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## GRIMSHAW v. GARDEN CITY CO.

(Supreme Court, Nassau County. February, 1923.)

**Waters and water courses** ⇨203(6)—Corporation to supply water to municipality may be formed under Business Corporations Law, without being subject to rate regulations.

A corporation may be formed to supply water to a municipality other than New York City, under Business Corporations Law, § 15, limiting section 2, in view of Laws 1873, c. 737, Laws 1880, c. 85, Laws 1890, cc. 566, 567, Laws 1892, cc. 617, 691, and Laws 1909, cc. 219, 240, and as the Business Corporations Law contains no provision for a regulation of rates, a water company organized thereunder is not subject to rate regulation.

Application for an injunction pendente lite by Benjamin Grimshaw, suing on behalf of himself and all others, consumers of water and users of sewer service in the Village of Garden City, similarly situated, against the Garden City Company. Application denied.

Raymond Ballantine, of New York City, for plaintiff.

Evarts, Choate, Sherman & Leon, of New York City (Frederick R. Coudert, Howard Thayer Kingsbury, and James Garretson, all of New York City, of counsel), for defendant.

LAZANSKY, J. Motion to restrain pendente lite increase of water rates and charges for sewer service in an action brought to determine reasonable rates for water supply and sewer service. Although the term that a business "affects public interest," as it is used by the courts where the question of rate regulation is under consideration (*Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460), is an elastic term and may be stretched to the breaking point, so that almost any private enterprise might be restricted by governmental supervision, it will be assumed that the defendant's present business of supplying water for the 3,000 inhabitants of the village of Garden City, "affects public interest." That the properties used for the water mains may have been those of the defendant or its predecessors, when the mains were laid and public authority may not have been called upon for permission to use public property, are not controlling.

The use of public property is not an exclusive test. However, it does not necessarily follow, because the services for which the defendant charges are rendered in a public employment, that they are the subject of court action. The only regulation of water rates to which attention has been called is found in the Transportation Corporations Law. That provides that "seven or more persons may become a corporation for the purpose of supplying water to any of the cities, towns or villages and the inhabitants thereof," and requires "a permit, signed and acknowledged by a majority of the board of trustees of the village" to be filed with the certificate of incorporation. Section 80. The corporation is required to "supply the authorities or any of the inhabitants of any city; town or village through which the conduits or mains of such corporation may pass, \* \* \* with pure and wholesome wa-

ter at reasonable rates and costs." Section 81. The defendant is a corporation organized under the Business Corporations Law. If a business corporation has no power to sell water, and the only corporation that may sell water is one formed under the Transportation Corporations Law, which provides for rate regulation, then defendant surely cannot escape the responsibilities of rate regulation, because under the Business Corporations Law, under which it is formed, there is no provision for rate regulation.

It is urged that a corporation formed to sell water may only be organized under the Transportation Corporations Law. Aside from a doubt that I have that a corporation formed for the development of a large tract of its own land would have to be formed under the Transportation Corporations Law, if it sought to lay pipes and supply water to people who buy or rent its property, which is the case in a large part of the development under consideration here, it seems to me that a corporation may be formed under the Business Corporations Law for the purpose of supplying water. Section 2 of the Business Corporations Law, as amended by Laws 1909, c. 484, provides that:

"Three or more persons may become a stock corporation for any lawful business purpose or purposes other than a moneyed corporation, or a corporation provided for by the Banking, the Insurance, the Railroad and the Transportation Corporations Laws. \* \* \*"

On its face this would prevent a corporation from being formed under the Business Corporations Law for the purpose of the distribution of water, since that privilege is provided for under the Transportation Corporations Law. But in conjunction with section 2 must be read section 15 of the Business Corporations Law as amended by Laws 1909, c. 240, which provides:

"*Water Companies.*—No corporation shall be formed under this chapter for the purpose of accumulating, storing, conducting, furnishing or supplying water for domestic, manufacturing or municipal purposes in the city of New York. Any corporation formed for the purpose of supplying any other city of the state with water, if unable to agree with the owners of any real property required for the purpose of the corporation for the purchase thereof may acquire title thereto by condemnation."

It thus clearly appears that the Legislature intended to provide for the formation of corporations under the Business Corporations Law for the supplying of water. Because of this provision the Transportation Corporations Law is not exclusive. Section 15 is a limitation or modification of section 2 of the Business Corporations Law, with the same effect as if to section 2 were added the words: "Except as provided in section 15 hereof." I think the fair import of section 15 is that corporations may be formed under the Business Corporations Law for the purpose of supplying water for domestic, manufacturing, and municipal purposes, except in the city of New York, with the right, where such a corporation is formed in any other city, to acquire property by condemnation. See Laws 1873, c. 737; Laws 1880, c. 85; Laws 1890, c. 566; Laws 1890, c. 567; Laws 1892, c. 617; Laws 1892, c. 691; Laws 1909, c. 219; Laws 1909, c. 240.

No regulation of rates is provided for by the Business Corporations Law. The courts do not act until the Legislature has made some provi-

sion with reference to rates. *Waterloo Water Co. v. Village of Waterloo*, 200 App. Div. 718, 193 N. Y. Supp. 306; *Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713; *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371. The meaning of the obiter dictum in the prevailing opinion in *Munn v. Illinois*, supra, as to a common-law rule with reference to rate regulation is not clear. It seems to be well settled in this state that court action is dependent on legislative initiative. It may seem absurd that a corporation formed under the Transportation Corporations Law may be regulated as to its rates, while an individual or a business corporation lawfully doing the same thing may charge any price. But that is a matter for the Legislature and not for the courts. Since under the Business Corporations Law a business corporation may engage in the sale of water, the rate regulations of the Transportation Corporations Law do not reach defendant, even though it be acting *ultra vires*.

The Legislature has made no provision for the regulation of sewer service, and therefore the courts will not interfere. The motion is denied.

Ordered accordingly.

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#### GERKEN v. GERKEN.

(Supreme Court, Appellate Term, First Department, April 17, 1923.)

1. Courts ⇨189(7)—Municipal Court cannot permit amendment, so as to acquire jurisdiction, defendant appearing specially to object to jurisdiction.

Where defendant appeared specially to object to the jurisdiction of the Municipal Court, the court must confine its rulings to the objections to the process and the rulings then before it, and cannot acquire jurisdiction by permitting an amendment to the complaint.

2. Courts ⇨169(1)—Municipal Court has no jurisdiction of action demanding \$25 a week.

The Municipal Court has no jurisdiction of an action based on an agreement in lieu of alimony, in which plaintiff demanded \$25 a week, as the amount demanded is not necessarily within Municipal Court Code, § 6, subd. 1, authorizing an action in which the amount claimed does not exceed \$1,000, exclusive of interest and costs.

3. Courts ⇨189(4)—Municipal Court summons must show jurisdiction.

As Municipal Court is court of limited jurisdiction, summons must show amount demanded is within court's jurisdiction.

4. Courts ⇨190(8)—Where trial court permitted amendment to complaint, when defendant appeared to attack its jurisdiction, only summons and original complaint considered.

Where, when defendant appeared specially to object to jurisdiction of the Municipal Court, that court erroneously permitted plaintiff to amend the pleadings, on appeal, in passing on the question of jurisdiction, only the summons and original complaint can be considered.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Mary L. Gerken against Henry Gerken, in which defendant appeared specially to object to the jurisdiction of the court. From an order granting an amendment to the complaint, defendant appeals. Order reversed, and complaint dismissed.