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Competition in Public Service--A New Interpretation

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COMPETITION IN PUBLIC SERVICE — A NEW INTERPRETATION

Whether the theory that competition is the life of trade be regarded as an economic maxim that does not rise to the stature of law or whether it be thought of as a "legal ideal" (accepted background of judicial reasoning — an ideological starting point that influences judges just as authoritatively, in its way, as ordinary legal rules),[1] there can be no doubt that in decision after decision this theory has swayed our courts, consciously or unconsciously, to

[1] As to "legal ideals", see Pound, *The Ideal Element in American Judical Decision* (1931) 45 HARV. L. REV. 136; Pound, *A Comparison of Ideals of Law* (1933) 47 HARV. L. REV. 1; Pound, *What Is Law?* (1940) 47 W. VA. L. Q. 1. *Cf.* Hardman, *Public Utilities. I. The Quest for a Concept—Another Word* (1934) 40 W. VA. L. Q. 230; Hardman, *"The Law"—in West Virginia* (1940) 47 W. VA. L. Q. 23. For a different approach, see Parry, *Economic Theories in English Case Law* (1931) 47 L. Q. REV. 183.

a remarkable and by and large predictable degree.[2] In the last decade or two, however, an entirely different theory has evolved into rather definite form with respect to public utilities: a theory to the general effect (in this state) that where an existing utility is already rendering adequate service, or can be required to do so, free competition is injurious to the public interest.[3] As our court

[2] See, *e. g.*, Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va. 739, 35 S. E. 994 (1900); Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264 (1906); Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. Ed. 773 (U. S. 1837); United Railroads of San Francisco v. City & County of San Francisco, 249 U. S. 517, 39 S. Ct. 361, 63 L. Ed. 739 (1919). See also Federal Communications Comm. v. Sanders Radio Station, 309 U. S. 470, 60 S. Ct. 693, 84 L. Ed. 869 (1940), applying this theory today to radio stations.

In England the attitude toward monopoly has not been altogether the same as in the United States. See Hare v. London *etc.* Ry., 2 Johns. & H. 80, 103. See also Simpson, *How Far Does the Law of England Forbid Monopoly?* (1925) 41 L. Q. Rev. 393.

[3] See, illustrating various angles of this theory, Reynolds Taxi Co. v. Hudson, 103 W. Va. 173, 136 S. E. 833 (1927); Quesenberry v. State Road Comm., 103 W. Va. 714, 138 S. E. 362 (1927); United Fuel Gas Co. v. Public Service Comm., 103 W. Va. 306, 138 S. E. 388 (1927); Monongahela West Penn Public Service Co. v. State Road Comm., 104 W. Va. 183, 139 S. E. 744 (1927); *cf.* Mewha v. Public Service Comm., 9 S. E. (2d) 868 (W. Va. 1940). In United Fuel Gas Co. v. Public Service Comm., *supra*, the West Virginia court said, *inter alia*, at p. 311: "Why not reduce its rates if too high . . .? The intervenor is fully equipped to render the service, is in the field with all necessary connections, and is ready and willing to serve its customers. Why duplicate the service to the ruination and destruction of the intervenor and its property?" The West Virginia legislature, like some other legislatures, has written this theory into statutory form, at least as to a large class of public utilities. See W. Va. Acts 1939, c. 86, amending prior legislation. Article 2, § 5 (a) provides in part as follows: ". . . if the commission shall be of the opinion that the service rendered by any common carrier holding a certificate of convenience and necessity over any route or routes in this state is in any respect inadequate or insufficient to meet the public needs, such certificate holder shall be given reasonable time and opportunity to remedy such inadequacy or insufficiency before any certificate shall be granted to an applicant proposing to operate over such route or routes as a common carrier." The remainder of this section is set out *infra* in the body of this note, at p. 274. See, discussing this theory and citing authorities, Hardman, *The Changing Law of Competition in Public* Service (1927) 33 W. VA. L. Q. 219; same title—*Another Word* (1928) 34 W. VA. L. Q. 123; but see Arnold, same title—*A Dissent* (1928) 34 W. VA. L. Q. 183; see Hall, *Certificates of Convenience and Necessity* (1930) 28 MICH. L. REV. 107, 276.

To be sure, this theory, like most legal theories, is not without some limitations. For example, where one of the public utilities is owned or operated or perhaps supported by the state, or by an arm thereof, such utility may be allowed to compete to a greater extent than that indicated in the general theory as herein stated. See, *e. g.*, Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U. S. 118, 59 S. Ct. 366, 83 L. Ed. 543 (1939); Puget Sound Power & Light Co. v. City of Seattle, 291 U. S. 619, 54 S. Ct. 542, 78 L. Ed. 1025 (1934); *Re* Harrison Rural Electrification Ass'n, 24 P. U. R. (N. S.) 7 (W. Va. Pub. Serv. Comm. 1938); also *cf.* Federal Communications Comm. v. Sanders Radio Station, 309 U. S. 470, 60 S. Ct. 693, 84 L. Ed. 869 (1940).

expressed it, in part, in referring to a prior decision which it did not follow:

> "That case [*Charles River Bridge v. Warren Bridge*][4] was decided in 1837. Then 'Competition is the life of trade' was accepted as a guiding maxim of economics. That maxim has long since been rejected so far as it applies to public utilities . . . 'The policy of the state . . . is [now] not to invite or encourage ruinous competition between public carriers; on the contrary its policy is to protect [them] . . . so that the public may be served most efficiently and economically, and by the best equipment reasonably necessary.' "[5]

In a number of comparatively recent adjudications, several of which have heretofore been discussed in the *Quarterly* by the present writer,[6] the West Virginia court has yielded almost completely to this new ideal, holding or indicating that in the long run the public will be better served in every respect by requiring the existing utility to serve adequately, where this is feasible, rather than by sanctioning the setting up of a competing service, thus avoiding a costly duplication of service with all its attendant evils.[7] Moreover, the West Virginia legislature has written this new theory into an administrative scheme of public utility regulation, at least as to a large class of public utilities.[8] In its latest decision in point, however, handed down on February 3, 1942,[9] our court has reached a result which tempts one to query whether between the lines a still different theory of competition is not discernible — whether, as to one class of public utilities at any rate, a theory of free competition, but with a limitation, is not now the accepted background of our judicial thinking.

The facts of the case were as follows. The *X* Taxi Company was operating a taxicab service from a stand in a city in West Virginia. This service was not over any fixed route or routes. The Y Taxi Company applied to the Public Service Commission for a certificate of convenience and necessity "to operate on call of the public over an irregular route" to and from a stand in that city. The established utility, holding a certificate of convenience and necessity to operate a similar service, opposed the granting of the certificate asked for, offered to furnish additional service as the

[4] 11 Pet. 420, 9 L. Ed. 773 (U. S. 1837).
[5] Monongahela West Penn Public Service Co. v. State Road Comm., 104 W. Va. 183, 139 S. E. 744 (1927).
[6] See Hardman, *supra* n. 3.
[7] See cases cited *supra* n. 3.
[8] W. Va. Acts 1939, c. 86, amending prior legislation.
[9] McKee v. Public Service Comm., 18 S. E. (2d) 577 (W. Va. 1942).

public needs might require, and requested an opportunity to render such additional service as the commission might deem necessary. The commission, after a hearing, found that the existing service was inadequate and authorized the Y Taxi Company to set up a competing service, without giving the established utility an opportunity to remedy the inadequacy.

The question to be decided by the court turned primarily on the interpretation that should be given to the applicable provision or provisions of the statute regulating the issuing of certificates to "common carriers by motor vehicles" to operate in this state. In terms of legislative intent, the issue, as the court reasoned, was whether the statute had made a distinction between (1) common carriers by motor vehicle operating "over a route or routes", and (2) those operating "over a territory" and not "over a route or routes", and whether the legislature had required that an opportunity to remedy any inadequacies in service should be given to the former class but had not required that a similar opportunity be given to the latter class.

The statute in point provided as follows: "(a) It shall be unlawful for any common carrier by motor vehicle to operate within this state without first having obtained from the commission a certificate of convenience and necessity. Upon the filing of an application for such certificate and after hearing thereon, if the commission finds from the evidence that the public convenience and necessity require the proposed service or any part thereof, it shall issue the certificate as prayed for, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the right granted by such certificate such terms and conditions as in its judgment the public convenience and necessity may require, and if the commission shall be of the opinion that the service rendered by any common carrier holding a certificate of convenience and necessity over any route or routes in this state is in any respect inadequate or insufficient to meet the public needs, such certificate holder shall be given reasonable time and opportunity to remedy such inadequacy or insufficiency before any certificate shall be granted to an applicant proposing to operate over such route or routes as a common carrier. Before granting a certificate to a common carrier by motor vehicle the commission shall take into consideration existing transportation facilities in the territory for which a certificate is sought, and, in case it finds from the evidence that the service furnished by existing transportation facilities is

reasonably efficient and adequate, the commission shall not grant such certificate."[10] The statute also contained this "definition" of terms: "The term 'common carrier by motor vehicle' means any person who undertakes, whether directly or by lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public *over the highways* of this state by motor vehicles for hire, *whether over regular or irregular routes . . .*"[11]

The court interpreted the statute to mean (1) that a taxicab company operating "over a territory" but not "over any designated route or routes" was a common carrier by motor vehicle within the statute and must secure a certificate of convenience and necessity before it could operate; (2) that the legislature had made a distinction between the two classes of carriers and that a taxicab company, inasmuch as it did not operate "over a route or routes", need not be given an opportunity to remedy any inadequacies in service found to exist — that competition might be authorized forthwith. Accordingly the court affirmed the order of the commission.

If the starting point in our legal reasoning is the old ideal that competition is the life of trade even in public service, the conclusion reached by the court may be readily enough deduced from the statute, for the legislation, being, from this point of view, in derogation of an accepted (and supposedly sound) common law theory, may, in accordance with orthodox reasoning, be construed "strictly".[12] If, however, our starting point be the more recently accepted theory that, under present-day methods of public utility regulation, competition is not desirable in public service if the existing utility is rendering adequate service or can be required to do so, this conclusion follows much less easily, if at all, for then the statute would be "remedial" (essentially declaratory of an accepted common law doctrine) and should, according to orthodox reasoning, be construed "liberally" so as to effectuate the general purpose of the statute.[13]

That the words "route or routes" are not so "unambiguous" as to have only one possible meaning seems fairly clear from many

[10] W. Va. Acts 1939, c. 86, art. 2, § 5 (a).
[11] *Id.* at art. 1, § 2 (e). Italics supplied.
[12] See Newhart v. Pennybacker, 120 W. Va. 774, 200 S. E. 350 (1938); 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION (2d ed. 1904) § 573.
[13] See Hasson v. City of Chester, 67 W. Va. 278, 282, 67 S. E. 731 (1910): "The rule of liberal construction applies, since the statute is remedial . . ." See 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION § 582 *et seq.*

decisions of our court, for our court has been very liberal on questions of interpretation,[14] having recently held, for example, that where a written contract contained words purporting to sell "all mining posts that the party of the first part has made and now has on hand," the word "all" could be construed, in the light of surrounding circumstances, to mean only a part.[15] Indeed on various recent occasions our court has, in general, gone along with Mr. Justice Holmes in his famous dictum in *Towne v. Eisner*[16] in which the learned judge said: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[17]

If the word "all" can be construed, in the light of the surrounding circumstances, to mean only a part, there would seem to be — in the absence of accepted theory to the contrary — no legal obstacle in the way of construing the words "route or routes" to include the irregular courses traversed by a taxicab company over the highways, especially in the light of the statutory definition of terms, declaring to be within the act any common carrier operating "*over the highways* of this state by motor vehicles for hire, *whether over regular or irregular routes.*"[18] The problem therefore would seem to resolve itself into the simple question of whether the ideal in this class of cases is the theory that, under present-day methods of regulating public utilities, free competition is not desirable where the existing utility is rendering adequate service or can be required to do so. If this is not the accepted theory, the statute may well be interpreted as saying to this class of utilities: Adequate service — or competition without opportunity to remedy inadequacies.[19]

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[14] See, discussing many of the West Virginia cases, Hardman, *A Problem in Interpretation* (1936) 42 W. VA. L. Q. 110; Hardman, *Interpretation of Documents—The Parol Evidence Rule and an Exception for Erroneous Description* (1941) 47 W. VA. L. Q. 319.

[15] Hodge v. Garten, 116 W. Va. 564, 182 S. E. 582 (1935).

[16] 245 U. S. 418, 38 S. Ct. 158, 62 L. Ed. 372 (1918).

[17] At p. 425.

[18] Italics supplied.

[19] For an extended discussion of West Virginia cases in point and for the present writer's views as to the applicable theory, see *The Changing Law of Competition in Public Service* (1927) 33 W. VA. L. Q. 219, and same title—*Another Word* (1928) 34 W. VA. L. Q. 123. *Cf.* Arnold, same title—*A Dissent* (1928) 34 W. VA. L. Q. 183.