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NOTES

HAS A MUNICIPAL CORPORATION THE RIGHT TO ESTABLISH PERMANENT COAL AND WOOD YARDS?

It has recently been reported that the City of St. Louis sustained a loss of approximately $4,000.00 in the operation of municipal coal and wood yards during last winter. The experiment is to be tried again this year, although there does not seem to exist any such condition of affairs which caused the inauguration of the practice last winter.

It becomes interesting to inquire whether or not a municipal corporation may be authorized to establish coal and wood yards and thus necessarily employ public moneys in an enterprise which until recently has invariably been considered private in character. There are but three States, at the present writing, whose courts have been called upon to decide the constitutionality of a statute authorizing a municipality to establish and maintain permanent

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coal and wood yards, namely, Massachusetts,[1] Maine[2] and Michigan,[3] although the court in the latter case, as we shall presently point out, was not called upon to decide that point squarely. It intimates pretty strongly, however, that the attempt of the legislature to confer such a power upon a city would be in conflict with the constitutional provision limiting the power of a State to levy taxes for public purposes only.

All the courts are agreed that no objection can be raised against the exercise of this power by a city, on the ground that in exercising it the city competes with its own citizens and taxpayers. The fact that a city engaging in a certain line of activity commercial in its nature, competes with and thereby damages one of its inhabitants in his business does not entitle such person to relief. The city owes him no immunity from competition.

The question, however, upon which the courts are squarely in conflict, is the one which involves the constitutional provision above indicated. In other words, the only opposition which may be offered to a city's attempt to establish coal and wood yards must be based upon the constitutional provision which says that taxes by State and city may be levied for public purposes only. It is upon the question as to what constitutes a public use or purpose that the courts have been unable to agree. The first case arose in Massachusetts.[4] The Legislature of that State, desiring to enact a statute authorizing a city to establish coal and wood yards, asked the Justices of the Supreme Court of that State to certify their opinion on the constitutionality of such a statute. The precise question which the court was called upon to decide was this: Can a municipal corporation be authorized by the Legislatures to establish coal and wod yards, *first,* in case a great many of the inhabitants are in distress and are in need of relief; *second,* in case there is a famine; *third,* in case the establishment of such yards would tend to lower the price of the commodities; *fourth,* in case the need is so great that private enterprises cannot meet it.

The court, in answering these questions, decides that such a statute would be unconstitutional and could not be justified on the first three gounds stated, for the reason, that, in the first case, a condition of that sort could be taken care of under that constitutional provision which enabled the State and city to make

[1] Opinion of Justices, 155 Mars. 598; Opinion of Justices, 182 Mars. 605.
[2] Laughlin v. City, 111 Me. 486.
[3] Baker v. Grand Rapids, 142 Mich. 687.
[4] Opinion of Justices, 155 Mars. 598; Opinion of Justices, 182 Mars. 605.

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provision for its paupers, and in the second case because private property cannot be taken for the use and benefit of a few.

The only case which would justify the city to establish such yards, and the only circumstances under which the city wolud be engaged in a public purpose, would be one in which the demand for coal was so great that private enterprise could not adequately meet the demand. In that case, the municipality would become the agent of the public. Thus, in rejecting the argument that furnishing fuel is a public service, the court says:

> "The business of selling fuel can be conducted easier by individuals in competition with one another. It does not require the exercise of any governmental powers as does the distribution of water, gas and electricity, which involves the use of public streets and the exercise of the right of eminent domain."

A decision directly and squarely in conflict is the case of Laughlin vs. the City of Portland.[5] The precise constitutional question involved in the Massachusetts case was raised in the Maine court. It should be noted that the latter case was an actual controversy, whereas the Massachusetts case was simply an opinion by the justices. The Maine Court disagrees with the Massachusetts Court as to what constitutes a public purpose, in the sense in which the phrase is used in the Constitution, and, arguing from the analogy of a Georgia case,[6] where a city was upheld in its establishment of an ice plant, decides that furnishing heat in winter is a public necessity and service and that a municipality may, therefore, engage in that sort of an enterprise. The theory of the court seems to be that the constitutional provision "taxes may be collected for public purposes only" should be construed in the light of present circumstances and changes in the conditions of society. What would have been a public use one hundred years ago may not be one today, and vice versa. Under modern conditions the furnishing of heat is a public service within the meaning of the Constitution. While agreeing with the Massachusetts Court that a municipality may not engage in the business of selling commodities which can be supplied by private concerns in competition with one another, this court makes a distinction in the case of selling coal and wood, on the ground that in such case it is not the particular specie that it supplies, but the ultimate thing or commodity, namely, heat, which is necessary for the comfort of its citizens. Viewed in that sense, the coal and wood yards are just

[5] Laughlin v. City of Portland, 111 Me. 486.
[6] Holton v. Camilla, 134 Ga. 560.

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as much public utilities as electric light and water plants. As the court says:

> "If, then, science had advanced so far that the heating as well as the lighting of houses by electricity were now a practicable method, there would seem to be no doubt that this also would fall within the realm of public purposes. The heat would be conducted by wires, etc., to the homes of the inhabitants."

In the opinion of the court, as will be seen, it makes no difference whether the fuel is burned at a central power house and then transmitted through pipes or wires to the residences of the citizens, or whether the coal is hauled over the highways of the municipality to the homes of the citizens.

This decision was adopted by the court in the latter case,[7] which was taken up to the United States Supreme Court, on the ground that the statute allowing the municipality to use the money collected from taxes in maintaining coal and wood yards violated the "due process" clause of the Federal Constitution.[8] Without going into much detail, the United States Supreme Court decides that since it is an established rule of conduct of that tribunal to respect the decisions of the Supreme Courts of the various States upon a question purely local in nature, it would not interfere, unless it was clearly established that some constitutional right of the complainant was being violated. The violation of that right would have to appear clearly and beyond a reasonable doubt. The court, however, was not prepared to say that the Maine court's decision to the effect that the establishment of a municipal fuel yard was a public utility in that State, in the sense that taxes might be used in establishing and maintaining it, was such a clear misconstruction and violation of the constitutional right of the complainant as to justify the interference of the Supreme Court.

While, then, it is true that the United States Supreme Court does not directly decide that coal and fuel yards are a public utility, it may safely be said that the decision throws a great deal of weight in favor of the Maine case which hitherto stood practically alone on this proposition.

In the Michigan case[9] above referred to, the court was not called upon to decide directly as to whether or not a municipality would have a right to establish coal and wood yards, the decision

[7] Jones v. Portland, 113 Me. 123.
[8] Jones v. Portland, 245 U. S. 217.
[9] Baker v. Grand Rapids, 142 Mich. 687.

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of that case being based on the ground that complainant had entered into a conspiracy with other men in a matter affecting the case and could not come into court and ask the relief of equity. It must be stated, however, that the dicta of that case favors strongly the Massachusetts doctrine.

Having presented an outline of the cases in which the precise powr of a municipal corporation was involved, and having briefly pointed out the particular ground of decision and the difference of opinion on the question of whether or not the maintenance and operation of municipal coal and wood yards can be considered a public enterprise, let us examine the doctrine laid down by the Maine court in the light of constitutional provisions, as they have been interpreted by the courts, and in the light of our present form of government, having regard to the modes of action and thought on political questions prevailing at the time the Constitutions of the several States were adopted, and paying particular attention to the intention of the framers of the Constitutions. Regarded in that light, the question is not whether the establishing of coal and wood yards by a municipality will tend to promote and advance the economic welfare of the community, nor whether it will bring comfort and convenience to a great many inhabitants and reduce for them the price of the commodity. As said by Judge Cooley,[10] "We perceive, therefore, that the term, 'public purpose,' as employed to denote the objects for which taxes may be levied has no relation to the urgency of the public need or to the EXTENT OF PUBLIC BENEFIT. It is, on the other hand, merely a term of classification, to distinguish the object for which, according to settled usage, the Government is to provide from those which, by like usage, are left to private inclination, interest. or liberality."

No matter how laudable and charitable the purposes may be, and even conceding that the benefits to be derived will be extensive, we are unable to see how the maintenance and operation of fuel yards can reasonably be brought within the above definition of a "public purpose." On the other hand, it clearly seems to be excluded from that kind or class of enterprises. It cannot be said that, at the time the Constitutions were adopted the coal and wood business was looked upon as anything but private in character. Nor has custom or usage changed our conception as to what constitutes a "public enterprise" in the Constitutional sense and mean-

[10] People ex rel Detroit & H. R. Co. v. Salem, 20 Mich. 452.

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ing of the phrase, so as to enable the Legislature to authorize a municipality to employ public moneys to operate and maintain it, even though we may differ as to what functions and purposes a municipal corporation should perform.

Practically all cases in which a municipality was said to be engaged in a public enterprise within the meaning of the State Constitutions were those in which the exercise of sovereign or governmental power was an absolute and necessary part of the enterprise, i. e., those enterprises which required the use of the streets, avenues, or highways of a city, and the successful operation of the business made it necessary for a private person to first obtain a concession from the city to perform that function. In other words, an individual could not conduct or engage in the business UNLESS HE FIRST OBTAIN PERMISSION FROM THE CITY TO DO THAT WHICH IT ALONE COULD DO. This, we submit, should be the deciding factor rather than necessity or the extent of public benefit.

While the court in the Maine case does not dispute this contention outright, it attempts to justify its position on the ground that no difference exists in the case of a municipality furnishing heat and that of furnishing water, gas, or electric light. As stated above, it makes no difference if the commodity is supplied through pipes or wires or is hauled over the highways in wagons. While it may, perhaps, come about that heat for our residences and apartments will in the distant future be transmitted through pipes and wires from a central power house, the fact remains that, at the present time, no such fact or condition exists, so that in maintaining a coal and wood yard a municipality is not exercising any function or power which any individual may not exercise WITHOUT BEING FIRST REQUIRED TO OBTAIN FROM THE CITY A GRANT OR SURRENDER OF A PORTION OF THE SOVEREIGN POWER VESTED IN THE MUNICIPALITY.

The analogy, therefore, that the court attempts to draw between the two classes of cases is clearly untenable, because, in spite of imagination, the very element which renders the one a case in which the municipality is engaged in a public enterprise is lacking in the other. It is as unreasonable and unsound as the attempted analogy of the Georgia Supreme Court in the ice plant cases, which seems to furnish weighty authority for the Maine court. It was said by the Georgia court[11] that if it is a public

[11] Holton v. Camilla, 134 Ga. 560.

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enterprise for a city to supply water, it was also a public enterprise to supply its citizens with frozen water, i. e., ice, and that, therefore, the city could use taxes to establish and maintain an ice and cold storage plant. In speaking of this analogy the Wisconsin Supreme Court says:[12] "Things which are similar physically or chemically may be dissimilar legally. The difference between the collection and distribution of water by means of pipes laid in the streets and the manufacture, sale and distribution of ice is that the first is in the nature of a monopoly, while the second is a competitive business enterprise. The first does not depend so largely upon skill in management."

"There would be analogy," says the Supreme Court of Louisiana,[13] in speaking of the Georgia cases, "if the city were to abandon the sovereign mode of water distribution by means of underground conduits through the public streets and to go peddling the liquid * * * as has been done with ice. There would then be complete analogy; but EVERYBODY WOULD THEN SEE THAT THE TOWN WAS NO LONGER DISCHARGING A SOVEREIGN FUNCTION, BUT CARRYING ON A PRIVATE ENTERPRISE.

This sharp and pointed criticism applies with equal force to the analogy that the Maine court attempts to draw between the case of supplying water, light, or, if it were possible, heat through wires strung over the public highways, and the case of maintaining coal yards. Indeed, the language quoted above shows not only that there is no possible analogy between the two classes of cases, but points out very clearly and, in unmistakable terms, the circumstance or condition which renders a certain enterprise one in which the municipal corporation may properly engage. Take away the condition which necessitates the exercise of a power that a private citizen may not perform without obtaining permission from the city and the enterprise becomes at once a horse of a different color.

Furthermore, if the selling of coal and wood ought not to be considered a sale of the particular specie or commodity, but the supplying of the ultimate commodity—HEAT—we are unable to perceive why the selling of bread, meat, groceries, clothing, etc., should not be considered a public enterprise for the same reasons that the first case is by the Maine court said to be a public enterprise. It is very easy to say that in all these cases it is not the

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[12] State ex rel Mueller v. Thompson, 149 Wis. 488.
[13] Union Ice & Coal Co. v. Ruston, 135 La. 898.

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particular specie, i. e., bread, meat, etc., that is supplied—but the ultimate thing or necessity of life—i. e., sustenance, protection against hunger, or shelter from the elements.

It may be well enough socially or economically to establish a form of government or a system under which all necessities of life should be furnished by the community. It may be highly desirable to establish a system under which private enterprise and management of those classes of business that supply the community with its daily wants shall be supplanted by governmental or municipal ownership. Such, however, is not the system or form of government at the present time, and under our present Constitutions such things are impossible. It cannot be said with any reason that our Constitutions, expressive of our conceptions of government and the functions thereof, contemplate, or that their framers contemplated, that a city be allowed to engage in a business which can be and is carried on by private concerns, and in the management and operation of which no sovereign or governmental power is required to be exercised. Surely, it will not be denied that in addition to the limitation contained in the Federal and State Constitutions there are those limitations upon the powers of the Legislature which inhere in the very nature of our form of government.

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