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Constitutional Law--Reasonable Exercise of Police Power

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stitutional. Congress might pass an act making all conditions in restraint of interstate commerce invalid; the result would be that the offeree might accept the offer and disregard the conditions. A state could not refuse to enforce his rights under the contract, not because it must enforce his inchoate right to do interstate business, but because his contract rights are property within the 14th amendment, and the supposed conditions do not limit them, being invalid under the federal legislation. If the state makes the offer with conditions attached in restraint of interstate commerce the conditions are void, being beyond its power to make; if an individual is the offeror, the conditions might be void under appropriate federal legislation, not because of a lack of power to make that kind of an offer, but because the conditions would be illegal.

—Bernard C. Gavit.

Constitutional Law—Reasonable Exercise of the Police Power—In any application of the constitutional requirement that a taking of private property by the state be a reasonable taking we are necessarily dealing in mental concepts. As to whether or not given action is reasonable depends ultimately upon the judges' ideas of reasonableness which in turn depend upon the experience, learning and philosophy of the judges themselves. In the recent ease of Louis K. Liggett Co. v. Baldridge,1 the majority of the Supreme Court of the United States say: "Mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health,—the act creates an unreasonable and unnecessary restriction upon private business." The minority say: "A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it.—The divorce between the power of control and knowledge is an evil.—It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less."

Other language of the opinions would indicate that perhaps the difference in result may be that the majority requires reasonable evidence to support the reasonableness of the regulation: the minority requires only a scintilla of evidence. This would be a departure from the accepted rules that one who attacks an act as unconstitutional has the burden of proof, and that all reasonable presumptions are in favor of the action of the state. But if the point were specifically raised both sides would undoubtedly pay lip-service to these rules. The majority opinion is really upon the theory that acting upon judicial knowledge and the evidence in the case there was no evidence to sustain the reasonableness of the legislation.

A regulation of private property must have in truth a reasonable foundation. The rights of private property are protected by the Constitution against every unreasonable taking even although the taking be under the guise of social welfare. Where a private right leaves off and social welfare begins depend in truth on the length and breadth of the so-called private right.


1 73 L. Ed. 45, 49 Sup. Ct. 57 (1928). The facts are stated, post, p. 295.
NOTE AND COMMENT

(Or the other way about—where social welfare leaves off and a private right begins depend in truth on the length and breadth of social welfare.) Rights are intellectual concepts. They exist and are protected by the law only in relation to the rights of others as individuals and society as a whole (the state). They have been conceived by the mind: they must be measured by the mind. So when a judge is measuring a private right, as against a conflicting social right, he must inevitably answer the question, where ought they to stop? The decision is really an expression of the judge's philosophy of life: if it is individualistic he will reach one result: if it is socialistic he may reach the opposite result.

A recent decision by the Supreme Court of Washington is another illustration of the truth of these assertions. In Brown v. City of Seattle it was held that an ordinance which required all butcher shops to close at six o'clock in the evening was unconstitutional, being an unreasonable regulation. The court could find no justification in it. In those fields, however, where we are accustomed to quite a little regulation, an innovation is more readily upheld. For example, the United States District Court for the Southern District of New York recently upheld a statute which provided that no eye-glasses were to be sold except under the supervision of a licensed optometrist.

—Bernard C. Gavit.

JURISDICTION—WRONG SIDE OF THE COURT—In Brakebush v. Assen the complaint sets forth separately 13 alleged causes of suit founded upon the agreed and reasonable value of labor expended by the plaintiff and 12 others, his assignors. The averments of work performed are followed by allegations of liens upon some logs. Defendant demurred on the ground that each cause as alleged did not state a cause of suit. Held, "That portion of section 390, ORIOEN LAWS, which provides 'No cause shall be dismissed for having been brought on the wrong side of the court,' was enacted for the express purpose of saving the necessity previously existing of dismissing a cause of action brought in equity which should have been brought at law, or a suit brought at law where the proper remedy was in equity. When the complaint was before the court upon demurrer it stated a cause of action for work and labor performed; hence the court could not dismiss the cause, although brought in equity. The limit of its jurisdiction was to remand it to the law side of the court."

Equity grew up as a system of jurisprudence and procedure entirely apart from law. The rules determining the court to which resort must be had in a particular situation were not clear and easy of application. Distinctions narrow and refined were drawn by the courts and a suitor might be denied justice on the ground that he had chosen the wrong tribunal. At his peril he had to decide whether to sue at law or equity. Under modern procedure, however, the distinctions have been largely done away with. The New York statute reads: "There is only one form of civil action. The distinction between actions at law and suits in equity, and the form of these actions and suits have been abolished." This provision is enacted in most of the code

2 272 Pac. 517 (1928).
3 D. S. Kresge Co. v. Ottenger, 29 Fed. (2d) 762 (1928).
1 267 Pac. 1035 (Or., 1928).