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nance Corp. v. Holley,[21] involving proven false representation in obtaining a loan. It was initially decided by the court that that portion of a loan representing a renewal could not be saved from discharge since no fraud was involved in obtaining it.[22] The presumption was also indulged that the payments made by the bankrupt were intended to be applied on the new debt since, knowing it would survive, he would have the most interest in reducing it.[23] However, on rehearing, the court's attention was called to the 1960 amendment,[24] which saves from discharge not only the original debt incident to obtaining money or property by false representation, but also any extension or renewal of such debt where there was reliance on a false representation in making such extension or renewal.[25] Such reliance was found present in the instant case.[26]

PUBLIC UTILITIES

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In *Morehouse Natural Gas Co. v. Louisiana Public Service Comm'n*,[1] the Louisiana Supreme Court has presumably supplied the definitive solution to a problem case which has been shuttling between Commission, District Court, and Supreme Court for some three and a half years. The case is the relatively unusual one of a profitable gas distribution property sold to another gas distribution company by a carbon black company, not in compliance with any order of a regulatory commission to which it was subject, but in order to avoid becoming subject to such regulatory authority.[2] The company was willing to sell the property for a fraction of its alleged depreciated original cost to accomplish this result and thus to lay the groundwork for a handsome return to the purchasers if the rates could be

21. 157 So. 2d 376 (La. App. 4th Cir. 1963).
22. In Guedry Finance Co. v. McCubbin, 120 So. 2d 298 (La. App. Orl. Cir. 1960), the renewal of an unmatured note was held not to involve property. See cases collected in Comment, 21 LA. L. REV. 645 (1961).
23. 157 So. 2d at 379, citing LA. CIVIL CODE art. 2166 (1870).
24. Commented upon in 21 LA. L. REV. 638 (1961).
25. 157 So. 2d at 379-80.
26. *Id.* at 378.
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1. 245 La. 983, 162 So. 2d 334 (1964).
2. *Id.* at 986, 162 So. 2d at 335.

maintained at a level such as to provide a return on the original cost rather than the actual purchase price.[3]

Since 1946, when the Commission announced that it was adopting original cost less depreciation as the rate base on which it would test the fairness of a rate of return yielded by customer tariffs,[4] its task has been mainly that of adjusting submitted plant, property, and reserve data to a satisfactory "original cost" basis.[5] It has rarely, if ever, had to consider the side of the coin here presented, where property devoted to the public use has changed hands at a substantial discount rather than a substantial mark-up. Had the community served been the purchaser, the resulting windfall probably would have caused little difficulty since it is unlikely that the effort to raise rates to the extent involved here would have been made by a municipal body. However, this was not the event and the Commission faced a stubborn effort by the new owners of the public utility to reap the rewards rather than the penalties of the Commission's original cost approach.

In the 1930's, Pennsylvania was one of the few states which voluntarily provided a return on original cost as a rate "floor" for its private utilities;[6] the theory was so distasteful to the utilities that it was resisted despite the escape which it provided from the logic of a current reproduction cost which could yield a rate base *below* original cost in those years of depressed values.[7] The logic of the original cost method (or prudent investment theory as sometimes called) was spelled out by the Louisiana Commission in the *Louisiana Power & Light* case[8] as meaning that only the money invested in used and useful property was protected against confiscation by the Constitution and that confiscation was avoided if on such investment "the investor [utility] is allowed to earn a rate of return which will attract purchasers for his interest and allow him to sell his interest and recoup his money invested." Morehouse is clearly

3. *Ibid.*
4. Louisiana Pub. Serv. Comm'n v. Louisiana Power & Light Co., LPSC Order No. 4346, 65 P.U.R. (N.S.) 18 (1946).
5. Southern Bell Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm'n, 239 La. 175, 183-84, 118 So. 2d 372, 375 (1960).
6. See Driscoll v. Edison Light & Power Co., 307 U.S. 107, 111, n.9 (1939).
7. See Dakin, *The Changing Nature of Utility Rate Regulation: Just Compensation, Due Process, and Equal Protection*, 36 TUL. L. REV. 401, 431 (1962).
8. 65 P.U.R. (N.S.) at 23.

urging that it is this estimated original unrecovered investment in used and useful property on which it is entitled to earn.[9]

In *Morehouse,* it was by no means clear, however, what the original investment in property was, nor was it clear how much of it had been recovered. Absent original cost records prior to 1942, an estimate had been resorted to both for the cost and the depreciation which had been recovered. An engineer had assumed an annual depreciation rate of 3% for the known acquisitions, but all property installed prior to 1942, of which there were no records, was assumed to have been acquired in 1924 and to have depreciated at a compromise rate of 1.7%, on the assumption that it should be fully depreciated by 1980. Presumably, it could have been assumed to have been purchased ratably over the period 1924-1942 at a higher rate and the result would have been little different. As to the post-1942 period, when acquisition dates were known, the appraiser nonetheless applied the same compromise rate of 1.7% up to 1960, after which date a 3% rate was used.[10]

Proscribed by the court[11] from other means of preventing a windfall to the bargain purchasers, the Commission adjusted the calculation so as to depreciate *all* of the property, including the original property at a straight 3% rate, a calculation which depreciated the entire original property in 33-1/3 years, or by 1957, thus eliminating it from the 1960 rate base.[12] The Supreme Court now settles the problem by ordering the estimated original property to be depreciated at 1.7% and the known acquisitions at a 3% rate. On this rate base, a return of 6% is allowed.[13] What a 6% return will mean to the new common stockholders is not apparent since the security structure of the company is not in evidence. However, as seems likely, the investment, some $34,000, was all made in common stock. If so, a rate of return of 6% on an original cost (depreciated) rate base of $165,000, as allowed by the court, translates into a return of some 30% on an investment of $34,000.

The Commission, as the agency charged with fixing just and reasonable rates, was understandably concerned but unable to

9. 245 La. at 986, 162 So. 2d at 335.
10. *Id.* at 989, 162 So. 2d at 336.
11. Morehouse Natural Gas Co. v. Louisiana Pub. Serv. Comm'n, 242 La. 985, 140 So. 2d 646 (1962).
12. 245 La. at 991, 162 So. 2d at 337.
13. *Id.* at 1002, 162 So. 2d at 340-41.

counter the original cost argument. Perhaps the use of a capitalization or investment rate base might have enabled the Commission more plausibly to control the rate of profit in a case such as this one. Justice Brandeis gave the classic description of the approach many years ago in a concurring opinion:[14]

> "The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. . . . The investor agrees, by embarking capital in a utility, that its charges to the public shall be reasonable. . . . The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor; the allowance for risk incurred; and enough more to attract capital."

The Commission, however, has not been consistent in espousing this approach and its success in maintaining judicial approval of a capitalization rate base was short-lived;[15] yet it is constitutionally entirely plausible.[16]

A case decided earlier in the term provides an interesting comparison to the preceding *Morehouse* case. In *La Salle Telephone Co. v. Louisiana Public Service Comm'n*,[17] a rate increase case was also being reviewed by the court, again involving the allowance of a proper rate of return on original cost less depreciation. However, *La Salle* is atypical in that it is capitalized with almost 86% long-term indebtedness to the REA at 2% and 14% common-stock and surplus.[18] *La Salle*, while urging that the 6% allowance which had been made by court and commission in numerous cases is applicable to it, nonetheless asked

14. Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 290-91 (1923).

15. *Upheld* in Southern Bell Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm'n, 232 La. 446, 94 So. 2d 431 (1957); *rejected* 239 La. 175, 118 So. 2d 372 (1960).

16. See Federal Power Comm'n v. Hope Natural Gas Co., 315 U.S. 575, 607 (1942): "[I]f the rate permits the company to operate successfully and to attract capital all questions as to 'just and reasonable' are at an end so far as the investor interest is concerned." See also, Dakin, *The Changing Nature of Utility Rate Regulation: Just Compensation, Due Process, and Equal Protection*, 36 TUL. L. REV. 401, 436 (1962).

17. 245 La. 99, 157 So. 2d 455 (1963).

18. *Id.* at 105, 157 So. 2d at 457.

for an increase in customer tariffs which would yield only 3.9% on the property rate base because "this . . . is the rate which its subscribers will bear without creating dissatisfaction and impairing the good relations now enjoyed by La Salle."[19] A 6% rate of return on property would have paid the interest on the debt and left some 29% for return on the common-stock equity, what the court terms "an unacceptable result."[20]

It is interesting to speculate what the result would have been in the *Morehouse* case, had it been established that the difference between the actual cash investment of the new owners and the net original cost ultimately accepted as a rate base had actually been paid in by subscribers as excessive depreciation to the old owners; the excessive reserve for depreciation could then have been regarded as direct consumer investment rather than indirect consumer investment through government loans from the REA. Would the 30% return to the common stockholders be an equally "unacceptable result"? The speculation underscores the unsatisfactoriness of a property rate base approach which ignores or pays insufficient account to the source of the property or what is termed the capitalization rate base.[21]

La Salle is interesting also for the method used by the Commission to support its proposed rate of return of 3.7%. From replies to a questionnaire sent to several state commissions, it discovered that rates of return on a property base applied to REA debt financed companies varied from 2-3/4% to as much as 6%.[22] Noting that consumer tariffs in effect would yield 3.7%, the Commission rejected the proposed increase.[23] The court, impressed with the projection by the company of a continuing decline in rate of return from 4.1% in 1958 to 3% in 1960, thought it unreasonable for the Commission to adopt the extreme lower side of the comparative range of returns which had been collated, in light of difficult operating conditions but acknowledged "efficient management"; the proposed 3.9% rate of return representing some 15-1/2% on common stock equity was hence approved.[24]

19. *Id.* at 108, 157 So. 2d at 458.
20. *Ibid.*
21. See Dakin, *The Changing Nature of Utility Rate Regulation: Just Compensation, Due Process, and Equal Protection*, 36 TUL. L. REV. 748-50 (1962).
22. 245 La. at 109-10, 157 So. 2d at 458.
23. *Id.* at 106, 157 So. 2d at 457.
24. *Id.* at 110-11, 157 So. 2d at 459.

The Town of Arcadia presented the court with a rather novel problem in the review of rate-making activities at this term, a problem made possible where a municipal body has franchise power but not rate-making power. Thus, in *Louisiana Gas Service Co. v. Louisiana Public Service Comm'n*,[25] the court was called upon to decide whether water rate decreases, ordered by the Commission in derogation of rates agreed upon between Louisiana Gas and the Town of Arcadia, should be permitted to stand. The franchise rates were part of an agreement pursuant to which Louisiana Gas agreed to install additional capacity to serve industry and afford expanded fire protection to the town and were designed to assure a return on the additional investment thus necessitated.[26] Non-cooperating citizens thereafter successfully petitioned the Commission to rearrange the rate schedule and, according to Louisiana Gas, precipitated an inadequate return on their over-all investment.[27]

The court found that the commission had the power under the Constitution to modify the franchise rates pursuant to which the investment in expanded facilities had been made by Louisiana Gas.[28] However, the court also found the subsequent action of the commission arbitrary, unreasonable, and an abuse of power and restored to effectiveness the original order and franchise agreement.[29] The court concluded that Louisiana Gas, despite the fact that the rates under the franchise agreement were alleged to be the highest in the state, had "proved that it required . . . annual additional revenue because of expanded facilities paid for by it."[30] The Commission had argued that Louisiana Gas "did not sustain the burden of proof required of it merely by proof of unusually high operating costs, without an adequate explanation . . . for those costs."[31]

25. 245 La. 1029, 162 So. 2d 555 (1964).
26. *Id.* at 1037, 162 So. 2d at 557.
27. *Id.* at 1036-37, 162 So. 2d at 557.
28. *Id.* at 1052, 162 So. 2d at 563.
29. *Id.* at 1057, 162 So. 2d at 564.
30. *Id.* at 1058, 162 So. 2d at 565.
31. *Id.* at 1040, 162 So. 2d at 558.