

April 1928

## The Changing Law of Competition--Rehabilitation After Impeachment by Contradiction

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### Recommended Citation

T. P. Hardman, *The Changing Law of Competition--Rehabilitation After Impeachment by Contradiction*, 34 W. Va. L. Rev. (1928).

Available at: <https://researchrepository.wvu.edu/wvlr/vol34/iss3/7>

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ing section of our own Code relative to service on carriers:<sup>32</sup>

"In a case against any common carrier (other than a corporation) for any liability as such, it shall be sufficient to serve any process against or notice to the carrier, or any agent, or the driver, captain or conductor of any vehicle of such carrier, and to publish a copy of the process or notice as an order is published under the twelfth section of this chapter."

It is not likely that this form of service has been commonly resorted to, and the absence of annotation indicates that the question of constitutionality of the act has never been raised. Might it not be upheld on the basis of reasonable regulation? If the operating of the vehicles of the common carrier endangers public safety, then under the police power it can be regulated, and the state can provide that the doing of such acts shall subject it to the jurisdiction of the courts as to causes of action arising out of such acts. There would be a question, of course, as to whether such regulation was reasonable and whether the notice provided was sufficient. The operating of numerous auto bus lines into the state might make it desirable to resort to the form of service on nonresident common carriers, not incorporated, provided by this section, which might be upheld as a reasonable exercise of the police power.

—EDMUND C. DICKINSON.

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<sup>32</sup> BARNES' W. VA. CODE ANN. 1923, c. 124 §9.

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THE CHANGING LAW OF COMPETITION—REHABILITATION AFTER IMPEACHMENT BY CONTRADICTION.—When a witness has been impeached by testimonial contradiction, the courts do not always permit him to be rehabilitated by disproving the alleged error. But when, as in the principal case, one has been impeached by "editorial" contradiction, all the authorities, *including editorial writers*, are unanimous in favoring not only a right of rehabilitation but a "no right" of re-contradiction and a right of trial by battle in case of any attempt. Accordingly it is herein proposed to rehabilitate the policy against ruinous competition which was advocated by the writer in the last issue of this Quarterly<sup>1</sup> and

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<sup>1</sup> Thomas P. Hardman, "The Changing Law of Competition in Public Service—Another Word," 34 W. VA. L. QUAR. 123 (1928).

which was, to many, convincingly impeached by Mr. Arnold in his able editorial "Dissent."<sup>2</sup>

The essence of Mr. Arnold's argument is that this policy is judicial legislation and that *courts should judicially legislate only "when there is no substantial difference of opinion as to the social desirability of the change."* Thus, Mr. Arnold agrees with the writer that "within appropriate limits judicial legislation is justifiable." But he denies that appropriate limits include the promulgation of a policy against ruinous competition in public service, for the reason that here reasonable men differ as to the necessity for a new policy. This means that, though there is actually the social desirability of the change, we can not judicially have what is socially desirable in case some reasonable men think a change undesirable.

If that were a correct criterion for changing the law judicially, our common law today would be much the same as it was in ancient times, at any rate so far as conscious growth is concerned, for perhaps most of the important conscious judicial changes in the law have been made over the opposition of reasonable men. Certainly judges in general must be classed as reasonable men. But many of the now admittedly justifiable changes in the law have been judicially promulgated over the well-meant dissent of four of the nine judges, or two of the five, or some such substantial proportion of the judges. It seems certain therefore that, if we take the law as we find it in the twentieth century, it can not be laid down as a general proposition that, when the courts do change the law, they change it only when there is no substantial difference of opinion as to the social desirability of the change.

The well-known recent change in our law, whereby liability was imposed upon the owner of a "family" automobile for the negligent operation thereof by a member of the family, will suffice as an illustration. This sheer judicial legislation, changing the time-honored *qui facit per alium facit per se* into the now famous "*qui facit per auto facit per se*," was made over the very able dissent of perhaps the noblest Roman of them all. And many others, mostly reasonable,

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<sup>2</sup> The Changing Law of Competition in Public Service—A Dissent, *ibid.* 183.

extra-judicially dissented. But the result is admittedly salutary.

Of course the courts should not be hasty in changing the law; for, among other reasons, the social interest in stability must be adequately secured—therefore, *stare decisis* as a rule. But the equally important social interest in progress must also be properly protected; and progress will be unduly impeded and often completely prevented if we must always wait for a judicial change until there is no substantial difference of opinion as to the social desirability of the change. Let us therefore have judges who, though not hasty leaders of a minority, will *cautiously* progress with a preponderant majority, *when progress is socially desirable*,<sup>3</sup> even though, as is commonly the case, there is a substantial minority of reasonable men who think it socially desirable that our law, like the law of the Medes and Persians, should change not.

—T. P. HARDMAN.

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<sup>3</sup> As to when such progress is socially desirable and therefore justifiable, see my paper, "Stare Decisis and the Modern Trend," 32 W. VA. L. QUAR. 163 (1926).

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SUFFICIENCY OF A NEW PROMISE TO TAKE AN ACCOUNT OUT OF THE STATUTE OF LIMITATIONS.—In West Virginia, an action upon an account is barred by the statute of limitations after five years from the date at which "the right to bring same shall have accrued";<sup>1</sup> but it is further provided, in the chapter dealing with the limitation of suits that:

"If any person against whom the right shall have so accrued on an award, or on any other contract, shall by writing signed by him or his agent promise payment of money on such award or contract, the person to whom the right shall have so accrued, may maintain an action or suit for the moneys so promised, within such number of years after the said promise, as it might originally have been maintained within, upon the award or contract, and the plaintiff may either sue on such a promise, or on the original cause of action, and in the latter case, in answer, to a plea under the sixth section, may, by way

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<sup>1</sup> WEST VIRGINIA CODE, c. 104, § 6.