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MOTOR CARRIER LITIGATION IN THE SUPREME COURT SINCE 1929

By JOHN J. GEORGE*

In order to facilitate a more satisfactory focus on principles and trends revealed in the regulation of motor carriers as adjudged by the Supreme Court in the last three years the writer prefers to treat the various phases of the regulatory process rather than consider the cases seriatim, the types of constitutional question presented, or the various forms of motor transportation involved.

AUTHORIZATION TO OPERATE

Public permission to operate a motor carrier service takes the form of a certificate of public convenience and necessity,2 a permit, or a license.

Whether the state commission could condition a certificate to operate interstate bus service between Columbus, Ohio and Huntington, West Virginia by forbidding specifically a proposed route loop into Kentucky thence back into Portsmouth, Ohio, came to the Supreme Court in J. P. Grubb Company v. Public Utilities Commission of Ohio.3 The commission ruled that the loop was merely a device whereby the applicant aimed to transport passengers between Portsmouth and other Ohio points without submitting to Ohio regulations as an intrastate carrier.

1Cases decided by the Supreme Court through 1929 (except Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 1928); I treated in "Motor Carriers and the Supreme Court," Commercial Law League Journal, February, 1930.

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2"Factors in Granting Certificates of Public Convenience and Necessity" I published in Indiana Law Journal, January, 1930; and as chapter 7 of my Motor Carrier Regulation in the United States (Band and White, Spartanburg, S. C.)

3281 U. S. 470, decided May 19, 1930.
To enjoin state enforcement of the loop prohibition Grubb sought interlocutory and permanent injunctions in the Federal district court which granted the interlocutory injunction. At this point Grubb tested in the state supreme court the validity of the commission order prohibiting the loop, which validity was sustained. When the permanent injunction petition came on for hearing the Federal district court announced that the final judgment in the state court constituted \textit{res adjudicata} in the district court and dismissed the petition. From this decree Grubb appealed to the Supreme Court.

In its opinion by Justice Vandevanter the Court first directs attention to the jurisdiction of Federal and state courts over interstate commerce: (1) Although appellant acknowledged and invoked the state court jurisdiction he may now question that jurisdiction, for jurisdiction over the matter rests on law and not on mere consent; (2) inadmissible and worthless is the view that the Constitution commits to Federal courts and denies to state courts jurisdiction over all cases of regulation or attempted regulation of interstate commerce; (3) except as reserved to Federal courts by acts of Congress those courts and state courts possess concurrent jurisdiction over civil suits under the Constitution and Federal statutes; (4) of such character is the litigation here involved that it could proceed in both state court and Federal court until a final judgment is reached in one, the judgment thereby becoming a \textit{res adjudicata} in the other.

As to the merits of the procedure actually employed by appellant, the court said: (1) Without value is the contention made here that the state court could not review the commission order, as it has repeatedly done so in earlier and later cases; the rulings of state courts on these questions of local law must be just as controlling in this court as in the Federal district court; (2) failure of the state court to mention specifically the constitutional validity of the commission order did not eliminate the question from the case; its opinion shows clearly that the court rested its decision on the question of validity among other causes; such omission does not weaken the \textit{res adjudicata} character of the judgment of the state court; (3) failure of appellant to present to the commission the fact that an earlier interstate bus applicant had obtained from the commission authority
to operate over a route including the loop at Portsmouth and his failure to offer that fact at the Ohio Supreme Court review preclude his presenting it in the present bill; "he was not at liberty to prosecute that right (of attack on the validity of the commission order) by piecemeal, as by presenting only a part of the available grounds, and reserving others for another suit, if failing in that"; (4) where the parties and subject matter are the same in two suits as regards both the matters "actually presented to sustain or defeat the right asserted" and "any other available matter which might have been presented to that end," appellant must accept the rule that a judgment on the merits of one suit is res adjudicata in another.

Holding unsubstantial the objections of appellant to the district court dissolution of the injunction and dismissing the bill, the Supreme Court sustained the motion of appellee to affirm the decree without awaiting oral argument. Thus the state was upheld in so applying its regulatory power to interstate motor carrier certificates as to safeguard against a subterfuge devised to defeat state power to regulate motor carriers of passengers in intrastate commerce. The opinion further clarifies the concurrent jurisdiction of state and federal courts over interstate commerce.

In April 1933 the Supreme Court in another Ohio case sustained the commission in denying a certificate to a proposed interstate motor common carrier freight service because the traffic on the proposed route was already severely congested. Attention was called to the fact that the state law allows an amended petition specifying another route.\(^a\)

A third Ohio case involved the authority of Cincinnati to classify “you-drive-it” automobiles as public vehicles and to require a license for their use of the streets.\(^4\) The plaintiff contended that the ordinance constituted a deprivation of property without due process and a denial of equal protection. The trial court agreed, and granted a permanent injunction; the state


\(^4\) Hodge Drive-It-Yourself Co. v. Cincinnati, 284 U. S. 335; 76 L. Ed. 323, January 4, 1932. A liability protection requirement was provided as discussed below in Safety and Liability Protection.
court of appeals tried the case anew, and upheld the ordinance and this judgment was sustained by the state supreme court.

The Supreme Court in review sustained the ordinance by the following reasoning: (1) The state has power to regulate the use of its highways in order to promote public safety, and may prohibit or condition as it sees fit the use of city streets as a place for carrying on private business; (2) appellants certainly understand that use of streets is essential to operation of cars they rent out, and the ordinance does not interfere with a business unrelated to matters of public concern; (3) it is not shown that the ordinance deprives appellants of property without due process, nor does it arbitrarily or capriciously violate equal protection; violation of equal protection cannot be substantiated "by mere conjecture or speculation."

But public authorization of motor service in the litigation here surveyed has centered emphatically around contract carriers. Cases involving this type have come from Kansas, Florida, and Texas.

The Kansas Act of 1931 classifies motor carriers into public carriers of property, public carriers of passengers, contract carriers of property, contract carriers of passengers, and private motor carriers, the latter being construed by the statute as those hauling property sold or to be sold by them in pursuance of some private enterprise. Public carriers are required to obtain certificates of public convenience and necessity as a condition to operate; the others, merely licenses.

Continental Baking Company, a private motor carrier of property in Kansas and other states delivering its goods by truck to customers, contended the act by its classification and obligations denied equal protection and deprived petitioner of property contrary to due process, violated privileges of citizens of the United States, and ran counter to the commerce clause. But the district court denied an injunction against enforcement, and petitioner appealed to the highest tribunal.

A separate article analyzing the entire body of regulation applied to the contract carriers in the last two years, I am now preparing. All motor carriers operating entirely within a municipality, private motor carriers operating exclusively in a radius of 25 miles from their domicile municipality, and owners who by their own vehicles transport their own live stock and farm products to market or supplies for their own use, are exempted from the statutory requirements.
Speaking of the license requirement as authorization to operate, the Court acknowledged the state power to require a license of private motor carriers of property on reasonable conditions, approved the exemptions from license requirements as set forth in the statute, and admonished that a classification need not possess theoretical or scientific uniformity to be valid.7

A Florida Act of 1929 provided that persons and corporations owning, operating or managing any motor vehicle used for transportation of persons or property for hire or as common carriers over a regular route on public highways must obtain a certificate of public convenience and meet other requirements.8

Whether this act could validly apply to a motor carrier operating under exclusive contracts with one specified concern and over regular routes between Jacksonville and other points in Florida, the operator being so engaged when the act was instituted, came to the Supreme Court in Smith v. Cahoon.9 The highest court in Florida had held the statute validly applicable to such a carrier. But the Supreme Court reasoned thus on the applicability: (1) The measure puts on the same footing all carriers covered by the act; (2) while the act does not expressly require private carriers to become common carriers, it does aim to subject to same obligations all carriers covered by its scope; (3) such a regulation of private carriers, which appellant undoubtedly is, transcends the power of the state; (4) no line of severance between the regulations applicable to common carriers and those relating to private contract carriers is made by the statute; (5) no knowable standard of conduct is set up, and the legislature could not impose on laymen at the peril of criminal prosecution, the severance of statutory provisions, and clarification of questions in a field of regulation in which "even courts are not yet in accord."

Because of this inseverability and uncertainty, the statute

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7 Continental Baking Co. v. Woodring, 286 U. S. 352.
8 Italics are mine. Taxicabs, hotel busses, school busses, vehicles hauling exclusively agricultural, horticultural, dairy or other farm products, fresh or salt fish, oysters and shrimp from point of production to assembly point en route to primary market, and those transporting and delivering dairy products only were exempted from the scope of the statute.
9 283 U. S. 553. An excellent summary of the entire opinion in this case appears in the later case of Stephenson v. Binford, Advance Opinions, October 1932 Term, 205.
was held inapplicable to appellant, the lower court was reversed and the cause remanded for further hearing.

More successful was the Texas Act which required of common carrier motor vehicles a certificate of public convenience and necessity and of private contract carriers, a permit, subjecting both types to the usual scope of state regulation, and authorizing the commission to fix minimum rates for private contract carriers, which shall not be less than those charged by common carriers with which the private contract carriers are competing. Contract carriers by truck over Texas highways attacked the statute as converting contract carriers into common carriers by fiat and as denying them equal protection by exempting from the permit and other restrictions specified for contract carriers those vehicles transporting particular farm products.

To these contentions of appellants, the Supreme Court in sustaining the statute pointed out that regulations similar in some instances, if not identical, could be applied by the state to the two types of carrier without putting them on the same regulatory basis; that this statute stated clearly and distinctly the provisions applicable to each, did not assume to force contract carriers to become common carriers; did not interfere with appellants in confining their business to private contract transportation; and no deprivation of property without due process nor any taking without just compensation resulted from the regulations.

As to certainty and severability of provisions aimed at contract and common carriers the contrast between the Texas and Kansas Acts on one hand and that of Florida on the other may well serve as a significant guide for all legislative bodies facing the problem of regulating contract carriers.

**USE AND PRESERVATION OF HIGHWAYS**

Use and preservation of highways constitute a primary motive actuating regulations of motor carriers, and the litigation here surveyed merely confirms this general principle of long standing. Highways are public property, their use is primarily for private purposes; using them for profit is special and this use the state generally may prohibit or condition as
it sees fit.\textsuperscript{10} Accepting the view that "you-drive-it" cars are
public vehicles, the Court emphasized the authority of the state
(city) to prohibit or grant on conditions it deems proper the
use of streets as a place of carrying on private business.\textsuperscript{11}

To decrease or ease the burden imposed on the highways
by employing them for private contract carrier transportation
is a proper object of the legislative power, said the Court in
\textit{Stephenson v. Binford}, stating further that where the object is
one for which the legislative power may be properly exercised,
it is for the judgment of the legislature and not of the courts
to determine the degree to which the provisions of a statute
tend toward that end, the degree of their efficiency, and the
closeness of their relation to the end sought.

In an extremely liberal and constructive portion the opin-
ion continues: "\textit{It is enough if it can be seen in any degree
or under any reasonably conceivable circumstances there is an
actual relation between the means and the end. . . . . Anyhow, if
the legislature concluded the required relation existed we must
accept that conclusion since we cannot say the legislature clear-
ly erred in reaching it. Debatable questions of this type are not
for the courts but for the legislature which is entitled to reach
its own conclusion.}"\textsuperscript{12}

To the contention of appellant Stephenson that the Texas
statute conflicts with the freedom of contract the Court observed
that in conflicts between the exercise of freedom of contract and
the state power and obligation to protect its property against
injury and maintain it for the uses for which it was primarily
designed the freedom of contract must yield to the extent rea-
sonably necessary to effectuate the state power and obligation.
This interference with freedom of contract is constitutionally
warranted by the fact that appellants contracts contemplate the
use of state highways for execution of these contracts, which
contracts must "be deemed to have been made in contemplation
of the regulatory power of the state. The power of Congress
to regulate private contracts wherever reasonably necessary to
effect any of the great purposes for which the national govern-
ment was created applies to the states under like circumstances."

Stating that it was not necessary to consider whether the act in some other phase "would be good or bad" the court held it sufficient to support the validity of the statute since one of its aims was to conserve the highways, and rejected the contention that the presence of other legislative purposes, considered separately, beyond the state power to make effective would destroy the act.

State power and obligation relative to the highways, have figured prominently in connection with the interstate motor carrier transportation. In the Continental Baking case\textsuperscript{13} appellants were engaged in intrastate and interstate delivery of their goods. That interstate motor carriers are subject to state regulations relative to highways appears in the opinion that since their movement on highways is destructive to the surface thereof, reasonable state regulations of highway use which do not discriminate against interstate commerce affected thereby impose no unreasonable burden on interstate commerce.

For the use of the highways employed by the agencies of interstate commerce an exaction may be imposed which constitutes a fair contribution to the cost of construction, maintenance and regulation of traffic on the highways, we hear from Justice Brandeis in the Interstate Transit opinion.\textsuperscript{14} While the contest in this case was over a tax,\textsuperscript{15} the question was decided on grounds of use and preservation of highways.

A matter of particular concern in Supreme Court litigation and more so in the uncontested legislative and administrative practice in the states seeking to preserve the highway surface is the fixing of limits on weight of vehicles using the highways.

In Carley & Hamilton v. Snook,\textsuperscript{16} the Court ruled that equal protection was not violated by a state statute classifying motor vehicles on a weight basis for purpose of imposing a graduated weight tax from which tax vehicles under 3,000 pounds were exempted. Such an exemption recognizes the unusual danger to which highway surface is subjected by the heavier vehicles.

\textsuperscript{13} 286 U. S. 352.
\textsuperscript{14} 283 U. S. 183 (1931).
\textsuperscript{15} See division on "Taxation" below.
\textsuperscript{16} 281 U. S. 66; 74 L. Ed. 704. Decided February 24, 1930.
The most serious and significant situation relative to preservation of highways has developed in Texas. Over the 200,000 miles of highways in the state, 20,000 of which the state has improved at a cost of $250,000,000 and has appropriated many millions annually for maintenance of the entire mileage, there were operating 65,000 trucks in 1924. A 300 percent increase brought this number to 206,000 in 1930. Of all motor vehicles in the state in 1930 less than one-half of one percent exceeded 7,000 pounds carrying capacity; and of the 206,000 trucks only 5,500 exceeded 7,000 capacity.\(^7\)

These 206,000 trucks were making such extensive use of the highways that in 1931 the legislature enacted maximum limits on height, length and weight of motor vehicles operated on the highways,\(^8\) forbade loads in containers of more than 30 cubic feet in volume and weighing more than 500 pounds each, prohibited the operation of any commercial property transportation vehicle, truck-tractors, or trailers beyond limits of a municipality if load exceeded 7,000 pounds and of all motor vehicles outside a municipality if the weight exceeded 600 pounds per inch of width of tire on any wheel concentrated on the highway surface.

From the length, weight, and height limits were exempted every vehicle used to transport property from point of origin to nearest practicable common carrier loading point or from such common carrier unloading point to destination by the shortest practicable route, provided the vehicle does not pass a delivery or receiving point of a common carrier equipped to transport such load, or the vehicle is hauling property from point of origin to destination when the destination is nearer the point of origin than to the nearest practicable common carrier receiving point prepared to transport the load concerned. For vehicles so employed a maximum combination length of 55 feet, and weight of 14,000 pounds is allowed. Further, the statute authorizes an exceeding of these limits if a special state permit therefore is obtained, and exempts from the limits busses, agricultural

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\(^{17}\) Findings from a survey made by the Federal district court prior to adjudicating the questions involved in *Stephenson v. Binford*, and incorporated in the opinion of the Supreme Court in its review of district court dismissal of complaint against the Texas statute. *Advance Opinions*, October 1932 Term, at 831-32.

\(^{18}\) Height, 96 inches; length, single vehicles 35 ft.; combination, 45; load weight, 7,000 pounds.
machinery, water drilling machinery, and highway building machinery.

Sproles and others, operating as common and contract carriers of property in interstate and intrastate commerce, and particular manufacturers and distributors of commodities sought to enjoin the enforcement of the act on the grounds that the provisions conflicted with due process and equal protection clause of the Fourteenth Amendment, conflicted with the commerce clause, and violated the contract clause. The Federal district court dismissed the complaint, and an appeal was taken to the Supreme Court. Let us observe the opinion of the Court on each particular complaint in the monumental case of *Sproles v. Binford*. 19

As to the relation of the limits fixed to the due process clause Chief Justice Hughes for the Court reasoned that (1) the 7,000 pound maximum weight limit does not deprive truck operators of their property without due process; (2) state control over its highways is not restricted to obtaining revenue for construction and maintenance, or to regulating the operation of vehicles thereon, but state power extends to prevention of hazards and wear on highways attributable to excessive size and undue weight of load, over both of which the legislature clearly has a range of discretion; (3) “an intolerable supervision hostile to basic principles of our government and wholly beyond the protection intended by the Fourteenth Amendment” would result from requiring a scientific exactness as a “criterion of constitutional power;” (4) granted that the subject lies within the state police power “debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to its own judgment and its action within its range of power cannot be set aside because compliance is burdensome”; (5) we know of no constitutional distinction admitting the power of the state to fix total load limit and denying authority to fix net load limit.

Whether the net load limit conflicted with the commerce clause evoked three points of argument; (1) there being no Federal regulation on interstate motor commerce, “the state may prescribe uniform regulations adapted to. . . . the conservation

286 U. S. 374.
of the use of the highways,” applicable alike to vehicles engaged in interstate and intrastate commerce; (2) no discrimination against interstate commerce is revealed in the present case, and state regulations assumed “to be otherwise valid come within the accepted principle that in matters admitting of diversity of treatment according to special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act”; (3) but in so fixing the weight and size standards one state cannot so prescribe as to “derogate from the equal power of other states to make regulations of their own.”

Further the Court stated that the limits do not deny equal protection by exempting machinery of an agricultural, water drilling, or highway building character; by fixing limits of length for individual vehicles and combinations thereof and allowing a greater length and heavier load to those vehicles hauling goods between point of origin and destination and a common carrier receiving or unloading point; by exempting busses from the net load limit imposed on motor vehicles transporting freight; by classifying motor carriers into carriers of property and carriers of persons, and prescribing separate regulations accordingly, nor by failure of regulations to “reach every class to which it might be applied.” A rational basis must support the classification made; and in restricting the size and weight of vehicles allowed on the highway the legislature may consider the frequency and character of the use made of the highway by the various classes of operations, and accordingly adopt regulations for each class of operations.

The state fixing of load limits was sustained as valid, constituting no unlawful violation of contracts existing when the statute was enacted. By empowering the highway commission to grant permits for loads exceeding those fixed by statute the legislature was not making any unlawful delegation. Further, the Court held that the lengthy phraseology of the provision exempting from the limits vehicles operating to and from a common carrier loading or unloading point did not void the statute for uncertainty.

For these reasons the Supreme Court sustained the statute,
and affirmed the district court dismissal of complaint against the act.20

SAFETY AND LIABILITY PROTECTION

The litigation has involved state power to promote highway safety and to require liability protection.

In the Hodge case21 the Court justified the regulation of the use of the highway on grounds of promoting public safety, and saw in the "you-drive-it" use of automobiles a greater peril in operation than in operation of vehicles by owner or chauffeur. Since their movement on the highways presents a constant and serious danger to the public, motor vehicles may be dealt with as a special class, declared the Court in Continental Baking Co. v. Woodring;22 here the statute involved by imposing on the commission the duty to have the vehicles maintained in a safe condition and to exact proper qualifications and working hours for drivers required no action not related to public safety.

Relative to the liability insurance provision of the Florida Act of 1929, a statute invalidated as applicable to appellant contract carrier because of its inseverability, the Court said: "We entertain no doubt of the power of the state to insist on suitable protection for the public against injuries through the operation on its highways of carriers for hire, whether they are common carriers, or private carriers."23

Sustaining the liability insurance requirement applied by Cincinnati to lessors of "you-drive-it" cars, the Court reasoned that "it does not seek to make hirers agents or employees of owners, nor make owners responsible for negligence of hirers. It merely requires giving security that lessees will answer in suits for damages for their own acts of tort."24

20 The limitations as to size (maximum of 30 cubic feet) and weight (maximum 500 pounds) of containers and maximum of 14,000 pounds load thereof applied to only uncompressed cotton bales. In behalf of W. T. Stevens, intervenor, and transporter of such cotton the district court had held the limitations valid only if construed together with the provision to become effective January 1, 1932 and forbidding operation on public highways beyond city limits of motor vehicles of more than 600 pounds per inch width of tire concentrated on highway surface. The Supreme Court affirmed this ruling.
21 284 U. S. 335.
22 286 U. S. 352.
23 Smith v. Cahoon, 283 U. S. 553.
24 Note 21. Quaere: What is the value of this "insurance" if the lessee appearing in court for negligent operation is adjudged responsible for damages but possesses no property with which to pay?
The Texas statute of 1931 regulating contract motor carriers of property specified liability insurance or bond be furnished the state commission in proper amounts. In the *Stephenson* case, appellant had sought injunction against the enforcement of the whole act before the state commission had attempted to apply the insurance provision. To the liability protection requirement the Court in its opinion sustaining the lower court stated substantially: Since no effort has been made to enforce the liability protection provision against appellants, they cannot attack its validity as an attempt to condition the purely private contractual relationship between contract carrier and shipper. No state court has dealt with the question and unless we have to do otherwise "we should not adopt a construction which might render the provision of doubtful validity, but await a determination of the matter by the courts of the state."

But the Court has ruled conclusively in *Continental Baking* case, that liability protection can be required of private motor carriers (construed in the Kansas statute as operators of motor vehicles transporting property sold or to be sold by them in pursuance of some private commercial enterprise), contract carriers of property, and contract carriers of passengers only as security against injury or damages to third persons and their property.

The ultimate in state obligation and authority to promote public safety on the highway was recently recognized by the Supreme Court in *Bradley v. Public Utilities Commission of Ohio*. Applicant had sought a certificate to operate an interstate motor freight service over route 20 between Cleveland and the Michigan line, enroute to Flint. The New York Central and Pennsylvania railroads protested the application on the ground that traffic was severely congested already on the proposed route. The commission, relying on two traffic counts made at Fremont, concluded that addition of the proposed service would produce and continue an "excessive and undue haz-
ard to public safety and security of the traveling public and the property on such highway', and denied the certificate in the interest of public welfare.

Contending that the commission order violated the Federal commerce clause, and denied equal protection to him in relation to vehicles transporting property of the owner, in relation to common carriers already authorized, and as between himself as a common carrier and contract carriers, Bradley asked and was refused a rehearing, sought in vain from the state supreme court a reversal of the commission order, and thereupon brought appeal to the highest Court.

Basing its argument on the consideration of public safety the Court reasoned as follows:

First: The commission order merely precludes operation by the applicant on the route proposed. The statute allows amended petition specifying another route, which petition applicant has not made; the commission is not obligated to offer a certificate over an alternate route.

Second: Invalidity of previous state efforts to deny certificate for interstate operation, on which denial appellant relies, was adjudged because these efforts sought to "prevent competition deemed undesirable." Promotion of safety was only incidental; here it is the controlling purpose. Highway congestion is the test of safety used in the present case, and the evidence adduced is sufficient to support the finding. Denying the certificate has only an incidental effect on interstate commerce.

Third: "Protection against accidents, as against crime, presents ordinarily a local problem;" safety measures constitute a proper exercise of the police power; to obtain safety is primarily a state function whether on private property or on public highways. Safety may preclude allowing further vehicles on the highway, and the denial is not violative of the commerce clause if the denial is based on evidence that such is necessary to the promotion of public safety.

Fourth: It is not suggested that Bradley received treatment less favorable than did those who made application at the same time or later for common carrier certificates, or that intra-

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state carriers are favored over interstate. To obtain highway safety the state may prescribe regulations favoring vehicles used exclusively in the business of their owners different from those for vehicles used by highway carriers. The denial here involved does not discriminate in favor of previously authorized carriers, for "classification based on priority of authorized operation has a natural and obvious relation to the purpose of the regulation."

On this reasoning the Court unanimously affirmed the denial of the interstate certificate for the route proposed.\(^{29}\)

**Taxation**

Seven of the eleven cases litigated involved tax provisions. City power to exact a license fee for the use of streets by "you-drite it" cars was sustained in the *Hodge* case.\(^{30}\) The Florida Act imposed a mileage tax graduated according to carrying capacity, to be paid quarterly in advance, five percent of the proceeds to be used for administration of the act, and the residue to go to counties in proportion to highways used. Together with other provisions this requirement was declared invalid as applied to contract carriers, because the statute was not severable as regards common carriers and contract carriers.\(^{31}\)

Whether commercial carrier vehicles operating principally or entirely in municipalities were denied due process of the Fourteenth Amendment and of the California constitution by application of the state graduated weight tax, the state registration tax, and a city tax ranging from $5 to $42 per vehicle, the state tax proceeds being directed to cost of administration, and of construction and maintenance of county and state roads, constituted the question presented in *Carley and Hamilton v. Snook*.\(^{32}\)

To this inquiry Justice Stone replied for the Court: (1) Operators of motor vehicles chiefly or entirely within municipalities and paying the city a tax, 75 percent of the proceeds going to street purposes does not deny equal protection of Fourteenth Amendment or of California constitution by a state

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* The Court held there was no occasion to determine whether the statute discriminates unlawfully between common and contract carriers.
* Note 21.
* *Smith v. Cahoon*, 283 U. S. 553.
* 281 U. S. 66.
act exacting registration fees whose proceeds go to administration costs and highway purposes; (2) due process of the Fourteenth Amendment does not require states to apply proceeds of motor vehicle registration fees for the benefit of those paying the fees; (3) a state may under different enactments levy two taxes on the same object to the extent that the total exaction, if levied by one statute, would not violate due process; (4) motor vehicle registration fees are not "tolls" in sense of Federal highway legislation requiring that all highways aided by Federal money be free from all types of tolls. Consequently the Supreme Court answered the question in the negative and affirmed the district court dismissal of petitions to enjoin the collection of taxes.

Whether a gross receipts tax imposed by an amendment to the California constitution in 1926 on all agencies engaged in highway transportation for profit in lieu of all other taxes could apply to the proceeds of a mail contract realized by a stage operator between two California points was answered affirmatively by Justice McReynolds saying: "One having a contract to carry the mails is not immune as an agency of Federal government from state taxation of property used in the performance of such a contract," despite the tax being levied on the gross receipts he realizes from his contract.33

Is a foreign corporation doing a taxicab business denied equal protection by a Pennsylvania statute imposing on all corporations a tax of eight mills per dollar of gross receipts realized from operation exclusively within the state? This question was presented in *Quaker City Cab Co. v. Pennsylvania*.34

Through Justice Butler the Court reasoned: (1) The corporation was subjected to competition from individuals and partnerships operating taxicabs to whom the gross receipts tax does not apply, but the taxicab corporation must pay all the taxes imposed on natural persons operating taxicabs; (2) equal protection safeguards foreign corporations35 in the protection of laws equally applied to all in the same situation; (3) plaintiff corporation is entitled to the same protection of equal laws in Pennsylvania as natural persons in Pennsylvania can demand.

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34 *277 U. S. 389* (1928).
35 Plaintiff in error was a New Jersey corporation.
under like circumstances; (4) the state may exercise its taxing power and adjust its legislation to differences in situation, and to classify for that purpose, but the classification must avoid the arbitrary and be "based on a real and substantial difference" relating reasonably to the subject of the legislation; (5) state power to deny authorization to a foreign corporation to do business in the limits of the state does not authorize the state to require the corporation to surrender the protection of the Federal Constitution; (6) the words of the statute are so plain as to require no explanation; the only contention is that the statute taxes gross receipts of corporations but exempts those of natural persons and partnerships; (7) we admit that a gross receipts tax can be validly applied in particular situations, but we regard the practical effect of the measure here involved and deal with it according to its effect; (8) the tax involved could as conveniently be levied on gross receipts of natural persons as on those of corporations; it is not peculiarly applicable to corporations as are corporation capital stock tax or franchise tax; (9) this measure distinguishes solely and discriminates solely on the basis of the character of the taxicab operator; neither the source of receipts nor the type of property used justifies the difference in treatment; (10) since the classification does not rest on a real and substantial difference reasonably related to the subject of the act, the measure denies equal protection.

Therefore the Court held the statute void. But Justices Holmes, Brandeis and Stone dissented, relying chiefly on the opinion of the Pennsylvania court sustaining the statute as validly treating corporations separately for purpose of taxation.

The Kansas Act of 1931 imposes, in addition to the usual license fees, a tax of one-half mill per ton mile operated by vehicles of each of the five classes of motor carrier specified, those commercial vehicles operating at all beyond the 25 mile radius of their domicile municipality being required to pay the mileage tax on the excess distance traveled. Resulting proceeds are directed in part to cost of administering the regulatory act, and in greater part to the highway fund.

Along with the other provisions of the act, this tax feature was sustained by the Supreme Court as applied to a private motor carrier of property on the ground that the state may
require such a carrier to obtain a license, pay a tax so long as the requirement is reasonable, and the excess of the tax and license receipts over administration cost goes to the highway fund.36

The leading tax case of the period is Interstate Transit v. Lindsey,37 involving the validity of the Tennessee Act of 1927 requiring operators of interstate motor buses on highways of the state to pay a tax graduated according to carrying capacity of vehicles used. For vehicles of 21-30 seating capacity the amount was fixed at $500.

Interstate Transit, an Ohio corporation engaged exclusively in interstate transportation between Cincinnati and Atlanta was assessed $4,000 for its eight busses operating through Tennessee. One quarterly payment was made and suit instituted to recover on the ground that the act violated the interstate commerce clause of the Constitution. The trial court allowed recovery, but the state supreme court reversed the lower ruling and the plaintiff appealed.

In an extremely clear, compact, and comprehensive opinion Justice Brandeis reasoned as follows: First. While the state cannot tax the privilege of engaging in interstate commerce, it may levy on motor vehicles engaged exclusively in interstate commerce an exaction for the use of the highways which is a fair contribution to the cost of construction, maintenance, and regulation of traffic on the highways.

Secondly. The tax involved is a burden on interstate commerce, and could be sustained only if shown to be levied solely as compensation for use of highways or of paying for regulation of traffic thereon. The statute clearly imposes the charge not for the above purposes, but for the privilege of engaging in the interstate bus business, as is evident by the following: (1) Inclusion of the tax in a list of 160 business taxes unmistakably labels it a business privilege tax and for general revenue purposes; (2) following this bus tax immediately by six sections dealing exclusively with similar privilege taxes; (3) imposing on interstate busses a tax of the same character as that levied for the privilege of engaging in any other business; the range of those taxes listed from $2.50 to $5,000.00 shows such variation

36 Note 22.
37 283 U. S. 183.
in amount that they "appear to be graduated according to assumed earning capacity;" (4) varying the tax on the business of operating busses according to seating capacity, and specifying it separately for interstate busses, intrastate busses, and for intrastate intercounty busses; (5) the contrast between the privilege tax division of the 1927 act and those measures relating to construction, maintenance, and regulation of traffic on the highways confirms our view that the interstate bus tax is imposed as a privilege tax for engaging in interstate commerce and not for compensation for use of the highways in interstate commerce, because the resulting proceeds are directed to the general fund, while the highway and the motor regulation statutes since 1915 concerning registration fees, gasoline tax, general road tax, and highway bond issues direct the proceeds to the highway fund.

Thirdly. The states may and often do impose a seating capacity tax on busses in intrastate commerce without regard to whether the tax represents a just compensation for use of the highways; but since states can exact of interstate busses a compensation commensurate with the facilities furnished, the standard for taxing vehicles in intrastate commerce cannot apply to those engaged in interstate operation.

Fourthly. "Being valid only if compensatory, the charge must be necessarily predicated on the use made or to be made of the highways of the state. The present act does not make the amount depend on such use; it does not rise with an increase in mileage traveled, or even with the number of passengers carried. Nor is it related to the degree of wear and tear incident to the using of motor vehicles of different sizes and weights, except insofar as this is indirectly affected by carrying capacity. The tax is proportional to the earning capacity of the vehicle."

Fifthly. The relation between the measure and the degree or mode of use is insufficient to justify the view that the tax represents merely a compensation for use of the highways by interstate busses, and consequently it is unnecessary for us to consider whether the tax "is unreasonably large or unjustly discriminatory."

With Justice McReynolds dissenting from his opinion, the Court by vote of 8 to 1 invalidated the interstate bus tax provision of the Tennessee statute.
SUMMARY AND SIGNIFICANCE

Of the eleven cases adjudicated three have come from Ohio, an early state to establish effective regulation, two each from California and Texas, and one each from Kansas, Tennessee, Florida and Pennsylvania. Five cases came from the state supreme court; six from the Federal district court.

In three cases the lower court was reversed; in eight, affirmed. Justice McReynolds dissented in Interstate Transit case; Justice Butler in Stephenson v. Binford; Justices Holmes, Brandeis and Stone in Quaker City Cab case. Excepting the latter case, there appears a practical unanimity of opinion among the court members on the questions presented. The opinions here surveyed reveal that Chief Justice Hughes has replaced Justice Brandeis as motor carrier opinion writer in the period prior to 1929.38

The usual common carrier no longer monopolizes the motor transportation litigation before the Supreme Court. "You-drive-it" cars have appeared, and are recognized as public vehicles, are required to obtain a license to use the streets, and pay a tax for this use. Taxicabs, for four years regulated by state authority in several jurisdictions,39 have successfully contested before the highest Court the application of a statute subjecting a taxicab corporation to a gross receipts tax not required of individuals or partnerships operating taxicabs.

But chief importance easily attaches to contract carriers as a type. In accord with the doctrine of the Frost opinion40 in 1926, the Court in the Cahoon case negatived the Florida effort to put contract carriers on the same footing with common carriers. The state may exact a permit or license of a contract carrier, but not a certificate of public convenience and necessity, which is an indispensable requirement for common carriers. Requiring contract carriers and private motor carriers to provide liability protection only as security against injury or dam-

38 Of the eleven earlier opinions Justice Brandeis prepared four; of the eleven here surveyed Chief Justice Hughes wrote three. But in the present eleven the work has been pretty well passed around, Justices Roberts and Cardoza being the only members not preparing an opinion.
39 My "Progress of State Regulation of Taxicabs" in Electric Railway Journal, March 1931; and my "State Regulation of Taxicabs in 1931-1932" appears in an early issue of Public Utilities Fortnightly.
40 46 Supreme Court Reporter 605.
age to third persons or their property has been adjudged valid by the Court. This decision is later than that in Smith v. Cahoon, and follows up and extends the doctrine specified in Sprout v. South Bend. Contract carriers are subject to state regulations as to weight limits, control of use of highways and preservation of highway surface as are common carriers. To compensate for the use of the highways by contract carriers, the state may apply to them a general and special tax.

In regard to constitutional provisions we find the contract clause invoked in two cases. Due process of law has proved an issue in four cases; interstate commerce has appeared in five; and in eight equal protection of law has been involved. Obviously, the equal protection and contract clauses are invoked readily by contract carriers; equal protection also appears in classifications singling out "you-drive-it" vehicles, taxicab corporations, and vehicles operating mainly within a 25-mile radius of domicile but occasionally going beyond that limit.

From interstate commerce, the dominant constitutional point involved in earlier Supreme Court litigation, the emphasis has shifted particularly to equal protection. Indications are positive that for some years litigation will continue to involve predominantly the contract carrier and equal protection.

Public authorization may now be required for all types of motor vehicles operated for others than the owners; Kansas validly demands a permit for operation of commercial property vehicles transporting goods sold or to be sold by the owner of the vehicles. The highest tribunal has affirmed state authority to prohibit in certificates to interstate common carriers subterfuges devised to enable the carrier to function as an intrastate

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41 Continental Baking Co. v. Woodring, Note 22.
42 277 U. S. 162. In Smith v. Cahoon the Court preferred to await an opinion by the state court on liability protection, a provision of the Florida statute, to enforce which, no effort had been made.
43 Note 41.
45 Sproles v. Binford, Hodge, Continental Baking, (286 U. S. 352), and Carley cases.
47 Those in Note 45 plus Quaker City Cab (277 U. S. 389) Smith v. Cahoon (283 U. S. 353), Stephenson v. Binford, and Bradley cases.
48 Note 22.
carrier without submitting to state regulation as such. Further the state may refuse to authorize additional motor freight service, even interstate, over a route whose traffic already severe would become an increased hazard to public safety.

Increasingly wide recognition is being accorded state power to subject all types of vehicles to size and weight restrictions as a means of conserving the highway, alleviating or at least discouraging further congestion of highway traffic, and promoting safety of travel.

Recognizing that accidents will result in motor operation, the states are extending further requirement of compulsory liability protection or demonstrated financial ability to compensate for injuries and damages.

Following decisions two years earlier by two Federal district courts holding state cargo insurance inapplicable to interstate carriers of property,⁴⁹ the Supreme Court in the Duke⁵⁰ case invalidated in 1925 the Michigan effort to require property insurance of a contract carrier in interstate commerce. In 1928 the highest court in Sprout v. South Bend sustained the Indiana liability insurance requirement as applied to an interstate carrier of passengers "if the liability is limited to injuries caused within the state to others than passengers."⁵¹ In holding recently that the state may impose on contract carriers the requirement of "suitable protection for the public against injuries through the operation on its highways of carriers for hire whether they are common carriers or private carriers" the Court in Smith v. Cahoon⁵² was recognizing the doctrine established in Sprout v. South Bend.

By holding ample the Kansas power to apply liability protection to contract carriers of passengers and contract carriers of property as security against injury or damages to third persons and their property, the Court in the Continental Baking case⁵³ observed the limitations established in the Red Ball, Liberty Highway and Duke cases, but applied vigorously the

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⁴ Liberty Highway case, 294 Fed. 703; Red Ball Transit Co. v. Marshall, 8 Fed. (2nd) 635.
⁵ Red Ball Transit Co. v. Marshall, 266 U. S. 570.
⁶ Sprout v. South Bend, 277 U. S. 162.
⁷ Liberty Highway case, 283 U. S. 553.
Sprout doctrine as the Court in Smith v. Cahoon indicated could be done in proper cases.

The Bradley case adds a new paragraph to the chapter of state authority over interstate motor transportation: By prohibiting additional interstate motor freight service over a proposed route which is already dangerously congested, the state does not "regulate" interstate commerce, but acts in such a manner as to promote public safety by seeking a distribution of motor carriage over a system of highways within the area of the state.64

Wide power of the state to tax motor carriers has been upheld. Over public carriers in intrastate commerce the state possesses more discretion in imposing taxes. Even the proceeds of a contract for transportation of the mail between two intrastate points is subject to the state gross receipts tax.55

But the statute imposing on all corporations a tax on total gross receipts realized in the state and exempting individuals and partnerships is invalid as applied to a corporation doing a taxicab business.66

All motor carriers in Kansas are validly subjected to a ton mileage tax in addition to the usual license fees. Application of this requirement to a purely private motor carrier was sustained by the Court, the requirement of the tax being reasonable, and the excess of the resulting proceeds over cost of administration going to the highway fund.57

The range of state authority to tax contract carriers constitutes a middle ground between its wide discretion over intrastate motor common carriers on one hand and exclusively interstate common carriers on the other. In taxing the latter type the state must take care (1) to impose no tax on the privilege of engaging in interstate commerce, or on the earning capacity of vehicles engaged therein; (2) that the charge be predicated on the use made or to be made of the highways; (3) that the amount of the tax constitute a fair contribution to the cost of construction, maintenance and regulation of traffic on the high-

64 How long will it be before some of the urban states deem it necessary to declaredly distribute over its highways not only interstate commercial motor transportation of property, but also of passengers, and even the operation of private vehicles devoted exclusively to non-commercial purposes?
65 Note 33.
66 Note 34.
67 Note 22.
ways; (4) that resulting proceeds be directed to the highway fund. For some years motor carriers have proved serious rivals of railroad freight service. Until recently most of the recognition of this rivalry centered around the motor common carrier, more than an echo of which is found in the recent Bradley case. Today contract motor carriers are contesting vigorously with railway freight service, especially in the urban and metropolitan states. Applicable regulation is favoring the railroads, however, as is revealed in the provision of the valid Texas statute forbidding authorization of contract motor carriers where to do so would impair the service of established common carriers, and prohibiting commission fixing of contract carrier rates lower than those charged by common carriers with whom the contract carriers are competing.

Further yielding to the interests of railroads by motor common carriers, even interstate, is clearly deducible from the effect of the Bradley decision. This merely manifests the broader principles of controlled monopoly and protection for the railroads clearly discernible in motor carrier regulation for some years past.

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64 Interstate Transit v. Lindsey, 283 U. S. 183.