

1963

Wycoff Company Inc. v. Public Service Comm. Of Utah et al : Brief of Appellants

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

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FILED

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WYCOFF COMPANY, INCORPORATED,

Plaintiff and Respondent,

vs.

**PUBLIC SERVICE COMMISSION OF
UTAH, HAL S. BENNETT, DON-
ALD HACKING and RAYMOND W.
GEE, ITS COMMISSIONERS,**
Defendants and Appellants.

Clerk, Supreme Court, Utah

Case No.

9915

... **BRIEF OF APPELLANTS**

Appeal from the Judgment of the
3rd Judicial District Court in and for Salt Lake County
Hon. Merrill C. Faux, Judge

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

WYCOFF COMPANY, INCORPORATED,

Plaintiff and Respondent,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH, HAL S. BENNETT, DON-
ALD HACKING and RAYMOND W.
GEE, ITS COMMISSIONERS,

Defendants and Appellants.

Case No.

9915

BRIEF OF APPELLANTS

STATEMENT OF KIND OF CASE

This is a Declaratory Judgment action that seeks to have declared unconstitutional the Utah Motor Carrier Act (Chapter 6, Title 54, Utah Code Annotated 1953) and all of the Public Utilities Act (Title 54, Utah Code Annotated 1953), to the extent that the provisions of the latter act relate to the regulation or control of motor carriers, on the basis that the provisions and requirements of said Acts, and the exemptions provided in Section 54-6-12, Utah Code Annotated 1953, are repugnant to Article I, Sections 2, 7

and 24 of the Constitution of the State of Utah and Amendment XIV of the Constitution of the United States of America.

DISPOSITION OF CASE BY LOWER COURT

Most of the facts pertaining to methods of regulation by the Public Service Commission were stipulated. No testimony was taken and the matter was submitted after the filing of written briefs and oral argument by counsel. The trial court found the issues in favor of respondent, based upon the following Conclusions of Law (R. 100) :

“That the exclusion provisions of the statute which, as set out in Section 54-6-12, Utah Code Annotated, 1953, exempt from general application of the Act and from the jurisdiction of the Public Service Commission (except as to requirements of insurance, safety regulations and accident reports), those motor carriers engaged in transportation for non-profit agriculture associations; or those motor carriers transporting, for hire, farm, orchard, or dairy products; livestock, farm, or dairy supplies used on or about farms or dairies; coal, lumber, logs, newspapers, money or valuables, are discriminatory and deny to those carriers brought within the Act in all particulars, the equal protection of the laws as guaranteed by Amendments XIV of the Constitution of the United States of America, and Article I, Section 7, of the Constitution of the State of Utah.”

The judgment of the court was as follows (R. 102-103) :

“It is hereby ordered, adjudged and decreed that Title 54, Chapter 6, Utah Code Annotated 1953,

as amended, is hereby declared to be in violation of Amendment XIV of the Constitution of the United States of America and Article I, Section 7, of the Constitution of the State of Utah, and that said Title 54, Chapter 6, Utah Code Annotated 1953, as amended, is unconstitutional and void."

The court's attention is directed to the fact that the above judgment is limited to declaring Title 54, Chapter 6 (the Motor Carrier Act) unconstitutional, and that Title 54 (the Public Utilities Act), insofar as its provisions relate to the regulation of motor carriers, was not declared unconstitutional.

RELIEF SOUGHT ON APPEAL

Appellants seek to vacate the Finding of Fact and Conclusions of Law, and the Judgment, of the court below, and to have this matter reversed in favor of the appellants and against respondent.

STATEMENT OF FACTS

The facts in this case are limited, as the issue is primarily one of law.

Respondent is a common motor carrier of property, operating in the State of Utah pursuant to various certificates of convenience and necessity issued by the Public Service Commission of Utah (R. 44-45). Since the commencement of this action, respondent has made application to the Public Service Commission of Utah for at least one additional certificate of convenience and necessity (R. 86).

Respondent alleges in paragraph 7 of its complaint, as follows (R. 3) :

“That the defendants have threatened to require plaintiff to pay substantial penalties and have caused criminal citations to be issued against plaintiff, and plaintiff's employees, the proceedings under some of which are still pending, for plaintiff's alleged failure to comply with the requirements of Title 54, Chapter 6, Utah Code Annotated 1953.”

At the time respondent filed its complaint in this matter, there was pending before the Supreme Court of Utah the case of *Wycoff Company, Incorporated v. Public Service Commission of Utah, et al.*, 13 Utah (2d) 123, 369 Pac. (2d) 283. The decision of the Supreme Court on March 1, 1962, affirmed the penalty assessed against respondent by the Public Service Commission in the amount of \$18,500.00 for violations of the Motor Carrier Act. The penalties were imposed pursuant to Sec. 54-7-25, Utah Code Annotated 1953, part of the Public Utilities Act not the Motor Carrier Act. There is presently pending before the District Court for Salt Lake County, case, Civil No. 140087, *State of Utah v. Wycoff Company, Incorporated*, which action was instituted to recover the aforesaid penalty of \$18,500.00 from Wycoff. A judgment in favor of the State of Utah was rendered April 10, 1963. On June 21, 1963, an order was issued by said District Court, suspending any further proceedings in said case until the constitutionality of the Motor Carrier Act is resolved by this court.

ARGUMENT

POINT I.

RESPONDENT IS ESTOPPED TO QUESTION
THE CONSTITUTIONALITY OF THE UTAH

MOTOR CARRIER ACT (CHAPTER 6, TITLE
54, UTAH CODE ANNOTATED 1953).

Respondent Wycoff has for many years been engaged in business as a common motor carrier of property, holding certificates of convenience and necessity to engage in the transportation of property for hire in Utah commerce, and during the pendency of this action, has petitioned the Public Service Commission of Utah for an enlargement or extension of its authority to engage in the transportation of property in intrastate commerce (R. 86). During this time, respondent has enjoyed the benefits a motor carrier derives from being the holder of certificates of convenience and necessity and did not choose to challenge the constitutionality of the Utah Motor Carrier Act, or the Public Utilities Act, as it pertains to motor carriers, until the filing of this action.

Apparently this action was commenced as a result of the allegations contained in paragraph 7 of respondent's complaint, which states: "That the defendants have threatened to require Plaintiff to pay substantial penalties and have caused criminal citations to be issued against plaintiff, and plaintiff's employees, the proceedings under some of which are still pending, for plaintiff's alleged failure to comply with the requirements of Title 54, Chapter 6, Utah Code Annotated 1953" (R. 3). With respect to the extent that respondent was adversely affected by such action, the Supreme Court of Utah laid the matter at rest on March 1, 1962, when it decided the case of *Wycoff Co., Inc. v. Public Service Commission of Utah, et al.*, supra, upholding the im-

position of a penalty of \$18,500.00 against the carrier for violations of its authority, and sustaining the validity of the statutes under which such action was taken.

The position of appellants is that respondent is estopped to question the constitutionality of the Utah Motor Carrier Act on the basis that one who retains and enjoys the benefits of a law may not attack its constitutionality.

It is a well recognized rule in constitutional law that one who accepts benefits under a statute may be estopped from questioning the constitutionality of the statute. This principle is stated as follows in the case of *Fahey v. Maloney*, 332 U. S. 245, 91 L. Ed 2031:

“* * * It is an elementary rule of constitutional law that one may not ‘retain the benefits of the Act while attacking the constitutionality of one of its important conditions.’ *United States v. San Francisco*, 310 U. S. 16, 29, 84 L. Ed. 1050, 1059, 60 S. Ct. 749. As formulated by Mr. Justice Brandeis, concurring in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 348, 80 L. Ed. 688, 711, 56 S. Ct. 466, ‘The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.’”

There are exceptions to the rule, however, and it appears that the courts are not in complete agreement. The situation is described thusly in the summary of a complete annotation on this subject in 65 A. L. R. (2d) 664:

“It is not possible to derive, from the cases discussed in this annotation, a flat or uniform rule governing the question whether a person is, by applying for or securing a professional or occupational license, precluded from attacking the valid-

ity of the licensing law, or any of its parts, or an administrative regulation issued thereunder. *The question ordinarily depends upon the circumstances of the individual case.*

“* * *

“As regards the nature of the proceeding in which an attack on the constitutionality of a licensing law, or part thereof, is made, the authorities seem in agreement that such an attack cannot be made in proceedings to obtain the license, except as to specific provisions which prevent the applicant from obtaining the license. Most cases hold that a person who obtains a license cannot afterward question the constitutionality of the licensing law when the license is sought to be revoked. But there are cases upholding such an attack even in proceedings related to revocation. It seems that the rule of estoppel or waiver does not apply in a criminal or civil proceeding for acting without a license. But it cannot be said that in civil actions between private parties the rule of waiver or estoppel never applies; the rule has been uniformly applied in actions on a licensee's bond.

“Apart from the circumstances of individual cases, there is a cleavage in the court's fundamental approach to the question under annotation. Some of the courts, in holding that an attack was not permissible, have emphasized that the application for the license was the voluntary act of the litigant, while other courts, in reaching the opposite result as to the permissibility of the attack, have emphasized that in view of the penalties prescribed in the licensing law for acting without license, the application for the license was not the voluntary act of the litigant.” (Emphasis added.)

In 1957 this court had a somewhat analogous situation before it in the case of *Salt Lake City Lines v. Salt Lake City*, 6 U. 2d 428, 315 P. 2d 859. To refresh the court's memory of the facts of that case, they are summarized in the syllabus as follows: "The Supreme Court, Henriod, J., held that where transportation company for six years accepted all terms of ordinance which permitted it to operate a mass transportation system by rail, bus, or other systems, and required company to pay license tax, company's conduct constituted an acceptance of ordinance and company could not attack validity of ordinance, even though company had not filed acceptance within 30 days after ordinance was passed and ordinance provided that failure to file would render ordinance null and void."

In its decision in the *Salt Lake City Lines* case, this court cited with approval the principle set down in *Fahey v. Mallonee*, supra, when it said:

"All of the contentions mentioned seem to be vulnerable to the general proposition that one accepting the benefits of legislation, ordinarily is speechless in denouncing its validity, even on constitutional grounds. * * *"

Another frequently cited case, *St. Louis Public Service Co., a corp., v. The City of St. Louis, et al.*, (Mo.), 302 S. W. 2d 875, states the rule as follows:

"The rule is well settled that one voluntarily proceeding under a statute or ordinance, and claiming benefits thereby conferred, will not be heard to question its validity in order to avoid its burdens. The same or similar rules have been applied in litigation involving many different types of instru-

ments, licenses, or other transactions. The designation used in referring to this rule or doctrine is obviously unimportant. It is frequently called an estoppel. However, it is akin to the rule against assuming inconsistent positions and it involves the principles of waiver, election, and ratification rather, perhaps, than being limited to the precise principles of equitable estoppel. Regardless of the name or principle designated, the result is clearly the same. It precludes one who accepts the benefits from questioning the validity of the accompanying obligation. * * *

See also *Neel v. Texas Liquor Control Board* (Texas), 259 S. W. 2d 312; *Crittenden County v. McConnell* (Ky.), 36 S. W. 2d 627; *American Board and Mortgage Company v. United States*, 52 F. 2d 318; and *Gregory v. Hecke*, (Calif.), 238 Pac. 787.

In *Cofman v. Ousterhous*, 40 N. D. 390, 168 N. W. 826, the court said:

“Nor in any event, can the relator question the right of the dairy commissioner to cancel the license on the ground of the unconstitutionality of the act, and that his business was such that could not be constitutionally licensed. It is clear, indeed, that a person who obtains a license under a law, and seeks for a time to enjoy the benefits thereof, cannot afterward question the constitutionality of the act when the license is sought to be revoked. *Minneapolis, St. P. & S., Ste. M. R. Co. v. Nester*, 3 N. D. 480, 47 N. W. 510; *Hart v. Folsom*, 70 H. H. 213, 47 Atl. 603; *State v. Seebold*, 192 Mo. 720, 91 S. W. 491; note in 19 Ann. Cas. 183.”

While it is true that in some instances the courts have not recognized the doctrine of estoppel on the basis that a

person acquiring a license does not do so voluntarily because he would be severely penalized if he operated without a license, such reasoning is not in accord with the facts of life today. At one time, few professions or occupations required a license, but today there is scarcely a trade or occupation, with any type of public interest, that isn't subject to licensing and regulation—lawyers, doctors, contractors, architects, barbers, beauty parlors, and public utilities, just to name a few. It would be specious thinking to say that the acquisition of a license to engage in these businesses and occupations is the involuntary act of the applicants. Today it is well recognized that most licensed businesses and occupations require certain qualifications or skills and that licensees receive benefits from being licensed.

In the instant case, respondent maintains an inconsistent position. For years, respondent has enjoyed the benefits of the Motor Carrier Act, and while this very action was pending, continued to seek additional authority to operate under the law. By virtue of the circumstances of this case, and the case law and texts heretofore cited, appellants submit that respondent is estopped to challenge the constitutionality of the Utah Motor Carrier Act.

POINT II.

A PARTY MAY NOT CLAIM THE INVALIDITY OF A STATUTE UNLESS SUCH PARTY IS HARMFULLY AFFECTED BY THE PARTICULAR FEATURES OF THE STATUTE.

In 16 Corpus Juris Secundum, Constitutional Law, Section 76, it is stated, in part:

"As a general rule, the constitutionality of a statute or other governmental action is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application. It is a firmly established principle of law that the constitutionality of a statute or ordinance may not be attacked by one whose rights are not, or are not about to be, adversely affected by the operation of the statute. This rule applies to all cases both at law and in equity, and is equally applicable in both civil and criminal proceedings. One of the many variations of this rule is the principle that one may not urge the unconstitutionality of a statute who is not harmfully affected by the particular feature of the statute alleged to be in conflict with the constitution."

In this connection, see *Tilleston v. Ullman*, 318 U. S. 44; *Jeffrey Manufacturing Co. v. Blagg*, 235 U. S. 571; *State v. Heitz* (Idaho), 238 Pac. (2d) 439; *Pugh v. Pugh*, 124 N. W. 959.

In *Bode, et al. v. Barrett, et al.*, 344 U. S. 583, 97 L. Ed. 567, the rule was stated as follows:

"* * * Appellants make other arguments to the effect that the statute is so inconsistent, vague, and uncertain in its classification as to violate the Equal Protection Clause of the Fourteenth Amendment. But even if we assume that the vagaries of the law reach that dignity, no showing is made that any of the appellants is the victim of an invidious classification."

See also *Utah Power & Light Co. v. Pfof*, 286 U. S. 165.

In what way do the exemptions in the statutes harm respondent? Respondent may haul the cargoes exempted under Section 54-6-12, Utah Code Annotated 1953, if it so desires. The only harm indicated by respondent is that it may be subject to penalties under the Public Utility Act, which Act is not before the court. It seems to appellants that the Act would be meaningless if it couldn't be enforced. As stated before, this court settled the matter with respect to penalties against respondent in the case of *Wycoff Company, Incorporated v. Public Service Commission of Utah, et al.*, supra.

POINT III.

THE PROVISIONS OF SECTION 54-6-12, UTAH CODE ANNOTATED 1953, AS AMENDED, DO NOT DENY RESPONDENT DUE PROCESS OR EQUAL PROTECTION OF THE LAW.

It is a well settled rule that when the constitutionality of an act of the Legislature is under consideration, there is a strong presumption that the act is constitutional. The Utah Supreme Court stated the rule as follows in the case of *Lehi City v. Meiling*, 87 Utah 237, 48 P. 2d 530:

“In approaching the subject we have in mind the rule that when an act of the Legislature is attacked on grounds of unconstitutionality the question presented is not whether it is possible to condemn the act, but whether it is possible to uphold it. The presumption is always in favor of validity, and legislative enactments must be sustained unless clearly in violation of fundamental law. *Wadsworth v. Santaquin City*, 83 Utah 321, 28 P. 2d 161. Every presumption will be indulged in favor of legislation

and only clear and demonstrable usurpation of power will authorize judicial interference with legislative action."

It is also a well established rule that a person attacking the validity of a legislative enactment has the burden of substantiating his claim. The rule is stated as follows in 11 Am. Jur. 796:

"With regard to the duties cast upon the assailant of a legislative enactment, the rule is fixed that a party who alleges the unconstitutionality of a statute normally has the burden of substantiating his claim and must overcome the strong presumption in favor of its validity. It has been said that the party who wishes to pronounce a law unconstitutional takes on himself the burden of proving this conclusion beyond all doubt, and that a party who asserts that the legislature has usurped power or has violated the Constitution must affirmatively and clearly establish his position. * * *"

This court recognized the rule in *Justice v. Standard Gilsonite Co.*, 12 Utah 357, 366 P. 2d 974, saying:

"* * * We recognize as correct the rule as stated in 12 American Jurisprudence 216 and 217, Sec. 521, as follows:

" 'One who assails the classification in a law must carry the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary. * * *

" * * * Before a court can interfere with the legislative judgment, it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. * * *"

In this case, respondent assails the constitutionality of the Utah Motor Carrier Act and the Public Utilities Act, insofar as it relates to the regulation of motor carriers, on the basis that Section 54-6-12, Utah Code Annotated 1953, exempts certain classes of motor vehicles from the need to obtain certificates of convenience and necessity and from complying with the tariff provision of the Utah Public Service Commission, thereby violating Amendment XIV of the Constitution of the United States of America and Article I, Sections 2, 7 and 24 of the Constitution of the State of Utah. The court below limited its judgment to declaring Title 54, Chapter 6, Utah Code Annotated 1953, as amended (the Motor Carrier Act), unconstitutional (R. 102).

For the convenience of the court, Section 54-6-12, Utah Code Annotated 1953, is set out below, with emphasis supplied to mark the exemptions:

“Except for the provisions of 54-6-17 relative to requirements of insurance, 54-6-21 relative to safety regulations, and 54-6-22 relative to accident report no portion of this act shall apply:

“(a) To motor vehicles when engaged exclusively in transporting *students or their instructors* to or from school or to or from school activities, the word ‘school’ to be construed to mean a place or structure in which the annual winter or summer elementary, collegiate, university or religious instruction is carried on; or

“(b) To motor vehicles when used exclusively in carrying the *United States mail* under contract with the federal government; or

“(c) To motor vehicles when the cargo consists exclusively of *livestock, farm, orchard, or dairy products* which are being transported between farm, orchard or dairy and a market, warehouse, creamery or processing plant; or exclusively of *farm or dairy supplies* used in or about the farm or dairy; or exclusively of *coal, lumber or logs* which are being transported from mine or forest to shipping point or market; or

• “(d) To motor vehicles when owned or operated by any duly organized *agriculture cooperative association* and used exclusively in the carrying on of its legally authorized nonprofit activities; or

“(e) To motor vehicles used exclusively in the distribution of *newspapers* from the publisher to subscribers or distributors; or

“(f) To motor vehicles when especially constructed for *towing, wrecking, maintenance, or repair purposes*, and not otherwise used in transporting goods and merchandise for compensation; or when constructed as *armored cars* and used for the safe conveyance or delivery of money or other valuables, or when used as *hearses, ambulances, or licensed taxicabs*, operating within a fifteen mile radius of the limits of any city or town; or to motor vehicles used as ambulances or hearses by any person, firm or corporation duly licensed in the state as an embalmer, funeral director, or as a mortuary establishment, provided that use of such motor vehicles as an ambulance shall be incidental to the use of embalming or funeral directing.

“(g) To a group of *employees riding together* in the automobile of a fellow employee to and from their employment and sharing the actual expenses of the transportation; provided that said group of employees shall not exceed 5 persons, in addition to

the driver of the vehicle, and in no event to exceed 3 persons in any one seat, and provided further that this subsection shall not apply to any individual so operating in excess of one motor vehicle.

“It shall be unlawful for any vehicle which is operated under any of said exempt classes to be operated upon the public highways of this state, for hire, without a public liability policy in an amount not less than \$20,000.00 for personal injuries to or death of one person, or less than \$40,000.00 for injuries to or death of more than one person; and for damage to property of any person other than the assured in an amount not less than \$10,000.00 for liability arising out of the operation of said vehicle for hire; without maintaining said vehicle and all parts thereof in a safe condition at all times and without reporting every accident arising from or in connection with the operation of such vehicle as required by law or to be operated for any uses or purposes not falling within said exempt classes, except in accordance with the provisions of this act.

“The commission shall have power and authority to prescribe such reasonable rules and regulations to carry out the purposes of this act as may be deemed necessary including the establishing of reasonable fees for registration and each annual renewal thereof of exempt carriers and for the services performed by the commission.

“The commission is vested with power and authority and it shall be its duty to supervise and regulate all motor carriers as excepted above in accordance with these rules and regulations and with the provisions of this section and all carriers now operating under the provisions of this section shall make application to register their operation with the public service commission on or before July 1,

1957, and thereafter each carrier commencing operations under this section shall apply for registration as provided herein within 30 days immediately after said operation.

“A violation of this section or of the rules established pursuant thereto shall constitute an unlawful act and shall be punishable in the same manner and to the same extent as provided for in this act for non-exempt carriers.”

In examining the record of this case, we fail to find any evidence wherein the respondent has affirmatively demonstrated the unreasonableness of the exemptions provided for in Section 54-6-12, except, perhaps, the bald statement in his memorandum to the court below, which reads as follows :

“What reasonable basis can exist to require general regulation of the transportation of sand and gravel, oil and ore, but exclude coal, lumber or logs; to regulate cancelled checks, but to exclude money and other valuables; to regulate trucks hauling newspapers and any other commodity, but not if it is the exclusive item; and numerous other illustrations that the exclusionary provisions of Title 54 readily bring to mind” (R. 54).

The Legislature undoubtedly had good reasons for exempting certain industries from general regulation. The laws of many states provide exemptions similar to those in the Utah law and the cases in which the exemptions have been considered by the courts amply illustrate the valid reasons for providing exemptions. In this connection, the court's attention is directed to the excellent annotation in 109 A. L. R. 550. We submit that the respondent has not

met the burden of affirmatively demonstrating the unreasonableness of the exemptions in Section 54-6-12 by merely asking the question as to what reasonable basis can exist for the exemptions.

Respondent, in his memorandum to the court below, states that he relies on the following authorities to sustain his contention that the Utah Motor Carrier Act is unconstitutional:

1. *Newman v. Public Service Commission*, Civil No. 92815, decided by the Third District Court, State of Utah, Honorable Joseph G. Jeppsen, Judge, on February 26, 1953.
2. *Smith v. Cahoon*, 283 U. S. 553, 75 L. Ed. 1264.
3. *Justice v. Standard Gilsonite Co.*, 12 Utah 2d 357, 366 P. 2d 974.

In *Newman v. Public Service Commission*, Judge Jeppson held unconstitutional the Utah Motor Carrier Act and the Public Utilities Act, insofar as its provisions relate to the regulation or control of motor carriers. The court's attention is called to the fact that this decision was made in 1953 and that several amendments to Section 54-6-12, Utah Code Annotated 1953, have been made since the decision.

In the recent *Justice v. Standard Gilsonite Company* case, the Utah Supreme Court held that the statute imposing penalties on employers for failure to pay wages due separated employees within 24 hours from demand therefor, was unconstitutional in its arbitrary exclusion of banks and mercantile houses from its provision. It is interesting to note that, although the court found the exemption of

banks and mercantile houses to be arbitrary, the decision was limited in its effect, the court saying:

“* * * So we conclude that this classification excluding banks and mercantile houses from the penalty provisions of this chapter is arbitrary and has no reasonable justification in fact. And that it is therefore unconstitutional to that extent.”

It is the contention of appellant that, while the problem before the court is similar to the *Justice v. Standard Gilsonite* case, the purpose of the act and the facts involved in that case were quite different; furthermore there is no showing or evidence herein that the Legislature was arbitrary in excluding the operations named in the statute presently under consideration.

The *Smith v. Cahoon* case, relied upon by respondent in the court below, was decided by the United States Supreme Court in 1931, and held the Florida Act regulating motor carriers unconstitutional. Since that time it has been the subject of critical examination in several decisions. The facts of the case are that the appellant was a carrier for hire who was arrested for operating without having obtained a certificate of convenience and necessity or having paid the tax required by the laws of Florida. The statutes provided that every auto transportation company must obtain a certificate of convenience and necessity, a bond or insurance policy must be given for protection of freight carried and the public which might be injured through negligent operation, and a mileage tax paid. From these provisions, the statutes exempted certain carriers as follows:

“* * * Provided, that the term ‘auto transportation company’ as used in this act shall not include corporations or persons engaged exclusively in the transportation of children to or from school, * * * in the transporting agricultural, horticultural, dairy, or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point enroute to primary market, * * * in transporting or delivering dairy products or any transportation company engaged in operating taxicabs, or hotel busses from a depot to a hotel in the same town or city.”

The facts in the instant case are distinguishable from those in *Smith v. Cahoon* in that here the appellant holds a certificate of convenience and necessity, and the Utah law does not exempt any class of persons from the requirements under the Motor Carrier Act relating to insurance, safety regulations or accident reports. Also, the Utah Motor Carrier Act does not discriminate by imposing a mileage tax on those having a certificate of convenience and necessity.

In its *Smith v. Cahoon* decision, the court said:

“* * * In the present instance, the regulation as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety. This is a matter of grave concern as the highways become increasingly crowded with motor vehicles, and we entertain no doubt of the power of the state to insist upon suitable protection for the public against injuries through the operations on its highways of carriers for hire, whether they are common carriers or private carriers. But in establishing such a regulation, there does not appear to be the

slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made.' * * *

It is to be noted that in the first part of the above statement, the court found that there was no valid reason for distinguishing between classes of carriers with respect to the requirement of a bond or insurance policy for the protection of the public. Under the Utah law, no carrier for hire is exempted from the insurance policy requirements.

As to the latter part of the above statement, the court said that the statute was designed to protect the use of the highways and that the exemption of private carriers was arbitrary. It appears that the Utah Legislature had a broader purpose in mind when it enacted the Utah Motor Carrier Act than is indicated by the Florida statutes quoted in *Smith v. Cahoon*. For example, Section 54-6-4, Utah Code Annotated 1953, provides:

"The commission is vested with power and authority, * * * to regulate the facilities, ac-

counts, service and safety of operations of each common motor carrier, to regulate operating and time schedules so as to meet the needs of any community, and so as to insure adequate transportation service to the territory traversed by such common motor carriers, and so as to prevent unnecessary duplication of service between these common motor carriers, and between them and the lines of competing steam and electric railroads; and the commission may require the coordination of the service and schedules of competing common carriers by motor vehicles or electric and steam railroads; * * *."

And Section 54-6-5, Utah Code Annotated 1953, provides:

"* * * the commission shall take into consideration the financial ability of the applicant to properly perform the service sought under the certificate and also the character of the highway over which said common motor carrier proposes to operate and the effect thereon, and upon the traveling public using the same, and also the existing transportation facilities in the territory proposed to be served. * * *"

And, with respect to contract carriers, Section 54-6-8, Utah Code Annotated 1953, provides:

"* * * If, * * * the commission shall determine that the highways over which the applicant desires to operate are not unduly burdened; that the granting of the application will not unduly interfere with the traveling public; and that the granting of the application will not be detrimental to the best interests of the people of the state of Utah and/or to the localities to be served, and if the existing transportation facilities do not provide adequate or reasonable service, the commission shall grant such permit."

From the foregoing, it can be seen that the Legislature had much more in mind than merely the protection of the highways and requiring a bond or insurance for the safety of the public, and it may well have had these other factors in mind when it exempted certain carriers from some portions of the Motor Carrier Act.

It is also of no small consequence that *Smith v. Cahoon* has been the subject of critical examination in more recent decisions. In the 1935 Wyoming decision of *Public Service Commission of Wyoming v. W. C. Grimshaw*, 53 P. 2d 1, 109 A. L. R. 534, the Wyoming Supreme Court said of the *Smith v. Cahoon* decision:

"The decision of *Smith v. Cahoon*, 283 U. S. 553, 51 S. Ct. 582, 75 L. Ed. 1264, relied upon by the defendant, has had its legal effect repeatedly reviewed by the above cited later cases from the court from which it emanated. See especially *Aero Mayflower Transit Company v. Georgia Public Service Commission*, supra. In view of its subsequent interpretation by the national Supreme Court, we are obliged to conclude that it cannot be regarded as applicable here."

The United States Supreme Court in *Aero Mayflower Transit Company v. Georgia Public Service Commission*, 295 U. S. 285, 79 L. Ed. 1439, analyzed *Smith v. Cahoon* as follows:

"*Smith v. Cahoon* has been considered in later cases in this court, and the limits of its holding, clear enough at the beginning, have been brought out in sharp relief. Thus, in *Continental Baking Co. v. Woodring*, supra (286 U. S. 371, 76 L. Ed.

1166, 52 S. Ct. 595, 81 A. L. R. 1402) which came here from the State of Kansas, exemption from various forms of regulation, including the payment of a tax, was accorded to 'the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle.' The exemption was upheld. Again, in *Hicklin v. Coney*, supra (290 U. S. 175, 78 L. Ed. 251, 54 S. Ct. 142) a statute of South Carolina gave exemption to 'farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber or logs from the forests to be shipping points.' The exemption was interpreted by the highest court of the state as limited to cases where the hauling was irregular or occasional and not as a regular business. We upheld the statute as thus interpreted though the effect was to relieve from the filing of a bond.

"These cases and others like them (*American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. Ed. 102, 21 S. Ct. 43) are illustrations of the familiar doctrine that a legislature has a wide discretion in the classification of trades and occupations for the purpose of taxation and in the allowance of exemptions and deductions within reasonable limits. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892, 10 S. Ct. 53; *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 125, 54 L. Ed. 688, 694, 30 S. Ct. 496; *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 572, 54 L. Ed. 883, 30 S. Ct. 578; *Stebbins v. Riley*, 268 U. S. 137, 142, 69 L. Ed. 884, 888, 45 S. Ct. 424, 44 A. L. R. 1454; *Ohio Oil Co. v. Conway*, 281 U. S. 146, 159, 74 L. Ed. 775, 781, 50 S. Ct. 310; *State Tax Comrs. v. Jackson*, 283 U. S. 527, 75 L. Ed. 1248, 51 S. Ct. 540, 73 A. L. R. 1464, 75 A. L. R. 1536."

Reference to cases in which *Smith v. Cahoon* has been considered indicates the restricted scope of that holding and its inapplicability to the instant case. In the case of *Railway Express Agency v. New York*, 336 U. S. 106, 93 L. Ed. 533, the Supreme Court of the United States considered the constitutionality of a city regulation prohibiting advertising vehicles in city streets but permitting business notices upon business delivery vehicles under certain specified conditions. In answering attacks upon the constitutionality of the ordinance, the court stated:

“* * * We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. See *Olsen v. Nebraska*, 313 U. S. 236, 85 L. Ed. 1305, 61 S. Ct. 862, 133 A. L. R. 1500. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.

“* * *

“We cannot say that that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. * * * And the fact that New York

City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all. *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 160, 57 L. Ed. 164, 169, 33 S. Ct. 66.”

Recent expressions of the United States Supreme Court, dealing with the question of classifications under the Fourteenth Amendment to the United States Constitution, include the Sunday Closing Law decisions: *McGowan v. Maryland*, 6 L. Ed. 2d 393; *Braunfeld v. Brown*, 6 L. Ed. 2d 563; *Gallagher v. Crown Kosher Supermarket*, 6 L. Ed. 2d 536; and *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 6 L. Ed. 2d 551. In the 1961 *McGowan* case, the Supreme Court of the United States, in sustaining the classifications under the Sunday Closing Law in question, stated as follows:

“* * * Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See *Kotch v. Board of River Port Pilot Comrs.*, 330 U. S. 552, 91 L. Ed. 1093, 67 S. Ct. 910; *Metropolitan*

Casualty Ins. Co. v. Brownell, 294 U. S. 580, 79 L. Ed. 1070, 55 S. Ct. 538; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 51 L. Ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C 160; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. Ed. 909, 19 S. Ct. 609."

The separate opinion of Mr. Justice Frankfurter, joined by Mr. Justice Harlan in the *McGowan* decision, and all of the other aforementioned Sunday Closing Law cases, reads in part:

"* * * The restricted scope of this Court's review of state regulatory legislation under the Equal Protection Clause is of long standing. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, 79, 55 L. Ed. 369, 377, 378, 31 S. Ct. 337, Ann. Cas. 1912C 160. The applicable principles are that a state statute may not be struck down as offensive of equal protection in its schemes of classification unless it is obviously arbitrary, and that, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute bears the burden of affirmative demonstration that in the actual state of facts which surround its operation, its classification lacks rationality."

In addition to the *Aero Mayflower Transit Company v. Georgia Public Service Commission* case, supra, see the following cases pertaining to exemptions in the transportation of livestock, dairy, agricultural, and horticultural products: *Hicklin v. Covey*, 290 U. S. 169, 78 L. Ed. 247; *Continental Baking Co. v. Woodring*, 286 U. S. 352, 76 L. Ed. 1155; *Bushnell v. People*, 92 Colo. 174, 19 P. 2d 197;

Schwartzman Service v. Stahl, 60 F. 2d 1034; *Riley v. Lawson*, 106 Fla. 521, 143 So. 619; *State v. King*, (Maine), 188 A. 775; *Ex Parte Iratacable*, 55 Nev. 263, 30 P. 2d 284; *Figenshaw v. McCoy*, (N. D.), 265 N. W. 259; *Wisconsin Allied Truck Owners' Assoc. v. Public Service Commission*, 207 Wis. 664, 242 N. W. 668.

With respect to the constitutionality of the exemptions contained in Section 54-6-12, Utah Code Annotated 1953, the court's attention is directed to the complete annotation on this subject in 109 American Law Reports, Annotated, 550. Beginning on page 570, the annotation specifically reviews most of the exemptions found in the Utah law. These exemptions are traditional and most of them can be found in the Interstate Commerce Act and in comparable acts of almost every state in the Union.

Subsection (a) of Section 54-6-12, Utah Code Annotated 1953, exempts motor vehicles engaged in transporting students or their instructors to or from school or school activities from the Motor Carrier Act. In *Continental Baking Co. v. Woodring*, 286 U. S. 352, 76 L. Ed. 1155, the United States Supreme Court sustained the constitutionality of a similar exemption, saying:

“The fourth exemption is ‘of transportation of children to and from school.’ The distinct public interest in this sort of transportation affords sufficient reason for the classification. The State was not bound to seek revenue for its highways from that source, and, without violating appellants’ con-

stitutional rights, could avail itself of other means of assuring safety in that class of cases."

See *Ex Parte Iratacable*, 55 Nev. 263, 30 P. 2d 284; *Riley v. Lawson*, 106 Fla. 521, 143 So. 619; *Kelly v. Finney*, 207 Ind. 557, 194 N. E. 157.

Subsection (b) of Section 54-6-12, Utah Code Annotated 1953, exempts motor vehicles engaged in carrying mail under contract with the federal government from certain provisions of the Motor Carrier Act. This type of exemption has been held constitutional in a number of cases. In *Kelly v. Finney*, *supra*, the court said:

"The exemption contained in subsection (b) of section 2, which exempts motor vehicles used exclusively in carrying United States mail, is also affected with the public interest, and can be sustained upon the same principles as the transportation of school children, and for that reason the classification is not invalid."

Also see *Public Service Commission of Wyoming v. Grimshaw*, *supra*.

Subsection (c) of Section 54-6-12, Utah Code Annotated 1953, exempts from certain provisions of the Utah Motor Carrier Act motor vehicles when the cargo consists exclusively of livestock, farm, orchard, or dairy products which are being transported between farm, orchard or dairy and a market, warehouse, creamery or processing plant; or exclusively of farm or dairy supplies used in or about the farm or dairy; or exclusively of coal, lumber or logs which are being transported from mine or forest to shipping point or market.

Attention is directed to the limitation imposed on the transportation of the products named in Subsection (c), above. Such products may not be transported just any place the carrier desires.

In *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, supra, the United States Supreme Court sustained the exemption of transportation of agricultural or dairy products under a statute which provided whether the "vehicle is owned by the owner or producer of such agricultural or dairy products or not, so long as the title remains in the producer." The court, in its opinion, quoted from an earlier Georgia case, *Nance v. Harrison*, 176 Ga. 674, 169 S. E. 22, as follows:

“* * * Many of the farm products must be brought from remote sections unaccommodated by the better system of roads—in some cases not even by a public road. * * *”

In *Schwartzman Service, Inc., v. Stahl, et al.*, (Mo. 1932), 60 F. 2d 1034, the District Court, Western District of Missouri, upheld an exemption similar to that in the Utah law, saying:

“It must be conceded that the interest of the public is involved in the gathering and marketing of farm products as speedily and economically as possible. The Legislature no doubt had in mind the facts, the same as have been made to appear to us, that the only use made by trucks within the exemption would be in gathering the products of the farmer and transporting them to the nearest shipping point.

"Necessarily, this would not involve an extensive use of the highways. In a few instances, no doubt the farmer would live on the state owned and controlled highway, but in most instances this would not be true. In the majority of cases the farmers first reach the state highways at the place of marketing their products. In such cases they would not use state highways at all. The highways would not be used by the farmer in marketing his product as much as the contract hauler and motor carrier would use the same highways within cities and suburban zones. Moreover long hauls could not be economically made under this exemption. The motor vehicle employed must return empty, as farm products could not be hauled both ways to market. Again, large heavy trucks could not be used in gathering farm products. Much of the time such trucks would be off of hard surfaced roads.

"Plaintiff relies upon the late case of *Smith v. Cahoon*, 283 U. S. 553, 51 S. Ct. 582, 587, 75 L. Ed. 1264. While the exemption in that case was in language very similar to the language in the case at bar, yet it contained this broad exemption, 'or to motor vehicles used exclusively in transporting or delivering dairy products.'

"It will be observed that this might involve long hauls over the highways and does not restrict deliveries merely for shipping purposes. The same could be used for hauling both ways."

Also see *Figenshaw v. McCoy* (N. D.), 265 N. W. 259; *State ex rel. Wisconsin Allied Truck Owners' Assoc. v. Public Service Commission*, 207 Wis. 664, 242 N. W. 668; *Riley v. Lawson*, *supra*.

With regard to the exemption for the transportation of coal, lumber or logs, it is to be noted that such transportation is restricted to hauling from the mine or forest to the shipping point or market. The Supreme Court of Oregon sustained a similar exemption for the transportation of logs, poles, piling or rough timber in the case of *Anderson v. Thomas, Commissioner of Public Utilities*, 26 P. 2d 60, 75, saying:

“* * * The lumbering business is one of the principal industries of the state, on which a large part of the population is dependent, and the state is interested in encouraging and developing this industry. Moreover, the commodity which is carried by the special carrier might not, in the opinion of the Legislature, be able to bear so large a tax as commodities ordinarily carried by the contract hauler.”

Also see *State v. King*, *supra*; *Hicklin v. Covey*, 290 U. S. 169, 78 L. Ed. 247, 54 S. Ct. 142.

The transportation of coal from the mine to shipping point or market would be analogous to the hauling of logs and agricultural products. The mines are usually not located adjacent to state highways, so that use of such highways is limited. It is also suggested that, in conjunction with this, the Legislature may have considered the economic importance of the coal industry to certain areas of our state and felt that its regulation to the same extent as other carriers would not be in the public interest.

Subsection (d) of Section 54-6-12, Utah Code Annotated 1953, exempts vehicles operated by agricultural cooperative associations in their nonprofit activities.

In *Kelly v. Finney*, supra, the court held constitutional a statute which exempted from the act regulating motor carriers “* * * vehicles transporting livestock, farm or dairy products or supplies from or to farm or dairy or from point of production to market warehouse, creamery or other original place of storage, or to or from any distribution depot owned, operated or controlled by any non-profit cooperative association when vehicle (is) owned, leased or operated by a non-profit cooperative association (and/or) when transporting property of the association or, of any of its members, * * *.” The court said:

“* * * The Legislature knew that the use of the state highways for the transportation of livestock or farm or dairy products, etc., coming within the exemption is relatively small and incidental, and is also affected with a general public interest, and such classification, we think, is entirely permissible.
* * *”

And, in *Baker v. Glenn*, State Tax Commission of Kentucky (1933 D. C.), 2 F. Supp. 880, the court considered an exemption for motor vehicles owned or leased by a non-profit, cooperative association, from an act regulating motor transportation, concluding:

“* * * The article in question provides that a motor vehicle owned or leased by a nonprofit, cooperative, association, and carrying only property belonging to the association or its members, ‘shall be considered to be an owner’s truck,’ as in fact it

seems to us, in a very true sense, to be. These associations are really a banding together of numerous individuals engaged in the same business for their common good. The enterprise is a joint one, usually limited to the producers of agricultural products. The analogy between transportation by such associations, and the transportation by a farmer of his own livestock and farm products to market, is so close, both in respect of frequency and character of use, as to make applicable, we think, the distinction stated in *Continental Baking Co. v. Woodring*, supra, at pages 371, 372, '373, of 286 U. S., 52 S. Ct. 595. * * *

Subsection (e) of Section 54-6-12, Utah Code Annotated 1953, exempts motor vehicles used exclusively in the transportation of newspapers from the publisher to subscribers or distributors.

The basis for upholding the exemption for the transportation of newspapers was well stated by the Supreme Court of Indiana in *Kelly v. Finney, et al.*, supra, as follows:

“Subsection (e) of section 2 exempts motor vehicles used exclusively in the transportation of newspapers from the publisher to the subscriber or distributor. Here again the public interest is involved. Newspapers are read almost universally, and form a very important part of our educational and business life. The general public is interested in rapid, frequent and cheap distribution of newspapers. No other type of transportation under modern and present day conditions would suffice, and the exemption of such transportation could well be made by legislative enactment in aid of this general public policy.”

Also see *Schwartzman Service v. Stahl*, supra; *State v. King*, supra.

Subsections (f) of Section 54-6-12, Utah Code Annotated 1953, exempts from the Utah Motor Carrier Act vehicles constructed for towing, wrecking, maintenance, or repair purposes; armored cars; hearses, ambulances, or licensed taxicabs operating within a fifteen mile radius of a city or town; and vehicles used incidentally as ambulances or hearses by a licensed embalmer, funeral director or mortuary.

The Legislature, no doubt, felt that the public welfare would be better served by exempting these special type vehicles from a portion of the regulations imposed on other motor carriers.

Attention is directed to the Nevada case of *Ex Parte Iratacable*, supra, in which several similar exemptions were considered. The court said:

“The first class of motor vehicle claimed to be exempted under the statute, * * * are hearses. * * * We must presume that the Legislature knew that cemeteries adjacent to cities are reached by traversing chiefly streets and highways not embraced in the public highway system, and that the use of public highways by hearses is rare; whereas, this petitioner, comparatively speaking, to use the language in *Continental Baking Co. v. Woodring*, supra, uses daily upon the public highways a fleet of trucks in the conduct of their businesses.

“The next class * * * are ambulances. Again we think the Legislature must be presumed to know that of our 90,000 population approximately

70,000 reside in the towns and cities exceeding 400 in population, where the hospitals are located, not requiring the use of the public highways to reach them, and that the population scattered in the remote regions without telephone connections can take an injured person to a hospital in the same length of time it would take to go for an ambulance. * * *

* * *

"The next class * * * are city licensed taxicabs operating within a ten-mile limit of a city or town. * * * the land two or three miles beyond the city limits of substantially all the cities and towns is arid and overgrown with sagebrush, that the population beyond such a point is scattered, and that the calls for taxicabs out to such localities are rare; and, furthermore, that beyond the city limits, in many instances, roads lead from such city which are not a part of the public highway system, * * *. They have a right, too, to take into consideration the fact that taxicabs are light and do practically no damage to the public highways, while, on the other hand, the trucks to which are often attached heavy trailers, are in constant use and do a great deal of damage thereto."

In *Continental Baking Co. v. Woodring*, supra, at page 1165 in 76 L. Ed., the court held that it was within the broad discretion of the Legislature to exempt motor vehicles operating within a radius of twenty-five miles from the city in which their operations were carried on.

Also see *Bacon Service Corporation v. Huss*, 199 Cal. 21, 248 Pac. 235.

Subsection (g) of Section 54-6-12, Utah Code Annotated 1953, exempts employees riding together to and from work and sharing transportation expenses.

Obviously this exemption is in the public interest. Workers frequently live long distances from their place of employment and public transportation is not always available. The effect of this exemption would actually be to reduce traffic on the highways. Also, the expenses shared must be actual expenses, and no individual may operate more than one vehicle under the provisions of this statute, so this is not a profit making type of operation.

In conclusion, appellants contend that there is a reasonable basis for the exemptions in the Utah Motor Carrier Act, and that similar classifications considered by other courts, both federal and state, have consistently been held constitutional. The Utah law appears to be more restrictive than similar laws in some of the other states in that it does not completely exempt any carriers from the law. Those that are exempted are still required to comply with the insurance provisions of the act, the safety regulations, and the accident reporting provisions. Furthermore, Section 54-6-12 provides that the Public Service Commission may prescribe reasonable rules to carry out the provisions of the act, including the establishment of reasonable fees for registration and services performed by the Commission. Exempt carriers are also subject to the penalty provisions of the Motor Carrier Act.

It appears, therefore, that the exemptions are consistent with the purposes of the Utah Motor Carrier Act. In many states the acts regulating motor transportation provide for taxes for the maintenance of the public highways. This is not so in the Utah law. Here the objective

is to regulate motor transportation so that the highways and traveling public will be protected, that adequate service will be provided, that reasonable fares will be charged, and that existing transportation facilities will not be unduly interfered with. Exempt carriers are not relieved of the burden of paying their fair share of highway costs, but rather, the Legislature, in what it believed to be in the best interests of the public, relieved them of a portion of the duties placed on motor carriers. The motor carriers falling within the exemptions in Section 54-6-12 are engaged in types of business distinct and different from those not exempted, and the exemptions were reasonably calculated to carry out the objectives of the Utah Motor Carrier Act. As this court said, in *Thomas v. Daughters of the Utah Pioneers*, 114 Utah 108, 197 Pac. (2d) 477, 499:

“* * * If by any fair interpretation of the statute the legislation can be upheld, it is the duty of this court to sustain it, even though judges may view the act as inopportune or unwise; and it is not within the province of the judiciary to question the wisdom or the motives of the Legislature in the enactment of a statute.”

POINT IV.

A FINDING THAT A PORTION OF THE UTAH MOTOR CARRIER ACT IS UNCONSTITUTIONAL DOES NOT RENDER THE ENTIRE ACT UNCONSTITUTIONAL.

This court has long recognized the rule that a portion of a statute may be found unconstitutional without affect-

ing the constitutionality of the remainder of the statute. *State v. Ledkins*, 5 Utah 2d 422, 303 P. 2d 1099; *North Tintic Mining Co. v. Crockett*, 75 Utah 259, 284 Pac. 328; *State ex rel. Shields v. Barker*, 50 Utah 189, 167 Pac. 262; *Tygesen v. Magna Water Co.*, 119 Utah 274, 226 P. 2d 127; *Patterick v. Carbon Water Conservancy Dist.*, 106 Utah 55, 145 P. 2d 503. The rule summarized, as follows, in *Union Trust Co. v. Simmons*, 116 Utah 422, 211 P. 2d 190:

“Severability or separability where part of a statute is unconstitutional, is primarily a matter of legislative intent. The test fundamentally is whether the legislature would have passed the statute without the objectionable part, and whether or not the parts are so dependent upon each other that the court should conclude the intention was that the statute be effective only in its entirety. * * * Frequently the courts are aided in the determination of legislative intent by the inclusion within a statute of a ‘saving clause.’ * * *”

This court has also said that a savings clause creates a presumption of separability, but such a presumption is not controlling if it is recognizable that the Legislature would not have enacted the remaining provisions alone, or that standing alone they would not provide for an operative whole. *State v. Roberts*, 92 Utah 204, 66 P. 2d 892, *In re Kesler*, (D. C. Utah), 187 F. Supp. 277.

There is nothing in the record of the case before the court showing the intention of the Legislature with respect to the exemptions in Section 54-6-12. However, on pages 21 and 22 of this brief there is set forth portions of the statutes which indicate the broad purposes of the Utah Motor Car-

rier Act. The intention of the Legislature is further shown by the savings clause contained in Section 25 of Chapter 65, Laws of Utah 1935, which set up the Utah Motor Carrier Act in its present form, although some provisions have since been amended. Said Section 25 reads as follows:

“If any part or parts of this act shall be held to be constitutional, such decision shall not affect the validity of the remaining parts of this act. The legislature hereby declares that it would have passed the remaining parts of this act even if it had known that such part or parts thereof would be declared unconstitutional.”

The court below held the entire Utah Motor Carrier Act unconstitutional on the basis that the exemptions in Section 54-6-12 violated the provisions of both the State and Federal Constitutions. It is our contention, however, that even if this section should be found to be unconstitutional, the remainder of the Act should not fall. The legislature stated its intention in this regard in the savings clause quoted above. Furthermore, the basic objectives of the Act would remain intact. The unconstitutionality of Section 54-6-12 would not render the remainder of the Act inoperative. While the Legislature undoubtedly intended, in the public interest, to relieve the exempt motor carriers from some of the regulations and obligations imposed on others, it is certainly questionable that the Legislature would not have enacted the Motor Carrier Act and would have let all motor carriers go unregulated simply because certain classes couldn't be exempted.

Appellants have cited cases in this brief in which nearly all of the exemptions provided in Section 54-6-12 have been held constitutional by other courts. It is appellants' further contention, however, that if there is a portion of Section 54-6-12 that is invalid, not all of that section need be unconstitutional. In volume 2 of Sutherland, *Statutory Construction*, page 195, it is stated:

"Recognition of a third separability situation in which a single section of a statute contains the language susceptible of applications, part of which are invalid, is important as the statute should be upheld even in the stricter jurisdictions, if, after the physical deletion of the offending section, a workable statute, reasonably conforming to legislative intent, remains. * * *"

In the case of *Farmers' Loan and Trust Co. v. New York Cent. R. R.*, 134 Misc. 778, 236 N. Y. Supp. 250, the court said:

"Where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void, unless the provisions are so connected together in subject-matter, meaning, or purpose, that it cannot be presumed the Legislature would have passed one without the other. * * * If the remaining provision is complete in itself and capable and being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. * * *

"Even where a single section attempts or purports to cover two entirely distinct and separable classes of cases, one properly and the other improperly, it may be upheld as to the class which consti-

tutionally may be thus covered, even though condemned as to the other. *Dollar Co. v. Canadian Car & Foundry Co.*, 220 N. Y. 270, 278, 115 N. E. 711. In such a case, the statute can be held entirely void only where it is evident from a contemplation of the statute and of the purpose to be accomplished by it that it would not have been passed at all, except as an entirety, and that the general purpose of the Legislature will be defeated if it shall be held valid as to some cases and void as to others. * * * The principle governing division is not a principle of form. It is a principle of function. The question in every case is whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excinded, or rejected altogether. * * *

The court's attention is directed to the case of *Justice v. Standard Gilsonite Company*, supra, in which it held only the exclusionary provisions of the Utah statute relating to banks and mercantile houses unconstitutional, saying:

"* * * so we conclude that this classification excluding banks and mercantile houses from the penalty provisions of this chapter is arbitrary and has no reasonable justification in fact and it is, therefore, unconstitutional to that extent."

Respondents contend that if the exemptions contained in Section 54-6-12 are found to be arbitrary and discriminatory the entire Motor Carrier Act must fall. It is the position of appellants, in view of the foregoing cases and text citations, that even if Section 54-6-12 should be found unconstitutional, said section is completely severable and the remainder of the Act should rest undisturbed. Also, appellants maintain that, while there has been no showing to

date that any particular class exemption under Section 54-6-12 violates the state or federal constitutional provisions, if any particular exemption or exemptions are found invalid, not all of Section 54-6-12 need be unconstitutional. It is clear, in this situation, that the Legislature would have passed the Act without all of the exemptions now contained in Section 54-6-12, as this section has been amended several times. For example, prior to the 1945 amendment (Chapter 105, Laws of Utah 1945), contract carriers operating within 15 miles of the corporate limits of a city or town were exempt; the 1948 amendment (Chapter 8, Laws of Utah 1948 First Special Session) added what is now subsection (g), exempting employees riding together; the 1957 amendment (Chapter 107, Laws of Utah 1957) added the paragraphs relating to insurance on, and regulation of, exempt carriers; the 1961 amendment (Chapter 125, Laws of Utah 1961) added the hauling of coal to the exempt classes.

In summary, it is the position of appellants that Section 54-6-12 is severable from the other provisions of the Utah Motor Carrier Act, and if the court should find that Section 54-6-12 violates the constitutional provisions complained of, the remainder of the Act should stand. Furthermore, if the court should find that any specific exemption in Section 54-6-12 is unconstitutional, the remaining portions of said section should rest undisturbed.

CONCLUSION

Respondent comes before the court in an inconsistent position. It holds certificates of convenience and necessity, and during the pendency of this case has applied for additional authority. For years respondent has enjoyed, and still does enjoy, the benefits of regulation under the Motor Carrier Act, and, therefore, is estopped from challenging the constitutionality of said Act.

The exemptions which respondent claims are repugnant to the Federal and State Constitutions are similar to those found in Federal and State laws throughout the nation and have been regularly upheld in the courts.

Appellants maintain that the Motor Carrier Act is constitutional and consistent with public policy and respectfully request this court to reverse the judgment of the court below.

Respectfully submitted,

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