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Is a Municipal Fuel Yard a 'Public Service Plant'?

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the performance of his duty? At least, it would seem that a party should act at his peril in attempting to escape, and his right of action denied if it turn out that the arrest was in fact legal. However, the modern tendency appears to be toward placing greater burdens on the officer in favor of the arrested party. Bourne v. Richardson, supra; see note to State v. Dunning, 177 N. C. 559; 17 Mich. L. Rev. 702; 29 Yale L. J. 128. Thus, for example, the law is zealous in guarding a misdemeanant from serious injury or killing by an officer. Gosczinski v. Carlson, 157 Wis. 551; Kouns v. Townsend, 165 Ky. 163. The reason stated is that the law-making power itself, under the constitution, cannot take life for a misdemeanor, and therefore it is better that a misdemeanant escape than that human life be taken. Brown v. Weaver, supra. Also, while the right to resist an officer engaged in making a wrongful attachment of property is denied, the right to resist illegal arrest is upheld, the distinction being based apparently on the theory that in the latter case there is an irreparable personal injury. State v. Selengut, 38 R. I. 302; 29 Harv. L. Rev. 330. But is this distinction sound? Where the party does not resist he can bring an action for false imprisonment against the officer and recover damages, which are then presumably an adequate legal compensation for the wrong, and the officer can be punished or dismissed, on complaint, if he has violated his duty.

Is a Municipal Fuel-Yard a "Public Service Plant"?—In Consumers' Coal Co. et al. v. City of Lincoln, et al. (Neb. 1922) 189 N. W. 643, the supreme court of Nebraska held that a municipal fuel-yard, selling fuel at retail to the inhabitants of the city, was not a "public service plant" authorized by a section of the city charter which empowered the city to acquire, own and operate gas and electric plants, street railways, telephone plants, "and any and all other public service plants and properties, for the purpose of supplying the city and the inhabitants thereof with such service and public utilities." The suit was brought by a retail coal dealer to enjoin the city from carrying out the intended project; the court below sustained the city's demurrer to the bill. The supreme court reversed this decision, holding that the city should be enjoined from going on with the enterprise.

The supreme court looked first at the question whether it would be competent for the legislature, by an express grant, to confer upon the city power to operate a municipal fuel-yard, and took the view that such an enterprise was for a public purpose and could therefore be expressly authorized by the legislature. The court also took the view that under the home rule charter provision of the Nebraska constitution, a city might frame a charter which would give it power to operate such an enterprise; but held, after an examination of the specific provisions of the city charter, that the operation of a fuel-yard could not be upheld under the section set out in the preceding paragraph, and that there was no showing of any emergency which might invoke the application of the "general welfare" section of the charter.

The opinion suggests several questions as to various phases of the
municipal fuel-yard problem, on nearly all of which there has been some contrariety of judicial opinion.

I. Does the operation of a municipal fuel-yard come within the "public purpose" which justifies the legislature in authorizing the city to expend moneys raised by taxation? This question met with a negative answer in the earlier cases, Opinions of Justices, 155 Mass. 598, 182, id. 605; Baker v. Grand Rapids, 142 Mich. 687, and has evoked the same answer when the question presented by the legality of a municipal ice-plant, Union Ice Co. v. Ruston, 135 La. 898, L. R. A. 1915 B 859, Ann. Cas. 1916 C 1274; State v. Orec, 277 Mo. 303. Most of these cases admit that in times of emergency, when fuel can be more readily obtained by the public than by individuals, the power might exist; but they deny the power of a municipality to enter into a "commercial enterprise", and hold that such action cannot be for a public purpose. On the other hand, Mr. Justice Holmes, dissenting from the majority opinion, in Opinion of Justices, 155 Mass. 598, says "the purpose is no less public when that article (one of general necessity) is wood or coal than when it is water, or gas, or electricity or education." And in several more recent cases the view has been taken that such an enterprise comes within the scope of public purpose. Holton v. Camilla, 134 Ga. 560, 31 L. R. A. (N. S.) 116, 70 Ann. Cas. 699; Laughlin v. Portland, 111 Me. 480, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916 C 734; Jones v. Portland, 113 Me. 123, affirmed in 245 U. S. 217, L. R. A. 1918 C 765; Ann. Cas. 1918 E 660; Central Lumber Co. v. Waseca (Minn. 1922) 188 N. W. 275. The basis of the later cases is well expressed in the case last cited: "Economic and industrial conditions are not stable. Times change. Many municipal activities, the propriety of which is not now questioned, were at one time thought, and rightly enough so, of a private character. The constitutional provision that taxes can be levied only for a public purpose remains; but conditions which go to make a purpose public change."

A somewhat similar question was presented in State v. Lynch, 88 Ohio St. 71, 48 L. R. A. (N. S.) 720, where the city of Toledo, acting under a home-rule charter authorizing it to "exercise all powers of local self-government" sought to establish and operate a municipal moving-picture theater. The power was denied by a divided court. The majority opinion rested on the contention that "local self-government" could not be construed to include this particular enterprise, which was so different from the ancient and well-recognized functions of city government, and which brought this city into the field of "purely private enterprise wholly disconnected and divorced from public needs or public purposes."

The question is obviously one of expediency rather than of strict legal rules. The Nebraska court in the principal case recognizes this in its opinion, saying—"while the final determination of that question is for the courts, the legislative expression upon the subject is of great weight." As between a narrowing and a broadening of municipal powers, it is pretty clear that the tendency of both legislatures and courts is toward the broader view.
II. Can a city operate a fuel-yard under a charter authorizing it to carry on a "public utility"? Even if we take the view that the legislature can expressly grant such power, it is usually true that it has not done so, and the city attempts to justify its operation of the fuel-yard under some power which is expressly granted in its charter. One such power, often invoked for this purpose (as in the principal case) is the power to construct, maintain and operate "public utilities". Cases on this point are few. In *Platt v. San Francisco*, 158 Calif. 74, it was held that a street railway was such, and that the term included "any utility employed in the rendition of quasi-public service, such as waterworks, gas works, a telephone system, street railways, etc." Such a classification could hardly include a fuel-yard. A broader meaning was given to the term in the more doubtful case of *State v. Barnes*, 22 Okla. 191, where it was held that a convention hall was a "public utility" under a constitutional provision authorizing the issuance of bonds for public utilities. The same court, in *State v. Miller*, 21 Okla. 448, had held that sewers were a public utility under the same provision, but in *Coleman v. Frame*, 26 Okla. 192, refused to hold that a street improvement came under the provision. Such authority as there is apparently upholds the Nebraska court in its conclusion that a fuel-yard is not a public utility. But here again, as with the term "public purpose" we are dealing with a term of changing significance, and it may well be that, as intimated in *Central Lumber Co. v. Waseca*, supra, the words may now include much more than they meant ten years ago, and much less than they may mean ten years hence.

III. Can the operation of a fuel-yard be justified under any other granted powers? It has often been said by the courts, as stated above, that an emergency might arise in which a city could operate a fuel-yard as an aid to its needy citizens, under the undoubted power to take care of such unfortunate class. No case is found, however, in which such a project has actually been upheld on this ground.

In *Saunders v. Arlington*, 147 Ga. 581, the court held that under charter power to secure the health of its inhabitants, a city could, without express authorization, build an ice and cold-storage plant, because it tended to promote the health of the community in preserving food, etc. The same argument is made in a dissenting opinion in *State v. Orear*, supra. If an ice-plant can be held to be justified on the ground here stated, it is difficult to see why a fuel-yard could not be. The question goes back to the already quoted statement of Justice Holmes that if the article supplied by the city is one of general necessity, it is proper for the city to supply it. E. H.