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Interstate Commerce: Regulation of Local Transit Companies

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certainty as to these two possibilities, however, the Court is following a recent trend as exemplified by the case of *Cliett v. Lauderdale Biltmore Corporation*,[31] in which the owner of a restaurant serving unfit food was held liable on an implied warranty of fitness for consumption. This case is but another application of the implied warranty theory to cement public policy into the law. The result reached is desirable in that it will cause the retailer to exercise greater caution in selecting reliable suppliers.

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INTERSTATE COMMERCE: REGULATION OF LOCAL TRANSIT COMPANIES

United States v. Capital Transit Co., 70 Sup. Ct. 115 (1949)

The Capital Transit Company, which operates bus and street car lines within the District of Columbia, previously operated a line across the Potomac River to the Pentagon Building in Virginia. The Interstate Commerce Commission compelled the company to set joint fares with Virginia transportation companies.[1] After this order the company abandoned its lines into Virginia and now operates solely within the District of Columbia. The Interstate Commerce Commission nevertheless continued to regulate the company. The Capital Transit Company brought suit to enjoin this regulation. The district court allowed the injunction on the ground that the Commission did not have jurisdiction after the abandonment of the Virginia lines.[2] On certiorari to the Supreme Court, HELD, the injunction should be set aside, since the complainant was engaged in interstate commerce. Judgment reversed, Chief Justice Vinson, Justices Reed and Jackson dissenting.

Essentially there are two problems in this case in regard to the regulation of interstate commerce. The first concerns the power of the Interstate Commerce Commission to obtain jurisdiction of the company when it operated the line into Virginia. Section 303(b)(8) of

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[31] 39 So.2d 476 (Fla. 1949).

[1] Alexandria, Bancroft & Washington Transit Co. and Washington, Virginia & Maryland Coach Co., Inc.

[2] Capital Transit Co. v. United States, 7 CCH FED. CARRIER CAS. ¶2036 (1949).

the Motor Carrier Act[3] provides that, unless it is necessary in order to carry out the national transportation policy,[4] interstate commerce shall not be regulated by the Interstate Commerce Commission under the Motor Carrier Act when the transportation in question is solely within a single municipality, between contiguous municipalities, or within a zone adjacent to and commercially a part of the municipality or municipalities. Transportation furnished by the Capital Transit Company clearly fell within these provisions, since the area between Washington and the Pentagon was a contiguous municipality. The Court in a previous case involving the company, however, had affirmatively found that the regulation of this transportation was essential to the national transportation policy, since the traffic moving to the Pentagon Building was important to national defense.[5] For this reason Section 303(b)(8) would not apply, and the Interstate Commerce Commission was not prohibited from regulating the company on the basis of the statutory exception dealing with contiguous municipalities.

The second and principal question in this case involves the determination of the theory under which the Supreme Court is permitting regulation by the Interstate Commerce Commission. The extent of regulation by the Federal Government has been determined in the past by three theories, popularly called the burden theory, the instrumentalities theory, and the flow theory. Although these theories tend to overlap each other[6] and have not been applied to the same extent in interpreting all statutes involving the commerce power,[7] they are nevertheless useful in analyzing decisions in this field. To determine if, under the Motor Carrier Act, Congress intended to delegate to the Interstate Commerce Commission the full extent of its power to regulate interstate commerce as delineated by the various theories, it is necessary to analyze these theories in connection with the Motor Carrier Act itself.

Under the burden theory, sometimes called the Shreveport Doctrine,[8] the regulation of purely intra-state activities has been permitted

[3]49 STAT. 546 (1935), 49 U.S.C. §303(b)(8) (1946).

[4]54 STAT. 899 (1940), 49 U.S.C. §1 (1946).

[5]United States v. Capital Transit Co., 325 U.S. 357 (1945).

[6]See McLeod v. Threlkeld, 319 U.S. 491 (1943); NLRB v. Jones & Laughlin, 301 U.S. 1 (1937); Stafford v. Wallace, 258 U.S. 495 (1922).

[7]Illinois Cent. R.R. v. Behrens, 233 U.S. 473, 477 (1914); Simpson v. Shepard, 230 U.S. 352, 399 (1913); Mondou v. New York, N.H. & H.R.R., 223 U.S. 1, 48 (1912); United States v. The Daniel Ball, 10 Wall. 557 (U.S. 1871).

[8]See 18 GEO. WASH. L. REV. 422, 424 (1950).

when the activity affects the flow or constitutes a burden on interstate commerce.[9] The use of this notion apparently is effectively precluded by Sections 303(a)(10)[10] and 316(e)[11] of the Motor Carrier Act. Section 303(a)(10), in defining interstate commerce as "commerce between any place in a state and any place in another state or between places in the same state through another state," seems to prevent the regulation of the Capital Transit Company by the Interstate Commerce Commission under the Motor Carrier Act after the abandonment of the Virginia line. That Congress intended to prohibit the use of the burden theory, that is, the result reached in the *Shreveport* cases, under the Motor Carrier Act is further strengthened by Section 316(e), which provides:

> ". . . nothing in this chapter shall empower the commission to prescribe or in any manner regulate the rate, fare, or charge for intrastate transportation . . . for the purpose of removing discrimination against interstate commerce or for any purpose whatever."

The second basis under which regulation has been permitted is the so-called instrumentalities theory. Under this theory, regulation by Congress under the interstate commerce clause has been permitted, for example, when a carrier ordinarily transports goods that are moving across state lines although the carrier itself remains at all times within one state and may not at all times transport such goods. Navigable waters,[12] railroads,[13] telegraph and telephone systems,[14] and ships[15] have all been classed as instrumentalities of interstate commerce. It is significant to note that in many cases in which the term "instrumentality of interstate commerce" or "highway of interstate commerce" has been used there have been present goods or passengers moving in interstate traffic, so that in reality the definition of "instrumentality of interstate commerce" must often depend upon determination of

[9]Houston, E. & W.T. Ry. v. United States, 234 U.S. 342, (1914).

[10]49 Stat. 544 (1935), 49 U.S.C. §303(a)(10) (1946).

[11]49 Stat. 558 (1935), 49 U.S.C. §316(e) (1946).

[12]New Jersey v. Sargent, 269 U.S. 328 (1926); Missouri v. Union Elec. Light & Power Co., 42 F.2d 692 (C.D. Mo. 1930).

[13]Missouri, K. & T. R.R. v. Northern Okla. Rys., 25 F.2d 689 (10th Cir. 1928).

[14]Western Union Tel. Co. v. Lee, 174 Ky. 210, 192 S.W. 70 (1917).

[15]Anderson v. Shipowners Ass'n, 272 U.S. 359 (1926).

whether such goods are moving in interstate commerce under the flow theory.[16]

In all probability, regulation of the Capital Transit Company by the Interstate Commerce Commission is being permitted under the flow theory. Under this theory, once goods are a part of or moving in interstate commerce, the carrier actually transporting them may be regulated even though it operates solely within the boundaries of a single state.[17] Little doubt exists that the instant decision lies within the realm of permissible federal regulation under the flow theory of interstate commerce, inasmuch as many passengers undoubtedly are carried by the plaintiff transit company who are subsequently transported to the Pentagon Building in Virginia. Although the subject case is primarily concerned with the determination of congressional intent, the wisdom of this extension of federal regulation into a field that has hitherto been largely left to local action is open to question at least on policy grounds.

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TORTS: RECOVERY FOR EMOTIONAL DISTURBANCE UNACCOMPANIED BY PHYSICAL INJURY

Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950)

In an action to recover both punitive and compensatory damages for mental pain and suffering, plaintiff alleged that during a temporary absence from home her small child was accidentally killed, whereupon defendant undertaker without authority took possession of the body. Defendant refused plaintiff's demand for return of the body; instead he embalmed it and continued to hold it until plaintiff paid an excessive charge. The lower court sustained defendant's demurrer on the ground that neither punitive nor compensatory damages were recoverable. On appeal, HELD, the allegations stated a cause of action in which a recovery could be had for both punitive damages and

[16]See note 7 *supra.*

[17]United States v. Yellow Cab Co., 332 U.S. 218 (1947); Baltimore & Ohio R.R. v. Settle, 260 U.S. 166 (1922); Texas & N.O.R.R. v. Sabine Tram Co., 227 U.S. 111 (1913); Earle v. Brink, Inc., 54 F. Supp. 676 (S.D.N.Y. 1943); Washington, B. & A. Elec. Ry. v. Waller, 289 Fed. 598 (D.C. Cir. 1923).