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The Changing Law of Competition in Public Service--A Dissent

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There is too much danger from injunctions like that in the Pittsburgh Terminal Coal Company Case that in this vast struggle of forces lying beneath social unrest the power of the state can justly be said to have been thrown on the side of capital.

—CLIFFORD R. SNIDER.

THE CHANGING LAW OF COMPETITION IN PUBLIC SERVICE—A DISSENT.—The principles outlined by Mr. Hardman in his very able article in this issue of the West Virginia Law Quarterly, and in his former article under the same title in the last volume of this Quarterly have attracted interest which is not confined to this state. Mr. Hardman is among the first to analyze the decisions illustrating what he terms a new judicial legal principle, *i.e.*, a principle of regulated monopoly in public service with a view to the protection of existing public utilities against ruinous competition. By this he means that courts should recognize that the paramount intent of the public in having good service at adequate rates is better served by protecting existing utilities against free competition.

The question of whether there is or whether there should be such a new legal principle in public utilities law is one which has attracted wide interest and even anxiety. The editors of the Quarterly have received letters and inquiries from various parts of the United States. Companies operating bus lines and companies manufacturing busses are anxious to know what this new legal principle is and what its results will be. Such companies have vital economic interests in the question. They are able to keep in touch with legislatures and usually have, or at any rate think they have, an idea of what legislative acts mean. They also have, or think they have, means of persuading legislatures to repeal acts if they are economically unsound. The announcement of a new judicial principle dealing with public utilities however leaves them in a state of perplexed

anxiety. It lacks the definiteness of an act of the legislature. An act of the legislature is static. Its passage does not mean that the next legislature is bound to carry its implications a step further. A judicial principle however is only a starting point and lawyers disagree just where it will end. Because they believe that West Virginia is a leading state in the promulgation of this principle many have asked for opinions from this law school regarding possible implications of this principle.

Mr. Hardman's second article published in this issue is in part an attempt to answer some of these questions. He makes his position clear. He believes that the time has come for the announcement of a new judicial principle dealing with public utilities and he supports the conclusions of the Supreme Court of West Virginia in a number of recent cases, laying down what he terms a changing law of competition in public service. The change he thinks has been the recognition by the courts, acting at least to a certain extent independently of particular legislative enactments, that existing public utilities should be protected against competition on account of the paramount public interest in regulated monopoly as opposed to what he terms ruinous competition.

We venture to dissent from Mr. Hardman's conclusions concerning this so-called new judicial principle. We will not discuss the doubt which has been raised by many as to whether such a new principle actually exists. Mr. Hardman does not contend that the principle is definitely settled or its limits defined. Nevertheless it would have to be admitted by anyone who disagreed with Mr. Hardman's conclusions that he has marshalled considerable judicial support, at least in the language and the reasoning of the court, for his statement of this principle. However, the decisions have not gone far enough so that the question as to the existence of such a principle and its social utility are not still open to question.

Should a court after a careful examination of the economic situation relating to public utilities lay down a principle involving the protection of regulated monopoly against ruinous competition in the absence of any specific declaration of the legislature? We think not. In order to do so

the court must decide two questions. One is economic, the other is legal. The court must roughly follow the following syllogism. (1) Protection against ruinous competition is a sound economic policy relating to public utilities. (2) The court in its decision should follow the sound economic policy. Therefore, the court should protect existing public utilities from competition.

On the first premise of this syllogism we are unable to register any certain conviction but we do, nevertheless, privilege ourselves considerable doubt. We distrust generalization in the field of economics. The answer to this question depends upon too many intangible things and the conclusion as to its soundness depends upon the point of view as to the ultimate end to be achieved. Assuming that such a principle conduces to the public comfort, is the protection of public comfort as opposed to private rights and freedom the sole object of judicial decision? This is a question which will never be conclusively determined. Neither is it at all certain that regulated monopoly is the best way of maintaining efficiency. We do not wish to argue this question but merely to point out that it is one on which reasonable men would differ.

The minor premise of this syllogism is that the court should follow economic principles, which seem to them sound, even to the extent of committing the crime of judicial legislation. Is this sound? It is true as Mr. Hardman points out that the nature of judicial process is such that "within its appropriate limits judicial legislation is justifiable." It is further true that "frankness in admitting the fact that courts do so legislate when justice requires will prevent much legal stagnation." Anyone can point out numerous examples of judicial legislation in the past which have been extremely successful from a social point of view and other examples may be found where the timidity of the courts in taking a step without the legislature's sanction has resulted in unfortunate social consequences. Admitting all this, we believe that this new policy against competition in public service advocated by Mr. Hardman implies a different kind of judicial legislation than has been indulged in by courts in their more conspicuous attempts at this hazardous occupation in the past. Let us examine four ex-

amples which are commonly cited as successful judicial legislation. Courts of equity in violation of the common law permitted married women to hold for their own benefit separate estates in equity. English courts recognized the custom of bankers in dealing with negotiable paper and laid the foundation for a new law of negotiable instruments. Courts in the mining districts in the west announced a completely new system of mining law which followed customs of miners built up by virtue of the necessity of orderly operation of lode claims. Courts in the arid states of this country threw overboard the doctrine of riparian rights in order to allow the irrigation of crops in a country where water was a valuable commodity. Other examples could easily be found but we cite these because they are conspicuous and because each of these attempts at judicial legislation was unquestionably a success. Yet in each of these cases the courts were forced into their decisions by conditions which the customs and necessities of society had created for them. They were not trying to give a different trend to the economic development of the matters affected. They were recognizing something which had only happened as a matter of custom. Further in these cases conditions confronted the courts about which reasonable men could hardly differ. For example, irrigation in the west was impossible as water in substantial quantities could not be diverted from streams. The court was forced to announce a new rule.

A similar situation does not exist today in the law of public utilities. It is not impossible to carry the public from place to place without the enunciation of a new doctrine favoring regulated monopoly against ruinous competition. We do not have a case where the legislature has failed to act on a matter of necessity. On the contrary, the legislature has acted under these circumstances. We dissent from the idea that a court may judicially determine the policy of the legislature in so acting and then embark on a new principle, using that policy as a starting point.

We believe that only in cases where two reasonable men would not differ as to the economic or social necessities of the new judicial principle, should the court announce one. We believe that there are certain fundamental reasons in-

herent in the structure of courts which render it inadvisable for them to announce economic policies on disputed economic questions. First, they may not act on first hand information, nor may they hire experts of their own, not connected with either side of the case to investigate whether competition in public utilities is affecting service to the public. No business executive could determine on an economic policy by avoiding personal contact with the problem and only hearing it vigorously argued pro and con by persons who had taken opposite sides. Conferences of parties interested in an informal manner are difficult, if not impossible, in judicial action. Second, judicial decisions, if wrong, are more difficult to change than the decisions of administrative bodies. They must fit into a philosophic system and must necessarily be surrounded with a certain amount of dignity. They must necessarily be protected by contempt proceedings from too acrimonious criticism. A court therefore cannot be a field of economic experimentation. Third, courts are not and should not be subject to changing policies on account of popular demand. If they announce an economic policy which does not fit they cannot change it under pressure of criticism without a certain loss of dignity which is a necessary attribute of their judicial functions.

This is not so true of commissions as it is of courts. It does not apply to legislatures at all. These bodies are and should be responsive to popular demand and criticism. They are proper bodies for economic experimentation as such is needed. They may and do shift with every wave of popular sentiment. If they are wrong, other commissions or legislatures will not only correct them without hesitancy but often will take an extreme pleasure in undoing what their predecessors have done. Further than that, the legislative acts do not necessarily carry an implication that further acts of the same character, extending the principles of the first act, will necessarily be passed. The condition of confused alarm as to what is going to happen in the future does not exist in the minds of those who read a legislative act of which they disapprove.

To sum up, we do not deny that courts do, and at times should, legislate. Many annoying and useless doctrines of

the common law remain to plague us because courts have refused to recognize changing conditions and have followed judicial formula where a bold and sweeping change amounting to judicial legislation would have been of the utmost social benefit. We believe, nevertheless, that those cases should be confined to that numerous class where there is no substantial difference of opinion as to the social desirability of a change. They should be cases where reasonable men would not differ as to the necessity of a new policy. When the courts, however, announce a new policy not based on previous custom and necessity, which is intended to mold the economic development of public utilities and when the result is not one which is arrived at by the construction of specific words in legislative enactment, or in determining whether a specific statute is unconstitutional or not, we believe that they have abandoned the proper field, which is the construction of statutes and the determination of private rights and have embarked on a hazardous venture of economic experimentation.

In dealing with the acts of Public Utilities Commissions we prefer the view that courts should give them as free a hand as is possible under constitutional provisions. In the absence of an appropriation of property without due process of law, or mere arbitrary and capricious action on the part of the Commission the court we believe should let its action stand. The Commission is certainly a proper forum in which economic and social arguments may be used. It is a fitting instrument for economic experimentation. It should be let alone so far as possible to investigate the economic principle involved in Mr. Hardman's thesis before this principle is permanently established as part of the judicial law.

—T. W. ARNOLD.

CONTEMPT—EVASION OF CRIMINAL PROCESS AS CONTEMPT OF COURT.—In a recent case[1] the Supreme Court of Iowa de-

[1] Burtch *v.* Zench, 200 Ia. 49, 202 N. W. 542, 39 A. L. R. 1349 (1925).