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Constitutional Law-Regulation of Private Businesses

CONSTITUTIONAL LAW—REGULATION OF PRIVATE BUSINESSES—The plaintiffs, private contract carriers, brought this suit against several state and county officials to enjoin the enforcement of a Texas statute which provided for the regulation of contract carriers by motor vehicle.[1] This act gave the Railroad Commission authority to regulate such carriers,[2] and among other things, gave it the power to fix minimum rates[3] and to require a permit,[4] the granting of which was to be conditioned upon proof that the operation of the applicant carrier would not interfere with the efficient service of authorized common carriers. The plaintiffs contend that "the result of this statute is to compel them to dedicate their property to the quasi public use of public transportation before they can operate their motors over the highways, and thus to take their property for public use without adequate compensation, and to deprive them of their property without due process of law." From a decree dismissing the bill, plaintiffs appeal. *Held*, affirmed.[5]

In several cases the Supreme Court has held that rate regulation is unconstitutional outside of public callings—that is, "businesses affected

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[12] *St. Bank of Halsted v. Bilstad*, 152 Iowa 433, 136 N. W. 204.

[13] *McCormick v. Gem State Oil, etc., Co.*, 38 Ida. 470, 222 Pac. 286, 34 A. L. R. 867, noted by Aigler in 22 Mich. L. Rev. 710.

[14] *Ernst v. Steckman*, 74 Pa. St. 13 (1873).

[1] Acts Tex., 1931, c. 277; Vernon's Ann. Civ. St. Tex., Art. 911(b).

[2] Sec. 4.

[3] Sec. 4 and Sec. 6(aa).

[4] Sec. 6(a).

[5] *Stephenson v. Binford*, United States Supreme Court, Dec. 5, 1932, 53 S. Ct. 181.

with a public interest."[6] The court has also held (or rather assumed) that it is unconstitutional to require a certificate of convenience and necessity as a condition precedent to carrying on a private business.[7] While the permit required by the statute under consideration is not exactly a certificate of convenience and necessity, its effect is substantially the same, and the same rule should apply. Are these cases overruled? Is it now the view of the Supreme Court that these regulations, heretofore only constitutional in the field of public callings, may be imposed upon private businesses?

In upholding the statute the court purported to go upon the theory that the regulations imposed were mere police regulations to preserve the highways and make them safe for the public. But, while they might indirectly result in some benefit of this kind, such regulations as these can hardly be classified as highway measures, for they are primarily business regulations.[8] The statute itself sets out as one of the legislature's purposes in enacting it the prevention of rate discrimination.[9] Regardless of this, it seems that if the scope of the legislative police power is great enough to allow the regulation of private businesses in order to protect the highways, it would also be great enough to cover their regulations for the purposes of improving the transportation system and protecting common carriers. It seems, then, that this case cannot be distinguished upon its facts from those cited above.

Just what, then, did this case hold? It did not hold that private carriers are common carriers, for there was an attempt to distinguish the cases of *Frost v. The Railroad Commission*,[10] and *Michigan Public Utilities Commission v. Duke*[11] upon the grounds that the statutes there involved did make private carriers common carriers. The court did not hold that private carriers are not common carriers but are nevertheless public callings, for it expressly said that it was not necessary to determine whether or not they were in a business affected with a public interest. The only alternative left is that the regulations here involved may be imposed upon a private business. That, in the last analysis, is the holding of this case.

Heretofore the court has refused to sustain any statute fixing rates or requiring a certificate of convenience and necessity for private businesses upon the theory that such regulation was not within the scope of the state's police power and was, therefore, a deprivation of property without due process of law.[12] In other words, it has been held that unless a business is one "affected with a public interest" the social interests in favor of such regulation could not outweigh those in favor of the personal liberties protected. In recent years the Supreme Court has adopted virtual monopoly plus indispensable service as the test for determining when a business is a public calling.[13] Until the principal case was decided, then, the Court was

[6] *Tyson v. Benton* (1926), 273 U. S. 418, 47 S. Ct. 426; *Ribneck v. McBride* (1927), 277 U. S. 350, 48 S. Ct. 545; *Williams v. The Standard Oil Co.* (1928), 278 U. S. 235, 49 S. Ct. 115.

[7] See *New State Ice Co. v. Liebmann* (1932), 285 U. S. 262, 52 S. Ct. 371.

[8] See note in 31 Mich. L. Rev. 395.

[9] Sec. 22(b).

[10] (1926), 271 U. S. 583, 46 S. Ct. 605.

[11] (1925), 266 U. S. 570, 45 S. Ct. 191.

[12] See note 6 and 7, *supra*.

[13] *Block v. Hirsch* (1921), 256 U. S. 135, 41 S. Ct. 458; *Tagg Bros. v. The United States* (1929), 280 U. S. 420, 50 S. Ct. 220; *Williams v. Standard Oil Co., supra*.

of the opinion that there could never be social interests enough in favor of applying this sort of regulation to any business, except one in which there was virtual monopoly plus indispensable service, to outweigh the opposing social interests.

The principal case is one of the most revolutionary ones decided by the Supreme Court for years. It is difficult to tell just where it will lead. If the control applied here can be imposed upon a private business under the ordinary rules of police power, there is no logical reason why other burdens, so far only borne by public callings, cannot likewise be imposed upon private enterprises. Thus they might be made to serve everyone, without discrimination, and to provide reasonably adequate facilities wherever the court is able to find sufficient social interests to justify the burden under the ordinary rules of police power.

This decision is of particular interest at this time. It dispels much doubt as to the constitutionality of the Domestic Allotment Bill and other legislation of a similar nature. It neems altogether possible that the court may have been consciously paving the way for holding such plans constitutional.

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