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Anna Bates Hersman

Washington University School of Law

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NOTES

RIGHT OF PUBLIC SERVICE CORPORATIONS TO SERVE THEMSELVES

The right of public service corporations to serve themselves is one branch of the question: Under what circumstances and to what extent should corporations be allowed to engage in activities outside the scope of the main business that they were created to carry on? The decision of this question depends upon a consideration of the interests of three classes of persons: First, the stockholders. Their interests do not fall within the purview of this discussion. Second, and more important than the first class, that part of the public that makes use of the services of the public utility. For instance, in the railroad-coal cases, the independent shippers of coal; or in the grain warehouse case, the independent owners of grain wishing to warehouse their grain. Third, and most important, the public as consumers of the article in question.

The lengthy argument and array of statistics produced in the trial of the cases to prove the existence or danger of monopoly and consequent fixing of prices, are directed to the protection of this vast consuming public.

There has been a good deal of legislation, on the part of the States, to prevent this kind of monopoly, either in the form of constitutional or statutory prohibitions of *ultra vires* activities, or by directly forbidding railroad companies to engage in mining, manufacturing, etc. These efforts have generally been abortive. They have had to face a legal situation, for many railroads had charters enabling them to hold and operate mines, and many owned large tracts of land given by the government. These efforts were also in conflict with a more powerful economic principle, the need to develop the resources of the country. In a country richer in natural resources than in capital or labor it seemed expedient to legislators, and doubtless to the consuming public itself, to foster rapid development rather than to shackle production by safeguards against monopoly. To illustrate this conflict and to explain the embarrassment of Congress when it was drafting the Commodities Clause, and of the courts in interpreting it, I shall quote from several State statutes. Pennsylvania, "It shall and may be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber and other material interests of this commonwealth by the purchase of their capital stock and bonds, or either of them, or by the guaranty of or agreement to purchase the principal and interest, or either, of such bonds," except in Schuylkill County. Washington, "It shall be lawful for any railway within the State or which may own, lease or operate in the future any such line or lines of railway within this State, to take, acquire, own, negotiate, sell and guarantee bonds and stocks of companies or corporations which are or may hereafter be organized for the purpose of irrigating and reclaiming arid lands contiguous or tributary to such line or lines of railway." Also, the railway may itself build and own and operate irrigation ditches. Therefore, when the Constitution of Pennsylvania, effective January, 1874, forbade a railroad to engage in mining or manufacturing articles for transportation of its lines, or to engage, directly or indirectly, in any other business than that of common carrier, naturally the courts of Pennsylvania construed this clause as applying only to future conditions, and, even so interpreted, did not rigidly enforce it; especially since there was no provision prohibiting control through stock ownership or subsidiary companies. Also, naturally, the Interstate Commerce Com-

mission recognized the railways involved as "possessing the commingled attributes of carrier and producer."¹

In the midst of this general situation two pieces of legislation against a public service corporation's serving itself have been enforced in the courts, with the result, probably, of a mere legal change, but no material economic alterations. The clause of the Illinois Constitution that declares grain warehouses of a certain description "public" is held to forbid the warehouse corporation, or stockholders, to mingle their grain with the grain of the patrons.² This is the only case in which the decision is based upon common law principles. The court held that the word "public" in this clause of the Constitution imposed upon the corporation and the individual stockholders the duty of acting in the interest of the whole public and of their patrons; of refraining from assuming any position that would expose them to the temptation of unfair dealing and manipulation of the market. It was claimed that the relation of a public service corporation to the public was similar to that of a trustee, and all the cases cited were trustee cases, except one that treated of the duty of an administrator; thus making use of the common law, not in the narrow sense, but in the broad sense, as including equity. Common law principles are referred to at length in many decisions, but such references are mere dicta, as the decisions are based upon the statute in question. For example, in *New Haven R. v. Inter. Com. Com.*,³ before the passage of the Commodities Clause, the court said: "We shall not direct our attention to expressly determining whether the assertion by a carrier of a right to deal in the products which it transports would not be so repugnant to the general duty resting on the carrier as to cause the exertion of the power to deal in the products which it transports to be unlawful, irrespective of statutory restrictions"; but the decision is based on the federal statute forbidding rate discrimination. Very similar to the language used in the Illinois case are dicta in *State v. Stand. Oil Co.*,⁴ and other cases arising under various anti-monopoly statutes. Compare summary of corporate actions condemned by the courts in H. O. Taylor's *Private Corporations*, under the headings *Ultra Vires* and *Monopoly*, especially sections 306, 307, 309, fifth edition. So in *Atty.-Gen'l v. The Gt. N. R. Co.*,⁵ the Vice-Chancellor

1. *D. L. & W. v. Haddock*, 3 I. C. R. 302 (1890); *Leh. V. R. R. v. Coxe*, 3 I. C. R. 460 (1891).

2. *Hannah v. The People*, 198 Ill. 77 (1902).

3. 200 U. S. 361 (1905).

4. 49 Ohio St. 137.

5. 29 Law Journal (N. S. Equity) 794.

said: "It is greatly against public interest that railways become merchants of the commodities they haul; the danger of monopoly is great." But he decided the case on the ground that dealing in coal was *ultra vires*, saying, "The law is in the act of parliament creating the joint-stock company." This case settled the matter for England. As her legislators and judges were not hampered by the legal and economic situation shown above in existence here, the question was the simple one of *ultra vires*.

The other piece of legislation is the Commodities Clause of the Hepburn Act, a revision of the Interstate Commerce Act made by Congress in 1906. By this clause interstate railroads are forbidden to transport commodities (other than lumber) owned or produced by themselves, except such as are for their own use. The word "produced" has been practically eliminated by judicial interpretation. Also, it is held that railroads have not been forbidden to own, by their stockholders individually or in their corporate capacity, some or all of the stock in corporations manufacturing or marketing their commodities.⁶ The latter point is supported by the discussion of the bill before its passage; for in the Senate, where the clause originated, amendments were rejected that forbade the transportation of commodities produced or owned by a corporation in which the railroad owned stock. In his dissenting opinion, Mr. Justice Harlan said that the statute meant to forbid a railroad's holding stock in manufacturing, etc., companies. "Any other view of the act will enable the transporting railroad company, by one device or another, to defeat altogether the purpose which Congress had in view, which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal." We may compare what the Chesapeake and Ohio actually did in West Virginia after the passage of the State statute forbidding a railroad company to buy and sell coal; it bought in the name of another.⁷ This case against the Delaware and Hudson R. R., together with cases against several other roads, was brought in a Federal circuit court. There the Commodities Clause was declared unconstitutional. It was carried to the Supreme Court, where the clause was held constitutional with the above interpretation, and all the cases sent back to the Circuit Court. Next we have the case of *U. S. v. Lehigh Valley R. R. Co.*,⁸ decided in Federal District Court for de-

6. See *U. S. v. Del. & H. R. Co.*, 213 U. S. 366 (May 3, 1909).

7. See *New Haven R. v. Inter. Com. Com.*, 200 U. S. 361 (1905), referred to above.

8. 220 U. S. 257 (1910).

defendant. On appeal to Supreme Court, it was held that a railroad is forbidden to do by indirection what it may not do directly. Case remanded to be tried on the facts as to whether the railroad company was using the Lehigh Valley Coal Company as its tool to monopolize the coal of a certain area, and to control prices both in the coal district and at the seaboard. It was tried before the District Court and decided for the defendant.

At last we have a conviction under the clause, *U. S. v. Del., Lack. & W. R.*⁹ The court asserts as governing principle, "The Commodity Clause of the Hepburn Act was intended to prevent railroads from occupying the dual and inconsistent positions of public carrier and private shipper." Decided, that the contract between this railroad and a coal company of the same name, organized by the railroad company after the passage of the Commodity Clause, is void because it violates the Commodity Clause, since the coal company is really made the agent of the railroad company, and because it violates the Sherman Anti-Trust Act, since it is in restraint of trade. Also in *Del., Lack. & W. R. v. U. S.*,¹⁰ it was held unlawful for a railroad to transport hay to feed the animals used in its coal mines, for 75% of the output of the coal mines was for sale; hence the hay was not for the railroad in its business as a carrier.

There is an interesting monograph, published in 1916, on "The Commodities Clause," by Thomas L. Kibler, professor of economics, A. & M. College, Texas. I have drawn largely upon its facts, but differ radically from its conclusions: it condemns monopolies. I should foster them and regulate them to cheapen commodities for the public. Also, Professor Kibler, as it seems to me, does not recognize the force of the difficulties and complications arising from our legal and economic situation as suggested at the beginning of this article.

MRS. ANNA BATES HERSMAN.

9. 238 U. S. 516 (June 21, 1915).

10. 231 U. S. 363 (1913).