

1963

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

Utah Supreme Court

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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 RESPONDENT

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

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FILED

AUG 16 1963

Clerk, Supreme Court, Utah

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WYCOFF COMPANY,
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GEE, ITS COMMISSIONERS,

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Case No.

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BRIEF OF RESPONDENT

INTRODUCTORY STATEMENT

The same designations of the parties will be used herein as were used in the Brief of Appellants. The defendants, Public Service Commission of Utah, and its Commissioners, will be called "Appellants" and Wycoff Company, Incorporated, a Utah corporation, will be called "Respondent."

Respondent essentially agrees with Appellants' introductory statements of the facts. However, some amplifying comments are deemed appropriate.

Although Respondent's Complaint sought to have declared unconstitutional all of the Public Utilities Act (Title

54, UCA 1953), to the extent that the provisions of the latter act relate to the regulation or control of motor carriers (as was ordered in the 1953 judgment in *Newman vs. Public Service Commission*, Civil No. 92815, District Court for Salt Lake County), Respondent withdrew from this position below, and does not appeal from the judgment of the District Court.

The court below heard and denied (R. 16) Appellants' Motion to Dismiss (R. 15), and Respondent's Motion for Summary Judgment (R. 20-21) was not granted (R. 94). At the top of Page 4 of Appellants' Brief, paragraph 7 of the complaint is quoted, as follows:

"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."

The foregoing allegations are admitted in paragraph 2 of Appellants' Answer (R. 17). Reference to *Wycoff Company, Incorporated vs. Public Service Commission of Utah*, et al, 13 Ut 2d, 123, 369 Pac 2d 283, involving assessment of a penalty by said Commission against Respondent in the amount of \$18,500.00 was, as stated by Appellants, assessed for violations of the Motor Carrier Act determined to be unconstitutional by the Court below; and collection proceedings are held in abeyance in the District Court for Salt Lake County, pending the outcome of the case at bar. (See Appellants' Brief, p. 4)

ARGUMENT

POINT I

THE EXCLUSIONARY PROVISIONS OF SECTION 54-6-12 UCA 1953, AS AMENDED, DENIED TO RESPONDENT CONSTITUTIONAL EQUAL PROTECTION OF THE LAW WHICH DEPRIVED RESPONDENT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

The decision of the trial court that Respondent seeks to have affirmed is based upon the trial court's findings that Respondent was not being accorded equal protection of the law in that it belonged to a class that the Motor Carrier Act discriminates against. This general proposition is described at 12 American Jurisprudence 220, "Constitutional Law," Section 525.

Generally – The theory underlying constitutional requirements of equality is that all persons in like circumstances and like conditions must be treated alike, both as to privileges conferred and as to liabilities or burdens imposed. Any statute which imposes special restrictions or burdens on, or grants special privileges to, certain persons engaged in a business, which burdens or privileges are not imposed on, or granted to, other persons engaged in the same business under the same circumstances, is invalid. In the application of the Fourteenth Amendment to the Constitution of the United States, no distinction is to be observed between the effect of privileges conferred and the effect of burdens imposed. A privilege conferred upon one class is a discrimination in favor of that class and against all others not similarly endowed

just as a burden upon one class is a discrimination against it and in favor of all others not similarly afflicted.

A privilege or a burden is or is not a denial of the equal protection of the laws according to whether the discrimination relates to a matter upon which classification is legally permissible and, if so, whether the classification is a reasonable one.

Respondent relies upon the following constitutional provisions:

* * * nor shall any state * * * deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws. (*Section 1, Fourteenth Amendment, U.S. Constitution*)

All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require (*Article I, Section 2, Utah Constitution*)

No person shall be deprived of life, liberty or property, without due process of law. (*Article I, Section 7, Utah Constitution.*)

All laws of a general nature shall have uniform operation. (*Article I, Section 24, Utah Constitution*)

The legislature is prohibited from enacting any private or special laws in the following cases:

* * *

16. Granting to an individual, association or corporation any privilege, immunity or franchise.

* * *

In all cases where a general law can be applicable, no special law shall be enacted. (*Article VI, Section 26, Utah Constitution*)

Sections 54-6-2, -3, -4, and -5 describe the extent to which carriers are to be regulated by Appellant Commission, declare that all common motor carriers are subject to such regulation as "common carriers," and prohibit any transportation operations for hire on the public highways of the State, that are not conducted in accordance with said Act. These Sections read as follows:

54-6-2. All motor carriers subject to regulation as common carriers. — All common motor carriers of property or passengers as defined in this act are hereby declared to be common carriers within the meaning of the public utility laws of this state, and subject to this act and to the laws of this state, including the regulation of all rates and charges now in force or that hereafter may be enacted, pertaining to public utilities and common carriers as far as applicable, and not in conflict herewith.

54-6-3. Transporting for compensation on public highways. — No common or contract motor carrier shall operate any motor vehicle for the transportation of either persons or property for compensation on any public highway in this state except in accordance with the provisions of this act.

54-6-4. Common motor carriers — Powers and duties of commission. — The commission is vested with power and authority, and it shall be its duty, to supervise and regulate all common motor carriers and to fix, alter, regulate and determine just, fair, reasonable and sufficient rates, fares, charges and classifications; to regulate the facilities, accounts, service and safety of operations of each such 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 line 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; to require the filing of annual and other reports, tariffs, schedules and other data by such common motor carriers and the public and between such common motor carriers and other common carriers, to the end that the provisions of this chapter may be fully and completely carried out. The commission shall have power and authority, by general order or otherwise, to prescribe rules and regulations in conformity with this act applicable to any and all such common motor carriers, and to do all things necessary to carry out and enforce the provisions of this act. All laws relating to the powers, duties, authority and jurisdiction of the commission over common carriers are hereby made applicable to all such common motor carriers *except as herein otherwise specifically provided.* (Emphasis added.)

54-6-5. *Intrastate commerce — Certificate of convenience and necessity.* — It shall be unlawful for any common motor carrier to operate as a carrier in intrastate commerce within this state without first having obtained from the commission a certificate of convenience and necessity.’ ’ ’

Section 54-6-18, Utah Code Annotated, 1953, stipulates that every carrier or person who violates any provision of the Motor Carrier Act is guilty of a misdemeanor; and Sec-

on 54-7-25, et seq, provide other penalties for failure to comply with *any* part of Title 54, Utah Code Annotated 1953. By excluding certain motor carriers from general regulation of the Public Service Commission, Section 54-6-12 establishes privileged classes which are not subject to the following type of general regulation by the Commission:

1. They do not have to obtain Certificates of Convenience and Necessity (Section 54-6-5) or Contract Carrier permits (Section 54-6-9).
2. They are not regulated as to rates and classifications (Section 54-6-11).
3. They are not subject to regulation in transferring certificates or permits in the event of transfer or death of the owner (Section 54-6-24).
4. They do not have to obtain temporary or emergency permits when the need arises (Section 54-6-10).
5. They are not regulated pertaining to their accounts and records, including methods of depreciation (Section 54-4-23, -24).
6. They are not regulated concerning keeping records and books available within the state and subject to inspection (Section 54-7-8).
7. They do not have to keep and maintain a schedule of rates and charges as condition precedent to doing business (Section 54-3-6 and 54-7-12).
8. If they are a corporation, they are not regulated as to declaration and payment of dividends (Section 54-4-27).
9. They are not forbidden to discriminate in services rendered or rates charged (Section 54-3-8).

The foregoing list does not purport to be an exhaustive one by any means, but is simply set forth to illustrate what is involved in being subject to general regulation and not being so subjected.

It may be of assistance to point out that Section 54-2-1 (28) defines the term "public utility" to include every "common carrier." Section 54-6-2 provides that all motor carriers "as defined in this act are hereby declared to be common carriers within the meaning of the public utility laws." Section 54-6-12 provides that "no portion of this act shall apply" to those carriers excluded from general regulation of the Public Service Commission, "except for the provisions of 54-6-17 relative to the requirements of insurance, 54-6-21 relative to safety regulations, and 54-6-22 relative to accident reports." It should be borne in mind that, although the next to last paragraph of 54-6-12 gives the Commission power to prescribe reasonable rules and regulations to carry out the purposes of the act, *any such rules and regulations are limited only to matters of insurance, safety regulations and accident reports*, as provided. The power to regulate exempt carriers is limited to the stated exceptions, namely, general regulation of insurance, safety regulations and accident reports.

The District Court found, and Respondent contends, that this causes the entire motor carrier act contained in Chapter 6, Title 54, Utah Code Annotated 1953, to be unconstitutional. The correct rule is stated in 11 American Jurisprudence 855, "Constitutional Law" Section 161, dealing with striking out unconstitutional exceptions:

One important class of cases in which questions as to the severability of valid and invalid portions of an act and the determination of the legislative intent

are involved consists of statutes containing invalid exceptions or provisos. The general rule is that if such a proviso operates to limit the scope of the act in such a manner that by striking out the proviso, the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent.

In other words, if the court were to strike out the exceptions contained in 54-6-12, the remainder of the Motor Carrier Act would be broader, the result would not be as intended by the legislature, which has a predominance of rural legislators, and the whole act would be invalid.

The quotation from 11 Am. Jur. 855 continues at page 866:

Instances of the application of this rule may be found in the case of statutes prohibiting trusts or combinations to fix prices or restrict the production of articles of commerce, *but excepting from the prohibitions all persons engaged in agriculture or horticulture*; * * *, and the courts may properly infer that it would not have been enacted if such group had not been excluded from its operation and protected from its provisions.

The recent decisions of the United States Supreme Court which have held that failure of state legislatures to reapportion themselves to be no longer without a federal judicial remedy, points up one of the political facts of life of the twentieth century: State Legislatures are controlled by rural areas although the rural population comprises a minority. It would be possible to infer that the exclusionary provisions of the 1935 Motor Carrier Act were inserted to satisfy the farm lobby and other politically-favored

groups who were more effective than others in escaping regulation. As the Court is aware, the Third District Court, for Salt Lake County, by and through Judge Joseph G. Jeppson, declared not only the Motor Carrier Act but all of the Public Utilities Act unconstitutional, to the extent that the provisions of the latter act related to the regulation or control of motor carriers (R. 7-11). Although this case was appealed to the Supreme Court, it was dismissed on June 3, 1953, upon the motion of the Public Service Commission (R.17, paragraph 2). Respondent does not now contend the Public Utilities Act (Title 54) to be unconstitutional because the Motor Carrier Act of 1935 was merely amendatory of the 1917 Public Utility Act. *Smith vs. Cahoon*, 283 US 553, 75 L. 2d. 1264 was the principal authority relied upon in the *Newman* case, and it involved a Florida motor carrier regulatory act with exclusions held to be constitutionally defective under the equal protection clause of the 14th Amendment of the U.S. Constitution. The exclusions from the Florida statute was quoted in the opinion (p. 1269), 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, or any transportation company engaged exclusively in the transporting of agricultural, horticultural, dairy, or other farm products with fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market or to motor vehicles used exclusively 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. (Emphasis supplied)

Regarding the exclusionary provisions, the Court declared at page 1274 of 75 L.ed.

• • • The act provides that the term auto transportation company, upon which the obligations of the act are imposed, shall not include 'any transportation company engaged exclusively 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 en route to primary market or to motor vehicles used exclusively in transporting or delivering dairy products.' The point with respect to this discrimination is not that a distinction is made between common carriers and private carriers, but between private carriers themselves, although they are alike engaged in transporting property for compensation over public highways between fixed termini or over a regular route.

The holding of the Court (page 1274) is plain and unequivocal:

• • • (T)here 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.' (Cases cited.)

The entire Florida act was declared void and unconstitutional and the Utah Motor Carrier Act can have no better standing.

Appellants would have this Court believe that the controlling factor which influenced the court in *Smith v. Cahoon* to declare the Florida motor carrier act unconstitutional was that regulated carriers were required to provide a bond or insurance and that excepted carriers were not. The opinion makes clear that there are other constitutional defects when, at page 1274 of 75 L Ed it is stated:

If we leave on one side the requirement that a certificate holder, who is a private carrier, shall give a bond or policy for the goods carried by him, irrespective of his contract with his employer whose goods he carries, and if we consider any of the provision for the protection of the public with respect to the use of the highways, *another* constitutional difficulty is encountered, that is, of an unconstitutional discrimination. (Emphasis supplied)

The court held that the Florida act was invalid on its face, on page 1272 of 75 L Ed:

The statute on its face makes no distinction between common carriers and a private carrier such as the appellant. It applies, without any stated exception, to every auto transportation company within the statutory definition, and this admittedly included the appellant. It not only required an application for certificate of public convenience and necessity but that this should be accompanied by a schedule of tariffs, and no such certificate was to be valid without the giving of a bond by the applicant * * *.

On the face of the statute, the scheme was obviously one for the supervision and control of those carriers

which, by reason of the nature of their undertaking or business, were subject to regulation by public authority in relation to rates and service.

It is submitted that the unlawful discrimination the court found through the failure to protect the public by requiring regulated and unregulated carriers to give a bond or public liability insurance was only "another" fatal defect.

The writer of this brief is well aware that the present members of this Court were the authors of the decision in *Justice vs. Standard Gilsonite*, 12 Utah 2d 357, 366 P.2d 974. This case recently declared unconstitutional the penalty provisions of the Utah statute governing payment of wages. Section 34-10-6, UCA 1953 provides as follows:

Section 34-10-2. "None of the provisions of this chapter shall apply to the state, or to any county, incorporated city or town, or other political subdivision, or to employers and employees engaged in farm, dairy, agricultural, viticultural or horticultural pursuits, or to banks and mercantile houses, or to stock or poultry raising, or to household domestic service, or to any other employment, where an agreement exists between employer and employee providing for different terms of payment."

The opinion specifies:

The question presented is whether the exclusion of "Banks and mercantile houses" makes the act arbitrary, discriminatory class legislation.

The Justice case overruled *State v. Walker*, 100 Utah 523, 116 P 2d 766 as a precedent, as follows:

In *State v. Walker*, a criminal conviction of an employer for refusal to pay wages due when demanded under Chapter 60, Laws of Utah for 1937, where the

statutes involved were similar to those involved in this action, we held that there is a reasonable basis to differentiate banks and mercantile houses from the included employers so that the provisions were not unconstitutional. We have carefully reconsidered this problem and notwithstanding our previous holding in the *Walker* case, we conclude that there is no reasonable basis for exclusion of banks and mercantile houses from the penalty provisions of this act as distinguished from other employers which are included, and that such provisions are thus reneeder unconstitutional.

Other courts have reached similar holdings.

Priest v. State Tax Commission, Ky., 80 S.W.2d 43, involved an interpretation of the Kentucky act regulating transportation for hire by motor vehicles. The act exempted:

Motor vehicles transporting farm products, including dairy products and livestock from the farm to point of destination, or from any point to the farm, by way of the shortest practicable route.

The court held:

The Supreme Court of the United States in the case of *Smith v. Cahoon*, 283 U.S. 553, 51 S. Ct. 582, 75 L. Ed. 1264, determined and disposed of what we conclude is almost exactly the same question by holding that the same attempted classification for exemption purposes in the same character of statute offended the provisions of the Fourteenth Amendment to the Federal Constitution and was invalid. The enactment there involved was a statute of the state of Florida, and which, as we have said, related to the same subject as do the two domestic statutes above referred to; i.e., the regulation of motor transportation vehicles on public highways for hire. Among the exempting pro-

visions in the Florida statute was one * * * saying: (Court quotes). It was attacked by others engaged in similar transportation of other freight and products not embraced therein upon the same ground as is urged by plaintiffs herein. The case found its way to the Supreme Court of the United States, and in its opinion it sustained the ground of attack because it found that the classification that the Florida Legislature attempted to make was unreasonable, arbitrary, and without factual distinction, and was not based on anything having relation to the purpose for which it was made.

Other questions are discussed and disposed of in the opinion, but on the one now under consideration the opinion said, *inter alia*: "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, * * * or tea or coffee, or groceries in general, or other useful commodities." The holding of the opinion was followed by the United States District Court of the Eastern District of South Carolina in *Nutt v. Ellerbe*, 56 F. 2d 1058, and by the United States District Court, District of Kansas, in the case of *Louis v. Boynton* 53 F. 2d 471, wherein the same character of exemption was involved in the statute there under consideration. The holding by the federal courts in those opinions has not been departed from, although learned counsel for defendants insist that they have lately manifested an inclination to do so. The cases cited in support of that suggestion do not involve the questions now under consideration, but dealt only with the right of a state to enact police regulations with reference to motor vehicles engaged in interstate commerce, and are therefore not applicable here.

The court concluded, by distinguishing cases later to *Smith v. Cahoon*, as follows:

The same counsel also rely upon the cases of *Continental Baking Co. v. Woodring*, 286 U.S. 352, 52 S. Ct. 595, 596, 76 L. Ed. 1155, 81 ALR 1402, and *Hicklin v. Covey*, 290 U.S. 169, 54 S. Ct. 142, 144, 78 L.Ed. 247. In the *Woodring* Case the exemption was: "The transportation of livestock and farm products to market 'by the owners thereof or supplies for his own use in his own motor vehicle.'" The Supreme Court referred to its prior opinion in the *Cahoon* Case, *supra*, and, in distinguishing the exemption there involved from the one then being considered, the opinion said: "The distinction in the instant case is of a different sort. The statute does not attempt to impose an arbitrary discrimination between carriers who transport property for hire, or compensation, with respect to the class of products they carry. The exemption runs only to one who is carrying his own livestock and farm products to market or supplies for his own use in his own motor vehicle." The exemption of the Kansas statute then under consideration was upheld.

In the *Hicklin* Case the exemption in the statute was:

"Farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber and logs from the forest to the shipping points." The Supreme Court, in upholding it, adverted to the fact that the particular excepted transportation was known to be seasonable, in that it was not constant the year round. But it furthermore said that: "The exemption here is further limited by the fact that it can apply only to one whose principal business is that of a farmer or dairyman and not to one merely incidentally engaged in farming or dairying." That language was taken with approval from the opinion of the Supreme

Court of South Carolina. In neither the *Woodring* nor the *Hicklin* opinions of the Supreme Court was there any modification of its opinion in the prior *Cahoon* Case, *supra*. On the contrary, in each of them it was expressly referred to, and the distinction between the statute there involved and the ones involved in the *Woodring* and *Hicklin* Cases was pointed out.

These same distinctions apply to these cases now which are cited in Appellant's brief.

As hereinbefore seen, exemption 3 of the 1934 act, which is the subject matter of attack by plaintiffs, is not limited or extended to the farmer, or the dairyman, or the producer of any of the articles therein mentioned in hauling his products to market by employing his own truck, as was true in the *Woodring* and *Hicklin* Cases; but, on the contrary, the exemption runs alone to not merely agricultural and dairy products, but to such products when, and only when, being transported from the farm to the point of destination by one who is regularly engaged in the motor transportation business for compensation, as are the plaintiffs in this action. We can see no escape from the conclusion announced by the Supreme Court in the *Cahoon* Case or any way by which it may be avoided. Indeed, the Legislature itself was necessarily doubtful of the proposition, since it expressly enacted in the 1934 act that, if the exemption 3 therein adopted should be declared to be unconstitutional, "then it is the intention of the legislature that the present section * * * shall remain and be in force," and which is exemption "Three" in the 1932 act. Since we conclude that there can be no reasonable distinction drawn between the statute here involved and the one before the Supreme Court in the *Cahoon* Case, it follows that the court erred in upholding the

validity of exemption No. 3 contained in the 1934 act, and which, according to the express provisions of that amendment, automatically reinstates exemption "Three" of the 1932 act.

Franchise Motor Freight Assn. v. Seavey, Cal., 235 P 1000 (Cal. Sup. Ct. in Bank) was a mandamus action to compel the State Commission to assume jurisdiction over agricultural truckers for hire who had been excluded from Commission regulation by an amendment to the existing act which plaintiffs contended was unconstitutional. The Commission had refused to exercise jurisdiction because said amendment excluded "the movement of products or implements of husbandry and other farm necessities from farm to farm or from and to farms to and from loading point, warehouse or other initial points."

At page 1002 the opinion states:

The question, therefore, is whether or not the exemption created by the proviso of 1923 constitutes a lawful classification. * * * It is equally well settled that a statute makes on improper and unlawful discrimination if it confers particular privileges upon a class arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted, and between whom and the persons not so favored no reasonable distinction or substantial difference can be found justifying the inclusion of the one and the exclusion of the other. 5 Cal Jur. 825, and cases cited.

What reasonable ground of distinction is there between a common carrier engaged in the business of hauling various kinds of freight, *including* products and implements of husbandry, by motor truck over a regular route upon the public highway, and another common carrier engaged in the business of hauling

freight, which *consists solely* of the products and implements of husbandry, by motor truck over the same route, which justifies the subjection of the one to the regulations imposed by the Auto Stage and Truck Transportation Act, and the exemption of the other from the burden of those regulations? (Emphasis added)

The court concluded:

* * * we are impelled to conclude that no natural, intrinsic, or constitutional distinction is to be found as a basis for the exemption of the transportation companies described in the 1923 amendment, *supra*, from the regulations described in the * * * Act, and that such attempted exemption is violative of the Fourteenth Amendment to the Federal Constitution and of like provisions in our State Constitution.

The *Seavey* Case was cited recently with approval by the California Supreme Court (en Banc) in *Katze vs. County of Los Angeles*,-Calif..... 341 P. 2d 310, at 316, as follows:

Where the legislative classification is unreasonable, the courts will invalidate the law. In *Franchise Motor Freight Association vs. Seavey*Calif....., 235 P 1000 (Cal S. Ct. in Bank) we said that "a statute makes an improper and unlawful discrimination if it confers particular privileges upon a class arbitrarily selected from a larger number of persons,"

etc. (as quoted above.)

As the Florida Act was held invalid in *Smith v. Cahoon*, it is submitted that the Utah Motor Carrier Act is unconstitutional on its face; and, in the language of the *Seavey* Case, what reasonable ground of distinction is there between the transportation of sand and gravel, ore, water and minerals

(subject to general regulation), and coal, lumber or logs (not so regulated); cancelled checks (regulated) and money and other valuables (not regulated)? Appellants contend that the legislature had good reasons for making these exemptions and cites a number of cases where other jurisdictions have upheld the various exceptions described in subsections (a) through (g) of Section 54-6-12.

Nearly all of the cases cited by appellants involve the construction of taxing statutes imposed for revenue purposes. The revenue cases must be distinguished from those involving regulatory legislation. Chapter 6 of Title 54, UCA 1953 is strictly a regulatory measure. Justice Cardozo in *Aero Mayflower Transit Company vs. Georgia Public Service Commission*, 295 U.S. 285, 79 L.ed. 1439, made this distinction apparent at 79 L Ed 1444 when he declared, after referring to the plight of Georgia farmers, as indicated in the earlier decision of Georgia Supreme Court:

* * * The effect of the exception would be to equalize the burden. "Every one knows that as a general rule a tax of this kind finally reaches the consumer of the product, or user of the service; and hence an exemption of carriers of such products is to be taken as an exemption of the products themselves, and not of the carrier." The enumeration of rational bases of distinction was not put forward as exhaustive. The court expressed the belief that others could be added.

We think a classification thus designed to ameliorate the lot of the producers of farm and dairy products is not an arbitrary preference within the meaning and the condemnation of the Fourteenth Amendment. The plight of the Georgia farmer has been pictured by the state court in words already quoted. To free him of fresh burdens might seem to a wise statecraft to be

a means whereby to foster agriculture and promote the common good. *The case is a very different one from Smith v. Cahoon*, 283 U.S. 553, 75 L Ed 1264, 51 S Ct 582. There a Florida statute, similar to this one in many of its provisions, gave relief from its exactions to any transportation company engaged exclusively in the carriage of agricultural, horticultural, dairy or farm products, whether for the producer or for any one else. *The attack was not directed, as in the case at hand, to an exemption of a particular class of carriers upon rational grounds of policy from the payment of an annual tax.* (Emphasis furnished.)

After discussing the cases (also quoted by Appellants from this *Aero Mayflower Case*), the Court's opinion continues at page 1445 of 79 L. Ed., as follows:

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. (Emphasis is mine)

and nails down the distinction when a tax statute is involved in this area of constitutional law at the end of this same page, by declaring:

Be that as it may, *exemption from a tax stands upon a different footing*, though the purpose of the tax is the upkeep of the highway. At such times the legislature may go far in apportioning and classifying to the end that public burdens may be distributed in accordance with its own conception of policy and justice. If its action be not arbitrary, the courts will stand aloof.

Continental Baking Company v. Woodring, 286 U.S. 352, 76 L.ed 1155; not only is a tax revenue case, but the agricultural exemption is distinguished by the court itself at 76 L. ed. 1167 when it points out that "the exemption runs only to one who is carrying his own livestock and farm products to market or supplies for his own use in his own motor vehicle."

It is obvious that any decision of a lower Federal Court, such as *Schwartzman Service, Inc. vs. Stahl*, 60 Fed. 2d 1034, is not to be given undue weight by counsel attempting to distinguish a U.S. Supreme Court decision.

Anderson v. Thomas, Commissioner of Public Utilities, 26 P 2d 60, *Kelly v. Finney* 207 Ind. 557, 194 N.E. 157; *Ex Parte Iratacable*, 55 Nev. 263, 30 P. 2d 284; *Hicklin v. Covey*, 290 U.S. 169, 78 L Ed 247 are all to be distinguished tax revenue cases and as otherwise distinguished hereinbefore.

The cases cited by Appellants involving constitutionality of various Sunday closing laws of the various states, surely have no application in these proceedings. Entirely different policy considerations are apparent when a State establishes a social policy having religious overtones, and when, as here, it regulates, or excepts from regulation a business enterprise serving the public as a common carrier.

Appellants infers that, the statute under question is valid, too, because federal law pertaining to motor carriers contains some exemptions or exclusions similar to those contained in the Utah Motor Carrier Act. Obviously there is a distinction between Federal and State legislation. The "due process" clause of the Fifth Amendment (Federal action), unlike the Fourteenth Amendment (State action), contains no equal protection clause. In *Sunshine Anthracite Coal Com-*

pany vs. *Adkins*, 310 U.S. 381, 84 L.ed. 1263, the court summarily rejected a "claim of discrimination" with the remark that, "the Fifth Amendment, unlike the Fourteenth, has no equal protection clause," citing *Steward Machine Company v. Davis*, 301 U.S. 548, 81 L Ed 1279.

The virility of *Smith v. Cahoon* is demonstrated by *Morey v. Doud*, 354 U.S. 457, 1 L.ed. 2d 1485, which involved a construction of the Community Currency Exchanges Act. The act required a state license from those issuing money orders in Illinois, and otherwise regulated their operations. The American Express Company was excepted from the provisions of the act and, for that reason the act's constitutionality was duly challenged. At 1 L.ed. 2d 1491 the court referred to *Smith vs. Cahoon* and stated:

• • • the act (in *Smith v. Cahoon*) excepted motor vehicles carrying specified products. This court held that the exception violated the Equal Protection Clause since the statutory purpose of protecting the public did not reasonably support a discrimination between the carrying of exempt products like farm produce and of regulated products like groceries. "Such a classification is not based on anything having relation to the purpose for which it is made." Ibid 283 U.S. 567.

• • •

The principles controlling in the *Smith* and *Hartford Co.* cases, both *supra*, are applicable here.

Appellants reference to *Railway Express Agency v. New York*, 336 U.S. 106, 93 L.ed. 533, to indicate a restricted scope of *Smith v. Cahoon*, fails to take cognizance of its strength when the opinion declares:

In (*Smith v. Cahoon*) * * * a motor vehicle regulation was struck down upon citation of many authorities because 'such a classification is not based on anything having relation to the purpose for which it is made.' If that were the situation here, I should think we should reach a similar conclusion.

The question before the court was the constitutionality of a city ordinance prohibiting advertising upon the business vehicles involved. This involved freedom of speech and is a far different situation than presented by the case at bar.

The exceptions of Section 54-6-12 are unreasonably discriminatory and, in your language in *Justice v. Standard Gilsonite Co.*, 12 Utah 2d 357, 366 P.2d 974, involve an "exclusion" which is "arbitrary and has no reasonable justification in fact." For convenience, portions of the opinion in the Justice case are set forth:

We have carefully reconsidered this problem and notwithstanding our previous holding in the Walker case, we conclude that there is no reasonable basis for exclusion of banks and mercantile houses from the penalty provisions of this act as distinguished from other employers which are included, and that such provisions are thus rendered unconstitutional.

* * *

* * * 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.

Respondent is unable to comprehend any proper justification reasonably related to the purposes of the Motor Carrier Act why trucks hauling oil, for instance, from the well-head to the refinery, or ores from the mine to the mill or market, should be subject to general regulation of the Appel-

lant Commission, while on the other hand, trucks hauling coal, lumber or logs to shipping point or market are exempt. Other illustrations are readily apparent by reading Section 54-6-12 and in comparing the exhibits attached to the Stipulation on file herein, between the parties (R.22-44). For instance, what is the basis for regulating "commercial papers" and "negotiable securities" used in a bank, (R.38, 43), but exempting "money and valuables" in an armored car? (Section 54-6-12(b)) This is certainly class legislation. The exceptions from general regulation of the motor carrier act result in improper class legislation. Said classifications do not bear a reasonable relationship to the objectives sought to be accomplished by this statute, as set forth in Chapter 6, Title 54.

Section 54-6-1 contains a catch-all definition to the effect that every motor carirer, for hire, is either a common or contract carrier, subject to general regulation. Section 54-6-2 purports to declare that all motor carriers, for hire, are subject to regulation of all rates and charges. A showing of public convenience and necessity, based upon a hearing and proper findings and conclusions of the Commission, is required by Sections 54-6-5 and -8. Nevertheless, Section 54-6-12 removes the necessity for certain favored carriers to comply with these requirements, whereas Respondent must comply or be subject to penalties and criminal citations.

The conclusions of the trial court are amply substantiated and the Motor Carrier Act is unconstitutional not only under the 14th Amendment of the Constitution of the United States of America and Article 1 Section 7, but also under similar provisions of the Utah Constitution.

For instance, as stated in *People vs. Western Fruit Growers*, Calif., 140 P.2d 13, 19:

In the leading case in this state on the question of the distinction between a general and special law, the court declared that a law is a general one when it applies equally to all persons embraced in a class founded upon some natural, intrinsic, or constitutional distinction; on the other hand, it is special legislation if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law. *City of Pasadena v. Stimson*, 91 Cal 238, 251, 252, 27 P. 604; and see *Ray v. Parker*, supra; *Jersey Maid Milk Products Co., Inc. v. Brock*, supra; *Frank v. Maguire*, 201 Cal. 414, 257 P. 515; *Martin v. Superior Court*, 194 Cal. 93, 227 P. 762; *Reclamation Dist. No. 1500 v. Riley*, 192 Cal. 147, 218 P. 762; *In re Sumida*, 177 Cal. 388, 170 P. 823; *Ex parte Stoltenberg*, 165 Cal. 789, 134 P. 971; *Matter of Miller*, 162 Cal. 687, 124 P. 427. Under this rule, it is apparent that the constitutional prohibition of special legislation does not preclude legislative classification but only requires that the classification be reasonable. *In re Willing*, 12 Cal. 2d 591, 86 P. 2d 663; *Barker Bros., Inc., v. City of Los Angeles*, 10 Cal. 2d 603, 76 P. 2d 97; *In re Weisberg*, 215 Cal. 624, 12 P. 2d 446; *Seaboard Acceptance Corp. v. Shay*, 214 Cal. 361, 5 P. 2d 882; *Watson v. Division of Motor Vehicles*, 212 Cal. 279, 298 P. 481; *Bacon Service Corp. v. Huss*, 199 Cal. 21, 248 P. 235.

Problems of classification under the California constitution are thus similar to those presented by the federal equal protection of the laws clause of the 14th Amendment. (Emphasis added)

The Utah Constitution also is similar.

POINT II

PLAINTIFF IS NOT ESTOPPED TO CHALLENGE THE CONSTITUTIONALITY OF THE MOTOR CARRIER ACT.

Section 78-33-2 UCA 1953, clearly authorizes a declaratory judgment proceeding to determine the constitutionality of a statute, as follows:

Any person * * * whose rights, status or other legal relations are affected by a statute, * * * may have determined any question of construction or validity arising under the * * * statute * * *.

In *PHI KAPPA IOTA Fraternity vs. Salt Lake City*, 116 Ut. 536, 212 Pac. 2d 177, and *Gray vs. Defa*, 103 Utah 339, 135 Pac. 2d 251, it has been held that declaratory relief is available to question the constitutionality of ordinances and statutes. Appellants completely ignore the effect of the Utah Declaratory Judgment Act and all of the cases cited in Appellants' Brief are to be distinguished. Cases under the Federal declaratory judgment act are not apposite because of the "case or controversy" requirements of the U.S. Constitution and due to the fact that the Federal act does not contain the following:

78-33-12 Chapter to be liberally construed. This chapter is declared to be remedial; its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

The annotation at 174 ALR 549, "Interest Necessary to Maintenance of Declaratory Determination of Validity of Statute or Ordinance," states the general rule here applicable:

Persons engaged in occupations or professions subject to regulation by statute or ordinance are generally considered to have a sufficient interest to maintain a declaratory judgment action testing the validity of the statute or ordinance. (Page 560; see also page 558.)

The cases cited by Appellants correctly state a rule which is not applicable here. There are well known exceptions to the rule relied upon by Appellants, although some courts have apparently differed, as recognized in 11 American Jurisprudence 771, "Constitutional Law, Section 124":

* * * The mere fact that one wishing to operate motor vehicles for hire on an interstate highway applies to the state officials for a certificate, as required by a state statute, does not prevent his assailing the statute as unconstitutional in case the certificate is denied. Similarly, securing a license under a statute does not estop one from questioning the validity of the statute, although as to this point some courts have reached a contrary conclusion. * * *

Courts are properly restrictively circumspect to require an adequate justicible interest in a party who challenges the constitutionality of a statute. As stated in 13 American Jurisprudence 393, "Licenses," Section 85:

Who May Question Validity or Administration of License Law — In accordance with the general rule that only those adversely affected by legislation can question its validity, the court will not consider an objection to the validity of a license law when made by one whose rights are not injuriously affected thereby, and one may not complain that a license law is invalid as against a class other than to which he belongs. * * *

When a statute, valid upon its face, requires the issue of a license or a certificate as a condition precedent to carrying on a business or following a vocation, *one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain of the invalidity of the statute.* (Emphasis added.)

In other words, only a person with sufficient interest has standing to raise a constitutional question. This rule is stated with plainness at 11 American Jurisprudence 755, "Constitutional Law," Section 111:

The general rule that in order to attack the constitutionality of a statute a person must show sufficient interest in himself applies with full force to attempted attacks upon the constitutionality of acts of the departments of government. It is an established principle that for a private individual to be entitled to invoke the judicial power to determine the validity of executive or legislative action, he must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action; it is not sufficient that he has merely a general interest common to all members of the public.

This rule is amplified and clarified at 11 American Jurisprudence 748:

One of the elementary doctrines of constitutional law, firmly established by the authorities, is that the constitutionality of a legislative act is open to attack only by a person whose rights are affected thereby. Before a law can be assailed by any person on the ground that it is unconstitutional, he must show that he has an interest in the question in that the enforcement of the law would be an infringement on his rights. Assailants must therefore show the applicabil-

ity of the statute and that they are thereby injuriously affected.

and in 11 American Jurisprudence 759:

A person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute.

It is submitted that to test the constitutionality of the Motor Carrier Act it would be extremely difficult, if not impossible to do so, unless one were a licensed motor carrier. This is indicated in 33 American Jurisprudence 393, "Licenses," Section 85:

When a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain of the invalidity of the statute or because of his anticipation of improper or invalid action in administration. * * * When, however, the statute is invalid upon its face and an attempt is made to enforce its penalties against such person in violation of his constitutional rights, the question of validity is necessarily presented.

An excellent annotation entitled "Right to Attack Validity of Statute, Ordinance or Regulation Relating to Occupational or Professional License as Affected by Applying for, or Securing License" appears at 65 A.L.R. 2d 660.

The quotation from 65 ALR 2d 664 in Appellants' Brief, beginning on page 6, omits the following portions of the material quoted in Respondent's Memorandum for the trial court (R. 63):

Excepting situations in which the attack is made in proceedings in which it is sought to obtain the license, it seems that a person is not, merely by applying for a license, precluded from attacking the validity of the licensing law. The mere fact that a license had been issued to a party without an application on his part for a license and that the party had complied with the conditions of the license has been held not to estop him from afterward attacking the validity of such condition.

While in some cases an attack on the validity of a licensing law as a whole has been held premissible, even though it was made by one who had obtained a license under the law, there are other cases indicating that such an attack may not be directed at the licensing law as a whole, but may be directed at specific provisions thereof. On the other hand, it cannot be said that an attack on specific provisions of the licensing law is always permissible; in particular, it has been uniformly held that a licensee may not attack the validity of provisions for fees or taxes contained in the licensing law. The courts are not in agreement as to whether a person is, by obtaining a professional or occupational license, precluded from attacking the validity of an administrative regulation issued under the licensing law. It has been uniformly held that the obtaining of a license does not prevent the licensee from challenging the validity of a provision of the licensing law enacted after his application for a license under an earlier statute has been granted.

It is of interest that a distinction is drawn when payment of a tax or license fee is involved as an issue. Appellants' inadvertently cut off the last portion of the quotation from 65 ALR 2d, and the period after the word "liti-

gant” should be a comma so that the last sentence reads as follows:

Some of the courts, in holding whether 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 supplied.)

At page 668 of 65 ALR 2d some of the cases are set forth in which an attack on the validity of the licensing law as a whole has been held proper against allegations of estoppel, even though made by one who had obtained a license under the law.

One of these is *Southern Motorways, Inc. v. Perry*, 39 Fed. 2d 145. This was a suit in equity challenging the constitutionality of the Georgia Motor Carrier Act and to enjoin its enforcement. This case apparently preceded enactment of the declaratory judgment acts, but it recognized some of the problems that exist through application of the estoppel doctrine here asserted by Appellants, when it concluded at page 148:

It would be unfortunate practically to have some of these carriers regulated through estoppel and others unregulated because of a successful attack upon the regulations.

Schwegmann Bros. vs. Louisiana Board of A.B.C., 216 La. 148, 43 So. 2d 248, 14 ALR 2d 680, puts this entire matter into proper perspective when, at pages 687 and 688 of 14 ALR 2d, the Court stated:

* * * appellants contend that as a licensee plaintiff has no right (it is estopped) to attack the statute under which it holds a permit.

This contention, in which we find no merit, has as its basis the doctrine of waiver or estoppel to assert the invalidity of a law. But essential to that doctrine is the element of voluntary action which is completely lacking here, resulting in the case falling within one of the frequently occurring exceptions.

In 11 American Jurisprudence verbo Constitutional Law, Section 124, it is said: "The most important and frequent class of exceptions to the general doctrine of waiver or estoppel to assert the invalidity of a law is that where a statute requires a duty which is mandatory in form, accompanied by penalties for failure to obey its provisions, or is otherwise coercive. In such cases the element of voluntary action essential to waiver or estoppel is absent * * *"

* * *

*True, the appellee here did not make application for its permit as a consequence of an injunction or a threatened seizure. A sort of coercion, however, attended the obtaining of it, for appellee was required by the statute to be licensed (if it operated) on pain of receiving criminal penalties and of the closure of its business. * * **

To hold applicable the doctrine of estoppel in a case of this kind would be to place the liquor dealer in a two-horned dilemma, from the choosing of either horn of which detriment might result to him. Thus, if he refuses to apply for the license, maintaining that certain statutory conditions surrounding its issuance violate his constitutional rights, he may be severely penalized; if, on the other hand, he secures the permit

he is denied the right of attacking the constitutionality of the statutory conditions.

But the law does not prevent such an attack. The United States Supreme Court has said specifically that the acceptance of a required statutory license does not impose on the licensee an obligation to respect or to comply with any provisions of the statute that are repugnant to the constitution. *Cargill Company v. State of Minnesota ex rel. Railroad & Warehouse Commission*, 180 U.S. 452, 21 S Ct 423, 45 L. Ed 619. And the soundness of this view cannot be denied. *The immunization of a law from constitutional attack by the simple expedient of requiring licenses from those in a business sought to be regulated clearly would be inharmonious with our American system of checks and balances.* (Emphasis added.)

In 1921, the Utah Supreme Court recognized this same principle in *Salt Lake City v. Industrial Commission*, 58 Utah 314, 199 Pac. 152, 153:

The fundamental distinction between these cases and the case at bar consists in the fact that the plaintiff in the instant case cannot be said to have accepted that provision of the law which it now asserts is unconstitutional. Neither has it received any benefit therefrom; hence it is difficult to see wherein the doctrine of estoppel can apply. In fact, it cannot be contended that plaintiff has voluntarily accepted any provision of the Industrial Act, for the act has been held to be compulsory.

The quotation from *Fahey vs. Mallonee*, 332 US 245, 91 L. ed. 2031, is quoted in full at the beginning of the annotation at 65 ALR 2d 660 referred to above. It should be noted that the quotation is contained in the *dissenting* opinion of Justice Brandeis, who concurred in the result on this one

point, and said quotation is pure dictum. *Ashwander vs. TVA*, 297 US 288, 348, 80 L ed 688, 711 contains the material quoted, but at page 698 of 80 L Ed, the majority opinion states:

The Government urges that the Power Company is estopped to question the validity of the Act creating the Tennessee Valley Authority and hence the stockholders, suing in the right of the corporation, cannot maintain this suit. (Citing cases.) *We think that the principle is not applicable here.* (Emphasis furnished.)

Salt Lake City Lines vs. Salt Lake City, 6 Ut 2d 428, 315 Pac 2d 859, is readily distinguished from the instant case. The case involved a revenue tax based on gross revenues contained in a Salt Lake City ordinance. The tax challenged by Salt Lake City Lines had clearly been a condition precedent to the issuance of the franchise inasmuch as the same ordinance approving the transfer to the plaintiff contained the license tax on intracity passenger transportation. The bus company was properly estopped.

All of the other cases are distinguishable on grounds already set forth herein. One of these, *Gregory vs. Hecke*, 73 Cal App 268, 238 Pac 787, has been distinguished by a later California Appellate Court in *People vs. Western Fruit Growers*, 129 Pac 2d 53, where, at page 54, it concluded its opinion as follows:

Plaintiff and the cross-defendants contend, further, that defendant here is estopped to dispute the validity of the license, relying upon the statement in *Gregory v. Hecke*, 1925, 73 Cal App 268, 284, 238 P 787, 794, that "One who elects to accept the benefits of a statute is estopped from denying its validity."

* * * It appears that over a considerable period of time, before this action was begun, defendant applied for and received such quotas and it is these acts which, its adversaries claim, estop it from objecting to the validity of the license. *But in so acting defendant was confronted with section 7 of the 1935 act which made is a misdemeanor*, punishable by a minimum fine of \$50 or a minimum imprisonment of 10 days, or by both, to violate any provision of a state license, and declared, "Each day any of the violations above referred to shall continue shall constitute a separate offense." The same penalty provision appeared in the 1937 act, Section 14. Under the statutory scheme defendant became subject to the license and therefore liable for its violation, upon its promulgation, without any affirmative act on its part. *Compliance with the license in the face of such penalties and under such circumstances does not work an estoppel to dispute its validity.* (Emphasis added.)

Section 54-6-18 Utah Code Annotated 1953 specifies that every violation of the Motor Carirer Act is a misdemeanor, and Section 54-7-25 stipulates that every violation of Title 54 "or of any order, decision, decree, rule, demand, or requirement, or any part or provision thereof, of the Commission * * * is a separate and distinct defense and, in case of a continuing violation, each day's continuance thereof shall be a separate and distinct offense."

Respondent is not estopped to challenge the constitutionality of the Utah Motor Carriers Act. On the contrary, only someone in its position has sufficient standing to complain, as indicated in the next Point.

POINT III

RESPONDENT HAS THE REQUISITE JUSTIFIABLE INTEREST TO CHALLENGE THE CONSTITUTIONALITY OF THE MOTOR CARRIER ACT AND BELONGS TO THE CLASS ADVERSELY AFFECTED BY THE DISCRIMINATORY EXCEPTIONS THERETO.

Appellants have correctly stated broad general principles, but Respondent submits same have not been correctly applied to the facts of this case.

In the first place, their entire argument is inapplicable, for the reason that Respondent is patently harmed by the unreasonable discriminations created by the exceptions from general regulation of motor carrier transportation, for hire, under the Motor Carrier Act. It should also be remembered that Respondent contends that the entire Motor Carrier Act is unconstitutional. How can anyone claim that a regulated motor carrier is not adversely affected? A more complete discussion of the differences between a regulated and an exempt motor carrier has been detailed under Point I of this brief. The discrimination extends further than merely to the freedom to haul certain commodities without the necessity of proving public convenience and necessity at a contested public hearing. It also includes the right to conduct business without constant bureaucratic regulation. (See sample list on page 7 of this brief of the differences between the two types of motor carriers.)

Appellants also contend that Respondent does not have sufficient interest to bring this suit. The principle involved

here is stated at 11 American Jurisprudence 755, "Constitutional Law," Section 111:

The general rule that in order to attack the constitutionality of a statute a person must show sufficient interest in himself applies with full force to attempted attacks upon the constitutionality of acts of the departments of government. It is an established principle that for a private individual to be entitled to invoke the judicial power to determine the validity of executive or legislative action, he must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action; it is not sufficient that he has merely a general interest common to all members of the public.

The statement on page 4 of Appellants' Brief that the Appellant Commission has assessed a penalty against Respondent in the amount of \$18,500.00 "for violations of the Motor Carrier Act," in and of itself is sufficient evidence that Respondent is in danger of sustaining injury under the Act. Appellants in their answer also admitted that they have caused criminal citations to be issued against Respondent and Respondent's employees for alleged failure to comply with the Motor Carrier Act. (R.3 Par. 7; R. 17, Par. 2).

An analysis of the cases relied upon by Appellants indicates the substantial difference on the facts between such cited cases and the case at bar:

Tileston v. Ullman, 318 US 44, involved a physician who attacked a statute which made unlawful the giving of advice in the use of contraceptives. The court correctly held that he had insufficient standing to raise this question, and that only the patients could challenge the statute.

In *Jeffrey Manufacturing Co. vs. Blagg*, 235 US 571, it

was held that the employer, who attempted to attack a Workmen's Compensation statute that applied only to employers with more than five employees, did not have sufficient standing to raise the question of an unconstitutional discrimination. The decision is clearly correct that only an excluded employee could raise this question.

State v. Hertz, Idaho, 238 Pac 2d 439, involved a criminal proceeding where the defendant was convicted of driving an overweight truck. Defendant challenged the constitutionality, not only of the provision under which he was convicted, but of other provisions of the penal code. The Court properly concluded that he did not have standing to attack the constitutionality of any section except the one under which he was being prosecuted.

Bode, et al v. Barrett, et al, 344 US 583, 97 L. ed. 567, involved the constitutionality of a gross weight tax statute. The Court held the plaintiff could not complain of nine provisions of the Act not directly affecting plaintiff.

None of authorities cited by Appellants is applicable to this case. Respondent clearly has standing to challenge the constitutionality of the Motor Carrier Act.

POINT IV

THE EXEMPTIONS OF THE MOTOR CARRIER ACT RENDER THE ENTIRE ACT UNCONSTITUTIONAL

The judgment of the trial court in declaring invalid *all* of Chapter 6, Title 54, UCA 1953, should be sustained for at least one of two reasons:

1. The legislature would not have enacted the statute without the exclusion of the enumerated classes.

2. The Motor Carrier Act has no severability clause inasmuch as it was repealed with the adoption of the 1953 Utah Code Annotated, but such a clause would not save this legislation.

The cases cited at 11 American Jurisprudence 855 are too numerous to be cited here. The proposition, however, bears repeating:

One important class of cases in which questions as to the severability of valid and invalid portions of an act and the determination of the legislative intent are involved consists of statutes containing invalid exceptions or provisos. *The general rule is that if such proviso operates to limit the scope of the act in such a manner that by striking out the proviso, the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid*, because such extended operation would not be in accordance with the legislative intent. (See *Frost v. Corporation Commission* 278 US 515, 73 L Ed 483 and other cases cited at 11 Am. Jur. 855) (Emphasis mine.)

Continuing at 11 American Jurisprudence 856:

In all such cases the exception of a particular group from the provisions of a general statute may have been a material consideration with the legislature in the passage of the act, and the courts may properly infer that it would not have been enacted if such group had not been excluded from its operation and protected from its provision.

Although the Utah Motor Act, when adopted in 1935 as Chapter 65, Laws of Utah, 1935, contained a severability

clause (Section 25), as quoted on page 40 of Appellant's Brief, this clause has been repealed and is no longer law. Amendatory acts have also contained severability clauses, but obviously these applied only to the particular acts then before the legislature. Section 68-1-9 UCA 1953 reads as follows:

The statute books consisting of ten volumes known as Utah Code Annotated 1953, duly certified by the Governor * * * is approved, adopted and legalized as to arrangement of said compilation by Title, Chapter, Article and Section for the purpose of amendment or repeal of, or additions to any statute compiled therein in whole or in part by reference thereto.

Respondent feels that Appellants are reading things into *Justice v. Standard Gilsonite Co.*, 12 Utah 2d 357, 366 P. 2d 974, which the case does not stand for.

Nowhere can Respondent see where the court was asked to determine whether the exclusion of more than "banks and mercantile houses" was unconstitutional. The opinion observes that the question presented is whether their exclusion makes the act arbitrary, discriminatory class legislation. Contrary to the argument of Appellants, the argument could also be made that there is no specific showing of evidence as to the evidence of banks and mercantile houses that the legislature is arbitrary in excluding them from the operation of the statute. Without knowing, this writer is of the opinion that the matter of banks and mercantile houses may have been the only objection urged upon the court, and that no more can or should be written into the decision.

CONCLUSION

It is submitted that the trial court's judgment contains no error and should be affirmed.

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