Decision No. 2901

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

WESTERN ASSOCIATION OF SHORT LINE RAILROADS,
Complainant,

vs.

E. M. HACKETT and J. A. DEBARRE, co-partners doing business under the firm name and style of WICHITA TRANSPORTATION COMPANY,
Defendants.

ORIGINAL

Case No. 827.

Clarence M. Oddie and D. M. Swobe for complainant.
Minor Moore for defendants.

THELEN, Commissioner.

O P I N I O N.

This is a test case to try out the question of the Railroad Commission's jurisdiction over motor bus lines, auto truck lines or auto stage lines engaged in the business of transporting freight for compensation for the general public over regular routes.

The matter comes before the Commission on complaint and on answer denying the Commission's jurisdiction. A public hearing was held in San Francisco on September 7, 1915. Evidence and argument on the question of jurisdiction were presented and the case is now ready for decision.

There is no substantial dispute with reference to the facts.

The complainant, Western Association of Short Line Railroads, is a California corporation organized by short line railroads operating steam and electric railroads in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. Sixteen of the railroads which

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are members of the Association operate in whole or in part within the State of California.

The defendants, E. M. Hackett and J. A. Debarre, are partners doing business under the firm name and style of Wichita Transportation Company, hereinafter referred to as the Transportation Company. The Transportation Company is engaged in the business of carrying freight and other property for hire by means of auto trucks or motor busses between San Diego and points in the Imperial Valley, in Imperial County. The motor busses or auto trucks operated by the Transportation Company move over the public highways and do not run on rails. The Transportation Company advertises daily trips between San Diego and Imperial Valley points, but does not hold itself out as starting at any definite time of the day. While holding itself out as transporting general merchandise, the Transportation Company will not transport explosives. The Transportation Company has no printed rates but has a typewritten sheet of rates on file in its office at San Diego, which rates are quoted to persons desiring to have freight transported.

The Transportation Company admits that it is a common carrier of freight, as the term "common carrier" is understood at common law and as the term is defined in Section 2168 of the Civil Code in so far as applicable to the transportation of freight, but contends that it is not a common carrier or a public utility as those terms are defined by the Public Utilities Act and is not subject to the jurisdiction of the Railroad Commission.

Complainant asks that this Commission make its order requiring the Transportation Company to file its schedules of rates and charges, and in all other respects to comply with the provisions of the Public Utilities Act.

In addressing myself to the law applicable to these facts, I shall refer first to the provisions of the Constitution

of California and then to the provisions of the Public Utilities Act of this State which have been referred to as bearing on the question now under consideration.

Section 17 of Article XII of the Constitution of California provides in part as follows:

> "All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control."

Section 22 of Article XII of the Constitution of California creates the Railroad Commission, and provides in part as follows:

> "Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission, than the rates, fares and charges which are specified in such tariff."

There is no contention herein that the Transportation Company is either a railroad or a canal company. The words "transportation companies", as used in these constitutional provisions, were construed by the Supreme Court of this State in Board of Railroad Commissioners vs. Market Street Railway Company, 132 Cal. 677. The Court held that a street railway company in San Francisco was not subject to the jurisdiction of the Board of Railroad Commissioners. At page 684, the Court continued:

> "Companies engaged in draying, running freight wagons, delivery wagons, delivering parcels, teaming and running elevators, are engaged in the business of 'transportation'; but it surely could not be contended that they are subject to the jurisdiction of the Railroad Commission. The people of the state would not have agreed to pay the salaries and expenses of the Railroad Commissioners, selected from different geographic sections of the state, for the purpose of regulating the charges of the 'United Carriage Company' of San Francisco. Yet it is a transportation company."

Complainant's chief reliance, in so far as constitutional provisions are concerned, is on Section 23 of Article XII of the Constitution of California, as amended on October 10, 1911. This

section provides, in part, as follows:

> "Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, or any part of such railroad, canal, pipe line, plant, or equipment within this state, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil, or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature, and every class of private corporations, individuals, or association of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

Complainant draws particular attention to the fact that "every common carrier" is declared to be a public utility, and insists that the question at issue is thus conclusively decided in its favor. It is unquestionably true, as already indicated, that the Transportation Company is a common carrier at common law and that the Constitution itself has declared that each common carrier is a public utility, but it is equally true that this section of the Constitution distinctly declares that the corporations and persons who are declared to be public utilities shall be subject only to such control and regulation by the Railroad Commission"as may be provided by the Legislature." It is distinctly provided that the Railroad Commission shall have and exercise "such" power and jurisdiction to supervise and regulate public utilities "as shall be conferred upon it by the Legislature". It would seem to be too clear for argument that the Railroad Commission's power over public utilities is expressly limited to the powers which may be

conferred upon it by the Legislature and that in order to determine whether or not the Transportation Company is subject to the jurisdiction of the Railroad Commission, it is necessary to look to the statutes which have been enacted by the Legislature. Complainant argues that even if common carriers such as the Transportation Company herein are not included in the Public Utilities Act, it is nevertheless the duty of the Railroad Commission to exercise jurisdiction over this kind of common carrier for the reason, simply and solely, that Section 23 of Article XII of the Constitution includes all common carriers as public utilities. In my opinion, it might be said with equal logic that if the Public Utilities Act had omitted gas companies, electric companies or water companies, it would nevertheless be the duty of the Railroad Commission to exercise jurisdiction over such companies because they are defined by the Constitution to be public utilities. I cannot believe that any such construction can be correct. The Supreme Court of this State passed upon a similar contention in the Market Street Railway Company case, supra. In that case, as already indicated, the Constitution of this State provided that all transportation companies should be common carriers subject to legislative control and that the Board of Railroad Commissioners should have the power to establish rates of charges for the transportation of passengers and freight by all transportation companies. Although it was perfectly clear that a street railway is a transportation company, the Supreme Court nevertheless held that a street railway was not subject to the jurisdiction of the Board of Railroad Commissioners, for the reason that the Legislature in defining the jurisdiction of the Board of Railroad Commissioners, in the Act of April 15, 1880, had defined transportation companies in such a way as to exclude street railways. In other words, the Supreme Court of this State upheld the right of the Legislature to make a specific definition of the classes of corporations and

persons who should be subject to the jurisdiction of the Board of Railroad Commissioners, even though the Constitution had conferred upon the Legislature the right to provide supervision and regulation by the Board of Railroad Commissioners for classes of corporations and persons in addition to those which were specifically designated in the act of the Legislature prescribing the powers and duties of the Board of Railroad Commissioners.

Attention has already been drawn to the fact that the Supreme Court further indicated its view that companies engaged in draying, running freight wagons, delivery wagons, delivering parcels, teaming, and running elevators, although clearly transportation companies, nevertheless were not subject to the jurisdiction of the Board of Railroad Commissioners.

I am of the opinion that it is not sufficient for complainant to draw attention to the fact that the Constitution of this State has declared that persons engaged in business such as that conducted by the Transportation Company, are common carriers and public utilities, and that the Constitution has given the Legislature the power to provide for regulation and supervision thereof by the Railroad Commission. In my opinion, the complainant must go further and must show that the Legislature has exercised the right conferred upon it by the Constitution and has actually included common carriers of this character within the public utilities over which the Railroad Commission has been given jurisdiction in the Public Utilities Act or through other legislative enactment.

In this connection, complainant contends that the Transportation Company comes within the provisions of subsections (k), (l) and (bb) of Section 2 of the Public Utilities Act.

Section 1 of the Public Utilities Act reads as follows:

> "This act shall be known as the 'public utilities act' and shall apply to the public utilities and public services herein described and to the commission herein referred to."

In this section the Legislature clearly shows that it intended that the Railroad Commission's jurisdiction should be limited to the public utilities and public services described in the Act.

Section 2 defines the principal terms used in the Public Utilities Act. In each case the term to be defined is followed by the words "when used in this act", thus showing that the Legislature intended to escape the confusion which might result from the fact that a particular term might be used in different senses in general parlance and to specify beyond a doubt the exact sense in which the term is to be understood whenever it appears in the Public Utilities Act.

Section 2 (c) reads as follows:

> "The term 'corporation', when used in this act, includes a corporation, a company, an association and a joint-stock association."

Section 2(d) reads as follows:

> "The term 'person', when used in this act, includes an individual, a firm and a copartnership."

After defining a number of terms on which neither party in this proceeding relies, Section 2 proceeds, in subsection (k) as follows:

> "The term 'express corporation', when used in this act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, engaged in or transacting the business of transporting any freight, merchandise or other property for compensation on the line of any common carrier or stage or auto stage line within this state."

Some contention is made herein that the Transportation Company is an "express corporation", as that term is thus defined. In my opinion, this contention is not borne out by the definition. In order to have an "express corporation" as defined in the Act, it is necessary to find a "corporation" or "person", as those terms are defined, who in turn are engaged in transporting freight,

merchandise or other property for compensation, "on the line of any common carrier or stage or auto stage line within this state". A company such as Wells, Fargo & Company comes within this definition. It is engaged in the business of transporting freight, merchandise and other property for compensation on the line of most of the railroads in California, and also on the line of a number of stage and auto stage lines. The Transportation Company herein, however, is not engaged in transporting freight, merchandise or other property on the line of any other corporation or person. Only one corporation or person transporting freight, merchandise or other property is here involved, and this corporation or person is the Transportation Company itself.

Subsection (L) of Section 2 of the Act reads as follows:

> "The term 'common carrier', when used in this act, includes every railroad corporation; street railroad corporation; express corporation; dispatch, sleeping car, dining car, drawing room car, freight, freight-line, refrigerator, oil, stock, fruit, car loaning, car renting, car loading and every other car corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, operating for compensation within this state; and every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any vessel regularly engaged in the transportation of persons or property for compensation upon the waters of this state or upon the high seas, over regular routes between points within this state."

Attention should be drawn to the fact that the term "common carrier" is specifically defined for the purposes of the Act to include railroad corporations, street railroad corporations, express corporations, car corporations of various kinds and corporations and persons operating vessels in the limited class of cases designated in the definition. There is no contention herein that the Transportation Company falls within any of the classes of corporations and persons designated in the definition except possibly within the words "and every other car corporation or person". It seems clear, however, that the word "car" is here an adjective and that it applies both to the word "corporation"

and the word "person". Attention has already been drawn to the definition of the terms "corporation" and "person", which terms are apparently so defined as to include between themselves all private individuals and combinations of private individuals in whatever form, engaged in the character of business covered by the Act. The words "every other car corporation or person" as used in subdivision (L) of Section 2 seem clearly intended to cover every other individual or combination of individuals in any form operating so-called "car companies". All the other companies included between the two semi-colons which set off this part of the definition of the term "common carrier" refer to different kinds of so-called "car companies", this being a well known term referring to companies owning or operating cars for various purposes over the lines of railroads and street railroads. These words have never been applied, as far as I have been able to ascertain, to companies whose vehicles do not move over the rails of railroad or street railroad companies.

Subsection (bb) of Section 2 of the Act, as amended on June 14, 1913, reads in part as follows:

> "The term 'public utility', when used in this act, includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger and warehouseman, whether such service is performed for or the commodity delivered to the public or any portion thereof."

Attention is drawn to the fact that this subsection as originally enacted in 1911 contained after the words "wharfinger and warehouseman" the words "as those terms are defined in this section". The argument is made that the omission of these words in the subsection as amended on June 14, 1913, must be construed to show an intention of the Legislature to disregard all the definitions which had been set forth with such pains in the earlier portion of the section, and to leave the door open to the

inclusion as "public utilities" of many classes of corporations and persons which are clearly not included in the definitions set forth in the preceding portions of Section 2 of the Act. I cannot believe that any such intention can be imputed to the Legislature. The words "as those terms are defined in this section", as originally used in subsection (bb) of Section 2 of the Act, were clearly surplusage and were apparently inserted out of a superabundance of caution. Each of the terms included in this subsection had already been defined, and in each case the definition had expressly stated that the term, whenever used in the Act, should have the meaning specifically set forth in the definition. Hence, it was entirely unnecessary to insert in subsection (bb) the words "as those terms are defined in this section". If any intention is to be imputed to the Legislature in connection with the omission of these words, it would seem more reasonable to say that the Legislature concluded that these words were surplusage, and that for this reason, when the Act was revised the words were omitted.

Attorney for complainant in Case No. 835, United Railroads of San Francisco vs. Peninsula Rapid Transit Company, drew attention, upon the argument in that case, to the use of the word "includes" in each of the definitions in Section 2, except the definition of the words "commission" and "commissioner". He drew attention to the fact that in certain cases the word "includes" is a word of enlargement and not of limitation, and contended that classes of corporations and persons other than those specified in the various definitions may be included within the terms as used in the Act and that this Commission may be compelled to take jurisdiction over such additional classes of corporations and persons. The meaning to be given to the word "includes" must depend in each case upon the context. Cases in which the word has been held to be a word of enlargement, rather than limitation, have generally been cases

in which the word follows words of comprehensive significance, such as "all personal property, including furniture"; "all necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, ~~of~~ commissions, the compensation of referees, and the expense of printing papers on appeal", and "all other corporate property, real and personal, of said railroad company, including all depots, warehouses or structures". In cases of this character, it seems clear that the word "includes" cannot properly be construed to limit the words of general significance which it follows.

A careful perusal of Section 2 of the Public Utilities Act would seem to show clearly that the Legislature intended, in defining each class of public utility, to specify the particular classes of corporations and persons, no more and no less, which should be referred to whenever the particular kind of utility is mentioned in the Act. The limitations and qualifications which are found in certain of the definitions are clearly of no avail unless this conclusion is sound. Thus, in the term "common carrier" the limitation of this Commission's control with reference to vessels to those which are "regularly" engaged in the transportation of persons or property "over regular routes between points within this state", is of no avail as against other vessels which may be held to be common carriers at common law, if complainant's contention is correct. Again, the very obvious intention of the Legislature, in subsection (p) of Section 2, to limit the definition of the term "gas corporation", so as to exclude cases in which gas is made or produced on and distributed by the maker or producer through private property alone solely for his own use or the use of his tenants, and not for sale to others, will fail if the definition is held to be merely illustrative. The same observation follows with reference to the definition of the term "electrical corporation" in subsection (r) of Section 2

of the Act. The same observation applies to the definition of the term "warehouseman" in subsection (aa) of Section 2, in which subsection the Legislature clearly intended to define the term so as to include certain warehousemen as to which regulation was thought to be necessary and to exclude other warehousemen.

It may reasonably be presumed that the term "common carrier" was defined in view of the difficulties which had already arisen and which had been pointed out by the Supreme Court of this State. In the Market Street Railway Company case, supra, the Supreme Court had pointed out that the people of the State could not have been presumed to have intended to confer jurisdiction upon the Board of Railroad Commissioners over companies engaged in draying, running freight wagons or delivery wagons, in delivering parcels, in teaming or in running elevators. The Legislature may well have had in mind the man who maintains an express wagon on the street corner and who holds himself out as willing to haul trunks or other merchandise for anyone who will pay him his regular rates. The Legislature may be presumed to have considered the cases of van and drayage companies, teamsters, taxicabs, and small gasoline launches many of which, notwithstanding their diminutive size and roving habits, are nevertheless clearly common carriers at common law. The Legislature may well have concluded that certain of these carriers were not in need of public regulation at all, and that as to others, such regulation as was necessary might be exercised by the local authorities. Subsection (L) of Section 2 of the Act shows, to my mind, conclusively that the Legislature intended to specify the particular kinds of common carriers at common law over which it thought regulation and supervision by the Railroad Commission to be necessary and expedient, and to omit all the others. I know of no language which the Legis-

lature could have adopted which could have more clearly expressed this very obvious purpose.

Referring specifically to motor trucks, auto bus lines or auto stage lines, such as the Transportation Company, there is evidence in other sections of the Act that the Legislature could not have intended to include them under the term "common carrier" or the term "public utility", as used in the Act. In defining the term "express corporation", the Act refers to corporations or persons transporting freight, merchandise or property for compensation on the line "of any common carrier or stage or auto stage line" within this State. If the term "common carrier" as used in the Act already included a stage or auto stage line, it obviously was entirely unnecessary to add these words in defining the term "express corporation". The term "common carrier" would alone have been sufficient. It is obvious that the Legislature had in mind the fact that express companies in this State, such as Wells, Fargo & Company, while operating principally over the lines of railroad corporations and vessels, also operate to some extent over the lines of certain of the stage and auto stage lines within the State. As stage and auto stage lines were not subject to the jurisdiction of the Railroad Commission except in the one respect hereinafter to be mentioned, Wells, Fargo & Company would have been relieved to that extent from the jurisdiction of the Railroad Commission, under the definition of the term "express corporation", if the words "or stage or auto stage lines" had not been added to the words "common carrier". The addition of these words shows to my mind conclusively that they were not included in the term "common carrier". This definition of the term "express corporation" was retained when the Public Utilities Act was amended on June 14, 1913, at which time the change in the definition of the term "public utility", hereinbefore referred to, was made.

The only other section of the Public Utilities Act in which the words "stage or auto stage lines" are used is Section 33,

which section refers to through routes and joint rates. After giving the Railroad Commission power to establish through routes and joint rates "over two or more common carriers", the Legislature added the following sentence to the section:

> "The commission shall have the power to establish and fix through routes and joint rates, fares or charges over common carriers and stage or auto stage lines and to fix the division of such joint rates, fares or charges."

If the term "common carrier" included stage or auto stage lines, it was entirely unnecessary to add this sentence, for the reason that authority to establish through routes and joint rates applicable to stage and auto stage lines would already have been conferred in the earlier portion of the section. I direct particular attention to the fact that the words used are "over common carriers and stage or auto stage lines". The use of the word "and" shows very clearly that in mentioning "stage or auto stage lines" the Legislature intended to add to "common carriers" something which was not included within those words as defined and used in the Public Utilities Act. A careful examination of the entire Public Utilities Act convinces me that the Legislature intended to confer jurisdiction upon the Railroad Commission over stage and auto stage lines only in the one respect set forth in Section 33 of the Act, namely, in the matter of through routes and joint rates.

That the Legislature could have conferred a more extended jurisdiction over these agencies is provided for by the Constitution itself, and is clear on principle. Munn v. Illinois, 94 U.S. 113; German Alliance Insurance Co. v. Lewis, 233 U.S. 389. It is equally obvious to my mind that the Legislature, for good and sufficient reasons, intended not to burden the Railroad Commission with jurisdiction over any class of common carrier not specifically designated in the Public Utilities Act.

Some light is shed on this subject by certain proceedings before the Legislature of 1915. It is well known that certain of the short line railroads and street railroads caused the intro-

duction of a number of bills amending the Public Utilities Act so as to include persons and corporations operating motor vehicles or automobiles upon the highways for the transportation of persons for hire. One of these bills, being Senate Bill No. 206, declares that each such corporation and person is "a common carrier and subject to the provisions of the Public Utilities Act". Obviously, it was entirely unnecessary to introduce such bill if motor vehicles and automobiles carrying persons for hire upon the public highways are already included within the Public Utilities Act. It is equally well known that representatives of the short line railroads, apparently reaching the conclusion that the Legislature was not yet prepared to confer these additional responsibilities upon the Railroad Commission, caused the introduction of another bill for the purpose of amplifying the jurisdiction of the local authorities so as to place them in a position to exercise more complete jurisdiction over the jitney bus and motor truck, at least until the extent, permanency and seriousness of the problem might be more definitely established. The fact that representatives of the short line railroads appeared before the Legislature in advocacy of this latter measure would seem to show quite clearly that, in their opinion at that time, jurisdiction did not vest in the Railroad Commission. While these matters are not conclusive of the legal question whether jurisdiction does or does not vest in this Commission, they are referred to as illustrative of the general attitude and belief of the short line railroads in this matter.

Reference was made in the argument herein to the decisions of a number of other state railroad or public service commissions on the question whether such commissions have jurisdiction over so-called jitney busses and motor trucks in their respective states. Such decisions must be based upon the particular statutory provisions of the respective states and are of but little assistance in California. In Georgia Railway and Power Company vs. Jitney Bus

Company, decided by the Railroad Commission of Georgia on June 8, 1915, it appears that the statute conferring jurisdiction upon the Railroad Commission uses the words "all common carriers", without any limitation whatsoever. Under such a statute, obviously the Railroad Commission would have jurisdiction over jitney busses and motor trucks carrying persons or property for compensation for the public. In In re Automobile Traffic on Auto Stage Lines, decided by the Corporation Commission of Arizona on June 15, 1915, the Corporation Commission took jurisdiction over auto stage lines, but no reference is made in the decision to the statute defining the jurisdiction of the Corporation Commission. Apparently no objection to the Commission's jurisdiction was presented by any party to the proceeding. This was a case in which one auto stage line asked the Commission to assume jurisdiction over itself and other lines of similar character. In Jacksonville Railway Company vs. O'Donnell, decided on June 3, 1915, the Illinois Public Utilities Commission assumed jurisdiction over jitney busses but did not in any way refer to the statute defining the Commission's jurisdiction. In In re Regulation and Control of Automobiles and Jitney Busses operating as Common Carriers, decided by the Maryland Public Service Commission on May 13, 1915, it appears that the Legislature of Maryland, in 1914, amended the Public Service Commission Law by specifically providing that the term "common carrier" when used in the law, should include all automobiles, transportation companies, and all persons and associations, whether incorporated or otherwise, operating automobiles or motor cars or motor vehicles for public use in the conveyance of passengers or property within the State of Maryland. In view of this amendment of the Public Service Commission Law, there could be no reasonable doubt that jitney busses were subject to the jurisdiction of the Public Service Commission. These are the only cases to which I have been referred as holding that jitney busses or motor trucks have become subject to the jurisdiction of some state railroad or public

service commission.

After a careful review of the Public Utilities Act and of each argument which has been presented by the complainant herein, I am driven irresistibly to the conclusion that this Commission has not been given jurisdiction over companies such as the Transportation Company herein, and that this proceeding must be dismissed for lack of jurisdiction.

If the Legislature hereafter confers upon the Railroad Commission jurisdiction in any respect over jitney busses or motor busses or any class thereof, this Commission will, of course, promptly exercise, to the best of its ability, the jurisdiction thus conferred. In the meantime, this Commission would properly be subject to the most severe criticism if it undertook to exercise jurisdiction over jitney busses and motor trucks when we are convinced that the Legislature has not conferred and has not intended to confer such jurisdiction upon this Commission.

I submit the following form of order:

O R D E R.

A public hearing having been held in the above entitled complaint and the Railroad Commission finding that it does not have jurisdiction,

IT IS HEREBY ORDERED that said complaint be and the same is hereby dismissed.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 30th day of September, 1915.

Max Thelen

H. D. Loveland

Alex Gordon

Edw. O. Edgerton

Frank R. Leahy

Commissioners.