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Constitutional Law—Regulation of the Ice Industry in Arkansas

(N. Y. 1833) 6 Wend. 327, it was held in an action of debt that a state court cannot claim jurisdiction of civil suits against foreign consuls, as the judicial power of the United States extends to all cases affecting ambassadors and other public ministers and consuls. In 1915 the New York Supreme Court held that it had no jurisdiction over a wife's action for separation from her husband, who was consul for the Republic of Peru. *Higginson v. Higginson* (1916) 96 Misc. 457, 158 N. Y. S. 92. This is, of course, squarely contra to the decision in the *Popovici* case.

The decision of the Supreme Court is particularly striking when considered in the light of many state decisions. It was held that the exemption of a foreign consul from suit in state courts cannot be avoided by joining another with him as defendant, and that the consul cannot waive his right of exemption. *Durand v. Halbach* (Pa. 1835) 1 Miles 46. Another case declared that a defect in the state's jurisdiction may be taken advantage of even after defendant has pleaded the general issue. *Davis v. Packard,* above. A later New York case held that it was the duty of the state court to confess want of jurisdiction and declare its former proceedings void when it appeared that a foreign consul is the defendant. *Griffen v. Dominguez* (1853) 9 N. Y. Super. Ct. 656. All that can be said of the principal case is that the Supreme Court refused to hear divorce suits, any statutes concerning consuls to the contrary notwithstanding.

G. E. S., '31.

CONSTITUTIONAL LAW—REGULATION OF THE ICE INDUSTRY IN ARKANSAS.—The Arkansas Supreme Court was called upon to decide the constitutionality of a statute, Ark. Acts 1929, p. 110, which provided for regulation of the ice industry in the state, vesting the power to regulate, supervise, establish and enforce prices and rates, require records and fees, etc., in the State Railroad Commission. The statute was upheld, except for three minor provisions allowing the Commission power to refuse to grant permits to establish new ice businesses in towns where one already existed, or to provide for joint operation of two businesses in the interests of economy. These provisions, said the court, tend to create a monopoly in violation of the state constitution. But the general regulation and rate making power vested in the Commission was sustained. *Bourland Ice Co. v. Franklin Utilities Co.* (1929) 22 S. W. (2d) 993. The statute in question was discussed in the light of its constitutionality in 15 ST. LOUIS L. REV. 88.

The basis of any decision upholding regulation of rate making in an industry is that such business must be affected with a public interest. *Munn v. Illinois* (1876) 94 U. S. 113. Chief Justice Taft divided businesses so clothed with a public interest as to justify public regulation into three classes: (1) those which are carried on under authority of a public grant or franchise, as common carriers and other public utilities; (2) certain exceptional occupations, historically regarded as of public interest and so regulated, as inns and cabs; and (3) other businesses which have come to have such a peculiar relation to the public that government regulation has been superimposed on them—where the owner, by devoting his business to

public use, in effect grants the public an interest in that use, and subjects himself to regulation to the extent of that interest. *Wolff Packing Co. v. Court of Industrial Relations of Kansas* (1923) 262 U. S. 522.

It is obvious that the ice-making industry must fall in the third class if in any. And the court in the principal case so classifies it. "It is a matter of common knowledge that the use of ice is universal in all the urban communities of this state; that it is both convenient and necessary for the comfort and well-being of a large proportion of our citizens; that the cost of machinery for the manufacture of ice and its installation is beyond the reach of the average citizen." These facts, says the court, make the industry monopolistic in its nature and clothe it with a public interest. Further, reasons the court: "In the states of Missouri and Wisconsin, where it has been held that the ice business is not public in its nature, the climatic conditions are vastly different from those of Arkansas, and the harvesting and storage of ice may be profitably pursued by individuals and the necessity for the manufacture by artificial means does not exist as it does in this state."

Ice cannot, as the court points out, be compared with an ordinary commodity, the sale of which usually has been held not to be a business clothed with a public interest. Thus the sale of oil and gas was held not a service, and hence not within the power of the legislature to regulate. *Williams v. Standard Oil Co.* (1929) 278 U. S. 235. Here the article in question, ice, is a household necessity which must be purchased every day, while ordinary articles may be purchased at any convenient time for future use.

That the ice business is one which is clothed with a public interest has also been held in *City of Denton v. Denton Home Ice Co.* (Tex. 1929) 18 S. W. (2d) 606, and in cases in Arizona and Georgia. Northern states as noted above usually hold contra.

It will be interesting to note what the United States Supreme Court says about the constitutionality of such statutes if this case, or similar cases, are appealed. It is a fair guess that the statute would not be upheld as the ice business is not one dedicated to the use of the public and it involves the sale of a commodity, not service. But this is not conclusive, and an exception might be made in the case of a Southern state. R. W. B., '31.

CRIMINAL LAW—POWER TO INSTRUCT THAT JURY MAY FIND DEFENDANT GUILTY WITHOUT FIXING PUNISHMENT.—In 13 ST. LOUIS L. REV. 25 the power of the Missouri courts under the following statute is commented upon: "Where the jury agree upon a verdict of guilty but fail to agree upon the punishment to be inflicted or do not declare such punishment by their verdict, the court shall assess and declare the punishment and render judgment accordingly. Where the jury find a verdict of guilty and assess a punishment not authorized by law, and in all cases of judgment by confession, the court shall assess and declare the punishment, and render judgment accordingly." Mo. Laws 1925, p. 197. This statute, in slightly varying form, has been on the books almost 100 years. The writer of the article proposed that before the jury retired to consider the case the court should