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Public Utilities--Discontinuation of Service

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Another view in respect to the determination of the heirs or next of kin when there is a postponed gift, in remainder or as a substitute gift, is that the class is to be determined as of the death of the life tenant though this can not be truly said to be a gift to the heirs of one who died other than at the death of the life tenant. *New York Life Ins. & Trust Co. v. Winthrop*, 237 N.Y. 93, 142 N.E. 431, 31 A.L.R. 791 (1923). This view was apparently followed in *National Bank v. Kenney*, 113 W. Va. 890, 170 S.E. 177 (1933). However, in the Kenney case, there was an express condition of survivorship as to the primary class gift and the court stated that this condition of survivorship applied equally as well to the substitutional class gift in favor of the testatrix's heirs, thus holding that only the heirs who survive the life tenant should take.

The principal case has suggested by inference at least a third possible view, i.e., the heirs who will take are determined when it conclusively appears that the heirs will take regardless of the fact that this happened neither at the testator's death nor at the termination of the final life estate (the time of distribution) but in the interim.

It is submitted that while the decision in the principal case was satisfactory from a practical point of view, yet the court should have taken a more positive position in order to establish a precedent for situations in the nature of the one above suggested, so that one may more clearly and with preciseness predict what the law will be.

G. H. A.

**Public Utilities—Discontinuance of Service.**—*P* filed a petition with the Public Service Commission praying authority to discontinue the furnishing of passenger service over its branch line between Elkins and Durbin, West Virginia. The commission entered an order granting in part the relief prayed for, but ordered that *P* continue furnishing passenger service three days per week. *Held*, that, where no public need for such service exists and a substantial loss is suffered by the carrier in the furnishing of such service, authority to discontinue the service should be granted. *Western Maryland Ry. v. Public Serv. Comm’n*, 106 S.E.2d 923 (W. Va. 1959).
In this state, railroad companies, because their corporate existence emanates from the public, owe to it in return therefor certain duties, the performance of which they cannot evade. Such duties have always existed. They were not created by statute, but are considered common law duties. *Chesapeake & O. Ry. v. Public Serv. Comm'n*, 75 W. Va. 100, 121 S.E. 924, (1914).

The principal case brings into issue the question whether this duty owed to the public by railroads is an unqualified duty; that is, must a railroad furnish passenger service to any group of citizens who demand it, or may consideration be given by the Public Service Commission and the courts to pecuniary loss, among other things, to the railroad and discontinue any service where the railroad sustains a heavy financial loss?

This comment does not deal with the scope of power of the Public Service Commission. It is sufficient to note that an order of the Public Service Commission will not be reviewed by the supreme court unless it shows unlawful, arbitrary or capricious exercise of power. *Bluefield Telephone Co. v. Public Serv. Comm'n*, 102 W. Va. 298, 135 S.E. 833 (1926). In the principal case the court clearly pointed out that the ruling of the commission was made in such manner and thus warranted review.

Past West Virginia decisions are somewhat in conflict as to when service may be ordered discontinued by the commission. One of the more prominent cases on this subject is *Chesapeake & O. Ry. v. Public Serv. Comm'n*, supra. In that case, the main ground of the complaint with the order of the commission arose from the probable inadequacy of returns from rendering passenger service on a branch line. It was contended that operating expenses would exceed the revenue derived from the service. The court said that to hold as the railroad contends would operate as a valid excuse for the refusal of personal transportation. The result of a comparison of expenses with prospective returns is not controlling.

It was also held in *Baltimore & O. R. R. v. Public Serv. Comm'n*, 90 W. Va. 1, 110 S.E. 475 (1922), that an enforced discharge by a railroad of its duty to provide reasonably adequate facilities for serving the public does not amount to a taking of property without compensation contrary to the fourteenth amendment or the constitution of West Virginia merely because it is attended with some expense.
In the case of Chesapeake & O. Ry. v. Public Serv. Comm'n, 78 W. Va. 667, 89 S.E. 844 (1916), it was held that an order of the Public Service Commission directing a carrier of passengers to furnish an extra service cannot be held unreasonable because it will impose pecuniary loss on the carrier, but the carrier's entire intra-state earnings from its passenger travel must be taken into account.

However, the court appeared to give great weight to pecuniary loss by the railroad in Collins v. Public Serv. Comm'n, 94 W. Va. 455, 119 S.E. 288 (1923), where it held, "this court will not suspend the action of the Public Service Commission, whereby it discontinues certain passenger trains, operated by a railroad on two branch lines, where the facts show that the continuance of said trains will be of great pecuniary loss to the company." However, the additional factor of other available public transportation was considered by the court in reaching this decision.

The holdings in the earlier West Virginia cases are open to the objection of making Peter pay for Paul's ride. It is obviously unfair to make one patron of a railroad pay part of the fare of another, and that is precisely the result reached in the earlier cases, but avoided by the Collins case. Peairs, The West Virginia Public Service Commission, 46 W. Va. L.Q. 293 (1940).

Even though the court in the principal case found the most recent law and the equities in favor of the railroad, consideration was apparently not given to a constitutional provision which appears to be directly applicable to the question in issue. W. Va. Const. art. XI, § 10, provides, "the legislature shall, in the law regulating railroad companies, require railroads running through, or within a half mile of a town or village, containing three hundred or more inhabitants, to establish stations for the accommodation of trade and travel of said town or village."

The legislature has evidently attempted to comply with this constitutional provision in enacting W. Va. Code ch. 24, art. 3, § 1 (Michie 1955), which provides, "... every railroad ... may be required by the Commission to establish and maintain such suitable public service facilities and conveniences as may be reasonable and just. ..." It should be pointed out that the constitutional language provides that the legislature "shall" require, whereas the statute uses the words "may be required".
It is submitted that, even though the court in the principal case may have reached the most just and equitable decision, W. Va. Constr. art. XI, § 10, is applicable to the facts of the case and should have been dealt with since the legislature has obviously left open the way for the Public Service Commission and the supreme court to apply a subjective test in determining when service may be required or discontinued by a railroad.

J. E. J.

Real Property—Rights of Remaindermen After Sale for Nonpayment of Life Tenant’s Taxes.—W devised real estate to A for life, remainder to P, the heirs of A’s body. A was named administrator, CTA, and registered the land for tax purposes as “Estate of W” for the years 1929 through 1936. The land was sold to C in 1936 under a tax sale, and, by successive conveyances, D obtained title. P, the remaindermen, brought this suit for partition, and alleged that any sale during the continuance of the life estate was ineffective as to their interests, that the duty to pay the taxes was on the life tenant, and that the interests of the remaindermen were not affected by reason of the failure of the life tenant to pay the taxes. Held, where the decedent’s will devised land to certain persons for life with a remainder to the respective heirs of their bodies, it was the duty of the life tenants to have the premises listed and assessed in their names and it was also the duty of the life tenants to pay the taxes assessed and levied against the premises, and upon their failure to do so, only the interests of the life tenants could be levied upon and sold to satisfy the delinquent taxes. Taylor v. Jennings, 106 S.E.2d 391 (S.C. 1958).

To the West Virginia lawyer, this case is most interesting when compared with the law prevailing in this state. Considering each of the many problems presented by this case, the first is whether or not the land was properly registered. In West Virginia, the registration statute provides that “... when the owner has devised the lands or a freehold estate therein absolutely, such land shall be charged to the devisee. ...” W. Va. Code ch. 11, art. 4, § 12 (Michie 1955).

It is the duty of the owner of the land to have the premises charged to himself and pay taxes thereon. Failure of the owner to register the land and pay the taxes renders the land liable to be