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# State Price Control

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SATURDAY, JUNE 30  
Morning Session, 9:30 o'clock

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Address—Prof. Edmund M. Morgan of the Harvard Law School.

Subject—"Rules of Evidence and the Legal Profession."

Unfinished Business.

Election of Officers.

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11:30 A.M.

Motor Trip to Lake Lure—Luncheon given by the Buncombe County Bar Association.

## NOTES

### STATE PRICE CONTROL

The price of gasoline is not subject to state regulation: so says a Federal district court of three judges sitting in Tennessee.<sup>1</sup> The man with the red, blue or orange "sentry" on whom so much of present day progress depends and the oil company behind him are not engaged in a "public calling." The question of what is a "public calling" or a business "affected with a public interest"<sup>2</sup> might be superficially dealt with by listing those businesses which have already been declared such. It might also be resolved by the assertion that monopoly is the test: that a business which enjoys a monopoly either legal (as by exclusive franchise) or natural (as by geographic location) is a public business and thereby rendered subject to governmental rate regulation.

This is the rule of many cases. But it will not do as a justification of others equally authoritative. These latter are the ones worthy of study—the simple cases take care of themselves.

Of course a business does not have to be "affected with a public interest" in order to be subject to some regulation; any occupation may fall under governmental control as to matters of public health, safety, etc.<sup>3</sup> It is when prices are involved that the question before us is raised.

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<sup>1</sup> *Standard Oil Co. of La. v. Hall, Comr.*, 24 F. (2d) 455 (M. D. Tenn., 1927).

<sup>2</sup> The classic phrase from Lord Hale, quoted in *Munn v. Illinois*, 94 U. S. 113, 126 (1876).

<sup>3</sup> Regulations concerning the labelling of gasoline containers (C. S. 4869) are of this class. Obviously such a statute is evidence of a "public interest"

The policy of the law is to have the necessities of life (and things which, while not necessities, have come to be regarded as part of the American standard of living)<sup>4</sup> available to everyone at reasonable prices, that is, prices which yield only a fair commercial profit to the seller. As to most things, prices are supposed to be kept within bounds by the beneficent influences of competition. If they are so controlled in fact, there is no need for governmental regulation. If they are not, then some type of governmental interference looms up as the solution. It is evident that in cases of franchise or natural monopoly,<sup>5</sup> competitive influences are lacking or restricted. Therefore these are the simplest cases for state rate regulation, the ones concerning which there is no dispute and the ones which furnished the monopoly test, inadequate, but most often advanced.<sup>6</sup> There is a third kind of monopoly which also prevents the natural drift of prices to reasonable levels; it is artificial combination of otherwise competitive groups. The law has dealt with this condition too,—not by regulating the rates of the combination, (since its exorbitant charges are not considered inherent in the business itself) but by criminal prosecution and dissolution proceedings to restore the natural state of affairs, *i.e.* by anti-trust laws.<sup>7</sup>

Finally there are some fields of human enterprise wherein for some reason not always clear or easy to classify one party deals at a

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in the conduct of the business and discredits the classification based on a technical use of the phrase in rate regulation cases. The latter involve only a special kind of public interest.

<sup>4</sup>As to things which are luxuries pure and simple there is at present no such policy (see, however, note 7, post) and that seems in large measure the basis of the decision in *Tyson v. Banton*, 273 U. S. 418, 47 Sup. Ct. 426 (1927) holding unconstitutional by a divided court a statute fixing the maximum resale price for theater tickets. Approved in 13 Va. L. Rev. 554; strongly disapproved in 25 Mich. L. Rev. 880. It has been urged that the charges of middlemen might be subject to regulation even when the original producers' price might not. Dissent of Mr. Justice Stone in *Tyson Case*; 75 U. Pa. L. Rev. 778.

<sup>5</sup>Franchise monopolies: Railroads, Telephone and Telegraph Companies, Gas and Electric Companies, the enterprises commonly called public utilities. Natural monopolies: Grain warehouses situated in a strategic position, *Munn v. Illinois*, *supra*, note 2. Regulation was subsequently sustained as to warehouses not so monopolistically situated, *Brass v. North Dakota*, 153 U. S. 391, 14 Sup. Ct. 857 (1894) and consequently the monopoly test was later said (McKenna, J., in *German Alliance Ins. Case*, note 8, post) to have been abandoned. Railroads classified above as franchise monopolies have also certain elements of natural monopolies since the amount of capital required to build one and its immobility when invested deter ready competition.

<sup>6</sup>See Wyman, 17 Harv. L. Rev. 156, 166.

<sup>7</sup>*Standard Oil and Tobacco Cases*, 221 U. S. 1 and 110; 31 Sup. Ct. 502 and 632 (1911). Combinations may be unlawful even though they do not relate to necessities or even articles of much public importance.

disadvantage with the other; wherein the evils of monopoly seem to be present though monopoly itself cannot be found; wherein for example, well informed sellers offer standardized contracts to poorly informed buyers and terms are largely the will of one side.

Out of such conditions came the fire insurance rate regulation statute of Kansas, and because of such conditions it was sustained in the United States Supreme Court.<sup>8</sup> Out of such conditions might also come regulation of rates in some vast industries against which the government has tried so far only the expedients of anti-trust prosecution under the possibly mistaken view either (1) that the advantage possessed by such concerns over the public was due entirely to unlawful and preventable "artificial" combination rather than to a natural economic tendency to deal in large units, or (2) that dissolution would really produce the desired results by restoring competition between the units.<sup>9</sup>

The instant case concerning price control of gasoline seems likely to be sustained. Natural conditions in the oil industry may not be such today as to produce inequality in bargaining between producer and buyer, though at least two other legislative bodies were moved to take defensive steps.<sup>10</sup> But the validity of such state action should be tested by the actual conditions and not by some supposedly sufficient rule about virtual monopoly. It was because the late Circuit

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<sup>8</sup> *German Alliance Ins. Co. v. Lewis, Kans. Supt. of Ins.*, 233 U. S. 389, 34 Supt. Ct. 612 (1914). See also *State v. Harty*, 278 Mo. 685, 213 S. W. 443 (1919); *People v. Hartford Life Ins. Co.*, 252 Ill. 398, 96 N. E. 1049 (1911); Freund, *Police Power*, 388.

<sup>9</sup> The fallacy of this belief might be either (1) in assuming that competition will invariably protect the public (see "The Field of Government Price Control," 35 Yale L. J. 438) or, (2) in assuming that competition is really restored by enacting or decreeing that it shall be. For example, the Chicago theater ticket scalpers ordinance is considered by one writer (13 Va. L. Rev. 554, 563, footnote 39) to be an effective and proper manner of protecting the public but it is elsewhere (36 Yale L. J. 985, 986) charged with failure to cure the evil. The dissolution of the Standard Oil Company (note 7, *supra*) is popularly supposed to have accomplished well nigh nothing.

<sup>10</sup> South Dakota in 1925 provided for state marketing of gasoline in competition with private companies in order to secure reasonable prices to its people. The act was held unconstitutional on a rather narrow ground which left the present question open. *White Eagle Oil & Refin. Co. v. Gunderson, Governor*, 205 N. W. 615 (1925). If the object of state competition is regulation of rates it would seem that the necessity and justification for such governmental enterprise would be the same as for regulation directly by price fixing, although state enterprise frequently has a different object and is therefore justifiable on other grounds, as *e.g.*, charity, where the object is to supply some public need free or below reasonable commercial figures. See 27 Yale L. J. 824; 21 Mich. L. Rev. 455; *Green v. Frazer*, 253 U. S. 233, 40 Sup. Ct. 499 (1920). The City of Lincoln gasoline selling ordinance was sustained by the state court (114 Neb. 243, 207 N. W. 172, 208 N. W. 964) and by the U. S. Supreme Court in 48 Sup. Ct. 155.

Judge Baker was unwilling to be bound by an arbitrary test and insisted, as he usually did, on considering existing conditions that he and his brethren on the federal bench in Indiana sustained a wartime state regulation of coal prices.<sup>11</sup>

M. S. BRECKENRIDGE.

#### ADMISSIBILITY OF CONFIDENTIAL CONFESSION TO SPIRITUAL ADVISER

The case of *State v. Alma Petty Gatlin*, tried before Judge Cameron McRae at a Special Term of the Superior Court of Rockingham County last February, aroused the interest of the public generally by its sensationalism; it is of peculiar interest to the profession—for the first time in North Carolina the question of the admissibility of a confidential confession as evidence was squarely raised. The case itself will not go before the Supreme Court; Mrs. Gatlin was acquitted. The question, therefore, remains unsettled. There is one point to be borne in mind in considering these cases; whether the minister may be *compelled* to testify is quite a different question from whether the matter secured from the confidential confession is *admissible* as evidence.

#### HISTORY OF THE QUESTION

Is a confidential communication to a minister, priest or spiritual adviser admissible as evidence? The question is, at least, as old as the Roman Law of an early period. In Rome not only were such communications excepted from evidence, but the priest who revealed them was punished, even where he had sworn not to reveal the information. The theory was that the communication passed through

<sup>11</sup> *Am. Coal Mining Co. v. Special Com.*, 268 Fed. 563 (D. Ind. 1920), appeal dismissed on company's motion, 258 U. S. 632, 42 S. Ct. 273. See notes 19 Mich. L. Rev. 74, 415; Simpson, "Due Process and Coal Price Regulation," 9 Iowa L. Bull. 145 (1924); *People v. United Mine Workers*, 201 Pac. 55 (Colo., 1921). Even by this broad rule there would be no foundation for general price regulation such as attempted but overturned in Montana. *Holter Hdwe. Co. v. Boyle*, 263 Fed. 134 (D. Mont., 1920). See *State v. Goldstein*, 93 So. 308 (Ala. App., 1922); *Territory v. McCandless*, 24 Hawaii, 485 (1918). And it is hard to see what caused the United States Supreme Court in one case to permit an inference of approving state regulation of laundry rates. *Okla. Operating Co. v. Love*, 252 U. S. 331, 40 Sup. Ct. 338 (1920). Rent regulation was sustained as an emergency measure during the war. *Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. 158 (1921); *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 44 Sup. Ct. 405 (1924); cf. *State v. R. R. Com.*, 183 N. W. 687 (1921) wherein the Wisconsin Act was held invalid because of being applicable only to Milwaukee; *Rumbo v. Winterroud*, 228 S. W. 258 (Tex. Civ. App., 1921) holding invalid statute which prohibited farm landlord taking more than certain percent of produce as rent.