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Public Utilities--Injunction Against Government Agencies

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assignment, mortgage, pledge, levy and sale, partition, or agreement to treat the interest as belonging to the tenants as tenants in common. 48 C.J.S. 927 (1947). The principal case adds one more method, *i.e.*, murder. The court in *In re King's Estate, supra,* expressly refused to add murder as an "approved" method by which a joint tenancy may be converted into a tenancy in common.

These cases reveal a tendency on the part of the courts to favor the maxim precluding benefit from one's own wrong over the right to inherit property. The courts do not agree upon the rationale or the proper method for resolving the conflict, but they do agree that the murderer should not benefit from his wrongful act.

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PUBLIC UTILITIES—INJUNCTION AGAINST GOVERNMENT AGENCIES.—Plaintiffs, a group of privately owned electric power utilities, sought to enjoin the Rural Electrification Administration (REA) and the Southwestern Power Administration (SPA), federal agencies within the Departments of Agriculture and Interior respectively, from entering into certain contracts with private federated power cooperatives. By these contracts, REA, which is empowered to lend money for "the purpose of furnishing electric energy to persons not receiving central station service" would lend money to the cooperatives for the construction of generation, transmission, and related facilities. Plaintiffs were then furnishing the cooperatives with central station service. Under a provision of the contract with REA, the cooperatives were to enter into a separate contract with SPA to sell all the power produced at the new generating plant to SPA and to construct and lease transmission lines to SPA. SPA in turn, was to supply the cooperatives with all their power requirements, which the plaintiffs were then doing. The cooperatives could buy power from any other source in case SPA was unable to furnish all their requirements. The plaintiffs sought to enjoin on the grounds that the contracts violated the loan standards of the REA and enabled the cooperatives to engage in ruinous competition with the plaintiffs. *Held,* on appeal, that the competition which the plaintiffs would suffer as a result of these contracts was not a sufficient interest to enable the plaintiffs to sue. *Kansas City Power & Light Co. v. McKay,* 225 F.2d 924 (D.C. Cir. 1955).

In the instant case the court applied the rationale laid down in *Tennessee Power Co. v. TVA,* 306 U.S. 118 (1939), and *Alabama*

Power Co. v. Ickes, 302 U.S. 464 (1938). The *Tennessee Power Company* case, *supra,* held that the right invaded had to be a legal right before the validity of action taken under a statute could be contested. The *Alabama Power Company* case, *supra,* held that injury to the plaintiff utility companies was *damnum absque injuria* when it resulted from certain municipalities which were enabled to compete ruinously with the plaintiffs after receiving federal loans.

However, notwithstanding the tenor of finality of those decisions and with all deference to the court in the instant case, the application of the rule in the present case would appear to create an extremely anomalous situation.

It is beyond argument that public service commissions, through the issuance of certificates of convenience and necessity, regulate and control public utility corporations, both as to their individual activities and as to competition among them in the same consumer areas. Further, where a public utility company has been rendering adequate service in a particular consumer area, commissions have generally refused to issue certificates of convenience to rival utilities of the same kind seeking to operate in the same area. The theory for refusing to issue certificates to the new utility in such situations is that through avoiding duplication of facilities and efforts, costly price wars, and demanding satisfactory service while allowing a "fair return", the public interests are better served. Thus, we have the theory and practice of regulated monopoly, certainly not of recent origin, having been thoroughly recognized and analyzed quite a few years ago. See Hardman, *The Changing Law of Competition in Public Service,* 33 W. VA. L.Q. 219 (1927).

And even among corporations which are not public utilities, where competition is deemed to better serve the public interest and is "the life of trade", competition in restraint of trade is not permitted by the federal government under the Clayton Act. 38 STAT. 731 (1914), 15 U.S.C.A. § 14 (1951). In the instant case, at least in substance if not in form, the "power" and "lease" contracts would appear to be perfect examples of the type of "tying clauses" which have been held to be invalid as being in "restraint of trade." See *Standard Oil Co. v. United States,* 337 U.S. 293, 300 (1949).

In addition, it is submitted that the provision of the cooperatives' contract with SPA, allowing the cooperatives to purchase power from other producers if SPA is unable to meet their require-

ments, means little or nothing. First, because the cooperative is the type of customer to which SPA is restricted in section 5 of the Flood Control Act of 1944, 61 STAT. 501 (1947), 16 U.S.C.A. § 825s (1952), SPA is not likely to ignore the needs of their "preferred customer." Secondly, the cooperatives themselves are not likely to let such a situation develop since they can purchase power from SPA at substantially lower rates than they would have to pay a private producer charged with meeting bonded indebtedness, taxes, and showing a profit to stockholders.

So, the situation would appear to be completely befuddled. In a field of corporate enterprise where competition is the exception rather than the rule, competition has been allowed. And the competition itself appears to be at least questionable under the rules laid down by the sovereign participating in it. Truly, the king can do no wrong.

A very recent case at the state level, involving substantially the same facts as the instant case, has been decided squarely against a rural cooperative. *Arkansas Electric Cooperative Corp. v. Arkansas Missouri Power Co.*, 221 Ark. 638, 255 S.W.2d 674 (1953). In that case the cooperative was prevented from selling power to SPA under a state statute regulating the activities of such cooperatives. In addition the contemplated contract between the cooperative and SPA was also held to be invalid on the federal grounds that Congress had not authorized SPA to acquire power in this manner. This determination of the federal law is clearly unnecessary and is probably dictum. But even so, the case does show a possible method of attack on the part of utilities where these cooperatives are considered subject to state commission regulation. This jurisdictional conflict, according to one commentator, is one which the REA, while contending that the cooperatives are not subject to state commission regulation, has tried to avoid having determined in the United States Supreme Court. See TROXEL, ECONOMICS OF PUBLIC UTILITIES 513 (1947). The reason that author gives for such reluctance on the part of REA is that a Supreme Court test of jurisdiction would necessarily involve a determination of the question of whether a federal agency has the right to control the intrastate business of private corporations.

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