Counsel for Parties.

## McDONALD *v.* THOMPSON ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 55. Argued November 8, 9, 1938.—Decided December 5, 1938.

1. Section 206 (a) of the federal Motor Carrier Act, 1935, declares that no common carrier by motor vehicle subject to the provisions of the Act may engage in interstate commerce unless there shall have been issued by the Interstate Commerce Commission a certificate of public convenience and necessity authorizing the operation. A proviso requires that the Commission issue a certificate without further proof as to public convenience and necessity, where the applicant was "in bona fide operation" as a common carrier by motor vehicle on June 1, 1935, and since that time, over routes for which application is made; and the applicant in such case is authorized to continue operation pending the determination of the application. *Held* that, one who had been operating as a common carrier without the authority of the state commission—his application therefor having been denied prior to 1935 by an order subsequently upheld by the state court—had not been "in bona fide operation" within the meaning of the proviso. P. 266.
2. As the Motor Carrier Act is remedial and to be construed liberally, a proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms. P. 266.

95 F. 2d 937, affirmed.

CERTIORARI, *post*, p. 580, to review a decree which reversed, with directions to dismiss the bill, a decree of injunction restraining enforcement against petitioner of the Motor Truck Law of Texas.

*Messrs. Lloyd E. Price* and *T. S. Christopher* for petitioner.

*Messrs. William McCraw*, Attorney General of Texas, and *Albert G. Walker*, Assistant Attorney General, for respondents.

Petitioner in this suit claims "Grandfather Rights" based upon his unlawful operation upon the highways of the State of Texas. His "right-of-way" for his interstate operations has never been secured from the constituted authorities of the State, and all of his operations have been as a trespasser upon the state highways, and unless the state laws have been superseded the mere filing of his application for certificate would confer no new right upon him to continue his unlawful use of these Texas highways. *Town of Conway* v. *Atlantic Coast Line R. Co.*, 20 F. 2d 250, 259.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. Daniel W. Knowlton* and *E. M. Reidy* on behalf of the Interstate Commerce Commission, in support of petitioner; and by *Messrs. John E. Benton* and *Clyde S. Bailey* on behalf of the National Association of Railroad & Utilities Commissioners, in support of respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner brought this suit in the federal court for the northern district of Texas against the members of the Texas Railroad Commission and its enforcement officers to enjoin them from enforcing against him the state Motor Truck Law.[1] Respondents answered; there was a trial; the court made findings of fact, stated its conclusions of law, and entered a decree permanently enjoining respondents from interfering with petitioner's business in interstate transportation. The circuit court of appeals reversed and remanded with directions to dismiss the bill. 95 F. 2d 937. This Court granted a writ of certiorari.

Section 3 of the state law requires every carrier of property by motor for hire over public highways of the

[1] Acts Reg. Sess., 42d Leg., 1931, c. 277; Vernon's Tex. Ann. Civ. St., Art. 911b.

State to obtain from the Railroad Commission a certificate of convenience and necessity. Section 4 makes it the duty of the commission to regulate the transportation, to prescribe rules for safety of carriers' operations, and to supervise all matters affecting relationships between the carriers and the public.

The federal Motor Carrier Act, 1935,[2] § 206 (a), declares that no common carrier by motor vehicle subject to its provisions shall engage in interstate commerce unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing the operation. A proviso in that section declares that, if any such carrier "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935," over routes for which application is made and has so operated since that time, the commission shall issue the certificate without requiring further proof that public convenience and necessity will be served by the carrier's operation. Pending determination of the application, the applicant is authorized to continue operations.

Since some time before the passage of the Act, petitioner has been continuously using Texas highways in interstate transportation of property by motor vehicle for hire. Claiming to have been in bona fide operation as contemplated by the proviso, he made timely application to the Interstate Commerce Commission for a certificate authorizing him to continue to operate over the highways he has been using. The application is still pending, and petitioner insists that, notwithstanding state law, he is entitled to continue operations under the proviso. The question first to be decided is whether his claim of bona fide operation is well founded.

In May of 1934 he applied to the state commission for a certificate authorizing operation as a common carrier in

[2] Act of August 9, 1935, 49 Stat. 543, 551; 49 U. S. C., § 306 (a).

interstate commerce. July 14, 1934, the commission denied the application on the ground that the proposed operations would subject the highways named in it to excessive burden and endanger and interfere with ordinary use by the public. Petitioner appealed to the district court of Travis county and obtained a decree enjoining the commission from interfering with his operations. The court of civil appeals, January 8, 1936, reversed and dissolved the injunction. 90 S. W. 2d 581. Thus it appears that petitioner's operations have been without authority of the Texas commission and, unless within the proviso of the federal Act, without authority of federal law.

Exact definition of "bona fide operation" is not necessary. As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Comm'n,* 286 U. S. 299, 311. To limit the meaning to mere physical operation would be to eliminate "bona fide." That would be contrary to the rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. *Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, 208. *Ex Parte Public National Bank,* 278 U. S. 101, 104. There is nothing to justify rejection of these qualifying words. The expression, "in bona fide operation," suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, and in context implies recognition of the power of the State to withhold or condition the use of its highways in the business of transportation for hire. Plainly the proviso does not extend to one operating as a common carrier on public highways of a State in defiance of its laws.

As petitioner is not protected in his operation as a common carrier by the proviso, we need not consider to what extent, if at all, the federal Motor Carrier Act superseded the state Motor Truck Law, or any other question presented by petitioner.

*Affirmed.*

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## M. E. BLATT CO. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 98. Argued November 15, 16, 1938.—Decided December 5, 1938.

1. Special findings of fact made by the Court of Claims are not affected by any statement of fact, reasoning, or conclusion that may be found in its opinion. P. 277.
2. Rent is a fixed sum, or property amounting to a fixed sum. It does not include payments, uncertain as to amount and time, made by the lessee for the cost of improvements. P. 277.
3. Improvements made by the lessee, even when required by the lease, will not be deemed rent unless such intention is plainly disclosed. *Id.*
4. Improved real property was leased for use as a picture theater, for ten years beginning upon completion of improvements made and paid for partly by the lessor and partly by the lessee. The lease provided that improvements made by the lessee should become the property of the lessor, on expiration or earlier termination of the leasehold. The Commissioner of Internal Revenue estimated the depreciated values, at the end of ten years, of the lessee's improvements, omitting some which could then have no value, and added one-tenth of the total estimate to the lessor's income for the tax year next following the commencement of the lease. *Held* erroneous.

(1) The question presented is whether, under this particular lease, one-tenth of this "estimated depreciated value," at the end of the term, was income of the lessor in the first year of the term. There is nothing in the findings to suggest that cost of any improvement made by lessee was rent or an expenditure not properly to be attributed to its capital or maintenance account as distinguished from operating expense. They disclose no basis of value on which to lay an income tax or the time of realization of taxable