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New Public Utilities

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NEW PUBLIC UTILITIES—To use the familiar phraseology of Lord Hale, when does a business “cease to be *juris privati* only” and become “affected with a public interest,”¹ so that it may be regulated as a public service? Before attempting to answer this question, which has been variously answered by various authorities and is not yet definitely settled,² it will be well to remember that all businesses, private and public, are, of course, subject to governmental regulation of a sort. But there is in one respect an important difference between the sort of governmental regulation to which private businesses may be constitutionally subjected and the sort of governmental regulation to which public businesses may be constitutionally subjected. The difference is not merely one of degree; it is one of kind. Generally speaking, governmental regulations in regard to private business are negative in character; govern-

¹ *De Portibus Maris*, 1 HARG. LAW TRACTS 78.

² See *Clarksburg Light & Heat Co. v. Public Service Commission*, 84 W. Va. 638, 100 S. E. 551 (1919). See, discussing the point and taking opposite views: Wyman, “The Law of Public Callings as a Solution of the Trust Problem”, 17 HARV. L. REV. 156, 217; Burdick, “The Origin of the Peculiar Duties of Public Service Companies,” 11 COL. L. REV. 515, 616, 743. Cf. 31 YALE L. J. 75-78. See Hough, J., in *Marcus Brown Holding Co. v. Feldman*, 269 Fed. 306, 317 (1920).

mental regulations in regard to public business, that is, in addition to negative regulations generally applicable to private business, are positive in character. The law says to those engaged in private enterprises: In conducting your business you must not do this or that, *e. g., sic utere tuo ut alienum non laedas*,³ which maxim is in essence a negative requirement not to use one's own so as to injure another. But to those engaged in public businesses the law also says (or may say): In conducting your business you must do this or that, *e. g.,* you must serve all, as a rule, and you must serve for a reasonable compensation. Of course, these positive duties in public service law may differ in regard to different public businesses,⁴ just as negative duties may differ in regard to different private businesses. But there is this fundamental distinction between the two classes of business, *viz.*, that the law peculiarly applicable to public business is coercive, imposing positive duties, while the law peculiarly applicable to private business is restraining imposing negative duties.⁵

From the time of our earliest reports the courts have classified commercial enterprises into these two categories and have applied quite different rules of law to each class of business. In medieval times the list of public businesses was long,⁶ while only a few years ago practically all businesses except two had, for various reasons, fallen into the category of private callings, only common carriage and innkeeping fully retaining their public character.⁷ Today, the list of public businesses, commonly called public utilities, includes, many, if not most, of the big modern businesses, and the length of the list is growing almost daily. The original question thus arises: When does a business which was always considered private, or was once considered public but later considered private, "cease to be *juris privati* only" and become "affected with a public interest?" Some say that, except as to innkeeping and common carriage, there must be either legislation that regulates the business (or declares it a public service) or an exercise of a public franchise by such a business before it can be held to be a public utility.⁸ This, however, seems unsound, for, among other reasons, it does

³ *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 417, 21 S. E. 1035 (1895); *Munn v. Illinois*, 94 U. S. 113, 124, 125 (1876).

⁴ *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 407 (1914).

⁵ See BEALE & WYMAN, *RAILROAD RATE REGULATION*, 2 ed., § 4; 1 WYMAN, *PUBLIC SERVICE CORPORATIONS*, § 38.

⁶ See 1 WYMAN, *op. cit.*, ch. 1.

⁷ See *Burdick, op. cit.*

⁸ *State ex rel. Star Publishing Co. v. Associated Press*, 159 Mo. 410, 60 S. W. 91 (1901); *Ladd v. Southern Cotton & Mfg. Co.*, 53 Tex. 172 (1880). See *Burdick, op. cit.*

not satisfactorily account for innkeeping and common carriage, the great examples of public utilities which are public utilities without legislation or exercise of franchises, and it is *contra* to considerable authority.⁹ The sounder view, supported by the reasoning in the leading cases,¹⁰ seems to be that neither of these two elements is necessary and that in order to have a public utility it is sufficient to have (1) a business public in character, *i. e.*, a business both (a) monopolistic in character—a “virtual monopoly,”¹¹ not necessarily a legal or absolute monopoly, and (b) essential to the welfare of the public, and (2) a holding out to serve the public generally,¹² or, more accurately to serve a permissible class, for the public of every public utility is, in the very nature of things, a limited class of the public,¹³ though the classification must, of course, be one which is legally permissible, *e. g.*, it would not be permissible for an innkeeper to hold himself out to serve white persons only—such a holding out would include others also—for, with respect to services essential to the public welfare, the law for obvious reasons does not sanction a discrimination against persons solely on account of race.¹⁴ But it would seem to be permissible for an innkeeper to hold himself out to serve women only, for a classification of the public into women and men is based on reasons that may be conducive to the public good. This point has been discussed at some length elsewhere in this publication,¹⁵ and so will not be discussed here except incidentally.

To illustrate, the theatre business is not a public service,¹⁶ principally for the reason that it is not yet considered essential to the welfare of the public or a permissible class of the public that people should see shows. As now produced and regarded, shows are rather in the class of luxuries—non-essentials—and often unwholesome luxuries at that. Therefore a producer of shows may deny admittance to his enemies,¹⁷ or charge them more than he does his friends. The extraordinary affirmative duties imposed upon those engaged in public businesses, *e. g.*, the duty to serve all as a rule, can be justified only in regard to *essential* services,

⁹ See authorities cited in footnote 36.

¹⁰ *Allnut v. Ingalls*, 12 East. 527 (1810); *Munn v. Illinois*, 94 U. S. 113 (1876). See also authorities cited in footnote 36.

¹¹ *Munn v. Illinois*, *supra*, at p. 131.

¹² *Gisbourn v. Hurst*, 1 Salk. 249 (1710); *Allen v. Sackrider*, 37 N. Y. 341 (1867).

¹³ Wyman, “The Inherent Limitation of the Public Service Duty to Particular Classes,” 23 HARV. L. REV. 339.

¹⁴ *Brown v. Memphis etc. Ry. Co.*, 5 Fed. 499 (1880). See WYMAN, *op. cit.*, §§ 565, 567.

¹⁵ 26 W. VA. L. QUAR. 140-149.

¹⁶ *Woolcott v. Shubert*, 217 N. Y. 212, 111 N. E. 829 (1916); *People v. Newman*, 180 N. Y. Supp. 892 (1919).

¹⁷ See cases cited in footnote 16.

though what is essential depends upon, and varies with, time, place and prevailing public opinion. In order to justify the imposition of these extraordinary affirmative duties it is necessary to balance the individual interests of the persons conducting the business and the social interests of those needing the services and the public interests, *i. e.*, the interest of the state, either as a juristic person or as guardian of social interests, and see which interests outweigh the others, *i. e.*, which interests should be secured and which sacrificed. For the modern conception of the end of law is "to secure as many interests as may be with as little sacrifice of other interests as may be."¹⁸ And the public or social interests outweigh the individual interest only where the service sought is an essential service, *e. g.*, electricity for illuminating purposes,¹⁹ gas for heating purposes,²⁰ or water for domestic purposes.²¹ Hence, the limitation that a business to be a public utility must be a business essential to the welfare of a considerable class of the public.

Again, the practice of medicine is not now²² considered a public service,²³ chiefly for the reason that the business today is normally not monopolistic in character, as usually competition can be counted upon to regulate the business, partly perhaps for the further reason that Anglo-American law hesitates to compel the performance of purely personal services. Again, the business of letting automobiles with drivers is not a public service unless there is a holding out to serve a permissible class of the public, but if there is such a holding out, the business is a public service.²⁴ The reasons are that while such a business is not an absolute monopoly it is monopolistic in character in that the elements of time (the immediate needs of the applicants), the expense in providing such services and the consequent lack of competition, put the public at the mercy of those conducting such businesses. And, since such business is indisputably essential to the public welfare, the individual interests of those conducting such a business are outweighed partly by the public interest, partly by the social interests of those needing such essential services, that is to say, are outweighed to

¹⁸ See POUND, OUTLINE OF A COURSE ON THE HISTORY AND SYSTEM OF THE COMMON LAW, 3, 5; Pound, "Interests of Personality," 28 HARV. L. REV. 343, 445; Pound, "The End of Law as Developed in Legal Rules and Doctrines," 27 HARV. L. REV. 195; Pound, "The End of Law as Developed in Juristic Thought," 27 HARV. L. REV. 605; *id.*, 30 HARV. L. REV. 201.

¹⁹ Jones v. North Georgia Electric Co., 125 Ga. 618, 54 S. E. 85 (1906).

²⁰ Charleston Natural Gas Co. v. Lowe & Butler, 52 W. Va. 662, 44 S. E. 410 (1901).

²¹ Lombard v. Stearns, 4 Cush. 60 (Mass. 1849).

²² As to the early law, see 1 WYMAN, *op. cit.*, § 6.

²³ Hurley v. Eddingfield, 156 Ind. 416, 59 N. E. 1058 (1901).

²⁴ Terminal Taxicab Co., Inc. v. Kutz, 241 U. S. 252 (1916).

the extent that the state may reasonably²⁵ regulate such businesses, provided, of course, that those conducting such businesses have held themselves out to render such services. Where, however, there is no such holding out to serve; the individual interests of those who so serve clearly outweigh the public or social interests of others with respect to such services, when not specially contracted for, since it would be outrageous to compel a man to enter upon a new class of business. Therefore, those who do not in some way, expressly or impliedly, hold themselves out to serve should not be compelled to serve.²⁶

By such reasoning it seems easy enough to justify the recent decisions which have added to the list of public businesses such enterprises as the following: the renting of houses,²⁷ fire insurance,²⁸ banking (public to a certain extent),²⁹ and the furnishing of electric burglar alarms under certain circumstances.³⁰ But how about the recent decisions adding coal mining to the list of public businesses?³¹ Because of the fact that most of the mines that can be operated economically are in the hands of comparatively few, and because of the fact that considerable capital is required in order to operate a mine so economically as to be able to compete with the established mining companies, the business of mining coal is often a "virtual monopoly,"³² not, of course, an absolute monopoly, but that, as we have seen, is not a necessary requirement. Hence, the miners and mine-operators virtually have the public at their mercy, unless the affirmative duties of public service law are imposed with respect to this business, for the business is clearly essential to the public welfare in that the life of the world is largely dependent upon the production of coal. Moreover, there is normally a holding out to supply coal to the public or a considerable class of the public. Therefore, since the modern conception of the end of law is "to secure as many interests as may be with as little sacrifice of other interests as may be," if we balance the interests here involved it seems clear that the public and social interests in the production of this essential commodity clearly outweigh the indi-

²⁵ *E. g.*, the state may not establish unreasonably low rates. *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362 (1894).

²⁶ See Wyman, "The Inherent Limitation of the Public Service Duty to Particular Classes," 23 HARV. L. REV. 339; 26 W. VA. L. QUAR. 140.

²⁷ *Block v. Hirsh*, 41 Sup. Ct. 458 (U. S. 1921); *Marcus Brown Holding Co. v. Feldman*, 41 Sup. Ct. 465 (U. S. 1921).

²⁸ *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389 (1914).

²⁹ *Noble State Bank v. Haskell*, 219 U. S. 104 (1911).

³⁰ *Holmes Electric Protective Co. v. Williams*, 228 N. Y. 407, 127 N. E. 315 (1920).

³¹ *State v. Howatt*, 198 Pac. 686 (Kan. 1921); *American Coal Mining Co. v. Special Coal etc. Commission*, 268 Fed. 563 (1920).

³² See *Munn v. Illinois*, *supra*.

vidual interests of the mine-owners or miners to the extent that the state may impose reasonable affirmative duties with respect to the mining and sale of coal.

Hence, it would seem that, subject to the above-mentioned conditions, the business of producing coal³³ and perhaps of selling coal otherwise than by the producers³⁴ may now properly be held to have "ceased to be *juris privati* only" and to have "become affected with a public interest."³⁵

The facts seem to establish between the coal producers and a permissible class of the public a relation indistinguishable, for present purposes, from the relation existing between the recognized public utilities and patrons. If so, then, according to the better view,³⁶ there arises from this relation, irrespective of the wills of the parties,³⁷ such affirmative duties as, under the preponderant public opinion, the law thinks proper to impose upon those producing coal, in order to secure, with the least sacrifice of interests and with the sacrifice of the least important interests, not only the public interest but the social interests and the individual interests involved in this class of business. To hold so is quite in accord with the modern salutary tendency toward a socialization of the law³⁸ at the expense of the extreme individualism of the law which particularly during the prevalence of the now disfavored doctrine of *laissez faire*, so often sacrificed the ultimate and more important social interests at the shrine of the immediate but less weighty individual interests.

—T. P. H.

NATURE OF JUDGMENT IN THE SUPREME COURT WHEN A VERDICT IS SET ASIDE ON THE GROUND THAT A CONTRARY VERDICT SHOULD HAVE BEEN DIRECTED IN THE LOWER COURT.—It seems to be conceded that the original and long prevailing practice in West Virginia, upon setting aside a verdict in the Supreme Court upon

³³ American Coal Mining Co. v. Special Coal, etc. Commission, 268 Fed. 563 (1920); State v. Howatt, *supra*.

³⁴ See Jones v. City of Portland, 245 U. S. 217 (1917). See 33 HARV. L. REV. 838. But see Opinions of the Justices, 182 Mass. 605, 66 N. E. 25 (1904). Compare Halter Hardware Co. v. Boyle, 263 Fed. 134 (1920); United States v. Cohen Grocery Co., 255 U. S. 81 (1921).

³⁵ See Thomas P. Hardman, "The Right of a State to Restrain the Exportation of Its Natural Resources," 26 W. VA. L. QUAR. 1, 16-18.

³⁶ Inter Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 56 N. E. 822 (1900); State v. Nebraska Telephone Co., 17 Neb. 126, 22 N. W. 237 (1885); McCarter v. Firemen's Ins. Co., 74 N. J. Eq. 372, 73 Atl. 80 (1909). See Wyman, "The Law of the Public Callings as a Solution of the Trust Problem", 17 HARV. L. REV. 156, 217; BEALE & WYMAN, RAILROAD RATE REGULATION, 2 ed., ch. 1. But see *contra* authorities cited in footnote 8.

³⁷ See ROSCOE POUND, THE SPIRIT OF THE COMMON LAW, 29.

³⁸ See ROSCOE POUND, THE SPIRIT OF THE COMMON LAW, ch. 1, especially at p. 7; ch. 5, especially at p. 129; ch. 8, especially at p. 195.