public use, in effect grants the public an interest in that use, and subjects himself to regulation to the extent of that interest. *Wolff Packing Co. v. Court of Industrial Relations of Kansas* (1923) 262 U. S. 522.

It is obvious that the ice-making industry must fall in the third class if in any. And the court in the principal case so classifies it. "It is a matter of common knowledge that the use of ice is universal in all the urban communities of this state; that it is both convenient and necessary for the comfort and well-being of a large proportion of our citizens; that the cost of machinery for the manufacture of ice and its installation is beyond the reach of the average citizen." These facts, says the court, make the industry monopolistic in its nature and clothe it with a public interest. Further, reasons the court: "In the states of Missouri and Wisconsin, where it has been held that the ice business is not public in its nature, the climatic conditions are vastly different from those of Arkansas, and the harvesting and storage of ice may be profitably pursued by individuals and the necessity for the manufacture by artificial means does not exist as it does in this state."

Ice cannot, as the court points out, be compared with an ordinary commodity, the sale of which usually has been held not to be a business clothed with a public interest. Thus the sale of oil and gas was held not a service, and hence not within the power of the legislature to regulate. *Williams v. Standard Oil Co.* (1929) 278 U. S. 235. Here the article in question, ice, is a household necessity which must be purchased every day, while ordinary articles may be purchased at any convenient time for future use.

That the ice business is one which is clothed with a public interest has also been held in *City of Denton v. Denton Home Ice Co.* (Tex. 1929) 18 S. W. (2d) 606, and in cases in Arizona and Georgia. Northern states as noted above usually hold contra.

It will be interesting to note what the United States Supreme Court says about the constitutionality of such statutes if this case, or similar cases, are appealed. It is a fair guess that the statute would not be upheld as the ice business is not one dedicated to the use of the public and it involves the sale of a commodity, not service. But this is not conclusive, and an exception might be made in the case of a Southern state. R. W. B., '31.

CRIMINAL LAW—POWER TO INSTRUCT THAT JURY MAY FIND DEFENDANT GUILTY WITHOUT FIXING PUNISHMENT.—In 13 ST. LOUIS L. REV. 25 the power of the Missouri courts under the following statute is commented upon: "Where the jury agree upon a verdict of guilty but fail to agree upon the punishment to be inflicted or do not declare such punishment by their verdict, the court shall assess and declare the punishment and render judgment accordingly. Where the jury find a verdict of guilty and assess a punishment not authorized by law, and in all cases of judgment by confession, the court shall assess and declare the punishment, and render judgment accordingly." Mo. Laws 1925, p. 197. This statute, in slightly varying form, has been on the books almost 100 years. The writer of the article proposed that before the jury retired to consider the case the court should

instruct them thus: "The court instructs the jury that if, under the evidence and under the other instructions given you by the court, you find defendant guilty herein, then it is your duty under the law of this state, to determine and to assess the punishment which the defendant herein shall suffer; but the court further instructs you that if, under the evidence herein and under the other instructions given you by the court, you find the defendant guilty herein, but you are unable to agree upon the punishment to be assessed, then you shall so state in your verdict, and in that event, but not otherwise, the court will assess the punishment."

On the one hand it would seem that the jury should know the law under which it is to function and hence that the instruction should be given before the jury retires. Moreover, if the jurors knew that they did not absolutely have to fix the punishment it would eliminate those cases in which a juror refuses to find the accused guilty because the others think he should receive a heavier penalty than this particular juror thinks he should. The one question would be separate and distinct from the other. On the other hand it seems that the instruction, given before the jury retires, would in some measure defeat the purpose of the statute, which obviously is to have the jury fix the punishment if possible and yet to prevent a mistrial if they cannot agree. If the jury know from the first that they do not have to fix the punishment the likelihood is greater that they will not do so.

In *State v. Adams* (Mo. 1929) 19 S. W. (2d) 671, the trial court gave almost the exact instruction proposed and it was approved by the Supreme Court of Missouri. However, the circumstances under which the instruction was given were as follows: The jury retired at 1:00 P. M. and at 3:20 P. M. announced that they had agreed on the guilt of defendant but could not agree on the punishment. The court sent the jury back to deliberate further. They again returned at 3:50 P. M. and announced that there was no possibility of agreeing on the punishment. The court then gave the instruction. Hence the important question of the time at which the instruction may be given has yet to be passed upon by the highest court of the state. B. L. W., '31.

DEATH—IMPUTATION OF CONTRIBUTORY NEGLIGENCE AMONG PARENTS.—The parents of a boy nineteen years old sued for his wrongful death caused by defendant railroad. The sum asked was the maximum amount allowed under the statute providing a penalty which is recoverable by the father and mother, each of whom shall have an equal interest in the judgment, or by the survivor, if either be dead. R. S. Mo. (1919) sec. 4217. The father's negligence had contributed to the accident. *Held,* the father's negligence, which would bar a judgment in his favor alone, should not be imputed to the mother, and the full penalty should be recovered because there can be no apportionment of damages. *Herrell v. St. Louis-San Francisco Ry. Co.* (Mo. 1929) 23 S. W. (2d) 102.

Many cases have held that the negligence of one parent which results in injury to their children must be imputed to the other. *O'Flaherty v. Union Ry. Co.* (1869) 45 Mo. 70; *Darbinsky v. Pennsylvania Co.* (1915) 248 Pa.