

January 1929

Constitutional Law—Regulation of Ice Industry in Arkansas

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Recommended Citation

Constitutional Law—Regulation of Ice Industry in Arkansas, 15 ST. LOUIS L. REV. 088 (1929).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol15/iss1/8

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nounced by the courts of an overwhelming number of states. *Bank v. Bradley* (1926), 136 S. C. 511, 134 S. E. 510; *Leach v. Iowa State Saving Bank* (Ia. 1926), 211 N. W. 517.

The statute provides for a preference to the extent of the item or items or for the balance payable upon a number of items which have been *exchanged*. It is not probable, although the language might so indicate, that the courts in construing this statute will permit a preference where the owner of the item or items is another bank which is in the habit of collecting for the insolvent institution and giving or accepting credit as the balance might dictate. The decision in *American Bank of De Soto v. People's Bank of De Soto* (Mo. 1923), 255 S. W. 943, in which such a reciprocal accounts arrangement existed, was justified in its refusal of a preference upon this ground by the cases of *Bank of Poplar Bluff v. Millspaugh* (1926), 313 Mo. 412, 281 S. W. 733 and *Federal Reserve Bank v. Millspaugh* (1926), 314 Mo. 1, 282 S. W. 706.

It is noticed that the statute is silent in requiring that assets at least equal in amount to the item or items for which preference is sought, be present in the vault of the insolvent bank or solvent correspondent banks, at the time of failure of the former. It is perhaps indicated, however, by this language ". . . irrespective of whether the fund representing such item or items can be traced and identified as *part* of such items." It is conceivable that since the courts are no longer burdened with reconciling their positions with age-old principles, such a requirement by a construction of this statute will be dispensed with.

With the exception of the proposition mentioned above, and that provided for in sec. 10, Mo. Laws 1929, 207, which preserves the rights of the owner of the item where remittance has been made in paper subsequently dishonored, the above statute appears a codification of the existing Missouri doctrine, and has relieved the courts from the burden of justifying by legal propositions and maxims a view in harmony with business practices. Note (1929) 14 ST. LOUIS L. REV. 406. F. E. M., '30.

CONSTITUTIONAL LAW—REGULATION OF ICE INDUSTRY IN ARKANSAS.—An interesting development in recent legislation is to be found in Acts of Arkansas, 1929, 110, Act No. 55, "An Act for the Regulation of the Sale, Delivery and Distribution of Ice, and Vesting the Railroad Commission with Jurisdiction over the Same." The Act provides (sec. 1) "that the use of ice is a public necessity, the use, manufacture, sale, delivery and distribution thereof, within the State of Arkansas, has direct relation to the health, comfort, safety, and convenience to the public, the same being a prime necessity of life and monopolistic in its nature and price, manufacture, sale and delivery and distribution of ice within the State of Arkansas is hereby declared to be a public business impressed with a public trust and subject to public regulation as hereinafter enacted." Provisions follow vesting the power to regulate, supervise, establish and enforce prices and rates, re-

quire records and fees, issue permits to new dealers after hearing, etc., in the State Railroad Commission. The Act expressly repeals all laws in conflict therewith, but it is not to be taken to apply to ice manufacturers who consume their own product. The Act closes with a general emergency provision declaring it effective from the date of its enactment.

The question at once arises whether such an industry can be made a public utility by legislative fiat. That question seems to have been answered in the main in the negative.

It is undoubtedly true that "a declaration by a legislature that a business has become affected with a public interest is not conclusive of the question whether attempted regulation on that ground is justified." *Wolf Packing Co. v. Court of Industrial Relations of Kansas* (1923), 262 U. S. 522. Citing that case, the Court later stated that "respect is due to a legislature on a declaration of this kind so far as it relates to present facts. But even as to them a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends on the truth of what is declared." *Chastleton Corporation v. Rent Commission* (1924), 264 U. S. 543. The same rule would apply to the declarations in the Act that the industry is a prime necessity of life, and monopolistic as to its nature and the price.

The *Wolf* case, *supra*, is considered as a guidepost in the limitation of governmental regulation of an industry. The case involved the validity of action by the Kansas Court of Industrial Relations in prescribing a wage scale in the business of a corporation engaged in slaughtering hogs and cattle and preparing the meat for sale and shipment. The Court held that the provision of the Kansas statute granting such power was unconstitutional as violating the guaranty of liberty found in the Fourteenth Amendment to the United States Constitution. A few extracts from the opinion of Taft, C. J., are significant. After holding that "legislative authority to abridge freedom of contract can be justified only by exceptional circumstances, and the restraint must not be arbitrary or unreasonable," he proceeds to classify businesses said to be clothed with a public interest into three classes: (a) those which are carried on under authority of a public grant or franchise, as common carriers and public utilities; (b) certain exceptional occupations, historically regarded as of public interest, and so regulated, as inns, cabs, and grist mills; and (c) other businesses which have come to have such a peculiar relation to the public that government regulation has been superimposed upon them—where the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to regulation to the extent of that interest. *Munn v. Illinois* (1876), 94 U. S. 113. An older classification, stressing the legal or virtual monopoly, is found in *State v. Kinloch Telephone Co.* (1902), 93 Mo. A. 349, 67 S. W. 684. The Court further states "whether the public has become so peculiarly dependent on a particular business that the owner, by engaging therein, subjects himself to intimate public regulation, must be determined from the facts of each case. The

option to deal or abstain from dealing usually distinguishes private from quasi-public occupations."

The statute in the *Wolff* case, as applied to packing plants, is, for the same reason, invalid as applied to coal mines. *Dorchy v. Kansas* (1924), 264 U. S. 286. A further provision of the Act, regulating the hours of labor in such industries as packing plants, was declared invalid. *Wolff Packing Co. v. Kansas Industrial Court* (1924), 267 U. S. 552. The recent attempt in New York to regulate the price of theatre tickets resulted in a nullification of the law in question. *Tyson v. Banton* (1926), 273 U. S. 418. It has also been held that the charges of a labor agency are not a proper subject for statutory regulation. *Ribnick v. McBride* (1928), 277 U. S. 350.

A significant note in these cases would seem to be that the regulation, where it has been favored at all, has been a regulation of a rate or charge for service, as in the cases of carriers, utility companies, and inns. In almost every instance an attempt to regulate the price of a commodity or wages has met with defeat. If that be the test the Arkansas Act in question seems invalid, although it is not always easy to distinguish between a commodity and a service. It has been held that an attempt to regulate the prices of oil and gas is distinctly beyond the power of the legislature. *Williams v. Standard Oil Co.* (1929), 278 U. S. 235. To again quote the *Wolff* case, "It has never been supposed since the adoption of the Constitution that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state legislation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but nowadays one does not devote one's property to public use, or clothe it with a public interest, merely by making commodities for, and selling them to, the public, in the common callings." The Act in question would seem to attempt that.

It must be conceded that the rule seems to have been relaxed in cases of actual emergencies of a serious nature. Temporary laws regulating rentals in cities have been upheld, when passed to relieve the housing conditions occasioned by concentration in cities during a war period. *Chastleton Corporation v. Rent Commission* (1924), 264 U. S. 543; *Brown Holding Co. v. Feldman* (1920), 256 U. S. 170; *Levy Leasing Co. v. Stern* (1922), 258 U. S. 242. The same principle has been applied to the temporary regulation of wages of railway labor to avert a threatened strike of national character and the resulting industrial paralysis. *Wilson v. New* (1917), 243 U. S. 332. But the general declaration of emergency in sec. 24 of the Arkansas Act seems rather to apply to the necessity for the Act to become effective immediately on passage rather than to any dire necessity or emergency requiring such a regulation of the industry as here sought. Even if construed as declaring an emergency, the declaration would by

no means be conclusive. Nor would the declaration that the industry is monopolistic in its nature.

It would seem then that the Act in question must fail to meet the test of constitutionality, if its validity is contested. But that observation is by no means conclusive. It would seem that the same bases upon which certain industries were declared clothed with a public interest, by judicial interpretation or legislative enactment, may, with changing conditions and increasing public dependence, be held to exist in the industry here declared subject to regulation. If that view be accepted it is easily conceivable that the Act providing for regulation of the ice industry in a southern state is valid.

C. V. E., '31.