Kentucky Law Journal

Volume 20 | Issue 3 Article 7

1932

Constitutionality of City Ordinance

Richard C. Stoll
Fayette Circuit Court

CONSTITUTIONALITY OF CITY ORDINANCE

Requiring Jitney Busses to Execute Bonds.*

Fayette Circuit Court.

Mamie J. Fox, Etc. . . . . *Plaintiff,*

vs.—Opinion of the Court.

City of Lexington, Et Al. . . . . *Defendants.*

This action is submitted to me upon a motion for a temporary injunction to prevent the City of Lexington from enforcing that portion of an ordinance enacted December 26, 1925, which requires all persons operating a jitney bus over the streets of Lexington on a fixed schedule to execute a bond to indemnify against loss to any passenger who may be injured by the negligence of the driver of the jitney bus.

Taxicabs charging twenty-five cents (25c) or more, hotel busses and the like are exempted from the provisions of the ordinance.

Plaintiffs attack the validity of the ordinance on two grounds: (a) That it provides for an improper classification in that it puts jitney busses in one class; and (b) because of the premium required on the bond the operators can make no money.

Jitney busses are comparatively modern methods of transportation, having sprung up in our cities because of modern smooth surface streets, and because of the development of the gasoline engine. They are common carriers and, of course, like all common carriers, are subject to the police power of the State and of the municipality. Section 3094 of the Statutes gives the city exclusive control and power over the streets of the city; and while the original source of power over the streets and highways is in the State, yet the State may delegate this power to a municipality, which has been done in cities of the second class. *Owensboro* v. *Cumberland Telephone Co.,* 230 U. S. 58.

---

* This is the second of a series of certain of Judge Richard C. Stoll's opinions rendered while Judge of the Fayette Circuit Court. In many instances they discuss the constitutionality of statutes and questions of law not as yet passed upon by the Court of Appeals of Kentucky. The Kentucky Law Journal is indebted to Mr. Gayle Mohney who has assisted in selecting and editing them.

The city is also given power to regulate vehicles using the highway by Section 3058-2 of the Statutes. *Commonwealth* v. *Nolan,* 189 Ky. 34.

In the Act known commonly as the Auto Transportation Act, which will be found in Chapter 81 of the Acts of 1924, a classification somewhat similar to the classification in the ordinance in question is made. This Act was declared constitutional by the Court of Appeals in a case originating in this court. *Reo Bus Lines Co.* v. *Southern Bus Line Co.,* 209 Ky. 40.

The provision for a bond in the ordinance is for the protection of the traveling public. Realizing that jitney busses may be operated by people who might not be financially responsible, whose only property is the bus, which may be heavily mortgaged, the City of Lexington determined that these common carriers, using the streets of Lexington, should protect in some way the traveling public from the negligence of the operators of the jitney bus. If the operators of the bus should be guilty of the grossest negligence and by reason thereof injure or kill men, women and children, then a judgment for a substantial amount might be recovered against the owner or operator of the jitney, and if he had no property the judgment would be worthless and the injured party could recover nothing on the amount due to him. Then, again, financial responsibility for carelessness or negligence causes a person to be more careful, and it is to the interest of the city and of its inhabitants that the owners or operators of these common carriers be careful and prudent in their operation. So the portion of the ordinance in question, requiring the bond, is an exercise of the police power of the city. The requirement of a bond is not a license tax.

The case of *People* v. *Coolidge, Judge,* 50 L. R. A. 493, cited by plaintiffs, clearly points out the difference in the power to enact ordinances, which come under the police power, and those which do not. In that case a bond was required by persons who sold farm produce. The court held that this could not be done, for it was an unwarranted interference with the rights of a citizen to carry on a legitimate business, and it could find no support in the exercise of the police power of the city, and the court says:

"It is not like the liquor traffic which, under the decisions

of the court, is subject to the police power. . . . Nor is there anything in it requiring regulation as to hack drivers, peddlers, pawn shops and the like."

The case of *Reo Bus Lines Co.* v. *Southern Bus Line Co.*, 209 Ky. 40, seems to me to be decisive of the question raised in this case. In that case the court said:

"The act is assailed as being class legislation, in that it denies to certain persons the use of the highways unless they secure a permit from the commission, and that it tends to create a monopoly."

It is well established that a business affected with a public use may be regulated by the state. 6 R. C. L. pages 224-228 and notes.

The general principle applying to this class of cases is well stated in Tiedman on Limitations, section 93, and quoted with approval in *Ky. T. & T. Co.* v. *Murray*, 176 Ky. 593:

"'Whenever the business is itself a privilege or franchise not enjoyed by all alike, or the business is materially benefited by gift by the state of some special privileges to be enjoyed in connection with it, the business ceases to be strictly private, and becomes a quasi public business, and to that extent may be subjected to police regulations.'"

Public highways are public property, established, constructed and maintained at public expense for public use, and naturally fall under governmental control.

Unquestionably in the exercise of the police power the state may by general law regulate the use of such highways and the character of vehicles operated thereon. This is done by the state as agent for the people each and all of whom, subject to such regulations, have an equal right in the ordinary use and enjoyment of the highway.

But it was never contemplated that the highways should form a part of the capital stock of common carriers engaged in the transportation of persons or property for profit, or that the use of the highways should be donated to them for that purpose.

Clearly these companies have no vested or inherent right in the highways, and their unrestrained use thereof is equivalent to an appropriation of public property for private use, and it is within the power of the legislature to prohibit this use or to prescribe the terms upon which it may be exercised.

In adopting the latter course the act does not impinge on any constitutional provision. *Green* v. *San Antonio* (Tex.) 178 S. W. 6; *Hadfield* v. *Lundin,* 98 Wash. 657; *Catrona* v. *Wilmington,* 126 Atl. 658; Ex Parte Dickey, 76 W. Va. 576; *Gruber* v. *Commonwealth,* 125 S. E. 427; *Sheets Taxicab Co.* v. *Commonwealth,* 125 S. E. 431; *Taylor* v. *Smith,* 32 Va. 416; *Receiver* v. *District Court,* 98 Atl. 92.

In most of these cases the validity of city ordinances was attacked, the *Sheets* and *Gruber* cases applying directly to the Virginia Transportation Act, which is essentially similar to the one under consideration, but the same principle was involved in all, some of the conclusions being thus expressed:

"The right of a citizen to travel upon the highway and to transport his property thereon in the ordinary course of life and business differs radically and obviously from one who makes the highway his place of business and uses it for private gain in the running of a stage coach or omnibus; the former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual and extraordinary." Ex parte Dickey.

"So in this case, appellant has never had any vested right to use the streets of San Antonio to engage in the business of a common carrier of passengers for hire, and no right of his is infringed or invaded by the ordinance requiring certain things to be done in order to enter into business on the streets, which have at the expenditure of large sums been placed by the city in prime condition for automobile travel. The streets belong to the public, the city being its trustee, and no private individual or corporation has a right to use such streets for the prosecution of a business without the consent of the trustee and the compliance with the conditions upon which the permission to so use them is given." *Green* v. *San Antonio,* 178 S. W. 6.

"The streets and highways belong to the public. They are built and maintained at public expense for the use of the general public in the ordinary and customary manner. The state and city, as an arm of the state, has absolute control of the streets in the interest of public. No private individual or corporation has a right to the use of the streets in the prosecution of the business of a common carrier for private gain without the consent of the state, nor except upon the terms and conditions prescribed by the state or municipality as the case may be. The use of the streets as a place of business is accorded as a mere privilege and not as a matter of natural right.

". . . Since the use of the streets by a common carrier in the prosecution of its business as such is not a right, but a mere license or privilege, it follows that the legislature may prohibit such use entirely without impinging on any provisions either of the federal or state Constitutions.

"If any proposition may be said to be established by authority the right of the state in the exercise of its police power, prohibit the use of the streets as a place of private business or as the chief instrumentality in conducting such business must be held so established. Nor can it be questioned that the power to prohibit includes the power to regulate even to the extent that the regulation under given conditions

may be tantamount to a prohibition." *Hadfield* v. *Lundin*, 98 Wash. 657.

"No man has the right to use the public streets as a place wherein to carry on his private business. The streets are not constructed and maintained by the public for the purpose of supplying sites and facilities for carrying on private occupations. If it were otherwise vendors of goods might with justice protest against all attempts to exclude them from the streets in the prosecution of their various businesses, notwithstanding the rights of the traveling public were being interferred with and traffic thereby obstructed." *Catrona* v. *Wilmington*, 124 Atl. 658.

We have been cited to no authority to the contrary and feel sure that none exists. Aside from the principle above stated of public ownership of highways and the resultant right of governmental control, transportation companies included in the act are common carriers subject in themselves to governmental control, and taken in connection with the rapid development of motor transportation and the number of private vehicles using the same highways, governmental supervision is essential for the protection both of the passengers of the transportation companies and of the general public using the highways. The patrons are entitled to regular schedules, fixed transportation charges and safe equipages.

In the case of *Auto Transit Co.* v. *Fort Worth*, 182 S. W. 685, the court had before it for consideration an ordinance similar to the ordinance in question, and it answers almost every contention made by the plaintiffs in this action. The whole case may be read with interest, but I will only make one quotation from it:

"Nor does the fact that the plaintiffs herein are not in a position to comply with the terms and provisions of the ordinance under discussion, of itself, establish the invalidity or unreasonableness of such ordinance. It is true that the provision requiring a surety bond may necessitate the incurrence of an expense which the plaintiffs may not be able to bear, and that therefore they will be required to abandon the operation of their motor busses, but that in itself does not establish the unreasonableness or invalidity of the ordinance. Nor does the fact that plaintiffs will suffer a pecuniary injury by reason of the enforcement of said ordinance even tend to establish the truth of the contention that the ordinance is invalid. As said by Mr. Justice Brewer in the N. Y. & N. E. R. Co. Cases, cited

in *Grainger* v. *Jockey Club,* 148 Fed. 513, 78 C. C. A. 199, 8 Ann. Cas. 997:

'The truth is that the exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character.'

"In the Jacobson Case, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, Mr. Justice Harlan says:

'In every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.'

"In the Barbier Case, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, cited in the same opinion, Mr. Justice Field says:

'Though, in many respects, necessarily special in their character, they (statutory regulations) do not furnish just ground of complaint if they operate alike on all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' Fourteenth Amendment, U. S. Constitution.

"In conclusion we desire to say that, so far as we have been able to determine, the ordinance in question was authorized under the general police powers with which the charter vested the board of commissioners, as well as other charter provisions hereinbefore mentioned, and that we cannot say that the ordinance should be held invalid on any of the grounds urged, or that it contains any unreasonable terms and conditions, or is discriminatory in its nature."

The ordinance which was before the court in *Huston* v. *Des Moines,* 156 N. W., 883, was similar to the one in question, and was sustained. In that case the court said:

"Coming now to the ordinance passed by the city council in virtue of the statute, it is claimed the bond as fixed is prohibitive. If a bond may be required at all for the purpose of indemnifying the public, which, of course, means the individuals going to make up that public, else it means nothing, it is perfectly apparent that the bond, rather than being excessive, is, to say the least, inadequate in amount as compared with the

damage which may be done any day through the carelessness of an operator. If it results in keeping irresponsible people off the street, it is not an unmixed evil. That it will have a tendency to make drivers more careful in the operation of their machines needs no argument, and that it may be beneficial to the owner or operator himself is not beyond the pale of reason."

To the same effect see *Memphis* v. *Tennessee,* L. R. A. 1916 B, 1151, and *Commonwealth* v. *Noland,* 189 Ky. 34.

It was suggested by counsel in argument that jitney busses are a public necessity. That they are of convenience to the public is true, but safety and responsibility should never be sacrificed to convenience. If the traffic on jitney busses is not great enough to justify the payment of a comparatively small premium on a bond for the convenience of the public, it can be attributed to only two things—either the rate of fare is too low or not enough of the public patronizes them to justify their operation with safety to the public, and if this latter be true, if not enough people ride on them to justify the small increased expenditure for the bond, then, of course, they are not necessary to the public, for if they were and the rate of fare charged was adequate, then busses would earn enough to pay operating expenses, premiums on bonds and a reasonable profit. If this were not true, then the jitney bus is not as yet a practical method of transportation.

In accordance with the principle announced in these cases, supra, and particularly those announced in the case of *Reo Bus Lines Co.* v. *Southern Bus Line Co.,* supra, I am of the opinion that the portion of the ordinance requiring the bond which is before me, is constitutional and valid, and the temporary injunction will be refused.

The Clerk will make this opinion a part of the record.

RICHARD C. STOLL,
Judge.