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NOTES.

CARRIERS—STATE RULES OF LIABILITY AS REGULATIONS OF INTERSTATE COMMERCE AND THE EFFECT OF THE ACT OF CONGRESS OF JUNE 29, 1906.—The view has once prevailed that in the absence of positive congressional action, there is no body of law applicable to transactions in interstate commerce. The interstate carrier was under no affirmative duty because it was considered subject solely to the Federal Congress which had not, by appropriate legislation, applied the common law to such commerce. It was therefore expressly decided that an injured party could recover nothing for discrimination and unreasonable charges against him, it being held that the common law rule forbidding common carriers from exacting unreasonable charges does not apply to interstate commerce, even where the contract of carriage is made in a State where that prevails, since such commerce is governed only by the laws of the United States, and the United States have never adopted the common law.[1]

[1] Swift v. Railroad, 58 Fed. 858, 1893, per Grosscup, J.: "It is not dis-

This view was abandoned and probably would never have passed review by the Supreme Court. In *dicta,* that court had committed itself to the contrary view in language so broad that it would seem, so long as Congress took no action, the common law, in all its phases, determined the relative rights involved in such commerce.[2] And some years later the Supreme Court expressly so ruled.[3]

Although it thus seems that authority and practical difficulty were against this view, there remained considerable conflict and uncertainty just what law did apply so long as Congress passed no positive statutes to define and regulate all branches of interstate

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puted that within the territory of the states, and upon subjects affected by the state laws, such a prohibition (against unreasonable rates) exists. It is one of the restraints embodied in the common law of England and is, therefore, in force within every jurisdiction where the common law is the law of the land. It seems to me equally clear, that, outside of the Interstate Commerce Act, there is no law in the United States, as a distinct sovereignty, imposing such restraint. The courts of the United States have had many occasions to enforce the common law, but in every instance it has been the municipal law of the state by which the subject-matter was affected." The court then concludes that the municipal law of the state is not applicable to transactions in interstate commerce, at least so far as it prohibits unreasonable rates and discrimination, the matter of the reasonableness of a charge in interstate commerce being wholly a national question.

It may be thought that the learned judge would not hold that the state law, either the positive law or the common law, was entirely without application upon any question in interstate commerce. However, the language seems very broad. If so, one who broke a contract in interstate commerce could not be held therefor by the injured party, so long as Congress had provided no remedy for breaches of contract in matters under federal control. Under this decision it would seem possible for a carrier to refuse the proper demands for interstate service made by the public of a state which had granted exclusive privileges or the power of eminent domain to the company.

It is no wonder, therefore, that Shiras, J., in Murray v. Chicago & Northwestern R. R. Co., 62 Fed. 24 (1894), said: "It is certainly a novel proposition that up to the date of the enactment of the Interstate Commerce Act, all the foreign and interstate commerce of the country was without the pale of the law, and that there were no legal rules or principles which governed or controlled the relations between shippers and carriers engaged in that business."

[2] Bank of Kentucky v. Adams Express Co., 93 U. S. 174 (1876), expressly ruling that a common carrier was charged with respect to interstate shipment with the common law liability of an insurer, which could not be avoided by a contract exempting it from liability for the negligence of an agent employed but not controlled by it, any more than for the negligence of its servants and agents which it did control, the latter having been ruled in Railroad v. Lockwood, 17 Wall. 357 (1873).

Interstate Commerce Commission v. B. & O. R. R., 154 U. S. 263 (1891), where Mr. Justice Brown in the opening sentence said: "Prior to the enactment of the Act of 1887, railroad traffic in this country was regulated by the principles of the common law applicable to common carriers." Smith v. Alabama, 124 U. S. 465 (1887); Railroad Co. v. Osborne, 52 Fed. 912 (C. C. A., 1892), per Brewer, J.

[3] Western Union T. Co. v. Call Pub. Co., 181 U. S. 92 (1900); Despeaux, *et al.,* v. P. R. R., 133 Fed. 1009 (1904), recognizing a complete common law basis of a cause of action for discrimination.

commerce. In one case it was pointed out that the law in question was the general principle of the common law and not therefore necessarily the common law as administered by the State where the controversy arose.[4] In another case it is said that the law governing such commerce, in the absence of congressional action, is the common law of the State.[5] The latter view was sharply criticised in the case first cited.[6] Perhaps neither view has produced the apparent present rule. One side reverts to the English common law; the other to the State municipal law. The latter admit that the actual result in the Federal Courts is frequently an interpretation of the common law different from that given by the courts of the State where the matter arose.[7] Even so it is said, "the law applied was none the less the law of that State."[8]

The subject matter of the decision which finally determined that the common law applies to interstate commerce,[9] was not one upon which the Federal and State interpretations of the common law differed. It therefore decides nothing in the controversy just noted. However a late case in the Supreme Court did involve a common law point upon which the Federal rule is in conflict with that of the State where the matter arose.[10] The Pennsylvania Supreme Court held the carrier liable to the full value of the loss caused by its negligence,

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[4] Murray v. Chicago & N. W. Ry. Co., *supra.*

[5] Smith v. Alabama, *supra,* per Mathews, J.: "A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the laws of the state for acts of non-feasance or mis-feasance committed within its limits." And further, "if the law of the particular state does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly provides it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which until displaced covers the subject."

[6] Page 34: "The rules prevailing in the different states may be variant or antagonistic. A delivery of goods may be made to a common carrier in California for transportation to New York. Do the legal relations, duties and obligations existing between the shipper and carrier vary and change as the shipment passes state boundaries, so as to accord with the local law of each state through which the carrier may choose to take them? Upon such a theory, what becomes of the principle that the exclusive control of interstate commerce and foreign commerce was committed to Congress in order to secure a uniform rule touching the same?"

[7] New York Central R. Co. v. Lockwood, 17 Wall. 357 (1873); Swift v. Tyson, 16 Pet. 1 (1849); Carpenter v. Insur. Co., 16 Pet. 495 (1849); Oates v. National Bank, 100 U. S. 239 (1879); Railroad Co. v. National Bank, 102 U. S. 14 (1880).

[8] Smith v. Alabama, *supra,* p. 478.

[9] Western Union Telegraph Co. v. Call Pub. Co., *supra,* unlawful discrimination of telegraph companies.

[10] Pennsylvania R. R. Co. v. Hughes, 191 U. S. 477 (1903), the validity of limiting the carrier's liability to an agreed valuation of the goods.

and this was sustained by the United States Supreme Court, though a limitation to a certain valuation, fairly agreed upon, was valid according to the authority in that court.[11] It thus appears that when the appeal to the Supreme Court is in error to the highest court of the State, the common law as interpreted by the latter, is applied, though the transaction is in interstate commerce. Where the appeal is from an inferior Federal Court the Supreme Court in a case where the interpretations of the common law differ, will apply its own view of the law.[12] Although that case was one of intrastate commerce, it would seem an *a fortiori* case when it is interstate commerce. If this be true we reach this conclusion upon the controversy, that so long as Congress has not acted, each State may apply its own common law to transactions in interstate commerce, and the Supreme Court of the United States will not reverse that decision in the absence of a Federal question, though if the same case had come originally into the Federal Courts a different view of the common law would have been taken.

But it is not to be concluded from this, that in every case would the application of the State common law to interstate commerce be sustained. The common law as adminstered by a State court may be as much a regulation of interstate commerce as a statute passed by the State Legislature.[13] This is clearly recognized in the following: "We can see no difference in principle based upon the manner in which the State requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the State courts."[14] It thus seems that the State common law rules will only fail to be invalid regulations of interstate commerce in so far as they would be valid as legislative enactments by the States.

Therefore to test what provisions of the State common law may be applied to interstate commerce the same principles must be followed that determine the validity of State legislation. Legislation affecting the liability of a carrier in interstate transportation follows the general rules of constitutional law, that in the absence of conflicting congressional action, the State may, in the exercise of its police power, incidentally affect interstate commerce so long as the matter is one of local concern and lays no direct burden upon such commerce.[15] The State may require a carrier to settle within a specified time claims for loss of or damage to freight while in its

[11] Hart v. Pennsylvania R. R. Co., 112 U. S. 331 (1884).

[12] New York Central R. Co. v. Lockwood, *supra.*

[13] State v. Great Northern Ry. Co., 14 Mont. 381, 36 Pac. 458 (1894), holding that the State Supreme Court has no jurisdiction to compel an interstate railroad to operate its road within the state, in the face of a general strike, on the allegation that enough competent men are willing to work for reasonable compensation.

[14] Pennsylvania R. R. Co. v. Hughes, *supra,* p. 491.

[15] Sherlock v. Alling, 93 U. S. 99 (1876), holding that a statute giving a right of action to the personal representatives of one whose death was

possession within that State.[16] Nor is it beyond the power of the State, in the absense of congressional action, to provide that all contracts of carriers limiting their liability for negligence or even the common law liability, shall be ineffectual, and this even though applied to a transaction in interstate commerce.[17] Also a State statute providing that a carrier receiving freight for interstate shipment beyond its own line, shall be liable for loss or damage caused by connecting carriers unless in a clear and unambiguous contract in the shipping agreement, it undertakes to carry it only to the terminus of its own line, is valid.[18] In like manner the State may provide as a rule of evidence, that such liability is assumed unless a contract to the contrary is expressly made and is signed by the shipper.[19] The power of Congress over interstate commerce does not affect the State's authority to create rules of evidence governing the form in which contracts therein when formed within their borders, may be made. But the State may not absolutely compel a carrier to whom freight is tendered for transportation beyond its own line, to become liable for the defaults of its connecting carriers, if the shipment is in interstate commerce.[20] A State statute making the statement contained in a bill of lading conclusive evidence in favor of bona fide holders for value is not an unlawful regulation of interstate commerce.[21] A penalty is unlawfully imposed for a refusal to furnish

caused by negligence applies to a transaction in interstate commerce and is valid.

[16] Atlantic Coast Line Co. v. Mazursky, 216 U. S. 122 (1910), affirming several South Carolina decisions to the same effect. See note 15 L. R. A. (N. S.) 983, on the cases in the state court.

[17] Chicago, M. & St. P. Ry. Co. v. Solan, 169 U. S. 133 (1897). Such a state statute does not amount to a regulation of interstate commerce, and is within the power of a state to adopt despite its incidental effect on interstate commerce. Affirmed in Richmond, &c., R. Co. v. Patterson Tobacco Co., 169 U. S. 311 (1897); Calderon v. Atlas S. S. Co., 170 U. S. 272 (1897); Lake Shore, &c., Ry. Co., v. Ohio, 173 U. S. 285 (1898); Cleveland, &c., Ry. Co. v. Illinois, 177 U. S. 514 (1899). Followed in Pittman v. Pacific Express Co., 24 Tex. Civ. App. 595, 59 S. W. 949 (1900); Galveston, &c., Ry Co. v. Fales, 33 Tex. Civ. App. 457 (1903). The same result had previously been reached in Ohio, &c., Ry. Co. v. Tabor, 98 Ky. 503, 32 S. W. 168 (1895).

[18] Missouri, &c., Ry. v. McCann, 174 U. S. 580 (1898). Such a statute only establishes a rule of evidence. It in nowise compels a carrier to be liable for the connecting carrier, but only provides in what manner a contract that it shall not be so liable shall be evidenced. It leaves to the carrier the right to limit its duty and obligation to carriage over its own route.

[19] Richmond, &c., R. Co. v. Patterson Tobacco Co., 169 U. S. 311 (1897). It may be thought that this entire class of state statutes is now obsolete as applied to interstate shipments since Act of Congress June 29, 1906, section 7 amending section 20 of Interstate Commerce Act of 1887 and imposing an absolute liability for the defaults of connecting carriers upon the initial carrier.

[20] Central R. R. of Ga. v. Murphy, 196 U. S. 194 (1904). This case does not involve exactly these facts, but a much less burden with respect to the connecting carrier, cast upon the initial carrier by Georgia Code , 1895, section 2317, was held a violation of the commerce clause.

[21] Zazoo, &c., R. Co. v. Bent, 47 So. 805 (Miss., 1908); Missouri, &c., R.

cars in a specified time, admitting of no excuse except from public calamity, when it is applied to interstate shipments.[22] But it is constitutional to require by State statute a telegraph company to receive despatches and to transmit and deliver them with due diligence.[23] So too a penalty may be provided for a carrier's failure to receive goods for transportation, though it be in interstate commerce.[24]

It may therefore be concluded that the imposition of a hard and fast liability on an interstate carrier additional to that prescribed by the general rules of law would be invalid. The general law of carriers imposes certain duties and liabilities upon public carriers. This is applicable to carriers in interstate commerce. While no further absolute liability can be added by the States, State statutes may regulate the rules of evidence with regard to an enhancement of the liability. The States may lessen the liability.[25] At common law contracts to relieve from the general liability in one form or other are valid, but the State may, as noted above, prohibit such contracts. And the State common law though it vary from the interpretation of the common law as given by the Federal Supreme Court, may be applied to the same extent that State legislation is valid.[26] Therefore a State rule of law prohibiting a contract the effect of which is to relieve the carrier from liability for the actual loss sustained through its negligence, is valid and will, on appeal from the State courts, be given effect by the Supreme Court. There is no Federal question, such a rule not being a regulation of interstate commerce.[27] It imposes no liability on the carrier greater than that

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Co. v. Simonson, 64 Kan. 802 (1902), but holding such statute unconstitutional under the Fourteenth Amendment.

[22] Houston, &c., R. Co. v. Mayes, 201 U. S. 321 (1906). At common law an unforeseen press of business would be an excuse. St. Louis Ry. Co. v. Clay Ginn. Co., 77 Ark. 357 (1906); State v. C. & N. W. R. Co., 83 Neb. 518 (1909). The Texas Code held unconstitutional ignored such defence.

[23] Western Union T. Co. v. James, 162 U. S. 650 (1895). Mr. Justice Peckham says, p. 660: "The direction that the delivery of the message should be made with impartiality and in good faith and with due diligence is not an addition to the duty it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution? We think not."

[24] Reid v. Southern Ry. Co., 149 N. C. 423, 63 S. E. 112 (1908). In Garrison v. So. Ry. Co., 150 N. C. 575 (1909), the court sustained the statute on the express ground that, so construed, it left to the carrier all usual common law defences, and therefore imposed no additional liability. In Reid v. So. Ry. Co., 153 N. C. 490 (1910), the court held there was no Act of Congress relating to the provisions of the State Act in question, Revisal, section 2631.

[25] Martin v. P. & L. E. R. Co., 203 U. S. 284 (1906), holding constitutional Penna. 1868, P. L. 58, making the liability of a carrier to a railway mail clerk, *inter alia*, the same as that to an employee.

[26] Note 14, *supra*.

[27] Wright v. Adams Express Co., 79 Atl. 760 (Pa., 1911).

it assumes by entering into the business of public carriage, viz., for the actual damages suffered.

The continued validity of such State statutes and rules of law as applied to interstate commerce is subject to the action of Congress at any time. The Act of Feb. 4th, 1887, the Interstate Commerce Act, is held not to have sanctioned agreements limiting liability to stipulated valuations and it was therefore proper to apply the State common law refusing to recognize this method of departure from the above rule that a public carrier is liable for the actual loss.[28] And so far as presently construed the Act of June 29, 1906, Sec. 7 amending Sec. 20 of the Act of 1887, has not done so.[29]

The later Act was construed by an inferior State Court[30] to prohibit such valuation agreements. This was reversed upon appeal and is the consensus of present judicial opinion.[31] The view was taken in the intermediate court that the Act of Congress meant to prohibit only an exemption from the liability of the initial carrier for the damage caused by the connecting carriers.[32] The Court of Appeals take the view that a stipulated valuation agreed upon is not a contract exempting the carrier from liability and was therefore not meant to be prohibited by the Act.[33] Moreover in the Massachusetts case it was strongly intimated that the use of the word "caused" in the Act indicated that a real contract of exemption of liability, even in whole, for anything but negligence or positive misconduct would be valid.[34] There seems no doubt that the Act applies as well to loss occurring on the line of the initial carrier as well as that of the connecting carriers. The weight of opinion is therefore that it neither prohibits nor sanctions agreements of valuation. The result is that Congress has taken no action as yet on the matter and accordingly, the State rules, whether founded upon their common law or statutes, prevail, and the validity of clauses limiting liability to the stipulated value are still dependent upon the State laws.

R. J. B.

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[28] Penna. R. R. v. Hughes, *supra.*

[29] Wright v. Adams Express Co., *supra.* The amending act makes an initial carrier liable for "any loss, damage or injury caused by it or any common carrier," and provides that no contract "shall exempt from the liability hereby imposed." 34 Stat., at L. 595.

[30] Greenwald v. Weir, 52 Misc. 431 (N. Y., 1908), holding that to limit the liability to an agreed valuation which is not the actual value, will not preserve the liability for *any* loss, damage, or injury, but will be a partial exemption thereupon, contrary to the statute. *Accord:* Schutte v. Weir, *Idem,* 438; Vigouroux v. Platt, 62 Misc. 365 (N. Y., 1909), the latter on the theory that the intendment of section 20 of the amending act was to impose a full liability upon the carrier to protect the shipper who by the same act was required to ship his commodity according to one fixed rate and could not obtain a better rate by relieving the carrier from liability.

[31] Greenwald v. Weir, 130 App. Div. 696 (1909), affirmed in the Court of Appeals in Greenwald v. Barrett, 199 N. Y. 170 (1910).

[32] This view of the act was that adopted by the court in Travis v. Wells-Fargo & Co., 74 Atl. 444 (N. J., 1909).

[33] This view was taken also in Bernard v. Adams Express Co., 91 N. E. 325 (Mass., 1910).

[34] *Idem,* p. 327.

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS.—An interesting question arose under the Constitution of the Commonwealth of Pennsylvania. The Legislature passed an act, the first section of which reads: "That on and after the passage of this act eight hours out of the twenty-four of each day shall make and constitute a legal day's work for mechanics, workmen and laborers in the employ of the State or any municipal corporation therein or otherwise engaged on public works." [1]

John F. Casey was indicted for a violation of this act and was convicted in the Court of Quarter Sessions of Allegheny County. He had entered into a contract with the city of Pittsburgh, a municipal corporation, for the construction of a filtration plant. The workmen employed by him were thus engaged on public works. Some of these men were employed for nine and ten hours. He appealed from his conviction to the Superior Court, where it was sustained.[2]

A further appeal to the Supreme Court was taken, where the conviction was set aside,[3] the act in question being held unconsitutional under Section 7 of Article III, which forbids the passage of any local or special law regulating labor, trade, mining or manufacturing, among other things.[4] A summary of the reasoning is as follows: Municipal corporations present two aspects. On one side, with respect to matters political and governmental, they are instrumentalities and agents of the sovereign power but on the other, with respect to matters proprietary and private, they are mere private corporations. That being the case, the act applies to some private corporations but not to others and we come to the question of whether a reasonable classification has been made. That depends on a difference of conditions and there is none between municipal corporations in their private capacity and other private corporations. In conclusion in the words of the court, "The act is special with regard to a subject which can only be legislated upon by general law."

Before we consider the constitutionality of this law, we must briefly examine the nature of municipal corporations and ascertain the amount of legislative control to which they are subject.

A municipal corporation in thus defined by Chancellor Saulsbury in Coyle v. McIntire:[5] "A body politic and corporate established by law to assist in the civil government of the state with delegated authority to regulate and administer the local or internal affairs of a city, town or district which is incorporated." This definition emphasizes the power of local government possessed by municipalities which leads us to the principal subject of our inquiry. Either a municipal corporation is absolutely at the mercy of the State Legislature, who created it and who may do with it what they will, ex-

[1] Act July 26, 1897, P. L. 418.

[2] Com. v. Casey, 43 Pa. Super. 494 (1910).

[3] Com. v. Casey, 231 Pa. 170 (1911).

[4] Constitution of Pennsylvania.—Buckalew, article III, section 7, part 24.

[5] 7 Houston (Del.), 44 (1884).

cept so far as the State Constitution may protect it, or it acquires vested rights, which are protected by the Constitution of the United States and hence is subject to a limited control only. The cases generally support the latter view, although setting forth the power of the legislature at great length, and only mentioning the limits of the power in a few words. A typical case is City of Clinton v. The Cedar Rapids & Missouri River Railroad,[6] the opinion being written by the Honorable John F. Dillon, author of the standard works on Municipal Corporations. Under the law of Iowa the ownership of the fee of the streets is in the city in trust for the public. The legislature had given a right of way to a railroad without providing for compensation to the city. This was held valid, not because a city did not have any vested rights, but because the streets of a city are not the private property of a corporation in the sense, that compensation must be made, when the legislature grants their use to a railroad. The part of the opinion bearing on the subject under investigation is as follows: "Municipal corporations owe their origin to and derive their powers and rights wholly from the legislature. It breathes into them the breath of life without which they can not exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State and the corporation could not prevent it." Almost lost in the decision, we find these important words: "But while the corporation exists and has been allowed to acquire private property, such property is doubtless protected by the constitutional provision the same as the private property of the citizen." The same thought appears in Board of Park Commissioners v. Common Council of Detroit,[7] in which case, Cooley, J., makes this statement: "The constitutional principle that no person shall be deprived of property without due process of law, applies to artificial persons as well as natural and to municipal corporations in their private capacity, as well as to corporations for manufacturing and commercial purposes."

Nowhere has this principle been more clearly enunciated than in our Pennsylvania decisions. Mr. Justice Stewart in his opinion in the principal case[8] treats these very fully. There is but one case in Pennsylvania, which appears to dissent, and that is Lehigh Water Company's appeal.[9] The Water Company had accepted the provisions of the Corporation Act of April 29, 1874,[10] Section 34, of which enacts, that the right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered

[6] 24 Iowa, at page 468 (1868).
[7] 28 Mich., at page 241 (1873).
[8] 231 Pa. 170 (1911).
[9] 102 Pa. 515 (1883).
[10] Act of April 29, 1874, P. L. 93.

by its charter, shall be an exclusive one. The City of Easton was about to build its own water works. An injunction was asked for. It was refused on the ground that the exclusive privilege was only with respect to other water companies. This would seem to depart from the doctrine, that there is a private side to a municipal corporation. But the leading cases [11] holding that view are expressly mentioned and interpreted to mean, that a municipal corporation may perform the function of a private corporation in supplying its citizens with gas and water. But that by so doing, it becomes a private corporation is denied. If this case conflicts with the earlier ones, it would seem, that Commonwealth v. Casey, *supra,* reaffirms them and repudiates this one.

The opinion in the case under discussion is in form a syllogism. Starting with the major premise, that municipal corporations in certain of their activities are mere private corporations, we next have a minor premise. All acts confined to certain members of a class are special laws and contrary to the constitution of Pennsylvania. The conclusion readily follows, that this act is unconstitutional. This is undoubtedly sound, because it is impossible to show that men engaged on public works labor under different conditions than men working for private persons.

E. S. McK.

[11] Western Savings Fund Society v. Philadelphia, 31 Pa. 175, and Same v. Philadelphia, 31 Pa. 185 (1858).