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Recent Cases

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INTERSTATE COMMERCE—STATE REGULATION OF WEIGHT AND SIZE OF TRUCKS USED ON ITS HIGHWAYS

South Carolina State Highway Dep't v. Barnwell Brothers[1]

Suit by plaintiff interstate trucker and shipper to enjoin enforcement of a South Carolina statute which prohibited the use on state highways of motor trucks whose width exceeds 90 inches and whose weight, including load, exceeds 20,000 pounds. The question for decision is whether these prohibitions impose an unconstitutional burden upon interstate commerce and whether this statute has been superseded by the Federal Motor Carrier Act of 1935.[2] The district court held the weight provisions were an unreasonable burden on interstate commerce in view of the large amount of motor truck traffic in that part of the United States. The Supreme Court reversed the lower court holding that "few subjects of state regulation are so peculiarly of local concern as is the use of state highways" and although the regulation involves a burden on interstate commerce, if the state action does not discriminate and in the absence of national legislation especially covering the subject of interstate commerce, "the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states." The court need only look to see if "it is possible to say that the legislative choice is without rational basis." Here the record was held to show affirmatively that there is adequate support for the legislative judgment.

The first group of cases dealing with the general problem of state regulation of traffic on its highways is that involving the well known state automobile license tax. This type of regulation was upheld as a proper exercise of state police power in the promotion of health, safety, and comfort of its citizens,[3] the reasoning being based on cases allowing the state to exact compensation for the use of facilities furnished by it whether the use is interstate or domestic.[4] However,

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1. 58 Sup. Ct. 510 (1938).
2. Another basis of contesting the validity of the statute was infringement of the due process clause of the 14th amendment. The district court summarily dismissed this contention on the basis of the decision in State *ex rel.* Daniel v. John P. Nutt Co., 180 S. C. 19, 185 S. E. 25 (1935), which held the same statute valid saying that reasonable regulations in this respect are within the police power.
3. Hendrick v. Maryland, 235 U. S. 610 (1915); Kane v. New Jersey, 242 U. S. 160 (1916).
4. Transportation Co. v. Parkersburg, 107 U. S. 691, 699 (1882) (rates charged for use of a city built wharf upheld); Huse v. Glover, 119 U. S. 543,

in requiring common carriers to obtain certificates of convenience and necessity, state regulation has been limited to cases where the certificate is denied by reason of highway safety and preservation. It is considered a burden on interstate commerce to deny the certificate simply because there was already adequate service by carriers in the territory requested by the applicant.[5]

Morris v. Duby[6] was the first case involving the type of legislation found in the principal case. A commission created by an Oregon statute reduced the maximum weight on trucks using its highways from 20,000 to 16,500 pounds because the greater weights were damaging the highways. The court upheld the statute in spite of a federal aid statute which it was contended vested in Congress the jurisdiction over federal-aided highways, saying that the Act of Congress did not withhold from the state its ordinary police power to conserve the highways in the interest of the public,[7] and in the absence of national legislation on the subject, the state may regulate to promote safety on its highways.[8] There have been many cases since *Morris v. Duby* announcing the same doctrine, thus removing any doubt of its verity.[9] In fact, there is a tendency to extend the doctrine to situations where the regulation is not as obviously for the conservation and safety of highways.[10] As *Buck v. Kuykendall*[11] illustrates, however, regulation with apparently no view to safety or conservation will not be sustained, but query as to what will be said to involve safety. Regulations purporting to be for safety purposes and sustained on that ground could in reality have been conceived for a different and unsustainable purpose.[12]

548, 549 (1886) (charges levied on vessels using state made improvements on a navigable river upheld); Monongahela Nav. Co. v. United States, 148 U. S. 312, 329, 330 (1893) (in condemnation proceedings against river improvements made by a state chartered corporation held that a state granted franchise to collect tolls for use of improvements is a vested property right and therefore is subject to just compensation).

5. Buck v. Kuykendall, 267 U. S. 307 (1925); Bradley v. Public Utilities Comm., 289 U. S. 92 (1933).

6. 274 U. S. 135 (1927).

7. Note (1925) 38 A. L. R. 291 (federal aid legislation for highway construction makes clear the purpose of Congress that state highways shall be open to interstate commerce).

8. The court cites Hendrick v. Maryland, and Kane v. New Jersey, both cited note 3, *supra.*

9. Sproles v. Binford, 286 U. S. 374 (1932); Butler-Newark Bus Line v. Sinclair, 34 F. (2d) 780 (D. N. J. 1929); City Grocery Co. v. State Road Dep't of Florida, 60 F. (2d) 331 (N. D. Fla. 1932); Werner Transp. Co. v. Hughes, 19 F. Supp. 425 (N. D. Ill. 1937).

10. Wald Storage and Transfer Co. v. Smith, 4 F. Supp. 61 (S. D. Tex. 1933) (state commission refused permit to use highways, under statute allowing such refusal, on grounds pertaining to highway conservation and where existing common carrier service was already adequate and was held a proper exercise of police power to restrict use of roads to purpose for which they were primarily designed viz., effective, safe, and convenient use by the general public).

11. 267 U. S. 307 (1925).

12. Butler-Newark Bus Line v. Sinclair, 34 F. (2d) 780 (D. N. J. 1929) (permission denied to operate a public omnibus over a parkway. In sustaining the denial, the court considers at length the history, development, and purpose of the park, its beautification, etc. Then it states that aesthetic grounds aren't the only ones, that the street was narrow and pavement was not designed for

One of the grounds upon which plaintiff attacked the statute in the principal case was that it was superseded by the Federal Motor Carrier Act of 1935.[13] The Supreme Court did not give this contention much consideration, merely mentioning the lower court's ruling that the state statute was not superseded. The district court went into the problem thoroughly, though, concluding that Section 225[14] dealing specifically with sizes and weights of vehicles precludes their regulation under Section 204 (a) (1) and (2)[15] which authorized the commission to establish reasonable requirements with respect to "safety of operation and equipment," and "standards of equipment," the rule of statutory interpretation being that general language, although broad enough to include it, will not be held to apply to a matter specially dealt with in another part of the same enactment. As to the applicability of Section 225, the court quotes from *L. & L. Freight Lines v. Railroad Comm. of Florida*,[16] "The authority is merely to 'investigate and report on' the 'need' for federal regulation of sizes and weights—a wholly prospective matter, clearly indicating an absence of intent to presently regulate in that respect. . . ."[17] This interpretation is supported by other cases.[18]

In the principal type of case it should be borne in mind that although Congress can prescribe sizes and weights of interstate vehicles under the commerce clause, until it does so, there would be no regulation at all if not done by the states. There must be control of some sort, otherwise chaotic conditions would quickly develop. This is in further justification of the doctrine that in the absence of congressional legislation on the subject, the states have the power to regulate an inherently local matter.

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the harmful heavy traffic); note (1933) 32 MICH. L. REV. 267 (commenting on the Wald case, note 11, *supra*, the writer says that the obvious purpose of the Texas statute was to curb contract carrier competition. But the court held that although the statute did not authorize the commission to deny the permit on the ground of highway conservation alone, such authority was assumed since highway conservation was the general policy underlying the statute. The writer further states that the liberal interpretation by the court shows a tendency for allowing wider power of state control).

13. 49 STAT. 546, 49 U. S. C. § 304 (1935).
14. 49 STAT. 566, 49 U. S. C. § 325 (1935).
15. *Id.* at 546, 49 U. S. C. § 304 (1935).
16. 17 F. Supp. 13, 14 (S. D. Fla. 1936).
17. 17 F. Supp. 803 (E. D. S. C. 1937) (decision of the district court in the principal case).
18. Werner Transp. Co. v. Hughes, 19 F. Supp. 425 (N. D. Ill. 1937); Lowe v. Stoutamire, 123 Fla. 135, 166 So. 310 (1936); Railroad Comm. v. Southwestern Greyhound Lines, 92 S. W. (2d) 296 (Tex. Civ. App. 1936).

NEGLIGENCE—LIABILITY OF VENDORS AND MANUFACTURERS

Tayer v. York Ice Machinery Corp.[1]

The York Company sold to John Morell & Co., a meat packing company, two ammonia compressors, equipped with manifolds. The compressors were installed according to specifications. The machines were put in operation and run almost continually for eight months when the manifold cracked and ammonia gas escaped. Tayer, the shift engineer in charge of the plant, pushed the switch to cut off the moter, creating an electric spark, causing the ammonia gas to explode, and producing injuries to Tayer from which he died two weeks later. Although recovery was denied because of certain defenses, the source of the manufacturer's liability was put on the law of negligence.

Where the supplier of a chattel is a bailor and is receiving a benefit, he owes a duty not only to the person supplied, but to persons who might use it with permission of the one supplied and also to persons in the vicinity of its intended use, not only as to dangers which he knows about but as to those he could have discovered by reasonable inspection.[2] Where the supplier is a manufacturer, the courts have developed two different approaches to his liability. The old theory was that the manufacturer only owed a duty to those persons immediately supplied by him on the ground that privity of contract was necessary.[3] Broad exceptions were engrafted to this rule.[4] One was where a manufacturer of chattels imminently dangerous to the life or health of mankind was negligent in the preparation of an article intended to preserve, destroy or effect human life. This was actionable by third parties who suffered from the negligence. Food and drugs were included under this exception. The second was where one made or sold an article which he knew to be imminently dangerous to life or limb to another without notice of its qualities. Here also he was liable to any person who suffered an injury therefrom which might have been reasonably anticipated. The courts have stretched these exceptions until about the same result is reached as if straight negligence principles were applied. The first exception has been extended to include dangerous weapons, explosives, oils, automobiles, bursting beer and coca-cola bottles.[5] As to the second exception, it has been held that since he is a manufacturer he is held to know of those defects which he could have discovered by the exercise of reasonable care.[6] The new theory

1. 119 S. W. (2d) 240 (Mo. 1937).
2. See note (1921) 12 A. L. R. 774; (1929) 61 A. L. R. 1336.
3. Winterbottom v. Wright, 10 M. & W. 109 (Ex. 1842).
4. Sanborn, J., in Huset v. J. I. Case Thresh. Mach. Co., 120 Fed. 865 (C. C. A. 8th, 1903). This phase of liability has been developed by BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 109.
5. The cases are collected in notes (1922) 17 A. L. R. 672; (1925) 39 A. L. R. 992; (1929) 63 A. L. R. 340; (1934) 88 A. L. R. 527.
6. Olds Motor Works v. Shaffer, 145 Ky. 616, 140 S. W. 1047 (1911); Berg v. Otis Elevator Co., 64 Utah 518, 231 Pac. 832 (1924); Sutton v. Otis Elevator Co., 68 Utah 85, 249 Pac. 437 (1926).

is that set out by Cardozo, which puts the source of a manufacturer's liability on straight principles of negligence.[7] This new theory has been adopted by the Restatement.[8]

Missouri lined up with those courts following the old theory of liability of a manufacturer. In the earliest case on the question in Missouri, *Heizer v. Kingsland & Douglass Mfg. Co.*,[9] the court made privity of contract a requirement for liability except where articles sold were necessarily and inherently dangerous to human life, or where the manufacturer knew of the dangerous condition. This case was approved but distinguished in the case of *Tipton v. Barnard & Leas Mfg. Co.*[10] The next case, *Stolle v. Anheuser-Busch, Inc.*,[11] did not discuss the two approaches to liability of a manufacturer. The still later case of *McLeod v. Linde Air Products Co.*,[12] has been interpreted by the more recent case of *Jacobs v. Frank Adams Electric Co.*,[13] as doing away with the older approach through the exceptions and as applying straight negligence principles. The *Jacobs* case employed this solution. While the *McLeod* case

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7. MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916).
8. RESTATEMENT, TORTS (1934) § 395.
9. 110 Mo. 605, 19 S. W. 630, 15 L. R. A. 821 (1892). An employee of the vendee was injured when a cylinder of a steam threshing machine, manufactured and sold by defendants, exploded. The employee was denied recovery. The court stated that the evidence showed negligence in the construction and testing of the machine, but defendant did not know of the dangerous condition and since the machinery was not necessarily dangerous the action based on negligence must be confined to the immediate parties.
10. 302 Mo. 162, 257 S. W. 791 (1924). An employee of the vendee was injured when an elevator sold by the manufacturer and vendor fell. The employee was denied recovery. Evidence showed negligence in the manufacture of the elevator, but the manufacturer and seller had no knowledge of it. Employee relied on the MacPherson case. Recovery was denied. The court held that the MacPherson case would seem to be in conflict with the Heizer case, but that the MacPherson case was not in point on the facts.
11. 307 Mo. 520, 271 S. W. 497, 39 A. L. R. 1001 (1925). Plaintiff's wife, while in a butcher shop, was injured when a bottle of Budweiser, manufactured by defendant, exploded. A third person had bought the Budweiser from a retailer and had set it on the counter near plaintiff's wife a short time before it exploded.
12. 318 Mo. 397, 1 S. W. (2d) 122 (1927). Defendant manufactured oxygen and sold it to plaintiff's father for use in his welding business. The oxygen was delivered in steel tanks in which there was a pressure of 1800 pounds. Due to a clogged valve, the tank exploded driving a piece of brass into the skull of the plaintiff. In awarding the plaintiff $12,000 damages the court said, "The early cases limited exception one to things in their nature destructive, such as poisons, explosives, and deadly weapons. . . . We think the exception should be extended to include 'a thing which when applied to its intended use becomes dangerous,' although not inherently so."
13. 97 S. W. (2d) 849 (Mo. App. 1936); note (1937) 2 Mo. L. REV. 247; McCleary, *The Restatement of the Law of Torts and the Missouri Annotations* (1937) 2 Mo. L. REV. 28, 37. Plaintiff sued defendant for negligence in the manufacture of an electric panel board. While engaged in installing the board upon the premises of a purchaser who had bought it from a jobber, plaintiff sought to test the board in the usual manner by turning on the current and observing if the results were satisfactory. Due to defective insulation, the turning on of the current caused a loud explosion, and a flash from the board temporarily blinded the plaintiff, causing injuries to his eyes for which he brought the action.

greatly extended the scope of the earlier exceptions to the general principle of non-liability of manufacturers as pronounced in the *Heizer* and *Tipton* cases, the court seems to follow both the result and reasoning of the earlier decisions rather than the general principle adopted by the *McPherson* case and the Restatement.

The principal case, while reaching about the same result as the *McLeod* case, has used the more rational reasoning employed in the *McPherson* case and the Restatement, which holds a manufacturer liable who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use.[14] Thus the principle of liability is becoming uniform in its application as to all suppliers of chattels without attempting an illogical differentiation between types of suppliers.[15]

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14. RESTATEMENT, TORTS (1934) § 395.

15. As to the responsibility of a manufacturer of beverages a more stringent liability has been applied. Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S. W. (2d) 445 (1936); Comment (1937) 2 Mo. L. REV. 73. Manufacturer-bottler sold a bottle of coca-cola to a retailer who in turn sold it to a customer. The customer drank from the bottle and became very ill from a deleterious substance (decomposed mouse) contained therein. The Missouri court of appeals allowed the customer to recover from the manufacturer-bottler on the basis of implied warranty of fitness for human consumption.