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Administrative Law -- Parties on Appeal from Utilities Commission -- Refusal to Take Judicial Notice of Interest of Affected Municipality in Discontinuance of Train Service

Edwin N. Maner Jr.

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NOTES AND COMMENTS

Administrative Law—Parties on Appeal from Utilities Commission—Refusal to Take Judicial Notice of Interest of Affected Municipality in Discontinuance of Train Service

The Atlantic Coast Line Railroad Co. petitioned the North Carolina Utilities Commission for permission to discontinue certain trains and passenger service in the eastern part of the state. The city of Kinston and others[1] appeared in opposition to the petition. The petition was allowed, and the protestants filed notice of appeal to the superior court. Hearing that the railroad intended to discontinue the trains before the appeal was heard, the protestants filed a motion before the Superior

[1] The protestants were the City of Kinston, the County of Lenoir, the City of Greenville, the County of Pitt, the Eastern Carolina Chamber of Commerce, and the Four County Committee. North Carolina Corporation Commission v. Kinston, 220 N. C. 359, 20 S. E. (2d) 322 (1942).

Court of Edgecombe County for an order[2*] directing the railroad to cease and desist from all efforts to carry into effect the commission's order. The railroad filed a counter motion to dismiss the protestants' motion and to dismiss the appeal from the order of the Utilities Commission on the ground that the matter was not properly in the superior court. However, the protestants' motion was granted, and the railroad appealed. The Supreme Court of North Carolina held that the motion of the railroad to dismiss the protestants' appeal should have been allowed on the ground that the protestants were not entitled to prosecute an appeal from the order of the commission, apparently because the protestants had failed to show sufficient interest to warrant the appeal. The court said that a party to a hearing must show some property or property interest involved in order to have the right to appeal. Judicial notice was not taken of the fact that the trains in question operated within the protesting towns and counties. It was said in the opinion, "We are not permitted to refer to matters not stated in the record, nor could the court below or the jury consider them."[3]

There is ample authority to support the position that the court will take judicial notice of facts known to the general public[4] when such facts are material and necessary to the decision.[5] In general, a request for judicial notice is necessary.[6] However, judicial notice has been taken of the fact that railroads operated within certain territories in cases where neither the fact of the railroad's operation nor a request was shown.[7]

In spite of the lack of showing of a request in the principal case, it is submitted that the court would not have been in error had it taken judicial notice of the fact that the trains in question operated within the protesting towns and counties. Thus the protestants' interest—the passenger service to which they had been accustomed, and of which they were being deprived—would have appeared. The action of the

[2*] The railroad contended that even if this case were properly in the superior court on appeal, the restraining order should not have been granted because: 1. The protestants should bring an independent action against the railroad; 2. If the motion for the order was proper, it should be supported by verified complaint or affidavit; and, 3. The protestants should post bond to protect the railroad. The railroad had presented affidavits to show that it would suffer serious loss if the order were granted.

The petitioners argued that the order requested was not in the nature of an injunction; that, after their appeal was perfected, the jurisdiction of the commission was shifted by law to the superior court, and there could then be no discontinuance of the trains until it was allowed by the court.

[3] The court was quoting from an opinion by Walker, J., in the case of State v. Atlantic Coast Line R. R. Co., 149 N. C. 470, 475, 62 S. E. 755, 757 (1908).

[4] WIGMORE, EVIDENCE (3d ed. 1940) §2571.

[5] Note (1935) 15 B. U. L. REV. 385.

[6] WIGMORE, EVIDENCE (3d ed. 1940) §2568.

[7] Goodman v. Heilig, 157 N. C. 6, 72 S. E. 866 (1911); State *ex rel.* McCullen v. Seaboard Air Line Ry. Co., 146 N. C. 568, 60 S. E. 506 (1908).

court in the principal case is somewhat suggestive of the action in *Riggin v. Collier*,[8] where the court refused to recognize New Orleans as a city in Louisiana.

However, the requirement that such an aggrieved municipality must show a property interest seems to be only technical law serving no good end. If, as in the instant case, such law is going to lead to the denial of protection to a city's interest in its transportation, then that law would be better abolished. The state of the law in North Carolina, since the principal case, would appear to be that neither individual citizens of a community nor the community itself may appeal from an order of the commission. Such law is opposed to the best interest of the public.

In support of that position in the principal case, the railroad cited *North Carolina Corporation Commission v. Winston-Salem Southbound Railroad Co.*[9] That case did hold that the citizens of Winston-Salem had no right to appeal from a proceeding before the commission regarding the relocation of a depot. The fact, however, was apparently overlooked by the railroad in the principal case that the *Winston-Salem Railroad* case involved the entirely different problem of the right of individual citizens to appeal. The principal problem is the right of cities and counties, the legal representatives of their people, to appeal.

The court in the *Winston-Salem Railroad* case argued, as does the railroad in the principal case, that C. S. §1097 confines the right of appeal from an order of the commission to a party to the proceeding, that to be a party a property interest must be shown, and that the intervenors showed no such interest. They were affected only as citizens of the community and had no more interest than other citizens who opposed the removal of the depot. The law does not authorize individual citizens to prosecute an appeal when they have no interest in the subject matter except that which is common to all. That right, argued the court, is reserved to the state which acts for all its citizens.[10*] To allow such an appeal, it was said, would be to destroy the purpose of the commission, *i.e.*, instead of decisions by the commission, we would have decisions by a jury in the locality of the complainant. However, the fact was ignored that this argument is equally applicable where

[8] 6 Mo. 568 (1839); Note (1922) 25 LAW NOTES 226.

[9] 170 N. C. 560, 87 S. E. 785 (1916).

[10*] N. C. CODE ANN. (Michie, 1939) §1908: "The cause shall be entitled 'State of North Carolina on relation of the utilities commissioner against (here insert name of appellant)...."

In Chief Justice Clark's dissenting opinion in North Carolina Corporation Commission v. Winston-Salem Southbound Railroad Co., 170 N. C. 560, 572, 87 S. E. 785, 791 (1916), he said, "The mere form of docketing is nothing more than a formality. The real plaintiffs are the petitioners whose property rights have been damaged... and who are entitled to have a jury pass on the question"

the appeal is by the railroad. It would appear that the result of the decision in this case was to deprive the injured protestant of the right of judicial review of an order refusing him relief, and, on the other hand, to afford the railroad every opportunity of review.

The case of *Southern Public Utilities Co. v. Charlotte*[11] weakens the *Winston-Salem Railroad* case as a precedent against an appeal by a municipality. There the right of the City of Charlotte to appeal from an order of the corporation commission allowing an increase of street-car fares in the city was sustained. Justice Hoke, writing the opinion, said, speaking of the *Winston-Salem Railroad* case, "I think I may safely say that none of the court entertained the view that the right of appeal in such cases is necessarily restricted to the state and the defendant corporation whose interests are adversely affected."

The *Winston-Salem Railroad* case is further weakened as a precedent for the railroad in the principal case by a split in the court there on the matter of the right to appellate review. Two justices, Brown and Walker, were of the opinion that there was no such right. This position was incorporated in the majority opinion written by Justice Brown. Two justices, Hoke and Allen, concurred in the result only. Justice Allen made no statement of his opinion, but Justice Hoke felt that there was a right of appeal, and Chief Justice Clark dissented on that ground. Thus, if Justice Allen's silence is overlooked, there is an even split in the court over the question of whether the protestants had a right to appeal. If, however, Justice Allen's silence can be interpreted to mean that he concurred in the result *only,* or that he concurred in the opinion of Justice Hoke, this case could be said to be an authority against the position of the railroad.

In Chief Justice Clark's dissenting opinion, he pointed out that the General Assembly has provided[12] that "either party affected" could appeal, and since it would indeed be a solecism for the commission to appeal from its own order, this must mean that the right to appeal is not restricted to the corporation whose interest is affected. However, it should be noted that the statute to which the Chief Justice referred is concerned with appeals to the supreme court and not to the superior court, but a similar provision is made in a statute on appeals to the superior court.[13]

It is apparent that there is more reason for refusing to allow an

[11] 179 N. C. 151, 166, 101 S. E. 619, 626 (1919).

[12] N. C. CODE ANN. (Michie, 1939) §1100: "Either party may appeal to the supreme court from a judgment of the superior court, and the same rules and regulations are prescribed by law for appeals. . . ."

[13] N. C. CODE ANN. (Michie, 1939) §1097: "From all decisions or determinations made by the utilities commissioner, any party affected thereby shall be entitled to an appeal. . . ."

appeal by an individual citizen than by a municipality. The argument most generally heard against appeals by individuals is that they would tend to flood the courts with litigation. However, this argument is hardly realistic in view of the expense involved. If an occasional suit by a vigilant citizen were allowed, it might well result in a better protection of the public interest.

Even if it were conceded that the words of C. S. §1097,[14] giving the right of appeal "to any party affected," constituted a limitation, then that limitation was removed by C. S. §1112(k),[15*] giving the right of appeal "to any party . . . to the proceeding."

As another basis for a more desirable result in the principal case, it is suggested that the court could have held the railroad estopped, by failure to object earlier in the proceeding, from claiming that the protestants had no sufficient interest.[16]

Possibly the best solution to the present uncertain state of the law in North Carolina is to be found through legislation. A Washington statute[17] extends the right of appeal to either the commission, any pub-

[14] *Ibid.*

[15*] N. C. CODE ANN. (Michie, 1939) §1112(k) ". . . from the decision of said utilities commissioner, or the said utilities commission, any party to said proceedings may appeal to the superior court. . . ."

The first case decided under this statute was Utilities Commission v. Carolina Coach Co., 216 N. C. 325, 4 S. E. (2d) 897 (1939). The Coach Co. had petitioned the commission for removal of certain restrictions in its franchise. The Greyhound Bus Co. intervened and protested, and the petition was denied. The Coach Co. appealed, and the protestant moved to dismiss the appeal on the ground that the order affected no property right of the appellants. It was held that C. S. §1097 does not confine the right of appeal to matters of property right. It was also pointed out that C. S. §1112(k) uses the most general language possible.

The protestants were relying on the Bus Law, N. C. Pub. Laws, c. 136, §8, saying that appeal lay from an order of the commission to suspend, revoke, alter or amend any franchise of a bus company. The argument was that since the commission in this proceeding refused to allow any change in the franchise, no property right was affected, and no right of appeal lay. The court said, "We do not believe that upon a fair interpretation of the law the right of appeal was intended to be confined to the single instance pointed out, or that appeal in any other instance is unprovided for by the statute on the theory *expressio unius est exclusio alterius*. Such an inferential conclusion would violate the rules of liberal construction which we think ought to be given to procedural laws protecting property rights." 216 N. C. 325, 328, 4 S. E. (2d) 897, 899 (1939), *reaffirmed in* 218 N. C. 233, 10 S. E. (2d) 824 (1940).

[16] State v. Rock Island Motor Transit Co., 209 Minn. 108, 295 N. W. 519 (1940).

State v. Tri-State Telephone and Telegraph Co., 146 Minn. 247, 178 N. W. 603 (1920), is a case which might be said to support the position of the court in the principal case if the Minnesota case were not based on a statute peculiar to that state. In that case the city of St. Paul was denied the right of appeal from a proceeding before the Railroad and Warehouse Commission to determine the reasonableness of telephone rates. However, it was said that the statute, Gen. Laws of Minn. 1915, c. 152, §22, gave the right of appeal only to those who have been made parties by law, who have a right to control the proceeding, and who are bound by the order. The fact that the city was affected by the order did not make it a party.

[17] REVISED STATUTES OF WASHINGTON (Remington, 1931) §10430.

lic service company, or any complainant. Indiana[18] allows appeal by any person, association, or city adversely affected. In Oklahoma, a constitutional provision[19] gives the right of appeal to any corporation affected, any person deeming himself aggrieved, or the state.

It seems improbable that the North Carolina legislature intended to limit the right of appeal as it was limited in the principal case. As is pointed out above, it appears that the best law is against that holding.[20*] However, the precedents to which the courts must look for guidance in construing the statutes being as conflicting as they are, it would seem advisable for the legislature to change the law so as clearly to give the right of appeal to either the defendant corporation, the state, or any affected person appearing before the commission and participating in the hearing regardless of a showing of a property interest.

EDWIN N. MANER, JR.

Constitutional Law—Racial Discrimination—Discriminatory Salary Schedules of Negro Schoolteachers Prohibited by Fourteenth Amendment

Plaintiff, a negro schoolteacher, brought an action for a declaratory judgment as to the legality of the action of the Board of Education of Nashville, Tennessee, in setting up different schedules of compensation for white and colored teachers of the same professional rating, for injunction against such future discrimination, and for past salary alleged to be due on the basis of the difference between the white and the colored schedules. The federal district court made findings of fact that the board had followed the schedules, that the only basis for the different scales was race or color, and held that such a distinction was a denial of equal protection of laws and so violated the Fourteenth Amendment. The declaratory judgment and the injunction were granted, but recovery of back salary was denied because the negro plaintiff had accepted the smaller amount in the past without protest.[1]

The instant case provides one more step in the slow advancement of

[18] Acts of Indiana 1927, c. 258, §1.

[19] OKLA. CONST., Art. IX, §20.

[20*] Corporation Commission v. Camnon Mfg. Co., 185 N. C. 17, 116 S. E. 178 (1923). The Southern Power Co. petitioned the Corporation Commission to fix reasonable rates. On the filing of the petition, the commission had notices issued and served on all customers under contract with the petitioner. Various customers appeared and objected to the proposed rates. From the commission's decision, the customers were allowed an appeal. (Appeal dismissed on other grounds.)

In State *ex rel.* Board of Railroad Commissioners v. Wilmington and Weldon R. R. Co., 122 N. C. 877, 29 S. E. 334 (1898), the petitioners had begun a proceeding before the commission to require the railroad to build a station. From the commission's finding, the petitioners appealed directly to the supreme court. It was held that the appeal would lie to the superior court and then to the supreme court.

[1] Thomas v. Hibbitts, 46 F. Supp. 368 (M. D. Tenn. 1942).