

75 Mont. 240
Supreme Court of Montana.

STATE
v.
JOHNSON.

No. 5789.
I
Jan. 26, 1926.

Synopsis

Appeal from District Court, Lewis and Clark County; W. H. Poorman, Judge.

Samuel S. Johnson was charged with owning and operating an automobile, motor vehicle, and bus line for transportation of persons for compensation without license and without filing bond. Defendant's motion for directed verdict was sustained, and case was dismissed, and the State appeals. Reversed and remanded, with direction to grant the State a new trial.

West Headnotes (20)

- [1] **Automobiles** ➡ Supervision by Public Officers
Rules of Railroad Commission under Motor Vehicle Transportation Act must reflect will of Legislature (Laws 1923, c. 154).
- [2] **Automobiles** ➡ Constitutionality and Validity of Acts and Ordinances
Motor Vehicle Transportation Act *held* constitutional as not interfering with distribution of governmental power or delegating legislative power (Laws 1923, c. 154; Const. art. 4, § 1).
- [3] **Automobiles** ➡ Constitutionality and Validity of Acts and Ordinances
Motor Vehicle Transportation Act *held* not to permit Railroad Commission to exempt persons at will (Laws 1923, c. 154, § 1 [e]).
- [4] **Automobiles** ➡ Constitutionality and Validity of Acts and Ordinances
Motor Vehicle Transportation Act *held* not invalid as interference with carriage of mail (Laws 1923, c. 154).
- [5] **Automobiles** ➡ Constitutionality and Validity of Acts and Ordinances
Motor Vehicle Transportation Act not invalidated by exemption of police and hospital vehicles (Laws 1923, c. 154, § 1[f]).
- [6] **Automobiles** ➡ Constitutionality and Validity of Acts and Ordinances
Motor vehicle license fees presumed reasonable (Laws 1923, c. 154).
- [7] **Automobiles** ➡ Statutory Provisions
Motor Vehicle Transportation Act conditional offer of privilege (Laws 1923, c. 154).
- [8] **Automobiles** ➡ Issues, Proof, and Variance
Designations in statutory definition of motor vehicle *held* surplusage as to accused operating motor bus (Laws 1923, c. 154).
- [9] **Constitutional Law** ➡ Nature and Scope in General
Constitution of Montana is not a grant of, but a limitation on, powers of Legislature.
- [10] **Action** ➡ Persons Entitled to Sue
A defendant cannot question provisions of an act which do not apply to his case.
4 Cases that cite this headnote
- [11] **Constitutional Law** ➡ Separation of Powers

Motor Vehicle Transportation Act *held* constitutional as not interfering with distribution of governmental power (Laws 1923, c. 154; Const. art. 4, § 1).

- [12] **Constitutional Law** 🔑 Separation of Powers
In theory, Const. art. 4, § 1, dividing powers of government into three co-ordinate branches, effects an absolute separation of the legislative, executive, and judicial departments.

5 Cases that cite this headnote

- [13] **Constitutional Law** 🔑 Delegation of Powers
Inherent power of the Legislature to make laws cannot be delegated (Const. art. 4, § 1).

- [14] **Constitutional Law** 🔑 Carriers
Automobiles 🔑 Constitutionality and Validity of Acts and Ordinances
Motor Vehicle Transportation Act, allowing Railroad Commission to fix amount of license fee, *held* not delegation of legislative power (Laws 1923, c. 154).

1 Case that cites this headnote

- [15] **Automobiles** 🔑 Constitutional and Statutory Provisions
Constitutional Law 🔑 To State and Local Authorities
Motor Vehicle Transportation Act *held* constitutional as not delegating legislative power (Laws 1923, c. 154; Const. art. 4, § 1).

- [16] **Public Utilities** 🔑 Legislative and Judicial Powers and Functions
Constitutional Law 🔑 Executive Exercise of Statutory Authority as Encroaching on Judiciary
Act delegating to Railroad Commission regulation as to amount or surety bond of licensee *held* not to vest judicial power in commission (Laws 1923, c. 154).

- [17] **Automobiles** 🔑 Constitutional and Statutory Provisions

Constitutional Law 🔑 Particular Issues and Applications

Act regulating transportation for hire over highways by motor vehicles *held* not invalid as violating rights of property (Laws 1923, c. 154; Const.Mont. art. 3, §§ 3, 14).

- [18] **Constitutional Law** 🔑 Licenses, Permits, Franchises, and Other Privileges

Right to use state highways is not vested right, but is privilege or license.

2 Cases that cite this headnote

- [19] **Constitutional Law** 🔑 Police Power; Public Safety and Welfare

In exercise of police power, exemptions may be made even of classes, provided it is reasonable and applies equally.

1 Case that cites this headnote

- [20] **Constitutional Law** 🔑 Buses and Shuttle Services

Act regulating transportation for hire over highways by motor vehicles *held* not invalid as violating due process clause (Laws 1923, c. 154; Const.U.S. Amend. 14).

2 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

MATTHEWS, J.

Appeal by the state from an order and judgment of dismissal on a directed verdict.

The defendant, Samuel S. Johnson, was placed on trial upon an information filed in the district court of Lewis and Clark county charging that, between the 18th day of April and the 10th day of November in the year 1924, he did "own and operate between Helena and East Helena an automobile, motor vehicle, and bus line for the transportation of persons for compensation, * * * without first obtaining a license, * * * and without filing any bond with the Public Service Commission," etc.

The evidence adduced was rather meager; but three witnesses were called. The first, E. G. Toomey, testified that he was attorney for and secretary of the Board of Railroad Commissioners and in charge of its records; that it appeared therefrom that defendant had never applied for or had issued to him the required permit or license, and had never filed with the board any bond or indemnity insurance such as is required by law and by the rules of the board on the issuance of such permit or license. One Ed. Majors testified that he had on one occasion, during the period named, ridden from East Helena to Helena in defendant's vehicle, which he designated as "Mr. Johnson's truck"; that he asked defendant what the fare was, and, on being informed by defendant that it was one dime, paid that amount to defendant. The witness further testified that from 8 to 12 smeltermen rode in the truck at that time, who also paid the defendant a dime each, and that defendant was working at the smelter "off" and "on." C. Ollie Connor testified that he had ridden many times with defendant during the period stated; that "Mr. Johnson operated a bus with seats on the sides and a top over it;" that, while witness had ridden at times gratuitously, he generally paid 10 cents each way over the route; that he never asked defendant what the fare was but just handed him 10 cents. This witness further testified that the bus was usually filled with passengers, and that, at times, defendant could not accommodate all of those who wished to ride with him; that he took his passengers on at the Helena end near the corner of Sixth avenue and Main street, and at the East Helena end, at the smelter. On the cross-examination of Mr. Toomey, counsel for defendant "assumed" that the car driven by defendant was a one-ton or seven-passenger Dodge car, model of 1922.

The essential portions of the act under which the state proceeded in this case (chapter 154, Laws of 1923) are as follows:

"Sec. 1. * * * (c) The term 'transportation company' when used in this act mean every corporation, person * * * owning, controlling, operating, or managing any motor vehicle, motor truck, motor bus, * * * used in the business of transportation of persons or property or as a common carrier for compensation over any public highway in this state between fixed termini; * * * (e) the words 'for compensation' shall be construed to mean transportation of any person for hire in any motor vehicle; provided, that the Railroad Commissioners may exempt from the operation of this act the transportation of freight or passengers by motor vehicle in rural communities when not done on a commercial basis; (f) the term 'motor vehicle,' when used in this act shall mean any self propelled vehicle moving over the highway of this state, excepting road rollers, farm tractors, traction engines, fire extinguishing engines and police or hospital busses or ambulances; provided that every motor vehicle equipped with more than four wheels shall be declared to be a motor vehicle used in connection with a trailer or subtrailer.

Sec. 2. No corporation or person, as defined in section one of this act, * * * shall operate any motor vehicle, motor truck, motor bus, but trailer, semitrailer, or other trailer in connection therewith for the transportation of persons or property for compensation of [on?] any highway or public highway in this state except in accordance with this act."

Section 3 of the act authorizes the Railroad Commission to regulate such transportation.

Section 4 provides for the issuance of permits to operate, and prohibits such operation without first obtaining such permit or license, and authorizes the commissioners to fix terms and conditions to be imposed.

Section 5 empowers the commission to revoke permits under certain circumstances.

Section 6, as it existed at the time of the alleged offense, requires each person or corporation before commencing operations under such license to file with the commission a good and sufficient "surety company" bond, satisfactory as to sureties and conditions to the commission, "or liability insurance, in such a penal sum as the Railroad Commission *1076 may deem necessary to adequately protect the interests of the public, with due regard to the number of persons and amount of property involved, which * * * shall bind the obligators thereunder to make compensation for

injuries to persons or loss or damage to property resulting from the operation of such vehicles," etc.

Section 7 extends the power and authority of the commission under the Constitution and laws of the state relative to complaints, hearings, etc., to and over persons and corporations engaged in this method of transportation, and gives the same right of appeal from its orders as in such other matters.

Section 8 of the act provides for a graduated license fee, according to the number, weight, and size of the vehicle used, but not to exceed \$10 per annum, "for defraying the expenses of administration of this act and the regulation of the businesses herein described."

Section 9 makes the violation of any of the foregoing provisions, or of the orders, rules, decisions, or regulations of the commission a misdemeanor, and provides a penalty therefor.

Section 10 declares that the act shall not be construed to apply to commerce with foreign nations or among the several states, "except in so far as the same may be permitted under the Constitution of the United States, treaties made thereunder and the acts of Congress."

Section 11 declares that, if any part of the act is declared unconstitutional, such decision shall not affect the validity of the remaining portions, and that the Legislature would have passed such remaining portions irrespective of those portions which may be declared unconstitutional.

At the close of the state's case counsel for defendants stated: "Defendant moved for a directed verdict, * * * on the grounds and for the reason that the state has failed to produce evidence sufficient to prove the commission of a public offense under this law, or produce sufficient evidence to make a case to go to the jury.

The Court: The motion, coming at this time, is equivalent to a motion to dismiss on the ground that, as a matter of law, the evidence is insufficient to submit anything to the jury."

Thereupon, after stating its reason therefor, the court sustained the motion and dismissed the case.

As no appearance was made in this court by the defendant, we are not aided, in the determination of the questions involved, by the usual brief of the respondent, and, were it not for the

reasons given by the learned trial judge for his disposition of the case and the question treated in the brief filed by the Attorney General and counsel for the Board of Railroad Commissioners, we would be at a loss to know what matters are before us. From these sources it would seem that no contention was made that the state did not sufficiently prove the allegation of the information to the effect that defendant did, between the dates mentioned, operate some sort of a self-propelled vehicle for the transportation of passengers for compensation and over a regular route between fixed termini, but that the motion was sustained upon the following assumptions:

(1) That the act under consideration is unconstitutional, by reason of the fact that it attempts to delegate to an executive or administrative board or commission legislative and judicial functions, in that it: (a) Permits the Railroad Commission arbitrarily to exempt from its operation "anybody they please"; (b) to fix the amount of license fees required; (c) to fix the amount of the bond or indemnity insurance which shall be filed; and (d) to make rules and regulations governing the issuance of permits and the conduct of the business engaged in under such permit or license.

(2) That, if the act is constitutional, it is fatally defective, in that it cannot be determined therefrom what is meant by the term "motor vehicle" as defined therein.

(3) That the evidence is insufficient to warrant a submission of the case to the jury for the reason that the state failed to prove that the vehicle operated came within the purview of the statute by not proving that the vehicle in question was not those exempted.

In justice to the learned trial judge be it said that on the hearing it was frankly admitted that this is but a test case brought to determine the constitutionality of the act, and that it was immaterial which way it was decided, so long as the ruling preserved this question for appeal, and that thereupon the court announced that it was not necessary to waste any more time or expense upon the trial, as the appeal could be taken from an order of dismissal.

The constitutionality of the creation of the Railroad Commission (chapter 257, Rev. Codes 1921) and the authority of the state, in the exercise of its police power for the preservation of the lives and property of its citizens, to place transportation by motor vehicles, trucks, and busses, whether by common carrier or by individuals, under the supervision and control of such a commission are not here questioned. Similiar action has been taken in practically every state of the

Union, and has been universally upheld. *Buck v. Kuykendall*, 45 S. Ct. 324, 267 U. S. 307, 69 L. Ed. 623, 38 A. L. R. 286; *Hendrick v. Maryland*, 35 S. Ct. 140, 235 U. S. 610, 59 L. Ed. 385; *Kane v. New Jersey*, 37 S. Ct. 30, 242 U. S. 160, 61 L. Ed. 222.

[1] 1. The first question here presented is: Has the Legislature, in the enactment of chapter 154 above, kept within its constitutional bounds?

[2] Our Constitution is not a grant of, but a limitation upon, the powers of the *1077 Legislature. *State v. State Board of Equalization*, 185 P. 708, 186 P. 697, 56 Mont. 413.

“The state Legislature possesses all legislative power, except such as has been delegated to Congress and prohibited by the Constitution of the United States to be exercised by the United States, and such as is expressly or impliedly withheld by the state Constitution from the state Legislature.” 12 C. J. 805, and authorities there cited.

This rule is expressly approved and followed in *Mills v. Porter (Veto Case)*, 222 P. 428, 69 Mont. 325, 35 A. L. R. 592.

[3] We have in our Constitution no prohibition against delegation of legislative powers other than that contained in section 1 of article 4 hereinafter commented upon; but it is a fundamental principle of constitutional law that this inherent power cannot, in the broad sense of an abdication by the legislative body of its sole authority to make laws on any subject, be delegated. Locke on Civil Government, § 142; Cooley on Constitutional Limitations (6th Ed.) 137, and cases there cited. This fundamental principle is, then, an implied restriction upon the legislative department under the above rule and under our Constitution.

[4] Section 1, article 4, of the Constitution, provides:

“The powers of the government of this state are divided into three distinct departments: The legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this Constitution expressly directed or permitted.”

In theory, this section, common in substance, except in a few instances, to all state Constitutions, effects an absolute separation of the three departments of our government, “but, while such is the theory of American constitutional government, it is no longer an accepted canon among political scientists; it has never been entirely true in practice.” 12 C. J. 803; Cooley on Constitutional Law, 44; Story on Constitution of the United States, 525.

In *Brown v. Turner*, 70 N. C. 93, it is said:

“While it is true that ‘the executive, legislative and supreme judicial powers of the government ought to be forever separate and distinct,’ it is also true that the science of government is a practical one; therefore, while each should firmly maintain the essential powers belonging to it, it cannot be forgotten that the three co-ordinate parts constitute one brotherhood, whose common trust requires a mutual toleration of the occupancy of what seems to be a ‘common because of vicinage’ bordering the domains of each.”

That section 1, article 4, does not wholly prevent the exercise of functions of a nature belonging to one department by those administering the affairs of another is recognized in *State ex rel. Hillis v. Sullivan*, 137 P. 392, 48 Mont. 320, wherein Mr. Justice Sanner, speaking for this court, said:

“The separation of the government into three great departments does not mean that there shall be ‘no common link of connection, or dependence, the one upon the other in the slightest degree’ (1 Story’s Commentaries on the Constitution, § 525); it means that the powers properly belonging to one department shall not be exercised by either of the others. Constitution, art. 4, § 1. There is no such thing as absolute independence.”

He then cites numerous instances of the exercise of powers by one department which, from their nature, would seem to belong to another, but which are incidents to the proper discharge of the powers vesting in the department exercising them, or are reposed in the particular department as a matter of convenience in governmental affairs.

“While the power to make laws may not be delegated to a board or commission, * * * a certain policy or rule having been prescribed by statute, matters of detail in carrying out the executive duty of giving

effect to the legislative will may be left to boards or commissioners. The Interstate Commerce Commission is a conspicuous example of this rule.

See 12 C. J. 847, where many other examples, including that of railroad commissions and public service commissions, are given, and many cases recognizing the rule are cited.

In the practical administration of public affairs, the adoption of this rule is found necessary. It would be impossible to cover by a general statute all of the intricate details of modern public utilities requiring supervision and regulation, or to lay down hard and fast rules which would not work injustice in individual cases.

It is said by Henry C. Spurr in his work on the Guiding Principles of Public Service Regulation," vol. 1, p. 1, that-

"The present public service or utility commissions with their broad powers * * * were created because of the total or partial failure of the older forms of regulation."

These "older forms of regulation" are designated as (1) competition; (2) state control by direct legislation. It is said that such statutes were, of necessity, passed without knowledge of conditions affecting the individuals of classes, and were, therefore, "arbitrary, unscientific and often unfair. They were found to be inadequate. A Legislature cannot examine into the merits of individual cases." The spread of regulation by state commissions was rapid because it was based on scientific principles.

The same author in his work on "Motor Vehicle Transportation," p. 19, says:

"Regulation of automobile transportation may be direct by the state, through an act of the *1078 Legislature; or indirect, through municipalities or public service commissions, to whom the power to regulate has been delegated by the state. * * * The right of the state to regulate, either directly, or indirectly, through the agencies mentioned, is well established." *Memphis v. State ex rel. Ryals*, 179 S. W. 631, 133 Tenn. 83, L. R. A. 1916B, 1151, Ann. Cas. 1917C, 1056,

P. U. R. 1916A, 825; *Ex parte Dickey*, 85 S. E. 781, 76 W. Va. 576, L. R. A. 1915F, 840; *Auto Transit Co. v. Fort Worth* (Tex. Civ. App.) 182 S. W. 685; *Greene v. San Antonio* (Tex. Civ. App.) 178 S. W. 6; *Smith v. State*, 100 A. 778, 130 Md. 482.

In *Interstate Transit Co. v. Derr*, 228 P. 624, 71 Mont. 222, this court held that-

"It is within the province of the Board of Railroad Commissioners to whom the Legislature has delegated authority, to administer the act [now before us] and impose reasonable and impartial regulations in the use of our highways by persons engaged in, or purposing to engage in, the transportation of passengers and freight by automobile."

The question arose in that case, however, only incidentally, and the constitutionality of the act was not questioned, and was therefore not decided, as such a question will never be passed upon unless it has been raised. *Potter v. Furnish*, 128 P. 542, 46 Mont. 391.

For the reasons stated, and after an examination of the authorities generally, we conclude that chapter 154, Laws of 1923, neither violates section 1, article 4, of the state Constitution, nor the fundamental law that legislative power shall not be delegated, in granting to the Railroad Commission the power to impose reasonable and impartial rules and regulations for the conduct of the business to be regulated, and to determine matters of detail in carrying out the expressed legislative will.

[5] [6] 2. Nor does it violate section 3 or section 14 of article 3 of the state Constitution, nor the Fourteenth Amendment to the Constitution of the United States, securing to the people the right of acquiring, possessing, and enjoying property, and prohibiting the taking of private property for public use or without due process of law, for, while a citizen has the right to travel upon the public highways and to transport his property thereon, that right does not extend to the use of the highways, either in whole or in part, as a place of business for private gain. For the latter purpose no person has a vested right in the use of the highways of the state, but is a privilege or license which the Legislature may grant or withhold in its discretion, or which it may grant upon such conditions as it may see fit to

impose, provided the imposition applies impartially. *Hadfield v. Lundin*, 169 P. 516, 98 Wash. 657, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942; *Gizzardelli v. Presbrey*, 117 A. 359, 44 R. I. 333; *Cummins v. Jones*, 155 P. 171, 79 Or. 276; *Memphis St. Ry. Co. v. Rapid Transit Co.*, 139 S. W. 635, 133 Tenn. 99, L. R. A. 1916B, 1143, Ann. Cas. 1917C, 1045; *Packard v. Banton*, 44 S. Ct. 257, 264 U. S. 140, 68 L. Ed. 598.

[7] Such an act does not purport to be, and is not in fact, a regulation of the use of the highways, nor does it attempt to transmute a private carrier into a public carrier against his will by legislative fiat, but merely makes a conditional offer of a special privilege, which the offeree may accept or not, as he sees fit. He is not entitled to the privilege as a matter of right, and, if he would accept, he must do so subject to the conditions attached to the offer. *Frost v. Railroad Commission* (Cal. Sup.) 240 P. 26; *Buck v. Kuykendall*, above; *People v. Yahne* (Cal. Sup.) 235 P. 50.

We have, so far, dealt only with the general nature of the act as affecting its constitutionality.

[8] 3. The trial court expressed the opinion that this act permits the Railroad Commission to exempt from its operation persons conducting a transportation business in rural districts, and that, as the act operates only in rural districts, it permits the commission to “exempt anybody they please”; that the act is arbitrary and despotic, and would be no more drastic had the Legislature given the board power to do just as it pleased in so many words.

If, as a matter of fact, no standard of exemption is laid down in the act, and the matter is left wholly to the discretion of the commission as to who shall be exempted from its operation, the act is void. *People v. Klinck Packing Co.*, 108 N. E. 278, 214 N. Y. 121, Ann. Cas. 1916D, 1051; *Noel v. People*, 58 N. E. 616, 187 Ill. 587, 52 L. R. A. 287, 79 Am. St. Rep. 238; *Anderson v. Manchester F. Assur. Co.*, 60 N. W. 1095, 63 N. W. 241, 59 Minn. 182, 28 L. R. A. 609, 50 Am. St. Rep. 400; *Soliah v. Cormack*, 117 N. W. 125, 17 N. D. 393; *Peterson v. Lewis*, 154 P. 101, 78 Or. 641.

This criticism of the act is based on the proviso found in subdivision (e) of section 1 thereof. A careful examination of this proviso does not warrant the conclusion reached by the learned trial judge.

It is clearly the express intention of the Legislature to include within the prohibition of the act every person operating a

vehicle of the nature described for hire and as a regular business, on a commercial basis, between fixed termini, and to exclude from its operation those residing in rural communities who may occasionally carry either passengers or freight, with or without compensation, but not “on a commercial basis,” and not as a regular business. As to this exemption, no doubt those persons included in the exemption would not be subject to the provisions of the act had the Legislature been silent on the subject. Having *1079 spoken, no discretion as to those persons is lodged in the commission. The performance of the act required, i. e., the exemption of those falling within the proviso, affects the rights of third persons, and therefore the proviso is to be construed as though it read “must exempt” instead of “may exempt.” *State ex rel. Stiefel v. District Court*, 96 P. 337, 37 Mont. 298; *State v. Dotson*, 67 P. 938, 26 Mont. 311; *State ex rel. Interstate Lumber Co. v. District Court*, 172 P. 1030, 54 Mont. 604; *Dryer v. Director General, etc.*, 213 P. 210, 66 Mont. 299. The exemption, then, is of a distinct class, and all persons falling within that class are exempted by the act from its operation.

[9] It is well settled that, in the exercise of the police power of the state, exemptions may be made even of classes which, except for the exemption, might fall within the purview of the statute, provided such exemption is reasonable and applies equally to all persons or subjects within the class designated (37 C. J. 236, and cases there cited; *People v. Sisk*, 130 N. E. 696, 297 Ill. 314), and, so long as the above rules are observed, it is immaterial that the classification is not scientific (*Stewart v. Brady*, 133 N. E. 310, 300 Ill. 425).

[10] 4. It is suggested in the record that the defendant was, during the period covered by the information, under a contract to carry United States mail, and that, as the statute does not exempt such carriers, it is invalid as an interference with the federal government. This contention was, at least impliedly, disposed of in the case of *Interstate Transit Co. v. Derr*, above. It was directly determined adversely to the position taken in *State v. Price*, 210 P. 787, 122 Wash. 421, and again in the state of Washington, while it was held that such an exemption did not render the act void (*State v. Seattle Taxicab Co.*, 156 P. 837, 90 Wash. 416), the court expressed the opinion that the act was not capable of a construction which would permit the carrier of United States mail to operate as a carrier of passengers or freight for hire without complying with the provisions of the act; and in Idaho a “motor transportation act” was held invalid because it did exempt from its operation hotel busses operating solely between hotels and trains and auto vehicles used in carrying the United States mail on “star routes,” thus permitting such exempted vehicles to

operate in violation of the provisions governing the carriage of passengers and freight for hire in connection with the exempted business. [State v. Crosson](#), 190 P. 922, 33 Idaho, 140.

The complete answer to this contention is that the transportation of passengers or freight for hire is an independent business having nothing to do with the carriage of the mail, and the regulation and control of the former cannot in any manner interfere with the transportation of the mail. All that was necessary in order that defendant might escape liability under this act was for him to proceed with his mail route and refuse to accept passengers for transportation for hire, as his contract for carrying the mail does not come within the definition of either passengers or freight. See [Buck v. Kuykendall \(D. C.\)](#) 295 F. 197.

[11] What is here said concerning motor vehicles used in carrying mail applies as well to those exemptions contained in subdivision (f) of section 1 of the act. The exemption is of a class of transportation not falling within the prohibition of the statute, and the exemption is not capable of a construction which would permit police or hospital busses or ambulances to carry passengers on a commercial basis, in the sense that such carriage is prohibited without first obtaining a license in the act before us, and such exemption does not therefore affect the validity of the act.

[12] 5. This act fixes a maximum fee for the license required of but \$10 per annum, and leaves to the commission the fixing of the amount, within the limit prescribed, to be paid by each licensee. This is not a delegation of legislative power. That power was exercised when the statute declared that such business should not be carried on without first procuring a license, and the limit within which the commission could fix the rate was set. It is akin to the power given by Congress to the Interstate Commerce Commission, which is upheld by the Supreme Court of the United States. [Interstate Commerce Commission v. Goodrich Transit Co.](#), 32 S. Ct. 436, 224 U. S. 194, 56 L. Ed. 729.

Owing to the diversity of vehicles to be used and their divergent effect upon the surface of the highways to the amount of business transacted varying in each instance, justice and fair dealing require a more or less elastic scale of fees to be charged for the privilege of conducting such business, and this detail can best be handled by a board or commission so situate that it can inquire into the circumstances of each applicant. Any attempt on the part

of the Legislature to meet all conditions which might arise would, of necessity, result in regulation which would be "arbitrary, unscientific, and unfair."

[13] In the absence of any showing to the contrary, the license fees required, as fixed by the act, and the rules, regulations, or requirements of the commission, must be presumed to be reasonable. [City of Bozeman v. Nelson](#), 237 P. 528, 73 Mont. ---.

[14] 6. The next contention suggested is that the act, in granting authority to the commission to fix the amount of the bond required, vests judicial power in that body.

As in the case of the license fee, here the Legislature has itself made the law by requiring *1080 the filing with the commission of a good and sufficient surety company bond, or indemnity insurance, and again has left the regulation as to the amount of such bond or insurance to the discretion of the commission, but in this instance neither maximum nor minimum is fixed. In this our act differs from like acts in most of the states where at least a maximum amount is fixed. The only act similar to our own in that respect which we have been able to find is that of Massachusetts. There, by chapter 159, General Laws of Massachusetts, the Legislature granted to all incorporated cities and towns the power to regulate motor transportation within the limits of the cities and towns and those passing through such limits and operating over routes with fixed termini, even though they do not take on or discharge passengers within such limits, and granted to the cities and towns the right to delegate such regulation to a board, officer, or commission. Section 46 of the above chapter requires that the licensee must deposit, with the town treasurer, security by bond or otherwise, running to the town treasurer, and approved by him and the licensing board or commission, in such sum as the licensing authority may reasonably require. As here, neither maximum nor minimum was fixed by the act. Certain towns delegated to the police commissioner thereof the administration of this law. The constitutionality of the act was attacked, but the Supreme Judicial Court of Massachusetts held against the contention of defendant: [Commonwealth v. Slocum](#), 119 N. E. 687, 230 Mass. 180; [Commonwealth v. Theberge](#), 121 N. E. 30, 231 Mass. 386. In the latter case the court said:

"One purpose of the statute, if not the main one, was the protection from injury of persons properly using the public ways; the Legislature well may

have considered that one frequent and serious cause of danger is the reckless or careless automobilist rushing through country towns. The town did not exceed the power given to it by the statute in adopting the regulation in question. Nor can the regulation be condemned as an unreasonable exercise of the power delegated. * * * The bond of \$2,500 cannot be condemned as unreasonable in amount, in view of the fact that it is designated to furnish security for injuries to person or property, or damages for death, caused by the negligent or unlawful act of the principal named in the bond or his agents or servants.”

Confronted with the necessity of the regulation of this rapidly increasing mode of transportation and the impossibility of adequately protecting the public by general legislative enactments, the details of classification and regulatory requirements are generally left by the legislative bodies of the several states to such commissions as ours, or those of like character, and such action is upheld by the court as a proper and constitutional method of meeting the new conditions arising, and to be neither a delegation of the powers of one department of the government to another, nor class legislation. *Nolen v. Reichman* (D. C.) 225 F. 812; *Lutz v. New Orleans* (D. C.) 235 F. 978, affirmed (C. C. A. 5) 237 F. 1018, 150 C. C. A. 654; *Jitney Bus. Ass'n v. Wilkes-Barre*, 100 A. 954, 256 Pa. 462; *West Sub. Transportation Co. v. Chicago, etc., Co.*, 140 N. E. 56, 309 Ill. 87; *Western Ass'n v. Railroad Commission*, 162 P. 391, 173 Cal. 802, 1 A. L. R. 1455; *Huston v. Des Moines*, 156 N. W. 883, 176 Iowa, 466; *Cummins v. Jones*, 155 P. 171, 79 Or. 276; *Desser v. Wichita*, 153 P. 1194, 96 Kan. 820, L. R. A. 1916D, 246; Ex parte Dickey, above.

[15] The rules and regulations promulgated and enforced by the commission must, however, be reasonable and lawful, reflecting the expressed will of the Legislature, and within the discretionary power vested in the commission. Such a commission has no arbitrary power. *Public Utilities Commission v. Smith*, 131 N. E. 371, 298 Ill. 152. If the rules and regulations adopted violate the above rules, the persons affected thereby are not without recourse or relief, as under the act an appeal lies to the courts from the rulings and orders of the commission.

[16] 7. The next contention raised is that the definition of “motor vehicle” contained in subdivision (f) of section 1 of the act is indefinite.

Why the Legislature sought to define the term is not clear. The act prohibits the operation not only of a “motor vehicle” but also of any motor truck or motor bus, and no attempt is made to define either of the latter terms.

[17] Here the information charges the defendant with the operation of an automobile, motor vehicle, and motor bus, using the terms interchangeably, and it would seem that proof that he did operate any one of the prohibited conveyances would be sufficient to establish his guilt. If the term “motor bus” applied to his conveyance, the remaining designations may be treated as surplusage, and it is immaterial what the definition of “motor vehicle” may be. A defendant cannot question provisions of an act which do not apply to his case. *People v. Beak*, 126 N. E. 201, 291 Ill. 449.

However, the definition of “motor vehicle” includes “any self propelled vehicle moving over the highway of this state,” with certain exceptions, and should be readily understood and construed, except as to the proviso that “every motor vehicle equipped with more than four wheels shall be declared to be a motor vehicle used in connection with a trailer or subtrailer.” We will agree with the trial judge that this proviso is incapable of accurate construction. It was probably included out of an abundance of caution to prevent the evasion of the law by the attachment to a four-wheeled car of some sort of *1081 permanent fixture supported by one or more wheels. But, as the act applies to all motor cars, trucks, or busses, except those exempted, whether operated as a single conveyance or with a trailer or subtrailer attached, it is immaterial what, if any, meaning the proviso has.

[18] 8. The final contention is that the state did not prove that the vehicle in question was not one such as is exempted from the operation of the act. This contention is without merit. An exception need not be negated, unless it is a constituent part of the offense. *State v. Tully*, 78 P. 760, 31 Mont. 365, 3 Ann. Cas. 824; *Territory v. Burns*, 9 P. 432, 6 Mont. 72; *State v. Big Sheep*, 243 P. 1067 (decided January 26, 1926, and not yet [officially] reported).

For the reasons stated, the judgment appealed from is reversed and the cause remanded to the district court of Lewis and Clark county, with direction to grant the state a new trial.

Reversed and remanded.

All Citations

CALLAWAY, C. J., and HOLLOWAY, GALEN, and STARK,
JJ., concur.

75 Mont. 240, 243 P. 1073



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Negative Treatment

Negative Citing References (1)

The KeyCited document has been negatively referenced by the following events or decisions in other litigation or proceedings:

Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by	 1. Bacus v. Lake County MOST NEGATIVE 354 P.2d 1056 , Mont. Taxpayer's action to test constitutionality of statute providing for the creation of and management of health districts. From and adverse judgment by the Fourth Judicial District...	Aug. 12, 1960	Case		—

Citing References (42)

Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by NEGATIVE	 1. Bacus v. Lake County 354 P.2d 1056, 1062 , Mont. Taxpayer's action to test constitutionality of statute providing for the creation of and management of health districts. From and adverse judgment by the Fourth Judicial District...	Aug. 12, 1960	Case		—
Cited by	2. Powder River County v. State 60 P.3d 357, 380+ , Mont. TAXATION - Real Property. Department, in researching and drafting bill, did not violate separation-of-powers doctrine.	Nov. 21, 2002	Case		—
Cited by	 3. Coate v. Omholt ¶ 662 P.2d 591, 594 , Mont. State auditor appealed from judgment of the First Judicial District Court, Lewis and Clark County, Peter G. Meloy, J., declaring unconstitutional two statutes imposing sanctions on...	Apr. 28, 1983	Case		—
Cited by	4. State v. Kirkland 602 P.2d 586, 590+ , Mont. Defendant was convicted in the Thirteenth Judicial District Court, Yellowstone County, Charles Luedke, J., of aggravated assault, and he appealed. The Supreme Court, Haswell, C....	Nov. 07, 1979	Case		—
Cited by	 5. State v. Azure 591 P.2d 1125, 1132 , Mont. Defendant was convicted before the First District Court, Lewis and Clark County, Gordon R. Bennett, J., of attempted deliberate homicide, and he appealed. The Supreme Court,...	Mar. 16, 1979	Case		—
Cited by	6. State v. Booke 583 P.2d 405, 409 , Mont. Defendant was convicted before the District Court, Thirteenth Judicial District, Carbon County, Robert H. Wilson, P. J., of two counts of attempted mitigated deliberate homicide,...	Aug. 21, 1978	Case		—
Cited by	 7. State ex rel. Judge v. Legislative Finance Committee and Its Members 543 P.2d 1317, 1321 , Mont. Governor brought original proceeding seeking declaratory relief as to constitutionality of several legislative enactments establishing and empowering defendant Legislative Finance...	Dec. 19, 1975	Case		—
Cited by	 8. State v. Andre ¶ 54 P.2d 566, 568 , Mont. Appeal from District Court, Granite County; R. E. McHugh, Judge. Peter Andre was charged by information with unlawfully keeping, giving, and consuming intoxicating liquors in a...	Jan. 31, 1936	Case		—

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	<p> 9. State ex rel. Normile v. Cooney ¶¶ 47 P.2d 637, 643 , Mont.</p> <p>Original proceeding by the State of Montana, on the relation of John Normile, on his own behalf and on behalf of all others similarly situated, and another against F. H. Cooney, as...</p>	July 10, 1935	Case		—
Cited by	<p>10. State v. Healow 38 P.2d 285, 286 , Mont.</p> <p>Appeal from District Court, Park County; Benjamin E. Berg, Judge. Francis Healow and F. B. Kemp were convicted of violation of chapter 184, Laws of 1931, and they appeal. Affirmed....</p>	Dec. 01, 1934	Case		—
Cited by	<p> 11. Barney v. Board of Railroad Com'rs ¶¶ 17 P.2d 82, 85 , Mont.</p> <p>Appeal from District Court, Fergus County; John C. Huntoon, Judge. Suit by Maynard N. Barney against the Board of Railroad Commissioners of the State of Montana and others....</p>	Dec. 19, 1932	Case		—
Cited by	<p> 12. Stoner v. Underseth 277 P. 437, 441 , Mont.</p> <p>Appeal from District Court, Lewis and Clark County; Wm. L. Ford, Judge. Action by George J. Stoner against Theodore Underseth and others. From a judgment for plaintiff, defendants...</p>	May 08, 1929	Case		—
Cited by	<p> 13. Northern Pac. Ry. Co. v. Bennett 272 P. 987, 991 , Mont.</p> <p>Appeal from District Court, Missoula County; Theodore Lentz, Judge. Suit by the Northern Pacific Railway Company against E. W. Bennett for an injunction. From a judgment for...</p>	Dec. 27, 1928	Case		—
Cited by	<p>14. Willis v. Buck ¶¶ 263 P. 982, 984 , Mont.</p> <p>Appeal from District Court, Sanders County; Asa L. Duncan, Judge. Action by C. M. Willis against J. G. Buck and others. Judgment for plaintiff, and defendants appeal. Affirmed.</p>	Feb. 04, 1928	Case		—
Cited by	<p>15. State v. Flagg 242 P. 1023, 1024+ , Mont.</p> <p>Appeal from District Court, Flathead County; C. W. Pomeroy, Judge. R. P. Flagg was accused of violating the statute regulating transportation for compensation over public highways...</p>	Feb. 18, 1926	Case		—
Cited by	<p>16. Harrison v. Big Four Bus Lines 288 S.W. 1049, 1050 , Ky.</p> <p>Appeal from Circuit Court, Harlan County. Action by John Harrison and others against the Big Four Bus Lines. Judgment for defendant, and plaintiffs appeal. Affirmed.</p>	Dec. 10, 1926	Case		—

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	17. State v. Le Febvre 219 N.W. 167, 171+ , Minn. Appeal from District Court, Itasca County; B. F. Wright, Judge. Application by Andrew J. Le Febvre to the Railroad and Warehouse Commission for a certificate of public convenience...	Apr. 13, 1928	Case		—
Mentioned by	18. Porter v. Investors' Syndicate 53 S.Ct. 132, 133 , U.S.Mont. On rehearing. Former opinion, in 286 U.S. 461, 52 S.Ct. 617, 76 L.Ed. 1226, which reversed decree in 52 F.(2d) 189, affirmed.	Dec. 05, 1932	Case		—
Mentioned by	19. Matter of Montana Pac. Oil and Gas Co. 614 P.2d 1045, 1048 , Mont. Oil and gas producer appealed from an order of the District Court, Toole County, R. D. McPhillips, J., which denied its petition to obtain orders requiring clerk of court to...	July 23, 1980	Case		—
Mentioned by	20. Douglas v. Judge 568 P.2d 530, 534 , Mont. In a declaratory judgment action challenging the constitutionality of Chapter 533, Laws of 1975, an act providing for the development of renewable natural resources, the First...	Aug. 22, 1977	Case		—
Mentioned by	21. City of Missoula v. Missoula County 362 P.2d 539, 541 , Mont. Action to determine constitutionality of statute creating county zoning commission having power to create zoning districts. From a judgment of Fourth Judicial District Court,...	June 12, 1961	Case		—
Mentioned by	22. State v. Cook 276 P. 958, 963 , Mont. Appeal from District Court, Lewis and Clark County; W. H. Poorman, Judge. Action by the State, on the relation of William G. Brooks, against Andrew B. Cook. From a judgment against...	Apr. 19, 1929	Case		—
Mentioned by	23. Arneson v. Denny 25 F.2d 988, 991 , W.D.Wash. In Equity. Suit by E. A. Arneson against John C. Denny and others, as the Department of Public Works of the State of Washington. On defendants' motion to dismiss the bill. ...	Apr. 18, 1928	Case		—
Mentioned by	24. John J. McCarthy Co. v. Alsop 189 A. 464, 468 , Conn. Case Reserved from Superior Court, Hartford County; John Rufus Booth, Judge. Appeal by John J. McCarthy Company from an order and decision of J. W. Alsop and others, the Public...	Dec. 01, 1936	Case		—
Mentioned by	25. In re Sioux Falls Traction System 228 N.W. 179, 180 , S.D. Application of the Sioux Falls Traction System for a certificate of necessity and convenience to operate as a class A motor carrier in the transportation of passengers and baggage...	Dec. 10, 1929	Case		—

Treatment	Title	Date	Type	Depth	Headnote(s)
—	<p>26. Constitutionality of license statute or ordinance as affected by delegation of authority as to amount of bond of licensee 107 A.L.R. 1506</p> <p>The reported case for this annotation is People ex rel. Rice v. Wilson Oil Co., 364 Ill. 406, 4 N.E.2d 847, 107 A.L.R. 1500 (1936).</p>	1937	ALR	—	—
—	<p>27. Jurisdiction of public service commission over carrier transporting by motor trucks or busses 51 A.L.R. 820</p> <p>The reported case for this annotation is Purple Truck Garage Co. v. Campbell, 119 Or. 489, 250 P. 213, 51 A.L.R. 816 (1926). This annotation is supplemented by 103 A.L.R. 268.</p>	1927	ALR	—	—
—	<p>28. Constitutionality of statutes or ordinances for taxation of common carriers by automobile 75 A.L.R. 13</p> <p>The reported cases for this annotation are Alward v. Johnson, 282 U.S. 509, 51 S. Ct. 273, 75 L. Ed. 496, 75 A.L.R. 9 (1931); and Iowa Motor Vehicle Ass'n v. Board of R.R. Com'rs,...</p>	1931	ALR	—	—
—	<p>29. Constitutionality of legislative delegation of powers to prescribe or vary regulations concerning motor vehicles used on highways 87 A.L.R. 546</p> <p>The reported case for this annotation is Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S.W.2d 691, 87 A.L.R. 534 (1932).</p>	1933	ALR	—	—
—	<p>30. Validity of privilege tax as applied to contractor performing contract with Federal government 97 A.L.R. 1257</p> <p>The reported case for this annotation is General Const. Co. v. Fisher, 149 Or. 84, 39 P.2d 358, 97 A.L.R. 1252 (1934). This annotation is supplemented by 114 A.L.R. 347.</p>	1935	ALR	—	—
—	<p>31. Burden of averment and proof as to exception in criminal statute on which the prosecution is based 153 A.L.R. 1218</p> <p>The reported case for this annotation is Williams v. U.S., 138 F.2d 81, 153 A.L.R. 1213 (App. D.C. 1943).</p>	1944	ALR	—	—
—	<p>32. Fletcher Cyclopedia Law of Private Corporations s 6674.10, § 6674.10. State public service commissions—Constitutionality of delegating power</p> <p>As a general rule, the validity of a delegation of power to a state administrative agency depends upon the constitution, laws, and court decisions of the particular state. Yet it..</p>	2023	Other Secondary Source	—	—

Treatment	Title	Date	Type	Depth	Headnote(s)
—	<p>33. Sutherland Statutes and Statutory Construction s 3:7, § 3:7. Minority view</p> <p>There are still modern vestiges of the conceptualistic view that the separation of powers requires the preservation of "water tight compartments" between departments. These cases...</p>	2023	Other Secondary Source	—	—
—	<p>34. Am. Jur. 2d Automobiles and Highway Traffic s 91, § 91. Governmental vehicles; vehicles transporting mail</p> <p>Am. Jur. 2d Automobiles and Highway Traffic</p> <p>The fact that a motor vehicle is owned by a governmental unit or is used in connection with governmental services does not necessarily exempt it from motor vehicle licensing or...</p>	2023	Other Secondary Source	—	—
—	<p>35. CJS Motor Vehicles s 131, § 131. Constitutionality</p> <p>CJS Motor Vehicles</p> <p>Statutes conferring powers upon commissions to the regulate public service motor vehicles are not invalid as violating a constitutional provision dividing the government into three...</p>	2023	Other Secondary Source	—	—
—	<p>36. CJS Motor Vehicles s 133, § 133. Exercise of powers</p> <p>CJS Motor Vehicles</p> <p>A commission regulating public service vehicles has power to decide all matters placed within its jurisdiction by the statutes. It has the powers expressly conferred on it and also...</p>	2023	Other Secondary Source	—	—
—	<p>37. CJS Motor Vehicles s 210, § 210. Persons or vehicles excluded or exempted</p> <p>CJS Motor Vehicles</p> <p>Statutes that require a special license, permit, or certificate of public convenience and necessity for motor vehicles do not apply to vehicles used only for the owner's personal...</p>	2023	Other Secondary Source	—	—
—	<p>38. CONSTITUTIONAL LAW - DUE PROCESS OF LAW: REGULATION OF TRADE OR BUSINESS - REGULATION OF PRIVATE CARRIERS</p> <p>40 Harv. L. Rev. 131 , 132</p> <p>A California statute required private automotive carriers wishing to operate for compensation on the public highways between fixed termini or over a fixed route, to secure a...</p>	1926	Law Review	—	—
—	<p>39. THE POACHER, THE SOVEREIGN CITIZEN, THE MOONLIGHTER, AND THE DENTURISTS: A PRACTICAL GUIDE TO INALIENABLE RIGHTS IN MONTANA</p> <p>77 Mont. L. Rev. 5 , 40</p> <p>The sacred rights of mankind are not to be rummaged for, among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the...</p>	2016	Law Review	—	—

Treatment	Title	Date	Type	Depth	Headnote(s)
—	40. THE FREE EXERCISE CLAUSE GETS A COSTLY WORKOUT IN EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON v. SMITH 18 Pepp. L. Rev. 163 , 212 The use of peyote by members of the Native American Church is one of the most controversial manifestations of religious conduct in this country. Peyote, a hallucinogenic drug...	1990	Law Review	—	—
—	41. NATIONAL RECOVERY CODE ASSESSMENTS 44 Yale L.J. 849 , 868+ The wholesale governmental regulation of industry created by NIRA necessarily involved a complex administrative organization with enormous attendant expenses which, exclusive of...	1935	Law Review	—	—
—	42. MOTOR CARRIER REGULATION BY CERTIFICATES OF NECESSITY AND CONVENIENCE 36 Yale L.J. 163 , 194 Within the past five years the motor vehicle for hire has developed from insignificance to a formidable position in our transportation system. Motor busses, for years confined to...	1926	Law Review	—	—

History

There are no History results for this citation.