⁷ "No separate scheme of regulation can be discerned in the terms of the act with respect to those considerations of safety and proper operation affecting the use of the highways which may appropriately relate to private carriers as well as to common carriers."

that fundamentally it was the imposition of that duty which, in the beginning, rendered unconstitutional the conversion of private carriers into common carriers.

It was while the case law on this subject was in the condition indicated¹⁸ that an article appeared in the Harvard Law Review¹⁹ reviewing the course of the decisions and setting out the prophecy, justifiable in the light of the prior decisions, that:

. . . regulation in the sense of control of contracts, rates and practices, and of the right to engage in the business, cannot be imposed upon the contract motor carrier without violating the due process clause. . . . If, for constitutional reasons, this illusory expedient must be abandoned with respect to the contract carrier, it is reasonable to hope that the intelligence of the business world will, by using the facilities at hand, work out a complete mechanism in which the railroad, the steamship, the pipe line, the airplane, and the motor vehicle will each be assigned the part in which it can contribute most to the cheap and efficient transportation upon which the public welfare depends.²⁰

That the prophecy has not come to fulfillment is due not to any lack of perspicacity of the authors of the above article, but to what can be described only as a change in emphasis by the Supreme Court of the United States in its more recent consideration of state regulatory statutes. That emphasis is upon the state's power arising from control of the highways to adopt legislation in the interest of the preservation of the highways and of the safety of the traveling public.

*Continental Baking Company v. Woodring*²¹ approving a

¹⁸ At the time of the publication of the article, *Smith v. Cahoon* was awaiting review by the Supreme Court, on appeal from the Supreme Court of Florida. Had the decision been rendered at the time, it would have confirmed the conclusions of the authors, in no small degree.

¹⁹ Regulation of the Contract Motor Carrier under the Constitution by La Rue Brown and Stuart N. Scott (1931) 44 Harvard Law Review 530.

²⁰ In explaining their conclusions Messrs. Brown and Scott asserted that state regulation of rates, practices, or competition in this field could not be justified on either of the accepted bases of state regulation of the contract carrier: i. e. *first*: power arising from control of the highways, to enforce regulations to preserve the highways and guard the safety of the traveling public; and, *second*: power of control arising from the nature of the business. The first theory, it was contended, could not justify such regulations because they are not bona fide highway regulations. The second was considered inapplicable because in the intendment of the decisions, the sole inference from the clothing of common carriers with a "public interest" is that other types of carriers possess no such characteristic.

²¹ (1931) 286 U. S. 352.

statute of the State of Kansas is in itself no great advance but is significant as a forerunner of the decisions to come. The Kansas statute referred to classified motor carriers into three groups²² and provided that contract carriers and private motor carriers must obtain licenses, keep a travel record for purposes of taxation per ton-mile, and furnish liability insurance.²³ An indication of the changed emphasis is in the following passage: "Requirements of this sort are clearly within the authority of the state, which may demand compensation for the special facilities it has provided and regulate the use of its highways to promote the public safety."

Along the same general tendency is the case of *Sproles v. Binford*,²⁴ in which the Supreme Court upheld the validity of those provisions of the motor vehicle act of Texas prescribing limitations on the size, weight, and load of motor vehicles operating over the highways of the State. The court stressed the right of the state to prevent the wear and hazards incident to traffic of vehicles of excessive size and weight of load.

Motor carrier regulation history was made by the Supreme Court last December in *Stephenson v. Binford*²⁵ by the Court's approval of a statute of the state of Texas²⁶ which provides about as comprehensive a plan for coordinating the contract carrier into the transportation mosaic as any advocate of public regulation might have asked. The statute has several significant pro-

²² Laws of 1931, c. 236. Passed primarily for exacting taxation as compensation for use of the highways, the act classified motor carriers into the three accepted groups:

- (1) "Public motor carrier", defined as one transporting "for hire as a common carrier," having fixed termini or fixed route.
- (2) "Contract motor carrier", defined as one who is not a "public motor carrier" and is engaged in transportation for hire as a business.
- (3) "Private motor carrier of property", defined as one transporting "property sold or to be sold by him in furtherance of any private commercial enterprise."

²³ In relation to the state's power to impose a bond and insurance requirement a distinction must be made between such as are intended to secure payment of claims arising from injuries to the public as a result of motor operation and on the other hand such requirements as are intended to secure payment of those claims and liabilities arising out of injuries to the cargo carried. The former type of insurance requirement is valid as a provision for the public safety; the other is invalid, as an attempt to condition the private contractual relationship between shipper and private carrier.

²⁴ (1931) 286 U. S. 374. The earlier cases on this subject are treated in an article by John J. George, *State Regulation of Interstate Motor Carriers* (1929) 14 St. Louis L. Rev. 136, l. c. 154.

²⁵ (1932) 287 U. S. 251.

²⁶ Vernon's Annotated Civil Statutes of Texas, article 911b, sections 1 et seq.

visions: *first*: it requires a contract carrier to obtain a permit from the Railroad Commission as a condition precedent to operation, and makes the issuance of the permit dependent on the condition that the efficiency of existing common carrier service is not impaired; *second*: it authorizes the Railroad Commission to prescribe minimum rates, not less than those prescribed for common carriers for substantially the same service; *third*: it requires every motor carrier to furnish a policy of insurance.²⁷ Naturally the unprecedented scope of the control spurred the interested appellant to indignant protests that it was another attempt to convert the private carriers of Texas into common carriers, depriving the appellant of his property without due process of law and abrogating his rights of private contract. In view of the past holdings of the Supreme Court it would seem that the appellant had just legal cause for complaint.

The saving grace of the entire statute, however, seems to lie in Section 22 (b) which is a broad recital of policy that the restrictions are to the end that the various transportation agencies of the state be "adjusted and correlated" so that the public highways may be preserved to serve the best interests of the general public.

The court, excluding other considerations, viewed as the issue of the case: Whether in the light of the broad general rule just stated²⁸ the statute may be construed and sustained as a constitutional exercise of the legislative power to regulate the use of the state highway? The court in answering its query with an affirmative, based its sanction of the statute on the theory that "the assailed provisions of the statute are not ends in and of themselves but means to the legitimate end of conserving the highways." The extent to which, as means, they lead to the required end, was, in the opinion of the court, a question left to the reasonable judgment of the legislature. In other words by imposing regulations to equalize contract carrier competition with existing common carrier traffic by rail or truck, and by making the non-existence of adequate transportation facilities a condition precedent to the issue of a permit, the state will decrease the

²⁷ As against appellants' construction of the bond and insurance policy requirement that it included insurance of cargo which might not validly be required, the court refused to pass on the question, holding that because no attempt had been made to enforce the provision against the appellants, they had no cause to complain until such attempt was made.

²⁸ "It is well established law that the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally, at least, the legislature may prohibit or condition as it sees fit." *Citing Packard v. Banton*, *supra*; *Hodge Drive-It-Yourself Co. v. Cincinnati* (1932) 284 U. S. 335; and others.

number of contract carriers and mitigate the pressure of the traffic on the highways of Texas.

Welcome as this decision is to the writer, meaning as it does that the states need no longer continue the trial and error method in the hope of getting a statute by the Supreme Court, it cannot be denied that this is a classic example of judicial rationalizing. It would better become the court frankly to assert the proposition that changing conditions in the transportation field have necessitated the abandonment of a concept of law which led only to chaos in the field. The fallacy of the court's theory is its ignoring the fact that most of the carriage which would have been done by the unregulated contract carrier will be done under an equalizing of competition, not by non-highway carriers but either by common carriers by motor vehicle or by private trucks which the shippers will purchase for their own use, both of which equally will wear the highway. This indicates an insularity of mind which ill becomes the supreme tribunal.

Aside from its "far fetched" reasoning, however, the *Binford* decision is auspicious and with ample economic justification. Coming as it does at a time when existing transportation facilities are greatly in excess of any effective demand possible in the immediate future, it gives the states something of a free hand in coordinating their transportation assets—to work the contract carrier into the comprehensive system of transportation in a manner which will provide for adequate public service, and yet will prevent tottering railroad valuations from further disaster. Future state legislation will, in all probability, adopt the opportunity of incorporating into itself such a recital as that which gave the court its cue for a change of heart in *Stephenson v. Binford*. "Oh highway preservation! What regulations shall be committed in thy name."

HARRY W. JONES, '34.

THE SUABILITY OF AN UNINCORPORATED ASSOCIATION IN MISSOURI

It appears to be a well settled rule of the common law that an unincorporated association cannot maintain an action in its own name,¹ but must sue or be sued in the names of the component members,² in the absence of a statute granting such powers.³

¹ *Francis v. Perry* (1913) 144 N. Y. S. 167; *Detroit Schuetzen Bund v. Detroit Agitation Verein* (1880) 44 Mich. 313, 6 N. W. 675.

² *Lewelling v. Woodworkers Underwriters* (1919) 140 Ark. 124, 128, 215 S. W. 258, 259; *Westbrook v. Griffin* (1906) 132 Iowa 185, 109 N. W. 608; *McMahon v. Rauh* (1871) 47 N. Y. 67.

³ *Int'l Bro. Loc. Engineers v. Green* (1921) 206 Ala. 196, 89 So. 435;