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Is a Lessor of Motor Vehicles a Contract Carrier?

James M. Marks
University of Kentucky

children as heirs.[11] This view is positive in that adoption does not justify exclusion in the absence of intent to limit heirs to blood relations.

Although the Kentucky Court of Appeals, in the latest interpretation of the word "heirs" has apparently adopted a liberal attitude, the decision falls squarely within the scope of the general rule construing "heirs" in reference to an adopted child taking under a will. The factual situation of *Isaacs* v. *Manning* would support the conclusion that a reasonable interpretation shows the existence of the necessary intent to include the adopted child.

DEMPSEY COX

IS A LESSOR OF MOTOR VEHICLES A CONTRACT CARRIER?

An increasing number of manufacturers and shippers who are located a greater distance from their consumers than their competitors face the realization that the soaring cost of transportation has materially weakened their competitive position. Others find that new markets have opened up for their products in places which are served by the existing carriers only indirectly or not at all with the result that the new markets are to them no markets at all. These and other situations have resulted in a diligent search by the shipper for a cheaper, more rapid, and more direct conveyance of his products.

One way in which shippers have avoided these difficulties has been the transportation of their goods by some motor carrier under contract to haul goods according to the route, schedule, and rate which is most suitable for their specific type of hauling. A route can thus be worked out which is more direct and a schedule drawn in accordance with production plans. The effect of this is a quicker turnover with less need for a large amount of working capital. The one thing that deters every shipper from accomplishing this seemingly Utopian result is the fact that every interstate contract carrier must obtain a permit from the Interstate Commerce Commission before he will be allowed to operate over a new route or haul a new type of goods.[1] The chances of the manufacturer being able to find an operating contract carrier with the authority to transport the particular goods over the particular route wanted are comparatively nil. He must then find a carrier willing to transport his goods according to his specifications. Once this is done, the carrier must file an application to secure a permit allowing him to so transport the goods. Due in part, no doubt, to the opposition of nearly every common carrier which operates over any part of the proposed route and the overcrowded condition of our highways, the Commission has become increasingly reluctant to issue any new permits.[2]

The shipper may avoid the necessity of complying with these Governmental controls which are incident to obtaining permits for contract carriers and still retain most of the benefits which are concomitant with that type of shipping by using his own trucks and men. This method of transportation brings with it, however, the necessity of buying trucks and repair equipment which might be too great a

[11] Restatement, Property, sec. 305, comment Y (1940).

[1] 49 Stat. 552 (1935), 49 U.S.C. sec. 309(a) (1946).
49 Stat. 552 (1935), 49 U.S.C. sec. 309(b) (1946).

[2] From October 31, 1948, to October 31, 1949, the Interstate Commerce Commission withdrew 186 more permits than it granted. Sixty-Third Annual Report of the Interstate Commerce Commission 104 (1949).

burden for a smaller business. Even the larger businesses dislike the idea of tying up their capital to go into the "trucking business" with which they are unfamiliar. Many feel that such an expenditure of capital could more profitably be invested in the expansion of their own businesses.

It was long ago discovered that an arrangement by the shipper with a trucking company whereby the company would lease the trucks needed to the shipper would incorporate nearly all the advantages found in both transportation by contract carrier and private carrier. Under such arrangement, the shipper could transport his goods at the time and by the route best suited to his needs without having to tie up his capital in a phase of business which he probably could not operate as efficiently as the lessor, a person who devotes his full time to the business. The leasing of trucks has the added advantage of allowing the shipper whenever he begins to ship a new type of goods to change the trucks then in use to different ones more suitable to his needs without having to bear the loss which comes with the buying and selling of motor vehicles.

However, the Interstate Commerce Commission will not accept without question every transaction which purports on its face to be a bona fide lease and hence without its control. It quickly recognized that a lease of trucks at a stated amount per mile or week or month may be no different than payment on a 100 pound basis,[4] and that it might be nothing more than a subterfuge to circumvent the necessity of applying for the permit required for contract carriers.

The distinction between a bona fide lease and unauthorized operation on the part of the alleged lessors has not been easy to make or to apply. The Commission has stated that, "One of the major difficulties with which we have been faced in connection with regulation of common and contract carriers subject to our jurisdiction has been the practices of such carriers in the so-called leasing of vehicles to shippers and private carriers. . . ."[5] The myriad [number of] variations in which leases can be and are drawn has resulted in the Commission setting up, in the case of *H. B. Church Truck Service Co. Com. Car. Application*,[6] a broad test to determine whether the lease is effectual in creating the lessee a private carrier; and, therefore, making the lessor not subject to the Commission's regulations. The test was "who has the right to control, direct, and dominate the performance of the service,"[7] and this is to be determined by the surrounding circumstances and actual practices. The right to direct denotes more than the right to instruct where the motor vehicle is to go and the time at which a trip is to be operated because such right is the natural attendant of any contract carrier operation under which specified vehicles are used exclusively by a single shipper.[8]

In the recent case of *Interstate Commerce Commission* v. *Isner*,[9] the court formulated the test that the Motor Carrier Act of 1935 is applicable to "all of those who, not matter what form they used, are in substance engaged in the business of transportation of property on the public highways for hire."[10] Although this case was brought to enjoin the lessor from continuing to transport goods from

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[4] Carroll Contract Carrier Application, 1 M.C.C. 788 (1937).
[5] Sixty-Second Annual Report of the Interstate Commerce Commission 101 (1948).
[6] 27 M.C.C. 191 (1940).
[7] *Id.* at 195.
[8] Centre Trucking Co. Inc., Common Carrier Application, 32 M.C.C. 313 (1942).
[9] 92 F Supp. 582 (E. D. Mich. 1950).
[10] *Id.* at 587.

Michigan to New Jersey without a permit, the court chose to rely principally on a closely analogous case which arose out of the three percent tax on charges of carriers for hire. The supporting case held that the decision of whether a lessor was a motor carrier for hire and, hence, subject to the tax rested on the determination of the following simple question. "Did the appellant [lessor] in fact furnish substantially all the facilities for, and perform substantially all the functions of, transporting the property of the forty-two customers [lessees] whose payments to it were taxed?"[11] This court stated specifically, however, that it made no attempt to tag the lessor a contract carrier. In end result these tests are the same, for a person who has the right to control, direct and dominate a business may fairly be said to be in substance engaged in that business. In each of them, the courts look beyond the lease to see the facts as they actually are in the light of surrounding circumstances. The Act is a remedial statute and liberally interpreted to effect its evident purpose.[12]

The one exception to this attitude of the courts is the case of *Schenley Distillers Corporation* v. *United States*,[13] wherein the lessor corporation, a wholly owned subsidiary of the lessee, was held to be a contract carrier despite the fact that if the corporate veil were pierced the result would be that the lessee had the right to control, direct and dominate the trucks and drivers even though they were on the payroll of the lessor. The court based its decision on the fact that corporate entities will not be disregarded where those in control have deliberately adopted the corporate form to use advantages derived therefrom and where no violence is done to legislative purpose by treating them as separate entities.

In determining whether the lease is bona fide, no one factor is conclusive, but undoubtedly the most important of all the factors is whether the driver of the truck is an employee of the shipper or the lessor. This was amply illustrated in the case of *John J. Casale, Inc., Contract Carrier Application*,[14] where the Commission held that the lessor was a contract carrier where he leased his trucks and drivers together, and he was not so considered where he leased his trucks only, although, the other factors surrounding the transactions were substantially similar. Yet, this factor is of little importance when the lease is of the driver alone without an accompanying truck, for in the *Church* case,[15] the Commission held that a rebuttable presumption arose in favor of the lessor being a contract carrier when the lessor is a motor carrier and leases equipment with drivers to the shipper. This presumption will yield when the evidence shows that the shipper has the exclusive right and privilege of directing and controlling the transportation service. Nevertheless, the case of *Motor Haulage Co. Inc.* v. *United States*[16] might well be contended to stand for the rule that a lease of trucks and drivers by a motor carrier to a private carrier raises a conclusive presumption that the lessor is operating as a contract carrier. In that case, the lessor was held to be a contract carrier even though he was without any responsibility if the cargo was lost or damaged. The court in upholding the Commission's finding stated "That even when plaintiff turned the driver and truck over to a lessee who then used the vehicle for its

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[11] Bridge Auto Renting Corp. v. Pedrick, 174 F 2d 733 (C.C.A. 2d 1949).

[12] *See* Georgia Truck System, Inc. v. Interstate Commerce Commission, 123 F 2d 210, 212 (C.C.A. 5th 1941).

[13] 326 U.S. 432 (1946).

[14] 44 M.C.C. 45 (1944).

[15] See note 6 *supra*.

[16] 70 F Supp. 17 (E.D.N.Y. 1947).

own purposes prescribing routes, there still remained a presumption of control by the plaintiff which brought it within the category of a contract carrier under the act."[17] None of the surrounding factors which are usually found along with the lease of driver and truck was present in this case. As already mentioned, the lessor did not carry cargo insurance as he was not responsible to the lessee for any damage done to the cargo. Neither did he have a lease for one trip only, a situation which has been held invalid so consistently as to constitute it a positive rule of law that such "trip-leases" of trucks and drivers are always deemed invalid as creating the lessor a non-carrier. Further, he did not issue bills of lading to the shipper as evidence of the cargo hauled, did not collect compensation on rates computed on a 100 pound basis, nor did he assume liability for operation of the leased vehicle on the highway.[18] If the absence of every single factor which the Commission usually relies on to support a finding that the lease is ineffectual is not enough to rebut the presumption that a motor carrier is a contract carrier when it leases both its trucks and drivers, it is dubious whether anything could rebut such presumption, and no cases which have done so have been found.

Further evidence of this is the fact that the Commission pursuant to an investigation instituted on its own motion, Ex parte No. MC-43, *Lease and Interchange of Motor Carriers*,[19] handed down an order, which was to be effective September 18, 1950, but suspended indefinitely before that time,[20] that prohibited the renting of equipment and drivers to non-carriers, and the assisting of such non-carriers in the selection or obtainment of drivers for such equipment rented to the non-carriers. Both this suspended order and the presumption formulated by Commission decisions apply only to "carriers" who rent to non-carriers; and, therefore, they are inapplicable to a mere lessor of motor vehicles who does not engage in any carriage of goods for hire in interstate commerce.[21] However, a lessor is deemed a motor carrier if it has its controlling interest owned by a carrier in interstate commerce.[22]

The necessity for making a bona fide lease is important to the lessor and the lessee. The Commission has the power to enjoin the operations of any motor carrier under its jurisdiction which are carried on in a manner not authorized by it.[23] It can also charge both the lessee and the lessor with criminal punishment if they knowingly and wilfully violate the Motor Carrier Act.[24] In addition, there is a three per cent tax levied on all charges of motor carriers for hire[25] and his nonpayment of it will subject him to pecuniary penalties.[26]

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[17] *Id.* at 21.

[18] Interstate Commerce Commission v. F & F Truck Leasing Co., 78 F Supp. 13 (— Minn. 1948); John J. Casale Inc., Contract Carrier Application, 44 M.C.C. 45 (1944); Centre Trucking Co. Inc., Common Carrier Application, 32 M.C.C. 313 (1942); Columbia Terms. Co. Contract Carrier Application, 18 M.C.C. 662 (1939), 32 M.C.C. 177 (1942); Herbert Buesing Exemption Application, 32 M.C.C. 731 (1941); H. B. Church Truck Service Co. Comm. Car. Application, 27 M.C.C. 191 (1940); Forsyth Common Carrier Application, 16 M.C.C. 267 (1939); Carroll Contract Carrier Application, 1 M.C.C. 788 (1937).

[19] Mimeograph.

[20] Suspended September 5, 1950.

[21] *See* John J. Casale, Inc., Contract Carrier Application, 44 M.C.C. 45, 52 (1944).

[22] *Id.* at 52, 53.

[23] 49 Stat. 543 (1935), 49 U.S.C. sec. 322(b) (1946).

[24] 49 Stat. 543 (1935), 49 U.S.C. sec. 322(a) (1946).

[25] 56 Stat. 979 (1942), 26 U.S.C. sec. 3475 (1946).

[26] 49 Stat. 1027 (1935), 26 U.S.C. sec. 3612 (1946).

If the draftsman will beep in mind the general principle and the relatively few pitfalls which stand in the way of a lease being deemed bona fide, it will enable him to draft the lease so that it will be upheld by the Commission and the courts. If the lessor is a motor carrier, he must first look to see if there has been an order pursuant to Ex Parte MC-43. The magnitude of the investigation, which concerns itself mainly with interchanging and augmenting equipment between contract and common carriers, necessarily delays any permanent order being formulated; still, one will be forthcoming which might well contain further prohibitions. The guiding principle in all these lease cases is to look through the form of the lease to see whether the lessor is in substance engaged in transportation for hire, and this includes the situation where he has control, direction and domination of the performance of the service. However, it has been deemed almost without exception that leases of vehicles and drivers together and "trip-leases" constitute the lessors contract carriers. Other factors which have frequently occurred in the cases and given weight in determining that the lessor was a contract carrier are compensation computed on the amount of the cargo carried, the lessor being responsible to the lessee for the safe delivery of the cargo and to the public for any liability that may be incurred, and the vehicle having marks of identification that indicate that it is owned and operated by the lessor. Still, if these factors can be avoided and transportation by leased motor vehicles can be arranged, it might well be the remedy so diligently sought by the shippers to ameliorate the present transportation situation which has so burdened them with worry.

JAMES M. MARKS

THE MISDEMEANOR MANSLAUGHTER DOCTRINE UNDER MODERN STATUTES*

There are many problems facing the prospective codifier of the law of homicide. Of these, one of the most interesting is the crime of involuntary manslaughter. The usual common law definition of this crime is similar to that used by a United States District Court, "Involuntary Manslaughter is where death resulted unintentionally, so far as the defendant was concerned, from an unlawful act on his part, not amounting to a felony, or from a lawful act negligently performed."[1] The same label and punishment are attached to a homicide committed in the perpetration of a *misdemeanor* ("an unlawful act not amounting to a felony"), and to a homicide resulting from the *negligent commission of a lawful act.*

This note will be concerned only with the so-called misdemeanor manslaughter phase of the crime of involuntary manslaughter as it now exists under statutes in the United States. A brief discussion of the common law rules of the crime will be in order to lay a foundation for the analysis of the statutes.

Hale stated that an unintentional homicide occurring in the course of *any* misdemeanor was manslaughter. He, however, suggested a limitation on this harsh rule by making a distinction between those misdemeanors *malum in se* and

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* This is a companion note to the one by Mr. Gromley on page .....

[1] U.S. v. Meagher, 37 Fed. 875, 880 (C.C. W.D. Tex., 1888).