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Some Phases of the Problem of Motor-Carrier Regulation

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lessened as the public gains or loses confidence in judges and members of the Bar.

For that reason a tremendous responsibility rests upon this and every other law school in the country to exercise care and caution as to the kind of human material they use to make lawyers."

EDITORIAL NOTES

SOME PHASES OF THE PROBLEM OF MOTOR-CARRIER REGULATION.—There is a variety of problems arising out of the phenomenal growth of the automobile industry, the exigencies of which are causing sweeping changes in heretofore well-settled legal principles in other branches of law, aside from the immediate question of the regulation of the employment of automobiles as common carriers. Whether the almost complete reversal of attitude towards free competition in the field of the law of public utilities is due entirely to the automobile, may be doubtful, but certainly the initial impetus of the legal retreat away from the doctrine of *laissez faire,* is due to it. Most, if not all, of the legislative bodies of the republic have definitely declared a new policy or a new principle to be followed in regulating the business of the common carriers in the automobile form in requiring certificates of public necessity and convenience to be obtained before automobile carriers are permitted to operate.

In 1900[2] the Supreme Court of Appeals of West Virginia decided that a municipality could not grant an exclusive franchise for the use of its streets to an Electric Light Company. In 1927 in the case of *Monongahela West Penn Public Service Company, et al.* v. *State Road Commission,*[3] the same court emphatically decides for the policy of protection of established utilities where the service rendered is efficient and economical. It may be said that this change of front is due to the declaration of a new policy by the legislature in the enactment of the Road Law, yet in the same year the same court reversed the order of the Public Service Commission[4] requiring one of two gas companies located in the same community to serve a manufacturing industry because its

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[1] 40 HARV. L. REV. 882.

[2] Clarksburg Elec. Light Co. *v.* City of Clarksburg, 47 W. Va. 739, 35 S. E. 994 (1900). See also Charleston Gas Co. *v.* Kanawha Gas Co., 58 W. Va. 22, 50 S. E. 876 (1905).

[3] 104 W. Va. 183, 139 S. E. 744 (1927).

[4] United Fuel Gas Co. *v.* Public Service Commission, 103 W. Va. 306, 138 S. E. 388 (1927).

rates were lower than the other for the reason that it would deprive the present serving company of large revenue and would require of the other with cheaper rates a great outlay of money in making the proper connections. The public or the social body guaranteeing both gas supplying utilities a fair return on investment would be obliged to stand the expense of earning a fair return on the added equipment in one instance and the loss of revenue in the other and with only the individual manufacturer benefitting. The court suggested that an application should be made to reduce the rates of the present supplying utility if they were too high. This decision is without the excuse of a legislative declaration of change in policy and can only be classed (not in a derogatory sense) as "judicial legislation," but following hard upon the automobile decisions it is a fair inference that the change in the attitude of the court towards unregulated or free competitive conditions in the utility field is due to the necessity of deciding the issues presented by the question of Motor-Bus regulation.[5]

The difficulties here considered of the regulations of the motor-bus are confined to the problems presented by its entering the common carrier field. The States have poured money lavishly into vast road building enterprises and in spite of federal aid the state owns the roads, and at first sight the questions of regulation would seem to be local ones for state authorities. Such is not the case; for aside from the maintenance of and insuring safety on the roads there is the conflict between the competing facilities—rail and motor-bus—with easily comprehended social consequences within the State on the one hand, and the commerce and due process clauses of the federal constitution on the other.

The regulation of motor carriers seems to present three major problems:

First, to protect the investment of the state in the highway itself. Most of the states have in their various acts relating to the subject matter imposed restrictions as to weight, width, number of trailers, etc.;[6] and subsidiary to this to render the highway safe for other forms of travel.

Second, to protect the authorized carrier against unauthorized carriers from ruinous competition.

Third, (an extremely difficult one) to settle the conflict arising out of the natural competition between rail transportation, both steam and electric, with their heavy and more permanent investments and the motor-carrier with its small and less permanent

[5] See the two excellent surveys of the "Changing Law of Competition in Public Service," by Thomas P. Hardman, 33 W. VA. L. QUAR. 219, 34 W. VA. L. QUAR. 123.

[6] BARNES' CODE, ch. 43, §312. 36 YALE L. J. 164.

investment. The economic consequence of this phase of the general problem is vast. The continual shrinkage in the number of passengers carried by rail, the discontinuance of local trains by railroads and the actual abandonment of electric railways from operation, and the ever-increasing number of superseding motor-carriers constitute a vivid commentary upon existing conditions.

The control of its highways by the state from the standpoint of the first problem seems open to little question and the difficulties ingredient in the question lie rather in the newness of the motor-carrier and a general lack of experience with it rather than in any legal or juristic embarrassment.

The second problem has generally been met by requiring a permit of "public convenience and necessity," to be obtained from the administrative commission.[7] The patent design of this formula is, in the language of Mr. Justice Brandeis, "to promote good service by excluding unnecessary competing carriers."[8] This does not mean that a legal monopoly is to be created, but rather that the economical and efficient service to the public is the primary consideration, and incidental to that object, the unfit carrier is eliminated and the carrier obtaining the permit is protected from cut-throat competition.

The considerations involved in the issuance of the certificates comprehend the third major problem alluded to. "Public convenience and necessity" as a rule requires definition, which by successive decision of the courts is tending to fixity as legal principle in the general body of the law. The motives and underlying reasons which support the actions and decisions of the courts in applying this phrase to a special set of facts cover a broad field of social policy.

The cases before the West Virginia Court of Appeals have been few so far, although two at least seem practically to settle the intra-state phase of the competitive side of the question of regulation. The earliest case was in 1923[9] a contest between a licensed auto operator under the Road Act of 1921 and an unlicensed operator. The right to an injunction was upheld. Several primary points were decided: (1) That the Road Act was constitutional as a valid exercise of police power. (2) A permit under the Act was in the nature of a "franchise" and an object of injunctive protection. This is all the case decides, but the court in referring to the cases in other jurisdictions in which street railways may enjoin the operators of unlicensed jitneys says that a similar principle is involved. If the court means by that that injurious competition

7 The Acts are collated in 36 YALE L. J. 166. BARNES' CODE, ch. 42, §82.
8 Buck *v.* Kuykendall, 267 U. S. 307, 315, 45 Sup. Ct. 324, 326 (1925).
9 Carson *v.* Woodrum, 95 W. Va. 197, 120 S. E. 512 (1923).

is to be restricted equally in either case no quarrel can be found with the illustration; but a street car railway operating on its own right of way in a contest with a carrier on the public highway for an injunction to prevent competition, while the result is the same as in a contest between two highway motor-carriers, yet the cases differ, it is submitted, in the degree of facility with such similar result is reached.

Since, however, the precise question of the electric railway's enjoining a motor carrier was very soon thereafter before the court for decision, it can be considered now in some detail.

In *Princeton Power Company* v. *Calloway,* (decided in 1925)[10] a street railway sought to enjoin a taxi company from operating along a highway paralleling its right of way. The taxi company had a taxi cab license but no certificate to operate between fixed termini. In fact the state road commission had established no regular route over and along said highway. The injunction was granted.

It should be carefully noted that the plaintiff did not predicate its claim to protection upon any rights accruing to it from the road law. The court indeed said that its right to relief "must therefore depend on whether it is entitled in equity to protect its franchise and privileges under its charter from the alleged invasion by defendants." And further:

> "The policy of the State as evidenced by the road law and of the Statutes relating to the public service commission, its powers and duties, is not to invite or encourage ruinous competition between public carriers; on the contrary its policy is to protect such public servants in the enjoyment of their rights, so that the public may be served most efficiently and economically, and by the best equipment reasonably necessary therein."

citing the case of *Chesapeake & Ohio Railway Company* v. *Public Service Commission*[11] as illustrative.

The court discusses the evident change of policy introduced by the requirement of a finding of public convenience and necessity preliminary to the issuance of permit to a carrier. And further, the control the State exercises over the licensees so that they "serve the public well and efficiently," and marches to the conclusion that they have "the right to occupy their particular places in the public service to the exclusion of all unauthorized invaders thereof." The court asks the hypothetical question, "Should not these

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[10] 99 W. Va. 157, 128 S. E. 89 (1925).
[11] 75 W. Va. 160, 83 S. E. 286. L. R. A. 1917F, 1190.

rights be extended to an electric railway exercising its franchise? We think public policy demands it."

For a further explanation of the theory upon which a public utility or private person may thus implead offenders against the law a very ancient principle of equity jurisprudence is invoked; namely, that while the public in general are affected, the utility is especially affected and its property rights impaired or destroyed, which is, you will see, a statement of the law of nuisance, existing without the aid of the State Road Law.

The conclusion seems sound; but the primary premise of the court was that the road law was not to be applied and resort was to be had entirely to equity to discover whether the plaintiff was to be protected in its franchises.

The case cited to illustrate the position of the court on a state policy against ruinous competition between public carriers only deals with the authority of the Public Service Commission to require a railway to inaugurate and maintain a passenger service between certain points.

The decision seems to support this line of reasoning. True, the road law is not invoked, yet the road law changed the policy of the state not only as respects competition within the purview of the act, namely the control of the highways of the State, but also as regards public utilities generally, particularly where competition by carriers naturally using the highways would come into competition with established carriers to their detriment. Therefore the general jurisdiction of equity applied to the situation. If the road law declared a new policy as regards common carriers on the highways, the street railway would have a right to protest in the first instance before the state road commission the granting of a certificate of public convenience and necessity and to resort to equity to prevent an unauthorized use of the highways to the detriment of the value of its franchise.

In the cases just referred to the State Road Commission had not taken any action under the State Road Act and its orders were not before the court. Now comes the question of whether or not when the State Road Commission has made its order, the same may be reviewed by the courts.

Reynolds Taxi Company v. *Hudson*[12] decides that the circuit court has the power to review by certiorari the orders of the State Road Commission granting certificates of convenience to independent bus lines proposing to furnish service in competition with established public carriers. The court, seemingly by way of gratuity added that while it could not decide the propriety of the

[12] 103 W. Va. 173, 136 S. E. 833 (1927).

State Road Commission's orders, yet there was no doubt of the right of an established carrier furnishing necessary service to protest the granting of a certificate of convenience to an applicant proposing to furnish competing service. A very narrow point was decided but the freedom of the language of the decision in indicating the attitude of the court on the competition between carriers is a significant preface to the case of *Monongahela West Penn Public Service Company, et al.* v. *State Road Commission,*[13] decided in October, 1927, when the final phase of the intra-state regulatory problem was under review. "Final phase" is not used as suggesting the end of the difficulties but to indicate the clear-cut, definite and far-reaching decision on the contest between rail and motor-bus transportation which was presented only in a lesser stage in the *Reynolds Taxi Company* v. *Hudson* Case.[14]

The subsidiaries of a Traction Company and a railroad were arrayed on the one side and motor-bus companies on the other in competition for certificates of convenience to operate motor vehicles for hire.

These facts should be noticed. None of the carriers was actually established and superficially it was a contest between carriers of the same kind except for the protests filed by the traction and railroad interests before the Commission. The Commission apparently had made its award upon the basis of priority. The court brushed aside all technical considerations and stated the issue, as follows:

> "* * * the single injury presented in each of these cases is, which applicant does law and justice favor?"

And this being interpreted means which, at the present time, is better for society, rail or motor-bus transportation? The Court says that, considering the public nature of the railroads, their tremendous investments, and the vital services that they render to the public, they must be given a preference over the motor-bus which as yet is economically irresponsible and very inadequate for proper performance of the services rendered by the railroads. That is the gist of the decision which labors hard to reach a social result rather than follow faithfully a system of rigid legal theory. There is a logical difficulty suggested by the dissenting opinion, that the applicants were not the railroads whose charter powers are limited and whose property rights are confined to their rights of way, but subsidiaries, distinct legal entities possessing their own rights, powers and duties; as well as

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[13] *Supra,* n. 3.
[14] *Supra.*

the charge that the majority opinion constituted an invasion of the legislative field.

Certainly the result of this decision is socially sound in the present situation.

But the end of the difficulty is not yet. Every State may go through the natural evolution that has taken place in West Virginia and reach the same end as expressed in the *West Penn* v. *State Road Commission* Case, which seems likely, but a good bit of the process, though very necessary, seems futile in view of the chaos obtaining in interestate motor-bus regulation.

Where the termini of the route lie in different states, the Federal Constitution in the Commerce and due process clauses seems to impose an insurmountable barrier to practical legislation by the States. In *Buck* v. *Kuykendall*,[15] Buck was refused a certificate of convenience because of frequent steam railroad facilities and adequate auto state lines connecting Seattle and Portland. The Supreme Court reversed a decree dismissing a bill for injunction on the ground that the primary purpose of the state act was not one of regulation with a view to safety or conservation of the highways, but the prohibition of competition, which is to be recalled, was the moving consideration in our West Penn Case. In a case decided the same day, *Bush* v. *Maloy*,[16] the rule in *Buck* v. *Kuykendall* was applied although there were two additional features absent in the latter case, one that there had been no federal aid in improving the highway in question and the other that exercise of the discretion under the state statute was unconstitutional while in the Kuykendall Case the statute itself by construction invaded the field reserved by the commerce clause for federal regulation.

Whenever the motor-bus carries only interstate traffic the result is reached that the state cannot demand a certificate of public necessity and convenience,[17] yet this undoubted principle does not prevent the state from assuming a degree of control, regulations which, for instance, deal with the use of the highways of the state as distinguished from the regulation of the business of the carrier in Interstate Commerce and which have the object of rendering the highway safe for the users thereof or provide for the maintenance of the highways.[18] The state may provide that a nonresident owner operating an automobile on a state highway must

[15] 45 Sup. Ct. 325, 267 U. S. 307 (1924).
[16] 45 Sup. Ct. 326, 267 U. S. 317 (1924).
[17] Buck *v.* Kuykendall, 45 Sup. Ct. 325, 267 U. S. 307 (1924); Bush & Sons Co. *v.* Maloy, 267 U. S. 317 (1925).
[18] Kane *v.* New Jersey, 242 U. S. 160 (1916).

appoint the secretary of state his attorney for service of process in any action arising out of the operating of motor vehicles.[19] This seems reasonable since the state owns its highways and can impose what conditions it sees fit upon the users so long as they do not have the direct or indirect result of violating the commerce clause of the Federal Constitution. The Commerce Clause seriously impairs the efforts of the states in their attempts to regulate in view of the fact that it is easy to evade or partially evade the force of any state statute by interstate organization. It is settled where there is transportation between termini in the same state over a route lying partly outside the state, the commerce is interstate.[20] It is reliably stated that the number of interstate busses for the year 1926 increased more than 60 per cent as compared with an increase of 11 per cent in intrastate busses.[21]

Aside from the commerce clause, the decision in *Frost* v. *Railroad Commission*[22] exposes state regulation to danger from another constitutional source. A private carrier engaged in contract hauling was compelled by the California Auto-State Truck Transportation Act to submit itself to the duties and burdens imposed upon common carriers. The whole act by a divided court was declared to be unconstitutional upon the ground that mere legislative command could not convert a private carrier into a public one, in spite of the fact that every section of the act was made independent of the validity of the rest. The danger of offending against the due process clause of the Fourteenth Amendment is a real one to state control. The state is limited, it seems, in the approach to the problem to mere regulation of traffic or the use of the highways. Thus, though genuine, intra-state common carriers are of easy regulation, so far as power goes, and aside from the practical difficulties of what the regulation shall be, they constitute only a small portion of the field to be regulated. The California Case was a patent attempt to bring about an economic result of protecting the business of the common carrier by averaging competitive conditions. The social intent of the California decision and our own in the West Penn Case were the same.

Congress has not yet laid down any uniform rule to be followed respecting automobile interstate commerce. It has been suggested that the problem is a local one and the states should be allowed a

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19 Hendrick *v.* Md., 235 U. S. 610 (1915).

20 Hanley *v.* Kans. City So. Ry., 187 U. S. 617 (1903); Western Union Tel. Co. *v.* Speight, 254 U. S. 17 (1920); 41 HARV. L. REV. 260.

21 40 HARV. L. REV. 883.

22 271 U. S. 583, 45 Sup. Ct. 605 (1926).

free hand until Congress has seen fit to act.[23] It is doubtful if this would meet the situation. It could at most only eliminate the interstate anarchy at present existing and would not touch the vital economic principle involved of the contest between different modes of travel. Forty-eight states could conceivably have forty-eight different solutions, which could only serve to make the tangle worse.

Economically considered the railroads are national institutions and the ever-increasing net-work of highways is rapidly making the automobile carriers the same and the states in the natural scheme of things can have little to do with their regulation, which must be from a common source in a uniform manner.

The days of free competition in public utilities are over; neither the State nor the Federal government can stand idly by and permit a knock-down-and-drag-out fight between motor transportation and the railroads.

If Congress, profiting by the efforts of the states, would inaugurate a system of Federal Control within the Federal field of jurisdiction, the states could follow this up with legislation by modeling intra-state control along the national lines thus laid down, in the same fashion as the State Public Service Commissions follow the head of the Interstate Commerce Commission in matters jointly affecting state and nation. Unless something is done nationally, the regulation of motor busses is, potentially at least, at a standstill.

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[23] See dissenting opinion of Mr. Justice Reynolds, Bush *v.* Maloy, Buck *v.* Kuykendall, 267 U. S. 325, 45 Sup. Ct. 327 (1925).

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THE RESTATEMENT OF CONFLICT OF LAWS BY THE AMERICAN LAW INSTITUTE AS AFFECTING WEST VIRGINIA*—It is entirely unnecessary to preface this discussion with a statement concerning the work of the American Law Institute or the method by which the work of that distinguished body is carried on. This Association on previous occasions has been quite fully informed on these subjects by two gentlemen preeminently qualified to discuss them—Mr. William Draper Lewis, the able director of the Institute, and Mr. Herbert F. Goodrich, who has recently been made its Adviser on Professional and Public Relations. The creation of this latter office emphasizes the importance that is now conceded to the second

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