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REGULATION OF MOTOR CARRIERS IN KENTUCKY

BY W. LEWIS ROBERTS*

There is probably no branch of public utility law that has developed more during the past decade than that governing motor carriers. In fact, the business of the motor carrier did not fill a very big place in the utility field ten years ago. There are many very interesting cases in the books today where the principles first announced in decisions concerning innkeepers and draymen, who professed to serve all who had goods to be hauled, have been applied to bus and truck lines. It seems worthwhile to examine the decisions of our own state to see what progress has already been made and to note the trend of development. We shall consider:

I. The right of the state to regulate.

II. The purpose of such regulation.

1. To limit competition.
2. To restrict the use of highways and streets.
3. To insure public safety.
4. To provide for satisfaction of legal liability.

III. State regulation of interstate motor carriers.

I. The Right of the State to Regulate Motor Carriers.

The Kentucky Court of Appeals has pointed out that the basis of the right of the state to regulate bus lines and other motor carriers is the police power.1 The legislature passed laws affecting motor carriers in 1920, 1924, 1926 and 1932. The statutory provisions in force at the present time are embodied in the enactment of the 1932 session.2

The limitations on the exercise of the police power to regu-

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2 Carroll’s Kentucky Statutes, Supplement, Sections 2739g-1 to 2739g-16.
late motor carriers are found in the federal constitution. The United States Supreme Court has held that state statutes that practically demand that private carriers shall be subjected to all the obligations of common carriers and shall really constitute themselves common carriers, are unconstitutional and beyond the power of the states. In the Duke case, a Michigan statute sought to impose all the obligations of common carriers to furnish indemnity bonds upon private contract carriers engaged in an interstate business. In the Frost case, a California statute imposed upon private contract carriers of citrus fruit between termini within the state, the obligation of first securing certificates of convenience and necessity. The view taken by the Supreme Court was that this was an attempt to convert a private motor carrier operating under a single contract into a common carrier by legislative fiat, and therefore a contravention of the due process clause of the Fourteenth Amendment. Doubtless had the constitutionality of the statute been urged on the ground of the right of a state to regulate or to limit the use of the highways, especially for highway protection and traffic safety, the act might have been sustained by the Supreme Court.

II. The Purpose of Such Regulation.

(1) To limit competition.

In Kentucky, as in nearly all the states of the Union, the commissioner of motor transportation can limit the number of motor carriers operating between any two termini by requiring them to secure from the commission a certificate of convenience and necessity as a condition precedent to doing business. This limitation on free competition is based upon the fact that experience has shown that the public interest is better served by such limitation. Free competition has proved wasteful in the past and has shown that in the long run the public has had poorer service. An over-investment of capital in competing lines has to be paid for by the public in the end.

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4 J. Byron McCormick, "The Regulation of Motor Transportation," 22 Cal. L. Rev. 24, at 64.

5 Kentucky Statutes (Carroll's Supp.), Sec. 2739j-3.

6 Pond, "Public Utilities" (3rd ed.), Sec. 903.
A surprisingly large number of questions requiring judicial attention arise under a statutory requirement of a certificate of convenience and necessity. Under the provision of the act of 1924, a company holding a permit to operate a bus line between two cities sought to enjoin one from operating five-passenger cars for hire between the same points without such a permit. As the act excepted from its provisions vehicles carrying five passengers or less, an injunction was denied. The act of 1926, however, extended the provisions of the 1924 act so as to include motor vehicles carrying five passengers or less, and this enactment was held constitutional. In one instance, an appellant contended that a permit should be granted where either convenient "or" necessary. The court rejected this contention and said that the words "necessary or convenient for the public" in the statute are to be read "necessary and convenient"—"or" is to be construed as "and". Where a certificate of convenience and necessity was awarded by the commissioner on the ground that such line would be a public convenience, without finding it was necessary, the Court of Appeals set the award aside. It must be both convenient and necessary for the public. The commissioner's refusal to grant a certificate to operate a bus line between two points already served by another line on the ground that it must be convenient and necessary for the public was sustained on appeal.

The commissioner of motor transportation is not authorized to grant certificates of convenience and necessity over a line served by two or more established lines except for insufficiency of present service and refusal on the part of the established lines to put on sufficient service. These established lines should be given a reasonable opportunity to put on sufficient service.

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4. *Cooper v. McWilliams and Robinson* (1927), 221 Ky. 320, 298 S. W. 961.
The insufficiency of the bonds given by the present holders of permits would not be sufficient grounds.\(^{12}\)

An injunction against taxicab operators forbidding picking up passengers at points on a route over which a bus company held a certificate of convenience, except at the stations of the operators of taxicabs or where prospective passengers had engaged taxicabs in advance, was sustained. The defendant taxicab operators had made a practice of driving along the bus line a few minutes before a bus was due and of picking up prospective passengers. This practice the court enjoined.\(^{13}\) Where a bus line company violates its permit in handling passengers between the termini of another bus line, the commissioner can revoke its permit; but where the offending company promptly made amendments and instructed its drivers not to handle passengers between such points, the commission was within its discretion in refusing to revoke the offending company’s permit.\(^{14}\) In fact, the commissioner of motor transportation has wide discretion in determining questions presented in granting and revoking permits. The mere disappointment of an unsuccessful applicant is no ground for disturbing the commissioner’s ruling.\(^{15}\)

(2) To restrict the use of highways and streets.

It is well settled that a state may regulate the use of its streets and highways. One writer on public utilities says, “In fact few legal propositions are more fully and firmly established than the right of the state in the exercise of its police power to regulate or prohibit the use of its streets and highways as places of private business, or as the chief instrumentality of conducting such business as that of operating motor vehicle systems for profit.”\(^{16}\) To the same effect are the words of the Kentucky Court of Appeals, “Indeed, a citizen may have, under the federal Constitution, a right to travel and to transport his property upon the highways by motor vehicle, but he has no right


to make the highways his place of business by using them as a common carrier for hire . . . Such use is a privilege which may be granted or withheld by the state in its discretion without violating any provision of the state or federal Constitution. The highways belong to the public, but are primarily for the use of the public in the ordinary way."

The size of trucks and maximum loads are prescribed by the statute. Such regulation has been upheld by the Court of Appeals. Also, city ordinances fixing maximum loads have been upheld under the act of 1926, which left the matter of maximum loads on city streets open to regulation by the cities involved. A municipality has the right to exact reasonable compensation for use of its streets, and a city is not precluded from exacting a license from a taxicab driver who operates on its streets by the fact that he has paid a license fee in an adjoining city.

It can require a license of a non-resident doing auto-trucking within the city, although it cannot require one of a non-resident who merely passes through the city. Such an ordinance, however, requiring licenses for motor trucks operated for "hire" or compensation, was held not to apply to a grocery truck used for the owner's individual business. And under the act of 1920, a city was allowed to impose a license tax in addition to an ad valorem tax on automobiles used for other than business purposes; the proceeds, the statute provided, should go into the municipal sinking fund. Under the act of 1924 it was held a local license could not be required of motor vehicles used in transporting passengers for hire, even though

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19 City of Ashland v. Ashland Supply Co. (1928), 225 Ky. 123, 7 S. W. (2d) 1087.
20 Town of Fleming v. Wright (1928), 225 Ky. 129, 7 S. W. (2d) 832.
24 Parke v. City of Louisville (1929), 229 Ky. 186, 16 S. W. (2d) 1034.
carrying five passengers or less. The statute had exempted them from local licenses.24

Bus lines were subject to franchise tax under the statute25 before the amendment of 1926 specifically mentioned them. This amendment was declaratory of the law then in force.26 An earlier decision, however, held that a transfer company was not within the provisions of this same section of the statute and, consequently, was not liable for the franchise tax. It did not come within the classification of common carriers covered.27 Where a bus line was operating in city streets without a franchise a street railway was allowed to maintain a suit as a taxpayer to restrain the operation of the bus line.28

Finally, an interesting question arose where taxing officials, having adopted the practice of issuing licenses for trucks based on manufacturers' ratings and having followed the practice for several years, attempted to change, without legislative enactment, and to base the license rates on actual carrying capacity. The court held they could not do this.29

(3) To insure public safety.

The statutory provisions requiring motor bus drivers to take examinations and forbidding their driving without having first secured a license granted after such examinations and also the provisions providing for inspection of busses and equipment, are to insure the safety of other users of the highways as well as the safety of passengers and freight transported.30

Furthermore, carriers of passengers and of freight may make rules for governing the conduct of their business, but the reasonableness of such regulations is for the court to determine and not for the jury. Such rules and regulations, however, must not conflict with those prescribed by the commissioner. The Court of Appeals sustained a rule by which seats were reserved for passengers who had reserved accommodations and

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24 Childress v. Riggs (1925), 212 Ky. 225, 278 S. W. 575.
25 Ky. Stats., Sec. 4077 (Carroll's 1930).
27 Commonwealth v. Louisville Transfer Co. (1918), 181 Ky. 305, 204 S. W. 92.
who were to be received enroute; also a rule not to take more passengers than could be seated in the bus.\textsuperscript{31}

(4) To provide for satisfaction of legal liability.

That the state may require that an applicant for a certificate of convenience and necessity shall take out liability insurance or give a bond to answer for injuries due to negligence in operating its busses is upheld as a valid condition to doing business. Municipalities under statutory authorization may also require insurance as a condition precedent to operating taxicabs or other motor vehicles for hire on its streets. This power has been passed upon several times by the Kentucky Court of Appeals.\textsuperscript{32} Furthermore, a federal district court, consisting of three judges, upheld the 1932 statute requiring a contract carrier to provide either insurance or bond protection for the public as a condition precedent to issuing a permit, and requiring contract carriers not to give unreasonable preference to patrons as compared with patrons of any common carrier.\textsuperscript{33} The court said it was controlled by the Supreme Court's decision in Sproles v. Binford\textsuperscript{34} where the principle was laid down "that the state has the right in such general motor vehicle regulations to foster a fair distribution of traffic as between the highways and the railroads, to the end that all necessary facilities shall be maintained and that the public shall not be inconvenienced by inordinate uses of the highways for purposes of gain."\textsuperscript{35}

III. State Regulation of Interstate Motor Carriers.

(1) Use of highways.

While the regulation of interstate commerce is vested by the Constitution in Congress, nevertheless, state regulation may and does affect interstate motor carriers. The limits within which the state may act are not clearly defined, and interesting questions are constantly arising in regard to such limits. The United States Supreme Court has held states may limit the size and weight of motor vehicles used on public highways, and

\textsuperscript{a} Brumfield v. Consolidated Coach Corp. (1931), 240 Ky. 1, 40 S. W. (2d) 356.


\textsuperscript{d} 286 U. S. 374, 52 S. Ct. 581, 76 L. Ed. 1167.

\textsuperscript{e} At page 882.
this is so even where operated over federal-aided highways. It is possible that the Supreme Court would sustain state legislation forbidding the use of its highways by common carriers altogether. The Supreme Court has held that a state may prescribe uniform regulations necessary for safety and order in respect to the operation of motor vehicles on its highways, including those moving in interstate commerce. The court held constitutional a statute providing that a non-resident owner of an automobile should appoint the secretary of state his attorney upon whom process might be served "in any action or legal proceeding caused by the operation of his registered motor vehicle within this state, against such owner." The court has also said that a state may impose as a condition precedent to the use of its highways, bonding and insurance requirements upon interstate carriers.

Two decisions of the United States Supreme Court have set limitations to the power of states to impose regulations on interstate commerce; Buck v. Kuykendall and Bush Co. v. Maloy, decided the same day. In the former case the state of Washington refused a certificate of convenience to one Buck over its highways, on the route between Seattle and Portland, Oregon, on the ground that the territory was adequately served. The Supreme Court held that the state of Washington could not restrict competition in interstate motor transportation. In the latter case a statute of Maryland prohibited common carriers of merchandise or freight by motor vehicle from using public highways over specified routes without a permit, and it was held unconstitutional as to a common carrier exclusively engaged in interstate commerce. In the first case the highways over which the applicant for a permit wished to operate were built.
with federal aid, but in the second they were not, so nothing turned on that fact. Mr. Justice McReynolds gave the dissenting opinion, basing his dissent upon the need of state regulation in the absence of federal legislation on the subject. Mr. Justice Brandeis, in speaking for the majority, conceded that a state might possibly deny the use of its highways to common carriers altogether; that the state may make provisions appropriate for securing the safety and convenience of the public in the use of its highways; that it may impose fees with a view both to raising funds to pay for construction and maintenance; and that it may limit the size and weight of vehicles and exclude unnecessary ones. However, in a very recent case, the Supreme Court, again speaking through Mr. Justice Brandeis, somewhat qualified its holding in these earlier cases and held that a state may refuse a certificate of public convenience and necessity to operate as a common carrier of property in interstate commerce over a certain route. The court assumed that there were other routes open to the applicant, since the duty to show the contrary rested upon him.43

Several times the Kentucky Court of Appeals has passed upon the right of the state to regulate the use of the state highways by interstate motor carriers. It has held that before an interstate carrier can engage in interstate business, the commission must find that public necessity as well as public convenience requires the granting of a permit.44 It has said that the state may restrain, prohibit, or condition a special and extraordinary use of the highways without violating any provisions of state or federal Constitution,45 and that a municipality under the statute of 1926 might compel a motor bus operator, even though engaged in interstate business, to pay a license, where he had not complied with that act and put himself within the provision providing exemption from local licenses.46 Also, where, under the same act, a taxi owner operating between two

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states had not applied for a certificate as a bus operator, the court said he should have been enjoined from engaging in every form of transportation along the bus route of the complainant partnership.47

A further limitation was pointed out by a three-judge federal district court, which held that the state commissioner of motor transportation could not limit an applicant for a certificate to engage in exclusively interstate business, to two interstate round trips per day instead of four, the number applied for, on the ground that additional trips would seriously affect safety of travel on the highway and seriously impair the road bed.48 Some states, including Kentucky, specify the routes of interstate motor carriers. This practice has been upheld in at least one state court.49

(2) Taxation.

Three interesting United States Supreme Court decisions bearing upon the right of a state to tax in the case of interstate motor carriers are, Helson v. Kentucky,50 Eastern Air Transport, Inc. v. South Carolina Tax Commission,51 and Nashville, Chattanooga & St. Louis Ry. v. Wallace.52 In the first, the Supreme Court reversed the ruling of the Kentucky Court of Appeals,53 sustaining a statute imposing a tax on gasoline consumed in operating a ferry on the Ohio river between points in Illinois and Kentucky. As three-fifths of the distance lay in Kentucky, the tax was imposed on three-fifths of the gasoline consumed. The statute was held unconstitutional, as it imposed a tax on an instrumentality of interstate commerce. Mr. Justice Sutherland, speaking for the Court, said:

"A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens the commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected."44

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50 (1929), 278 U. S. 245, 49 Sup. Ct. 112, 73 L. Ed. 311.
52 (1933) 288 U. S. 249, 53 Sup. Ct. 345, 77 L. Ed. 730.
54 At page 252.

K. L. J.—4
In the second case in upholding a special tax on the sale of gasoline made to an interstate air transport company for consumption in interstate carriage, Mr. Justice Hughes observed:

“A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the state may be subjected.”

The last case concerned a Tennessee tax upon gasoline brought into the state by a railroad company and stored there until used in interstate commerce. Mr. Justice Stone said:

“We cannot say that the tax is a forbidden burden on interstate commerce because appellant uses the gasoline, subsequent to the incidence of the tax, as an instrument of interstate commerce. Taxes said to burden interstate commerce directly when levied upon or measured by the operation of interstate commerce or gross receipts derived from it, are beyond the state taxing power.”

This was a tax upon gasoline in storage and “so was a part of the common mass of goods within the state, subject to local taxation.”

A note writer in the Yale Law Journal very nicely summarizes the power of a state to tax interstate motor carriers in these words:

“For state taxation imposed upon operators of vehicles engaged in interstate commerce by motor vehicle to be valid under the commerce clause of the Constitution, three general requirements must be met. The tax must be imposed for a proper purpose, it must be reasonable in amount, and it must not be discriminatory against interstate commerce.”

Where the fund raised by the tax is used in building or maintaining highways or for the expenses incurred in administering the highway department and does not place an undue portion of the burden on interstate motor carriers, the state taxing statute will be upheld. Furthermore, Mr. Justice Brandeis pointed out in Clark v. Poor that “since the tax is assessed for a proper purpose and is not objectionable in amount, the use to

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55 At page 341.
56 At page 267.
42 Yale L. Jour. 402.
which the proceeds are put is not a matter which concerns the plaintiffs (the carriers).”

CONCLUSION

Under its police power, the state may regulate the use of motor vehicles on its highways. It may require motor carriers to secure a certificate of public convenience and necessity and such permit is to be granted for the convenience and necessity of the public and there must not only be a convenience to the public shown, but a necessity. The driver for a motor carrier must secure a license to operate granted after an examination as to his fitness for such work. The commissioner may route such carriers and inspect the busses and trucks used. Such carriers may be taxed to raise funds for building and maintaining highways and may be required to furnish bonds or insurance to indemnify passengers, shippers or other users of the highways against damage from injuries sustained through the negligence of such carriers. Furthermore, competition between carriers may be limited, and taxicab drivers or other carriers may be enjoined from picking up passengers along the route assigned to a carrier under a permit, or may revoke a permit of another carrier who has violated his certificate of convenience. The state may also regulate or limit the size and weight of vehicles used on the highway.

The legislature may delegate the power to license or regulate the use of motor vehicles on its streets to a municipality. Before the recent statutes such regulation was delegated to the municipalities in Kentucky. A carrier of passengers or freight may make reasonable regulations governing the conduct of his business.

A state may make regulations affecting the use of its highways by interstate carriers, although the limits to which such regulation may be carried are not clearly defined. The court has said that a state might possible forbid the use of its highways to common carriers altogether. It may prescribe uniform regulations necessary for the safe and orderly use of its highways. The United States Supreme Court has said a state cannot deny an interstate carrier a certificate of convenience. It

*At page 557.*
has said it may deny the use of a specific route, however. Finally, a state may assess a tax on such carriers to make them bear their fair proportion of the expense of building and maintaining the highways.