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PUBLIC UTILITIES - CONSUMERS' ACTIONS TO ENFORCE PERFORMANCE OF PUBLIC DUTIES

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PUBLIC UTILITIES — CONSUMERS' ACTIONS TO ENFORCE PERFORMANCE OF PUBLIC DUTIES — The petitioner, suing on behalf of himself and ten thousand other consumers, sought to compel the defendant gas company to furnish gas in accordance with the terms of a rate ordinance. The defendant challenged the petitioner's right to sue, on the ground that statutes had conferred this right upon the city solicitor. *Held*, the statutes were not intended to abrogate a consumer's common-law right to compel a utility company to perform its public duty. *Maxwell v. Ohio Fuel Gas Co.*, 61 Ohio App. 394, 22 N. E. (2d) 639 (1939).

The majority rule that private persons having no special interest in the matter cannot enforce public duties¹ is applied quite consistently in suits involv-

¹ *Smith v. Collison*, 119 Cal. App. 180, 6 P. (2d) 277 (1931); *Greene v. Holmes*, 201 Ind. 123, 166 N. E. 281 (1929); *Mayor of Baltimore v. Employers'*

ing public duties of utility companies.² In such cases private persons are given a standing in court only when they can show that the public officers or agencies empowered to enforce public duties are unwilling to act.³ However, the courts are not in full agreement on the question of what constitutes a special interest. It has been held that consumers of water have such an interest and may enjoin water companies to furnish mains,⁴ to give service in accordance with terms and conditions of the franchise,⁵ and to refrain from charging "unreasonable, unlawful, and oppressive" rates.⁶ Consumers have obtained writs of mandamus

Assn. of Maryland, 162 Md. 124, 159 A. 267 (1932); *Buckley v. Baldwin*, 230 App. Div. 245, 244 N. Y. S. 295 (1930); *Stokes v. Jenkins*, 107 N. J. Eq. 318, 152 A. 383 (1930); *State ex rel. Guenther v. Charleston Light & Water Co.*, 68 S. C. 540, 47 S. E. 979 (1904). For cases representing the minority and contrary rule, see 38 C. J. 840 (1925).

² *Atlantic City Gas & Water Co. v. Consumers' Gas & Fuel Co.*, 70 N. J. Eq. 536, 61 A. 750 (1905); *Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*, 155 Ind. 566, 58 N. E. 851 (1900); *McNulty v. Brooklyn Heights R. R.*, 31 Misc. 674, 66 N. Y. S. 57 (1900). See also 38 C. J. 842, note 44 (1925).

³ *Giddings v. Secretary of State*, 93 Mich. 1, 52 N. W. 944 (1892); *State v. Sovereign*, 17 Neb. 173, 22 N. W. 353 (1885). See *Williams v. Champlin*, 26 R. I. 416, 59 A. 75 (1904).

Except for the cases falling within sections eight and nine of the interstate commerce act,—24 Stat. L. 382, 49 U. S. C. (1934), §§ 8, 9; *Central Stock Yards Co. v. Louisville & N. R. R.*, (C. C. Ky. 1902) 112 F. 823—the courts quite generally agree with the principal case that statutory authorizations of suits by public officers or agencies to enforce public duties of utility companies do not abrogate the consumer's right to sue. *Michel v. Illinois Bell Telephone Co.*, 226 Ill. App. 50 (1922); *Felton v. Kansas City, M. & O. Ry.*, (Tex. Civ. App. 1912) 143 S. W. 650; *McClaugherty v. Bluefield Waterworks & Improvement Co.*, 67 W. Va. 285, 68 S. E. 28 (1910); *Union Pacific R. R. v. Hall*, 91 U. S. 343 (1875). An objection to this attitude of the courts is that it burdens public utilities with numerous and vexatious suits, and thus impairs the public service or makes it more expensive. See *St. Paul Book & Stationery Co. v. St. Paul Gaslight Co.*, 130 Minn. 71, 153 N. W. 262 (1915). But it has been suggested that to deny private persons the right to sue will leave no assurance that public duties will be enforced. *State v. Sovereign*, 17 Neb. 173, 22 N. W. 353 (1885). However, it would not be necessary to go so far as completely to deny consumers a standing to enforce the performance of public duties owing by a utility company. If courts required a showing that proper officers or agencies refused to enforce the public duty in which the complaining consumer is specially interested, it would remove many objections to consumer suits without taking away the consumer's ultimate right to relief. Therefore it would seem desirable to construe statutes so as to require a consumer to appeal to the proper public officers or agencies before giving him a standing in court.

⁴ *Alabama Water Co. v. City of Jasper*, 211 Ala. 280, 100 So. 486 (1924). For another case permitting a consumer to enjoin a gas company from charging rates in excess of those prescribed by statute, see *Westfield Gas & Milling Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033 (1895).

⁵ *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 76 N. E. 211 (1906); *Walton v. Proutt*, 117 Ark. 388, 174 S. W. 1152 (1915). See also *Robbins v. Bangor Ry. & Electric Co.*, 100 Me. 496, 62 A. 136 (1905).

⁶ *Town of Mamaroneck v. New York Interurban Water Co.*, 126 Misc. 382, 212 N. Y. S. 639 (1925).

compelling power companies to supply current,⁷ at non-discriminatory rates.⁸ Railroads have been compelled to carry goods of the relator "and others similarly situated."⁹ The New York court denied a citizen an injunction to prevent a street car company from charging rates in excess of those prescribed by statute, since "this action [is] in behalf of the whole people where the injury to him is in common with others,"¹⁰ but in an earlier case the same court saw no difficulty in issuing a writ of mandamus on application of "any citizen of the city" to compel a street railway to run its cars.¹¹ Citizens have compelled a railroad to construct its line through their city.¹² And in *Union Pacific R. R. v. Hall*¹³ the United States Supreme Court verbally rejected the requirement of "special interest," and permitted two Iowa merchants, "having frequent occasion to receive and ship goods" over defendant's interstate railroad, to enforce defendant's "public duty" to "operate its road as a continuous line, throughout its entire length." The language of the Ohio court in the principal case does not seem to require a "special interest" to give private persons a standing to bring an action to compel a utility company to perform its "public duties." Still, it cannot be said that the Ohio court, or even the Supreme Court, has abandoned the requirement of a "special interest." In each of these cases the moving party had an interest as a present or prospective shipper or consumer. In the absence of at least such an interest, it is doubtful if any court would entertain a suit by private persons to enforce public duties of utility companies.¹⁴

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⁷ *North Carolina Public Service Co. v. Southern Power Co.*, 181 N. C. 356, 107 S. E. 226 (1921). Mandamus or injunction will issue to compel telephone companies to restore service. *O'Neal v. Citizens Public Service Co. of South Carolina*, 157 S. C. 320, 154 S. E. 217 (1930).

⁸ *Salisbury & S. Ry. v. Southern Power Co.*, 180 N. C. 422, 105 S. E. 28 (1920).

⁹ *Codd v. McGoldrick Lumber Co.*, 46 Idaho 256, 267 P. 439 (1928). See also, *Southern Express Co. v. Rose Co.*, 124 Ga. 581, 53 S. E. 185 (1906); *American Coal Co. v. Consolidation Coal Co.*, 46 Md. 15 (1876).

¹⁰ *McNulty v. Brooklyn Heights R. R.*, 31 Misc. 674 at 677, 66 N. Y. S. 57 (1900). But see *People ex rel. Jackson v. Suburban R. R.*, 178 Ill. 594, 53 N. E. 349 (1899).

¹¹ *Matter of Loader*, 14 Misc. 208, 35 N. Y. S. 996, 999 (1895).

¹² *Felton v. Kansas City, M. & O. Ry.*, (Tex. Civ. App. 1912), 143 S. W. 650; *Macon & B. R. R. v. Gibson*, 85 Ga. 1, 11 S. E. 442 (1890).

¹³ *Union Pacific R. R. v. Hall*, 91 U. S. 343 (1875). Cf. *Southern Express Co. v. Rose Co.*, 124 Ga. 581, 53 S. E. 185 (1906).

¹⁴ *Atlantic City Gas & Water Co. v. Consumers' Gas & Fuel Co.*, 70 N. J. Eq. 536, 61 A. 750 (1905); *Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*, 155 Ind. 566, 58 N. E. 851 (1900). *MOSES, MANDAMUS* 194 (1867).