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Waiver by a State of the Right to Regulate Rates

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made by the lessee, and so it is probable that this rule imposes no great hardship on him.

—J. W. S.

WAIVER BY A STATE OF THE RIGHT TO REGULATE RATES.—As the regulation of rates charged by public utilities is admittedly a governmental function—a function generally regarded as an exercise of the police power of the state[1]—there is obviously a grave, if not vital, objection to holding that a state by its legislature may ever waive the right to exercise this fundamental, governmental power. Thus, it is well-settled law that neither the state, nor a municipal corporation to which the state has delegated its powers, can by contract waive the right to exercise those police powers which protect the health, safety, or morals of the public.[2] May a state, then, waive its right to exercise the allied power to regulate rates?

Upon this point the Supreme Court of Appeals of West Virginia has held that this power—a police power—is so fundamentally governmental and that the right to exercise it at all times is so vital to the essential interests of the public and so dependent upon changing conditions that any attempt by the state legislature to relinquish the right is ineffectual.[3] Hence, according to this view, any alleged contract, purporting to be authorized by the state directly through its legislature or indirectly through a municipality to the effect that rates thus fixed by the state or municipality are not to be changed for a stipulated time, is not a valid contract, and, therefore, any subsequent regulation of the rate by the state is not an impairment of the obligation of a contract in contravention of the federal Constitution.[4] Upon principle it is submitted that the above-mentioned view of the West Virginia court is sound; but unfortunately the United States Supreme Court seems to

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[1]Munn *v.* Illinois, 94 U. S. 113 (1876); Union Dry Goods Co. *v.* Georgia Public Service Corporation, 248 U. S. 372 (1919); City of Benwood *et al. v.* Public Service Commission, 75 W. Va. 127, 83 S. E. 295 (1914). But see William Draper Lewis, "Constitutional Questions Involved in the Commodity Clause of the Hepburn Act, 21 HARV. L. REV. 595, 609.

[2]Beer Co. *v.* Massachusetts, 97 U. S. 25 (1877); Stone *v.* Mississippi, 101 U. S. 814 (1879); City of Petersburg *v.* Petersburg Aqueduct Co., 102 Va. 654, 47 S. E. 848 (1904); see FREUND, POLICE POWER, §§ 24, 362.

[3]Laurel Fork & Sand Hill R. R. Co. *v.* West Virginia Transportation Co., 25 W. Va. 324 (1884).

[4]Article I, § 10.

have committed itself to a different doctrine;[5] and the Supreme Court of Appeals of Virginia, in purporting to follow the Supreme Court of the United States, has, in a very recent case,[6] carried the federal doctrine so far as to warrant a consideration of the soundness of the decision.

But, before considering the special facts of the principal case as affecting the correctness either of its conclusion or of its reasoning, it will be necessary to ascertain the view of the United States Supreme Court on this question. Perhaps the view of that court can best be stated in the language of the court itself (*per* Mr. Justice Moody):[7]

> "It has been settled by this court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite time and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. . . But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government. . . *the authority to make it must clearly and unmistakably appear and all doubts must be resolved in favor of the continuance of the power.*"
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> "*The general powers of a municipality or of any other political subdivision of the State are not sufficient. Specific authority for that purpose is required.*"[8]

The United States Supreme Court, therefore, is invariably inclined to construe very strictly any alleged surrender by a state of its right to regulate rates, and where there are two possible constructions of the surrendering grant that construction is adopted which retains the power in the state for the benefit of the public.[9] The basic question, then, is whether the surrendering grants involved in the principal case confer "clearly and unmistakably" "specific authority" to contract away the right to regulate rates. The court held in the principal case that the state had

[5]See, *e. g.*, Detroit *v.* Detroit Citizens Street Railway Co., 184 U. S. 368 (1902); Home Telephone and Telegraph Co. *v.* City of Los Angeles, 211 U. S. 265 (1908), and authorities therein cited. See, also, Pingree *v.* Michigan Cent. R. Co., 118 Mich. 314, 76 N. W. 635 (1898). See a collection of authorities on the point in L. R. A. 1915C, 261 (note).

[6]Virginia-Western Power Co. *v.* Commonwealth, 99 S. E. 723 (Va. 1919).

[7]Home Telephone & Telegraph Co. *v.* City of Los Angeles, *supra*, note 5, p. 273.

[8]Italics ours.

[9]See, *e. g.*, Home Telephone and Telegraph Co. *v.* City of Los Angeles, *supra*, note 5.

granted to the municipality the power to make such a contract and that, therefore, the subsequent regulation of the rate fixed by such municipal contract impaired the obligation of a contract in violation of the federal Constitution. The statutory (and constitutional) provisions relied upon by the court as granting to the municipality the power to make such inviolable contract were as follows:[10]

> "No . . . [public utiltiy of the class in question] shall be permitted to use the streets, alleys or public grounds of a city or town without the previous assent of the corporate authorities of such city or town."
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> "Every . . . grant [by a municipality of a franchise for a term of years] shall . . . make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates, and the maintenance of the property in good order throughout the term of the grant."
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> "Nothing in this section shall impair the right which has heretofore been or may hereafter be conferred by law upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any service performed by it under a municipal or county franchise . . . ."
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> "The . . . courts . . . shall have jurisdiction by mandamus . . . to enforce compliance by said cities or towns and by all grantees of franchises . . . with all the terms and contracts and obligations of either party, as contained in franchises."

These provisions undoubtedly confer upon the municipality very extensive powers to contract and to fix rates, but, assuming that a state may, *by express grant to that effect,* confer upon a municipality power to contract away the right to regulate rates, it is submitted that the powers conferred by the above-mentioned provisions are mere "general powers" to prescribe and fix rates and are not "specific authority" to contract away the right to regulate rates; and the United States Supreme Court has held that the grant by a state to a municipal corporation of the power "to fix and determine" rates is a mere "general power" and not "specific authority" to contract away this sovereign right.[11] "It

[10]Other provisions, but little relied upon, together with the full form of the provisions quoted from and the references thereto, are set forth in the statement of facts by the judge in the principal case.

[11]Home Telephone and Telegraph Co. *v.* City of Los Angeles, *supra,* note 5.

authorizes the exercise of the governmental power" to regulate rates but it does not "authorize a contract upon this important and vital subject."[12] To the same effect the Supreme Court of Appeals of West Virginia has rather recently held that the power of a municipal corporation to "contract and be contracted with" and "to erect, or authorize or prohibit the erection of . . . . water works" confers power to regulate water rates and to contract with water works company as to the rates to be charged, but does not confer power to contract away the state's right to intervene and regulate the rates so fixed.[13] Said the court:[14]

> "For a municipal corporation to claim the power to fix rates inviolably, it must show clear and express delegation of the same to it from the legislature. . . . . The presumption is against such delegation of the power. The delegation must clearly and unmistakably appear."

Does, then, such delegation of power "clearly and unmistakably appear" from the provisions in the principal case? With great deference it is submitted that, to use again the language of the West Virginia court, there is no "clear and express delegation" of the "power to fix rates inviolably," and as all doubts as to the surrender by a state of its sovereign powers must be resolved in favor of the state or, in other words, in favor of the public, it would seem to follow that the court should have adopted that construction which would not have involved a surrender by the state of this important governmental power, a power which, because of ever-changing conditions, the state should always be free to exercise in behalf of the public.

Upon this theory there was no valid contract in the principal case that there would be no subsequent regulation of the rates fixed by the municipality, and, therefore, there could be, of course, no impairment of the obligation of a contract. However, suppose that, but for the exercise by the state of its right or alleged right to regulate rates, there is an otherwise valid contract that the rates, as fixed by the municipality, are not to be changed, does a subsequent change of rates by the state impair the obligation of the contract within the meaning of the constitutional prohibition that no state shall pass any "law impairing the obligation of

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[12]*Ibid.*, p. 274.
[13]City of Benwood *et al. v.* Public Service Commission, *supra*, note 1.
[14]*Ibid.*, pp. 131, 132.

contracts?'' The United States Supreme Court has held that such a contract, if made under an express delegation of authority to that effect, is a contract within the protection of the ''contract clause'' of the Constitution.[15] But in a much later decision—a case decided in January of this year[16]—the United States Supreme Court held that, where a public utility, acting under a power granted by the state, had made a contract with a consumer to furnish service at a stipulated rate, a subsequent regulation of the rate by the state is not an impairment of the obligation of the contract within the meaning of the Constitution, but is a legitimate effect of a valid exercise of the police power of the state. Said the court, quoting with approval from its former decisions:

> ''It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from properly exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.''[17]
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> *''It is settled that neither the 'contract clause' nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant, and that all contract and property rights are held subject to its fair exercise.''*[18]
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> ''Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government and no obligation of a contract can extend to defeat the legitimate government authority.''[19]

It is quite true that the facts in the later case are somewhat different from those in the first-mentioned cases, but the power of the public service corporation in the later case to contract as to rates depends, of course, on the grant by the state of the power to make such contract, just as the power of the municipal corporation in the earlier cases to contract as to rates depends on

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[15]See authorities referred to, *supra*, note 5.

[16]Union Dry Goods Co. *v.* Georgia Public Service Corporation, *supra*, note 1.

[17]*Ibid.*, p. 375, quoting from Manigault *v.* Springs, 199 U. S. 473, 480 (1905).

[18]*Ibid.*, p. 376, quoting from Atlantic Coast Line R. R. Co. *v.* Goldsboro, 232 U. S. 548, 558 (1914). Italics ours.

[19]*Ibid.*, p. 376, quoting from Knox *v.* Lee, 12 Wall. 457, 551 (1870).

the grant by the state of the power to make such contract; and if "this power can neither be abdicated [by the state] nor bargained away, and is inalienable even by express grant" in the later case it would seem to be so, by the very same reasoning, in the former class of cases. In other words, the reasoning of the court in the later case would seem to indicate a possible change of view by the Supreme Court in regard to the power of a state through its legislature to waive the right to regulate rates. Whether the Supreme Court is willing to apply the reasoning in the later case to facts like those in the principal case remains to be seen, and the court may hesitate to do so for the reason that it would require the overruling of several former decisions, but it is submitted that the reasoning of the court in the later decision is indisputably the sounder in that it does not permit a state legislature to bargain away its police power to the detriment of the public. Besides, it would seem that in order to be consistent it would be necessary to hold that a state, by its legislature, may not waive the right to regulate rates, for, as we have seen, the Supreme Court holds that a state, by its legislature, may not waive the right to exercise those police powers which protect the public health, public safety or public morals, though the same court has held that the state may so waive the right to exercise the police power to regulate rates, at least in some cases, and this though the same court has held, in regard to regulating the service of public utilities, that "the power of a state by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals or the public safety."[20] Now, if a state cannot contract away the police power "to protect the public health, the public morals or the public safety" and "the power of the state by appropriate legislation to provide for the public convenience stands upon the same footing precisely" how can it be consistently held that a state can (at least in some cases) contract away the power to regulate rates, a power which the court holds is a police power and is clearly a "power to provide for the public convenience?" Some commentators have attempted to explain this apparent inconsistency by saying that the power to regulate rates is not a police power but the power to control employments affected with a public interest.[21] The United States Supreme Court,

[20]Lake Shore & Michigan Southern Ry. Co. *v.* Ohio, 173 U. S. 285, 300 (1899).
[21]*Cf.* 21 HARV. L. REV. 595, 609. See 23 HARV. L. REV. 388, 389.

however, decided in the leading case on the question,[22] and has since frequently held,[23] that the regulation of rates is an exercise of the police power, and there seems to be no real ground for doubting that decision.

Moreover, as we have seen, the Supreme Court has recently held that a regulation by a public service commission changing the rates fixed by contract between a consumer and a public service corporation does not impair the obligation of a contract within the meaning of the Constitution for the reason, assigned by the court, that the power to regulate rates is a police power and that "it is settled that neither the 'contract clause' nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant, and that all contract and property rights are held subject to its fair exercise." Now, if, as the court reasons in this case, a state cannot grant to a public service corporation the power to contract away this right to regulate rates, it is submitted that for the very same reasons a state cannot grant to a municipal corporation the power to contract away the right to regulate rates. It would seem, therefore, that not only consistency but analogous precedent and sound principle would lead to the conclusion that a state should never, even by express legislative grant, be permitted to waive its sovereign right to regulate rates, a conclusion, which because of ever-changing conditions and of the vital importance to the public of the retention of the right, is, it would seem, "a consummation devoutly to be wished."

—T. P. H.

IS INTERSTATE TRANSPORTATION OF INTOXICANTS BY PRIVATE MEANS AND FOR PERSONAL USE WITHIN THE REED AMENDMENT?—In a recent Virginia case,[1] the defendant had been indicted for bringing intoxicating liquor into the state in violation of the federal "bone-dry law," usually known as the Reed Amendment,

[22]Munn *v.* Illinois, *supra*, note 1.

[23]See, *e. g.*, Union Dry Goods Co. *v.* Georgia Public Service Corporation, *supra*, note 1.

[1]Sickel *v.* Commonwealth, 99 S. E. 678 (1919).