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Public Utilities--Is an Ice Business "Affected With a Public Interest"

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It is submitted that this holding may be extended to all quasi-contractual obligations, and likewise to obligations arising upon the commission of a tort where such tort gives rise not only to damage to the person injured, but also to a monetary benefit to the tort-feasor. Alternative obligations arise—on the one hand an obligation to pay such damages as the plaintiff has suffered, and on the other an obligation to pay for such benefits as the defendant has received. If the plaintiff elects to enforce the obligation to make restitution, and proceeds under the statute in question, no violence is done the language of the statute. True there has been no assent or voluntary assumption of the obligation, but the whole law of quasi-contract, from the remedial point of view, depends on the fiction that the defendant has promised to do that which in justice he ought to do.⁵

Virginia has found it desirable to extend the scope of the remedy, until at the present time one may proceed by notice of motion for judgment in any case, with certain jurisdictional limitations, where there is a right to maintain an action at law.⁶ Such provision is a compromise between a system of code pleading, and a system of common law pleading as modified by statutes. Doubtless we have proponents of each system. If West Virginia should make this extension the advocates of code procedure will have full opportunity to develop the merits of the system. If they prove more satisfactory than the present system the transition would be much easier than a complete change at one time.⁷

—DONALD M. HUTTON.

PUBLIC UTILITIES — IS AN ICE BUSINESS "AFFECTED WITH A PUBLIC INTEREST"? — The plaintiffs were engaged in the manufacture and sale of ice in Oklahoma City pursuant to a license granted according to the statute of Oklahoma.¹ The defendant was about to set up a similar business in the same city without applying to the Corporation Commission for the required certificate of convenience and necessity.² The plaintiffs sought to enjoin this establishment on the grounds that it is in violation of the

⁵ WOODWARD, *THE LAW OF QUASI-CONTRACTS* (1913) c. 19, 20.

⁶ VA. CODE ANN. (1930) § 6046.

⁷ BURKS, *The Code of 1919* (1919) 5 VA. L. REG. (N. S.) 97, 120.

¹ Okla. Sess. Laws 1925, c. 147.

² *Ibid.*, § 2.

statute. The court affirmed the decision of the District Court for the Western District of Oklahoma which refused the injunction.⁵ *Southwest Utilities Ice Co. v. Liebman*.⁶

Price regulation presents the point at which litigation of this sort usually arises. While it is true this case arises over the validity of a statute requiring additional regulation, *i. e.*, the requiring of a certificate of convenience and necessity, still the reasons underlying the decision are similar to those in the price regulation cases. In a fairly recent case the Supreme Court of Arkansas held valid a similar statute.⁷ On the other hand we find, in some jurisdictions, holdings to the effect that an ice plant is not a public utility such as may be operated by a municipality.⁸ By analogy they would lend weight to the decision in the case under discussion.

The fundamental justification for such governmental regulation has been the protection of the public against the evils arising out of monopolies⁷ or what have been more accurately termed businesses "monopolistic in nature".⁸ The search for a "test" or rule that will accurately determine just what businesses should be subjected to such rigid regulation has been rather futile. Many courts talk about and apply the time-worn test "affected with a public interest". This, however, is little more than a conclusion of law which requires explanation more than it explains. Mr. Chief Justice Taft went so far as to divide businesses into three classes in an effort to solve the problem.⁹ Neither has proved satisfactory.

Here we find the court approaching the problem from an entirely different angle. Refusing to recognize any dogmatic rule which will serve as a solution it bases its decision squarely on the facts of the case. It reasons thus: whether a business may be so controlled by legislative enactment is a matter to be determined by the economic and social conditions surrounding that

⁵ 49 F. (2d) 913.

⁶ 52 F. (2d) 349 (C. C. A. 10th 1931).

⁷ *Cap F. Bourland Ice Co. v. Franklin Utilities Co.*, 180 Ark. 770, 22 S. W. (2d) 993, 68 A. L. R. 1018 (1929).

⁸ *State ex rel. Kansas City v. Orear*, 277 Mo. 303, 210 S. W. 392 (1919); *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 137 N. W. 20 (1912). *Contra: Denton v. Denton Home Ice Co.*, 18 S. W. (2d) 606 (1929); *City of Tombstone v. Macia*, 30 Ariz. 218, 245 Pac. 677 (1926).

⁷ Wyman, *The Law of Public Callings as a Solution of the Trust Problem* (1904) 17 HARV. L. REV. 156.

⁸ Hardman, *Public Utilities. I. The Quest for a Concept* (1931) 37 W. VA. L. Q. 250.

⁹ *Wolff Packing Co. v. Industrial Court*, 262 U. S. 522, 43 S. Ct. 630 (1923).

business in that particular locality. The court in applying this realistic approach to the facts of the case in hand found that the danger of a prejudicial monopoly in the ice business is largely averted by two prevalent conditions, namely: (1) the ease with which ice can be, and frequently is shipped long distances and (2) the introduction of domestic refrigeration plants. Thus the protection sought for is furnished naturally, without the aid of such a statute.¹⁰ A similar approach was made in another recent case.¹¹

Undoubtedly, there are those who have different ideas as to the wisdom of invalidating a statute rigidly controlling the manufacture and sale of ice. Still their quarrel here would be with the conclusion reached by the court, while from a broad viewpoint the judicial approach to a general problem is more significant than a decision in a single case.

—E. GAUJOT BIAS.

TRUSTS — EXERCISE BY TRUSTEE OF POWER TO TERMINATE AFTER PERIOD OF GOOD BEHAVIOR BY SPENDTHRIFT. — The St. Louis Union Trust Company was named trustee for Vincent Kerens under the will of Kerens' father. The trust created was terminable in two ways: by Vincent's death or by satisfactory proof to the Trust Company "that he shall of his own free will and desire have passed five consecutive years of continued sobriety and good behavior". The Trust Company determined that Kerens was entitled to the *corpus* of the trust in 1928, after his fifth application to have this trust terminated. To insure its position it filed a bill for instructions in the Federal District Court for Eastern Missouri, naming Kerens and his sisters, the remaindermen under the trust, as nominal defendants. The sisters appealed from the decision of the District Court affirming the position taken by the Trust Company. The Circuit Court of Appeals found from the evidence in the case that the Trust Company knew that Kerens had falsely sworn to an affidavit made in

¹⁰ Southwest Utilities Ice Co. v. Liebman, *supra* n. 4, at 353. ". . . . there is both potential and actual competition in such business to afford adequate protection With such competition existing in the business, we seriously doubt that the manufacture of ice is so affected." (as to warrant such regulation).

¹¹ Consumers' Light & Power Co. v. Phipps, 251 Pac. 63 (Okla. 1926). See also Mr. Justice Stone's dissent in Tyson & Bros. v. Banton, 273 U. S. 418, 447, 47 S. Ct. 426 (1927).