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TROLLEY BUS—NO PROVISION OF SECTION 9100 ET SEQ. G. C. RELATIVE TO EXTENSION OF LINES ALONG PUBLIC WAY OUTSIDE LIMITS OF MUNICIPALITY IS APPLICABLE TO TRACKLESS TROLLEY BUS COMPANIES.

SYLLABUS:

None of the provisions of Section 9100 et seq., General Code, relative to the extension of lines along a public way outside the limits of a municipality is applicable in the case of trackless trolley bus companies.

Columbus, Ohio, June 12, 1952

Hon. Mathias H. Heck, Prosecuting Attorney
Montgomery County, Dayton, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The City Railway Company of Dayton operates an electric trolley coach line in the City. Its operation does not require the use of tracks. It operates exclusively in transporting passengers for hire. The trolley coaches use electricity as power which is supplied through feeder wires from a power station and by overhead wires which conduct electricity to the coaches by trolley poles.

"The City Railway Company has made application to the Board of County Commissioners of Montgomery County for the right, privilege and franchise to operate an electric trolley coach line over and along Otterbein Avenue from the City corporation line westwardly to Ruskin Road, thence on Ruskin Road southwardly for one block to Harvard Boulevard, thence on Harvard Boulevard eastwardly to the corporation line, together with the right and privilege to construct and maintain poles, wires, overhead construction and such other equipment as may be necessary and proper for such operation.

The City Railway Company of Dayton is the same in character, construction and operation, trackless operation, as the trackless trolley buses operated by the Akron Transportation Company, considered in the case decided by the Supreme Court, May 31st, 1951. Reported in 155 Ohio State, page 471.

"The question before the court in that case was solely a question of taxation.

"Otterbein Avenue, Ruskin Road and Harvard Boulevard are improved streets on platted land outside the corporate limits of the City of Dayton, but in a well populated district.

"The application of the City Railway Company for a franchise to operate its trolley buses on these streets was made under the provisions of Section 9101 G. C.

"There were no written consents of any of the owners of the lots and lands abutting on these streets, presented to the County Commissioners as required by Section 9105 G. C. and Section 9118 G. C. It is claimed that these sections are part of Chapter 10, Division 2, Title IX and refer only to street and interurban railways that use single or double tracks, and has no application to trackless trolley systems.

"Notwithstanding this, the application of the City Railway is to construct and maintain poles, wires and overhead construction along these streets.

"The following questions I would like you to consider. Since these streets are outside the limits of a municipal corporation:

"a. Does the operation of these trackless trolley buses, exclusively in the transportation of passengers for hire over the streets and roads outside municipal corporations, still classify them as street or interurban railways under the terms of Sections 9100 to 9149-10 General Code both inclusive?

"b. If they are not so classified, are these poles and wires and overhead construction such an additional burden to these streets, as to require the consent of the majority of or all of the owners of property abutting on these streets.

"c. Or if consents are necessary, would the consent of only such abutting property owners be necessary, whose rights of ingress and egress have been interfered with by the construction of the necessary trolley poles?

"As these questions are of state wide importance, and a ruling by the Montgomery County Commissioners might conflict the ruling of the commissioners of other counties with growing cities, I thought it best for you to rule on the matter."

Certain of the statutory provisions pertinent to your inquiry are Sections 9100, 9105 and 9118, General Code. These sections are as follows:

Section 9100:

"Street railways, with single or double tracks, side-tracks, and turn-outs, may be constructed or extended within or without,

or partly within and partly without, any municipal corporation. Offices, depots, and other necessary buildings therefor, also may be constructed."

Section 9105:

"No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along which it is proposed to construct such railway or extension thereof; and the provisions of all ordinances of the council relating thereto, have in all respects been complied with, whether the railway proposed is an extension of an old or the granting of a new route."

Section 9118:

"Such companies may occupy and use for their tracks, cars, necessary fixtures and appliances, the public highways outside of cities and villages with the consent of the public authorities in charge of or controlling such highways, and with the written consent of the majority, measured by the front foot, of the property holders abutting on each of such highways."

The nature of the consents required by these provisions is indicated in the decision in Traction Company v. Parish, 67 Ohio St., 181, the syllabus in which reads in part as follows:

"1. The consents of owners of lots abutting on a street, to the construction and operation of a street railroad on such street, are not property rights that can be appropriated under the power of eminent domain.

"2. Such consents are not property rights, but rights in their nature personal to each owner of an abutting lot.

"3. Such personal rights were bestowed by the general assembly on owners of abutting lots, as a check upon the power of municipal authorities to authorize street railroads to be constructed and operated against the wishes of the owners of lots on such street."

Although the fee of the land occupied by highways outside of municipalities is in the owner of the adjoining lands, this circumstance could not have the effect of changing the nature of the right thus bestowed on such adjoining owners by the General Assembly, and I conclude, therefore, that as to such owners also the right of consent is not subject to appropriation under the power of eminent domain.

Having regard, therefore, to the nature of these rights, as applicable to the owners of adjoining lands in the instant case, it is clear that they are essentially statutory grants to private persons and constitute a self-imposed limitation on the power of the sovereign to authorize particular uses of the public highways. This being the case the language of the statute making the grant must be subjected to a strict construction. The rule in this respect is stated in 37 Ohio Jur. 739, Section 418, as follows:

> "Legislative grants which contain ambiguous words are generally subject to a strict construction, and are interpreted most strongly against the grantee and in favor of the government. A grant of a part of the sovereignty of the state is presumed to embrace in its terms all that was intended to be granted at all, so that only such powers and rights may be exercised under it as are clearly comprehended within the words of the act,—that is, such as are specifically or expressly conferred thereby, or derived therefrom by necessary implication. It is not to be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed. Nor is the grant to be extended by its letter beyond the obvious spirit and meaning of the statute which confers it. It follows from these principles that doubtful claims as to power are to be resolved against the grantee and in favor of the public. The construction should be adopted which is most favorable and advantageous to the public interest and general welfare."

If doubtful claims to power are to be resolved against the grantee and in favor of the public, then the case at hand will be seen to present but little difficulty. It is a matter of common knowledge that at the time of the passage of these statutes street railways, operating with a system of electric trolleys and steel rails, were in wide use but trolley coaches, operating with pneumatic tires without steel rails, were then unknown. It can hardly be supposed that the General Assembly, in enacting the statutes here under consideration, intended to provide a right of consent with respect to systems of common carrier transportation generally, nor with respect to those systems which differ from street railways such as were in general use at the time of the enactment of this legislation, in the important respects which are apparent in the instant case. What was clearly envisaged by the General Assembly in these enactments was the protection of such owners, as observed by Burket, C. J., in the Parish case, supra, against oppressive action of the public authorities "in the exercise

of the power to grant franchises for street railroads * * * against the wishes of the abutting lot owners"; and the propriety of that protection must have been determined by the General Assembly with regard to the objectionable features of street railways as then known.

In view of the radical differences between modern trolley coach lines and street railways as known at the time of the enactment of Section 9100 et seq., General Code, there is, in my opinion, serious doubt whether the General Assembly, in granting the right of consent in these enactments, intended to extend such right so as to be applicable to all future forms of common carrier transportation which might utilize electric trolley power; and such doubt, under the rule hereinbefore noted, would be resolved against the grantees and in favor of the public.

In the Akron Transportation case, mentioned in your inquiry, the court was concerned with the scope of the term "street railroad company" as defined in a tax statute, Section 5416, General Code. In this definition no mention is made of the operation of vehicles on fixed rails or tracks, but the court, nevertheless, decided that a company which operated trackless trolley busses did not fall within such definition.

In the chapter with which we are here concerned, Section 9100, et seq., General Code, express reference is made to "street railways, with single or double tracks, side-tracks, and turn-outs * * *." It would appear, therefore, that there is even greater justification in the instant case for concluding that trackless trolley companies are not "street railways" than was found by the court in the Akron Transportation case for concluding that such companies do not fall within the category of "street railroad company."

The logical classification of trackless trolley companies is indicated in the opinion in the Akron Transportation case by Matthias, J., in the following language:

> "* * * The statutory definitions of 'street railroad company' set forth above do not include within their express terms trolley busses or motorbusses operated for the transportation of passengers within the limits of a city. On the contrary, logically, such bus lines fall within the classification of motor transportation companies as defined in Section 614-84, General Code. That section reads, in part, as follows:
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> " 'The term "motor transportation company," or "common carrier by motor vehicle," when used in this chapter, shall in-

> clude, and all provisions of law regulating the business of motor transportation, the context thereof notwithstanding, shall apply to every corporation, company, association, joint stock association, person, firm of copartnership, their lessees, legal or personal representatives, trustees, receivers or trustees appointed by any court whatsoever, when engaged, or proposing to engage, in the business of transporting persons or property, or both, or of providing or furnishing such transportation service, for hire, whether directly or by lease or other arrangement, for the public in general, in or by motor propelled vehicles of any kind whatsoever, including trailers, over any public highway in this state * * *.' "

In view of this language and of the express reference in Section 9100, supra, to "single and double tracks, side-tracks, and turn-outs," and because of the several important respects in which trackless trolleys differ from the street railways in common use at the time of enactment of the statutes here involved, I am impelled to the conclusion that none of the provisions of Section 9100 et seq., General Code, relative to the extension of lines along a public way outside the limits of a municipality, is applicable in the case of trackless trolley bus companies.

The scope of this conclusion is such that it becomes unnecessary to consider your remaining questions, especially in view of the extent to which they relate to matters of purely private controversy between the common carrier company and the abutting owners concerned. It may be observed in passing, however, that under the rule stated in Telephone Co. v. Watson Co., 112 Ohio St., 385, such abutting owners probably have the right to compensation by reason of the construction of poles in the public way for the support of the necessary trolley wires, assuming that the court will recognize the right of a trackless trolley bus company to exercise the power of eminent domain under the provisions of Section 10128, General Code. This question, however, is not one with which the county commissioners will need to concern themselves in considering any application for their consent, as for example under the provisions of Section 7204, General Code, to the erection by the utility company of structures within the limits of a public highway. For this reason a further consideration herein of such question would be inappropriate.

Respectfully,

C. WILLIAM O'NEILL
Attorney General.