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Legislative Power the Public Utility Rate and the Local Franchise

William L. Ransom

The Legislative Power, The Public Utility Rate, and The Local Franchise

By WILLIAM L. RANSOM[1]

It is a familiar observation that the tripartite division of governmental functions between executive, legislative and judicial branches brings every fundamental question of public policy sooner or later to the courts, and carefully devolves upon the trained minds and deliberative judgment of the courts the task of finding an orderly way of accomplishing the result really called for by the public emergency. This is only a more formidable phrasing of Dicey's brilliant generalization that the American federal system "substitutes litigation for legislation", and calls upon those who are usually the best trained and most disinterested of all our public servants to analyze the situation and "point the way" to sound and conservative steps forward. A time of economic and social readjustments subjects existing mechanisms of government to new and unexpected strains and makes new and unforeseen demands. Long before the executive and the legislature are ready to deal adequately and courageously with the new conditions, the processes of litigation have commonly placed the whole problem "on the door-step" of the courts and have pleaded for judicial aid more summary than the leisurely course of legislation seems likely to yield.

The entry of the United States into the World War precipitated novel and unprecedented conditions as to public utility rates and service. The spring of 1918 brought a real crisis. The companies themselves were poorly prepared for such a startling readjustment of their basic problems, and the governmental machinery set up for handling the relationship of the state to its corporate creatures in the public-service field was still less ready and suitable for such an emergency. The whole problem was new, and no one had given much thought to the ways of meeting it. The past twenty or thirty years, in the public utility field, had generally been a period of falling costs per unit of service. The volume of service rendered had risen rapidly; the units of operation had been continuously enlarged;

[1]Cornell, LL.B. 1905. Formerly Justice of the City Court of New York, and later chief Counsel for the New York State Public Service Commission for the First District, and member of the Valuation Committee of the National Association of State Railway and Public Utility Commissioners. He participated in the principal cases discussed in this article.

radical economies in methods and outlays had been introduced; and the result was a period in which the trend of operating costs per unit of service was downward, and all departments and branches of government had been invoked to ensure that the cost of the service to the patron would keep pace with the declining cost to the company. Commissions were set up with elaborate powers of rate-fixation, all bestowed in phraseology pre-supposing their use to force further reductions in rates. Special statutes were passed. prescribing specific maximum rates for specific services in specific areas. To prevent reductions being made which would work confiscation, the courts were very guarded in fortifying the powers of the new administrative commissions, and insisted upon methods of procedure and nature of proof which forestalled flexible changes in rates. On the other hand, the legislature was, in many instances, careful to withhold from the commissions power to sanction rates higher than those prescribed by special statutes (*Cf.* New York Pub. Serv. Coms. Law, Sec. 72). The whole thought was of reduction, rather than increase; the legislature, the commissions, the municipalities, and in some instances the courts, were invoked and marshalled to aid in the favorite civic (I shall not say political) pastime of hammering public utility rates down to the closest possible margin of correspondence with the falling costs of operation. No one thought of the desirability of having but *one* public authority fix rates, on a sound, scientific and flexible basis; that the more numerous are the agencies of rate reduction, the less likely are rates to continue excessive, was the concept of that heyday of regulation.

Then came the war and the cataclysm. Costs of operation mounted and mounted, and everywhere the demand and the need arose that rates be readjusted upward, to keep pace with the rising costs, even as they had been forced and kept down, when costs were falling or stationary. The whole mechanism which had been set up to *lower* rates was suddenly called upon to *raise* them; the concepts of procedure and of proof, which had been built up to retard reductions, were found now to be flung squarely in the path of imperative increases; the barriers which had been builded, in the days when legislatures, commissions, municipalities, and courts, were vying with each other in securing for the public some share in the benefits of lowered cost of operation, were found to bar necessary readjustments which would have made the public share in the burden of increased costs of operation. Under the impact and strain and in the face of new conditions, the regulative system proved not to have within itself the essential powers of accommodation and adjustment. It failed to meet the emergency; failed to adapt itself to put

in force such rates as would ensure the upkeep of the service and properties, and literally broke down, in many of the American states, even as the Interstate Commerce Commission had failed to meet the national need respecting the railroads. The result, in New York and some other states, was that the problem of public utility rates under war conditions was thrown into the courts.

This article is written to review what happened in the courts of New York—the trend of decision in a state whose public utility enterprises are the largest in the world, are conducted by the largest aggregations of capital, and present inherently the most difficult problems of regulation; a commonwealth whose courts, constitution and legislature alike had developed certain anomalies of view which rose to plague and perplex when the need came that rates execute an "about face" and march back up the hill. I shall try to write about the matter in a vein which may be regarded as "popular" rather than technical or legalistic. My purpose is to analyze what the courts have decided, and not what I might personally have felt they should have decided, in the several cases which arose during 1918; but I cannot refrain from expressing the opinion that the whole record of the 1918 decisions of the Court of Appeals concerning public utility rates and service presents a vital, human narrative of the way in which the members of this court have grappled with a big problem and have tried to do the sound, just, workable thing in relation to it, in an open-minded, constructive, forward-looking way—a problem whose public-policy elements should have been dealt with promptly by the legislature and never brought to the court at all. That the Court of Appeals has found itself obliged to re-trace its steps, in more than one important particular, does not detract at all from the force or truth of the observations heretofore made in this article.

COMMISSION POWER OVER RATES REGULATED BY STATUTE OR BY FRANCHISE

The public utility problems first came to the Court of Appeals in 1918 upon questions of the *power* of the Public Service Commissions to increase rates adequately:

(1) Could the commission, upon a proper showing of fact, increase a street railroad or gas rate to a figure higher than the maximum prescribed by a special act of the legislature?

(2) Could the commission, upon a proper showing of fact, increase a street railroad or gas rate to a figure higher than the maximum to which the company had contractually agreed as one of the terms of its local franchise?

Wrapped up in the court's consideration of these two questions, particularly the latter one, were a number of underlying questions, partly of law and partly of judicial intuition, insight and public policy. In tracing the trend of decision during 1918, it will be helpful to keep these fundamental aspects in mind; therefore I shall endeavor to indicate them, somewhat succinctly:

(1) What is the New York court's view of rate fixation? Is it a legislative or a judicial function? Does the Public Service Commission, in prescribing a rate for a public utility, act legislatively or judicially?

(2) What is the court's view of a public utility rate? May a rate limitation be the subject-matter of a *contractual* agreement between the public utility company and the franchise-granting power? In vesting municipalities with *contractual* powers, has the constitution or the legislature alienated the *regulative* power over rates? Does the "police power" of the legislature include the rate-regulating power? If a franchise contract made by the muncipality, in pursuance of powers delegated to it by the legislature or the constitution, contains a covenant by the company never to charge more than a prescribed rate without municipal consent, may the legislature confer on a public service commission power to put in force a higher rate?

(3) What is the court's view of the Public Service Commission's functions and of the Public Service Commissions Law—literalistic and "strict construction" or broad-gauge and remedial? Is the court still distrustful of the newly erected tribunals, and disposed to construe narrowly their power to act plenarily in keeping rates *reasonable*, whether that means increase or reduction?

(4) What is the court's view of a municipality, of municipal autonomy under our New York Constitution, and of municipal control of public utility rates? Is a rate provision in a municipal franchise an autonomous contract or an exercise of *regulative* power? Does a rate limitation contained in a *franchise* stand on an equal footing with a rate warranted by commission *formulæ*, so that the latter cannot be deemed paramount to the former?

(5) What effect shall be given by the court to some of the new machinery of government—*e.g.*, the referendum provision in the City of Buffalo's "commission-form-of-government" charter.

These basic aspects of commingled law and policy may helpfully be kept in mind in considering the various decisions which I shall now discuss. They constitute "yard-sticks" by which the processes of juridical readjustment may conveniently be admeasured. In

gauging what has taken place in New York, and the factors which have led to it, one needs also to take into account the traditional New York view as to the *sanctity* of a franchise contract between a municipality and a public utility corporation, when either the municipality or the state itself tries to abrogate it or modify its terms, *over the company's objection.* New York had gone further, I think, than any other jurisdiction, in enforcing the inviolability of the contract (*People v. O'Brien, 111 N. Y. 1*), and in holding that there could be no abrogation or alteration of terms unless the company consented. If a franchise contract could not be modified, in an essential term, by the action of the state or municipality, without the consent of the opposite party to the contract, it seemed to many, at first impression, to be a sound rule of morals, policy and law alike that there could be no modification at the company's request, even by the state, without the consent of the city, altogether overlooking the fact that even under the rigorous rule of the *O'Brien* case, the state could exercise its "police power" and disregard and overrule franchise terms, without the consent of either the city or the company and over the objection of both. New York has never regarded a franchise term as a barrier to the power of the state to safeguard the safety, health, morals or essential welfare of the public, and neither the municipality nor the company had ever been permitted to claim that *their* bargain, binding *inter se,* had barred or limited what the state would and could otherwise do for public safety and convenience. The fact that rate regulation was a phase of the "police power" was momentarily lost sight of; public utility rates were looked upon as a permissible subject of bargaining, binding on the state no less than on the city, and the company. The menace to public safety and convenience, inherent in rates too low to permit proper upkeep of the rolling-stock and the hiring of skilled employees, was overlooked at first impression, and the rule of the *O'Brien* case was enforced against *the state,* when the company sought an exercise of the "reserved police power," even as that rule would be enforced against the company or the municipality, as to an issue arising *inter se,* where either party to the contract stood upon the contract terms.

THE DECISION IN THE QUINBY OR ROCHESTER-FARE CASE

This article might accurately be called the narrative of the *Quinby* decision in April of 1918 and of the efforts of the court to escape the legal and practical consequences of the ruling then made. All that the *Quinby* case (223 N. Y. 244) *held* was that the legislature had not undertaken to confer upon the Public Service Commission power to increase the street railroad rate fixed in the franchises granted by the

City of Rochester under the authority of Section 18 of Article III of the New York State Constitution. Power to increase rates thus fixed by municipal action under the constitutional authorization would not be deemed to have been intended to be conferred upon the Public Service Commissions, the court ruled, in the absence of clear and definite language conferring such jurisdiction without ambiguity. But if that was all the court *held*, there was much more which it *said*, and the court has subsequently experienced difficulty in reconciling itself to the consequences both of what it said and what it did.

The *Quinby* or Rochester-fare case was argued on March 25, and decided on April 5, 1918. The legislature was in session; the importunity of the public service companies was very great indeed; and there was a general demand for a judicial decision which, before the adjournment of the legislature, might clarify the present confines of commission power and afford a basis for the immediate formulation of remedial legislation, if the decision disclosed any to be necessary. Quinby was the Comptroller of the City of Rochester. The street railway company in that city was operating under franchises by which it had bound itself not to charge more than five cents per passenger. An act of the legislature had in terms recognized and ratified this agreement of limitation. Nevertheless, when net revenues declined under war conditions, the company asked the commission for the second district to fix a higher rate, and the commission was proceeding to hold hearings to that end. The commission for the second district was of the opinion that it had been empowered to prescribe reasonable rates, notwithstanding franchise provisions (*Matter of Petition of Huntington R.R. Co.*, 14 Official State Dept. Reports 305); the commission for the first district had felt obliged to rule that no such power had been conferred by the legislature (*Matter of Application of New York & North Shore Traction Co.*, 15 Official State Dept. Reports 1), although the commission expressed trenchantly its feeling that power to secure to an operating company an adequate revenue was essential to the continuance of adequate service and the proper discharge of the functions of the regulative tribunal. In order to obtain the earliest possible ruling as to the powers thus far conferred on the commission, Corporation Counsel Cunningham of Rochester sought a writ of prohibition, in the name of the muncipality and its fiscal officer, to prevent the commission for the second district from proceeding to take testimony concerning a six-cent fare application which the municipal authorities believed the commission would be powerless to grant. Their contention was two-fold: (1) That the commission had been given no power to authorize the company to charge six cents when the Railroad Law and the municipal charter

said the company could not charge more than five; and (2) that the commission had been given no power to authorize the company to charge six cents when by the terms of its franchise the company had agreed to charge no more than five.

The opinion of a majority of the court, granting a writ of prohibition on the issue litigated, was written by Judge Pound. Judges Cuddeback, Cardozo, Crane and Andrews concurred with him, Judge Crane in a separate six-line memorandum which has proved prophetic of the eventual attitude of the court. Chief Judge Hiscock and Judge Collin dissented. Perhaps the best "guide-post" to what was in the minds of the majority of those concurring with Judge Pound is to be found in the view which Judge Crane felt that he must separately state, in spite of his concurrence in the actual point of the majority holding. Judge Crane said (I italicize certain words which I deem especially significant):

"I concur. I am of the opinion that *the reserve police power* of the Legislature has *not* been *contracted* away. I concur in the above opinion *in so far* as it states that the Legislature has not *in this instance* given to the Public Service Commission the power of regulation."

With respect to the delegated power of the commission to increase street railroad rates limited by a statute prescribing a specific maximum, the *unanimous* view of the court (although the opinion bears internal evidences that this conclusion was not reached without difficulty; see page 258) was that the legislature had "constitutionally conferred upon the Public Service Commission certain functions, which plainly include the power to regulate rates fixed by statute." Although the legislature, in framing Section 49, sub-division 1, of the Public Service Commissions Law, used language which specifically and in terms delegated power to *decrease* a rate below the maximum fixed by the legislature, the absence of reference to *increasing* a rate *above* the maximum, taken in connection with the general delegation of rate-fixing power, was deemed to denote an intent to vest the commission with power to increase as well as decrease street railroad rates dealt with by statute. Because, however, "it is impossible to find a word in the statutes (Pub. Serv. Coms. Law) which discloses the legislative intent to deal with the matter of rates fixed by agreement with local authorities", the same general words of delegation were deemed to warrant the inference that the legislature "excluded them" (such agreements) "from consideration by failure to mention them and that it has made no attempt to turn them over to the Public Service Commission for revision."

Turning aside, however, from the actual point of decision, we find a number of highly significant things said as embodying the view of a majority of the court at that time:

As to the "home-rule" powers of municipalities in granting street railroad franchises: The provision of the State Constitution, by requiring the consent of the municipal authorities to the construction of a street railroad, was deemed to recognize, "that our municipalities are *pro tanto* independent of legislative control, exercising some fragment of power, otherwise legislative in character, which has been thus *irrevocably transferred by the fundamental law* from the legislature to the locality."

As to a rate provision contained as one of the conditions of the grant of the franchise "consent" of a municipality to the construction of a street railroad: The evident view of the author of the opinion, and probably also of the majority of the court (all except Chief Judge Hiscock and Judges Collin and Crane) was: (1) That the *constitution* vested the city with the power to bargain as to rates and insert a rate provision in its franchise grant to the company; (2) That a grant and a rate provision thus made under the authority of the constitutional provision becomes, when once accepted and availed of by the company, "a contract which neither the state nor its agencies can impair (*People v. O'Brien, 111 N. Y. 1*);" and (3) that "the paramount power of the Legislature over the subject of fares was" to be "upheld in the absence of a constitutional limitation," and that only in the case of rates prescribed in franchises not granted in pursuance of power conferred by the state constitution itself, the "reserved police power" of the legislature would enable it to increase rates above the franchise maximum or vest the commission with power to exceed the franchise figure.

After this expression of *view*, however, the majority, contented themselves by holding that, "It is, however, unnecessary, and therefore improper, to decide at this time what the limits of legislative power are in this connection * * * We should not unnecessarily hold that the legislature has intended to delegate any of its powers in the matter. * * * It is impossible to find a word in the statutes which discloses the legislative intent to deal with the matter of rates fixed by agreement with local authorities." The question whether the legislature *could* vest the commission with power to increase street railroad rates fixed by franchise agreements was thus specifically reserved; the court was content to hold that the legislature *had not tried* to do any such thing.

With respect to street railroad rates, the court did, however, disclose its view to be that "in *regulating rates* three courses were open to the legislature:

"1. To prescribe rates itself. 2. To delegate the power to the Commission. 3. To leave the matter to agreement between the street railroad company and the local authorities."

A bargain between the municipality and the street railroad company, prescribing a fare limitation as one of its terms, was held to be an act of rate regulation, the exercise of a "fragment of power, otherwise legislative in character, which has been thus irrevocably transferred by the fundamental law from the legislature to the locality." In other words, the municipal ordinance or franchise grant was declared to be an exercise of regulatory power—the exercise of the same power which the legislature might itself have exercised or delegated, as it saw fit, were it not for the constitutional provision. Some of the potential consequences of this ruling have not yet been realized.

THE FIRST MUNICIPAL GAS COMPANY CASE

In what we may call the first *Municipal Gas Company* case in the Court of Appeals during 1918, the question was as to the power of the Public Service Commission, under the legislative delegation, to do anything effectual itself to relieve a gas company from a statutory rate now so unremunerative as to be confiscatory and oppressive. (*People ex rel Municipal Gas Co.* v. *P. S. Comm., 224 N. Y. 156.*) At the time of this decision (July 12, 1918), the court was evidently still in the throes of the literalistic concept of regulatory legislation which had pervaded the *Quinby* decision and the ruling in *People ex rel New York Railways Company* v. *Public Service Commission* (233 N. Y. 373), decided on May 14, 1918. In the *New York Railways case*, a month after the *Quinby* decision, it may be said in passing, the court rigorously and summarily applied the "strict construction" concept to the Public Service Commissions Law, and seemed little conscious of the need that the regulative authority have adequate power over either rates or upkeep of property for service.

The enactment of the Public Service Commissions Law in the spring of 1907 had followed closely on the heels of the exhaustive investigation into gas rates, within the City of New York and other cities of the state, by the so-called Stevens Committee of the legislature, for which Mr. Charles E. Hughes, later Governor of the State, was counsel. In 1906, the legislature had passed maximum-rate statutes governing the supply of gas in New York City, and in 1907 similar statutes were passed in relation to Albany, Syracuse and Buffalo.

The "Eighty-cent gas" Law for the metropolis was already in litigation (*Willcox v. Consolidated Gas Co.*, 146 Fed. 150; 157 Fed. 849; 212 U. S. 19) in 1907, and a successful attack was being made upon the gas-rate sections of the Gas and Electricity Commission Act of 1905 (*Village of Saratoga Springs* v. *Saratoga Gas Co.*, 191 N. Y. 123). To avoid the effect of the decision in the *Saratoga* case, a gas company was given the right to complain to the commission and ask for an *increase* in the rate chargeable by it, even as representative consumers or certain municipal officers might make a complaint for a reduction in rates. Evidently to prevent the new commissions, experimentally created and not completely "trusted" by the public any more than by the regulated corporations, the legislature made Section 72 of the Public Service Commissions Law read so as to confer on the commission power to fix a gas rate, higher or lower than that being charged, but "not exceeding that fixed by statute"—a provision not found in Section 49, sub-division 1, relative to street railroads, construed in the *Quinby* case.

In the spring of 1918, the Municipal Gas Company of Albany, for which the legislature had prescribed a $1.00 maximum in 1907, found itself harassed and threatened with financial disaster, because the $1.00 rate no longer yielded essential revenues. So the company cast about for a ready road to relief and sought to find it in the power of the commission and that body's thorough knowledge of the company's affairs and finances—a knowledge acquired through more than ten years of close supervision of its accounts, securities and operations. Only the unadjudicated clause quoted from section 72 seemed possibly to bar the way to the quick relief which the company felt was sorely needed, and the company was evidently advised that the words "not exceeding that fixed by statute" were equivalent to "not exceeding that fixed by a *valid* statute" and that although these words fixed the upper boundaries of commission action so long as the rate prescribed by the statute was remunerative and non-confiscatory, the commission was not bound by a statutory rate which it found had become so unremunerative as to be confiscatory and so unconstitutional and void.

The Public Service Commission for the First District, earlier in the year, had ruled unanimously in the *Bronx Gas & Electric Company* case that it had no power to exceed the statutory maximum, even when that rate had become confiscatory, and in the *Municipal Gas Company* case the commission for the second district, by a vote of hree to two, had reluctantly overruled the company's contention and taken the same view. This ruling the Court of Appeals upheld, McLaughlin, J., alone dissenting. The prevailing opinion written

by Collin, J., held that the words of section 72 fixed absolutely, as between the commisson and the legislature, the boundaries of the power and jurisdiction of the commission; that the rate fixed by the special statute might be manifestly confiscatory, but that this did not invalidate the words of limitation on the commission's jurisdiction contained in the Public Service Commissions Law, or broaden the confines of the power which the legislature had seen fit to delegate to the commission. As between the gas company and the state, the company was deemed to have no doubt a way of freeing itself from the oppressive special statute; but as between the commission and the state, the commission could not, at the behest of the company, free itself from the boundary which the legislature had set up as marking and limiting the power it would give the commission. Beyond the rate fixed by a statute, be the statute valid or invalid, the Court of Appeals held that the commission could not go, because "the legislature evidently intended to retain unto itself the power of fixing rates exceeding those fixed as the greatest by statutes. We cannot discern in such retention of legislative power any violation of a constitutional provision."[2]

THE RANN CASE

In July of 1918, the Court of Appeals was evidently still under the sway of the juristic and governmental philosophy which had dictated the decision in the *Quinby* case. On July 12, the day on which the decision in the first *Municipal Gas Company* case was filed, *Matter of International Railway Co.* v. *Rann* was argued in the Court of Appeals, and on the same day decided (224 N. Y. 83). The opinion of the court, written by Pound, J., was regarded at the time as broadening and extending the concepts of the *Quinby* decision. Chief Judge Hiscock and Associate Judges Hogan, Cardozo, McLaughlin and Andrews concurred in Judge Pound's pronouncement. Judge Crane voted to dismiss the appeal, but indicated no dissent from the view of his colleagues on the substantive issues.

The *Rann* case was "the first fruits" of the *Quinby* decision, and its natural aftermath. The street railway service in Buffalo, prior to 1892, had been rendered by three corporations, each of which operated over its own lines and charged a separate initial fare with an addi-

[2]As to some of the practical consequences deemed to follow from this ruling, see the opinion of Ex-Justice Charles E. Hughes as Referee in Brooklyn Borough Gas Co. v. Public Service Commission, decided August 5, 1918, and now on appeal to the Appellate Division for the First Department. Contrary conclusions as to consequences were reached by Justice Russell Benedict in the Kings County Supreme Court in Public Service Commission v. Brooklyn Borough Gas Co., 104 Misc. 315, now on appeal to the Appellate Division for the Second Department.

tional charge for a transfer to any line of another company. In 1892, the companies entered into a contract with the city, known as the "Milburn agreement," upon which the rate provisions of all prior and subsequent franchises are now based. Transfer charges were abolished and a five-cent fare was established between any two points on any of the lines. The International Railway Company, as the successor of the companies signing the Milburn agreement, asked the consent of the municipality, in view of the *Quinby* decision. to a modification of the rate provision in the franchises and the "Milburn agreement", so as to permit the Public Service Commission for the Second District to fix a rate one cent higher, if the facts were found to require it, such modification and increase to be effective only during the war period. The Buffalo council passed resolutions consenting to such a modification, and a referendum thereon was invoked, under the unusual provision of the Buffalo "commission-government" charter that "no resolution disposing of any property or rights of the city" shall become effective until the opportunity has expired for the requiring of a referendum thereon. The company contended that no "property or rights of the city" were "disposed of by the resolutions of consent, and that accordingly no referendum could be compelled."

"Is the provision in the Milburn agreement for a five-cent fare a property right of the City of Buffalo?" was "the heart of the controversy" resolved by the court in the *Rann* case. As a starting point, the court laid down two propositions:

(1) "Under the existing law, before the rate can be changed, the consent of the city is necessary;"

(2) "The Public Service Commission may, with the consent of the local authorities evidenced as provided by law, increase rates of fare previously agreed upon by street railroad corporations and the city."

"The regulations as to rates of fare are conditions upon which the railroads exercise their franchises", continued the learned court, and added, upon the authority of the *Quinby* decision, "they are not immutable."

The opinion of Judge Pound must be regarded as a very lucid exposition of the underlying concept that the rate provision of a street railway franchise is a subject upon which a municipality may bargain and barter, in pursuance of *legislative* or regulatory power delegated to it *by the constitution*, and which it may then modify upon such terms as it sees fit without any "reserved police power" of the legislature operating to enable that body or the Public Service

Commission to increase the franchise rate. Every municipal corporation was declared by the court to have a two-fold character—one governmental, the other private:

> "In its governmental capacity it may command; in its private character, as a collection of individuals it must sometimes barter and bargain. The Milburn agreement is the result of bargaining beween the people of the City of Buffalo, represented by the municipal authorities on one hand, and the street railroad companies on the other. * * * The right of the inhabitants of the City of Buffalo to ride on the street railroad for a five-cent fare is a property right; a right enforcible in the courts. * * *. We must conclude that the common rights of the inhabitants of the city, secured through the agency of the city officials, are rights of the city and that the resolutions of the council thus modifying the Milburn agreement come peculiarly within the description of resolutions 'disposing of rights of the City.' They make an end to the present five-cent fare and add twenty per cent to the burdens of the traveller. Few rights of property are of more immediate concern to a greater proportion of the population than the right to ride on the street cars for a small sum."

Thus it was held by the Court of Appeals, not only that the street railway company and the Public Service Commission for the Second District could not increase the rate of fare to six cents during the war-time emergency without the contractual consent of the city,[3] but also that the municipal council, which made the agreement by which a five-cent fare was secured, could not, without a popular referendum, consent to even a temporary and guarded restoration of the regulative power, to the extent of permitting the Public Service Commission to fix a six-cent fare for the war period if the facts were found to demand it. Under the language of the Buffalo charter and the provisions of the "Milburn agreement", this ruling was deemed to follow from the decision in the *Quinby* case, but in practical consequences it left the Buffalo mayor and council powerless to assure adequacy or continuity of street railway service during the war period and led to consequences highly detrimental to public interest, as we shall see.

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[3]As to the interest and right of the municipality in a proceeding involving a public utility rate not fixed or limited by a municipal franchise, see Consolidated Gas Co. v. Newton, — Fed. —, decided by Mayer, J., in U. S. Dist. Ct. for So. Dist. of N. Y., Feb. 24, 1919; *Re* Engelhard & Sons Co., 231 U. S. 646; Consolidated Gas Co. v. Mayer, 146 Fed. 150; Richman v. Consolidated Gas Co., 114 App. Div. (N. Y.) 216, 224; Buffalo Gas Co. v. City of Buffalo, 156 Fed. 370.

THE INTERNATIONAL RAILWAY MANDAMUS PROCEEDING

In connection with the decision in the *Rann* case, reference may well be made to the controversy which came to court as its aftermath. Upon the referendum necessitated by the decision in the *Rann* case, the vote of the Buffalo electorate defeated the proposed ordinance by a majority of more than 5 to 1. The electorate was unwilling even to empower the commission for the second district to increase the five-cent rate, temporarily, during the war period, no matter if the facts showed the justice and the imperative public need of such a readjustment in the rate charged. When the company found it could not secure the increased rate it had expected, it informed its employees it could not give them the increase in wages they had been virtually or actually assured as of a date in May, in the event the ordinance was carried and the Public Service Commission granted a higher fare during the emergency. Thereupon the operating employees of the Company "struck," demanding not only the increased wage for the future but $275,000 "back pay" on the increased scale. The company conceded the justice of the wage increase, both retroactive and prospective; the advance had in fact been "recommended" by the National War Labor Board; but the company frankly and flatly said it could not, under the franchise rate, borrow the $275,000 needed to make the scale retroactive, and could not derive from the five-cent fare sufficient revenue to pay the increased scale for the future. So the crews did not take out cars, traffic stopped, the public walked, business suffered severely, and there was bitter public criticism of the legislative and regulative mechanism which left an absolutely essential public service with no alternative but to suspend, for lack of means of working out a rate proportioned to the emergency costs.

Under these circumstances, the Public Service Commission for the Second District sought judicial aid to compel the company to the scriptural task of "making bricks" without straw. If the company did not run cars, regardless of men or money, the court must compel the furnishing of service. Accordingly application was made to the Erie County Special Term for a writ of mandamus, under Section 57 of the Public Service Commissions Law, on the theory that the company was "omitting" to do something required of it by law (*viz.*, was "omitting" to run cars) and, therefore, mandamus was sought to compel the company "within two days to operate its cars in and between the cities of Buffalo, Niagara Falls and Lockport, for the carriage of passengers in such measure as to meet the reasonable demands of the traveling public."

Before making this application to the court, the commission did not conduct any hearing or make any finding or order, on its own part, determining what cars should be run, what service would be a reasonable and adequate service under the conditions, what service was possible under the conditions, what funds or borrowing power the company had, or anything else. The company said it *could not* render any service; the commission said the company *must* render *adequate* service; and the commission put the whole controversy gracefully and carefully upon the lap of the court, without having itself made an order defining adequate service, for the guidance of the court, without having even indicated in its petition for the writ, what service it thought the company should or could render; and without having investigated as to the company's ability to meet the financial demands and render service under the existent conditions.

The commission having thus virtually abdicated its performance of the duties which the Public Service Commissions Law had vested in it, rather than the courts, and having sought to require the court to perform functions which the commission was in far better position itself to perform, the company answered the commission's petition with a strong plea of the *physical impossibility* of doing what the commission had requested but had not ordered. The commission urged that even where the commission had made no order and had conducted no hearing, the court could not inquire into the merits of a plea of physical impossibility due to inadequacy of revenue and lack of borrowing power. Distinguished counsel for the commission for the second district persuaded the Erie County Special Term and a divided court in the Appellate Division for the Fourth Department (*Public Service Commission for Second District v. International Ry. Co.*, 220 App. Div. 185) to disregard the company's plea of insuperable physical and financial obstacles and grant the writ, without this aspect of the matter having been inquired into, by the commission or by the court.

The Court of Appeals, however, in a fragmentary *per curiam*, memorandum (224 N. Y. 631) held that this could not be done; that "the courts will not command the defendant, under pain of punishment for contempt, to do what it cannot;" and that mandamus is not the proper remedy "where a corporation concedes itself powerless to fulfill its public duties." It was held that inquiry must be made into the merits of the company's plea of inability. So the writ was reversed, and the matter remanded for a rehearing. Whether the Court of Appeals would in any respect have ruled otherwise, if the commission had itself investigated and made an order defining reasonable service under the conditions and passing upon

the company's plea of financial difficulties, is a question which future decisions may elucidate. Beyond peradventure, the learned court was right in ruling that no corporation or corporate officers should be brought to jeopardy of contempt, through the issuance of a judicial mandate that specified things be done, unless and until *some tribunal* shall have heard the evidence in support of a plea of physical impossibility, and shall have determined in a judicial manner whether such plea has merit. That the court at Special Term need not and will not re-examine the question of the company's ability to do the things demanded of it by the commission, where the commission has duly made an order defining the thing the company is to do and the company's duty to do it, and has inquired fully into the company's financial and physical ability to comply with the order, has been decided, within the present month, by the learned Appellate Division for the Second Department, in a case which I argued before it in November, following the October memorandum of the Court of Appeals in the Buffalo case, which was the sole matter discussed under the oral argument (*Public Service Commission for the First District v. New York & Richmond Gas Co.*, decided March 1919.)

JUSTICE RUDD'S DECISION IN THE MOST RECENT BUFFALO LITIGATION

The chronicle of "Milburn agreement" litigation would not be complete, if I omitted reference to the decision of Justice Rudd in the Albany County Special Term, granting the International Railway Company a writ of mandamus against the Public Service Commission for the Second District. Mr. Louis P. Fuhrmann, individually and as mayor of Buffalo, had instituted a proceeding before the commission, several years ago, to obtain a *reduction* in the five-cent fare charged in Buffalo. The proceeding "slumbered" when costs began to climb; the company never even filed an answer. The city's complaint, framed years before the *Quinby* decision, alleged that the commission had full power and jurisdiction over the rate of fare charged by the company.

After the *Quinby* decision, the Company's lawyers sought to file an answer, which admitted the city's allegation as to the commission's power, and asked the commission to fix a rate higher than five cents, even as the city sought a rate lower than five cents. The commission refused to receive the answer or predicate a hearing upon it, over the city's objection, on the ground that the *Quinby* case settled the law to be that the commission would have no power to sanction a rate higher than that permitted by the "Milburn agreement."

Justice Rudd granted the company's motion to compel the commission to go ahead with the case. He declined to draw any distinction between gas and street railway franchises, and treated the *Quinby* decision as overruled by the *South Glens Falls* case (*post*). He said that he was "sustained in this conclusion by the United States Supreme Court in *Union Dry Goods Company v. Georgia Public Service Commission*,, 39 Supreme Court Reporter 116 (February 1st, 1919)."

In point of fact, the *Union Dry Goods* case does not impress me as bearing on the present question at all. That case involved no more than the right of the legislative power, *with the consent of the company*, to prescribe the rates which shall be charged to the company's consumers generally, notwithstanding that one or more of these consumers has a private, individual contract (not a franchise or local "consent") with the company, which contract would, if the state power did not intervene and the company ask the exercise of regulative power otherwise, give that consumer or those consumers the continued benefit of a rate lower than that which the legislative power deems reasonable. Cases which have real pertinency, in the Federal jurisdiction, are *Detroit United Railway Co. v. Detroit*, 248 U. S. 429; *City of Englewood v. Denver & S. P. Ry. Co.*, 248 U. S. 294.

No matter what the adequacy or inadequacy of his reasoning, the significant thing is that in the first devision of any court after the *South Glens Falls* case, so careful a jurist as Justice Rudd treats the *Quinby* case as no longer embodying the law of the state and compels the commission to act in disregard of it. The appeal from his decision will shortly be heard in the Appellate Division for the Third Department.

THE SECOND MUNICIPAL GAS COMPANY CASE

We come now to two decisions filed by the Court of Appeals on its first "decision day" of 1919, argued late in December of 1918. Both involved rates chargeable for gas, and each disclosed a court which has come to greater firmness and clarity in its view of the relationship of the judicial and the legislative power to public utility rates. The court gives the impression of having reached now a vigorous readiness to treat the enabling of adequate public utility rates as an important modern aspect of judicial functions. I shall first refer to the luminous opinion of Judge Cardozo for a unanimous Court (Hiscock, Ch. J., and Chase, Collin, Cuddeback, Pound and Andrews, JJ., concurring), in what we may call the second *Municipal Gas Company* case (225 N. Y. 96).

When the Court of Appeals had held in the prior case (224 N. Y. 156) that the Public Service Commission had no power to supersede

a statutory rate for gas, and that for confiscation, however grievous and marked, there must be resort to other remedies, the Albany company sought injunctive relief in equity. Its complaint was demurred to by the Public Service Commission for the Second District, on the ground that no cause of action for an overthrow of the statute prescribing a $1.00 maximum for the City of Albany was made out. The opinion of the Court of Appeals, sustaining the sufficiency of the complaint and overruling the demurrer, proceeds along lines at variance with some of the contentions which I made in that court in behalf of the client for whom I a pp red in this case, but I am frank to confess my belief that Judge Cardozo's utterance in this case is one of the most notable in the history of the jurisprudence of this state and one of the most influential in the annals of public-service regulation in the United States. In felicitous phrasing it states, with greater force and clarity than has ever been employed elsewhere, the virile doctrine that rates must remain reasonable and that regulatory barriers cannot forestall the duty of the courts to prevent confiscation. If the legislative and regulatory processes of public control fail to readjust themselves to changed conditions, the courts must, upon application, suspend and restrain the enforcement of the regulatory standard, as long as the conditions are such that its enforcement would involve confiscatory consequences. The processes of regulation—by legislature, commission, or municipality—must vouchsafe a rate yielding an adequate return, else the court will suspend the regulatory barrier for so long a period as its enforcement would withhold a fair return. To quote the impressive declaration of the court:

> "the argument is that a statute is either valid or invalid at the moment of its making, and from that premise the conclusion is supposed to follow that there is a remedy for present confiscation, but none for confiscation that results from changed conditions. We do not view so narrowly the great immunities of the Constitution, or our own power to enforce them. A statute prescribing rates is one of continuing operation. It is an attempt by the Legislature to predict for future years the charges that will yield a fair return. The prediction must square with the facts, or be cast aside as worthless. *Ex parte Young*, 209 U. S. 123, 147, 148, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. It must square with them in one year as in another, at the beginning but equally at the end. In all such legislation, from the hour of its enactment, there thus inheres the seed of an infirmity which the future may develop. It is the infirmity that always waits upon pro-

> phecy; the coming years must tell whether the prophecy is true or false. All that we can say at the outset is that the power to regulate exists. The validity of its exercise depends upon the nicety of the adjustment between forecast and events. This is as true of a regulation which looks forward a year as of one which looks forward a decade or a century. In either case, with difference only of degree, there is a forecast of the future, which must be justified by results. Into every statute of this kind, we are to read, therefore, an implied condition. The condition is that the rates shall remain in force at such times and at such only as their enforcement will not work denial of the right to a fair return. When the return falls below that level, the regulation is suspended. When the level is again attained, the duty of obedience revives. There would be no obscurity about this if the condition were expressed. It is no less binding because it is implied. The Constitution is the supreme law, and statutes are written and enforced in submission to its commands."

So the demurrer, predicated on a contention that the complaint did not make out a cause of equitable cognicance, was overruled; and at the time of this writing, the case is on trial on its merits, before Justice Nichols, in the Albany County Special Term.

THE SOUTH GLENS FALLS CASE

The *South Glens Falls* case involved a village and a gas company. It did not involve a rate fixed in a franchise granted in pursuance of Section 18 of Article III of the State Constitution. Article 7, Section 61, Sub-division 1, of the Transportation Corporations Law gave to gas companies the right

> "to lay conductors for conducting gas through the streets * * * in each such city, village and town, with the consent of the municipal authorities thereof, and under such reasonable regulations as they may prescribe."

At first blush, this might appear to be an even more specific grant of power by the legislature to insert a rate provision in the franchise than is contained in the constitutional provision as to street railroad corporations; for this and other reasons, it will be of interest to analyze the court's present view of its prior decision in the *Quinby* case.

The Village of South Glens Falls had granted a license or franchise to the United Gas, Electric Light & Fuel Company, to use the village streets, etc., for a term of fifty years. It was provided that in consideration of this grant of right, the company should charge no greater sum than $1.25 per thousand cubic feet for gas. In August of 1917,

when the cost of coal, labor, oil and the like, had greatly increased, so that the $1.25 rate had become not only unremunerative but confiscatory, the company filed a tariff increasing its rate to $1.60. Thereupon the village made complaint to the commission for the second district, under Section 71 of the Public Service Commissions Law, and asked the commission to prevent the company from charging more than the franchise rate. Counsel for the village waived all question of the reasonableness of the $1.60 rate; he attacked only the right of the company to charge more than the franchise maximum. The commission dismissed the proceeding, in view of the stand of the village only upon the franchise provision; but the Appellate Division for the Third Department felt constrained by the decision in the *Quinby* case to reverse the commission and sustain the complaint of the village, even though a gas, rather than a street railway franchise, was under scrutiny.

By a vote of four to three, the Court of Appeals reversed the action of the Appellate Division and brought the case out from under the rule of the *Quinby* decision. Crane, J., who wrote the very significant memorandum to which I have referred in connection with the *Quinby* case, elaborated now the same essential view in the principal opinion in this case, in which Hiscock, C. J., and Cuddeback and McLaughlin, JJ., concurred, the latter in an opinion in which also Hiscock, Ch. J., concurred. Chase, J., read a dissenting opinion, in which Collin, J., concurred, out of his deference to the *Quinby* decision, from the making of which he had dissented. To complete the record in the *South Glens Falls* case, Hogan, J., dissented generally.

The opinion of Judge Crane inquired into two questions:

(1) Has the legislature power to regulate, and if need be to increase, the price chargeable by this company for gas, notwithstanding the franchise provision?

(2) Has the legislature conferred such power on the commission?

Both of these questions four members of the court answered in the affirmative. An undisclosed number of the four were "of the opinion that, in view of the changes which naturally come with time in civic life, the fixing of a given rate by a village for a period of fifty years was not a reasonable regulation within the terms of the statute". (Transp. Corp. L., Art. 7, Sec. 61, sub-div. 1.) None of the members of the court rested their decision upon this significant ground, however, but discussed instead what Judge Crane called "the much broader principles which are here involved."

The *prevailing* view or views in the *South Glens Falls* case may perhaps be most quickly apprehended if the *dissenting* view is first

analyzed. In epitome, Judge Chase's dissent seems based on four propositions:

(1) That the *Quinby* decision dealt only with the power which the legislature *had* delegated to the commission—not what it *might* have delegated or *could* now delegate.

(2) That the legiaslature could if it saw fit, empower the Public Service Commission to increase *any* public utility rate—gas or street railway—whether limited by franchise agreement or not.

(3) That so far as its potential subordination to the sovereign legislative power is concerned, a franchise provision fixing a maximum rate chargeable for gas stands on no different basis than a franchise fixing a maximum fare on a street railroad.

(4) That the legislature has not thus far delegated to the commission power to increase *either* gas or street railroad rates above *maxima* prescribed in franchise agreements.

The most serious concern of the minority seems to have been that an effort to draw a line of distinction between the powers of the commission as to gas and street railroad franchises "may lead to the conclusion that, so far as street railroads are concerned, the legislature has no power to interfere" with the franchise rates.

We may next analyze the reasoning by which Judge McLaughlin and Chief Judge Hiscock reached a conclusion of concurrence "in the *result* reached by Judge Crane," though not of willingness to concur in his opinion. Judge McLaughlin's fundamental conclusion is that the Village of South Glens Falls had been in no way, by the constitution or by legislation, authorized to fix a gas rate so that the state could not fix or authorize a different and higher rate. This conclusion he reached from the following underlying assumptions of legal principle:

(1) That the right to regulate rates of public service corporations is a *governmental* power vested in the *state* in its sovereign capacity.

(2) That this rate-regulating power may be exercised by the legislature, or through a commission, or may be delegated to a municipality.

(3) That delegation of this power, to a commission or municipality, is never implied, and will not be assumed to have been intended unless it clearly and unmistakably appears.

(4) No provision of the village charter, state constitution, or statute gave the village power to fix a gas rate *except as between the village and the company;* the contract between the village and the company can have no effect on the plenary power of the legislature and the commission over gas rates.

(5) The delegated power of the village to prescribe "reasonable regulations," in granting a franchise or license to a gas company, does not include a right to fix a gas rate so that the state cannot fix a higher one.

From the foregoing, Judge McLaughlin and Chief Justice Hiscock reached the view that "it necessarily follows that there is at the present time lodged in the Public Service Commission the power to fix a rate at which gas shall be sold by the appellant" company. The instant case was distinguished, upon its facts, from the *Quinby* case, as follows:

> "In the present case there was no constitutional provision requiring the consent of the local authorities before the streets of the village could be occupied by the gas company. There has been no legislative recognition of the terms imposed as a condition of granting the franchise. No statute has been enacted fixing the maximum price at which gas can be sold. And it does appear from the Public Service Commissions Law that the Legislature intended to and has given the commission the power either to increase or to decrease the price at which gas shall be furnished to the public.
>
> "The distinction thus made is not fanciful. It is real. It is substantial. In the Quinby Case the intent on the part of the Legislature to delegate the power to fix a rate could not be found, and there was a fair inference, at least, from legislative acts that such power had not been given but was retained by the state. In the present case the intent does appear. The statute creating the Public Service Commission indicates as clearly as language can that the Legislature intended to give to the commission all the power necessary either to increase or to diminish rates at which gas should be sold."

We may turn now to the opinion of Judge Crane. As to the power of the legislature over rates fixed by franchise terms, he declared that such rates "cannot be said to form contracts beyond the inherent power of the legislature to modify for the public welfare. Subsequent conditions may call for modification in the rate, *upward or downward*, in the public interest:

> "Reduction in rates seems to be generally recognized as a public benefit, and yet an increase may be equally so. * * * A reasonable increase in rates in order to provide the money for these changed conditions is as much a benefit to the public as a reduction in rates when the charge is excessive. It is a bad political economist who thinks the public is always served best by that which is cheap."

Judge Crane's conclusion upon this phase was that

> "Rate regulation is a matter of the police power of the State, and the terms and conditions such as are here contained in a franchise to a service corporation may be modified without impairing the provision of the contract within the provisions of the constitution."

Upon the second phase of the case, whether the inherent power of the legislature as to gas rates has been conferred upon the commission, Judge Crane's argument is more cryptic and less elaborate than that of Judge McLaughlin and Judge Chase. He does not labor greatly in trying to escape the application of the *Quinby* decision. He *hints* at a distinction, and flatly refuses to apply the *Quinby* ruling to a gas franchise.

In conclusion it may be said that the "present state of the law" as to the powers of the New York Public Service Commission may perhaps be accurately summarized as follows:

(1) As to special statutes prescribing maximum rates for other than gas or electric service, the commission has power to fix reasonable rates, above or below the statutory figure.

(2) As to statutes prescribing maximum rates for gas or electric service, the commission may prescribe rates *lower* than the statutory figure but may not fix a rate *higher* than that prescribed by the statute.

(3) As to public utility service other than street railroad transportation, the legislature has delegated to the commission power to fix and prescribe a reasonable rate, notwithstanding that a lower or higher rate has been prescribed by a "consent", franchise or contract of the company with a municipality or other local political subdivision of the state.

(4) As to street railroad fares limited by such a "consent," franchise or contract entered into under the sanction and protection of the state constitutional provision, under the precise state of facts shown in the *Quinby* case, the legislature has not yet delegated to the commission power to fix a rate in excess of the franchise figure, but may delegate such power, in its discretion.

Back of these questions as to the power which the legislature has delegated or may delegate, and far more fundamental than any question of the relief which the Public Service Commissions have been placed in position to grant, is the fundamental attitude which the court has disclosed, of vigorous insistence that public utility rates shall be neither too high nor too low; that the processes and mechanisms of public control shall work out and assure such an adequacy,

but not an excess, of revenue; and that if the legislative power leaves any public utility in such a plight that a confiscatory rate is inflicted, by statute, refusal of change in a franchise provision, or otherwise, the wholesome powers of a court of equity will be exerted, to hold the confiscatory regulation in abeyance, during whatever period of time its practical workings would produce confiscation. If they see fit to exercise their power, the legislature and the Public Service Commissions are to be the instrumentalities by which rates are to be kept from excess or deficiency; but if the legislative power withholds this measure of justice, the judicial power will, for the time and *pro tanto*, suspend the regulation whose consequences are proved to be confiscatory.

(5) As to street railroad fares limited by such a "consent," franchise or contract entered into under the sanction of the state constitutional provision, but under circumstances varying at all (if not distinguishable) from those passed on in the *Quinby* case, the Court of Appeals has indicated its disinclination to apply the *Quinby* ruling, but has not yet squarely said that it will not do so.

(6) As to fares on transportation facilities furnished under *lease* of *city owned* property rather than franchise rights in public streets (*e. g.*, the New York City subways), the Court of Appeals has in nowise indicated its view whether the "reserved police power" could avail to increase a rate fixed as one of the terms of such a lease of city property.

On one hand, the New York City Dual Subway Contracts are not "franchises" or "local consents" granted under the constitutional provision; on the other hand, they involve a formal lease, a complicated contract with elaborate terms of mutual obligation, and the use of the subways built with city monies and *owned* by the *city*, as distinguished from public streets, which *belong* to all the people of the state and not to the municipality. The question of legislative power and delegation thus stands on a somewhat different basis as to the subway contracts, and I have not attempted to discuss it.

For my own part, I feel that reasons remain for doubt whether, in any case where the safety, convenience and welfare of the public are shown to be actually menaced by the inevitable consequence of rates too low the Court of Appeals will ever again refrain from holding that the full "police power" of the state over rates has been withheld from the Public Service Commissions, so far as franchise limitations are concerned. At the present time, however, the *Quinby* decision must be deemed to be still the law as to situations based on similar facts.