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NOTES

CONSTITUTIONAL LAW—DUE PROCESS— STATUTORY REGULATION OF PRIVATE OR CONTRACT MOTOR CARRIERS

Within the past decade the motor carrier has risen from a comparatively insignificant position to an essential and formidable place in the field of transportation. The widespread and ever growing use of the public highways by freight and passenger motor carriers for profit has not only proved destructive of the highways and a menace to the safety and convenience of the driving public, but has presented new problems of serious economic consequence, particularly in regard to their position as powerful competitors with the railroads. It has become evident that besides ordinary road and safety regulations, such as limiting the weight of trucks, requiring licensed drivers, etc., which regulations the state unquestionably has the power to make,¹ it is economically necessary further to regulate motor carriers (i.e. regulate their business, as distinguished from the use of their property) to the end of preserving the continued existence of the railroads; and, in the case of contract motor carriers, to protect also the highway common carriers. The power of the state to employ this latter type of regulation is not so certain, in view of the limitations of the due process clause, and it is with this type of economic regulation that this note deals.

There is no regulatory difficulty in respect to the common carrier truck or bus. These can of course be constitutionally regulated as to rates, service, and permission to enter the field, and in most states they are placed under the

¹See Rosenbaum & Lillienthal, "Motor Carrier Regulation" 26 Col. Law Rev. 954, 961 (1920). Continental Baking Co. v. Woodring, 286 U. S. 352, (1932); Buck v. Kuykendall, 267 U. S. 307, 314.

full supervision of the Public Utility Commission.² It follows that the passenger motor carrier for hire presents no serious problem, for such carriers must, with the exception of a few particular types of operation, such as the contract school bus, run on a regular schedule at fixed rates and serve the public, thereby bringing themselves within the common carrier category.³ It is therefore only the private or contract freight carrier which escapes completely commission control, and it is with the statutory regulation of this type of carrier, to which recent legislation has been confined, that this note will deal.⁴

Although the general principle of law which differentiates the common carrier from the private or contract carrier is easily stated,⁵ its application to specific operations is another matter, and the maze of cases which have attempted to place a particular service within the protective cloak of "private business," or to expose it to the commission regulations of a common carrier, are conflicting and challenge analysis.⁶ The fact remains that it is possible for one to haul for several customers under several individual

²47 states and the District of Columbia have common carrier regulatory statutes. See Brown & Scott, *infra* Note 6, at 568. The Pennsylvania Public Service Co. Law puts common carriers under the jurisdiction of the Public Service Commission; 66 P. S., Sec. 1.

³On the Commission regulation of bus operations in Pennsylvania, see S. G. McNees, "Regulation of Motor Transportation," 37 Dick. L. R. 81 at 92. (January 1933).

⁴No attempt will be made here to discuss the question of regulation of carriers engaged in Interstate Commerce. For a discussion of that problem see McNees, *supra* Note 3 at 86.

⁵"The Private Carrier is one who, without engaging in such business as a public employment, undertakes by special contract to transport goods in particular instances from one place to another. . . . The common carrier is one who holds himself out in the exercise of a public calling, to carry, for hire, for whomsoever may employ him." Dobie, "Bailments & Carriers." Sec. 106, 107.

⁶See Brown & Scott, "Regulation of the Contract Motor Carrier under the Constitution." 44 Harv. L. R. 530, at 535. (1931). McNees, *supra* Note 3.

contracts and still retain the status of a private carrier.⁷ Many more motor truck carriers are now engaged in such contract business than in common carriage and the size and extent of their business exceed that of the latter. The inevitable result of the unrestricted continuance of this condition will be the extirpation of the common carrier from the highways and increased rates and poorer service by the railroads, if not their elimination.

It is true that truck carriers provide more efficient service than the railways in respect to certain common business practices of today which require prompt delivery,⁸ but in the case of long distance bulk hauling the railroad alone can serve the public. Even as to the beneficial speedy truck carriage, if the contract carrier is permitted to drive the common carrier out of business the public will be injured, for there then would be no carriers from whom the public could demand service at reasonable rates. It is evident that what is needed is a comprehensive regulation of all these types of carriage, with a view to preserving a correlated transportation system which will best subserve the interests of the public.

Pressed with this economic need several states passed statutes providing for regulation of the business of the contract motor carrier and all of them met the fate of being held unconstitutional⁹ until the recent Texas Act¹⁰ which was upheld in *Stephenson v. Binford*.¹¹ The importance of

⁷*Terminal Taxicab Co. v. Kutz*, 241 U. S. 256 (1916); *Film Transportation Co. v. Michigan P. U. C.*, 17 Fed. (2nd) 857 (E. D. Mich. 1927); *Re Jones*, P. U. R. 1924A, 540 (Pa.). This principle is recognized in the cases *infra* Note 9.

⁸For example, many retail merchants today do not keep large stocks on hand but order only as their business demands. Such a practice requires a speedy delivery usually done by trucks.

⁹*Michigan P. U. C. v. Duke*, 266 U. S. 570, 45 S. Ct. 191, 36 ALR 1105, (1925), noted in 38 Harv. L. R. 980. *Frost v. Railroad Commission*, 271 U. S. 583, 47 ALR 457 (1926), noted in 40 Harv. L. R. 131. *Smith v. Cahoon*, 283 U. S. 553, (1931), noted in 30 Mich. L. R. 629 (1932).

¹⁰Texas General Laws 1931, c. 277.

¹¹53 S. Ct. 181, (1932).

this decision is clear, but its real significance and its usefulness as a guide for future legislation can be better understood after a brief review of the prior cases declaring similar legislative regulation invalid.

The first of these statutes to reach the Supreme Court was the Michigan statute considered in the *Duke* case.¹² This statute provided that all persons engaged in transportation for hire upon the public highways should be common carriers and that all laws regulating transportation by common carriers should apply with equal effect to them. A motor freight carrier operating under three contracts assailed the validity of the act as applied to him. The act was declared unconstitutional, the court employing the following language, "Moreover it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, for that would be taking private property for a public use without just compensation."¹³

The next important case, *Frost v. Railroad Commission*,¹⁴ dealt with a California statute¹⁵ which did not declare that all carriers for profit were common carriers, but required a private carrier to secure a certificate of public convenience before doing business on the highways. This was construed by the California Supreme Court¹⁶ as subjecting the private carrier to all the duties and burdens imposed by the act on common carriers. The United States Supreme Court accepted this interpretation of the act and declared it unconstitutional because it, in effect, converted

¹²Mich. Pub. Acts 1923, No. 209, Mich. P. U. C. v. Duke, supra Note 9.

¹³Ibid. 45 S. Ct. at 193. This means no more than that the question as to whether a particular business is so affected with a public interest as to be subject to statutory regulation is a question for judicial determination and not one to be arbitrarily determined by the state legislature; but the "legislative fiat" phrase is a potent epithet which the court often employs with telling effect to exterminate unwise economic legislation.

¹⁴Supra. Note 9.

¹⁵Cal. Gen. Laws (Deering 1923) Act 5129, sec. 1 (c).

¹⁶*Frost v. Railroad Commission*, 197 Cal. 230, 240 Pac. 26, (1925).

private carriers into common carriers and hence came within the same prohibition as the *Duke* case. In answer to the argument that the use of the highways for profit was a privilege which the state could forbid altogether¹⁷ and hence could permit only upon such conditions as it saw fit, the court applied the doctrine of unconstitutional conditions.¹⁸

In *Smith v. Cahoon*,¹⁹ a Florida statute,²⁰ in most respects similar to the California Act, was before the court. It required a certificate of public convenience from all who operated motor vehicles for compensation and placed all obtaining such under the control of the Railroad Commission, with power to regulate rates, service, etc. Here, however, the State Supreme Court held that the act did not require private carriers to become common carriers; that the provisions of the act were separable; and that only those regulations which the commission could lawfully apply to private carriers were intended to apply to them.²¹ The Supreme Court however did not accept this interpretation and held that no separate scheme of regulation could be discerned as applicable to each type of carrier and that therefore the act was invalid as coming within the ban of the prior two cases. One definite limitation of the state's

¹⁷"The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for purpose of gain is special and extraordinary and, generally, at least may be prohibited or conditioned as the legislature deems proper." *Packard v. Banton*, 264 U. S. 140, 144. 44 S. Ct. 257 (1924).

¹⁸This is the doctrine which the court had enunciated in respect to foreign corporations, to the effect that whereas a state could keep a foreign corporation out altogether it could not permit it to do business in the state only upon complying with a condition which requires the relinquishment of rights guaranteed by the Constitution; on the ground that the state could not do indirectly what it could not do directly. *Home Insurance Co. v. Morse*, 20 Wall 445, (1874). See Note 79 U. of P. Law Rev. 1119, 1128 criticizing this doctrine as reflecting on the logical validity of the general theory of a foreign corporation's status. The same objection would seem to be true of its application to the "special privilege" theory of the use of the public highways.

¹⁹*Supra*. Note 9.

²⁰Fla. Gen. Laws 1929, c. 13700.

²¹*Cahoon v. Smith*, 99 Fla. 1174, 128 So. 632, (1930).

power can be drawn from these cases, viz., a state cannot require a private carrier to become a common carrier, and this is true whether the statute expressly states that intention or its operation actually effects that result. It is to be noted that in none of these cases did the court expressly hold that the state could not regulate both types of carriers in the same manner, so long as their regulation was under separate schemes, nor was there any pronouncement that a contract motor carrier was not in a business affected with a public interest.²²

With these statutes and decisions in mind the Texas legislature drafted an act²³ regulating common carriers and contract freight carriers. It carefully separates the two types of carriers and has separate provisions applicable to each. The common carrier must obtain a certificate of public convenience and the contract carrier must have a "permit" before engaging in business. The latter is not to be granted if the Commission is of opinion that the proposed operation will impair the efficient public service of an authorized common carrier then adequately serving the same territory. The Commission is also given authority to fix minimum rates to be charged by the contract carrier, which rates shall not be less than those prescribed for common carriers for substantially the same kind of service. There were other regulatory provisions but these two regulations were the only ones vigorously assailed and the only

²²It would seem such a holding was implied in the doctrine that the state could not convert a private carrier into a common carrier, since this doctrine must have been based on the theory that a private carrier was not affected with a public interest. However, saying it cannot be made a common carrier does not necessarily mean that it is not a business affected with a public interest. It might merely mean that it cannot be compelled to serve all; and a business may be affected with a public interest and subject to rate regulations though it is not under the obligation to serve all. *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 58 L. Ed. 1011, (1914), and see Powell, "State Utilities and the Supreme Court", 29 Mich. L. R. 811 (1931).

²³Texas Gen. Laws, 1931, c. 277.

two considered by the court.²⁴ The act also declared contract carriage to be a business affected with a public interest and contained a declaration of policy showing its purpose was to preserve the highways, promote the safety of the travelling public, and to adjust and correlate the various transportation agencies of the state in the interests of the public.

The statute was held valid in the District Court²⁵ on the broad ground that the business of the contract motor carrier was a business affected with a public interest, the Court emphasizing, the special privileges of using the highways for profit. When the case came before the Supreme Court²⁶ the District Court was affirmed but an entirely different approach was taken. The court first expressly put aside the question as to whether the contract motor carrier was a business affected with a public interest and confined its decision solely to the question whether the statute could be sustained as a regulation of the use of the highways. After deciding there was no attempt here, expressly, or in effect, to convert a private carrier into a common carrier,²⁷ and thus, (to the court's satisfaction) disposing of the *Duke, Frost, and Cahoon* cases, the court proceeded to consider whether the permit and rate fixing provisions were means to the legitimate end of conserving the highways.

The court upheld the permit requirement as a highway regulation, saying that it was a means to the end of preserving the highways because it would divert carriage from the highways to the railroads and correspondingly relieve the latter from burdensome traffic. If the commission, in

²⁴The court refused to pass upon the requirement that all motor freight carriers must furnish a bond and insurance to cover loss or injuries to property arising out of the operation of the common carrier.

²⁵*Stephenson v. Binford*, 53 Fed. (2nd) 509, (S. D. Tex. 1931).

²⁶*Supra*, Note 11.

²⁷"It is true that the regulation imposed upon the two classes are in some instances similar, if not identical; but they are imposed upon each class considered by itself, and it does not follow that regulations appropriately imposed upon the business of a common carrier may not also be appropriate to the business of a contract carrier". *Supra*, Note 11, at 185; and see Note 22 *Supra*.

refusing a permit, was to base its refusal upon considerations of traffic congestion one would agree with this holding, but it is submitted that since the Commission was to base its refusal upon the question as to whether there were already common carriers serving the field (the same test applied in the case of certificates of public convenience), it was primarily and substantially an economic measure, regulating the business of the contract carrier and not the use of his property on the highways. Further, the preservation of the highways is not accomplished by reducing the number of companies or persons engaged in motor transportation, for a company will increase its facilities as business increases. The only effective method of regulating the use of the highways is by regulation of the kind of facilities and the manner of using them.²⁸ That some type of certification would be permissible was implicit in the opinion in the *Frost* case, and Justice Holmes, in his dissent in that case,²⁹ stated that you could regard as a highway regulation a permit requirement; but the permit there referred to was one limiting the number and kinds of facilities rather than one limiting the number engaged in the business and aimed at curbing destructive competition, as in the Texas statute.

The court had a little more difficulty with respect to the rate fixing provision but this too was upheld as a regulation for the preservation of the highways upon the same ground, viz., that it tended to divert traffic from the highways to the railroad. Though it clearly interfered with the freedom of the parties to contract the court disposed of this objection by saying that these contracts contemplate the use of the highways and since the state can regulate the use it can regulate contracts in so far as they relate to the use. This theory as to the purpose of rate fixing is a departure from the previous holdings of the Supreme Court. The power of a state to fix rates has always been justified on the ground that the business regulated was affected with a

²⁸See Note 80 U. of P. Law Rev. 1008, 1013 (1932).

²⁹*Supra*, Note 9, 271 U. S. 583 at 592.

public interest and hence that the business itself could be regulated.³⁰ Fixing the rates of common carriers has been recognized as a regulation of the business itself — as economic legislation aimed at restriction of destructive competition, and it is difficult to see why the same type of regulation when applied to a contract motor carrier loses its aspect of business regulation and becomes a measure to preserve the highway and protect the life and limb of the people.

One cannot quarrel with the result of the decision. The Texas statute was a sound and much needed economic regulation; but it is felt that if the court had recognized the statute to be economic legislation aimed at the business of carriage itself, and upheld it on that ground, the decision would have been less violative of logic and precedent and would have served as a better guide in determining the extent to which such regulation may go. Since the court refused to decide whether the contract motor carrier was in a business affected with a public interest that question is still open, though it would seem the court doubted its status as such, or it would not have indulged in a form of legal apologetics in sustaining it, by specious reasoning, as a highway preservation measure.

It would seem that the legislation could be upheld on the public interest theory. True, if the contract carrier is segregated and considered apart from other carriers it savors of a private enterprise. But why not consider it as it is, an integral and inseparable part of the whole transportation system, which system, as a whole, is vital to the public welfare? Then we would be on solid ground and the test of affectation with a public interest would be satisfied. Perhaps this approach is not so much the traditional application of the public interest concept as it is the pragmatic, wholly sensible approach to the problem advocated by Justices Stone and Holmes in their dissents in *Tyson v. Ban-*

³⁰Munn v. Illinois, 94 U. S. 113 (1877); German Alliance Insurance Co. v. Lewis, 233 U. S. 389 (1914).

ton and *Ribnik v. McBride*³¹ and by Justice Brandeis in his dissent in *New State Ice Co. v. Liebmann*.³² Their theory would ignore the distinction between regulation of the use of property and the regulation of the business itself,³³ and deal with all cases of statutory regulation as involving the one general police power of the state. By that test the Texas act would be upheld simply because its purpose was to prevent unrestricted competition where that competition was harmful to the general public. The state can prevent one public utility from entering the field in competition with a utility already adequately serving the same territory, because such restriction on competition best serves the public interest. Is not the public interest just as vitally affected where one not strictly a public utility (when considered by itself) enters into destructive competition with a utility adequately serving the territory? That being so, why cannot the state require a certificate or permit from such person before going into business?³⁴

It would also seem that the legislation could be upheld

³¹*Tyson & Brothers v. Banton*, 273 U. S. 418, 71 L. Ed. 718 (1927); *Ribnik v. McBride*, 277 U. S. 350, 72 L. Ed. 913 (1928).

³²52 S. Ct. 371, P. U. R. 1932B, 433 (1932).

³³The theory that rate regulation stands on a different footing than regulation of the manner of carrying on a business, and requires a different or special degree of public interest, was really never suggested until the case of *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, P. U. R. 1923D, 746 (1923). For a criticism of this distinction see Finkelstein, "From *Munn v. Illinois* to *Tyson v. Banton*." 27 Col. L. R. 769, 779, (1927).

³⁴An argument along this line has been advanced to support the proposition that the Commission can require a certificate of public convenience before doing business from a company which supplies water to one or several contract customers for profit, to the injury of a public utility water plant serving the same community. If it is held that the Public Service Company law intends to include such a business within the regulatory powers of the Commission (and such seems a reasonable construction) it would seem to be constitutional, on the above reasoning. A decision on this question should be forthcoming in Pennsylvania, in the case of *Borough of Ambridge v. A. M. Byers Co.*, P. S. C. Docket No. 9058 (1931), recently argued before the Superior Court.

on the ground of "special privilege."³⁵ The court's application of the doctrine of unconstitutional conditions in the *Frost Case*³⁶ would seem to eliminate the special privilege argument. However a different approach is possible. The courts have consistently held that where the state has granted a special privilege, such as the right of eminent domain or monopoly, or where a franchise to use streets for equipment has been given, the receiver is under a correlative obligation to be regulated by the public in respect to the user of that privilege.³⁷ Why is the same theory not applicable to a carrier which is given the special privilege by the state to use its highways for the purpose of gain?³⁸

The principal case is a landmark in the field of economic legislation and serves as a solution (in part at least) of one of the most pressing and perplexing economic problems of the day. On its facts it sustains the right of a state to require a permit (actually no different than the certificate of public convenience, except for the obligation to serve all inherent in the latter) and to fix minimum rates with respect to the contract motor carrier; provided such regulation is separated from regulation of the common carrier. Further it displays a liberal attitude on the part of the court in sustaining experimental economic legislation.³⁹ The question arises as to how much further, or in what other manner, the contract carrier can be regulated. It would seem that if regulation must be purposed on the preservation of the

³⁵See note 17 supra. The court used identical language in *Stephenson v. Binford*, 53 S. Ct., 181, at 184.

³⁶See note 18 supra.

³⁷In the *Wolf* case, supra note 33, Chief Justice Taft placed such businesses in the first of the three classes of businesses which could be regulated.

³⁸This test is suggested in 31 Mich. L. R. 395, 401 (1933).

³⁹It is interesting to observe that the attitude of judicial conservatism noticeable under the regime of Taft, C. J., as illustrated by his opinion in the *Wolf* case, supra note 33, and by Sutherland J. in *Ribnik v. McBride and Tyson v. Banton*, supra note 31, seems to have given way to a more liberal and pragmatic attitude with the recent changes in the personnel of the Supreme Court. For example note the personnel of the majority and minority opinions in the *Tyson and Ribnik cases* as compared with *O'Gorman v. Insurance Co.*, 282 U. S. 251 (1931).

highways, as in the principal case, its extent must be more limited than if sustained on the broader theories above suggested. For example, can a requirement that a contract carrier furnish a bond and insurance to cover injuries to goods in transit be sustained as a provision for the preservation of the highways?⁴⁰ The aura of uncertainty still hovers over contract carrier legislation and any further or novel method of regulation will have to run the gauntlet until the Supreme Court makes a more definite pronouncement delineating the penumbra of valid regulation.

F. E. Reader.

SOME PRACTICAL APPLICATIONS OF THE
DOCTRINE OF LACHES IN EQUITY
IN PENNSYLVANIA

"Vigilanibus, non dormientibus subveniunt leges" ("Equity serves the vigilant, and not those who sleep upon their rights"). It was said by Lord Cadman in a famous English case,¹ "A court of equity has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced and therefore, from the beginning

⁴⁰The causal connection between compulsory insurance and preservation of the highways is probably no more remote than the fixing of rates. Any regulation of a contract carrier could conceivably tend to discourage his entry into the business and thus divert traffic from the highways. Carried to its ultimate conclusion the doctrine would seem to permit a requirement that the contract motor carrier must serve all. Yet the rule of the *Duke and Frost* cases plainly forbids that, for that would be converting a private carrier into a common carrier. Somewhere between the regulations of the Texas statute and complete commission control, the line must be drawn.