693.

MOTOR TRANSPORTATION COMPANY—HAULING BY FARMER MAY CONSTITUTE—HOW DETERMINED.

SYLLABUS:

Discussion of Section 614-84, *General Code.*

COLUMBUS, OHIO, July 30, 1929.

HON. G. G. JEWELL, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I am in receipt of your recent letter as follows:

"A number of requests have been made at my office concerning the meaning of House Bill No. 141, especially part of Section 614-84. The meaning of 'Motor Transportation Co.' is understood, but what these three words do not include is causing much controversy. Would your office be good enough to explain that portion of Section 614-84 (a) that does not fall within the definition of Motor Transportation Co.?

No doubt you have a number of similar requests about these amended Sections. Since Preble County is strictly agricultural, the right of farmers to haul and not violate any Section of House Bill No. 141 is giving rise to much speculation."

Section 614-84, General Code, until amended by House Bill No. 141, read as follows:

"(a) The term 'motor transportation company,' when used in this chapter, means every corporation, company, association, joint stock association, person, firm or co-partnership, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled vehicle not usually operated on or over rails, used in the business of transportation of persons or property, or both, as a common carrier, for hire, under private contract or for the public in general, over any public highway in this state; provided, however, that the term 'motor transportation company' as used in this chapter shall not include any private contract carrier, as defined in Section 614-2, and shall not include any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, in so far as they own, control, operate or manage a motor vehicle or motor vehicles used for the transportation of persons or property, or both, and which are operated exclusively within the territorial limits of a municipal corporation, or within such limits and the territorial limits of municipal corporations immediately contiguous thereto, or in so far as they own, control, operate or manage taxicabs, hotel busses, school busses or sightseeing busses, or in so far as they own, control, operate or manage motor propelled vehicles, the use of which is for the private business of the owners and the use of which for hire is casual and disassociated from such private business."

Amended Section 614-84, General Code, now reads as follows:

"(a) The term 'motor transportation company,' when used in this chapter, * * * *shall include, and all provisions of law regulating the business of motor transportation, the context thereof notwithstanding, shall apply to,*

every corporation, company, association, joint stock association, person, firm or co-partnership, their lessees, trustees, receivers or trustees appointed by any court whatsoever, when engaged * * * in the business of * * * *transporting* persons or property, or both, * * * *or of providing or furnishing such transportation service,* for hire, * * * for the public in general, *in or by motor propelled vehicles of any kind whatsoever, including trailers,* over any public highway in this state; provided, however, that the term 'motor transportation company' as used in this chapter * * * shall not include any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, in so far as they own, control, operate or manage a motor vehicle or motor vehicles used for the transportation of persons or property, or both, and which are operated exclusively within the territorial limits of a municipal corporation, or within such limits and the territorial limits of municipal corporations immediately contiguous thereto, or in so far as they own, control, operate or manage taxicabs, hotel busses, school busses or sight-seeing busses, or in so far as they own, control, operate or manage motor propelled vehicles, the use of which is for the private business of the owners and the use of which for hire is casual and disassociated from such private business." (Asterisks indicate deletions. Italics indicates new matter.)

It will be noted that the new law eliminates the definition of a private contract carrier, as defined in Section 614-2, and eliminates reference to such a classification. With the exception of this change, that portion of Section 614-84 (a) which you desire explained does not differ from its old form.

To lay down a definite measuring rule in an opinion of this nature is, of course, very difficult and possibly unwise, as the Supreme Court has frequently indicated that the facts in each case must determine whether or not the operator is a motor transportation company as defined by the law. This perhaps accounts for the elimination of the phrase and definition of "private contract carrier." If an operator constitutes a motor transportation company, as defined by the earlier portions of the section which you have no difficulty in construing, then he should, and must obtain a Certificate of Public Convenience and Nocessity for such operation, as provided by law. If he is not a motor transportation company, then it matters not whatever else he may be, so far as the requirements of the motor transportation law are concerned. The term "private contract carrier" thus loses significance.

In *Craig* vs. *Public Utilities Commission,* 115 O. S. 512, it was held that:

"The Legislature has broad powers in regulating public motor transportation over the highways throughout the state and may confer upon the Public Utilities Commission authority to determine whether or not the character of public transportation service constitutes such service a public utility service and such carrier a common carrier.

Where an owner of trucks employs the same partly in the prosecution of his own business and partly in hauling goods and merchandise for the public for hire, there is a partial dedication of such property to the public service, and, to the extent of such dedication and such use, the hauler is a 'common carrier'."

The reasoning in that opinion is so cogent that we quote from it at considerable length:

"In the case of *Hissem* vs. *Guran,* 112 O. S., 59, 146 N. E., 808, it was declared that a person who hauled merchandise for others over the highways of

the state, under private contracts with certain patrons, and did no hauling for persons other than those with whom he had such definite contracts, lacked some of the essential elements of a common carrier, and that it was not within the power of the Legislature to make a hauler a common carrier by legislative fiat, where no service of a public character was in fact being rendered.

The instant case is essentially different from the case of *Hissem* vs. *Guran.* Craig does hold himself out to the public as an applicant for patronage, and does dedicate his property, in some measure at least, to public use, and does receive a transportation revenue from such patronage, and does use the highways of the state as one of the facilities and instrumentalities of his business. To hold that Craig is a private carrier for no other reason than that he uses his trucks and equipment partly in his own business would have the result of completely nullifying the attempted regulation of bus and truck service. To avoid regulation, and the payment of taxes, and carrying insurance and other requirements now imposed, it would only be necessary for each holder to transact some business for himself and to use his equipment for that purpose.

The question involved in the instant case is one of legislative power to regulate bus and truck service. While the facts of this case indicate that the service in which Craig is employing his trucks might lack some of the elements of a strictly technical definition of a common carrier, the Legislature must be held to have an unusual latitude in regulating bus and truck service where the public highways are being employed. Busses and trucks could not render utility service except for the existence of improved highways. The state is investing each year millions of dollars in constructing and repairing and improving the highways, and one source of revenue is found in the taxation of busses and trucks used in public utility service. A liberal rule must therefore be applied in determining the power of the Legislature to provide rules and regulations for such operation."

Another leading decision on this question is *Breuer* vs. *Public Utilities Commission,* 118 O. S., 95, as follows:

"It is a question of law for the court to determine what constitutes a common carrier; but it is a question of fact whether one charged as a common carrier is within that definition and is carrying on his business in that capacity.

One who transports merchandise in motor vehicles over the highways of this state for hire and holds himself out to the public as being willing to serve the public indifferently to the limit of his capacity is a common carrier and subject to regulation as such though in each instance he makes a written contract before transporting the merchandise and refuses to carry for persons who are not responsible or who will not sign a written contract."

The other principal amendment in this Section 614-84, (a) consists of inserting the words "or of providing or furnishing such transportation service."

In this connection, attention is called to the case of *Motor Freight, Inc. vs. Public Utilities Commission of Ohio,* 120 O. S., 1. Paragraph 2 of the syllabus in that case is as follows:

"By the provisions of Sections 614-2 and 614-84, General Code, only a 'motor transportation company' as defined therein is subject to public regulation; such definition requires that the transportation company must own, control, manage or operate the motor vehicles used in transportation."

Again, on page 9 of that opinion, we find the following:

"One of the most potent reasons for the conclusions we have reached in this case is found in the fact that Motor Freight, Inc., does not own any of the motor vehicles employed in the transportation."

And on page 10, as follows:

"Our interpretation of the testimony taken before the commission is that the respondent did not own the equipment and did not operate the same; that it did not control or manage the equipment; that the owners of the motor vehicles were independent contractors; that respondent exercised no supervision or control over the vehicles or the persons who drove them; and that therefore this evidence does not bring the respondent within the meaning of the definition of a motor transportation company, as defined in Section 614-84, General Code."

This case having been decided on February 13, 1929, it is probable that the amendment to include operators who provide or furnish such transportation service was passed with the legislative intent of requiring regulation over such operations.

Other than the changes mentioned above, there is no substantial difference between the old Section 614-84 (a) and as now amended. Applying the tests laid down in the cases cited, and in the light of these changes, it should be possible from the facts in each case, to determine whether or not the operator is a motor transportation company, as defined by law.

I realize the difficulties encountered in attempting to determine whether farmers, who haul for their neighbors, are within the exceptions set forth in Section 614-84, supra. To determine this question, the particular business must be scrutinized in order to determine whether the use of the motor vehicles "for hire is casual." Synonyms for the word "casual", as found in Webster's International Dictionary, are: "fortuitous," "incidental," "occassional," "unforeseen," "unpremeditated," "contingent." Manifestly, the antitheses of these words would be "habitual," "continual," "regular," "to make a business of" and "according to design or plan." Accordingly, if a farmer is so engaged in hauling for hire, even though for his neighbors, with such regularity as to make such employment cease to be casual, he becomes a motor transportation company, and subject to the act. In my opinion, this does not necessarily mean that he must haul every day, but the regular recurrent use of his facilities, as his neighbors' demands require, might be sufficient to make the employment other than casual.

As I have heretofore stated, each case must be controlled by its specific facts, and no specific rule may be set forth which will govern in all cases.

Respectfully,
GILBERT BETTMAN,
Attorney General.

694.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN HOLMES COUNTY.

COLUMBUS, OHIO, July 30, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*