RECENT DECISIONS

Common Carriers—Public Utilities—Aerial Navigation—Before a state court of last resort for the first time (in *South Mississippi Airways* et al. *v. Southern Airlines* et al., 26 So. (2d) 455 (Miss., 1946)) is the question whether the legislature intended to grant jurisdiction to the Public Service Commission over air carriers or over only those means of transportation enumerated in the statute. The commission granted certificates of convenience and necesssity to intrastate airlines over protest by existing airlines and railroads that the commission had no jurisdiction to regulate common carriers by air. Applicants contended that the power was implied from constitutional and statutory provisions.[1] The county court vacated the order but on appeal the instant court held that the commission was without jurisdiction to regulate common carriers by air in the absence of express statutory authority. The Mississippi appellate court reads the term "other common carriers" to mean "other common carriers on land and water," holding that a motor driven airplane is a motor vehicle but that an air route is not a highway within the meaning of the statute (instant case at 461).[2] A similar problem arose when the automobile came into use as a common carrier. Commissions originally established to regulate railroads extended their jurisdiction to motor carriers, both by liberal construction of the broad language of constitutions and statutes, and by specific legislation covering motor carriers;[3] and generally, public service commissions have been held to have jurisdiction over automobile common carriers under general statutory provisions, but legislation specifically covering motor carriers has practically eliminated the question.[4] It may be expected that courts which liberally construed statutes to include motor carriers are not likely to find obstacles to the inclusion of air carriers. One factor, however, distinguishing the transition to regulation of air carriers from the earlier transition to automobiles is the extensive federal control of air commerce.[5] The Mississippi appellate court refers to provisions for federal regulation without commenting upon their significance (instant case at 459). Jurisdiction over common carriers by air has been assumed

---

1. MISS. CONST. Art. 7, § 186: "The legislature . . . shall enact laws for the supervision of railroads, express, telephone, telegraph, sleeping car companies, and other common carriers in this state, by commission or otherwise." MISS. CODE (1942) § 7639: "No common carrier by motor vehicle . . . shall engage in intrastate operation on any highway within this state unless there is in force with respect to such carrier a certificate of convenience and necessity issued by the commission authorizing such operation."

2. The court relied upon the use in the statute of prepositions like "upon" and "thereon" in reference to highways, and the failure of the legislature in 1938 to mention air carriers, to support the conclusion that air traffic was not contemplated. Instant case at 459-461.

3. Western Ass'n of Short Line Railroads v. R. R. Comm. of Calif., 173 Cal. 802, 162 Pac. 391 (1916); Note (1919) 1 A. L. R. 1460.

4. Notes (1936) 103 A. L. R. 273, (1927) 51 A. L. R. 821, (1920) 9 A. L. R. 1011, (1919) 1 A. L. R. 1460.

5. 52 STAT. 1012 (1938), 49 U. S. C. §§ 401, 560 (1940) prohibits the operation without an airworthiness certificate of any aircraft within the limits of any civil airway, or directly affecting, or endangering safety in interstate commerce.

by commissions in a number of states without specific statutory authority.[6] In Pennsylvania and at least one other state, the commissions have been granted jurisdiction over all common carriers, including aircraft, in unmistakable language.[7] In other states the view is expressed that without specific legislation the commission has jurisdiction over *rates* of air carriers, but no other regulatory power.[8] Although the wording of the statute is ambiguous and open to narrow construction, the uncontested extension of jurisdiction by other state commissions indicates that the decision in the instant case is against the general view. The problem is likely to be the subject of litigation and specific legislation as intrastate air traffic increases.[9]

Marriage: Common Law—Statutes—Judicial Dicta—Revival of common law marriages took place in Pennsylvania when the Superior Court in Buradus v. General Cement Products Company *et al.*, 159 Pa. Super. 501 (1946) overruled dictum in the case of Fisher v. Sweet and McLain *et al.*, 154 Pa. Super. 216 (1944). In 1941 C and H without securing a physical examination or license, performed acts which met all the requirements of a common law marriage. In 1943 H died as a result of injuries sustained in the course of his employment and C asserted, as his common law wife, a claim for workman's compensation. The compensation board denied an award believing itself bound by a 1944 Superior Court dictum in the *Fisher* case [1] to the effect that thereafter no common law marriage would be valid unless the parties passed a physical examination and secured a license pursuant to the Act of 1939.[2] The lower court reviewing this decision de-

6. Arizona: Application of Century Pacific Lines before Corporation Comm., (1932) U. S. Av. R. 190 (Vigorous dissent by Commissioner C. R. Howe); Colorado: Application of Pike's Peak Air Commerce, Inc., before Public Utility Comm., (1930) U. S. Av. R. 253, 83 A. L. R. 338; Illinois: Application of Century Air Lines before Commerce Comm., (1932) U. S. Av. R. 197; Opinion of Att'y Gen., June 14, 1944, (1944) U. S. Av. R. 46.

7. PA. STAT. ANN. (Purdon, 1941) tit. 66, § 1102 (5): "'Common carrier' means any and all persons or corporations . . . undertaking . . . for compensation . . . the transportation of passengers or property . . . by, through, over, above, or under land, water, or air . . ."; NEV. COMP. LAWS (Hillyer, 1929) § 6106(a): "The provisions of this act, and the term 'Public Utility' shall apply to . . . all railroads, corporations, airships, automobiles . . . that shall do any business as a common carrier. . . ."

8. McKeage, *The Calif. R. R. Comm. Has Jurisdiction Over Intrastate Rates and Charges of Air Lines,* (1945) 33 CALIF. L. REV. 298; Mass.: Opinion of Att'y Gen., March 20, 1944, (1944) U. S. Av. R. 51. The opposing view is expressed in: Wolcott, *Does the Jurisdiction of the Calif. R. R. Comm. Extend to Air Transportation?,* (1945) 33 CALIF. L. REV. 114; South Carolina: Opinion of Att'y Gen., Jan. 28, 1944, (1945) U. S. Av. R. 162.

9. The report of the instant case does not indicate why, if compliance with requirements of the Civil Aeronautics Board will permit intrastate operation, airways companies should seek regulation by a state commission.

1. In an addendum to the opinion in Fisher v. Sweet and McClain *et al.*, 154 Pa. Super. 216 (1944), the court after stating that the problem was not raised or at issue nevertheless considered that "it is within our province, however, to hold that a valid marriage cannot *hereafter* be entered into in this commonwealth without first complying with the Act of 1939 and securing a marriage license pursuant to its provisions."

2. Act of May 17, 1939, P. L. 148, 48 PA. STAT. ANN. (Purdon, 1930) § 20, to the effect that no license could be issued until there was on file with the clerk of Orphans' Court a physician's statement that the applicant had been examined within 30 days of date of application and had been found to be free from the disease. This act was repealed by Act of May 16, 1945, P. L. 577, § 513, and is replaced by Act of May 16, 1945, P. L. 577, § 6, 35 PA. STAT. ANN. (Purdon, 1930) § 587.6, which is generally to the same effect.

clared the marriage valid on the grounds that it had been entered into prior to the *Fisher* case (instant case at 503). On appeal the judgment was affirmed, and by dictum the court declared further, that the marriage was valid notwithstanding the Act of 1939 since that act did not mention common law marriages and, therefore, could not affect their validity. This court was fully aware that the practical necessity for the common law marriage had disappeared,[3] and that today it is all too often used to convert illicit relationships into "honest" marriages for purely mercenary reasons.[4] It indicated in fact that the present case was not above suspicion on this score (instant case at 503). Nevertheless, on the facts, it is clear that this marriage was properly upheld.[5] This court, however, passed over the grounds of the lower court by which both this marriage and the doctrine of the *Fisher* case could have been sustained to state by way of dictum that the prior dictum was not a proper statement of law,[6] and was untenable. This declaration is, in effect, a restatement of the validity of the common law marriage in Pennsylvania. It may well be questioned whether any great service was done by revitalizing a legal arrangement so fraught with abuses. However, the court made its point clear. It now feels that if this abuse is to be destroyed it is the responsibility of the legislature to do so.[7]

3. American recognition of the common-law marriage grew out of the difficulties in our pioneer communities in securing the service of minister or magistrate. See MADDON, PERSONS AND DOMESTIC RELATIONS (1931) 50; RICHMAN AND HALL, MARRIAGE AND THE STATE (1929) 26.

4. "The doctrine of informal marriages favors the harlot and the adventuress and paves the way for them to claim the rights of common law widows upon the death of some man of wealth." Gilky, *Validity of Common Law Marriage in Oregon* (1923) 3 ORE. L. REV. 28, 46. Over one-half of the American jurisdictions now refuse to recognize common law marriages. For a list of these jurisdictions see MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) 51; 38 C. J., MARRIAGE, § 88 and yearly supplements thereto.

5. "On any view, this is not a proper case in which to give effect to our dicta in the Fisher case since the parties were married before the date of the decision." Instant case at 504.

6. The Act of June 23, 1885, P. L. 146, 48 PA. STAT. ANN. (Purdon, 1930) § 2, declaring that no person should be joined in marriage until a license had been obtained, is the controlling statute. It has never been contended that it applied to other than ceremonial marriages. Licenses were never required by common law marriages. The Act of 1939 relied on in the Fisher case dicta only declared that no license could be obtained without an examination, and made no reference to common law marriage. Ergo, on the basis of the long accepted rule of statutory interpretation that the law in the absence of an express declaration will presume that the Act did not intend any change in the common law it follows that the validity of the common law must remain unimpaired. See Heaney v. Boro. of Mauch Chunk, 322 Pa. 487, 490, 185 A. 732 (1936). Instant case at 506.

7. "But whether the suggestion of the Fisher case is to be given effect will be exclusively for the legislature to determine." Instant case at 507.