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What Constitutes a Public Service

T. P. H.
West Virginia University College of Law

on Uniform State Laws would be appointed in each branch of the Legislature, as has been done in many states, if THE WEST VIRGINIA BAR ASSOCIATION at its next meeting would provide for a standing Committee on Uniform Laws, as has been done by several state bar associations, and if commercial organizations such as bankers associations, commercial associations, and boards of trade would give the matter special consideration.

—H. C. J.

WHAT CONSTITUTES A PUBLIC SERVICE.—While the law of public service is admittedly one of the oldest branches of the law, dating as it does from the time of our earliest reports, it is still perhaps the most unsettled branch of the law, being, in many respects, law still in the making, and the courts and commissions, in an ever-increasing number of cases, are constantly called upon to answer the elusive and elastic question: What constitutes public service justifying state regulation? In the leading case on the question[1]—a case often referred to as the most important case ever decided by the United States Supreme Court—there was very vigorous and voluminous dissent by two of the judges on the question whether the storage of grain in elevators under the circumstances in question was public service justifying state regulation. And quite recently the United States Supreme Court, in a very important case,[2] was still farther from unanimity on a very similar question, *viz.*, whether the business of fire insurance as generally conducted is a public service justifying governmental regulation of rates. And in a very recent case,[3] presenting the general problem in an apparently novel form, the decision by the Supreme Court of Appeals of West Virginia, while unanimous and perhaps correct, seems to be of sufficient importance to justify a consideration not only of the soundness of the decision but also of the fundamental principles which determine whether a given business or part of a given business is a public service and, therefore, subject to state regulation under the police power, or a purely private business and, therefore, under the "due process" clause of the

[1]Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77 (1876).

[2]German Alliance Insurance Co. *v.* Kansas, 233 U. S. 389, 58 L. Ed. 1011, 34 S. Ct. 612 (1914).

[3]Clarksburg Light & Heat Co. *v.* Public Service Commission, 100 S. E. 551 (W. Va. 1919).

federal Constitution not subject to the regulatory power of the state.

The precise question raised in the last-mentioned case, hereinafter referred to as the principal case, was whether the West Virginia Public Service Commission could regulate the rates charged by a natural gas company to its industrial consumers. It was admitted that the company was a public utility as to its domestic consumers, but as to supplying gas to industrial consumers it was contended that this part of the utility's service was not a public service and, therefore, was not subject to the regulatory power of the state. An interesting and apparently unsettled question is thus raised, whether a natural gas company may be a public utility as to domestic consumers and a private enterprise as to industrial consumers—a question which the Court answered in the negative—but before considering the soundness of this conclusion, it will be necessary to consider the basic question: What constitutes a public service? Upon this point the Court, in the principal case, said:[4]

> "When does any particular enterprise or line of business fall within the regulatory power of public authority? . . . *No rule can be laid down which can be followed blindly or arbitrarily over any period of time.* The ever-changing conditions of modern business, and the constantly varying relations of the public to such business, make necessary the extension of this power in the interest of the public to such businesses as may by their conduct decidedly influence for weal or for woe the general welfare of the community."

Thus, many businesses, which were once considered public utilities, such as tailoring, practicing medicine and shoeing horses, are now considered purely private enterprises,[5] while many businesses which were once considered private, such as fire insurance[6] and storing grain in elevators,[7] are now under proper circumstances considered public utilities. It can thus be readily seen that, while the underlying principle of law may remain invariable, what constitutes a public service is in fact a variable quantity. Precedents are of little service in solving the problem for, as we have seen, what is a public utility today may not be one tomorrow

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[4]*Ibid.*, p. 554. Italics ours.
[5]See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 6, 7, 8 *et seq.*
[6]German Alliance Insurance Co. *v.* Kansas, *supra*, note 2.
[7]Munn *v.* Illinois, *supra*, note 1.

and what is a private business today may be a public utility tomorrow. It will be useful, however, to consider why such persons as the physician, the tailor and the smith, once on the list of public callings, are now off, and why such businesses as fire insurance, grain-elevating, *etc.*, once off, are now on. The answer is to be found in the historical fact that in early times when the physician, the tailor and the smith were under proper circumstances on the list of public callings, the businesses or professions of these persons were, because of the then existing conditions, really monopolistic in nature.[8] There was not sufficient competition to protect the public against imposition on the part of the dispensers of these essential services. Hence, the then necessity of subjecting these enterprises to governmental regulation. With the rise of modern industrialism, however, the normal situation changed from one of monopoly to one of competition, and thus, as competition effectively regulated most businesses, governmental regulation as a rule became unnecessary and, therefore, disappeared in practically all cases except that of the innkeeper and the carrier.[9] But the pendulum of normal business which swung from mediaeval monopoly to modern competition is, apparently, swinging back to a present-day practical monopoly—a consideration which accounts for the many, more or less recent additions to the list of public utilities, and a consideration which doubtless led the Court in the principal case to say that, "it cannot be doubted that in the future, as the relations of our ever-increasing population grow more intimate and interdependent, many businesses and enterprises which are at this day considered as entirely of private concern and beyond the power of the public to regulate will become subject to control under the police power." Hence, the importance of determining what constitutes public service, or in other words, when governmental regulation is permissible, for if the service in question is not a public service, governmental regulation thereof is want of "due process" and, therefore, unconstitutional.[10]

What, then, is the test of what constitutes public service? Of course, a statute declaring a certain business a public service cannot change the business from a private business to a public service, for the statute would be unconstitutional and void.[11]

[8]See WYMAN, "The Law of Public Callings as a Solution of the Trust Problem," 17 HARV. L. REV. 156 *et seq.*

[9]*Ibid.*

[10]Munn *v.* Illinois, *supra*, note 1.

[11]Clarksburg Light & Heat Co. *v.* Public Service Commission, *supra*, note 3.

In doubtful cases, however, where the courts, in the absence of statute, might well hold a business to be private, the courts might well and consistently uphold a statute declaring the business a public service, for statutes are presumed to be constitutional and, hence, all doubts are resolved in favor of the constitutionality of the statute.[12] Nor is the presence of legal privileges such as eminent domain at all conclusive, for if such privileges are granted for private purposes the grant is void.[13] Nor is the number of customers or consumers to whom the service is supplied of more than persuasive value, for the number of patrons may be one or many.[14] Nor, as we have seen, are precedents of much importance, for what was a private business yesterday may be a public service today. Nor does the fact that the business in question is only an incidental part of one's principal business afford any test as to whether the business is a public service.[15] Nor, as pointed out in the principal case, does the use to which the patron puts the particular service afford any criterion.[16] Nor, finally, does the nature of the service itself afford any test, for no business is necessarily a public service under all circumstances—even a railroad may be a private carrier in part or in whole.[17] It is necessary, therefore, to resort to the common-law criterion, one, but only one, essential of which, is, as already intimated, that a business to be a public service must be *at the time in question monopolistic in nature*.[18] This monopoly, which need be only a virtual or practical monopoly, may arise in various ways and the manner in which it arises seems to be immaterial.[19] Thus, the limitation of time is the principal factor that gives the innkeeper a practical monopoly, for the immediate needs of the traveler give the innkeeper the upper hand and prevent bargain and choice on the part of the traveler, and this is true even though there are a score of inns nearby; so, the cost of building an electric plant or water works or a railroad, operating as a deterrent to would-be competitors, is the principal factor that makes these businesses virtual monop-

[12]*Ibid.*

[13]Bridal Veil Lumbering Co. *v.* Johnson, 30 Ore. 205, 46 Pac. 790 (1896). See 17 HARV. L. REV. 217.

[14]Bridal Veil Lumbering Co. *v.* Johnson, *supra*, note 13.

[15]Gordon *v.* Hutchinson, 1 W. & S. 285 (1841).

[16]See, also, to the same effect, Pinney & Boyle Co. *v.* Los Angeles Gas & Electric Corp., 168 Cal. 12, 141 Pac. 620 (1914).

[17]*Cf.* 1 WYMAN, *op. cit.*, § 239. See 23 HARV. L. REV. 339.

[18]See 17 HARV. L. REV. 156 *et seq.*, and 217 *et seq.*

[19]*Ibid.*

olies; so, limitations as to sources of supply, as in cases of natural gas companies, limitations as to suitable sites, as in cases of stockyards, grain elevators, *etc.*, are the principal factors that give rise to a natural monopoly in such enterprises. So, in general, wherever the situation of the parties, from whatever causes, is such as to make the business conducted a virtual monopoly, the business is such that, *under proper circumstances,* it may be held to be a public service.[20] What, then, constitutes the above-mentioned "proper circumstances," for it is indisputable that many monoplies are not public utilities? Thus, the limitation as to source of supply may give a diamond producing company a virtual monopoly, but it could not be contended that selling diamonds is a public service justifying state regulation of prices; so, because of scarcity of sites, cost of construction, *etc.*, a theatre may have a practical monopoly, but a theatre is not a public utility. Why? The law of public service is a law of extraordinary rigor imposing *extraordinary duties* upon the dispenser of the services, and, therefore, should be invoked only so far as it is necessary to protect the public in regard to what may be considered reasonably necessary service. It cannot be justified in regard to luxuries and non-essential services, for as was well said by Lord Ellenborough[21] and quoted with approval by the United States Supreme Court in a leading case:[22]

> "There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it."

It is only in regard to reasonably necessary services, then, that an exception is made and a law of extraordinary rigor applied, the exception being based, of course, principally on the ground of public necessity. But it is not every practical monopoly of what is normally a reasonably necessary service that is a public service. Thus, an electric supply plant organized to supply, and supplying, only one manufacturing plant with electric light and power would not, without more, be a public utility.[23] It is only when the dispenser of such services voluntarily holds himself out as willing to serve the public generally, or rather a permissible

[20] *Ibid.*, p. 227.
[21] Allnutt *v.* Inglis, 12 East 527 (1810).
[22] Munn *v.* Illinois, *supra,* note 1.
[23] See Avery *v.* Vermont Electric Co., 75 Vt. 235, 54 Atl. 179 (1903); Fallsburg Power & Mfg. Co. *v.* Alexander, 101 Va. 98, 43 S. E. 194 (1902).

class of the public, that a service both monopolistic and essential in nature becomes a public service.[24] In other words, in order to have a public service, there must be not only (1) *a business public in nature, i. e.,* a business both (a) monopolistic in nature and (b) essential to the welfare of the public or a permissible class of the public, but also (2) *a public profession, i. e.,* a voluntary undertaking to serve the public generally, or, more accurately, to serve generally applicants of the class in question, for the public of every public utility is, in the very nature of things, a limited class of the public, though the classification must, of course, be one which is legally permissible.

Perhaps this second essential of a public utility is nowhere better illustrated than in a recent important decision by the United States Supreme Court. In that case[25] a taxicab company (a corporation authorized by charter to operate taxicabs but not to exercise any of the powers of a public service corporation) performed *inter alia* two distinct classes of service: (1) One part of the business of the company was the furnishing of taxicab service to guests at certain hotels. This service was furnished under contracts with the hotels, which contracts gave the taxicab company the exclusive right to solicit business in and about the hotels, and, in turn, required the company to furnish taxicabs for guests at the hotels. Here, there was a public profession on the part of the company to serve generally any member of a permissible class of the public, though a very limited class of the public, and the business being admittedly public in nature, the court accordingly held that this part of the business was, therefore, a public service. (2) Another part of the business of the company, however, consisted of a livery or garage service. This service was furnished to individuals on orders delivered to the garage either personally or by telephone. The charges were, as a rule, practically uniform, but individual contracts were made in the case of each hiring, and while the company extensively advertised this part of the service, it asserted the right to reject any applicant whose credit the company considered unsatisfactory. Here, it will be seen, there was lacking a public profession to serve generally applicants of the class in question, though the nature of the service was substantially the same in other respects as in the case of the service supplied

[24]Terminal Taxicab Co., Inc. *v.* Kutz, 241 U. S. 252, 255, 60 L. Ed. 984, 36 S. Ct. 583 (1916).

[25]Terminal Taxicab Co., Inc. *v.* Kutz, *supra,* note 24.

to guests at hotels. Accordingly the court held that this part of the business was not to be regarded as a public utility. Said the court (*per* Mr. Justice Holmes):[26]

> "The important thing is what it [the company] does . . . [and as to this part of the service there is no undertaking] to serve the public generally."

With reference to just such a question Mr. Wyman has summarized as follows what is believed to be the correct view:[27]

> "It is ordinarily said that those who have undertaken a public service owe a duty to the public in general, whatever may be their inclinations. But it will be found upon inquiry that in the case of every public calling service is legally due to persons belonging to a special class, and not to every member of the public, as such. This is the inevitable consequence of the elementary principles as to the essential nature of public employment and the necessary scope of public profession. By these fundamental rules an employment is held public in its nature only in so far as it is affected with a public interest and only to the extent that it has been undertaken. *Both that public interest and that public profession must co-exist in order that there may be a public duty in particular cases.*"

But what is the view of the Court in the principal case with reference to the necessity of a public profession? Said the Court:[28]

> "When does any particular enterprise or line of business fall within the regulatory power of public authority? . . . It may be said that whenever the relation of any business or enterprise to the public, or to any substantial part of a community, becomes so close as to make the welfare of the public, or any substantial part of it, depend upon the proper conduct of such business, then it becomes a subject upon which the regulatory power of the state may be exercised for the benefit of the whole. . . . If it [the utility] is subject to public regulation in supplying its product to one class of consumers, such as domestic consumers, or to school houses or public buildings, it cannot very well be conceived how the supplying of its product to other consumers in the same community can be placed upon a different footing. . . When rival business enterprises

[26] *Ibid.*, pp. 254, 255.

[27] "The Inherent Limitation of the Public Service Duty to Particular Classes," 23 HARV. L. REV. 339. Italics ours.

[28] Clarksburg Light & Heat Co. *v.* Public Service Commission, *supra*, note 3, pp. 554, 555. Italics ours.

> locate in a community, can a public service corporation engaged in supplying fuel to the inhabitants of that community be permitted to say: We will supply fuel to one of these plants, and will subject the others to the necessity of procuring fuel of another kind at a largely increased cost? Such a holding in the end is bound to result in the petitioner not only having a monopoly in the business of selling gas in which it is engaged, but in creating a monopoly for the benefit of such private manufacturer, or manufacturers, as it might choose to favor with its supply of gas, to the prejudice of those who are forced to supply themselves with other fuel or discontinue their business. . . The duty of the petitioner to supply the public with gas is its paramount duty. *It makes no difference who that public is* or to what use the gas is to be appropriated."

But must such a conclusion be necessarily accepted? Does not the reasoning in the principal case lay insufficient emphasis upon the second essential of a public utility, *viz.*, that a *business public in nature* is not a public utility unless there is also a *public profession* on the part of the utility to serve applicants of the class in question? But, of course, as we have seen, the classification must be one which the law allows, *e. g.*, a natural gas company could not hold itself out to serve white persons only and not negroes. The above-mentioned *Taxicab Case* is a very good example. To illustrate further, a carrier may classify its carriage of goods into ordinary freight and express, and it is held that a carrier may by its profession undertake to carry ordinary articles only and not things of exceptional value such as money, or diamonds.[29] If, therefore, in a given instance such carrier undertook by special contract only, to carry a parcel of diamonds it would not necessarily follow that the carrier might not subsequently refuse to carry a similar parcel for some one else; nor, if the carrier under special contract agreed to carry money for A only, does it necessarily follow that the carriage is subject to the regulatory power of the state in regard to the rate charged? Such carriage of money or diamonds would normally be private carriage and the carrier would be a public utility as to ordinary articles and a purely private carrier as to the other class of goods, *viz.*, things of exceptional value.[30] Or, again, suppose that the X Natural Gas Co., was organized to supply natural gas to a single manufacturing

[29]See The Citizens Bank *v.* The Nantucket Steamboat Co., 2 Story 16, (U. S. C. C. 1841). See WYMAN, *op. cit.* § 255.

[30]See authorities cited in note 29.

plant, has never held itself out to serve any other manufacturing plant, has refused to supply some manufacturing plants, and has never supplied gas to any except a few manufacturing plants, and, moreover, has supplied such plants under such special and different contracts as to each applicant as it saw fit to make in each case. It would seem clear that as the law now stands such a utility is not a public utility[31] and, therefore, is not subject to the regulatory power of the state. What, then, is there to prevent a natural gas company from being, under proper circumstances, a public utility as to domestic consumers and a private business as to industrial consumers? It is admitted that a public utility may properly classify its consumers into domestic consumers on the one hand and industrial consumers on the other,[32] and may fix different rates for the two classes.[33] If, then, a natural gas company supplying only industrial consumers may, under proper circumstances, be a private business not subject to state regulation of rates, and if a natural gas company may, as it may, classify its consumers into domestic on the one hand and industrial on the other, why may not such a company under proper circumstances be a public utility as to one class and not as to the other? It would seem that there is just as much ground for such a classification as there was for the classification permitted in the *Taxicab Case*,[34] for supplying gas to manufacturing plants in large quantities and often for a part of the year only is a totally different sort of service from supplying gas for domestic purposes. And the law takes notice, to some extent at least, of this difference, for, among other things, it allows different rates for the two classes of service,[35] and if there is at any time insufficient service to serve both classes of consumers, domestic consumers should be served to the exclusion of industrial consumers.[36] It would seem, therefore, that it does not necessarily follow from the Court's reasoning that a natural gas company may never be a public utility as to its domestic consumers and a private enterprise as to industrial

[31]See WYMAN, *op. cit.*, § 243. *Cf.* Charleston Natural Gas Co. *v.* Lowe & Butler, 52 W. Va. 662, 44 S. E. 410 (1901).

[32]See, *e. g.*, the principal case.

[33]*Id.*

[34]*Supra*, note 24.

[35]This difference in rates, however, may be justified in some cases on the ground that it represents the "difference in the cost of the service to the consumers" of the two classes. And this is the ground upon which the difference in rates is based in the principal case.

[36]See, *e. g.*, the principal case, confirming an order of the Public Service Commission in which this difference was admitted and sanctioned.

consumers. Of course a natural gas company may be, and often is, a public utility as to industrial consumers, but whether in a given case a particular natural gas company is supplying its industrial consumers on a public basis or on a private basis, depends, it would seem, upon the facts of the particular case, *viz.*, whether the gas company has held itself out to serve industrial consumers generally, *i. e.*, depends upon the existence of a *public profession* to serve that class of applicants. But how far a classification is permissible is a point that is not free from doubt, and, in justice to the decision it should be said that it is perhaps possible to sustain the actual conclusion reached in the principal case on the ground that there was probably present the requisite public profession, but the Court, apparently taking the view that a public profession as to one class of applicants is a public profession as to the other class, does not throw much light upon the point herein suggested.

—T. P. H.

DOES A PROVISION THAT AN OIL AND GAS LEASE SHALL BE VOID UNLESS THE LESSEE DRILLS OR PAYS RENTAL CREATE A CONDITION?—An important class of oil and gas leases has been termed by some courts "unless" leases. As an example of the provision which distinguishes "unless" leases we may take the following clause from a lease involved in a well known case[1] in which the term was five years and as long thereafter as oil or gas should be found in paying quantities. The provision is as follows:

> "Provided, however, that this lease shall become null and void and all rights thereunder shall cease and determine *unless* a well shall be completed on said premises within three months from date hereof, or in lieu thereof thereafter the parties of the second part shall pay to the parties of the first part fifteen dollars for each three months delay, payable in advance, until a well is completed."

Thus the essential feature of an "unless' lease is a provision to the effect that the lease shall become null and void (or shall terminate) unless the lessee drills a well within a fixed period or pays a certain sum for the privilege of delaying such drilling dur-

[1]Pyle *v.* Henderson, 65 W. Va. 39, 66 S. E. 10 (1909). A statement as to the characteristics of an "unless' lease will be found in Northwestern Oil & Gas Co. *v.* Branine, 175 Pac. 533 (Okla. 1918). The term may not be a desirable one but it is short and the meaning is now well known to lawyers familiar with oil and gas litigation.