Indiana Law Journal

Volume 8 | Issue 4 Article 8

1-1933

Public Callings-When is a Business a Public Calling-Regulation to Which They May Be Subjected

PUBLIC CALLINGS—WHEN IS A BUSINESS A PUBLIC CALLING—REGULATION TO WHICH THEY MAY BE SUBJECTED—The Plaintiff, a duly licensed manufacturer and distributor of ice, brought this suit to enjoin the defendant from manufacturing and distributing that product without procuring a license as required by statute.[1] This statute made it a misdemeanor to manufacture, sell or distribute ice except when one had been granted a license to do so by the Corporation Commission. Sec. 3 of the act provided that a hearing should be held before issuing a license and that the commission might refuse to grant it unless necessity for the business were

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[14] *Wolff Packing Co. v. Court of Industrial Relations* (1923), 262 U. S. 522, 43 Sup. Ct. 630.

[15] *Munn v. Illinois* (1876), 94 U. S. 113, 24 L. Ed. 77; *People v. Budd* (1892), 117 N. Y. 1, 22 N. E. 670; *German Alliance Ins. Co. v. Lewis* (1914), 233 U. S. 389, 34 Sup. Ct. 612; *National Union Fire Ins. Co. v. Wamberg* (1922), 260 U. S. 71; *In re Opinion of Justice* (1903), 55 Atl. 828.

[16] *Bunting v. Oregon* (1917), 243 U. S. 426, 37 Sup. Ct. 435; *Holder v. Hardy* (1898), 169 U. S. 366, 18 Sup. Ct. 383; *Knoxville Loan Co. v. Harbison* (1901), 183 U. S. 13, 22 Sup. Ct. 1; *Mutual Loan Co. v. Martell* (1911), 222 U. S. 225, 32 Sup. Ct. 74; *Atkins v. Kansas* (1903), 191 U. S. 207, 24 Sup. Ct. 124; *McLean v. Arkansas* (1909), 211 U. S. 539, 29 Sup. Ct. 206; *Schmidinger v. City of Chicago* (1913), 226 U. S. 578.

[1] Oklahoma Session Laws of 1925, Chap. 147.

shown—that is, unless the facilities then being furnished by a person, firm, or corporation already licensed were not sufficient to supply the needs of the public in the community in which the applicant proposed to locate. The decree in the court of original jurisdiction was for the defendant upon the theory that the statute violated the Fourteenth Amendment to the Constitution of the United States. This is an appeal by the plaintiff from an order of the United States Circuit Court of Appeals affirming the decree of the lower court. *Held,* decree affirmed.[2]

The state surely does not have the power to refuse to permit a citizen to engage in any lawful private business without showing a public necessity for him to do so unless the business is a public calling—that is, "affected with a public interest." This fact was assumed in both the majority and the dissenting opinions. Perhaps no better statement of the law upon this subject can be found than that in the case of *The People v. Budd.*[3] There the court said that the power to regulate depends upon the police power, and that while this power does not ordinarily extend to a private business, it will when such a business becomes so affected with a public interest that its regulation is necessary for the public welfare.

How is it to be determined whether or not a business is a public calling? For many years there was such confusion in the cases upon this point that it would have been impossible to state a definite rule. Some writers are of the opinion that originally all businesses were in this class.[4] Some of the early cases indicate that this theory is not without foundation.[5] But whatever was the law at that time, there can be no question but that only some businesses are public callings today. To determine which fall within this class the courts have, from time to time, applied a number of tests. It has been held that any business which is a virtual monopoly—that is, has a strong tendency toward monopolization—is a public calling.[7] It is evident that this test by itself is not conclusive, as many businesses, such as groceries and meat markets, which unquestionably render an indispensable service are not public callings. Another test which has been suggested is legislative declaration—that is, the courts have said that a legislature can make any business a public calling by merely declaring it to be one.[8] This has, of course, been repudiated.[9] Indeed, the courts have enforced public calling duties in business in regard to which no legislation existed.[10] Another suggested test is historical survival.[11] If all businesses

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[2] *New State Ice Co. v. Liebmann,* Supreme Court of the United States, March 21, 1932, 52 Sup. Ct. 371.

[3] 117 N. Y. 1, 22 N. E. 670 (1889).

[4] Adler, "Business Jurisprudence," 28 Harv. L. R. 135 (1915).

[5] Year Book 19, Henry VI 49, pl. 5 (1441); Keilw. 50, pl. 4 (1450); Year Book 10 Henry VIII, pl. 14 (1494).

[6] *Allnut v. Ingles* (1810), 12 East. 527; *Munn v. Illinois* (1876), 94 U. S. 113.

[7] *German Alliance Ins. Co. v. Lewis* (1914), 233 U. S. 389, 34 Sup. Ct. 612.

[8] *Brass v. North Dakota ex rel. Stoeser* (1894), 153 U. S. 391, 14 Sup. Ct. 857.

[9] *Frost v. Ry. Comm. of Calif.* (1926), 271 U. S. 583, 46 Sup. Ct. 605; *Wolff Packing Co. v. Ct. of Industrial Relations of Kansas* (1923), 262 U. S. 522, 43 Sup. Ct. 630.

[10] *State ex rel. Mason v. Consumers' Power Co.* (1912), 119 Minn. 225, 137 N. W. 1104.

[11] *Wolff Packing Co. v. Ct. of Industrial Rel. of Kans.* (1923), 262 U. S. 522, 43 Sup. Ct. 630.

were formerly public callings, it is obvious that such a test has little value. Some courts have said that a business is a public calling when the grant of a public privilege is necessary to its operation.[12] This test can not be conclusive, for many businesses have been held to be public callings when there was no such grant of a privilege.[13] It seems, however, that at last the United States Supreme Court has adopted a definite test. This test is virtual monopoly plus indispensable service.[14] This was the test which was applied in the principal case. While the grant of a public privilege was mentioned in the majority opinion, it is obvious that virtual monopoly plus indispensable service was the test actually used both there and in the dissenting opinion.

Is the business of manufacturing, selling, and distributing ice a virtual monopoly and is the service rendered indispensable? Apparently in the majority opinion, and certainly in the dissenting one, the court admitted that ice is indispensable. The majority of the court said, however, that while the business may have once been of a monopolistic character it is no longer possible for it to be oppressively monopolized because ice can now be manufactured in the home with either gas or electricity at a moderate cost. The dissenting justices, on the other hand, expressed their opinion to be that home refrigeration methods are still in their infancy, and that it is not only possible for those in the business of manufacturing and distributing ice to form dangerous and injurious virtual monopolies, but that experience has shown that they have a strong tendency to do so. It seems that this question is essentially one of fact and that we must accept the opinion of the majority of the court as to present nature of the business. The question is, at any rate, a close one, and it would be impossible to say arbitrarily that the court reached either the right or wrong conclusion.

Another, and perhaps more interesting, question which this case presents is whether or not the control provided for by the statute was constitutional even if we assume that the business involved is a public calling. Public callings are under a duty to serve everyone in the class they undertake to serve[15] with reasonably adequate facilities[16] and for a reasonable compensation.[17] They may be subjected to whatever regulation is necessary in the enforcement of such obligations, but can not be made to submit to unreasonable regulations.[18] Is the control provided by the statute necessary and reasonable? The majority of the court answers this in the negative, and points out that the effect of the enactment would be to foster (rather than to discourage) monopoly. This is obviously true, and is ad-

[12] *Haugen v. Albina Water Co.* (1891), 21 Ore. 411, 28 Pac. 244; *Wolff Packing Co. v. Ct. of Indus. Rel. of Kans.* (1923), 262 U. S. 522, 43 Sup. Ct. 630.

[13] *Munn v. Illinois* (1876), 94 U. S. 113; *People v. Budd* (1889), 117 N. Y. 1, 22 N. E. 670; *German Alliance Ins. Co. v. Lewis* (1914), 233 U. S. 389, 34 Sup. Ct. 612.

[14] *Williams v. The Standard Oil Co.* (1928), 278 U. S. 235, 49 Sup. Ct. 115; *Block v. Hirsch* (1921), 256 U. S. 135, 41 Sup. Ct. 458; *Tagg Bros. v. The United States* (1929), 280 U. S. 420, 50 Sup. Ct. 220.

[15] *Keilw*, 50 Pl. 4 (1450); *State ex rel. Gwynn v. Telephone Co.* (1901), 61 S. C. 83, 39 S. E. 257.

[16] *Baker v. Boston & M. R. Co.* (1906), 74 N. H. 100, 65 Atl. 386; *Camden, etc., R. Co. v. Hoosey* (1882), 99 Pa. St. 497.

[17] *Allnut v. Inglis* (1810), 12 East 527, 104 Engl. Repr. 206; *Munn v. Illinois* (1876), 94 U. S. 113.

[18] *Wilson v. New* (1917), 243 U. S. 332, 37 Sup. Ct. 298.

mitted in the dissenting opinion. The dissenting justices, however, say that sometimes monopolization is desirable and that it may both improve the service rendered and reduce the cost. They point out the well established law of economics that mass production cheapens the cost of manufacture and improves the methods of distribution. The point made in the dissenting opinion is clearly well taken. There is no incongruity in saying that a business may be controlled because of its monopolistic tendency and then saying that the control may take the form of further monopolization. The court merely looks into the monopolistic character of the business to determine whether or not it falls within that class which is so "affected with the public interest" that its regulation is necessary for the public welfare. If the business is of such a nature, there is no reason why legislation can not be valid which will tend to further monopolize it, if the public interest can best be served by so doing. It seems, then, that we must conclude that such regulation may be within the limits of the police power. W. H. H.