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## PUBLIC UTILITIES-STREET RAILWAY REGULATION BY STATE COMMISSION IN HOME RULE CITY-PERMISSION TO WITHDRAW FROM SERVICE

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PUBLIC UTILITIES—STREET RAILWAY REGULATION BY STATE COMMISSION IN HOME RULE CITY—PERMISSION TO WITHDRAW FROM SERVICE—A street railway company, located in a city with a home rule charter adopted in accordance with the state constitution, petitioned the state railway commission

and was granted authority to curtail its transportation by buses. The company had been in bad financial condition during recent years; the number of passengers carried had been substantially decreasing, and the company was not able to pay full interest on bonded debt. Upon the insistence of the city, the company had put bus lines in operation several years earlier and these had continually been operating at a deficit. Upon appeal, the court held that the adoption of a home rule charter does not of itself give the city jurisdiction over curtailment of bus and street-car service. *Omaha & Council Bluffs Street Ry. v. Omaha*, (Neb. 1934) 252 N. W. 407.

It has become almost axiomatic that when a business is affected with a public interest, it ceases to be *juris privati* and becomes subject to public regulation.<sup>1</sup> The State has inherent power, within reasonable and proper limits, to regulate and control public utilities within its borders. As long as the public service company continues in business, it is subject to such regulation,<sup>2</sup> but it can always withdraw from business entirely whether the business is being run at a loss<sup>3</sup> or a profit.<sup>4</sup> If the utility desires to abandon a part of its service, this can be done only by permission of the State or its agency.<sup>5</sup> Unless the constitution otherwise provides, the power to regulate rests, primarily, in the legislature,<sup>6</sup> and the legislature may delegate this power by express language

<sup>1</sup> *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77 (1877); *Allnutt v. Inglis*, 12 East 527, 104 Eng. Repr. 206 (1810).

<sup>2</sup> *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77 (1877); *Palmyra Tel. Co. v. Modesta Tel. Co.*, 336 Ill. 158, 167 N. E. 860 (1929); *Ex Parte Tindall*, 102 Okla. 192, 229 Pac. 125 (1924).

<sup>3</sup> I SPURR, GUIDING PRINCIPLES OF PUBLIC SERVICE REGULATION 38 (1924); *Brooks-Scanlon Co. v. R. R. Commission of Louisiana*, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. ed. 323 (1920); *Bullock v. Florida ex rel. R. R. Commission*, 254 U. S. 513, 41 Sup. Ct. 193, 65 L. ed. 380 (1921); 8 MICH. L. REV. 679 (1910).

<sup>4</sup> Very few cases can be found on this point since owners do not, as a practical matter, abandon a profitable utility. Compare I WYMAN, PUBLIC SERVICE CORPORATIONS, sec. 296 (1911); *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77 (1877); *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. 137 (1907) with *Southern R. R. v. Hatchett*, 174 Ky. 463, 192 S. W. 694 (1917), and note in L. R. A. 1915A 549.

To the effect that, though a public business which is being run at a loss may be discontinued, it may be done only in the way provided by law, see *Norristown v. Reading Transit and Light Co.*, 277 Pa. 459, 121 Atl. 495 (1923).

<sup>5</sup> *Fort Smith Light and Traction Co. v. Bourland*, 267 U. S. 330, 45 Sup. Ct. 249, 69 L. ed. 631 (1925); *State v. Dodge City, M. & T. Ry.*, 53 Kan. 377, 36 Pac. 747, 42 Am. State Rep. 295 (1894). See Chaplin, "Limitations Upon the Right of Withdrawal from Public Employment," 16 HARV. L. REV. 555 (1903). To the effect that if the public service corporation gets permission to abandon service, it may do so even though the general public objects, see *Jeffries v. Commonwealth*, 121 Va. 425, 93 S. E. 701 (1917); *Asher v. Hutchinson Water, L. & P. Co.*, 66 Kan. 496, 71 Pac. 813 (1903). See 20 MICH. L. REV. 802 (1922).

A street railway can be enjoined from quitting without permission of the State. *H. Herpolsheimer Co. v. Lincoln Traction Co.*, 96 Neb. 154, 147 N. W. 206 (1914).

<sup>6</sup> *Southwest Missouri R. R. v. Public Service Comm.*, 281 Mo. 52, 219 S. W. 380 (1920); *Scranton v. Public Service Comm.*, 268 Pa. 192, 110 Atl. 775 (1920).

or by necessary implication to a commission<sup>7</sup> or to a municipality.<sup>8</sup> In the instant case, both the home rule city and the state railway commission claimed to have been made the agency of the State in regulating the street railways within the city. The commission was created by the state constitution with power and duties which included "the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."<sup>9</sup> The city argued that by virtue of its home rule charter<sup>10</sup> the municipality had sole jurisdiction to pass upon the curtailment of the bus service. The powers of a city operating under a home rule charter<sup>11</sup> are derived directly from the constitution and charter and not from the legislature, and the charter has the same effect as a law enacted by the legislature.<sup>12</sup> But a home rule charter only gives the municipality authority over municipal affairs.<sup>13</sup> "The permission of the constitution to a city of a specified population to frame and adopt a charter for its own government

<sup>7</sup> *Superior Water, L. & P. Co. v. Superior*, 174 Wis. 257, 181 N. W. 113 (1921); *McAneny v. Board of Estimate & Apportionment*, 232 N. Y. 377, 134 N. E. 187 (1922).

<sup>8</sup> *St. Cloud Pub. Serv. Co. v. St. Cloud*, 265 U. S. 352, 44 Sup. Ct. 492, 68 L. ed. 1050 (1924). Even where statute or constitution says that consent of city must be obtained before a street railway can construct its roads in such city, it has been held that this gives the municipality a veto power only, and does not give the right of regulation. *Chicago v. O'Connell*, 278 Ill. 591, 116 N. E. 210 (1917).

The power may be revoked by the legislature, such revocation taking place when the same power is conferred on a state board or commission. *Northern Trust Co. v. Chicago Railways Co.*, 318 Ill. 402, 149 N. E. 422 (1925); *Phillipsburg v. Board of Public Utility Com'rs*, 85 N. J. L. 141, 88 Atl. 1096 (1913).

That a municipality is a subordinate subdivision of the State with no power to control public utilities unless expressly given, see *State ex rel. Triay v. Burr*, 79 Fla. 290, 84 So. 61 (1920); *Traverse City v. Michigan Ry. Commission*, 202 Mich. 575, 168 N. W. 481 (1918).

<sup>9</sup> Nebraska Constitution, art. 4, sec. 20, adopted in 1920. That the commission had jurisdiction over street railways, see *Herpolsheimer Co. v. Lincoln Traction Co.*, 96 Neb. 154, 147 N. W. 206, 1114 (1914).

<sup>10</sup> Adopted by authority of Nebraska Constitution, art. 11, sec. 5, adopted in 1920, which provides that a home rule charter shall be "subject to the constitution and laws of the state."

<sup>11</sup> The following state constitutions provide for home-rule, constitutional, or freeholders charters: Arizona, California, Colorado, Maryland, Michigan, Minnesota, Missouri, Nebraska, Ohio, Oklahoma, Oregon, Texas, Washington, Wisconsin.

<sup>12</sup> *Community Natural Gas Co. v. Northern Texas Utilities Co.*, (Texas Civ. App. 1928) 13 S. W. (2d) 184; *Ex Parte Smith*, 231 Mo. 111, 132 S. W. 607 (1910); *St. Louis v. Nash*, (Mo. 1924) 260 S. W. 985; *Fitzgerald v. Cleveland*, 88 Ohio St. 338, 103 N. E. 512 (1913). See 1 McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., sec. 250 (1928).

<sup>13</sup> *State ex rel. United Rys. Co. v. Public Service Commission*, 270 Mo. 429, 192 S. W. 958, P. U. R. 1917D 752 (1917); *Carlberg v. Metcalfe*, 120 Neb. 481, 234 N. W. 87 (1930); *Attorney General ex rel. Lennane v. Detroit*, 225 Mich. 631, 196 N. W. 391 (1923); *Ex Parte Boalt*, 123 Ore. 1, 260 Pac. 1004 (1927); *Portland Ry. L. & P. Co. v. Portland*, (D. C. Ore. 1914) 210 Fed. 667.

does not hamper nor thwart the state from exercising its police power to protect not only the inhabitants of such city, but the public generally. A city is not a sovereignty respecting matters of general concern, matters not pertaining strictly and exclusively to local municipal affairs."<sup>14</sup> Although purely municipal affairs have not as yet been clearly differentiated in all cases,<sup>15</sup> it does not seem open to controversy that the exercise of power in the regulation of service and rates of public utilities has always been regarded as a state rather than a municipal affair.<sup>16</sup> Courts agree that a state commission, in the absence of a statute to the contrary, has the power to regulate street railways and other public utilities in a home rule city.<sup>17</sup> Though the power to regulate and control street railways may be conferred upon a city, ". . . it is not a power appertaining to the government of a city and it does not follow as an incident to a grant of a power to frame a charter for a city government."<sup>18</sup>

J. W. C.

<sup>14</sup> McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., sec. 215 (1928).

<sup>15</sup> For a list of the activities that have been held to belong to municipal government, and those that belong to the State, see I McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., secs. 194-196 (1928).

<sup>16</sup> Kalamazoo v. Titus, 208 Mich. 252, 175 N. W. 480 (1919); City of Bartlesville v. Corporation Commission, 820 Okla. 116, 199 Pac. 396 (1921); State ex rel. United Rys. Co. v. Public Service Commission, 270 Mo. 429, 192 S. W. 958 (1917); Portland Ry., L. & P. Co. v. Portland, (D. C. Ore. 1914) 210 Fed. 667.

A state commission has the power to regulate a municipally owned utility. Logansport v. Public Service Commission, 202 Ind. 523, 177 N. E. 249 (1931).

<sup>17</sup> Portland Ry., L. & P. Co. v. Portland, (D. C. Ore. 1914) 210 Fed. 667; Castle Rock Mountain Ry. & Park v. Denver Tramway Co., 1 Colo. Public Utilities Commission 126, P. U. R. 1915F 224 (1915); State ex rel. Garner v. Missouri & K. Tel. Co., 189 Mo. 83, 88 S. W. 41 (1905); Detroit v. Mich. Ry. Commission, 209 Mich. 395, 177 N. W. 306 (1920).

<sup>18</sup> State ex rel. v. Missouri & K. Telephone Co., 189 Mo. 83 at 100, 88 S. W. 41 at 43 (1905).