(Annex 3.)

The only question for determination in the case at bar is whether or not respondent Judge had, in the words of petitioner herein (par. 10 of the petition), "exceeded his authority when he issued the order of April 11, 1953" (Annex E), directing the provincial sheriff "to sell at public auction whatever rights, interest and participation the defendants may have on the property levied upon x x x the proceeds thereof to be applied in satisfaction of the judgment rendered in this case." Petitioner maintains the affirmative, upon the ground that "said partnership being in the hands of a receiver, the same or the properties thereof cannot be reached by execution." (Par. 10 of the petition.)

This pretense is untenable for the exemption from attachment, garnishment or sale under execution of properties under receivership is not absolute. Such properties may not be levied upon "*except by leave of the Court* appointing the receiver" (4 Am. Jur. 808; 45 Am. Jur. 132). This is a mere consequence of the theory that "a receivership operates to protect the receiver against interference, without the consent of the court appointing him, with his *custody and possession* of the property subject to the receivership" (45 Am. Jur. 132; underscoring supplied). Hence, "it has been held x x x that real estate in the custody of a receiver can be levied upon and sold under execution, provided only that the *actual* possession of the receiver is not interfered with" (45 Am. Jur. 133-134, citing Albany City Bank v. Schermerhorn, 9 Paige [NY] 372, 38 Am. Dec. 551). The reason is that "only a receiver's *possession* of property subject to receivership x x x is entitled to protection x x x against interference" (45 Am. Jur. 134; see, also, 75 C.J.S. 759).

Then, again, the interference enjoined is that resulting from orders or processes of a court "*other*" than that which appointed the receiver (45 Am. Jur. 136), the rule being predicated upon the need of preventing "unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons" (45 Am. Jur. 137). Thus, in Cu Unjieng e Hijos vs. Mabalacat Sugar Co. (58 Phil. 439, 441); this Court said:

> "The fact that the mortgaged properties are in the hands of a receiver appointed by the court which tried the foreclosure suit does not prevent the same court from ordering the sale of the aforesaid mortgaged properties, inasmuch as although the said properties are in *custodia legis* by virtue of the conflict of jurisdiction therein because the court that ordered the sale thereof is the same which ordered that they be placed under receivership."

This view was reiterated and applied in Orlanes & Banaag Trans. Co. vs. Asiatic Petroleum Co. (P.I.), Ltd. and Laguna-Tayabas Bus Co. (59 Phil. 433, 439), in the following language:

> "The appellants contend that inasmuch as the certificates of public convenience in question were in the hands and under the control of a judicial receiver and, therefore, in *custodia legis*, the Court of First Instance of Tayabas had no jurisdiction to order the sale thereof and, consequently, the sale made by the sheriff of the City of Manila to the Asiatic Petroleum Company (P.I.), Ltd., and the assignment for the latter of its rights in favor of the Laguna-Tayabas Bus Company are null and void.
>
> "In the case of Cu Unjieng e Hijos vs. Mabalacat Sugar Co. (58 Phil., 439), which was decided on September 22, 1933, this court held that the court, which ordered the placing of the mortgaged property in the hands of a receiver in a foreclosure proceeding, has jurisdiction to order the sale of said property at public auction even before the termination of the receivership.
>
> "In the case under consideration, it was the same Court of First Instance of Tayabas, which ordered the certificates of public convenience in question placed in the hands of a receiver, appointed the receiver who was to take charge thereof, and ordered the receiver thus appointed to sell said certificates. In accordance with the afore-cited doctrine, said Court of First Instance of Tayabas had jurisdiction to order said sale."

For this reason, respondents maintain that petitioner is not entitled to the relief sought, the garnishment and the sale under execution complained of, having been ordered, not only by the *same court* of First Instance of Negros Occidental which had jurisdiction over the receivership, but, also, by the *same Judge*, respondent Jose Teodoro, Sr., who appointed the receiver

At any rate, the receivership in case No. 2371 is limited to the "possession" and administration "of the Cinema House dominated and popularly known as Eden Theater" (Annex 3). This is not necessarily a receivership of the partnership in question. But, even if it were, neither said possession by the receiver, nor the administration of the Eden Theater are affected by the order complained of (Annex E), the same being directed, not against the partnership or its properties, but against those of Gorgonio Pandes, particularly, "whatever rights, interest and participation" he "has or might have" in said partnership. This right, interest or participation, if any, is a property of *Gorgonio Pandes*, separate and distinct from the properties *of the partnership*, which has a personality of its own, distinct from that of its partners, and, certainly, of said Gorgonio Pandes (Arts. 44 and 1768, Civil Code of the Philippines). Such property, if any, of the latter, is not under receivership. The receiver had no authority to take it under his custody and, in fact, never had it in his possession or under his administration. Consequently, it is not in *custodia legis* and is subject to levy, even without the permission of the court appointing the receiver.

In view of the foregoing, the petition is hereby dismissed, with costs against the petitioner.

IT IS SO ORDERED.

Paras, Pablo, Bengzon, Montemayor, Reyes, Jugo, Bautista Angelo and *Labrador*, J.J., concur.

Mr. Justice Padilla did not take part.

XXX

Luzon Stevedoring Co., Inc., and Visayan Stevedore Transportation Co., Petitioners, vs. The Public Service Commission and the Philippine Shipowners Association, Respondents, G. R. No. L-5458, September 16, 1953, Tuazon, J.

1. PUBLIC SERVICE LAW; WHAT CONSTITUTES PUBLIC SERVICE OR PUBLIC UTILITY. — It is not necessary, under Sec. 13(b) of the Public Service Law (Commonwealth Act No. 146) that one holds himself out as serving or willing to serve the public in order to be considered public. In Luzon Brokerage Co. v. Public Service Commission, 40 O. G., 7th Supplement, p. 271, this Court declared that "Act 454 is clear in including in the definition of public service that which is rendered for compensation, although limited exclusively to the customers of the petitioner."

2. IBID; IBID. — In the United States where, it is said, that there is no fixed definition of what constitutes public service or public utility, it is also held that it is not always necessary, in order to be a public service, that an organization be dedicated to public use, i.e., ready and willing to serve the public as a class. It is only necessary that it must in some way be impressed with a public interest; and whether the operation of a given business is a public utility depends upon whether or not the service rendered by it is a public character and of public consequence and concern. (51 C. J. 5.) Thus, a business may be affected with public interest and regulated for public good although not under any duty to serve the public (43 Am. Jur. 572.)

3. PUBLIC SERVICE COMMISSION; APPOINTMENT OF A COMMISSIONER TO TAKE EVIDENCE. — Objection to the appointment of a commissioner to take evidence can not be made for the first time after decision was rendered, for such objection must be deemed waived.

Perkins, Ponce Enrile & Contreras for petitioners.
A. H. Aspiliera, Ozaeta, Roxas, Lichauco & Picazo and *Juan H. Paulino* for respondents.

DECISION

TUASON, *J*:

Petitioners apply for review of a decision of the Public Service Commission restraining them "from further operating their watercraft to transport goods for hire or compensation between points in the Philippines until the rates they propose to charge are approved by this Commission."

The facts are summarized by the Commission as follows:

"x x x respondents are corporations duly organized and existing under the laws of the Philippines, mainly engaged in the stevedoring or lighterage and harbor towage business. At the same time, they are engaged in interisland service which consists of hauling cargoes such as sugar, oil, fertilizer and other commercial commodities which are loaded in their barges and towed by their tugboats from Manila to various points in the Visayan Islands, particularly in the provinces of Negros Occidental and Capiz, and from said places to Manila. For this service respondents charged freightage on a unit price with rates ranging from ₱0.50 to ₱0.62-1/2 per bag or picul of sugar loaded or on a unit price per ton in the case of fertilizer or sand. There is no fixed route in the transportation of these cargoes, the same being left at the indication of the owner or shipper of the goods. The barge and the tugboats are manned by the crew of respondents and, in case of damage to the goods in transit caused by the negligence of said crews, respondents are liable therefor. The service for which respondents charge freightage covers the hauling or carriage of the goods from the point of embarkation to the point of disembarkation either in Manila or in any point in the Visayan Islands, as the case may be.

"The evidence also sufficiently establishes that respondents are regularly engaged in this hauling business serving a limited portion of the public. Respondent Luzon Stevedoring Co., Inc. has among its regular customers the San Miguel Glass Factory, PRATRA, Shell Co. of P.I., Ltd., Standard Oil Co. of New York and Philippine-Hawaiian; while respondent Visayan Stevedore Transportation Co. has among its regular customers the Insular Lumber, Shell Company, Ltd., Kim Kee Chua Yu & Co., PRATRA and Luzon Merchandising Corp. During the period from January, 1949 and up to the present, respondent Luzon Stevedoring Co., Inc. has been rendering to PRATRA regularly and on many occasions such service by carrying fertilizer from Manila to various points in the province of Negros Occidental and Capiz, such as Hinigaran, Silay, Fabrica, Marayo, Mambaquid, Victorias and Pilar, and on the return trip sugar was loaded from said provinces to Manila. For these services, as evidenced by Exhibits A, A-1, A-2, A-3 and A-4, respondent Luzon Stevedoring Co., Inc. charged PRATRA at the rate of ₱0.60 per picul or bag of sugar and, according to Mr. Mauricio Rodriguez, Chief of the division in charge of sugar and fertilizer of the PRATRA, for the transportation of fertilizer, this respondent charged ₱12.00 per metric ton. During practically the same period, respondent Visayan Stevedore Transportation Co. transported in its barges and towed by its tugboats sugar for Kim Kee Chua Yu & Co. coming from Victorias, Marayo and Pilar to Manila, and for Luzon Merchandizing Corp., from Hinigaran, Bacolod, Marayo and Victorias to Manila. For such service respondent Visayan Stevedore Transportation Co. charged Kim Kee Chua Yu & Co. for freightage ₱0.60 per picul or bag as shown in Exhibits C, C-1, C-2, C-3, C-4, C-5, C-6, C-7 and C-8, and Luzon Merchandising Corp. was also charged for the same service and at the same rate as shown in Exhibits B, B-1 and B-2."

It was upon these findings that the Commission made the order now sought to be reviewed, upon complaint of the Philippine Shipowners' Association charging that the then respondents were engaged in the transportation of cargo in the Philippines for hire or compensation without authority or approval of the Commission, having adopted, fixed and collected freight charges at the rate of ₱0.60 per bag or picul, particularly sugar, loaded and transported in their lighters and towed by their tugboats between different points in the province of Negros Occidental and Manila, which said rates resulted in ruinous competition with complainant.

Section 13 (b) of the Public Service Law (Commonwealth Act No. 146) defines public service thus:

"The term 'public service' includes every person that now or hereafter may own, operate, manage, or control in the Philippines, for hire or compensation, with general or limited clientele, whether permanent, occasional or accidental, and done for general business purposes any common carrier, railroad, street railway, traction railway, subway, motor vehicle, either for freight or passenger, or both, with or without fixed route and whatever may be its classification, freight or carrier service of any class, express service, steamboat, or steamship line, pontines, ferries, and small water craft, engaged in the transportation of passengers and freight, shipyard, marine railway, marine repair shop, warehouse, wharf or dock, ice plant, ice-refrigeration plant, canal, irrigation system, sewerage, gas, electric light, heat and power, water supply and power, petroleum, sewerage system, telephone, wire or wireless telephone, wire or wireless telegraph system and broadcasting radio stations."

It is not necessary, under Sec. 13(b) of the Public Service Law (Commonwealth Act No. 146), that one holds himself out as serving or willing to serve the public in order to be considered public service.

In Luzon Brokerage Co. v. Public Service Commission, 40 O.G., 7th Supplement, p. 271, this Court declared that "Act 454 is clear in including in the definition of a public service that which is rendered for compensation, although limited exclusively to the customers of the petitioner."

In that case, the Luzon Brokerage Company, a customs broker, had been receiving, depositing and delivering goods discharged from ships at the pier to its customers. As here, the Luzon Brokerage was then rendering transportation service for compensation to a limited clientele, not to the public at large.

In the United States where, it is said, there is no fixed definition of what constitutes public service or public utility, it is also held that it is not always necessary, in order to be a public service, that an organization be dedicated to public use, i.e., ready and willing to serve the public as a class. It is only necessary that it must in some way be impressed with a public interest; and whether the operation of a given business is a public utility depends upon whether or not the service rendered by it is of a public character and of public consequence and concern. (51 C. J. 5.) Thus, a business may be affected with public interest and regulated for public good althought not under any duty to serve the public. (43 Am. Jur. 572.)

It can scarcely be denied that the contracts between the owners of the barges and the owners of the cargo at bar were ordinary contracts of transportation and not of lease. Petitioners' watercraft was manned entirely by crews in their employ and payroll, and the operation of the said craft was under their direction and control, the customers assuming no responsibility for the goods handled on the barges. The great preponderance of the evidence contradicts the assertion that there was any physical or symbolic conveyance of the possession of the tugboats and barges to the shippers. Whether the agreements were written or verbal, the manner of payment of freight charges, the question who loaded and unloaded the cargo, the propriety of the admission of certain receipts in evidence, etc.,

to all of which the parties have given much attention — these are matters of form which do not alter the essential nature of the relationship of the parties to the transactions as revealed by the fundamental facts of record.

It is contended that "if the Public Service Act were to be construed in such a manner as to include private lease contracts, said law would be unconstitutional," seemingly implying that, to prevent the law from being in contravention of the Constitution, it should be so read as to embrace only those persons and companies that are in fact engaged in public service" with its corresponding qualification of an offer to serve indiscriminately the public."

It has been already shown that the petitioners' lighters and tugboats were not leased, but used to carry goods for compensation at a fixed rate for a fixed weight. At the very least, they were hired, hired in the sense that the shippers did not have direction, control, and maintenance thereof, which is a characteristic feature of lease.

On the second proposition, the Public Service Commission has, in our judgment, interpreted the law in accordance with legislative intent. Commonwealth Act No. 146 declares in unequivocal language that an enterprise of any of the kinds therein enumerated is a public service if conducted for hire or compensation even if the operator deals only with a portion of the public or limited clientele.

It has been seen that public utility, even where the term is not defined by statute, is not determined by the number of people actually served. Nor does the mere fact that service is rendered only under contract prevent a company from being a public utility. (43 Am. Jur. 573.) On the other hand, casual or incidental service devoid of public character and interest, it must be admitted, is not brought within the category of public utility. The demarkation line is not susceptible of exact description or definition, each case being governed by its peculiar circumstances.

"It is impossible to lay down any general rule on the subject whether the rendering of incidental service to members of the public by an individual or corporation whose principal business is of a different nature constitute such person a public utility. In the result reached, the cases are in conflict, as the question involved depends on such factors as the extent of service, whether such person or company has held himself or itself out as ready to serve the public or a portion of the public generally, or in other ways conducted himself or itself as a public utility. In several cases, it has been held that the incidental service rendered to others constituted such person or corporation a public utility, but in other cases, a contrary decision has been reached." (43 Am. Jur. 573.)

The transportation service which was the subject of complaint was not casual or incidental. It has been carried on regularly for years at almost uniform rates of charges. Although the number of the petitioners' customers was limited, the value of goods transported was not inconsiderable. Petitioners did not have the same customers all the time embraced in the complaint, and there was no reason to believe that they would not accept, and there was nothing to prevent them from accepting, new customers that might be willing to avail of their service to the extent of their capacity. Upon the well-established facts as applied to the plain letter of Commonwealth Act No. 146, we are of the opinion that the Public Service Commission's order does not invade private rights of property or contract.

In at least one respect, the business complained of was a matter of public concern. The Public Service Law was enacted not only to protect the public against unreasonable charges and poor, inefficient service, but also to prevent ruinous competition. That, we venture to say, is the main purpose in bringing under the jurisdiction of the Public Service Commission motor vehicles, other means of transportation, ice plants, etc., which cater to a limited portion of the public under private agreements. To the extent that such agreements may tend to wreck or impair the financial stability and efficiency of public utilities who do offer service to the public in general, they are affected with public interest and come within the police power of the state to regulate.

Just as the legislature may not "declare a company or enterprise to be a public utility when it is not inherently such," a public utility may not evade control and supervision of its operation by the government by selecting its customers under the guise of private transactions.

For the rest, the constitutionality of Commonwealth Act No. 146 was upheld, implicity in Luzon Brokerage Company v. Public Service Commission, *supra,* and explicitly in Pangasinan Transportation Co. v. Public Service Commission, 70 Phil. 221.

Were there serious doubts, the courts should still be reluctant to invalidate the Public Service Law or any provision thereof. Although the legislature can not, by its mere declaration, make something a public utility which is not in fact such, "the public policy of the state as announced by the legislature will be given due weight, and the determination of the legislature that a particular business is subject to the regulatory power, because the public welfare is dependent upon its proper conduct and regulation, will not lightly be disregarded by the courts." (51 C. J. 5.)

The objection to the designation of Attorney Aspillera as commissioner to take the evidence was tardy. It was made for the first time after decision was rendered, following a prolonged hearing in which the petitioners cross-examined the complainant's witnesses and presented their own evidence.

The point is procedural, not jurisdictional, and may be waived by expressed consent or acquiescence. So it was held in Everret Steamship Corporation v. Chua Hiong, G. R. No. L-2933, and La Paz Ice Plant and Cold Storage Co. v. Comision de Utilidades Publicas et al., G. R. No. L-4053.

Upon the foregoing considerations, the appealed order of the Public Service Commission is affirmed, with costs against the petitioners.

Paras, Pablo, Bengzon, Padilla, Montemayor, Reyes, Jugo; Bautista Angelo and *Labrador, J.J.*, concur.

CERTAIN VEXATIOUS QUESTION...

(Continued from page 270)

in Tan Hi v. Republic, G.R. No. L-3354, decided on January 25, 1951, the Supreme Court cited a previous decision of said Court which denied the application on the ground that "the applicant for naturalization had nine children all enrolled in the Philippine schools except one, a minor because she live from infancy in China, where she was enrolled in an English school in Amoy."

From this decision of the Court it appears in bold relief that if in an ordinary naturalization case the non-enrollment of a child because she is studying in her native country is a ground for rejecting an application for naturalization, it results by inference that children of mothers marrying Filipino citizens, much less cannot become citizens of the Philippines for that matter.

CONCLUSION AND RECOMMENDATION TO PART II

Any other interpretation to the contrary, like the three Opinions of the Secretary of Justice hereinabove referred to, would lead to injustice, inequity, and even absurd results, which, perforce, must be avoided, for it would give rise to incongruous possibilities wherein full-blooded aliens with no interest or background on our social, political, and economic way of life could otherwise be Filipino citizens merely on papers contrary to the spirit of our Constitution and laws on the matter.

On the whole, therefore, whether the children of the foreign woman are legitimate or illegitimate, and whether the mother is a divorcee, or not, and on the assumption that such minor children have already citizenship of their own, such citizenship which the Municipal Law of the country of their birth has conferred upon them, be allowed to continue the same citizenship—a suggestion or a course which would tend to reduce conflicting problems of citizenship in the future.