HARVARD LAW REVIEW

VOL. XLI JANUARY, 1928 No. 3

THE PUBLIC UTILITY CONCEPT IN AMERICAN LAW

KINDS OF BUSINESS AFFECTED

SINCE not long after the Civil War we have accustomed ourselves to "private business" as one large category, and "public business" as another. The distinction is part of our settled ideas, and it has become a pretty clear thing in the treatment of the respective classes after the labeling has been accomplished. Although recent history is a progression of state interference in both sorts, in the "public" business it has fallen into definite lines, common to most of them, and is put under special agencies of control which run to type in their characteristics, their makeup and their function. A whole field of law thus covers the businesses once publicness is conceded; but the questions, why is this enterprise "private" and that "public," and what are the bases of the selection for the special treatment, are far from being readily answered. Should the inquiring Martian tax us to explain, we should, no doubt, in some language or other, succeed in conveying that the answer lies in the sense, upon the part of contemporary society, of its dependence upon certain sorts of enterprises. We should package the idea in phrases such as "felt needs," "economic dependence," or the like.

A logical Martian might then list the things on which, as human beings, we are most dependent, and conclude that the public utilities class are the enterprises by which food, water, shelter, fuel, or clothing are purveyed; surveying the current organization of

local society, so largely urban and so greatly not self-supporting in the sense that the rural population used to be, he might then add the processes of distribution. But we should say him nay as to the necessaries of life as a category, and we should tell him that of the distributive processes, not all, but only one, has fallen into the class of publicness; that merchandizing, even of the necessaries, is not "public" business, nor is banking nor the large financial fabric of distribution,[1] but that transportation is "public" and that it is "public" aside from the character of the article handled. In the face of these statements, he might then shift his ground and say "Is it then a matter of bigness; if enterprises grow so large that the operation of the laws of the competitive system are interfered with, they become public and are regulated by the positive law?" But again we say no. We mention the Sherman Act, the Clayton Act, Federal Trade Commission Act, Packers Act, but not Public Utility acts. Mere size has not made an enterprise public. Recently the largest ten of the country's corporations were listed.[2] The hugest of all — which, in a similar list of world corporations, including governments, was outranked only by the United States of America and the British Empire — was not a public utility, nor were the most profitable.

Neither of these direct and frontal attacks upon the inquiry give an answer. So far as there is one it has been arrived at by flanking movements, and the slow approach. One case established has served as a cover for further advance, and the definition of a public utility is a communique of positions won, or, if one takes the individual viewpoint, of those lost. "We can best explain by examples," says Mr. Justice McKenna.[3] He gives the clue to the

[1] Banking is, of course, pretty closely regulated and the public interest in it is expressed in a number of ways. See Schaake v. Dolley, 85 Kan. 598, 118 Pac. 80, (1911), holding that the principles underlying the doctrine requiring certificates of public necessity and convenience for new public utilities are applicable when new banks are in question, relying upon the state guaranty fund scheme upheld in Noble State Bank v. Haskell, 219 U. S. 104, 575 (1911).

[2] (1927) 82 RAILWAY AGE 1049. The figures are: U. S. Steel, $2,446,000,000; So. Pac. R. R., $2,147,000,000; Pennsylvania R. R., $1,819,000,000; Am. Tel. & Tel., $1,646,000,000; N. Y. Cent. R. R., $1,449,000,000; Standard Oil, N. J., $1,369,000,-000; Union Pac. R. R., $1,140,000,000; Atchison T. & S. F. R. R., $1,071,000,000. General Motors and the Ford Motor Company finished the list but the automobile companies were both relatively and absolutely the most profitable.

[3] German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 406 (1914).

HeinOnline -- 41 Harv. L. Rev. 278 1927-1928

early judicial technique employed when he adds, "The transportation of property — business of common carriers — is obviously of public concern and its regulation is an accepted governmental power." The obviousness was a matter of history merely and was not obvious if the history went far enough back,[4] but the momentous thing was that, as to common carriers, regulation *was* accepted. This furnished a point of departure; and the answering of the question "what businesses are public?" became, and, both in the courts and legislatures, till lately remained, a process of adding to or excluding from the list of "common carriers."

With transportation as an accepted jump-off the list grew by analogy. It was said that,

> ". . . they all have direct relation to the business or facilities of transportation or distribution — to transportation by carriers of passengers, goods, or intelligence by vehicle or wire; — to distribution of water,[5] gas or electricity through ditch, pipe or wire; to wharfage, storage or accommodation of property before the journey begins, when it ends, or along the way. When thus enumerated, they appear to be grouped around the common carrier as the typical public business." [6]

The older technique thus discloses an assumed starting point, arrived at by an historical inquiry, which finds the carrier to be "public." That it was such, represents both a grouping of circumstances on the one hand and the response to them, in terms of law, by a prior social order, on the other; but the cases which developed public utility doctrines out of the carrier have been content to build upon the response alone rather than upon the factual background and the response to it taken together.[7] In the earlier

---

[4] See Adler, *Business Jurisprudence* (1914) 28 HARV. L. REV. 135, 156. It is there shown that the distinction was not in the *kinds* of the service but in the manner of doing service of whatever kind. A more recent article to the same effect is Arterburn, *The Origin and First Test of Public Callings* (1927) 75 U. OF PA. L. REV. 411, 418.

[5] It will be noticed that water comes in as water transported rather than as water a necessity of life.

[6] Lamar, J., dissenting, in German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 426–27 (1914). See Beale, *The Carrier's Liability: Its History* (1897) 11 HARV. L. REV. 158; Arterburn, *The Early Liability of a Bailee* (1927) 25 MICH. L. REV. 479.

[7] "We overlooked completely that the law maker is the man of his time thoroughly saturated with the thoughts of his time, thoroughly filled with the culture that surrounds him, that he works with the views and conceptions that are

HeinOnline -- 41 Harv. L. Rev. 279 1927-1928

"carrier" law the social interest spoke largely with respect to the bailment feature, and our treatment till a comparatively recent period has been of "bailments and carriers." The bailment responsibility which bulked so large under former conditions, is far less a factor now-a-days, as the newer policies of restricted liability indicate; [8] and the more recent social interest has lain in the defining and the enforcement of duties which are conceived as existent prior to the assumption of service for a customer, and as running in favor of those who might seek to become customers. From liability in service the law turned to the development of the duties to the general public as conceived to be inherent in the idea of being a utility enterprise.

The famous *Munn* case [9] is a classic example of the judicial method adverted to. Carriers of various sorts are "regulatable in England from time immemorial": Munn's elevator "stands in the gateway of commerce," part of the stream of transportation: it is clothed with a public interest "by the facts" that Munn's plant was not only a pool in the stream of commerce, but the neck of the bottle at Chicago, part of a "virtual monopoly." Was it "public" because of *all* the circumstances, or would any one set, separately, suffice to justify the label? All contributed to the decision in the case itself, but the process of originally combining circumstances A, B, and C into result X, has not precluded a later arrival at result X by adding only A to C, or even from A or B or C alone. The X of the *Munn* case is stated as simply, "grain elevators are 'public.'" Soon the Court said, "When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain" [10] the special circumstances became irrelevant. Grain elevators were public, when the legislature said so, because they were grain

drawn from his sphere of culture, that he speaks with words that have a century of history behind them and whose meanings were fixed by the sociological process of a thousand years. . . ." 1 KOHLER, LEHRBUCH DES BÜRGERLICHEN RECHTS §§ 38–39, in POUND, READINGS IN ROMAN LAW (2d ed. 1914) 20.

[8] For recent discussions, see (1926) 12 VA. L. REV. 235; (1927) 12 CORN. L. Q. 203.

[9] Munn v. Illinois, 94 U. S. 113 (1876). It upheld a statute setting rates for grain elevators as applied to an elevator business which had begun long before the regulation.

[10] Brass v. Stoeser, 153 U. S. 391, 403 (1894).

HeinOnline -- 41 Harv. L. Rev. 280 1927-1928

elevators rather than because they were grain elevators under special circumstances.

Stockyards are public because " intimately related to the business of transportation " and because " a practical monopoly of a vast business," and because the business " corresponds with that of warehousemen, and therefore is subject to the same principles of law." [11] Later, stockyards are public utilities in their own right.[12] A cold storage business is " public " [13] because it is a part of the distribution system linked with transportation. Enough has been shown to illustrate the technique of the advance by the method of real or fictional analogy.[14]

The *German Alliance Insurance* case [15] was an advance under newer cover, since it could not start from the carrier. Some of the court could not follow in the new departure, which put insurance, an old and approved game of chance, long justified of its utility in distributing losses, into the class of businesses so far " public " that its rates are regulatable.[16] Necessarily departing from the simple analogy method, the case adopts a phraseology and a question. Quoting the language of one of the New York elevator cases,[17] Mr. Justice McKenna says, " The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation "; and he asks, " Is the business of insurance within the principle? " [18]

---

[11] Ratcliff v. Wichita Union Stock-yards Co., 74 Kan. 1, 86 Pac. 150 (1906).

[12] See Packers and Stockyards Act, 42 STAT. 159 (1921), U. S. COMP. STAT. (Supp. 1923) § 8716½; Stafford v. Wallace, 258 U. S. 495 (1922). The statute is stated and discussed in (1922) 22 COL. L. REV. 68.

[13] Pub. Util. Comm. v. Monarch Refrigerating Co., 267 Ill. 528, 108 N. E. 716 (1915); (1916) 11 ILL. L. REV. 281.

[14] The method of analogizing to carriage is dealt with in a Note in (1902) 15 HARV. L. REV. 309.

[15] German Alliance Ins. Co. v. Lewis, 233 U. S. 389 (1914); (1914) 28 HARV. L. REV. 84.

[16] A recent book shows how deeply society has entered upon its supervision. PATTERSON, THE INSURANCE COMMISSIONER OF THE UNITED STATES (1927), reviewed in (1927) 41 HARV. L. REV. 111. The present court's attitude toward the case is stated by Sutherland, J., in Tyson v. Banton, 273 U. S. 418, 434 (1927). It " marks the extreme limit," he says.

[17] People v. Budd, 117 N. Y. 1, 27, 22 N. E. 670, 677 (1889), *aff'd*, Budd v. New York, 143 U. S. 517 (1892). It applied the Munn case to elevators at Buffalo.

[18] 233 U. S. at 411.

HeinOnline -- 41 Harv. L. Rev. 281 1927-1928

The problem is thus made to hinge less upon the historical analogies and more upon current realism, and the machinery which gives expression to the "ideals of the epoch" enters upon the task of selecting the enterprises for special treatment. The machinery of selection has gone through several phases. The courts themselves made no great difficulty in creating or denying new categories of "public" businesses so long as the process was that of analogizing on the carrier, or on some other calling traditionally common. Cotton gins were declared by one court to be "public,"[19] and by another not to be.[20] The question was not beyond the judiciary in either case. The present day machinery, however, is set forth with the statement that, "Until the legislature brings a business within the police power by clear intent, the courts will not do so."[21] It is thus become a complex machinery: the legislature speaks and the court also speaks, and because the selection is conceived of as a matter of "due process of law" within the content which the Supreme Court of the United States may put into that phrase, the apparatus is a combination of legislature-court-state-and-federal elements.

On the actualities one might neatly and safely define a "public utility" as any form of enterprise so labeled if and when the state and federal authority agrees with the label. This, of course, gives only a list of positions already taken: a category of things established rather than a formula wherewith to establish new things. Many of the "principles of the law" in other fields are thus made up.

This "definition" leads to an interesting inquiry: are all those who *do* deal with the general public potentially subject to having the stamp "public utility" impressed upon their business? Can any formula state the case more than to say that conditions as expressed by legislators and checked — "checked" both in the sense of verified and in the sense of stayed — by the judiciary, will be the process, but that on the whole the history of the last fifty years makes safe the forecast that a half century hence the public utility status will have been imposed upon more businesses? For one thing we have now a psychological acceptance of the idea of

---

19 Tallassee Oil and Fertilizer Co. v. Holloway, 200 Ala. 492, 76 So. 434 (1917).

20 Ladd v. Southern Cotton Press and Mfg. Co., 53 Tex. 172 (1880).

21 State v. Spokane, etc. R. R., 89 Wash. 599, 605, 154 Pac. 1110, 1113 (1916).

HeinOnline -- 41 Harv. L. Rev. 282 1927-1928

the state's " invasion " of business; the competency of a competitive system, based on untrammeled individualism, to do all things necessary for social good, is no economic maxim of this day, nor is individualism one of its juristic fetishes.[22]

In the last few years several legislatures have sent forth, to run the gauntlet of the judicial clubbing, various ventures in the labeling of new public utilities. So frequently are there several states upon a territory not too large to be adequately administered by one, that the grumblers at the expense forget the usefulness of the states as experimental plots for new juristic crops. Kansas and New York recently offered themselves for such crops. The gardening in the Sunflower State, which withered under the scorching ray of the Supreme Court, was an attempt to declare publicness upon the general theory of our Martian. It followed the demand of the Governor of Kansas for legislation, " Declaring the operation of the great industries affecting food, clothing, fuel, and transportation should be impressed with the public interest and subject to regulation by the state." The phrase " necessaries of life " is so frequently used in the governor's message and in the resulting statute [23] that both apparently originated in the impulse to read " public utilities " as substantially a correlative for it.

The fate of these frank innovations is a commentary on how far the Supreme Court will take a state's own declaration of readiness and ecological fitness as an experimental plot for new crops. The Court's attitude of acceptance has been a variable; it reached close to high water mark in *Green v. Frazier* [24] where the Court said:

[22] See Sombart, *An Economic Forecast* (1927) 332 LIVING AGE 1070. Sombart considers that " Public control of industry is inevitable because classes of society which exercise great and growing influence demand it."

[23] This statute is analyzed in Humble, *The Court of Industrial Relations in Kansas* (1921) 19 MICH. L. REV. 675; Young, *Industrial Courts* (1921) 5 MINN. L. REV. 185; Rabinowitz, *The Kansas Industrial Court Act* (1923) 12 CALIF. L. REV. 1.

[24] 253 U. S. 233, 239-40 (1920). A taxpayer's right to restrain the use of public funds in state operation of marketing of farm products was denied. The last decade has apparently seen a decline in the Court's willingness to accept novel state legislation. See Brown, *Due Process of Law, Police Power, and the Supreme Court* (1927) 40 HARV. L. REV. 943, 944, where the author says " that in the six years since 1920 the Supreme Court has declared social and economic legislation unconstitutional . . . in more cases than in the entire fifty-two previous years. . . ."

HeinOnline -- 41 Harv. L. Rev. 283 1927-1928

> "In the present instance under authority of the constitution and laws prevailing in North Dakota the people, the legislature, and the highest court of the State have declared the purpose for which the several acts were passed to be of a public nature, and within the taxing authority of the State. With this united action of people, legislature and court, we are not at liberty to interfere unless it is clear beyond reasonable controversy that rights secured by the Federal Constitution have been violated. . . . With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned."

Yet unwisdom shades into unconstitutionality and where the transition comes is, of course, a major inquiry.

That fuel production was affected with a public interest was the first of the Kansas declarations to come under judicial review. In *State v. Howat*,[25] the state court, in adjudging a mine leader guilty of contempt of an injunction, not of the Industrial Court but of a regular court, issued against his calling a strike in a coal mine, accepted in full the addition to the list of public enterprises, and in the familiar technique of simile and metaphor clothed the new venture in the language of the *Munn* case. On writ of error, the Supreme Court, while giving Howat no comfort, avoided the decision of the matter here pursued. Coal, however, was dealt with as "public" by another state court in *People v. United Mine Workers*,[26] with the same conclusion as the Kansas decision, and by the same process. Out of Kansas came a later case involving August Dorchy, vice president of the miners' union of which Howat was president, who was prosecuted under the Industrial Court Act for wilfully calling a strike as a device to enable one Mishmash to collect from his employer a disputed claim. The matter was twice before the Supreme Court,[27] which finally affirmed Dorchy's conviction, holding that the state court's decision that the statute was separable left only the question whether a state could make Dorchy's act a felony. On this the

[25] 109 Kan. 376, 198 Pac. 686 (1921). See (1922) 28 W. VA. L. Q. 213; (1921) 31 YALE L. J. 75; (1921) 7 CORN. L. Q. 61. The case in the Supreme Court is Howat v. Kansas, 258 U. S. 181 (1922).

[26] 70 Colo. 269, 201 Pac. 54 (1921). See (1920) 19 MICH. L. REV. 74; (1922) 6 MINN. L. REV. 251.

[27] Dorchy v. Kansas, 264 U. S. 286 (1924). See Simpson, *Constitutional Limitations on Compulsory Industrial Arbitration* (1925) 38 HARV. L. REV. 753, 773. Dorchy v. Kansas, 272 U. S. 306 (1926); (1927) 75 U. OF PA. L. REV. 268; (1927) 21 ILL. L. REV. 727.

HeinOnline -- 41 Harv. L. Rev. 284 1927-1928

Supreme Court held that to strike in order "to collect [such] a stale claim . . . is not a permissible purpose. . . . To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise." [28]

The general question we are pursuing was adverted to in the first *Dorchy* case, which went off on the then undecided point of separability, as follows: "After the judgment under review was entered in the Supreme Court of Kansas, this Court declared, in the *Wolff Packing Co. Case*, . . . that the system of compulsory arbitration as applied to packing plants, violates the Federal Constitution. For the reasons there set forth, it is unconstitutional, also, as applied to the coal mines of that State." [29]

We are thus brought to a discussion of the *Wolff Packing* cases which also were twice [30] before the Supreme Court. They concern the Kansas declaration of publicness as applied to the food industry. Comment has dealt with them as decisions in the labor field, as the order of the Industrial Court which the Wolff Company resisted in the first case prescribed a scale of wage increases and, in the second, an hours of labor schedule. Since neither wage nor hours [31] litigation necessarily involves the question of what may be called public utilities, the court's discussion of the latter topic was not the only path to the reversal of the Kansas Supreme Court's judgment that the Company must obey the orders; but since the statute was presented to the courts as an expansion of the public utility classes and the state judiciary had decided on that theory, the Supreme Court was naturally led to that particular aspect of the Act. Chief Justice Taft accepted the assignment. Speaking for the Court he made the most recent authoritative effort to answer the question of this paper.

"Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

---

[28] 272 U. S. at 311, *per* Brandeis, J.

[29] 264 U. S. at 289, *per* Brandeis, J.

[30] Chas. Wolff Packing Co. v. Industrial Court, 262 U. S. 522 (1923); Chas. Wolff Packing Co. v. Industrial Court, 267 U. S. 552 (1925).

[31] *Cf.* Adkins v. Children's Hospital, 261 U. S. 525 (1923) (wages); Muller v. Oregon, 208 U. S. 412 (1908) (hours); Bunting v. Oregon, 243 U. S. 426 (1917) (hours).

HeinOnline -- 41 Harv. L. Rev. 285 1927-1928

(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional, the public interest, attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. . . .

(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly." [32]

It will be observed that in this listing the first paragraph would appear to make " the public grant of privileges " the touchstone. What is meant by the phrase is not defined, but though " common carriers " are included they have frequently been such though no "public grant of privileges" appeared, and even in the case of other indisputable "public utility " types the special privilege has not been an essential.[33]

The second paragraph is the historical approach in a new and restricted fashion, selecting only " cabs " out of the carrier classes. In the *Munn* case, Chief Justice Waite read the list of survivals more widely, as " ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c." [34]

The classes of the third paragraph indicate a realignment of reasons for the *Munn*, the *Brass*, and the *Budd* cases; the actual opinions in these combine the historical and analogy methods with the language which the present Chief Justice uses, and which is paraphrased from the *Munn* decision. Only in the banking, the

---

[32] 262 U. S. at 535.

[33] Wingrove v. Pub. Serv. Comm., 74 W. Va. 190, 81 S. E. 734 (1914).

[34] 94 U. S. at 125.

HeinOnline -- 41 Harv. L. Rev. 286 1927-1928

insurance, and in the rent case, did the opinions cut loose from the earlier methods. One may surmise that the Chief Justice was relieved indeed to conclude that he did not need to decide "definitely whether preparation of food should be put in the third class" — which he in this sentence calls "the third class of quasi-public businesses —"[35] but his excursion into the unnecessary, while it has not clarified the vague wording of the *Munn* case,[36] has at least made manifest that if the state of Kansas had persisted in its program any closely subsequent decision of the Supreme Court would be adverse to the experiment. It seems clear also that the consideration given to the fact of the free flow of food into Kansas under competitive conditions of national scope would indicate a like ruling as to coal and as to clothing.[37] It appears fair to say, therefore, that under conditions likely to continue for an unpredictable period any state endeavoring to make "public utilities" and "necessaries of life" approximately interchangeable will not secure the assent of the Supreme Court.

A distinction may be made as to that necessity of life, housing. Notwithstanding that its rigidity as to the surface has been so greatly discounted by acceptance of life in layers, and by the multiplication of the layers, the perennial pinch in New York became so sharp during the post-war period that the legislature of the Empire State[38] came into action. The resulting legislation had little regard for the logical, though Turk-like method of order-

[35] Yet the Federal Government itself has become deeply committed in the regulation of the packing industry. See note 12, *supra.*

A recent case, Cudahy Packing Co. v. United States, 15 F.(2d) 133 (C. C. A. 7th, 1926), holds that a demand by the Secretary of Agriculture that the packers open their books to his auditor without limitation as to the character of the business examined was too wide.

[36] See Rottschaeffer, *The Field of Governmental Price Control* (1926) 35 YALE L. J. 438, 445.

[37] Young, *supra* note 23, written prior to the Wolff cases, shows that, up to then, the Industrial Court had very realistically handled a milling case.

[38] Hough, J., in Marcus Brown Holding Co. v. Feldman, 269 Fed. 306, 314 (S. D. N. Y. 1920), recited it thus: "The demands of a world at war had for several years produced such application of men, money, and material to other and more immediately lucrative occupations that new dwellings in the city of New York and adjacent territory were conspicuously absent, while the same attractions that had practically stopped building had increased the home-seeking population of the city to an extent unstated, but certainly large.

See a Note in (1920) 20 COL. L. REV. 109, discussing the terms of the statutes and the "erratic advance" of the courts in delimiting the property concept.

ing a million people out of the city. In a democracy where there are more tenants than landlords, it naturally took another form. It amounted to a declaration that the housing business was of a public nature. War-time Washington also dealt with housing. Neither act is in the familiar words, but the resulting litigation was presented in the language of the *Munn* case. Thus the whirligig of time brought about the very case which Mr. Justice Field had set forth in 1876, when he said, "The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed, any thing like so great an interest"; [39] and the Supreme Court was asked to pass upon a new effort to transform "necessaries of life" enterprises into "businesses affected with a public interest." Notwithstanding that it had called the Kansas crop tares, the urban agriculture resulted in what it accepted under the conditions as sound juristic wheat.

Mr. Justice Holmes, speaking for a five to four court in *Block v. Hirsh*,[40] said, "Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far." Mindful that most debates come in the end to a conclusion assumed, he concluded without much more argument that the statute did not take too great a jump from firm ground.[41] This particular judicial technique might be called the every-little-bit-added-to-what-you've-got method. Mr. Justice McKenna cast the dissent in the familiar behold-how-great-a-matter-a-little-fire-kindleth form.[42] In the *German Alliance Insurance* case, where the latter had written for the Court that the regulation there did not go too far, it was Mr. Justice Lamar who reminded his colleagues of the "far-reaching effect

---

[39] 94 U. S. at 140.

[40] 256 U. S. 135, 156 (1921).

[41] The housing law experiment naturally called forth a great deal of comment. See Burdick, *Constitutionality of the New York Rent Law* (1921) 6 CORN. L. Q. 310; Boyd, *Rent Regulation under the Police Power* (1921) 19 MICH. L. REV. 599; Wickersham, *The Police Power and the New York Emergency Rent Laws* (1921) 69 U. OF PA. L. REV. 301. See also (1921) 9 CALIF. L. REV. 337; (1920) 20 COL. L. REV. 109; (1921) 7 CORN. L. Q. 47; (1921) 34 HARV. L. REV. 426; (1920) 19 MICH. L. REV. 95; (1921) *ibid.* 869.

[42] *Cf.* Field, J., in Munn v. Illinois, 94 U. S. 113, 140 (1876).

HeinOnline -- 41 Harv. L. Rev. 288 1927-1928

the principle announced," [43] but now for Mr. Justice McKenna the rent cases open long vistas of fearsome things, and "against the first step to it this court has warned, expressing a maxim of experience, — 'Withstand beginnings.' . . . Houses are a necessary of life, but other things are as necessary." [44]

Some comment is appropriate upon the growth, in the doctrines of "publicness," of what may be termed the time element. As the space element was part of the make-weight in the grain elevator cases,[45] the temporary and emergency character of the rent laws was part of the appeal for their acceptance; but the Court has later said that "even with the emergency, the statutes 'went to the verge of the law.'" [46]

The whole subject has lately had an overhauling in *Tyson v. Banton*.[47] As the decision was five to four, and four opinions were written, it shows alike the impossibility of any formula, and the ease with which a rehashing of the familiar language leads to opposite results in a particular problem.[48] The case arose under a New York statute which "declared that the price . . . for admission to theaters . . . is a matter affected with a public interest," and forbade the resale of a ticket at a price in excess of fifty cents in advance of the price printed on the face of the ticket. The

---

[43] 233 U. S. at 420.

[44] 256 U. S. at 160, 161.

[45] The strategic location of the elevators, where rail and water met, was stressed, and the monopoly feature argued from it.

[46] Tyson v. Banton, 273 U. S. 418, 437–38 (1927). The post war exodus from Washington has played its part. The original two year law expired in 1921, but by successive yearly enactments it was extended to May 22, 1925. In Chastleton Corp. v. Sinclair, 264 U. S. 543, 548 (April 21, 1924), the order of the Commission was dated Aug. 7, 1922, and it was upheld; but the Court said ". . . if the question were only whether the statute is in force today, upon the facts that we judicially know we should be compelled to say that the law has ceased to operate." Accordingly, an order dated May 2, 1924, was upset in Peck v. Fink, 2 F.(2d) 912 (Ct. of App. D. C. 1924). *Cf.* (1921) 21 COL. L. REV. 802.

The situation in New York City, indeed, is such that the writer's discussion of emergency as a time element is wrong. The emergency is constant. The latest phase is N. Y. LAWS 1926, c. 823, § 2, which undertakes to declare the business of housing a public use for the purpose of exercising eminent domain. See (1926) 26 COL. L. REV. 1015, for a discussion of the details of the project.

[47] 273 U. S. 418 (1927).

[48] Keezer, *Some Questions Involved in the Application of the "Public Interest" Doctrine* (1927) 25 MICH. L. REV. 596, 603, heads a section with the title *"Impossibility of Generalizing about Characteristics of Public Interest Enterprises."*

HeinOnline -- 41 Harv. L. Rev. 289 1927-1928

Tyson reselling agency sued to enjoin the local district attorney from enforcing the fifty cent limitation.[49] Its attack upon the constitutionality of the statute failed before the district court of three judges, who denied an injunction: but the Supreme Court held that "the statute assailed contravenes the Fourteenth Amendment." [50]

Mr. Justice Sutherland, who wrote for the Court, though mentioning the resale matter, dealt chiefly with the assertion of the statute that the admission price itself was "a matter affected with a public interest." His method is the purely analytical case by case approach, heavily charged with the historical.[51] A sense of the actualities, or of a willingness that men of today may make the laws of today is entirely absent. Asserting that "Lord Hale's statement that when private property is 'affected with a public interest, it ceases to be *juris privati* only,' is accepted by this court as the guiding principle in cases of this character," he continues, "That this phrase was not intended by its author to include private undertakings, like those enumerated in the statute now under consideration, is apparent when we consider the connection in

---

[49] The New York Court of Appeals had upheld the act in People v. Weller, 237 N. Y. 316, 143 N. E. 205 (1924), and the Supreme Court upheld its decision upon only the precise point involved, which was a provision for licensing the ticket broker. Weller v. New York, 268 U. S. 319, 325 (1925).

The Massachusetts court, being requested by the state senate to give its opinion on the constitutionality of a similar statute, discussed the various cases mentioned in this article, and replied: ". . . we are of opinion that theatres and other places of public amusement are affected with a public interest and devoted to a public use." Opinion of the Justices to the Senate, 247 Mass. 589, 595, 143 N. E. 808, 810 (1924). The statute is MASS. ACTS 1924, c. 497.

[50] 273 U. S. at 445.

[51] That is on the historical side of the *law*. The historical side of the *theatre* was argued but the opinion met it with the following: "The contention that, historically considered, places of entertainment may be regarded as so affected with a public interest as to justify legislative regulation of their charges, does not seem to us impressive. It may be true, as asserted, that, among the Greeks, amusement and instruction of the people through the drama was one of the duties of government. But certainly no such duty devolves upon any American government. . . . It does not appear that any attempt hitherto has been made to fix their charges by law. This is a fact of some significance in connection with the historical argument, and, when set in contrast with the practice in respect of innkeepers and others, whose charges have been subjected to legislative regulation from a very early period, it persuasively suggests that by general legislative acquiescence theatres, historically, have been regarded as falling outside the classes of things which should be thus controlled." 273 U. S. at 441.

HeinOnline -- 41 Harv. L. Rev. 290 1927-1928

which it was used." In the assumptions of this sentence the case was already decided but the opinion goes on to reassert the assumptions.

> "A theatre or other place of entertainment does not meet this conception of Lord Hale's aphorism or fall within the reasons of the decisions of this court based upon it. A theatre is a private enterprise, which, in its relation to the public, differs obviously and widely, both in character and degree, from a grain elevator, . . . or stock yards, . . . or an insurance company. . . . Sales of theatre tickets bear no relation to the commerce of the country; . . . The interest of the public in theatres . . . may be more nearly . . . assimilated to the like interest in provision stores and markets, and in the rental of houses and apartments for residence purposes; although in importance it falls below such an interest in the proportion that food and shelter are of more moment than amusement or instruction. As we have shown, there is no legislative power to fix the prices of provisions or clothing or the rental charges for houses or apartments, in the absence of some controlling emergency." [52]

The opinion concludes with the familiar fearful-consequences-and-where-is-the-limit motif.

Dissenting, Mr. Justice Holmes puts himself in the present and among the realists, perhaps as much too much as Mr. Justice Sutherland sets himself the other way. His language is brief and wide:

> "I think . . . that the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. . . . But if we are to yield to fashionable conventions, it seems to me that theatres are as much devoted to public use as anything well can be." [53]

Mr. Justice Stone, in dissenting, calls the case back to its precise issue, and back to the actualities of the situation of the theater in New York. He says,

---

[52] 273 U. S. at 439–40.

[53] 273 U. S. at 446–47. The opinion of Holmes, J., is quoted in full in Frankfurter, *Mr. Justice Holmes and the Constitution* (1927) 41 HARV. L. REV. 121, 156–57.

HeinOnline -- 41 Harv. L. Rev. 291 1927-1928

"The phrase 'business affected with a public interest' seems to me to be too vague and illusory to carry us very far on the way to a solution. It tends in use to become only a convenient expression for describing those businesses, regulation of which has been permitted in the past. . . . The very fact that it has been applied to businesses unknown to Lord Hale, who gave sanction to its use, should caution us against the assumption that the category has now become complete or fixed and that there may not be brought into it new classes of business or transactions not hitherto included, in consequence of newly devised methods of extortionate price exaction.

". . . An examination of the decisons of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community." [54]

In respect to the theater, as in regard to the other enterprises, the regulation is not regulation for its own sake, but for a purpose as revealed by conditions found objectionable. Upon the typical "public utility" class — which Mr. Justice Sutherland accepts when he says, "Certain properties and kinds of business it obviously includes, like common carriers, telegraph and telephone companies, ferries, wharfage, etc." [55] — the character of the duties imposed has become manifold as the needs became apparent.

[54] 273 U. S. at 451–52. The case has been much noted. See (1927) 40 HARV. L. REV. 1009; (1927) 22 ILL. L. REV. 192; (1927) 25 MICH. L. REV. 880; (1927) 11 MINN. L. REV. 656; (1927) 75 U. OF PA. L. REV. 778; (1927) 13 VA. L. REV. 554; (1927) 36 YALE L. J. 985, 987. In the last named "W. F. D[odd]" says, "The Mr. Justice Sutherland who wrote the ticket scalping opinion is not the Mr. Justice Sutherland who in the present term of the Supreme Court wrote the opinion in *Euclid v. Ambler Realty Company*, [272 U. S. 365]. . . . In the *Euclid* case he said for the court that the scope of application of constitutional principles 'must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.' . . . But when applied to the recognized evil of ticket-scalping, the same constitutional principles become rigid in application and must be 'applied as they are written.'" See also Finkelstein, *From Munn v. Illinois to Tyson v. Banton* (1927) 27 COL. L. REV. 769. Further comment on the Tyson decision is invited by the words of Taft, C. J., in the first Wolff case, 262 U. S. 522, 539 (1923): "The extent to which regulation may reasonably go varies with different kinds of business." *Cf.* Cudahy Packing Co. v. United States, *supra* note 35.

[55] 273 U. S. at 430.

HeinOnline -- 41 Harv. L. Rev. 292 1927-1928

Needs as to the theater had indicated and induced much regulation before this particular need for price regulation presented itself. This is all summarized in its various aspects by Mr. Justice Stone. Some of the most obvious duties of the accepted "utility," to serve "all" and to serve them without discrimination, have been forced upon the theater by the Civil Rights Acts in various states.[56]

"DEVOTION" TO THE PUBLIC

Having thus pursued the topic of the public business down to the latest decision, only to discover in it a new experience in the tyranny of ancient phrases, we turn to the history of another phrase. Beside calling to new life the words of Lord Holt, Chief Justice Waite in the *Munn* case combined them with some of his own. "Property," he said, "does become clothed with a public interest when used in a manner to make it of public consequence." [57] This Mr. Justice Sutherland in the *Tyson* case quotes. He then continues:

"The significant requirement is that the property shall be devoted to a use in which the public has an interest, which simply means, . . . that it shall be devoted to 'a public use.' Stated in another form, a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public." [58]

The question thus arises whether the conduct or method or course adopted by the individual enterpriser figures in bringing the state into his affairs. He may desire to engage in an activity not yet "public," or he may desire to enter into one which wears an already established "public" labeling. As to the former he

[56] Pickett v. Kuchan, 323 Ill. 138, 140, 153 N. E. 667 (1926), is a recent decision under the Illinois Civil Rights Act in favor of a negro woman denied admission to a minstrel show. The court used large language, saying that: "The right of the state to regulate theaters and all places of public amusement is universally recognized. (*People* v. *Steele*, 231 Ill. 340). This right to regulate includes the right to compel persons engaged in businesses catering to the public to furnish equal facilities and accommodations to all members of the public without discrimination." See a note on the case in (1927) 11 MINN. L. REV. 463.

[57] 94 U. S. at 126.

[58] 273 U. S. at 433-34.

HeinOnline -- 41 Harv. L. Rev. 293 1927-1928

is secure so long as the enterprise itself remains in the private category; but the inquiry now raised is whether he is necessarily subject to regulation merely because he is in a type of enterprise which already is or which becomes "public." Munn did no devoting or granting in any volitional sense. He vigorously fought the grant which the Supreme Court assured him he had made, and the whole litigation is the record of his unwillingness. So far as he was concerned, the public forged his signature to its invitation to a share of control in his business.

Yet the phrase has developed a clear content since Munn's time, and is the epitome of another set of explanations upon the question what is or may be made to be a public utility. Historically, the carrier again furnishes the starting point. Transportation as an occupation distinguished from, say, baking, was "public," but not all transportation fell under regulation. The classes were "common carriage" and "private carriage." Recent scholarship [59] has shown the ancient meaning of "common carriage" to be simply carriage as a business, and many cases and some writers state the principle under which regulation becomes proper to be whether the carriage is or is not made a "business." [60] Accent on this word furnishes the background for recent legislation.

Some years ago, Ohio enacted that "any person . . . when engaged in the business of . . . transporting persons or property . . . in motor vehicles . . . for hire . . . is declared to be a common carrier," [61] and under regulation. One Guran had a contract with a milk producers' association whereby he and a partner "were employed for hire to collect and transport milk and cream of the members of the said association, and no one else, to the White Rock Dairy Company of Akron, and no other person, upon a regular schedule of prices, depending upon the distance." In *Hissem v. Guran*,[62] the Ohio court held that Guran's operations were outside the statute and made "dedication" a condition to valid regulation. "Dedication" was defined as "of such a char-

---

[59] See the articles cited *supra* note 4, and Burdick, *The Origin of the Peculiar Duties of Public Service Companies* (1911) 11 COL. L. REV. 514.

[60] Cushing v. White, 101 Wash. 172, 172 Pac. 229 (1918), collects and cites the language of many texts and cases.

[61] OHIO GEN. CODE (1923) § 614(2).

[62] 112 Ohio St. 59, 60, 64, 146 N. E. 808, 809 (1925).

HeinOnline -- 41 Harv. L. Rev. 294 1927-1928

acter that the product . . . [must] be available to the public generally and indiscriminately, and that the carrier must hold himself ready to serve the public indifferently." [63]

In Michigan a similar statute was enacted. One Duke employed seventy-five men and no less than forty-seven trucks in his business of carrying for hire automobile parts from several manufactories to a single assembling point, under a contract like that of Guran. In *Michigan Public Utility Comm. v. Duke*,[64] the Supreme Court held that Duke could not be subjected to the act. For a unanimous court, Mr. Justice Butler said, "Plaintiff is a private carrier. . . . He does not undertake to carry for the public and does not devote his property to any public use. He has done nothing to give rise to a duty to carry for others." [65]

Departing from this historical division of the carriers, California, on the principle that matters that look unconstitutional should go into the constitution, amended that now bulky instrument in 1911 so as to give the legislature a free rein to fill in declarations of "public utility." [66] The case which tested this treatment of the subject had to do with a pipe line, which, as an

[63] In Craig v. Pub. Util. Comm., 115 Ohio St. 512, 154 N. E. 795 (1926), Craig hauled about fifty-fifty, he testified, for himself and for others; the court held him subject to the act as a common carrier. The opinion includes a differentiation, favoring the regulation, between a single special contract and a series of them.

[64] 266 U. S. 570, 576 (1925). See (1925) 38 HARV. L. REV. 980; (1925) 34 YALE L. J. 675.

[65] A recent case handled the Duke situation on the same general facts except that the haul was wholly intrastate. In Film Transport Co. v. Michigan Pub. Util. Comm., 17 F.(2d) 857, 858 (E. D. Mich. 1927), the former had "contracts with 150 theaters" and over definite territory and fixed routes carried moving picture films among them. The court said: "It is true that in the Duke Case the question of interstate commerce was involved, and that that question is not present in this case. . . . The test, however, applied to the transportation company in the Duke Case, in order to determine whether it constituted a private or a public carrier, when applied to the plaintiff in this case, leads inevitably to the same conclusion."

[66] The California court said: "And this [is] without reference to the character of the business, whether it be a bootblack stand, grocery store or agricultural pursuit conducted in a purely private capacity." Associated Pipe Line Co. v. R. R. Comm., 176 Cal. 518, 521, 169 Pac. 62, 63 (1917). A recent case seems to hold that dedication is arrived at, so far as California regulation is concerned, only when the product is destined for use by the California "public," though the production is in California. Nevada-California Power Co. v. Borland, 76 Cal. App. 519, 245 Pac. 209 (1926); (1927) 15 CALIF. L. REV. 175.

HeinOnline -- 41 Harv. L. Rev. 295 1927-1928

enterprise, was an accepted "public utility." [67] Attack upon the California experiment was not, therefore, made upon the declaration as to pipe lines but on the legislature's enactment that *all* pipe lines were common carriers. This the Associated Pipe Line Company denied. It asserted it was not a common carrier of oil and refused to submit to an order of the commission. The oil it transported was partly that produced by a railroad for its own use, and partly oil which the Pipe Line Company itself bought in the producing field, plus some of its own production there.

In *Associated Pipe Line Co. v. Railroad Comm.*,[68] the California court agreed with the company. It said,

"The record discloses no action . . . which constitutes an irrevocable dedication of [the] property to a public use. . . . It must have been made to appear that they had voluntarily devoted their transportation facilities to the indiscriminate use of the public for hire, thus constituting them common carriers."

Other litigation involving these California concerns, engaged in business and engaged in it for profit, yet so organized as to escape the regulatory power of the state, has established the point that "devoting" is the voluntary act of the utility, and that pitchforking into the public utility status by mere legislative fiat is a denial of due process.[69] The question was raised in the Supreme Court of the United States in *Producers Transportation Co. v. Railroad Comm.*,[70] and the Court said,

"It is of course true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, for carrying for the public, the State could not by mere legislative fiat or by any regulat-

[67] The Pipe Line Cases, 234 U. S. 548 (1914).

[68] 176 Cal. 518, 523, 169 Pac. 62, 64 (1917).

[69] See Allen v. R. R. Comm., 179 Cal. 68, 175 Pac. 466 (1918). The California cases are set forth in (1918) 6 CALIF. L. REV. 146; (1919) 7 *ibid.* 121; Blanchard, *The Relation Existing between Irrigation Water Users and Distributing Companies* (1919) *ibid.* 295, 377; (1921) 9 *ibid.* 440. The Associated Pipe Line case is also noted in (1918) 13 ILL. L. REV. 352, and the Allen case in (1919) 3 MINN. L. REV. 199.

[70] 251 U. S. 228 (1920).

HeinOnline -- 41 Harv. L. Rev. 296 1927-1928

ing order of a commission convert it into a public utility or make its owner a common carrier." [71]

Thus the settlement of the public or non-public character of the enterprise as a class does not of itself determine the validity of the application to it of the regulatory authority. Even with food, or fuel, or housing, or amusement purveying, established as "public" enterprises, this question of "dedication" remains.

A difficulty arises, however, when *The Pipe Line Cases* [72] are considered. There the outstanding fact was that the Standard Oil Company, by having control of the pipe lines, refused to carry any oil unless the same was sold to it, thus carrying no oil for anybody except itself. The decision that the pipe lines were common carriers was arrived at largely by main strength. Mr. Justice Holmes said,

"The provisions of the act are to apply to any person engaged in the transportation of oil by means of pipe lines. . . . If the Standard Oil Company and its coöperating companies were not so engaged no one was. It not only would be a sacrifice of fact to form but would empty the act if the carriage to the seaboard of nearly all the oil east of California, were held not to be transportation within its meaning, because by the exercise of their power the carriers imposed as a condition to the carriage a sale to themselves. . . . [The] evident purpose was to bring within its scope pipe lines that although not technically common carriers yet were carrying all oil offered, if only the offerers would sell at their price." [73]

---

[71] This series of decisions ought to dispose of a persistent fallacy which is adverted to in Anderson v. The Fidelity & Casualty Co., 228 N. Y. 475, 490, 127 N. E. 584, 588 (1920), by Hiscock, C. J.: "It is also said in attempted solution of this question that the company operating the taxicab would not be subject to action if it refused to accept a passenger and that it was not subject to the high measure of liability which attaches to a common carrier. So far as concerns these last propositions they seem to me to involve an argument which moves backward and which attempts to determine a status by consideration of results which flow from the status if established. The liabilities which have been mentioned cannot be regarded as creating the status of a common carrier; they arise from the condition of being a common carrier if that is once established."

[72] 234 U. S. 548, 559 (1914). The case is laid against a background of the monopolistic character of the Standard Oil Company and the part in its monopoly played by its control of the pipe lines. "The circumstances in which the amendment [to the Interstate Commerce Act] was passed are known to every one." 234 U. S. at 558.

[73] The case naturally enough bothered the California court in its pipe line

HeinOnline -- 41 Harv. L. Rev. 297 1927-1928

However desirable as part of an effort to club monopoly, the case is a stumbling block to the statement of the doctrines of the Supreme Court as set out in the *Duke* and *Producers Transport* cases, unless, indeed, that tribunal is prepared to limit the later language to the precise terms it uses, that no *state* "by mere legislative fiat [may] . . . convert into a common carrier." The effort to rationalize the earlier decision so as to make the pipe lines which are conceived of as "common carriers in substance" "to become so in form" would negative this, and *The Pipe Line Cases* are left to be explained as another illustration of the use of fiction in law as a device for achieving ends which current opinion will accept.

The question being thus one of fact, some of the results naturally lie open to discussion as findings of that character. Some recent decisions are of interest. When Judge Elkus remarked in 1920 that the term "common carrier" had been successively applied to each new development and that "to-morrow, in a proper case, it may well be that it may be applied to that most recent device for eliminating the fetters of distance, the aeroplane,"[74] the matter he had in mind was just around the corner. It was presented in the form of an action upon an insurance policy allowing added compensation for accidents sustained on various named vehicles "or other public conveyance provided by a common carrier." Recovery called for bringing within this term a plane in which the operator took up persons, at a charge of five dollars each, and circled about for ten or fifteen minutes. In *North American Insurance Co. v. Pitts,*[75] the court went elaborately into the meaning of "common carrier" and came forth with

decision. In Associated Pipe Line Co. v. R. R. Comm., *supra* note 68, at 525, 169 Pac. at 65, it said: "Respondent lays great stress upon a decision of the United States supreme court entitled *United States* v. *Ohio Oil Co.* [The Pipe Line Cases], 234 U. S. 548. . . . To our minds, there are many features of this case which clearly distinguish it from that at bar." It then recited the monopoly features based upon the Standard's buying-up policies, and distinguished the cases on that basis.

[74] Anderson v. The Fidelity & Casualty Co., *supra* note 71, at 480, 127 N. E. at 585. It was an action on an insurance policy which had special provisions concerning accidents while riding on a "common carrier." It held a taxicab to be one.

[75] 213 Ala. 102, 104 So. 21 (1925). In Brown v. Pac. Mut. Life Ins. Co., 8 F.(2d) 996 (C. C. A. 5th, 1925), the facts and decision were similar. The cases are respectively noted in (1925) 20 ILL. L. REV. 511, and (1926) 24 MICH. L. REV. 619. The former sees some complications because a legal duty to carry, it has been said, cannot arise out of such carriage because the flying is trespassing.

a denial of recovery, but largely on the ground that this type of conveyance was not within the terms of the policy. In adverting to the aeroplane as used in the manner indicated, the court said that it was operated "as a private carrier . . . under special contract." Such cases may be likened to those concerning pleasure apparatus such as ferris wheels or roller coasters where the movement is not for transportation purposes, but they, of course, can have no bearing on air transportation systems which already are a factor in English and Continental transportation.

A New York decision puts the special contract carrier in a somewhat peculiar light and raises the question as to the relation of Duke or Frost or Guran to the individuals for whom they haul. In *Textile Alliance, Inc. v. Keahon*,[76] Keahon, a truckman, had a contract with the United States for the exclusive carrying of merchandise from the steamship docks to various bonded warehouses for storage pending appraisal for customs duties. The charge was fixed by contract between the United States and the truckman, but the importer reimbursed the government. The goods were "under the control of the government" but the importer might, and in the case did, designate the bonded warehouse, en route to which the containers were smashed. The importer sued the truckman on the "insurer's" liability of a common carrier. The court said he was a common carrier, on the theory that,

"under these circumstances it is difficult to distinguish the work performed . . . from [that of] a railroad between two points along which there is no competing line. Such a transit line is a carrier with a monopoly of rail transportation between the two given points; except that in the case of the railroad the hiring is by the shipper direct and not by an agency which has the hiring right for the account of the shipper. The distinction is not sufficiently decisive to take the defendant out of the class of common carrier."

The last few words evince a significant attitude; it is hard not to think common carrier when carriage as a business is in mind.[77]

How a bus which is a common carrier on a public road is any less one while trespassing through a private estate is not so clear: certainly it is not clear as to its liability to the people already in it. See Zollman, *Aerial Insurance* (1927) 11 MARQUETTE L. REV. 93.

[76] 125 Misc. 400, 211 N. Y. Supp. 205 (1925).

[77] A note in (1925) 25 COL. L. REV. 1081, seems to consider the decision at variance with the Duke case.

HeinOnline -- 41 Harv. L. Rev. 299 1927-1928

In *Dawkins Lumber Co. v. L. Carpenter & Co.*,[78] the lumber concern had a short stretch of railroad over which it carried its own logs, picking up loaded cars of its lessor company, and it later picked up another company's coal, and some passengers. For all it collected money. The facts show a complicated tangle of affiliated friends of whom the Carpenter firm was not one, and whose freight was refused. The Kentucky court held that the line was not a common carrier, though it said, ". . . we find that between Royalton and Carver, the Dawkins Lumber Company was . . . accustomed to transport for hire, passengers . . . , and that between Royalton and Mill branch it transported freight for such parties as it chose to make contracts with." There were in this case two "such parties."

In another case[79] it developed that oil had been discovered three miles off the line of a railroad, and the road had contracted with the discoverers to extend its line and to carry their oil under a contract which recited that the road *was* a "private railroad." Like contracts with new oil producers followed, and "transportation was limited to parties under contract." The "parties" were apparently only three concerns. The state commission asserted jurisdiction over the road as a common carrier and ordered it to establish and file rates. When the railroad sought to enjoin this action the court found that "the evidence establishes that the respondent was willing to transport oil for all in the field who were willing to make a special contract." This court relied on the *Duke* case, as did the Kentucky court, but it decided that the extension of the road was a public utility.

California has recently sought again, and by a new approach, to bring under regulation an enterprise which, by the tests thus far worked out, had not been "devoted." In *Frost v. Railroad Comm.*,[80] it evoked a decision which has fortified against regulation those who do business as did Guran and Duke. The Frosts had "a single private contract . . . for stipulated compensation."

[78] 213 Ky. 795, 801, 281 S. W. 1013, 1016 (1926). The case is noted in (1927) 11 MINN. L. REV. 178.

[79] Smitherman v. Mansfield Hardwood Lumber Co., 6 F.(2d) 29 (W. D. Ark. 1925). The case is noted in (1926) 24 MICH. L. REV. 186.

[80] 271 U. S. 583 (1926). The details are given in Frost v. R. R. Comm., 240 Pac. 26 (Cal. App. 1925). The case in the Supreme Court is noted in (1926) 6 BOSTON U. L. REV. 259; (1926) 21 ILL. L. REV. 380; (1926) 40 HARV. L. REV. 131.

HeinOnline -- 41 Harv. L. Rev. 300 1927-1928

They used the California highways, and the local railroad commission cited them before it for operating without a certificate of convenience and necessity. It relied upon a statute which defined a "transportation company" as a "common carrier for compensation over any public highway," amended in 1919 to apply specifically to automotive carriers of persons or property operating under private contracts. The commission conceded that the Frosts were private carriers. The state courts supported the commission and the Frosts brought the case before the Supreme Court, arguing that the act as applied to them denied due process. The Court agreed with them. Thus was upset the state's ingenious device to make the use of the state highways equivalent to a "dedication" to the public.

California's argument was based on the proposition that the state could grant or withhold the use, for business purposes, of its highways,[81] and might, therefore, grant their use on conditions, and that the condition of "dedication" was valid. Mr. Justice Sutherland who wrote for the Court made this his point of departure.

> ". . . the case presented is not that of a private carrier who, in order to have the privilege of using the highways, is required merely to . . . become subject to regulations appropriate to that kind of a carrier; but it is that of a private carrier who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier and of being regulated as such by the railroad commission. . . . The power to prohibit the use of the public highways in proper cases — the state possesses; . . . the power to compel a private carrier to assume against his will the duties and burdens of a common carrier — the state does

[81] See Lilienthal and Rosenbaum, *Motor Carrier Regulation by Certificate of Necessity and Convenience* (1926) 36 YALE L. J. 163. See Harrison v. Big Four Bus Lines, 217 Ky. 119, 122, 288 S. W. 1049 (1926), where an established bus route was invaded by a taxicab service regardless of a local statute which forbade operation over a route for which another line held a certificate. The court sustained the statute under the theory that "The state . . . has the right to prohibit the use of the highways as places of private business, such as the appellants seek to carry on, or to grant the right to one and refuse it to another." See also (1927) 15 KY. L. J. 351. Pub. Serv. Comm. v. West Maryland Dairy Co., 150 Md. 641, 135 Atl. 136 (1926), citing only a few local cases, held that a milk company which sent its own trucks out to the farmers comprising a Dairy Association which sold only to the milk company, was subject to the local public utility commission as to a permit to operate.

HeinOnline -- 41 Harv. L. Rev. 301 1927-1928

not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion." [82]

Mr. Justice Holmes wrote a dissent in which Mr. Justice Brandeis concurred.[83] Mr. Justice McReynolds, dissenting separately, said,

"Having built and paid for the roads, California certainly has the general power of control. Plaintiffs in error are without constitutional right to appropriate highways to their own private business as carriers for hire. And if, in so many words, the Legislature had said that no intrastate carriers for hire except public ones shall be permitted to operate over the state roads it would have violated no federal law." [84]

The elaborate fictions, under the doctrines of voluntary "election" by the victim, by which many new legal burdens have been laid upon unwilling backs [85] are thus controlled. Hereafter a constitutional power may not be so used as to obtain an unconstitutional result.[86]

---

[82] 271 U. S. at 592, 593.

[83] 271 U. S. at 600-02. Holmes, J., referred to Packard v. Banton, 264 U. S. 140 (1924), which held that a New York statute making necessary the bonding of those who operate motor vehicles for hire was not unconstitutional. Sutherland, J., wrote the opinion. Checker Taxi Co. v. Collins, 320 Ill. 605, 151 N. E. 675 (1926), sustained like legislation in Illinois, and Georgia has lately sustained a similar provision imposed by an ordinance of a city. Transylvania Ins. Co. v. Atlanta, 35 Ga. App. 681, 134 S. E. 632 (1926); (1927) 21 Ill. L. Rev. 745.

[84] 271 U. S. at 602-03.

[85] Ernst Freund develops the idea as to workmen's compensation statutes in a note to Booth Fisheries Co. v. Industrial Comm., 271 U. S. 208 (1926), in (1926) 21 Ill. L. Rev. 385. "Election" to make a local official an agent to accept service in Massachusetts was predicated upon a Pennsylvania automobilist's use of the Massachusetts highways in Hess v. Pawloski, 274 U. S. 352 (1927). But the Court rejected an argument that a utility had "elected" a statutory procedure which would bar timely recourse to the federal judiciary against confiscatory rates in Railroad, etc. Comm v. Duluth St. Ry., 273 U. S. 625 (1927).

[86] A. A. Bruce, writing in (1926) 21 Ill. L. Rev. 380, considers the case an example of federal centralization of business control by use of the Fourteenth Amendment. Mr. Justice Brandeis indicates his sense of the magnitude of the problem thrust upon society's regulatory forces by the motor vehicle business. Some 38

HeinOnline -- 41 Harv. L. Rev. 302 1927-1928

Aside from any question as to state regulation of purely private carriers, as such, we have arrived through these recent cases at a pretty definite content for the phrase "devoted to the public." It means doing business or offering to do business with the public: only those who do so offer may have imposed on them the utility status. This has long since been pointed out as ancient.[87]

Labor "Devoted" to Public Utility Service

There remains the inquiry as to *what* is devoted or dedicated or granted to the public interest so that it "must submit to be controlled by the public for the common good." In any production of results in business the ingredients are things and men who work upon the things. The classical expositions of the economic order as regulated by the competitive system frankly put *both* men and things into the hopper. Regulation by competitive process was conceived of as operating upon the capital and upon the labor alike. Public utility regulation, however, has been a scheme for the control of *property* devoted to a public use. The familiar cases concern grain elevators, pipe lines, stockyards, housing, not taken as going concerns combined with the labor of men, but as the *property* of an owner. He was put under regulation personally only because of his relationship to *things*. But in 1917 the country realized that it was not interested in any sort of *property* devoted to the public use. Its interest was in the result produced by going concerns made up of things and of men, which were "devoted" to enterprises the country was especially interested in. There followed an articulate statement that since the same factors for securing results are at work under the new public utility regulation as under the old competitive scheme, the new should, somehow, also operate on both.

The occasion was the railroads' test of the Adamson Law,[88] in

states have sought legislation to cope with it. The Duke and Frost cases show the hurdles set by the due process clause; the commerce clause furnishes additional hurdles. See Buck v. Kuykendall, 267 U. S. 307 (1925); Bush Co. v. Maloy, 267 U. S. 317 (1925); Interstate Busses Corp. v. Holyoke St. Ry., 273 U. S. 45 (1927); (1927) 11 MINN. L. REV. 157; (1927) 40 HARV. L. REV. 882.

[87] See Adler, *supra* note 4; Burdick, *supra* note 59.

[88] For the history of the statute see Bonney, *Federal Intervention in Labor Disputes* (1923) 7 MINN. L. REV. 467, 551. See also (1917) 30 HARV. L. REV. 739.

HeinOnline -- 41 Harv. L. Rev. 303 1927-1928

Wilson v. New.[89] The act was there sustained; but, while the statute was no regulation of labor in the sense of putting pressure upon the labor factor in railroad enterprise, since it actually granted a wage increase, thus operating upon the property ingredient, the opinion included some provocative language. Chief Justice White, speaking for the Court, said:

"That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation . . . is settled. . . . And this leaves only to be generally considered whether the right to exercise such a power under the conditions which existed was limited or restrained by the private rights of the carriers or their employees."

He found no difficulty, of course, in the regulation of the carriers' contracting power; but

"As to the employee . . . whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them, and, by concert of action, to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest, . . . and the resulting right to fix, in case of disagreement and dispute, a standard of wages, as we have seen, necessarily obtained." [90]

The Kansas experiment in new public enterprises was supported by its proponents upon this decision[91] in its aspect as an attempt to secure continuity of operation of public utilities as against the labor ingredient. The Kansas court said,[92]

---

[89] 243 U. S. 332, 347 (1917). See Burdick, *The Adamson Law Decision* (1917) 2 CORN. L. Q. 320; Powell, *The Supreme Court and the Adamson Law* (1917) 65 U. OF PA. L. REV. 607.

[90] In Adair v. United States, 208 U. S. 161 (1908), the Court held unconstitutional an act preventing an interstate carrier from discharging employees because of union membership. McKenna, J., (who concurred in Wilson v. New), there dissented, saying "[The statute presents] a well coördinated plan for the settlement of disputes . . . and [prevention of] strikes and . . . derangement of business. . . . I submit no worthier purpose can engage legislative attention. . . ." 208 U. S. at 184.

[91] See Young, *supra* note 23, at 207.

[92] State v. Howat, *supra* note 25, at 417, 198 Pac. at 705.

HeinOnline -- 41 Harv. L. Rev. 304 1927-1928

"Heretofore the industrial relationship has been tacitly regarded as existing between two members — industrial manager and industrial worker. They have joined whole-heartedly in excluding others. The legislature proceeded on the theory there is a third member of those industrial relationships which have to do with production, preparation and distribution of the necessaries of life — the public. . . . Whenever the dissensions of the other two become flagrant, the third member may see to it the business does not stop."

Since the legislation had been particularly designed to cope with cessation in the fuel industry,[93] the Kansas strategy which brought the scheme on for the Supreme Court's imprimatur in the vehicle of a threatened strike in a packing plant, considering the possible advantages of riding into court upon a case involving coal, may be questioned. In addition, the test was made not only on a packing plant but on a wage setting and hours of labor order fought by the plant owner and not by the labor.[94] It was on such examples that the whole experiment collapsed.

Chief Justice Taft in the first *Wolff* case,[95] after saying that "The avowed object is continuity of food, clothing and fuel supply," continued,

" [It] involves a more drastic exercise of control to impose limitations of continuity growing out of the public character of the business upon the employee than upon the employer; and without saying that such limitations upon both may not be sometimes justified, it must be where the obligation to the public of continuous service is direct, clear and mandatory and arises as a contractual condition express or implied when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service. . . . The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. . . . It is not too much to say that the ruling in *Wilson* v. *New* went to the borderline. . . . Certainly there is nothing to

[93] Rabinowitz, *supra* note 23, lays the background which made the legislation a political possibility in Kansas.

[94] "H. M. B[ates]," writing in (1923) 22 MICH. L. REV. 135, discusses the mistake in tactics in testing the Kansas act with a case so weak for the purposes of the state.

[95] *Supra* note 30.

HeinOnline -- 41 Harv. L. Rev. 305 1927-1928

justify extending the drastic regulation sustained in that exceptional case to the one before us." [96]

The Kansas Industrial Court decisions might be explained on the ground that compulsory arbitration, generally, is barred,[97] or on the alternate ground that the statute failed because the enterprises were not accepted as "public." Whether they leave compulsory arbitration constitutional in accepted "public utilities" generally, or only in public utilities when they are big enough, and what degree of bigness is enough, and whether the doctrine is only for emergencies and what they are, and whether only the Federal Government may do anything about enforcing continuance, and then only on interstate commerce grounds, remain open questions. As an inquiry into the special duties, if any, of the personnel devoting its effort to the service of public utility enterprises, not connected with interstate commerce, this line of approach toward even a theoretical discussion of labor's obligations seems blocked. So far as Kansas is concerned the experiment has ended, for the statute has been repealed and the court abolished.[98]

The Federal Government also gave ear to the call that it "do something" in its field. The result was the creation of the Railroad Labor Board [99] by the Transportation Act of 1920. This effort was largely hortatory,[100] and, though it gave rise to some litigation,[101] the whole experiment has seemed to commentators

---

[96] 262 U. S. at 541, 543, 544.

[97] On compulsory arbitration see Simpson, *supra* note 27, discussing Wilson v. New, and the first Wolff case. The same author wrote a note on the second Wolff case in (1925) 38 HARV. L. REV. 1097. It is also noted in (1925) 24 MICH. L. REV. 60.

[98] See Huggins, *Just What has the Supreme Court done to the Kansas Industrial Act? Why Did it Do It?* (1925) 11 A. B. A. J. 363, and *The Province of Law and Order in the Realm of Industry* (1926) 24 OHIO L. B. 557. The author of these articles was presiding judge in the court and drafter of the statute creating it.

[99] See Wheat, *American Legislation for the Adjustment of Labor Disputes* (1920) 27 W. VA. L. Q. 43, 128, 312; Bonney, *supra* note 88, at 550.

[100] Practically the only power given the Board was that of publishing its decisions. This was all the sanction which the Massachusetts Railroad Board had when that forerunner of modern commissions started. See MASS. ACTS AND RESOLVES 1869, c. 408.

[101] Pennsylvania R. R. v. Labor Board, 261 U. S. 72 (1923); Pennsylvania, etc. Federation v. Pennsylvania R. R., 267 U. S. 203 (1925); Pennsylvania, etc. Brotherhood v. Pennsylvania R. R., 267 U. S. 219 (1925). See (1925) 38 HARV. L. REV. 374; *ibid.* 986.

HeinOnline -- 41 Harv. L. Rev. 306 1927-1928

to be an adventure in futility.[102] In 1926 a further step was taken when the United States Board of Mediation was organized.[103] This Board has been busy, but most of its cases have resulted in wage increases. A labor control board which grants labor's demands sheds no light on what to do when labor refuses its public service.

The logic of the thing seems clear enough. The "public interest" is *not* in the property "devoted"; it *is* in the accomplishment of whatever result of the use of the property may be in question, and the use is the product of a going concern of men and of things. But, it will take a large amount of long suffering to buy public acceptance for even the attempt at a scheme for making men work. Enlistment in the army or navy, aside from drafting, is the analogy which appeals to Chief Justice Taft.[104] He cannot mean that such a contract, in all of its obligations, is the product of the joint agreement of both parties. The enlister may be said to "contract" in the sense that he may know of such obligations, but the very point at issue here is whether a state as guardian of social interests, which are obvious enough, should also impose some obligation on the man who enters volitionally, of course, into the service of a public utility. One senses the feeling against such a proposition. Labor contracts where all the terms are set by the employer and all the "contracting" the men do is to consent to be employed, are not unfamiliar, but they enjoy no great popularity. There is a popular psychology back of the Thirteenth Amendment, a repugnance to compulsion beyond its mere words, which rests in a deeper background.

How to do it, if the will to do it comes or is forced upon an exasperated community, is the nub of the whole matter after all. How to *make* men work at any job is insuperable enough, but how to make them work when life and limb and food and comfort depend upon the proper doing of the job, is still "more" insuperable. Whether democracy as a form of government could bring

[102] The literature is considerable; much of it is gathered in Kennedy, *Law and the Railroad Labor Problem* (1923) 32 YALE L. J. 553, and in Powell, *Commerce, Congress, and the Supreme Court* (1926) 26 COL. L. REV. 396, 409.

[103] The explanatory literature may be found in (1926) 16 AM. LABOR LEG. REV. 140; (1926) 12 A. B. A. J. 633; Fisher, *The New Railway Labor Act* (1927) 17 AM. ECON. REV. 177.

[104] See *supra* p. 305.

HeinOnline -- 41 Harv. L. Rev. 307 1927-1928

into play sufficient force to try it on any large scale — and by hypothesis only a large scale discontinuance of service would raise the problem at all — is itself a question.

It seems inevitable that however imperative the manner as to "property devoted to a public use," the hortatory, not to say petitory tone is necessarily the mode with labor so devoted. It is no unthinkable thing that statesmanship among labor leaders may effect more result than direct attempt at regulation. That sense of responsibility and that conservatism which has so frequently followed power, may well come upon them as it has come upon others. At least if we *do* regulate the owner's property interest and set the prices of his output in gas, electricity, transportation, or other "public" commodities, it would seem that both he and whatever gestures of regulation we make as to his personnel should be under the same agency. The objection to putting the regulation of rates in one commission and that of wages in another seems just.[105]

Gustavus H. Robinson.

BOSTON UNIVERSITY LAW SCHOOL.

---

[105] See DIXON, RAILROADS AND GOVERNMENT (1922), reviewed in (1924) 24 COL. L. REV. 215, and (1922) 16 AM. POL. SCI. REV. 713.

On the general topic see Thompson, *Labor and The Law in the Public Utility Field* (1922) 21 MICH. L. REV. 1. The articles of the past year include Lay, *State Legislation that Hurts* (1927) 61 AM. L. REV. 39, 48; Saunders, *A Review of Recent Decisions Affecting Labor and Employment* (1927) 15 GEORGETOWN L. J. 361; Moorehouse, *Some Limitations of Arbitration in Public Utility Disputes* (1927) 3 J. OF LAND AND PUB. UTIL. ECON. 77. See also (1925) 39 HARV. L. REV. 101; *ibid.* 128; ELLINWOOD AND COOMBS, THE GOVERNMENT AND LABOR (1926), reviewed in (1927) 27 COL. L. REV. 760, and in (1927) 21 ILL. L. REV. 755.

HeinOnline -- 41 Harv. L. Rev. 308 1927-1928