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Public Utilities -- Regulation of Private Contract Carriers

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under the criminal law.[14] The strongest and most frequently employed argument is the one of policy.[15] In practically all cases in which the defendant has had insurance such element has been lightly brushed aside as a wholly irrelevant consideration,[16] but under the present decision it has been treated as one of decided importance.

Strictly viewed, the holding of the present case extends only to a situation where the parent is protected by insurance in his vocational capacity, but the court's rejection of refined distinctions suggests that it would sanction other suits where the defendant has insurance covering liability outside his vocational sphere.[17] It appears quite clear that the case does not go beyond this point; to do so would infringe upon the holding of the same court in *Securo v. Securo*[18] (denying the child's cause of action where the parent himself has to pay the judgment), a result the West Virginia court did not intend.[19] Inasmuch as the policy which is the core of the rule denying recovery when child sues parent is dissolved by the element of insurance, it appears that the court, in allowing the action to be maintained, has reached a result that is as logical as it is laudable.

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Public Utilities—Regulation of Private Contract Carriers.

A recent decision of the United States Supreme Court[1] marks the successful culmination of a long series of efforts on the part of the

[14] In Hewlett v. George, *supra* note 4, the court said, 9 So. at 887, 13 L. R. A. at 684: "The state, through its criminal laws, will give the minor child protection from personal violence and wrongdoing, and this is all the child can be heard to demand." Matarese v. Matarese, *supra* note 12, at 199.

[15] One of the most celebrated and widely commented upon cases is that of Wick v. Wick, *supra* note 8, and it contains an excellent statement of the policy argument. *Cf. supra* note 12. Note (1926) 1 ST. JOHN'S L. REV. 209; Note (1926) 11 MARQUETTE L. REV. 164.

[16] Small v. Morrison, *supra* note 5; Ledgerwood v. Ledgerwood, 114 Cal. App. 538, 300 Pac. 144 (1931). The suit was by a mother against her infant son, the court saying the presence of insurance is irrelevant. The rule would have been the same had the parties been reversed.

[17] The court speaking through Hatcher, J., said, at 539: "When no need exists for parental immunity, the courts should not extend it as a mere gratuity. Without such an extension, nothing stands in the way of this action. It is familiar law that a child may bring to account the parent for wrongful disposition of the child's own property. It must not be said the courts are more considerate of the property of the child than of its person (when unaffected by the family relationship)."

[18] 110 W. Va. 1, 156 S. E. 750 (1931).

[19] In the Lusk case the court said, at 539: "They [counsel for plaintiff] recognize that Securo v. Securo opposes a recovery from the father. But they would differentiate this case. . . ." The distinction was allowed by the court.

[1] Stephenson v. Binford, 287 U. S. 251, 53 Sup. Ct. 181, 77 L. ed. 203 (1932).

states to bring contract motor carriers within the scope of the regulatory powers of the state. In this case the Court upheld a Texas statute[2] which requires that contract motor carriers shall obtain permits from the Railroad Commission before operating on the state highways, and that such permits shall not be issued if the Commission be of the opinion "that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier then adequately serving the same territory." The act further empowers the Commission to prescribe minimum rates "which shall not be less than the rates prescribed for common carriers for substantially the same service." The statute was attacked mainly on the ground that it would compel contract carriers to dedicate their property to a public use, and thus take their property without just compensation. The Court sustained this statute, obviously designed to control the business of contract carriage, by adroitly treating it as a measure to preserve the highways and promote safety thereon.

With the tremendous growth of commercial motor transportation, it became apparent that if there was to be a uniform transportation system functioning smoothly and adequately, the motor transportation agencies would have to be brought within the regulatory powers of the government. The regulation of common carriers by motor presented little difficulty, since the regulation of common carriers generally had long been recognized.[3] However, it was soon found that this left unregulated a great and ever-increasing body of motor carriers—the private contract carriers.[4] One of the first efforts to control this group was in Michigan, where the state simply enacted that all persons engaged in the transportation of persons or property for hire by motor vehicles upon the state highways should be

[2] TEX. LAWS 1929, c. 314, as amended by TEX. LAWS 1931, c. 277.

[3] Chicago B. & Q. R. R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94 (1876); Peik v. Chicago & N. W. Ry. Co., 94 U. S. 164, 24 L. ed. 97 (1876); Terminal Taxicab Co. v. Dist. of Col., 241 U. S. 252, 36 Sup. Ct. 583, 60 L. ed. 984 (1916); Dresser v. City of Wichita, 96 Kan. 820, 153 Pac. 1194 (1915).

[4] See Brown & Scott, *Regulation of the Contract Motor Carrier* (1930) 44 HARV. L. REV. 530 at 534, n. 13, indicating that there are nearly twice as many contract carriers as there are common carriers by motor.

A contract carrier is generally defined as one who is employed by a definite number of persons to transport goods or persons for compensation. To constitute a common carrier there must be a dedication of property to public use of such character that the service is available to the public generally and indiscriminately, and the carrier must hold himself ready to serve the public indifferently to the limit of his capacity. Hissem v. Guran, 112 Ohio St. 59, 146 N. E. 808 (1925); HUDDY, AUTOMOBILES (8th ed. 1927) §196.

common carriers and subject to complete regulation.[5] In *Michigan Public Utilities Comm. v. Duke*,[6] the United States Supreme Court held this act unconstitutional as violative of the Fourteenth Amendment, saying that the state could not by mere legislative fiat convert a contract carrier into a public utility.

In two subsequent decisions[7] the Court held invalid attempts of California and Florida to subject contract carriers to regulation, not by declaring them to be common carriers, but by providing that they should be subject to the same regulations as common carriers. In the *Cahoon* case,[8] though the Florida court had explicitly said that the act did not convert contract carriers into common carriers[9] the Court met this pronouncement by saying that "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 highways which may appropriately relate to private carriers as well as to common carriers."

The fatal vice of these early attempts at regulation of contract carriers seems to have been in the failure to devise separate schemes for the regulation of each class of carrier.[10] In the Texas statute the two types of carriers are treated individually, and a distinct scheme of regulation is imposed upon each. Thus, though virtually the same regulations are imposed upon each class, it cannot be said that there is an attempt to convert contract carriers into common carriers. By this reasoning, the Court was able to distinguish its previous decisions, and to consider, "unembarrassed by any previous ruling," whether the state had the power to impose regulations upon carriers who were doing business only under private contracts.

It is clear that the state has certain powers of regulation arising from the public control of the highways, such as regulations tending to preserve the roads and provide for the safety of the traveling

[5] MICH. LAWS 1923, No. 209 §§1-3.

[6] 266 U. S. 570, 45 Sup. Ct. 191, 69 L. ed. 445, 36 A. L. R. 1105 (1925), noted in (1925) 38 HARV. L. REV. 980.

[7] Frost & Frost Trucking Co. v. R. R. Comm. of Cal., 271 U. S. 583, 46 Sup. Ct. 605, 70 L. ed. 1101, 47 A. L. R. 457 (1926), noted in (1926) 40 HARV. L. REV. 131; Smith v. Cahoon, 283 U. S. 553, 51 Sup. Ct. 582, 75 L. ed. 1264 (1931), noted in (1931) 31 COL. L. REV. 1194, (1932) 30 MICH. L. REV. 629.

[8] *Supra* note 7.

[9] Cahoon v. Smith, 99 Fla. 1174, 128 So. 632, at 634 (1930).

[10] See Brown & Scott, *op. cit. supra* note 4, at 538 *et seq.*, where it is pointed out that perhaps these early failures were due to the rapid growth of motor transportation and the haste of the legislatures to bring it under control. Indeed, most states merely enacted a general regulatory statute applying both to common carriers and to private carriers, or else simply amended the old statute so as to include contract carriers within its scope.

public.[11] It was upon this theory that the Court sustained the Texas act. The Court conveniently closes its eyes to the fact that the statute is undeniably a regulation of the business of carriage, for the act not only requires the securing of a permit "the issue of which is dependent upon the condition that the efficiency of common carrier service then adequately serving the same territory shall not be impaired," but it also provides for rate fixing by the commission.[12]

The result reached in the principal case seems eminently desirable. However, it is believed that the same result could have been reached by a frank recognition that the business of contract carriers, viewed in their relation to common carriers, is a business affected with a public interest, and thus subject to regulation.[13] An adequate transportation system cannot be maintained if a part of that system is allowed to go unregulated. All the various transportategral parts of a system so bound together and so interdependent that if an adequate and efficient system cannot be maintained because of the inharmonious functioning of one, then, that part may be regulated.[14]

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[11] Packard v. Banton, 264 U. S. 140, 44 Sup. Ct. 257, 68 L. ed. 596 (1924); Buck v. Kuykendall, 267 U. S. 307, 45 Sup. Ct. 324, 69 L. ed. 623, 38 A. L. R. 286 (1924); Ogden & Moffett Co. v. Mich. P. U. Comm., 58 F. (2d) 832 (E. D. Mich. 1931); Barbour v. Walker, 126 Okla. 227, 259 Pac. 552 (1927); Rutledge Coöp. Ass'n. v. Baughman, 153 Md. 297, 138 Atl. 29 (1927).

[12] The lower federal court in upholding the statute frankly admits that it is a regulation of business, saying: "Here is a case of a clear, a simple, a complete declaration of policy that the public has an interest in the business of carriage for hire over the highways of the state, a prohibition of the right to engage in such business except under a franchise, and an affixing to the enjoyment of a franchise the condition that the holder must become an integral part of the transportation system of the state, and must submit to the regulations applicable to his franchise as to rates and practices." Stephenson v. Binford, 53 F. (2d) 509, at 514 (S. D. Tex. 1931).

[13] This seems to have been the basis of the decision in the lower court. Stephenson v. Binford, *supra* note 12 at 514, 515. See an excellent note in (1931) 80 U. OF PA. L. REV. 1008, where the writer develops this idea more at length.

[14] The action of Congress in wielding the commerce power is somewhat analogous to the method suggested of extending public utility regulation. Thus, the Federal Safety Appliance Act has been held to apply to intrastate trains operating on interstate railroads so as to afford greater safety to interstate trains. Southern Ry. Co. v. U. S., 222 U. S. 20, 32 Sup. Ct. 2, 56 L. ed. 72 (1911). Likewise, federal control of interstate rates has been construed to extend to the adjustment of intrastate rates, so as to make the latter bear a proportionate part of the burden of maintaining an adequate interstate system. R. R. Comm. of Wis. v. Chicago, B. & Q. Ry. Co., 257 U. S. 563, 42 Sup. Ct. 232, 66 L. ed. 371 (1921). For further extensions of the commerce power, see Board of Trade v. Olsen, 262 U. S. 1, 43 Sup. Ct. 470, 67 L. ed. 839 (1922); Tagg Bros. v. U. S., 280 U. S. 420, 50 Sup. Ct. 220, 74 L. ed. 524 (1930).