Constitutional Law--Municipal Corporations--Fluoridation of Water Supplies

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This "establishment of religion" clause has received the Supreme Court's attention primarily with respect to education problems. *Everson v. Board of Education*, 330 U.S. 1 (1947) (holding tax expenditures for transportation of children to parochial schools constitutional); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948) (religious teaching in public schools violated First Amendment as made applicable to the states by the Fourteenth); *Zorbaugh v. Clauson*, 343 U.S. 306 (1952) (approving "released time" system of New York City schools). The clause has been considered with respect to other subjects in lower federal courts, where it has been held not violated by exempting from combatant military service the members of religious sects whose tenets exclude the moral right to engage in war, *Roodenko v. United States*, 147 F.2d 752 (10th Cir. 1947), and the refusal of a Jehovah's Witness to serve on a jury is justified by this Amendment. *United States v. Hillyard*, 52 F. Supp. 612 (S.D. Wash. 1943).

Whether or not the Supreme Court will generalize its attitude in the school cases in such a manner as to affect adoption statutes of this sort is the important question which awaits an answer when the Court is presented with a case which it is willing to dispose of on the merits.

E. W. C.


Fluoridation of water, one part to one million parts water, has the effect of reducing dental caries, the major cause of tooth decay, by building up the enamel of the teeth. It affects only children under twelve years of age. It is highly recommended by dental and medical societies and by the West Virginia Board of Health.

In *Kraus v. City of Cleveland*, 66 Ohio L. Abs. 417, 121 N.E.2d 311 (1954), and *De Aryan v. Butler*, 119 Cal.App.2d 674, 260 P.2d 98 (1953), the same problem is presented with results in accord with the principal case. In each case, the action of the municipality
was attacked on the grounds of violation of the Constitution of the United States and lack of municipal authority.

As to the constitutional argument, it is everywhere conceded that the preservation of its people's health falls within the police power of the state. *Grosso v. Commonwealth*, 180 Va. 70, 21 S.E.2d 728 (1942), citing *Dent v. West Virginia*, 129 U.S. 114 (1889), in which the Supreme Court of the United States affirmed a holding of the West Virginia supreme court.

There is a complication here, however, in that fluoridation of water directly affects only children under twelve years of age. But, the courts have held that measures designed to preserve and promote the health of children are for the public welfare generally. *Bissell v. Davidson*, 65 Conn. 183, 32 Atl. 348 (1894) (vaccination of school children). Furthermore, as indicated in the principal case, the children, when they mature, will carry the benefit into their adult life, so it is only those citizens of the city who are above the age affected when the plan is adopted who will receive no benefit directly. This is not a violation of the "equal protection" clause of the Fourteenth Amendment to the Constitution of the United States. *Field v. Barber Asphalt Co.*, 194 U.S. 618 (1904); *Hansen v. Raleigh*, 391 Ill. 536, 63 N.E.2d 851 (1945). Furthermore, "...the United States Supreme Court, in establishing and clarifying the Constitutional right of religious and other freedoms, has distinguished between direct compulsion imposed upon individuals, with penalties for violations, and those which are indirect or reasonably incidental to a furnished service or facility." *De Aryan v. Butler*, supra, at 683, 260 P.2d at 103, citing *Hamilton v. Regents of University of California*, 293 U.S. 245 (1934); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); and *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940).

In *Hayes v. Town of Cedar Grove*, 126 W. Va. 828, 30 S.E.2d 726 (1944), the court said that the power of the state to provide for the health of its people has been stressed as one which may be given the broadest application and exercised in keeping with advances in science. The courts require only that reasonable methods are employed and natural and constitutional rights of citizens are not invaded.

Thus, the state would probably have the authority to enact such legislation as that presented, since it would not seem to violate any constitutional restrictions. Therefore, the question resolves itself into an inquiry of the authority of the municipalities to enact fluoridation ordinances in the absence of specific legisla-
tion. The court in *Hayes v. Town of Cedar Grove*, *supra*, in discussing W. Va. Code c. 8, art. 4, § 10 (Michie, 1949), which gave the council of a municipal corporation the general power, among others, to enact, authorize or prohibit a water works and maintain a healthful water supply, stated that it delegated to municipalities power to take all measures necessary to protect the health of its residents. Every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases, to interfere with the power imposed by law in municipal corporations for the protection of local rights and the health and welfare of the people of the community. *Stark ex rel. Oil Service Co. v. Stark*, 96 W. Va. 176, 122 S.E. 533 (1924); and see, to the same effect, *Gorieb v. Fox*, 145 Va. 554, 134 S.E. 914 (1926), *aff’d*, 274 U.S. 603 (1927). In *Board of Supervisors of Nansemond County v. City of Norfolk*, 153 Va. 768, 775, 151 S.E. 142, 145 (1930), the court said: “A city not only has the right to protect its water supply, but it must protect it. . . . It is the settled policy of the state and of all states to encourage any reasonable exercise of this right and power.”

Considering the ease with which the courts in the three cases directly concerned with fluoridation disposed of the arguments in opposition to the city’s action and the broad powers, in the field of public health, conferred on West Virginia’s municipal corporations by statute as construed by the court, there seems to be little question but that fluoridation of water by municipalities will be upheld.

However, the implication which arises therefrom is not so easily disposed of. Where will this type of ordinance lead us? Prior to the enactment of fluoridation ordinances, health measures of a similar nature did not have the effect of *adding* something to the water, milk, or other products which is beneficial to the human body, but rather of *removing* something which would be harmful. Chlorination of water is done to “remove” harmful bacteria. Pasteurization and vaccination have much the same function. But here, we have something which has its effect in adding something to the water, removing nothing, in order that dental caries, producers of decay, cannot operate as effectively on the teeth. This is held a valid exercise of the police power because it has reasonable relation to public power. But now, what else can be added to the water supply as beneficial to public health? The implications are vast. Are we opening a new door in public
health measures by allowing the use of water supplies as the means for the addition of beneficial substances to the body? Is the next step the addition of vitamins or poliomyelitis vaccine? And then what? Whether they realize it or not, apparently the courts in these decisions have found that the police power of municipalities is broader in scope than was previously realized.

H. R. A., Jr.

CONTRACTS—COLLECTIVE BARGAINING—CONSIDERATION FOR PROMISE TO PAY CASH EQUIVALENT OF BENEFITS.—Ps were employees of D pursuant to a collective bargaining agreement providing for vacation pay, accumulated sick leave, and retirement benefits. The agreement also provided that, if D's properties were ever sold, said agreement and its benefits would terminate. D proposed to sell the company, and orally promised Ps that if the sale were consummated, it would pay to them the cash equivalent of said benefits which had accrued up to the date of the sale. Ps continued working for D, at regular wages, until the sale was made, and they were continued in their same employment by D's purchaser. Ps sue to recover the promised cash value of the accumulated sick leave and retirement benefits which D had refused to pay. Held, that D's promise was unenforceable because unsupported by consideration. Nor would the doctrine of promissory estoppel apply, for justice here did not require that D's promise be enforced. The dissent maintained that there was consideration in Ps' acceptance of the promise in settlement of their rights under the agreement; in their continued service and implied promise not to seek other means of protecting their rights. Byerly v. Duke Power Co., 217 F.2d 803 (4th Cir. 1954).

It is a well settled rule of law, with certain well defined exceptions, that a consideration is an essential element of a simple contract, and hence a promise is binding only if consideration is given in exchange for it. Peoples Bldg. & Loan Ass'n v. Swaim, 198 N.C. 14, 150 S.E. 668 (1929); Thomas v. Mott, 74 W. Va. 493, 82 S.E. 325 (1914). A consideration is an act or forbearance, or the creation, modification, or destruction of a legal relation, or a return promise, bargained for and given in exchange for the promise. RESTATEMENT, CONTRACTS § 75 (1933), cited with approval in principal case. A consideration may involve either a legal detriment to the promisee or a legal benefit to the promisor. Fawcett v. Fawcett,