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Louis J. Fisher III

tried by court-martial for offenses committed while he was in uniform.[26] However, military jurisdiction is not lost when the serviceman immediately re-enlists[27] or retains an inactive reserve status.[28] Civilian dependents accompanying the armed forces abroad may not be subjected to a military trial in peace time when charged with a capital crime.[29] Whether this reasoning will be applied in civilian dependent non-capital cases remains to be seen. However, a civilian employed by the armed services abroad is deemed to have military status and consequently is amenable to military jurisdiction,[30] even in capital cases.[31] It will be interesting to see if the Supreme Court agrees that civilian employees and inactive reservists are in the land and naval forces for purposes of military trial in peace time.

RICHARD VON BIBERSTEIN, JR.

Constitutional Law—Police Power—Changed Economic Condition of Railroads Judicially Applied in Determining Reasonableness of Ordinance

The generally accepted test as to the constitutionality of an exercise of the police power[1] is whether under all the existing conditions and surrounding circumstances it is reasonable;[2] *i.e.*, it must be reasonably adapted to accomplish a legitimate end,[3] be reasonable toward persons whom it affects,[4] must not be for the annoyance of a particular class,[5] nor be unduly oppressive.[6] Reasonableness is a question of law for the

[26] United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).
[27] United States v. Gallagher, 7 U.S.C.M.A. 506, 22 C.M.R. 296 (1957).
[28] Wheeler v. Reynolds, 164 F. Supp. 951 (N.D. Fla. 1958).
[29] Reid v. Covert, 354 U.S. 1 (1957).
[30] United States *ex rel.* Guagliardo v. McElroy, 158 F. Supp. 171 (D.D.C. 1958); *In re* Varney's Petition, 141 F. Supp. 190 (S.D. Cal. 1956).
[31] Grisham v. Taylor, 161 F. Supp. 112 (M.D. Pa. 1958).

[1] Police power, although elusive of definition, has been defined as "the power inherent in every sovereignty to govern men and things, under which power the legislature may, within constitutional limits, not only prohibit all things hurtful to the comfort, safety, and welfare of society, but may prescribe regulations to promote the public health, morals, and safety, and add to the general public convenience, prosperity, and welfare." 11 AM. JUR., *Constitutional Law* § 247 (1937).

[2] Austin v. Shaw, 235 N.C. 722, 71 S.E.2d 25 (1952); Berger v. Smith, 156 N.C. 323, 72 S.E. 376 (1911). It has been suggested, however, that an exercise of the police power may be reasonable and yet unconstitutional. Soref, *The Doctrine of Reasonableness in the Police Power,* 15 MARQ. L. REV. 3 (1930).

[3] "It is necessary . . . that the proposed restriction have a reasonable and substantial relation to the evil it purports to remedy." State v. Harris, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940). See also East Side Levee and Sanitary Dist. v. East St. Louis & C. Ry., 279 Ill. 123, 116 N.E. 720 (1917); Victory Cab Co. v. Shaw, 232 N.C. 138, 59 S.E.2d 573 (1950).

[4] East Side Levee & Sanitary Dist. v. East St. Louis & C. Ry., *supra* note 3; State v. Bass, 171 N.C. 780, 87 S.E. 972 (1916).

[5] Plessy v. Ferguson, 163 U.S. 537 (1896); Town of Clinton v. Standard Oil Co., 193 N.C. 432, 137 S.E. 183 (1927).

[6] Plessy v. Ferguson, *supra* note 5.

court,[7] and is said to be based on human judgment, natural justice, and common sense in view of all the facts and circumstances.[8] The application of the police power may vary as social, economic, and political needs change;[9] therefore, what was once a proper exercise of such power may later become arbitrary and unreasonable as a result of changed conditions and circumstances.[10]

Winston-Salem v. Southern Ry.[11] is a recent North Carolina decision wherein the foregoing principles were applied. In this case it appeared that the plaintiff had been given power by its city charter[12] to require any railroad company "at its own expense, to construct, maintain and repair . . . crossings at grade, over or under its streets . . . ."[13] Pursuant to this power, the Board of Aldermen of Winston-Salem enacted an ordinance[14] requiring the defendant to rebuild, at its entire expense, an existing trestle over a municipal street so as to accommodate a proposed intracity thoroughfare which was to cross the street under the trestle. Writ of mandamus[15] was requested to enforce the ordinance.

Defendant challenged the provisions of both the charter and the ordinance on the ground that they were arbitrary, unreasonable, and unconstitutional, and contended, *inter alia,* that the instant case was factually distinguishable from the numerous cases cited by the plaintiff

[7] Durham v. Southern Ry., 185 N.C. 240, 117 S.E. 17 (1923).

[8] Bonnett v. Vallier, 136 Wis. 193, 116 N.W. 885 (1908).

[9] Elizabeth City v. Aydlett, 201 N.C. 602, 161 S.E. 78 (1931) (police power expands); State v. Lockey, 198 N.C. 551, 152 S.E. 693 (1930) ("The police power is elastic, stretching out to meet the progress of the age.")

"It is more accurate to say, however, that the power itself remains the same, and that its apparent extension is only the application of the principle on which it is based to new conditions as they arise." State *ex rel.* Short v. Reidall, 109 Okla. 35, 39, 233 Pac. 684, 687 (1924); *accord,* Schmidt v. Board of Adjustment, 9 N.J. 405, 88 A.2d 607 (Sup. Ct. 1952).

[10] Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935) ("A statute valid as to one set of facts may be invalid as to another."); Abie State Bank v. Bryan, 282 U.S. 765 (1931) (assessments under bank guaranty law); Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924) (post war rent controls); Atlantic Coast Line R.R. v. Ivey, 148 Fla. 680, 5 So. 2d 244 (1941) (statute making railroads absolutely liable for injury to livestock on unfenced track, and no such liability put on motor vehicles); Realty Revenue Corp. v. Wilson, 181 Misc. 802, 44 N.Y.S.2d 234 (Sup. Ct. 1943) (order requiring sprinkler systems in multiple dwellings held invalid where material not obtainable due to war). See also Note, 40 CORNELL L.Q. 780 (1955).

Likewise, a once improper regulation may later become proper. Miller v. Board of Pub. Works, 195 Cal. 477, 234 Pac. 381 (1925) (zoning laws); Elizabeth City v. Aydlett, 201 N.C. 602, 161 S.E. 78 (1931) (zoning laws). For this reason a few jurisdictions state that stare decisis has no application to the exercise of police power. Schmitt v. F. W. Cook Brewing Co., 187 Ind. 623, 120 N.E. 19 (1918); State *ex rel.* George v. Aiken, 42 S.C. 222, 20 S.E. 221 (1894).

[11] 248 N.C. 637, 105 S.E.2d 37 (1958).

[12] The General Assembly may delegate to a municipality a quantum of the state's sovereign police power. Brewer v. Valk, 204 N.C. 186, 167 S.E. 638 (1933).

[13] N.C. Private Laws 1927, c. 232, § 54. [14] Adopted April 15, 1957.

[15] As to mandamus being the proper remedy, see 2 ELLIOTT, RAILROADS § 1013 (4th ed. 1926), and cases there cited.

in which similar statutes and ordinances were upheld.[16] In support of its position, defendant introduced into evidence special facts[17] tending to show changed economic conditions unfavorable to the railroads. The trial court, without reference to these special facts, granted mandamus.[18] On appeal the supreme court reversed, holding that the ordinance (also the provision of the charter) was unconstitutional, as applied to the facts of the case, in that it was an unreasonable exercise of the police power, depriving the defendant of its property without due process of law in violation of the Constitution of North Carolina.[19]

[16] Where an ordinance, in the interest of public safety, convenience, or welfare, requires the railroad to construct or reconstruct passageways over or above streets and highways, whether existing at the time such passageway is constructed or not, the majority view is that such an ordinance is valid as a reasonable exercise of the police power. Atchison, Topeka & Santa Fe Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953); Erie R.R. v. Board of Pub. Util. Comm'rs, 254 U.S. 394 (1921); Chicago, Milwaukee & St. Paul Ry. v. Minneapolis, 232 U.S. 430 (1914); Cincinnati, I. & W. Ry. v. City of Connersville, 218 U.S. 336 (1910). The theory of these cases is that the public has a superior right to the safe and unimpeded use of the streets and highways, that the railroad is obstructing such use, and that the cost to the railroad is *damnum absque injuria,* or deemed to be compensated by the public benefit which the company is supposed to share. Erie R.R. v. Board of Pub. Util. Comm'rs, *supra;* Missouri Pac. Ry. v. Omaha, 235 U.S. 121 (1914).

The great weight of authority refuses to recognize any distinction, as pertains to railroad liability, between streets laid out previous to or subsequent to the existence of the railroad track. 44 AM. JUR., *Railroads* § 297 (1942), and cases there cited.

It is interesting to note that in State v. Wilmington & Weldon R.R., 74 N.C. 143 (1876), the railroad was not required to repair a bridge where such repairs were made necessary by roads laid out subsequent to the existence of the railroad. An opposite result was reached in Atlantic Coast Line R.R. v. Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911), *aff'd,* 232 U.S. 548 (1914). Though it might be argued that these variant decisions rest on differences in the respective charters, the *Goldsboro* case, *supra,* quotes with approval the majority theory as found in State *ex rel.* Minneapolis v. St. Paul, M. & M. Ry., 98 Minn. 380, 108 N.W. 261, (1906), *aff'd mem.* 214 U.S. 497 (1909), *viz.,* "A railroad . . . accepts . . . its franchise subject to the implied right of the state to lay out and open new streets and highways over its tracks, and must be deemed, as a matter of law, to have had in contemplation at the time its charter was granted, and is bound to assume, all burdens incident to new, as well as existing, crossings."

The principal case seems passively to accept the majority view.

[17] The special facts are, in essence, the following:

(1) Large-scale competition from trucks and public carriers has resulted in economic hardship for railroads, and costs of trestle improvements cannot be passed to the public by higher freight rates.

(2) The City of Winston-Salem has at its disposal, for street improvements, over $500,000 yearly, obtained from *ad valorum* taxes on motor vehicles and from gasoline taxes.

(3) Benefit of trestle construction no longer goes to railroads through creation of "feeders" which bring business to the railroads, but rather, the benefit goes to the railroads' competitors.

(4) There is a growing legislative trend toward relieving the railroads of some or all of such costs.

[18] Mandamus was issued July 24, 1957, by Resident Judge Walter E. Johnston, Jr., who found as fact that "the trestle of the defendant as now located constitutes an unreasonable and dangerous interference with and will endanger and impede and obstruct traffic on [the proposed street] . . . and constitutes a danger to the traveling public for the City of Winston-Salem." Transcript of Record, p. 179, Winston-Salem v. Southern Ry., 248 N.C. 637, 105 S.E.2d 37 (1958).

[19] N.C. CONST. art. I, § 17.

In the principal case, the court noted a lack of evidence that the present underpass was dangerous to existing traffic at the underpass, and in that respect distinguished it from cases based primarily on the safety factor.[20] It is admitted by the court that when the proposed street is built it will have to narrow considerably in order to pass through the existing trestle, and that in fact a hazardous situation will result at this bottleneck. The court disposes of this rather summarily, however, with the statement that "this situation of possible danger would be entirely of the *City's* making in its attempt to eliminate traffic congestion, originating principally in other areas of the City . . . ." (Emphasis added.)[21] The implication from such language is that the railroad would not be held liable for the cost, even in the event that a hazardous bottleneck subsequently occurs, so long as the situation is caused by factors unconnected with the location and operation of the railroad. The soundness of this implication should be considered in connection with the three cases which follow.

In *State ex rel. Minneapolis v. St. Paul, M. & M. Ry.*,[22] a somewhat novel situation arose when the city constructed, at its own expense, a new street and trestle through the railroad's embankment. The street was designed as a thoroughfare (as in the principal case) manifestly to aid the flow of traffic in other parts of the city. The trestle subsequently burned and the city directed the railway, at its entire expense, to build a new trestle. The court, in an elaborate decision, upheld the city's power.[23]

In *Atlantic Coast Line R.R. v. Goldsboro*,[24] streets were laid out subsequent to the existence of railroad tracks. The town graded the streets parallel to the tracks, leaving the tracks six to eighteen inches higher than the streets. The court upheld an ordinance requiring the

[20] See, *e.g.*, Durham v. Southern Ry., 185 N.C. 240, 117 S.E. 17 (1923), in which mandamus was granted to enforce an ordinance requiring the railway to separate a grade crossing and construct a street underpass at its entire expense of $250,000, where the tracks were crossed by thousands of pedestrians and motorists every day, several accidents had occured, and where traffic was obstructed by trains and switching engines. Likewise, in Shreveport v. Kansas City, S. & G. Ry., 167 La. 771, 120 So. 290 (1929), where the street underpass originally served street traffic and one street car track; twenty years later there were two street car tracks and barely room for two lanes of motorist traffic; the city's population had doubled; and the underpass was a hazard, the railway was forced to rebuild the underpass at its entire expense of $43,000.

[21] 248 N.C. at 650, 105 S.E.2d at 46.

[22] 98 Minn. 380, 108 N.W. 261 (1906), *aff'd mem.*, 214 U.S. 497 (1909).

[23] The underpass was said to be analogous to a grade crossing safety device, the only difference being one of relative cost, and not of principle.

Quaere: Assuming that the city under its charter has power to require railroads to construct safety devices at crossings of new roads, could not the court in the principal case have decided in favor of the city on the basis of this analogy? Would the hesitance to accept such an analogy indicate that the objection was one of principle, or of extra cost?

[24] 155 N.C. 356, 71 S.E. 514 (1911), *aff'd*, 232 U.S. 548 (1914).

railroad, at its entire expense, to lower the tracks in the interest of public safety and convenience.

In *Atchison, Topeka & Santa Fe Ry. v. Public Util. Comm'n*,[25] the railroad, in 1914, constructed two adjoining street underpasses, the principal uses of which were to give access to a garbage disposal plant. The City of Los Angeles, in order to alleviate traffic conditions in other parts of the city, subsequently (in the late 1940's) built a main thoroughfare boulevard sixty feet wide which narrowed to twenty feet at the underpasses, thereby causing a bottleneck. The Utilities Commission, empowered by statute to allocate costs, required the railroad to pay fifty per cent of the cost of reconstructing the underpasses. In affirming the allocation, the United States Supreme Court said: "[T]he improvements were instituted . . . to meet local transportation needs and further safety and convenience, made necessary by the rapid growth of the communities. In such circumstances, this Court has consistently held that in the exercise of the police power, the cost . . . *may be* allocated all to the railroads. . . . There is the proper limitation that such allocation of costs must be fair and reasonable."[26]

In each of the latter three cases the railroad was held liable for at least a proportionate part of the expense, notwithstanding that the hazards and inconveniences were "entirely of the City's making."

Having ruled that public danger, either existing or prospective (as a result of a probable bottleneck), has no bearing on this case, the court states that this case is one of public convenience, designed to relieve traffic congestion in other parts of the city; that where the location of the railroad is not a reasonably related causative factor in producing the inconvenience sought to be remedied, the railroad cannot be held liable for the entire expense. The court would seem to restrict the railroad's liability for public inconvenience to cases of traffic congestion caused by the location of a particular grade crossing.[27]

It is important to note that there are cases of public convenience in which no traffic congestion—indeed, no traffic—existed prior to the construction of an underpass or overpass. These cases should be compared to the principal case in that respect.

In *Cincinnati, I. & W. Ry. v. City of Connersville*,[28] the city extended

[25] 346 U.S. 346 (1953). [26] *Id.* at 352.

[27] For example, in one of the consolidated cases of *Atchison, Topeka, & Santa Fe Ry. v. Public Util. Comm'n*, a grade crossing, often blocked by trains, caused a considerable backlash of traffic; no danger was involved. The Court upheld the commission order requiring the railroad to pay almost $750,000 (half of the total cost) to construct an underpass so as to alleviate the inconvenience. Likewise, in State *ex rel.* Wabash Ry. v. Public Serv. Comm'n, 340 Mo. 225, 100 S.W.2d 522 (1936), the railroad was required to build an underpass, since the existing grade crossing was causing delay, congestion, and general inconvenience to motorists and pedestrians in a public park.

[28] 218 U.S. 336 (1910).

its city limits to include the railroad tracks, then constructed a new street up to the railroad embankment and required the railroad to provide, at its own expense, an underpass for the new street. The United States Supreme Court upheld the action of the city.

In a later United States Supreme Court decision, *Chicago, Milwaukee & St. Paul Ry. v. Minneapolis*,[29] the railroad tracks were situated between two lakes used for recreation. The City of Minneapolis proposed to connect the two lakes by means of a canal in order that pleasure boats could pass from one lake to the other. The Court held that no constitutional rights of the railroad had been violated by virtue of its being required to build a bridge over the canal, at its entire expense, for the convenience of passing boats.[30]

It is submitted that the principal case cannot be distinguished from cases cited in support of the plaintiff on the ground that the location of the existing trestle does not cause public inconvenience; nor does the court *purport* to distinguish the present case on such ground. Rather, the court states: "The uncontroverted special facts shown in evidence or of which the courts may take judicial notice, as herein pointed out,[31] disclose changed economic conditions bearing favorably on the financial condition of the City but unfavorably on that of the railway company, and factually distinguish the instant case from the decisions cited by the City and take the case out of the principles relied upon by it as authority to sustain the validity of its ordinance."[32]

Fifty years ago, trestle costs were not unfairly imposed on the railroads, since in most cases they benefited directly by a reduction in tort claims through the elimination of dangerous grade crossings,[33] or indirectly in that new roads acted as "feeders," transporting business to and from the railroad.[34] Even in cases where no benefit can be found,[35] there was no burden on the railroad, since the costs were easily passed on to the ultimate consumers of rail-carried goods.

[29] 232 U.S. 430 (1914).

[30] The Court reiterated the rule set out in the *Connersville* case, stating: "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings but also to build and maintain suitable bridges or viaducts to carry highways, *newly laid out*, over their tracks . . . ." (Emphasis added.) *Id.* at 438.

For the theory behind the holdings of the *Connersville* and *Minneapolis* cases, see note 16, *supra*.

Note that the street underpass now in dispute in the principal case was constructed by the railway in 1923, at its entire expense, pursuant to a resolution by the city in order to make way for the *new* city street constructed up to the railway's embankment; the railway apparently never questioned the fact that such was its duty.

[31] See note 17 *supra*.

[32] 248 N.C. at 655, 105 S.E.2d at 50.

[33] See, *e.g.*, Erie R.R. v. Board of Pub. Util. Comm'rs, 254 U.S. 394 (1921).

[34] See, *e.g.*, Cincinnati, I. & W. Ry. v. City of Connersville, 218 U.S. 336 (1910).

[35] See, *e.g.*, Chicago, Milwaukee & St. Paul Ry. v. Minneapolis, 232 U.S. 430 (1914).

Today the imposition of such costs is not always so fair and justifiable. New streets which were once "feeders" for the benefit of the railroads are now avenues of convenience for the benefit of the railroads' competitors—the trucks and public carriers. Costs which once could be passed to the public in the form of higher shipping rates must now be absorbed by the railroads, since to raise rates would mean loss of business to competitors.

It would seem that the North Carolina court is the first to apply the dictum of Justice Brandeis, in *Nashville, C. & St. L. Ry. v. Walters*,[36] which judicially recognizes the significance of the changing economic position of the railroads brought about by increased competition.

Municipalities should take notice of the implications of the principal case—that fairness of allocation of trestle construction costs on the railroad will in large part be determined by the present economic and competitive positions of the railroads, including the relative economic status of the railroad and municipality. Economic position, benefit[37] or detriment, local necessity for the construction, and purpose of the construction—all must be considered as factors in determining the reasonableness and fairness of the cost imposition. Apparently, then, municipalities will find little solace in precedent decisions which ignore such considerations.[38]

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[36] 294 U.S. 405 (1935). The Tennessee Supreme Court was held in error for ruling that a police regulation requiring the railroad to pay 50% of the costs of a new underpass was valid on its face, and that evidence of changed conditions could not be admitted. The United States Supreme Court did not say that the excluded evidence showed that the regulation *was* arbitrary or unreasonable, but only that the evidence of changed conditions should be examined as *possibly* affecting the reasonableness of the regulation. The excluded evidence showed that the underpass proposed was not necessary nor requested by the rural community of 1,823 inhabitants using the crossing; that the proposed highway was a link in the federal interstate system which would manifestly further the convenience of motor carriers in competition with the railroad. Justices Stone and Cardozo dissented on the ground that even in view of all these facts the regulation could not be held to be arbitrary or unreasonable.

For discussions of the *Nashville* case, see Notes, 13 N.C.L. REV. 491 (1935) (predicting changes in railroad law), 23 CALIF. L. REV. 631 (1935), 13 CHI.-KENT L. REV. 262 (1935), 44 YALE L.J. 1259 (1935).

Recognition of the change in economics and competition as discussed in the *Nashville* case is found in dictum of Austin v. Shaw, 235 N.C. 722, 71 S.E.2d 25 (1952).

[37] The principal case does not go so far as to hold that fairness depends solely on benefit derived, though defendant sought this result. This theory was expressly negated in the recent United States Supreme Court case of Atchison, Topeka & Santa Fe Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953).

[38] Although the decision of the principal case was particularly favorable to the railroads, it must not be assumed that the court protected the interest of railroads at the expense of the public interest; it is more probable that the court recognized that the best interest of the public lies in preventing the too-rapid decline of the railroad industry.

As to the railroads' decline and effect on national economy and defense, see 25 ICC PRAC. J. 836 (1958).