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THE SUPREME COURT AND COMMERCE BY MOTOR VEHICLE

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"Indian travois and canoe, ox cart, pack horse, Conestoga wagon, stage coach, canal barge, steamboat, steam railroad, electric railway, motor vehicle, airplane—these words spell the progress of transportation in America."[1] This paper will deal with the motor vehicle, to which is attributable much of present day legislation and litigation for reasons not hard to find. In 1895, the year the internal combustion engine was patented, four passenger cars were produced. From such humble beginnings, the manufacture of motor vehicles has become a major industry. During 1927, twenty-three million vehicles were registered in the United States; seven states exceeded the million mark for registrations. With motor cars have come improved highways.[2] During the period 1918 to 1927, total expenditures on state, county and local roads amounted to nearly nine billion dollars.[3] Travel ceased to be confined to the family passenger car. The day of the motor bus and motor truck had arrived.[4]

This phenomenal development has by no means sounded the death knell of railroad transportation. Doubtless, as Commissioner Esch reports: "Steam railroads are, and so far as now can be discerned will remain, the backbone of the national transportation system."[5] Even so, comparison of investment in the railroad transportation system, twenty-three billion dollars, with that in the highway system including equipment shows the latter leading by three and one-half billion dollars.[6] The railroads are under strict federal supervision. Congress has remained silent as to motor vehicles. So far as the Commerce Clause is concerned, to what lengths may the states go in regulating and taxing motor vehicles and motor vehicle transportation? Supreme Court decisions between 1916 and 1928 furnish the source materials from which to fashion an answer.[6a]

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[1] Esch, C., *Motor Bus and Motor Truck Operation*, 140 I. C. C. 685, 695 (1928).

[2] Service Bulletin, American Automobile Association, June 1, 1928, p. 5.

[3] *Ibid.* p. 3.

[4] 140 I. C. C. 685, 699, n. 3.

[5] *Ibid.* p. 719.

[6] *Ibid.* p. 741.

[6a] For a thorough discussion of the problems of motor carrier regulation, see the following articles by David E. Lilienthal and Irwin S. Rosenbaum:

INTERSTATE COMMERCE

(a) Motor vehicles; operators' permits, vehicle registration and exactions therefor.

On July 1, 1910, Hendrick, "resident and commorant in the District of Columbia," left his Washington office by automobile for Prince George's County, Maryland.[7] The Maryland Motor Vehicle Law, which went into effect that day, required that all persons using the highways obtain an operator's permit and register with the Commissioner of Motor Vehicles, who would issue a car license. Hendrick failed to comply with the law, was haled before a Justice of the Peace and fined fifteen dollars. In the Supreme Court, counsel for Hendrick contended that the act was unconstitutional as a regulation of interstate commerce. "Passing into or through states of the Union in automobiles is an act of interstate commerce." And this matter of interstate transportation being "capable" of uniform regulation and legislation "is thus exclusively within the domain of Congress." The subject is national in character, demanding uniformity of treatment, and even in the absence of congressional action the state must keep hands off. Consequently the exaction of permit and license is invalid as an attempt to regulate commerce and also as imposing a direct burden upon it.

Counsel for Maryland countered by calling the act a valid exercise of police power. He admitted that "since the automobile came into more or less common use, this precise question has not been before this court," but contended that the law only incidentally affected interstate commerce. Regulation of the use of the highways is a matter of local concern. Each side made use of the *Cooley* classification, national-local, and of the more recent, directly burden-incidentally affect, test.

In his opinion Mr. Justice McReynolds assumed that Hendrick was engaged in interstate commerce, while sustaining the law. The opinion contains these words, which in varying form have been used often in later cases:

Motor Carrier Regulation by Certificates of Necessity and Convenience, 36 YALE L. J. 163 (1926); *Motor Carrier Regulation: Federal, State and Municipal,* 26 COL. L. REV. 954 (1926); *Motor Carrier Regulation in Illinois,* 22 ILL. L. REV. 47 (1927); *Motor Carrier Regulation in Ohio,* 1 U. OF CINN. L. REV. 288 (1927); *The Regulation of Motor Carriers in Pennsylvania,* 75 U. OF PA. L. REV. 696 (1927). See also COMMENTS, 6 N. C. L. REV. 208, 7 N. C. L. REV. 83.

[7] Hendrick v. Maryland, 235 U. S. 610 (1915).

"In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. . . . This is but an exercise of the police power . . .; and it does not constitute a direct and material burden on interstate commerce."[8]

The court does not call the matter one of local concern but quotes with approval from another case: "The provisions . . . are not regulations of interstate commerce. It is a misnomer to call them such." Failure to classify as local is of little moment. We have the word of Mr. Justice Hughes that "the principle, which determines this classification [into subjects requiring uniformity or admitting of diversity of treatment], underlies the doctrine that the States cannot under any guise impose direct burdens upon interstate commerce."[9] Burdick thinks that the newer form "states the basis of state action more satisfactorily"; that it covers all the cases classified under the national-local formula.[10] He refrains from expressing an opinion as to whether the sustained exercises of state power in the upper register would fall within the older classification. Maybe this is not important, for if we agree with Professor Powell, "when Congress has not exercised its power at all, state action under the reserved powers is held valid or invalid according to the supposed test of some flexible formula which leaves the courts free to decide each case as they think best."[11]

We have then, that a state may require *all* operators of automobiles on its highways to secure a permit to drive[12] and a license for the car.[13] Such requirements are "primarily for the enforcement of good order and the protection of those within its own jurisdiction." The Commerce Clause does not prevent.

Maryland, however, went further than this. The permit and license were not issued gratis. For the first Hendrick paid a flat fee of

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[8] *Ibid.* p. 622.

[9] *The Minnesota Rate Cases,* 230 U. S. 352, 400 (1913).

[10] BURDICK, THE LAW OF THE AMERICAN CONSTITUTION (1922), p. 245.

[11] Thomas Reed Powell, *The Supreme Court and the Constitution, 1919-20,* POLITICAL SCIENCE QUARTERLY for September, 1920, p. 422.

[12] Eighteen states and the District of Columbia have drivers' license laws, the minimum age requirement varying from fourteen to eighteen years. *Op. cit.* note 2, p. 6.

[13] All states and the District of Columbia require vehicle registration by residents. "Special Taxation for Motor Vehicles," Motor Vehicle Conference Committee, January, 1928.

two dollars, for the other either six, twelve, or eighteen dollars depending on horse-power. The money collected was to be used for salaries and expenses of administration; any surplus, "to be used in construction, maintaining, and repairing the streets of Baltimore and roads built or aided by a county or the state itself." Hendrick contended that "the tax imposed is not laid as compensation for the use of the roads" but is "an unlawful attempt to collect revenue for the state."

The court made short work of both contentions, saying: "A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the the class of those for whose needs they are essential and whose operations over them are peculiarly injurious. . . . The statute is not a mere revenue measure. . . ."[14] Mr. Justice McReynolds felt that there could be no doubt of the state's ability to effectuate its purpose by imposing an annual fee based on horse-power. Prior decisions had sustained toll charges for the use of highways,[15] bridges over navigable streams, public wharves.[16] The state could choose either means. The income derived need not cover merely the expense of maintaining the highway department. A surplus was permissible, in fact contemplated although none was proved to exist. Later, when it was shown to exist the court upheld its application to the maintenance of improved roads.[17] Still more recently, the court seems to have decided that if "the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter" of concern.[18] It feels that "the amount of the charges and the method of compensation are primarily for determination by the state itself. . . ."[19] There is a point where the charges will be too high, but "so long as they are reasonable and fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce."[20] Words like "reasonable" and "fair standard" leave room for the exercise of state judgment.

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[14] 235 U. S. at 622, 624.
[15] Federal Highway Act, U. S. C., Tit. 23, Ch. 1, §9 provides: "All highways constructed or reconstructed under the provisions of this chapter shall be free from tolls of all kinds."
[16] 235 U. S. at 624.
[17] Kane v. New Jersey, 242 U. S. 160, 169.
[18] Clark v. Poor, 274 U. S. 554, 557.
[19] *Supra* note 16.
[20] *Ibid.*

The result is that the state can make the interstate traveller pay to help keep up its roads,[21] possibly to help build its roads, so long as it does not make him pay too much. Mr. Hendrick failed to prove this and the court refused to "say from a mere inspection of the statute that its provisions were arbitrary or unreasonable." The reserved police power has triumphed. But how long will it last?

In *Kane v. New Jersey*,[22] the court took occasion to show that the license fee in *Hendrick's Case* was not sustained on the ground that Maryland granted reciprocal free use of its highways to non-residents. So far as the Constitution goes, it need not do so.[23]

An added fact in *Kane's Case* was the New Jersey requirement that non-resident autoists constitute the secretary of state their agent for service of process.[24] Both provisions withstood Fourteenth Amendment objections.

Johnson v. Maryland,[25] the third case involving automobiles upon highways is not a Commerce Clause decision. But it should be mentioned nevertheless. As Mr. Justice Holmes expressed it in his usual terse style: "The naked question is whether the state has power to require [a driver of a Post Office Department truck] to obtain a license by submitting to an examination concerning his competence and paying three dollars. . . ."[26] And he was of opinion that Maryland had not. The limitation upon the state's power because of our dual system of government is stricter than that worked by the Commerce Clause. However, the driver is not relieved from obeying all state laws. It is intimated that he would still have to comply with "a statute or ordinance regulating the mode of turning at the corners of streets."

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[21] In 1927, the total gross receipts from state registration fees, including drivers' licenses, amounted to 300 million dollars. Bureau of Public Roads, Table MV-2 (1927).

[22] 242 U. S. 160 (1916).

[23] In fact many states have reciprocity laws applying to registration by non-residents. *Op. cit.* note 2, p. 5.

[24] A Massachusetts statute, providing that use of the highway by a non-resident shall be treated as the equivalent of appointing a state official his agent for service of process, was held not to violate the Due Process Clause, in Hess v. Pawloski, 274 U. S. 352 (1927); while in Wuchter v. Pizutti, 48 S. Ct. 259 (1928), a similar New Jersey law was held to violate that clause, for failure to contain a provision making it reasonably probable that the non-resident would receive notice of service on the official.

[25] 254 U. S. 51 (1920).

[26] *Ibid.* at 55.

(b) Motor trucks; contract carriers; liability and cargo insurance, indemnity bonds; common carriers.

In *Michigan Commission v. Duke*,[27] one Duke was under contract to carry automobile bodies from Detroit to Toledo by motor truck.[28] His hauling business was done entirely under private contract He did not hold himself out as a carrier for the public in any way. By Michigan law "no person shall engage in the business of transporting persons or property by motor vehicle for hire upon the public highways of the state over fixed routes or between fixed termini, unless he shall have obtained from the Michigan Public Utilities Commission a permit so to do." This permit would only be issued in accordance with public convenience and necessity. The law provided that persons engaged as above stated should be common carriers and must carry insurance or furnish an indemnity bond to cover any claims resulting from injury to the property carried. Does the law run afoul the Commerce Clause in the absence of congressional action?

Requiring Duke to use his trucks as a common carrier, says Mr. Justice Butler, is "to take from him use of instrumentalities by means of which he carries on the interstate commerce in which he is engaged and so directly to burden and interfere with it."[29] Preventing him from using the trucks "exclusively to perform his contracts" where "his sole business is interstate commerce" is an unconstitutional interference with commerce. Further, compelling him to submit to the "onerous duties and strict liability of common carrier" is a direct burden on interstate commerce. So is the requirement that he furnish cargo insurance or indemnity bond. But why? We can at once see that there is factual interference with Duke's business and we admit that this business is interstate. But not all factually direct interferences are prohibited by the Commerce Clause. We get no help from noticing that the state requirements were con-

[27] 266 U. S. 570 (1925).

[28] "Truck operations fall into one of three general classes: (1) Where the truck is owned by the operator and is used in the transportation of his own goods or products and in the conduct of his business—the *owner-operated* truck; (2) the so-called *contract carrier,* who enters into special agreements for transportation with one or more shippers, but does not hold himself out to haul for the public generally; (3) the *common-carrier truck,* which (*a*) operates on schedule over a regular route or between fixed termini, and usually at published rates, from which it may not depart, and (*b*) the so-called anywhere-for-hire carrier." 140 I. C. C. at 705.

[29] 266 U. S. at 577.

ditions precedent to the carrying on of interstate commerce. So they were in the *Hendrick*[30] and *Kane*[31] cases. The court gives us its answer in these words:

"Clearly, these requirements have no relation to public safety or order in the use of motor vehicles upon the highways, or to the collection of compensation for the use of the highways. The police power does not extend so far."[32]

Unless the state law promotes safety or effects compensation it is invalid. Requiring a private carrier to submit to regulation as a common carrier or to carry cargo insurance does not promote either. This result follows from the Commerce Clause.

With respect to the first requirement, *Frost Trucking Co. v. R. R. Com.*[33] laid down that the Fourteenth Amendment prevented it as applied to a local carrier. Neither Mr. Justice Sutherland's opinion for the majority, nor Mr. Justice Holmes' dissent, nor any expressions in either vary the decision on this point in the *Duke* case.

With respect to the cargo insurance, the court, it seems, has properly applied its line of distinction. Only by tenuous reasoning can relation be shown between such insurance and safety in the use of motor cars on highways. But suppose insurance was required against death or injury to third persons, resulting from the operation or construction of the vehicle. Such a requirement of exclusively intrastate operators survived Fourteenth Amendment objections in *Packard v. Banton.*[34] And in the latest case on the subject Mr. Justice Brandeis says that requiring this kind of insurance is not, "even as applied to busses engaged exclusively in interstate commerce, an unreasonable burden on that commerce, if limited to damage suffered within the state by persons other than the passenger."[35]

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[30] *Supra* note 7.
[31] *Supra* note 22.
[32] *Supra* note 29.
[33] 271 U. S. 583 (1926).
[34] 264 U. S. 140 (1924).
[35] Sprout v. City of South Bend, Ind., 48 S. Ct. 502, 505 (1928). See also Elsbree and Roberts, *Compulsory Insurance Against Motor Vehicle Accidents,* 76 U. OF PA. L. REV. 690 (1928).
Conclusion 10 of the report, *supra* note 1, 140 I. C. C. at 746, reads: "[Federal] legislation for the regulation of motor-bus lines operating as common carriers over the public highways should provide as prerequisites to operation: (1) Certificate of convenience and necessity; and (2) liability insurance or indemnity bond or satisfactory assurance of financial responsibility which will insure adequate protection for the responsibility assumed."

(c) Motor busses; certificates of convenience and necessity; federal highway legislation.

Buck v. Kuykendall[36] involved a law of the State of Washington which required common carriers by automobile to obtain a certificate of public convenience and necessity before operating. Buck wanted to set up as a common carrier of passengers and express between Seattle and Portland. He had received the Oregon equivalent of a certificate of convenience. Washington refused him one on the ground that the field was adequately served already by trains and other bus lines. The court held that "such state action is forbidden by the Commerce Clause. It also defeats the purpose of Congress expressed in the legislation giving federal aid for the construction of interstate highways."[37]

This is the first case where an Act of Congress has played a part in the decision as to state power. In the case of the sustained registration and license requirement, should Congress take over the field, inconsistent state laws would become inoperative. But it is not clear from a reading of the Federal Highway Acts[38] that they cover the *Buck* situation. The lower federal courts were of opinion they did not. And in a case decided the same day, *Bush Co. v. Maloy*,[39] where the Maryland highway in question was not federally aided, Mr. Justice Brandeis explained that such aid was not a controlling reason for the decision in *Buck's Case*. The Commerce Clause itself invalidated that state law, in that the law directly burdened commerce. What the federal legislation did was to make "clear the purpose of Congress that state highways shall be open to interstate commerce."[40] Where Congress is silent as in the *Bush* case, it means hands-off because the subject—the existence of adequate facilities—is one of national concern "peculiarly within the province of federal action."[41] Phrased differently, the effect on interstate commerce "is not merely to burden but to obstruct it." Where Congress has spoken even to the limited extent of the road aid legislation, it may be considered not as a taking over of the field, but as giving its sanction to the judicial solution of the problem.

[36] 267 U. S. 307 (1925).
[37] *Ibid.* at 316. But such action is recommended to be taken by the federal government, *supra* note 35, and in part upon the consideration of already available transportation service. 140 I. C. C. at 747.
[38] 267 U. S. at 314.
[39] 267 U. S. 317 (1925).
[40] 267 U. S. at 324.
[41] 267 U. S. at 316.

But suppose Congress should be persuaded by the dissent of Mr. Justice McReynolds that "the exigency [of suddenly increasing motor vehicles] cannot be met through uniform rules laid down by Congress. . . . Control by the states must continue, otherwise chaotic conditions will quickly develop."[42] Suppose the solons said to the states, "you may apply your statutes to interstate commerce by motor vehicle in all its phases until we see fit to regulate the matter ourselves." The possibilities of such action by Congress have been effectively canvassed by Professor Biklé.[43] Perhaps he is right in believing that we should deduce from the decisions sustaining Liquor Legislation a broad principle of choice of means. But there is enough of talk in the cases which characterizes that legislation as *sui generis* to make one doubt. Wouldn't it have simplified things if Mr. Chief Justice Taney's view of concurrent state power over all interstate commerce had survived?[44]

The fact of federal aid was one ground of the argument in *Morris v. Duby*[45] against applying the provisions of Oregon's highway law. When the first federal act was passed Oregon law provided that no motor truck of over five tons capacity should be operated on a state highway without a permit. The then existing law allowed a twenty-two thousand pound load. Finding that the roads were being injured, the State Commission changed its rules and refused permits for loads over sixteen thousand five hundred pounds. Morris, who operated

[42] 267 U. S. at 325. "Chaotic conditions" did develop. "Any serious complaint against bus operations appears to be directed against those conducted by noncertificated, unregulated interstate operators commencing operations after the state regulatory bodies were deprived by decisions of the Supreme Court of such control as they had exercised over interstate motor carriers." 140 I. C. C. at 702.

[43] Biklé, *The Silence of Congress,* 41 HARV. L. REV. 200. Cf. Dowling and Hubbard, *Divesting an Article of its Interstate Character,* 5 MINN. L. REV. 100, 253.

The Interstate Commerce Commission recommends that "original jurisdiction in the administration of regulation over motor-bus lines" be vested in state boards and, where necessary, joint boards composed of two or more state boards, with appeal from either to the Interstate Commerce Commission. 140 I. C. C. at 746. The Commissioner's reasons for thinking this solution constitutional are set forth, *ibid.* at 743.

[44] Mr. Justice McReynolds would let the states act "until something is done which really tends to obstruct the free flow of commercial intercourse." Inasmuch as there was an element of obstruction, in fact, in the Washington and Maryland laws, "really" must connote the idea that the factual flow can be checked if it is in part an economically unnecessary flow. "Really" also suggests motive and the Justice gives the state laws a clean bill of health, for they "indicate an honest purpose to promote the best interests of all." 267 U. S. at 325.

[45] 274 U. S. 135 (1927).

over twenty-two miles of federally aided road between points in Oregon and Washington, alleged that the state and federal acts constituted a contract whereby he could operate his five ton trucks regardless of load. Mr. Chief Justice Taft brushed aside the contention, saying:

"Conserving limitation is something that must rest with the road supervising authorities of the state, not only on the general constitutional distinction between national and state powers,[46] but also for the additional reason, having regard to the argument based on a contract, that under the convention between the United States and the state, in respect of these jointly aided roads, the maintenance after construction is primarily imposed on the state."[47]

State conservation regulations, like licensing of operators, and vehicles, are valid unless arbitrary or unreasonable. And "the mere fact that a truck company may not make a profit" carrying the decreased load does not amount to unreasonableness.

(*d*) *Further of* (*a*), (*b*), (*c*).

Mr. Justice Brandeis in *Clark v. Poor*[48] reaffirmed the power of the state to tax an interstate motor truck line for the maintenance of the highways and administration of highway laws. The tax was graduated according to the number and capacity of the vehicles used.[49] It was imposed in addition to the annual license or registration fee. The Justice said:

"There is no suggestion that the tax discriminates against interstate commerce. Nor is it suggested that the tax is so large as to obstruct interstate commerce."[50]

Clearly, a tax which falls on interstate commerce in certain ways called "discriminatory" is prohibited. But the only claim was that an interstate common carrier had to pay two taxes while others paid only one. The case decides that where motor trucks use the highways as their place of business, they are properly chargeable with an extra

[46] It is curious that on the commerce point, the Chief Justice (274 U. S. at 144) quoted from the Buck case (267 U. S. at 315) part of a passage in Mr. Justice Brandeis' opinion, beginning thus: "In support of the decree dismissing the bill this argument is made:. . .," and ending, *"The argument is not sound."* (Italics by author.)

[47] 274 U. S. at 144, 145.

[48] 274 U. S. 554 (1927).

[49] As to "common-carrier fees and taxes on motor-trucks," see 140 I. C. C. at 711, and for requirements in each state, see *op. cit.* note 13.

[50] 274 U. S. at 557.

tax for such use. Discrimination does not rest on a simple mathematical excess.

In the quotation above, Mr. Justice Brandeis uses "obstruct" instead of "directly burden." Once before, in *Bush v. Maloy*,[51] he said the effect of a statute was "not merely to burden but to obstruct" interstate commerce. Many sustained laws factually burden interstate commerce, but the interference is sustained on a balance of considerations and is called "indirect." This expresses a result. The reason lies behind the adjective. Perhaps "obstructs," connoting the idea of physical stoppage, more correctly expresses not only the result but the reasons behind it.

Two other features of the *Clark* case engage attention, chiefly because they are old friends. The Ohio law required a certificate of public convenience partially conditioned upon filing a policy covering liability and cargo insurance. In the District Court, the Commission admitted it could not now withhold the certificate because the roads were crowded and in the Supreme Court, stated that the insurance requirements would not be insisted upon. Consequently, aided by a separability clause[52] in the law, the court was able to sustain it, by treating as inoperative the objectionable features and by following the Commission's lead in ignoring the questionable ones.

Mixed Commerce

(a) Licenses to operate; competition with railways.

We have seen that a state cannot withhold a certificate of convenience from one engaged exclusively in interstate commerce by motor vehicle. Many bus lines carry both interstate and intrastate passengers.[53] What is the extent of the state's power to refuse a certificate in this situation?

In *Interstate Busses v. Holyoke Ry.*[54] the vehicles ran from Connecticut into Massachusetts. A substantial part of the business consisted of local carriage. Part of its way, the bus line paralleled a street railway doing an interurban business. The railway's income

[51] *Supra* note 39.

[52] A note, *Effect of Separability Clauses in Statutes*, 40 Harv. L. Rev. 626, is helpful.

[53] "While there is an appreciable amount of long-distance travel by bus, and it will grow with the improvement of highways and the consolidation and development of stronger bus lines, nevertheless at present travel by bus is predominantly local and short haul." 140 I. C. C. at 699.

[54] 273 U. S. 45 (1927).

was being eaten into.[55] Massachusetts had a law which required carriers by motor bus to secure a license from each municipality through which its cars ran. To prevent enforcement of the law at the instance of the railway company, the motor carrier sought an injunction. The District Court denied it and the Supreme Court sustained the lower court.

The argument for the bus company was based on the two *Kansas* cases[56] in which the state law imposed a *tax* on the total capital stock of foreign corporations doing both an interstate and local business. The court decided in those cases that a tax on the local privilege may have such economic effect that it amounts to the same thing as a direct burden on interstate commerce. Mr. Justice Butler said: "The appellant relies on [the *Kansas* decisions]. But there the state was using its authority as a means to accomplish a result beyond its constitutional power."[57] He did not need to say whether the principle would control this case. The trouble was that no facts were adduced which showed any intent to regulate or any regulation in fact of interstate carriage of passengers. The law was on the books before motor bus travel became common. The only place the railway company sought to have the act enforced was along the route where it competed with the bus line. The record failed to show how many interstate passengers were carried competitively, or that it was not reasonably practicable for the bus line to separate them, or even that the interstate business was "dependent in any degree upon the local business in question." For exclusively interstate travel by motor bus, neither state nor municipality can require a certificate or license. The Massachusetts statute recognized this. But where the carrier mixes up interstate and local carriage the "burden is on [him] to show that the enforcement of the Act operates to prejudice interstate carriage of passengers."

The case reaches a result that is highly desirable. It is unfortunate enough to have a temporarily[58] unregulated field in the case

[55] Compare the situation in Indiana where the railway operated a bus line. "A competing bus line also operates over the same route. There are also competing bus lines over portions of the route. The traction company reports that it has been compelled to charge so low a rate on its bus line owing to the keen competition that it is making only about one-half of the cost of operation." 140 I. C. C. at 727.

[56] Western Union Tel. Co. v. Kansas, 216 U. S. 1 (1910); Pullman Co. v. Kansas, 216 U. S. 56 (1910).

[57] 273 U. S. at 51.

[58] See note 43.

of all-interstate traffic. It might play havoc to relieve the bus line of state control on the simple showing that some passengers were travelling interstate.

(b) Licenses to operate; bus line competition; city terminals.

It is a treat to read *Hammond v. Schappi Bus Line.*[59] Here are the facts. Schappi, an Illinois corporation, operated three lines of motor busses under a certificate of public convenience from the Indiana Public Service Commission. The business was mainly interstate and on one line, wholly interstate. Busses of each of these lines ran into Hammond, Indiana, where the terminal was located in the business district. In 1924 the city authorized the Calumet Company, a competitor of Schappi, to run its busses and to stop them on any street to take up or discharge passengers. An ordinance was passed in 1925 forbidding busses to operate on streets leading into and through the business district, or to stop to collect or discharge passengers anywhere in the city, without a permit. But the ordinance was not to affect any motor vehicle contracts to which the city was a party. Hammond admitted that the Schappi busses could not continue their present routing under this ordinance, but argued that it was passed "to prevent congestion of traffic and to promote safety." Schappi denied the fact of congestion and the record showed that there was at least an hour's parking privilege on both sides of the streets which his busses travelled. His theory was that the ordinance was designed purely to protect Calumet. And he objected that the city was without power to act under state law, that the ordinance was invalid under the state constitution, and under the Commerce Clause and Fourteenth Amendment.

The Court of Appeals held the ordinance inoperative because of discrimination, without mentioning what law or constitutional provision necessitated the result. It ignored the Commerce Clause argument. In remanding the case to the District Court, Mr. Justice Brandeis said:

"Whether it is void under the law of Indiana involves questions upon which this court should not be called upon to pass without the aid which discussion by members of the lower courts familiar with the local law would afford.

[59] 275 U. S. 164 (1927). Hammond v. Farina Bus Line, 275 U. S. 173, was decided the same day. "The contentions, the issues of fact and of law, and the character of the evidence introduced, are largely similar to those in the Schappi case."

"On the other hand, if it should become necessary to consider Schappi's rights under the Commerce Clause, it is not fitting that these should be passed upon by this court upon the present record and at this stage of the proceedings."[60]

He put five pertinent questions, raised by the briefs and arguments, which had not been considered by either of the courts below. As he expressed it, "before any of the questions suggested, which are both novel and of far reaching importance, are passed upon . . . the facts essential to their decision should be definitely found . . . upon adequate evidence."[61]

Schappi's Case is chiefly important for what it fails to decide and why. It demonstrates that constitutional decisions are not to be made in the dark. It vividly instances "an application of a new technique in constitutional [decision] wherein an appreciation of facts is the decisive element. . . ."[62] To be appreciated the facts must be shown.

Applications

The Supreme Court has continued to insist on having all the facts presented; what the meaning of the state action is in terms of interstate business. In *Interstate Busses v. Blodgett,*[63] a Connecticut motor bus corporation, engaged exclusively in interstate commerce, was subjected by that state to four taxes in common with intrastate carriers.[64] Fifth, there was imposed a tax of one cent for each mile of highway in the state travelled by any of its busses. This was called "an excise on the use of such highway." In place of it, intrastate motor carriers were subjected to an excise of three per cent of their gross receipts.[65] Interstate busses objected to the mileage tax as one discriminating against interstate commerce, for the reasons (1) that "there are obvious differences between it and the gross re-

[60] 275 U. S. at 169, 170.

[61] *Ibid.* at 171, 172. See Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action,* 38 Harv. L. Rev. 6.

[62] Frankfurter and Landis, The Business of the Supreme Court, p. 192. "Decision" is substituted for "arguments." The quotation is apt, however, for it refers to the type of argument and brief which Mr. Brandeis, when counsel, introduced in the Muller case.

[63] 48 S. Ct. 230 (1928).

[64] These were: (1) personal property tax upon cars used in state, (*accord,* 35 states and the District of Columbia, *op. cit.* note 13); (2) registration fee, (*accord,* all states); (3) gasoline tax of 2 cents per gallon, (5 cents—6 states, 4 cents—12 states, 3 cents—15 states, 3½ cents—1 state, 2 cents—12 states and D. C., no tax—Mass. and N. Y.); (4) corporation income tax of 2%.

[65] "Declared to be in lieu of all taxes on intangible personal property." And payment of gross receipts tax exempted from paying the 2% income tax.

ceipts tax" and (2) that "it already contributed to the maintenance of the highways of the state in the same manner and to the same extent as others."

To the first objection Mr. Justice Stone replied that neither differences in form or method of assessment of taxes, nor the fact that one must pay more named taxes, without more, establish discrimination. He is unable to say "from a mere inspection of the statutes that the mileage tax is a substantially greater burden on appellant's interstate business than its correlative, the gross receipts tax, on comparable intrastate business." To get relief it must be shown "that in actual practice the tax of which [one] complains falls with disproportionate economic weight."[66] This is significant language: the mere fact that Connecticut singled out interstate commerce and taxed it, doesn't mean that the tax is unconstitutional. Has Mr. Justice Stone converted the court to a view that a state may tax interstate commerce? His answer to the company's second objection shows that he is treating the tax as a price paid for a special facility, heretofore sustained as a valid police measure. It is no objection to this excise that the state has imposed others for the use of its highways. The company failed to show that the total of charges sustained "no reasonable relation to the privilege granted."

The last case to be discussed in this paper, *Sprout v. South Bend*,[67] evidences that the court is still hampered by the treatment which other courts accord Commerce Clause questions. It is illustrative of the assiduity of our High Bench to sustain state and municipal laws.

Sprout operated a bus between South Bend, Indiana and Niles, Michigan, carrying mostly interstate passengers. South Bend required a license to operate any motor bus for hire on its streets and imposed a fee of fifty dollars per bus. Sprout paid the state registration fee but refused to comply with the city ordinance. Some of his passengers he put down before reaching the Michigan line. True, they paid fares to a Michigan point, but in fact they were intrastate passengers.[68] In the state court it was not shown what percentage

[66] 48 S. Ct. at 231.

[67] 48 S. Ct. 502 (1928). See COMMENT, 7 N. C. L. REV. 83.

[68] Without in any way meaning to imply that Mr. Sprout was practicing a subterfuge, we read in 140 I. C. C. at 703 that "certain operators pick up passengers at Fall River, Mass., run their busses south a short distance over the Rhode Island-Massachusetts line, turn around, and then proceed north to Boston, Mass."

of Sprout's business was the result of intrastate carriage. That court did not mention it "nor did it consider whether [his] rights as an interstate carrier would be affected by his engaging also in intrastate business," a very pertinent question under the *Holyoke* case. It sustained the fee as a police measure on the ground that Sprout was using the streets as a place of busines, even though engaged in interstate commerce.

In holding the ordinance invalid, Mr. Justice Brandeis calls the roll of sustained state and municipal legislation.

(1) License (inspection) fees to defray the expenses of administering safety regulations. The fee here does not fall under that head for

> "it does not appear that . . . it was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such a purpose."[69]

(2) Fee for the use of special facilities. There are two objections to putting the tax under this head. First, the ordinance itself as well as the Indiana court's treatment of it fails to show that any of the proceeds of the tax go to keep up the streets. Second, the fee is flat, imposed regardless of the nature or number of the trips made by the carrier. However, the size of the charge varied with the seating capacity of the bus. Mr. Justice Brandeis does not hold that all flat taxes are bad for his second reason just given. He guardedly says that such a flat tax "could hardly have been designed" as a measure of the value of using the streets.

(3) Occupation tax on an intrastate business. To sustain the fee under this head "it must appear that it is imposed solely on account of the intrastate business." That is, the burden is on the *city* to justify such an imposition. This was not the approach taken in the *Holyoke* case where cities along the bus route were allowed to demand "licenses," in all probability to refuse them, in the absence of a showing by the *bus company* of prejudice to its interstate business. But in that case there was no attempt to tax, simply to regulate in the best interests of the public, presumably. In the *Sprout* case, for all that appeared, the ordinance requiring license and fee would apply

[69] 48 S. Ct. at 504.

to those engaged solely in interstate commerce; and the Indiana court so assumed.

The case, then, decides that an ordinance which imposes a tax on all (and interstate) carriers using the city streets, but fails to provide that the proceeds shall be used for street administrative or maintenance purposes, is invalid. Calling it a license fee does not save it. As was said in an earlier case, if a tax "bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."[70] There was no showing of discrimination in the sense of "disproportionaate economic" incidence. A state or city cannot tax interstate commerce unless it justifies. Mr. Justice Stone did not cut a new path in the *Blodgett* case. He did put the emphasis in the right place there, as when he remarked to the American Bar Association, that "where commerce is concerned, it seems clear that the function of the court must continue to be, as in the past, to prevent discrimination." But his test of discrimination is to be applied only after determination that the exaction falls within an approved class.

One thing more remains to be mentioned. The license was not to be issued to Sprout unless he paid the tax. Of this feature Mr. Justice Brandeis said: "The privilege of engaging in [interstate commerce] is one which a state cannot deny. . . . A state is equally inhibited from conditioning its exercise on the payment of an occupation tax."[71] Payment of an unconstitutional tax cannot be made a condition precedent to engaging in interstate commerce. It is supposedly true as well, that "payment of even a lawful tax may not be enforced by the exclusion of the taxpayer from interstate commerce." Whether this principle "goes so far as to prevent a state from excluding from its highways a motor carrier which refuses to pay a charge for their use," a valid exaction, has not been determined, for the Supreme Court is not willing to assume that a carrier will persist in refusing to pay what it rightfully owes.[72]

The court has pointed out the line by which the states may regulate and tax commerce by motor vehicle, in the absence of congressional action, without running athwart the Commerce Clause. Because it decided that they cannot prevent this commerce upon con-

[70] Galveston, H. & S. A. Ry. Co. v. Texas, 210 U. S. 217, 227 (1908).
[71] 48 S. Ct. at 505.
[72] 48 S. Ct. at 231.

siderations of convenience, *Buck v. Kuykendall*[73] may stand out as the most important case of the series. It has brought appreciably nearer, not only the day of federal regulation of motor bus transportation,[74] but possibly, of "definite coördination of all existing transportation agencies on land, water, and air."[75]

[73] *Supra* note 36.

[74] For a discussion of the legislation proposed in the 69th Congress, see 140 I. C. C. at 733-736.

[75] 140 I. C. C. at 748. And thus without specific intent, we end as we began, by quoting from this careful report.