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of an adverse general verdict. Such separate verdicts are not unknown in this jurisdiction. They are required by W. VA. CODE c. 38, art. 5, § 21 (Michie, 1949), for money recovered in a suit for the recovery of property subject to a lien, and are urged by the court in an action where the defendant pleads a set-off. *Black v. Thomas*, 21 W. Va. 709 (1883).

G. W. S. G.

PUBLIC UTILITIES—SUPPLEMENTAL MOTOR TRUCK OPERATIONS OF RAILROADS—CERTIFICATE OF CONVENIENCE AND NECESSITY AS MATTER OF RIGHT.—*P* railroad applied to the Public Service Commission of West Virginia for a certificate of public convenience and necessity authorizing the transportation, by the railroad, of its less-than-carload freight over state highways by motor truck, rather than by rail, within a defined area. The commission denied the application, apparently on the basis of interpreting the protective clause of the Motor Carrier Act, W. VA. CODE c. 24A, art. 2, § 5 (Michie, 1949), as requiring the commission to deny any such application unless it be sufficiently shown that existing motor carier service is inadequate, which was not shown. The railroad appealed. *Held,* that the factual question, relating to inadequacy of service being rendered by existing motor vehicle carriers, is not material in the determination of the right of the applicant in this proceeding, that proof of such fact should not be required or considered in determining whether the authority sought should be granted, and that the final order is reversed and ". . . remanded . . . with directions that such certificate be granted . . . ." *Chesapeake & Ohio R.R. v. Public Service Comm'n,* 81 S.E.2d 700 (W. Va. 1953).

For the purposes of this comment it is assumed that the court properly construed the Motor Carrier Act as inapplicable to a factual situation like the one under consideration. So construing the statute, the court might properly have reversed the commission's order and remanded the cause with direction that the commission *might* issue the certificate regardless of the existence of adequate motor carrier service. But, instead the court directed that the commission *must* issue the certificate.

By this decision the court seems necessarily to have taken one of two possible positions, either that in such cases the court, rather that the commission, will determine if public convenience and necessity will be best served by issuance or denial of the certificate, or that in such cases a certificate must issue irrespective of considerations of public convenience and necessity.

The Ohio decisions, relied on by the court, being, as the dissenting opinion points out, mere affirmances, afford no support for the holding that the commission *must* issue the certificate. The tenor of these opinions is permissive, and they leave the Ohio commission's discretion completely intact. *Norwalk Truck Line Co. v. Public Util. Comm'n,* 148 Ohio St. 247, 74 N.E.2d 328 (1947) ("... certificate ... may be granted ..."); *accord, B. & N. Transp. v. Public Util. Comm'n,* 153 Ohio St. 441, 92 N.E.2d 265 (1950); *Cleveland, Columbus & Cincinnati Highway v. Public Util. Comm'n,* 144 Ohio St. 557, 60 N.E.2d 166 (1945); *H. & K. Motor Transp. v. Public Util. Comm'n,* 135 Ohio St. 145, 19 N.E.2d 956 (1939).

The Supreme Court decision referred to with favor in the majority opinion, is also an affirmance, and permissive in tenor. See *Interstate Commerce Comm'n v. Parker,* 326 U.S. 60 (1945) ("... the Commission may authorize the certificate. ..").

The first alternative suggested above, seems untenable in West Virginia on the basis of what has been settled law since *Hodges v. Public Service Comm'n,* 110 W. Va. 649, 159 S.E. 834 (1931). This leading case interprets Article V, of the West Virginia Constitution, regarding separation of powers. The case dealt with a statute vesting in the public service commission authority to grant or deny licenses for the construction of dams, and providing for appeal to the circuit court of Kanawha county "with trial *de novo*", to consider the record before the commission with any additional evidence offered the court by either party. The Supreme Court of Appeals held this enactment unconstitutional as granting to the judiciary a legislative or administrative power, contrary to the provisions of the constitution regarding separation of powers. Accepting by quotation the proposition that, " 'The question of what the public convenience requires is a political, not a legal one' . . .", the court stated: "This attempt of the legislature to commit one of its great responsibilities to the judiciary is a flattering display of confidence in our department. But we must reject this expansion of our power just as firmly as we should resist a reduction of our rightful authority." *Id.* at 657, 159 S.E. at 837. For the court on its own to undertake the exercise of such authority would represent a radical departure from the *Hodges* doctrine.

Probably then, the court has taken the second alternative. It appears to rest this on W. VA. CODE c. 31, art. 2, § 1 (Michie, 1949), a provision held not repealed by enactment of the Motor Vehicle Act. It provides in part: "Every railroad company . . . is a common carrier, and is authorized . . . to engage in transporting . . . by any

and all means and methods, which are now used, or which may hereafter be developed, for such purpose." Referring to this statute, the court states: "It is common knowledge that in the early days of the development of this country the Federal Government and most State Governments, *extended special grants or privileges to railroad companies* in an effort to further such development. Questions as to whether such policy should be continued . . . are questions for legislative determination. The function of the courts is to apply the law, not to enact or repeal statutes." *Chesapeake & Ohio R.R. v. Public Service Comm'n, supra* at 712. (Italics supplied.)

This statute does not purport to grant railroads special privileges not granted other carriers. Rather it confers upon incorporated railroads generally certain broad powers in furtherance of a legislative scheme of uniform chartering of railroads, replacing an earlier method whereby a special legislative act stipulating particular powers and duties was required for each railroad. The reviser's note prefacing W. VA. CODE c. 31, art. 2 (1931), states: "No reason longer exists why there should be a special provision for incorporating a railroad company and it is desirable to have one plain and practical method of chartering and organizing all corporations, regardless of the purpose for which created.

"The regulation of railroad companies is now centered in . . . the public service commission of this State, which . . . (has) full power . . . to prescribe the character of the service that the railroad company shall furnish."

W. VA. CODE c. 31, art. 2, § 1, *supra,* expressly states that railroads are *common carriers.* This terminology seems to point to the existence of a specific intention that railroads, like all other carriers affected with the public interest are to come within the normal common carrier concept, with the rights, duties, and regulation which that term connotes. If so, W. VA. CODE c. 24, art. 2, § 1 (Michie, 1949), which provides in part: "The jurisdiction of the (public service) commission shall extend to all public utilities in this State, and shall include any utility engaged in . . . Common carriage of passengers or goods . . . by railroad . . ." would seem to apply. Therefore, the present construction of W. VA. CODE c. 31, art. 2, § 1 (Michie, 1949), making issuance of a certificate of convenience and necessity to the railroad a matter of right, rather than for the sound discretion of the commission, is not readily understandable.

In other jurisdictions, at least, the view has obtained that in passing on an application for a certificate of public convenience and necessity, the public's interest rather than that of the applicant is paramount. See, *e.g., H. & K. Motor Trans. v. Public Util. Comm'n,* 135 Ohio St. 145, 153, 19 N.E.2d 956, 960 (1939). Possibly an economically healthy trucking industry might even be in the public interest as much as an economically healthy railroad.

J. K. B.

QUO WARRANTO—PERSONS ENTITLED TO RELIEF.—Proceedings on an information in the nature of quo warranto by the state, on the relation of certain Clarksburg city councilmen, to try title of two other members of the council on the ground that they were not freeholders of record in the city when elected, as required by the city charter. *Held,* that a duly qualified member of a city council has such an interest as to enable him, as relator, to prosecute such a proceeding. *State* ex rel. *Morrison v. Freeland,* 81 S.E.2d 685 (W. Va. 1954) (3-2 decision).

W. VA. CODE c. 53, art. 2, § 4 (Michie, 1949), provides that "any person interested" may bring such an action to try title of a public officer. The West Virginia court has aligned itself with the great weight of authority under similar statutes in interpreting this to mean interested other than as a citizen and taxpayer. *State* ex rel. *Depue v. Matthews,* 44 W. Va. 372, 29 S.E. 994 (1898) (holding a defeated candidate has no such interest); *State* ex rel. *Scanes v. Babb,* 124 W. Va. 428, 20 S.E.2d 683 (1942) (holding a *de facto* officer does not possess the requisite interest). The precise question in this case was whether relators held an interest distinct from that of citizens and taxpayers. The court found such an interest in the fact that councilmen are peculiarly interested in having only properly elected members on the council.

The dissent emphatically objects that this holding is "unsound", "completely unsupported", leads to "intolerable consequences", and is contrary to the weight of authority under similar statutes. The dissent relies heavily on a Washington case in which a mayor sought to oust a councilman but was held not to be a competent relator as he had no special interest in the office. *Mills v. Washington,* 2 Wash. 566, 27 Pac. 560 (1891). However, the statute there was not similar for it contemplated institution of such actions only by a claimant to the office. As quoted within