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Public Service Corporations--Excuses for not Serving--Operation at a Loss Cannot Be Required

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tants of Holyoke, 105 Mass. 82; *Corbett* v. *City of Troy,* 53 Hun. 228, 6 N. Y. Supp. 381. They have also held that a ridge or ball of ice on a sidewalk is an actionable defect. *Abbott* v. *City of Springfield,* 210 S. W. 443 (Mo.). In a New York case where the plaintiff fell on a raised place in a sidewalk, which was caused by the root of a tree, and which was covered with ice, the court allowed a recovery. *Conklin* v. *City of Elmira.* 11 App. Div. 402, 42 N. Y. Supp. 518. If the proper construction of the West Virginia statute is to render defects in sidewalks, it is difficult to see why the walk in question was not "out of repair" within the meaning of that statute. —M. T. V.

PLEADING—TIME WITHIN WHICH MAY BE FILED—RULES OF COURT LIMITING TIME.—A defendant, who had already pleaded the general issue, at a subsequent term of court tendered a special plea and a notice of set-offs, less than five days before the case for trial on the docket, but more than five days before the case was actually called for trial. Because of a rule of court to the effect that "no pleadings, notices or counterclaims shall be filed in court, in any case, later than the fifth day before the day in which the case is set for trial on the docket, except pleas of the 'general issue' and 'general replication' . . . ," the trial court refused to permit such plea and notice to be filed. *Held,* The rule of court is valid and the trial court's interpretation of it correct. *Teter* v. *George,* 103 S. E. 275 (W. Va. 1920.)

For a discussion of this case, see NOTES, p. 77.

PUBLIC SERVICE CORPORATIONS—EXCUSES FOR NOT SERVING—OPERATION AT A LOSS CANNOT BE REQUIRED.—A lumber company owned a railway which was operated primarily as a logging road, but which did some business for third persons as a common carrier. When the lumber company had cut all of its timber, it discontinued operation of the railroad, which could no longer be operated except at a loss. The lumber company, however, was making a profit on its entire business. *Held,* The lumber company cannot be compelled to operate its railroad at a loss. *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana,* 40 Sup. Ct. Rep. 183 (1920).

Under the older view, the general rule seems to be that a railroad cannot abandon its road or a branch, even though it may be operated at a loss, because it owes a duty to the public. *Farmers' Loan & Trust Co.* v. *Henning,* Fed. Cas. No. 4,666; *Gates* v. *Boston & N. Y. Air Line R. Co.,* 53 Conn. 333, 5 Atl. 695. The modern, and better view, is that constitutional liberty as applied to public service means, that as the entrance into a public service is voluntary, so total withdrawal is possible upon reasonable notice. *Satterlee* v. *Groat,* 1 Wend. (N. Y.) 273; *Munn* v. *Illinois,* 94 U. S. 113. Of course, so long as a public service company retains its charter, mandatory in terms, no part of the service may be abandoned. *Chicago & Alton R. Co.* v. *Suffern,* 129 Ill. 274, 21 N. E. 824; *Savannah & Ogeechee Canal Co.* v. *Shuman,* 91 Ga. 400, 17 S. E. 937. But where the receipts of an entire railroad are insufficient to meet its operating expenses, operation at a loss will not be compelled, and it may be abandoned unless forbidden by the express terms of its charter, in the absence of special circumstances. *Moore* v. *R. Co.,* 80 W. Va. 653; 93 S. E. 762; *Jack* v. *Williams,* 113 Fed. 281, affirmed in 76 C. C. A. 165, 145 Fed. 281, distinguishing *State* v. *Sioux City & Pacific R. Co.,* 7 Neb. 357. The reason for the modern view is, that to compel operations at a loss would violate the due process clause of the constitution. *Pa. R. R. Co.* v. *Public Service Commission of Pa.,* 40 Sup Ct. Rep. 36. Under both the older and newer views, however, a company operating its railroad primarily for the purpose of transporting its own wares, and only incidentally for the benefit of third persons, may abandon the road or any part of it, whenever the business of the company does not justify that it longer be operated. *Montell* v. *Consolidation Coal Co.,* 45 Md. 16. The same argument based on the due process clause applies here. A complete discussion of the right to withdraw from public service may be found elsewhere. See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, 253-279. See also 26 HARV. L. REV. 659; 32 HARV. L. REV. 716; L. R. A. 1915 A. 549; L. R. A. 1917 D. 1105; L. R. A. 1918 A 1028n.; L. R. A. 1917 E. 1193.

—A. W. L.

STATUTE OF FRAUDS—CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR—PAROL LEASE.—The defendant held under a written lease which was to expire December 31, 1919. A verbal agreement was made on November 12, 1919, again leasing to the defendant for six months from January 1, 1920, with a