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Recommended Citation
Gavit, Bernard C., "State Highways and Interstate Motor Transportation" (1927). Articles by Maurer Faculty. 1112.
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STATE HIGHWAYS AND INTERSTATE MOTOR TRANSPORTATION

By Bernard C. Gavit*

I.

There have been five recent decisions of the Supreme Court of the United States which have had to do with the problem of motor truck transportation. These cases are: Packard v. Banton,1 Michigan Public Utilities Commission v. Duke,2 Buck v. Kuykendall,3 Bush & Sons Company v. Maloy,4 and Frost v. Railroad Commission.5

The case of Packard v. Banton decided that there was nothing in the United States Constitution which protected a taxi man as against ordinances of the city of New York, which in effect prohibited him from carrying on his business.

The cases of Michigan Public Utilities Commission v. Duke and Frost v. Railroad Commission decided that a state could not force one engaged in business as a private carrier to become a common carrier and thereby subject to regulation by a public utilities commission. The cases of Buck v. Kuykendall and Bush & Sons Company v. Maloy decided that a state cannot prohibit the use of state highways for the operation of motor vehicles engaged in interstate commerce.

It is the purpose of this paper to discuss the question of the rights of a state to regulate the use of its highways as against persons engaged in interstate commerce and it is the contention here that the cases of Buck v. Kuykendall and Bush & Sons Company v. Maloy are not the final word upon the questions there involved.

II.

At the outset it is well to review the law concerning the highways of the country. Except in the instances where the United States has some claim or title to particular highways the universal rule is that the highways of a state are the property of the state.

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1. 264 U. S. 140, 68 L. Ed. 596.
2. 266 U. S. 570, 69 L. Ed. 445.

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The state may own the fee, or it may own only an easement, but the result is the same; the highways are held by the state for use as public thoroughfares. "The streets belong to the public, and are primarily for the use of the public in the ordinary way."6

The control of the streets may rest in the legislature, the county, the city, in a public commission, or jointly in all of those agencies; but again the result is the same, neither the state nor any of its agencies can barter away the rights of the public to the free use of the streets "in the ordinary way."

The proper authorities have a right to devote the streets to useful public purposes, provided there is left an unobstructed driveway for ordinary passage.8 The public authorities may, therefore, by license or franchise give to a common carrier, or a public utility, a right to use the streets for gain.9 The reason is not that the carrier may make money, but that thereby the public convenience is served.

But nowhere is there any dissent from the proposition that the use of the streets for purposes of gain is special and extraordinary, and may be prohibited or conditioned as the public authorities deem proper. Without a franchise one who is using the streets as a common carrier for hire has no property right protected by the Constitution of the United States.10

In addition to the rights of the public generally the abutting property owners have varying private interests in the highways. These rights, of course, the public authorities cannot deal with.11

III.

It is said that the public highways are held in trust for the people. Does this include the people of the country generally, or merely the people of the state? The court in the case of Buck v. Kuykendall12 suggests that "the right to travel interstate by auto vehicle upon the public highways may be a privilege or immunity of citizens of

7. Sims v. City of Frankfort 79 Ind. 446.
11. Ewbank v. Yellow Cab Co. 149 N. E. (Ind.) 647.
the United States.” But this would not help a corporation, for it is not a citizen within the meaning of that constitutional provision.\textsuperscript{13}

In a similar situation there is authority that the bed of a lake, held in trust by the state for “the people,” is held only for the people of the state.\textsuperscript{14}

Finally, then, there may well be a distinction between the rights of a non-resident citizen and a non-resident corporation to operate as common carrier in interstate commerce. As far, however, as the present decisions go the distinction is immaterial, for the Supreme Court says that determining who is to use the highways is not regulation of the use of the highways, but is a regulation of the business of interstate commerce.

It is with that proposition that the present quarrel is to be had.

\textbf{IV.}

In the \textit{Buck v. Kuykendall} case the court says:

“The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highway may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner.—Thus the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce.”

In the \textit{Frost v. Railroad Commission} case the court uses similar language. And in both cases it was assumed that the complaining parties had no rights which were protected by the Fourteenth Amendment.

The question of interstate commerce was not involved in the \textit{Frost} case, and the case finally merely holds that a state cannot grant a privilege upon condition that one give up a constitutional right, in that case the right to operate as a private carrier. (And it may be that, after all, that too is a privilege and not a right.)

\textbf{V.}

It appears impossible to the writer to reconcile the decision of the Supreme Court in the case of \textit{Packard v. Banton} with the decision in the case of \textit{Buck v. Kuykendall}. The first case held that “a distinction must be observed between the regulation of an activity

\textsuperscript{13} \textit{Western Turf Assn. v. Greenberg} 204 U. S. 359, 51 L. Ed. 520.

\textsuperscript{14} \textit{Lake Sand Company v. State} 68 Ind. App. 439, 120 N. E. 714.
which may be engaged in as a matter of right, and one carried on by government sufferance or permission”; that the business of operating a taxicab for hire on the public streets was strictly a privilege and not a right, and its prohibition was a valid regulation of the use of the public streets. The second case holds that the prohibition of the use of the public highways to one proposing to operate motor vehicle for hire in interstate commerce is not a regulation of the use of the highways, but is a regulation of a business. Prohibition of the use of the public highways for purposes of intrastate business is a regulation of the use of the highways; prohibition of the use of the public highways for the purposes of interstate business is not a regulation of the use of the highways.

It seems almost too plain for words that when a state licenses the use of its highways for use by a common carrier for gain, it is in fact licensing the use of the highways and not the business of common carrier. It is submitted that there can be no distinction between the two situations and that the two cases are in conflict, and that the Packard case is the correct decision. It may appear on the face of it that there is a regulation of business, but that is not the true situation; it is the refusal to inaugurate or establish a business. One of the facilities of the business is the use of the streets for gain; it cannot be acquired without the consent of the proper authorities. It may be that there is a fundamental right to engage in interstate commerce, but that assumes the lawful acquisition of the facilities with which the interstate commerce is to be carried on. Nobody, for instance, ever supposed that because one proposed to engage in business as a common carrier by railroad, he had the right to lay his track down any highway, or across any property he desired. If a city refused permission to such a one to lay tracks down the main street there would be little argument that the city was regulating interstate commerce instead of the use of its streets.15

Although there is a difference in degree between the use of streets by a street car company or a steam railroad and its use by motor vehicles for hire, all are uses of the highways for gain. In all essentials the licensing of the use of streets for private business is a regulation of the use of the streets and is not a regulation of a business. Regulation of business presupposes that there is a business to regulate. It is incorrect to say that the refusal to grant a license or certificate of necessity is a prohibition of business; it is merely the refusal to give consent to a use of the public highways.

VI.

It must be noted that the federal control of interstate commerce arises out of the provision of the Constitution which gives Congress the power to regulate interstate commerce. The Supreme Court has defined "regulate" as follows: "To regulate in the sense intended is to foster, protect, control and restrain." There is no authority given Congress or any other agency to establish interstate commerce.

There is at least one decision to that effect, which is not discussed in any of the cases so far cited, and which is directly contradictory to the result of the *Kuykendall* case. That is the case of *City of St. Louis v. Western Union Telegraph Company.*

In that case the city was attempting to collect money due under an ordinance requiring the telegraph company to pay for certain privileges in its streets. The telegraph company pleaded that it had established its lines in interstate commerce in pursuance to government aid. The court said this:

"We find that the charge is imposed for the privilege of using the streets, alleys and public places. The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent. Whatever benefit the public may receive in the way of transportation of messages, that space (occupied by the company) is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public. By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel appropriated to the separate use of companies and for the transportation of messages. It is a misconception, however, to suppose that the franchise or privilege granted by the Act of 1866 carries with it the unrestricted right to appropriate the public property of a state. It is like any other franchise, to be exercised in subordination to public and to private rights. No one would suppose that a franchise from the federal government to a corporation, state or national, to construct interstate roads, or lines of travel, transportation or communication would authorize it to enter upon the private property of an individual and appropriate it without compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a state. This rule extends to streets and highways; they are the public property of the state."

Although the case talks about the exclusive character of the use by telegraph poles and car tracks, the fundamental principle involved

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extends to the use by motor carriers. Anything beyond the ordinary use of a highway for the purposes of common travel is subject to license and regulation by the state. As suggested in the last case, if a telegraph company may place one line of poles in the streets because it is engaged in interstate commerce then it may place a dozen. The rights of the public to common travel are thereby surrendered to interstate commerce. In the same way if one company may use a highway for interstate commerce by motor vehicle then a hundred may do the same, without let or hindrance, and the rights of the public to common travel are again surrendered to interstate commerce.

The case last cited is distinct authority for the proposition that there is nothing which can compel a state to devote its public property to interstate commerce against its consent. The right to engage in interstate commerce does not carry with it the right to force anyone to contribute the instrumentalities with which the commerce is to be carried on. To refuse to devote the property of the state and of adjoining property owners in the streets to the uses of interstate commerce is not a regulation of interstate commerce; there can be no business until the instrumentalities have been lawfully acquired.

VII.

It has been suggested that the "freedom of interstate commerce involves the right to make reasonable use of common state facilities." There is cited for this proposition the case of Sioux Remedy v. Cope, where it was held that the enforcement in the state courts of a cause of action arising out of the sale of goods in interstate commerce was an incident of interstate commerce, and that certain regulations concerning the right to sue were unreasonable burdens on interstate commerce. It will be observed that the plaintiff in that case had a valid right acquired by the law of the state where relief was sought; i.e., a cause of action for the goods sold. The case holds that the state cannot make unreasonable regulations concerning the enforcement of the right. Even, then, if it be admitted that the right to sue was a privilege, back of the privilege was a right, and the case might well fall in the general class of cases which hold that a state cannot grant a privilege which actually or in effect requires as a condition precedent the relinquishment of a constitutional right. But in any event the interstate commerce in that case was

18. By Charles B. Elder, in an article in ILLINOIS LAW REVIEW XXI 166.
established; the privilege of suing was granted, and the state could not burden it unreasonably. The case is similar to one where a state would give a license to use the roads in interstate commerce and then attempt to limit the speed of all vehicles to an unreasonable figure.

The same author cites several cases involving the right of a state to regulate telegraph companies established on the post roads of the United States, pursuant to legislation authorizing the use of the roads. None of these cases contains anything contrary to the doctrines announced in the case of City of St. Louis v. Western Union Telegraph Company.

Two other cases are cited in that article which appear to be somewhat conflicting with the views here expressed. They are the cases of West v. Kansas Natural Gas Co., and Barrett v. New York. But both cases are distinguishable.

In the first case several petitioners owned or leased certain oil and gas wells in Oklahoma and had acquired private rights of way for a gas pipe line into Kansas and other states, for the purpose of conveying the gas to other states for sale and use there. A statute of the state of Oklahoma forbade the exportation of gas, and limited the right to cross the highways of the state with a pipe line to companies or persons doing merely a local business. In view of the fact that the gas could only be transported in interstate commerce by means of pipe lines the court held the statute invalid. But an extraordinary use of the highways was not there involved. As owners of the abutting property the persons in that case had a right to egress and ingress, which under the circumstances of that case would certainly include the right to lay the pipes in question.

In the case of Barrett v. New York the Supreme Court held invalid an ordinance of the city of New York which licensed the business of expressmen, and required licenses for drivers of all express wagons and bonds for the driver, conditioned that he would safely and promptly deliver all packages entrusted to his care. The court says:

22. 221 U. S. 229.
"The requirements—cannot be regarded as imposing a fee or tax for the use of the streets.—The sections under consideration constitute a regulation of the express 'business.' Article 1 is entitled 'Business Requiring a License'; sec. 305 containing the enumeration, provides that 'the following businesses must be duly licensed,' and sec. 306, that 'no person shall engage in or carry on any such business without a license therefor' under a stated penalty. The right of public control, in requiring such a license, is asserted by virtue of the character of the employment."

The court held that the provision for a bond conditioned on the safe delivery of goods was invalid as applied to interstate commerce for the good reason that Congress had occupied the field of the obligations of interstate express carriers. The court then goes on to determine the validity of the license for drivers, and holds that it is inseparable from the balance of the law and even if valid would fall with the balance of the ordinance. The court does say that it believed the provision invalid, but there is no decision to that effect. It will be observed that the ordinance as a whole was never even sought to be sustained as a regulation of the use of streets, but as a regulation of the business of expressing as a whole, including the maintenance of an office, the liability for misdelivery of goods, and other incidents of the business which had no connection with the streets.

VIII.

There is no real authority to support the case of Buck v. Kuykendall, and the case of City of St. Louis v. Western Union Telegraph Company is directly contradictory to its result.

It is submitted that the state has the right to prohibit to an interstate carrier by motor vehicle the use of its streets. It not only has the power to regulate the use of the streets for interstate commerce, but it has the duty to protect the rights of its own citizens in their highways, which must at all times be left open to free passage for ordinary use.

Although one should be slow to dispute such great authority as the Supreme Court of the United States, it would certainly seem that the case of Buck v. Kuykendall is not the final word on the subject, and that there must be some retraction from that opinion. The question is not one of expediency, but one of power; arguments as to confusion, lack of uniformity and the desirability of motor
transportation are beside the point. There is no more reason in compelling a state to devote its highways to interstate commerce by motor vehicle than there is in forcing it to devote them to interstate commerce by steam or electric railroads.