St. John's Law Review

Volume 6, May 1932, Number 2 Article 19

Constitutional Law--Requirement of Finding of Public Need for Additional Facilities as Prerequisite to License to Engage in Ice Business (New State Ice Company v. Liebmann, U.S. Daily, March 22, 23, 24, 1932, at 128, 129; 137, 139; 144, 145 (Decided March 21, 1932))

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The Commission has broad powers and a wide extent of administrative discretion but it is fundamental that the powers of the Commission are subject to circumscription by legislative enactments and constitutional rights. It is a fundamental requirement that opportunity for a fair hearing must be provided by the Commission in the discharge of its duties.[1] Lacking this, an order of the Commission will be in violation of the due process clause.[2] Moreover, an edict of the Commission may be set aside as arbitrary and unreasonable in the light of the general intendment of the legislative requirements.[3] Assuredly, in view of the present economic conditions existing in the country and in view of the financial situation of the railroads, the order of the Commission, based on facts existent in 1928, requiring the lowering of rates is unreasonable and arbitrary. No opportunity for a fair hearing on the basis of a record reflecting the present conditions has been given. The difference between conditions in 1931 and in 1928 is not a matter of a slight fluctuation in business conditions but is the result of the advent of a new economic level. The allegation that the general business level has drastically declined needs no proof. The change is the outstanding contemporary fact, dominating thought and action throughout the country. Since it is a fact of common everyday knowledge which admittedly everyone within this country can be presumed to know, the court will take judicial notice of the present economic situation; it would not be good sense to do otherwise.[4] Stripped of its technical grounding in the rules of administrative and constitutional law, the decision is one which has for its motivating power a degree of common sense which seems to be an attribute peculiar to the members of the United States Supreme Court.

E. P. W.

CONSTITUTIONAL LAW—REQUIREMENT OF FINDING OF PUBLIC NEED FOR ADDITIONAL FACILITIES AS PREREQUISITE TO LICENSE TO ENGAGE IN ICE BUSINESS.—Plaintiff, engaged in the manufacture, sale, and distribution of ice in Oklahoma City under a license of the Corporation Commission of Oklahoma, brought a bill in the United States District Court to enjoin defendant from engaging in the same

[1] Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 91, 33 Sup. Ct. 185, 186 (1913).

[2] Dohany v. Rogers, 281 U. S. 362, 369, 50 Sup. Ct. 299, 302 (1930).

[3] Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 30 Sup. Ct. 155 (1910); Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 32 Sup. Ct. 108 (1912).

[4] MCKELVEY, EVIDENCE (1924) §12. "The doctrine of judicial notice is that there are certain facts of which the courts will not require evidence, because they are so well known, so easily ascertainable or so related to the official character of the court, that it would not be good sense to do so."

business in Oklahoma City without first obtaining a license from the Corporation Commission. Statute[1] provided that the manufacture, sale and distribution of ice was a public business; that no one could engage in it without first obtaining a license from the Commission; and that if upon the hearing on the application it appeared that facilities for furnishing ice already existed in the locality in which the applicant wished to do business, sufficient to meet the public needs therein, the Commission could refuse the application. Defendant had not applied for a license. The District Court dismissed the bill; on appeal to the Circuit Court of Appeals, affirmed. On appeal, *held,* affirmed. The business is an ordinary one and "* * * bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use, * * *" and the regulation is one "* * * denying or unreasonably curtailing the common right to engage in a lawful private business. * * *" *New State Ice Company* v. *Liebmann,* U. S. Daily, March 22, 23, 24, 1932, at 128, 129; 137, 139; 144, 145. (Decided March 21, 1932.)

The requirement of the existence of a "public interest" in a business as a condition to state regulation of its affairs, growing out of the rate making cases,[2] tends to obscure the conditions upon which the state can exercise a more general but less drastic regulatory power. The purpose of the instant statute is evidently to secure a reasonable price and an equitable distribution of the commodity to consumers by preventing wasteful duplication of facilities and ruinous competition.[3] The method is partial exclusion from what before the enactment was a common calling[4]—the fostering of regulated quasi-monopolies. This was accomplished at least once without reference to the "public interest" doctrine, in the interest of public health.[5] But the present statute invited application of the "public interest" test by

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[1] OKLA. COMP. STAT. ANN. (Bunn Supp. 1926) §6619.

[2] Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77 (1876); Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468 (1892); Brass v. North Dakota, 153 U. S. 391, 14 Sup. Ct. 857 (1894); German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 34 Sup. Ct. 612 (1914); Tyson v. Banton, 273 U. S. 418, 47 Sup. Ct. 426 (1927); Ribnik v. McBride, 277 U. S. 350, 48 Sup. Ct. 545 (1928); Williams v. Standard Oil Co., 278 U. S. 235, 49 Sup. Ct. 115 (1929); *cf.* Standard Oil Co. v. City of Lincoln, 275 U. S. 504, 48 Sup. Ct. 155 (1927), *aff'g,* 114 Neb. 243 (1926); see Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 535, 43 Sup. Ct. 630, 632 (1923); Finkelstein, From *Munn v. Illinois to Tyson v. Banton, A Study in Judicial Process* (1927) COL. L. REV. 769, 774, 777.

[3] See Cap F. Bourland Ice Co. v. Franklin Utilities, 180 Ark. 770, 772, 22 S. W. (2d) 993, 994 (1929), 68 A. L. R. 1018 (1930).

[4] The right to engage in the common callings has latterly been closely protected. Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7 (1915); Adams v. Tanner, 244 U. S. 590, 37 Sup. Ct. 662 (1917); Meyer v. Nebraska, 262 U. S. 390, 43 Sup. Ct. 625 (1923); see Butchers Union v. Crescent City, 111 U. S. 746, 757, 762, 4 Sup. Ct. 652, 657, 660 (1884); *cf.* Bartemeyer v. Iowa, 18 Wall. 129 (1873); Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273 (1887); Warren, *The New Liberty Under the 14th Amendment* (1926) 39 HARV. L. REV. 431, 445, 454.

[5] The Slaughter-house Cases, 16 Wall. 36 (U. S. 1873).

its phrasing,[6] its resemblance to the "certificate of public convenience and necessity" cases,[7] and the severity of its method of regulation.[8] Yet the factual situation, elaborately examined by Mr. Justice Brandeis in his dissenting opinion, might justify the conclusion that "the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation" [9] created a public interest, calling for regulation which would be valid if it "bore a substantial relation to the evils found to exist." [10] Perhaps a more liberal attitude toward the legislative [11] and administrative [12] judgment on these points might have been indulged. But the "propriety of deferring a good deal to the tribunals on the spot" [13] is not so keenly felt when the business, *prima facie,* seems almost certainly not public and the mode of regulation is so closely akin to one applicable to public utilities, operating under grants of special powers, in which the state has, consequently, a peculiarly paternal interest. The avoidance of duplication of facilities in the utility cases is, in a measure at least, rather incidental to the withholding of necessary special privileges than an end in itself. Of course, the required public interest could not be created by legislative pronouncement, thrusting public duties upon an inherently private

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[6] The statute, *supra* note 1, in sub-section 1, declares the ice business a "public business"; sub-sections 3 and 5 give the Commission power to require the licensee to afford its facilities and services to the public, and the same power to fix "the rates, rules, charges and regulations" of the licensee that it has in relation to transportation and transmission companies. Appellant "relied" on Frost v. Corporation Commission, 278 U. S. 515, 49 Sup. Ct. 235 (1929), in which under a similar statute applicable to cotton ginning, it was assumed that the business was public and the license to engage in it held, for the purposes of that case, a special franchise. Corporation Commission v. Lowe, 281 U. S. 431, 50 Sup. Ct. 397 (1930) involved a similar assumption in regard to the same statute.

[7] Frost v. Railroad Commission, 271 U. S. 583, 46 Sup. Ct. 605 (1926); Smith v. Cahoon, 283 U. S. 553, 51 Sup. Ct. 582 (1931); *cf.* Stephenson v. Binford, 53 F. (2d) 509 (S. D. Tex. 1931), noted (1932) 45 HARV. L. REV. 583.

[8] Cap F. Bourland Ice Co. v. Franklin Utilities Co., *supra* note 3, held under a similar statute that, though the business was affected with a public interest, and was amenable to rate regulation, a similar licensing feature was unconstitutional.

[9] Wolff Packing Co. v. Court of Industrial Relations, *supra* note 2 at 538, 43 Sup. Ct. at 634.

[10] Dissenting opinion of Mr. Justice Brandeis in the instant case.

[11] See McLean v. Arkansas, 211 U. S. 539, 547, 548, 29 Sup. Ct. 206, 208 (1909); Chicago, B. & Q. R. R. Co. v. McGuire, 219 U. S. 549, 569, 31 Sup. Ct. 259, 263 (1911); Tanner v. Little, 240 U. S. 369, 385, 36 Sup. Ct. 379, 384 (1916); O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251, 257, 51 Sup. Ct. 130, 132 (1931); and Finkelstein, *op cit. supra* note 2 at 782.

[12] The Corporation Commission had several times requested specific legislation on the ice question after some years' experience at regulating the industry under a general statute [OKLA. COMP. STAT. ANN. (Bunn 1921) §11032] giving it broad powers over businesses found to be "virtual monopolies." Oklahoma Light & Power Co. v. Corporation Commission, 96 Okla. 19, 220 Pac. 54 (1923).

[13] Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365, 30 Sup. Ct. 301, 302 (1910).

business.[14] To seek to sustain the statute, now seven years old, as emergency legislation against the depression [15] would be to exaggerate the emergency and overestimate the remedy.[16] It hardly goes to the root of the difficulty. At all events Lord Hale's phrase,[17] "the worn touchstone of constitutionality," still serves to "prevent the making of social experiments * * * in the insulated chambers afforded by the several states," [18] when an unsympathetic court judicially reviews the exercise of legislative discretion.[19]

J. F. D., JR.

EQUITY—CONSTRUCTION OF TERM "SALE" IN LEASE AND BOND.—Plaintiffs deposited stocks and money as collateral security with the defendant indemnity company which was surety on a bond given by the plaintiffs to secure the faithful performance of a lease. The lease and bond contained provisions that if the lessor sold the leased property the bond should be cancelled, provided the plaintiffs had faithfully performed up to that time. The lessor died during the term of the lease, and the property passed under his will to his children, who formed a corporation of which they were the sole stockholders and to which they transferred the property, receiving in return the corporate stock and bonds in equal shares. No money consideration or price was involved. Plaintiffs had fully performed up to the time that the property was transferred to the corporation.

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[14] Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 45 Sup. Ct. 191 (1925); Frost v. Railroad Commission, 271 U. S. 583, 46 Sup. Ct. 605 (1926); see Producers Transportation Co. v. Railroad Commission, 251 U. S. 228, 230, 40 Sup. Ct. 131, 132 (1920). But see Adler, *Business Jurisprudence* (1914) 28 HARV. L. REV. 135, 146 *et seq.* for a discussion of the historical impossibility of "privacy" in a business.

[15] As suggested by Mr. Justice Brandeis in his dissenting opinion.

[16] The statute seems, too, to lack the temporary quality of the approved emergency statutes. Chastleton Corp. v. Sinclair, 264 U. S. 543, 44 Sup. Ct. 405 (1924); see Block v. Hirsh, 256 U. S. 135, 157, 41 Sup. Ct. 458, 460 (1921) ("The regulation is put and justified only as a temporary measure"); Wilson v. New, 243 U. S. 332, 345, 37 Sup. Ct. 298, 301 (1916).

[17] See McAllister, *Lord Hale and Business Affected with a Public Interest* (1930) 43 HARV. L. REV. 759, for the origin of the phrase and much of its later history; and Hamilton, *Affectation with Public Interest* (1930) 39 YALE L. J. 1089, 1095, for the manner of its adoption by Mr. Chief Justice Waite in Munn v. Illinois.

[18] Truax v. Corrigan, 257 U. S. 312, 344, 42 Sup. Ct. 124, 134 (1921).

[19] See McClain, *The Convenience of the Public Interest Concept* (1931) 15 MINN. L. REV. 546, 557, suggesting that if, as was said in Wolff Packing Co. v. Court of Industrial Relations, *supra* note 2 at 539, 43 Sup. Ct. at 634, kinds of public interest and degrees of regulation are admissible under the doctrine, then a finding of some public interest adds little to the solution of the problem and leaves the particular regulation still to be justified on the general principles governing exercise of the police power.