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George W. Goble

University of Kentucky

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ARE PROPERTY INTERESTS SECURE?
A Consideration of the Recent Rent Decisions of the United States Supreme Court.*

GEO. W. GOBLE
Professor of Law, University of Kentucky

Property won and lost at the hands of the United States Supreme Court in its recent so called "rent decisions." In holding that the renting of houses for dwelling purposes is a business sufficiently affected with a public interest to enable the legislature to regulate the rate, the tenure and the conditions of renting, under the police power of the state, the Supreme Court has given the interests of property a staggering blow, in setting a precedent for extreme curtailment of property rights, but it has at the same time upheld and protected the interests of property by administering what is believed to be an effective antidote to property's most persistent enemy, socialism.

These far reaching decisions deserve more than passing consideration on the part of the layman. What is the doctrine announced by the Supreme Court in these cases? What will be its social and political effects? Is the doctrine radical and without precedent to support it, or is it a natural outgrowth of the past? These are pertinent enquiries to the attempted answers of which this article is devoted.

It has been the law for generations that certain kinds of businesses are subject to state regulation. The innkeeper and the common carrier are familiar examples. The public has an interest in the charges made and the character of service rendered by such businesses, and consequently the state can control them to a greater extent than it can control a strictly private business, in which the public has no particular interest. True, the Constitution of the United States says property shall not be taken without due process of law, and the obligation of contract shall not be impaired, and because of

*This article deals with the political, rather than the technical legal aspects of the questions involved.

1Marcus Brown Holding Co. v. Marcus Fielding and Block v. Hirsh decided April 18, 1921, but not yet officially reported.
such inhibitions a legislature cannot ordinarily dictate the price for which property shall be sold or leased, nor under what terms and conditions service shall be rendered, for it is recognized property has no existence except in the uses to which it is put and the profits which may be derived from it. But it has been recognized universally, that when the public health, morals or general welfare demands it, the constitutional provisions designed to protect property rights do not stand in the way of the legislature's providing the required legislation for regulation. The courts have announced the rule to be that when a business becomes affected with a public interest it becomes subject to legislative control in respect to the rate charged, and the character of the service rendered, and the "due process" clause of the Constitution is available to, and a protection of the business only to the extent of preventing an unreasonably low or confiscatory rate. Under this rule, railroad, street car, telephone, telegraph, electric light, water and gas companies are recognized as businesses affected with a public interest, and therefore subject to state control.

The law was thus when in 1871 the legislature of the State of Illinois enacted a statute regulating the charges for the storage of grain in elevators and warehouses in Chicago. The law was attacked for being in conflict with the "due process" clause of the Constitution. It was contended that since the law deprived elevator proprietors of the right to make any contract that might be agreed to by their customers, they were therefore being deprived of the use and profit which could be derived from the property, and that was the same thing as being deprived of the property itself.

But the Supreme Court in the historic case of Munn v. Illinois, speaking through Chief Justice Waite, said that because of the limitation of building sites, the grain elevators and warehouses of Chicago, although owned and operated by a number of different people, constituted a "virtual monopoly" in whose power the people of the state were practically helpless with respect to rates charged, and character of service rendered. The court's conclusion was that when a business of such vital importance to the people of the state becomes a "virtual monopoly," it becomes clothed with a public interest, and the "due process" clause of the Constitution does not block the way

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2 91 U. S. 113.
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of reasonable regulation by the state. However, two justices vigorously dissented from this line of reasoning and thought the law was unconstitutional.

Up to the time of this decision it was generally believed that a business was subject to state control and regulation only when it had received a franchise, tax exemption privilege, power of eminent domain, or some other special favor from the state. In consideration of the special favors granted, it was said the state obtained the right to regulate. This was the contention of the dissenting justices, but it is palpably unsound, because it would be unconstitutional for the state to grant special favors to a business except on the ground that it first be affected with a public interest, and if it is affected with a public interest it is subject to control whether or not it is the beneficiary of any special favors at the hands of the state. The elevators of Chicago were not beneficiaries of any such favors. Nevertheless the court said they could be regulated.

This decision was important because it demolished this old theory, and because it removed the cloak of protection of the “due process” clause from a profitable class of business, which theretofore had been regarded as strictly private, and therefore amply protected from interference at the hands of a meddlesome legislature. This was the first severe blow administered to property from this angle.

In 1891 the soundness of the doctrine laid down in the case of Munn v. Illinois was tested by an appeal to the Supreme court of a New York case (Budd v. New York) involving another grain elevator regulatory act—this one applying only to Buffalo. Though the opponents of the Munn doctrine obtained three vigorous dissenters on this test, the majority of the court was more earnest than before in affirming the principles laid down in the Munn case. The effect of this decision was to firmly establish the proposition of law that the existence of a “virtual monopoly” in a business of vital importance to the welfare of the state subjected the business to state regulation and control.

If the Supreme Court, after this decision, believed it had definitely settled the question of defining what sorts of businesses were subject to legislative control, it was doomed to disappointment, for in

*144 U. S. 517.*
the short space of three years another case (Brass v. North Dakota) requiring it to go into the question again, was presented. This was a grain regulatory question too. But the perplexing thing about this case was that although, most of the facts were identical with those in the other two cases, there was one vital fact lacking, and that fact was the one upon which the decisions in the other cases apparently had turned. The missing fact was: There was no “virtual monopoly.” The statute applied to hundreds of grain elevators distributed all over North Dakota and operated by hundreds of proprietors. There were plenty of elevators and plenty of room to build others.

But the absence of this fact, vital as it was in the other cases, was not sufficient to deter the court in again holding the business of storing grain a public business, the court saying:

“When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and other circumstances.”

This decision exploded the view created by the previous cases, that a “virtual monopoly” must exist before state regulation is justifiable. This time four judges dissented, among them the late Chief Justice, who also dissented in the recent rent cases. It was clear that the extension of the doctrine of the Munn case was far from unanimous, and that any attempt to extend the doctrine further was likely to meet with determined resistance.

The Supreme Court was not called upon to consider this question further until in 1914—twenty years after the Dakota case, when it decided in German Alliance Insurance Company v. Lewis, against the dissent of three of its members, among them Chief Justice White again, that the State of Kansas could regulate insurance rates, even though there was no monopoly in that business. This case strengthened the position taken in Brass v. North Dakota and brought another business into the class of businesses subject to regulation.

Munn v. Illinois, Budd v. New York, Brass v. North Dakota and German Alliance Insurance Co. v. Lewis are outstanding cases.
They have blazed the way in the development of the most important phase of the law of public service. They have advanced the law step by step, starting from the principle that only beneficiaries of special governmental favors were subject to complete state control, and ending with the principle that whether or not a business is subject to state control, depends upon the reach and extent of its operations and influence, its necessity, its importance, the number and dependence of the people affected, and any other circumstances which might bear upon the public good or the public need. "Virtual monopoly" is still important, but its existence is not now indispensable to enable the state to subject a business to control.

And now we come to the recent rent decisions, Marcus Brown Holding Company v. Marcus Fieldman, an appeal from New York, and Block v. Hirsch, an appeal from the District of Columbia. In these cases, decided with the court divided five to four, the Supreme Court holds, it is not in violation of the "due process" clause of the Constitution for the state to regulate the business of renting dwelling houses, provide for the determination of reasonable rents by a fair rent commission, and to prescribe reasonable duties owed by the landlord to the tenant. In the development of the law, it has been but natural and logical for the Supreme Court to take the step it has, and declare that when circumstances are such that tenant houses become scarce in proportion to the number of tenants, and housing profiteers become keen to take advantage of the situation to demand exorbitant rents, it is legitimate for the legislature to step in and take charge of the situation. This is but the logical development and consequence of the principles announced in the earlier cases.

But from the layman's point of view, altho he approves, the rent decisions announce a somewhat radical doctrine. This is because the layman has been in the dark as to the direction this branch of the law has been tending. He is now surprised to find the law so far advanced. But the decisions are unprecedented only in that they directly affect an unprecedented number of people.

In the development of this doctrine of the law up to this point it has been necessary for the courts to draw a line between two opposite and conflicting principles—the police power upon the one
hand, which allows interference with private interests if the public health, morals or welfare require it; and the constitutional inhibitions against taking property without due process of law, and against the impairment of the obligation of contract, upon the other, which forbid interference with private interests. Where these collide, which shall prevail? The court's answer is: The police power. This power has been gradually nullifying the principle protecting private interests, and the rule now seems to be that the police power is amply sufficient to enable a state legislature to regulate a business to any extent the public good demands, irrespective of the incidental injury to private rights through interference with its use, through decreasing its value, or through impairing contractual obligations. By the police power the legislature is not warranted in fixing the rate of rents so low as to make renting of dwellings unremunerative. The public good does not demand that. Indeed, that would defeat the public good, for no one would go into the business of renting houses. In such cases the Constitution would be available to the property owner as a defense. But if the public good should require it, even that would be granted, and the Constitution would not block the way. The state prohibition laws, which not only deprived brewers of all their profits, but reduced the value of their property to an extent amounting almost to confiscation, were held constitutional. The police power was strong enough to accomplish this result, in spite of the constitutional inhibitions against the taking of property without due process and against the impairment of the obligation of contract.

And since according to Justice Holmes in the rent cases, "a legislative declaration concerning public conditions is entitled to great respect," the present state of the law will allow a state legislature, by a mere declaration, to place almost any business in the class of businesses subject to regulation. This means private rights in property are insecure to that extent, and this is so because the common good demands that they be insecure.

But if the interests of property have been rendered insecure from the interference indicated above they have at the same time obtained security from the much graver peril of socialism. It is believed the development of this doctrine of the law will effectually check the advances of socialism, because the doctrine recognizes that
under our present political system, the legislature can assume as full and complete control over private property and private business as the welfare of the public requires. Socialism will have no purpose, if what socialism wants can be obtained without socialism. In 1876 (the date of the Munn decision) the public welfare required that the legislature control the business of storing grain, which theretofore had been strictly private, and immune from governmental interference. It was granted. In 1921 the public welfare demanded legislative control of rents and tenant property in New York, Washington and other places. It was granted. In the future, public welfare may require the legislative control of the food staples, our natural resources or we know not what. If so, it will be granted. Whatever the public good requires the police power will give. No constitutional limitations can prevent it.

In his dissenting opinion in the rent cases, Justice McKenna said, "This decision smacks of socialism." But doesn't it smack of socialism only to the extent of taking the wind out of the sails of socialism? And isn't it better for the interests of all that the decision should smell of socialism, than that it be socialism, which ultimately might have been the only alternative? If the Supreme Court, so quietly and peaceably, has accomplished this result, well might property interests be grateful for the stand taken.

That each one of the decisions referred to has been rendered by a divided court, indicates with what reluctance the law has come forth in its present form, and with what tenacity the interests of property have clung to the old security. They have lost the old security, but have won the new. And with such forward looking men on the Supreme Bench as Holmes, Pitney, Brandeis and Clarke further advancement of the law in the direction of the interests of humanity may be expected.