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Duty of Gas Company to furnish sufficent amount of gas and pressure where there is no such provision in franchise—Beneficiary may sue—Implied contract.

The recent case of *Humphrey v. Central Kentucky Natural Gas Co.,* in which Chief Justice Carroll handed down an opinion on November 30, 1920, decides two questions of considerable interest.

The opinion cannot be held as final, since a petition for re-hearing will probably be filed by the Gas Company.

Humphrey was a florist in Mt. Sterling, Ky., in December, 1917. His establishment was heated by gas, and he alleges that because of the failure of the Company to furnish a sufficient supply thereof, several hundred dollars worth of his plants and flowers were destroyed. He also alleged that the Gas Company knew the nature of his business, what he used gas for, and the quantity of gas and pressure necessary for the purpose, but failed and neglected to furnish the same. The franchise of the Company did not bind it to furnish the city or its inhabitants any fixed quantity of gas or pressure, or provide any liability for a failure to do so, and imposed no duty upon the Company for the privilege granted in the franchise.

The circuit court sustained the demurrer to his petition, but upon appeal, the Court of Appeals reversed the judgment and held:

1—If there had been an express contract between the city and the Company, fixing the quantity and pressure of the gas to be furnished the inhabitants, or a special contract between Humphrey and the Company, Humphreys might recover under such contract.

2—When a public servce corporation which obtains the privilege of using and does use the streets of a city for a public service, beneficial to the inhabitants of the city, and there is no express contract between the city and the corporation defining the duties and obligations of the latter, the law will imply an enforceable contract and impose upon the Company the obligation to render the service assumed to have been in the contemplation of the parties.

As to the first proposition, this is the rule recognized in Kentucky (*Paducah Lumber Co. v. Paducah Water Supply Co.,* 89 Ky.

340). However, a contrary rule is laid down in a great majority of other jurisdictions.

Upon the matter of an implied contract to furnish a fixed amount of gas and pressure, we have been able to find little or no authority. In the case of *Hangen v. Albince Light and Water Co.,* 20 Pac. 244, in commenting upon the duty of the company to supply water to all inhabitants of the city under a franchise in which there was no express stipulation that the company was required to supply water to all, the court said: "As the defendant could not carry on the business of supplying water to all without the franchise, the city must have intended, in granting such franchise, to charge it with the performance of the duty it undertook for the public by the terms of its incorporation, and the defendant, in accepting the benefits of such grant, must have assumed the performance of such duty." This case seems to be authority for the principle that a beneficiary of an express or implied contract, to which he is not a party, may recover on it in an action brought in his own name.

(NOTE—The opinion of the court has not yet been published, but will probably appear in —— Ky. Citation will appear in our next issue.) D. H. Turner.

Railroads—Federal Control—Effect of.

The L. & N. Railway Co. was indicted for a violation of the Kentucky Statutes relating to the maintenance of a waiting room at one of its passenger stations. The railroads at this time were under Federal Control. The Court held that the Federal control act contemplated one control, and that the officers and employees of the company became agents of the Director General. The carrier being an agent of the Government was held not subject to indictment.

Commonwealth v. Louisville & Nashville Railroad Company, 189 Ky. 309 (1920). D. H. Turner.

Trespass of Domestic Fowls—Liability of Owner for.

Adams Brothers were the owners of a poultry and feed barn upon the opposite side of the street from a poultry yard containing from 250 to 400 chickens, which was operated by Mrs. Clark. These chickens crossed into the yard of Adams Brothers and ate a considerable portion of a large quantity of grain stored upon their prop-

erty. The city of Smithland, in which the property is situated, had an ordinance making it a penal offense for the owner of chickens and other fowls to allow them to run at large. It was held that the owner of the chickens was liable both under the Common Law and under this ordinance. As to the Common Law rule which makes the owner of fowls liable to the trespasses committed by them, it was held to be still in force in Kentucky, not having been modified by statute as in the case of the Common Law rule in regard to cattle. The owner is required to confine them to his own premises, and if they run at large, he is responsible for the damage which they do, and the property owner upon whom the trespass is committed is not required to fence his premises against such. However, the person damaged is confined to his civil rights, the court held, and has no right to kill the fowls while trespassing. The court also held the owner of the fowls liable under the ordinance, which made the allowing of the chickens to run at large an unlawful act.

Adams Brothers v. Clark, 189 Ky. 219 (1920).

D. H. Turner.

United States v. One Essex Touring Automobile.

Internal Revenue—Prior tax acts not repealed by the eighteenth amendment or National Prohibition Act.

Proceedings by the United States against one Essex touring automobile, claimed by one Carl Little and another. Action was instituted in the N. D. District Court of Georgia, July 1, 1920. The libel proceeds under Rev. St. 3450, providing for the forfeiture of vehicles used for the removal, deposit, or concealment of any article on which tax is due or unpaid with intent to defraud the United States government of the tax. Under this, the vehicle may be seized and sold, notwithstanding the fact that the person transporting the article was not apprehended. Subsequently the National Prohibition Act was passed. In term, it applies only when "a person is discovered in the act of transporting in violation of the law." The question before the court was, whether the Prohibition Act repealed the revenue act. If so, a vehicle taken without the person transporting in violation of the law could not be sold by court or held against the will of the owner. The Prohibition Act does not prohibit the manufacture, transportation, and sale of intoxicating

liquors for medical, sacramental, scientific and some commercial purposes; that distilled liquors, whether produced under a permit for lawful purposes or in violation of the law, are still "a commodity in respect whereof a tax is imposed". It was not the intention of the eighteenth amendment to do away with this tax. The Revenue Act was repealed only to the extent of inconsistency with the Prohibition Act. The taxation of illegal acts does not relieve the criminal responsibility. The tax operates as an additional penalty and tends rather to the enforcement than to the defeat of the prohibition scheme. In no way is this provision inconsistent with the Prohibition Act, therefore it has never been repealed. Under the Revenue Act, the person transporting the liquor and the owner of the vehicle need not be the same person. An automobile transporting untaxed intoxicating liquors without permit may transgress both statutes at the same time, but that results only in giving the United States an election as to which cause of forfeiture it will pursue. George F. Gallup.

Operation of Automobiles—Right of city to pass ordinance restricting operation of same.

The city council of Harlan passed an ordinance confining the operation of all motor vehicles on one of its narrow streets, for a certain distance, to travel in one direction. Appellee violated the ordinance. As a defense, he set up that the ordinance was unconstitutional, because of its applicability to motor vehicles alone, making it discriminatory and oppressive as to that class of vehicles.

Held: That the right of the State or municipality to regulate the operation of motor vehicles may be said to be universally recognized, and that this must be done by putting them in a class in which other vehicles are not included on account of the new elements of danger, due to their structure, mechanism and use; that a city of the fourth class may pass such restrictive ordinance by virtue of Section 3562 Ky. Statutes, giving the "city council exclusive control over the streets, roadways," etc.; that the fact that such ordinance will inconvenience a few individuals does not make it invalid for the good of the public will be regarded as of paramount consideration.

The court cited numerous authorities in point from other jurisdictions and concluded by saying: "The authorities we have cited and commented on seem to us to be conclusive of the question under consideration, and while we do not hold that motor vehicles may be wholly excluded from the use of any road used by other vehicles, we are not inclined to disagree with the conclusions they otherwise express. Manifestly there is nothing unreasonable or oppressive in an ordinance which confines the use of a single dangerous street by such vehicles to travel one way."

Commonwealth v. Nolan 189 Ky. 34. Berl Boyd.

School Taxes—Act of General Assembly of 1917 *exempting property from local taxation not repealed by Act of* 1920 *regulating the schools of the State.*

The fiscal court of Graves County, acting under an act of the legislature passed in 1920, regulating the schools of the State, providing among other things that the fiscal courts were to levy school taxes upon all taxable property subject to State taxation, directed the county clerk to prepare appellant's tax list. The tax was levied upon his farming implements and intangible property. Appellant sued for an injunction restraining appellee, the sheriff of the county, from collecting the taxes. Under the general law relating to taxation passed by the legislature in 1917 certain property, including farm machinery and intangible property, were to be subject to State taxation only.

Held: That the act of 1920 did not repeal the act of 1917 or subject to local taxation the classes of property exempted from such taxation; that the rule of law is well settled that if by fair and reasonable interpretation, acts which are seemingly incompatible may be upheld, the later act will not be regarded as repealing the other by construction or intendment.

Thomas v. McCain, Sheriff et al, 189 Ky. 373.

Berl Boyd.

Mines and Minerals—Deeds—Grant of Mineral Rights—Extrinsic Evidence—When Admissable.

The case of *Hudson & Collins v. McGuire,* 188 Ky. 712 holds that a deed conveying "all the minerals, except stone coal, with necessary right of ways and privileges for prospecting, mining and

smelting'' does not clearly grant oil or gas rights, but it is recognized in the case that such rights would pass under a deed without limiting or qualifying words. The point in the case is that the qualifying words, when explained by extrinsic evidence, indicate that there was no intention on the part of the grantor to convey gas and oil rights. Oil and gas are not mined and smelted. The use of those terms indicates that other mineral rights than those in oil and gas were intended to be granted.

The extrinsic evidence is admitted on the theory that the limiting and qualifying words used in the lease render the extent of the grant doubtful, and evidence to show the situation of the parties, the circumstances surrounding the execution of the deed and the intention of the parties is proper.

The tendency of modern decisions is to treat all uncertainties in a conveyance as ambiguities, subject to be cleared up by resort to the intention of the parties, as gathered from the instrument itself, the circumstances attending and leading up to the execution, and the subject matter and the situation of the parties at the time of is execution.

C. O. Burton.