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Note and Comment

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NOTE AND COMMENT

CONSTITUTIONAL LAW—APPLICABILITY OF FIRST TEN AMENDMENTS TO UNINCORPORATED TERRITORY—A man was killed aboard an American ship in a Virgin Island port. A police investigation was started the next day and continued for twelve days thereafter, during which twenty three witnesses were examined by the government. During most of the investigation the prisoners were present, and most of the testimony was translated into Spanish for their benefit, that being the only language they understood. No formal charge had been made against them and they were without counsel, but they were given an opportunity to "explain" after the testimony of each witness. The record was then transferred to the District court where the same judge presided, assisted by four lay judges. Formal charge was made, and the prisoners had counsel. The trial consisted of arguments on the facts as found in the above investigation, no more witnesses being called, although the prisoners were given the opportunity of calling witnesses in their behalf. They were found guilty. Act of Congress of March 3, 1917 (39 Stat. c. 171) provided that, as to judicial proceedings, the local laws should continue in effect *"in so far as compatible with the changed sovereignty,"* until Congress should otherwise provide. It was assumed that the above proceedings were in accord with the "local laws" as established by Denmark. *Held,* the prisoners are

entitled to a new trial, for the new sovereignty gives them the right to be confronted by the witnesses against them, and to be heard through cross-examination. *Soto* v. *U. S.*, (C. C. A., 3d Circ., 1921), 273 Fed. 628.

As the new sovereign of the Virgin Islands is our Federal Government, and as that Government must look to the Constitution for all its power, the phrase "in so far as compatible with the changed sovereignty" should mean in so far as not in conflict with the Constitution.

Since the war with Spain the determination of the legal status of our outlying territories and the inhabitants thereof has been a difficult problem, and a solution satisfactory from the view point of certainty has not been reached. The actual decisions by the Supreme Court are few in number, and narrow in scope, and have been by a court divided four against five. While the statements of principles in these cases have covered the whole field of territorial government and private rights thereunder very thoroughly, no one theory has had the sanction of a majority of the court.

As the law now stands, excepting from consideration foreign territory temporarily occupied and territory taken for consular jurisdiction, the authority of the federal government extends over three classes of territory, namely, states, incorporated territory, and unincorporated territory. The Constitution is operative over the whole, in so far as its provisions are applicable. All are applicable to the states. All are applicable to incorporated territory, except those which by their nature can pertain to states only. As to what provisions are applicable to unincorporated territory, no general statement can be made with any assurance of accuracy. Such territory is not foreign territory in an international sense. *De Lima* v. *Bidwell,* 182 U. S. 1. It is foreign territory in a domestic sense, for instance, within the meaning of the revenue clauses of the Constitution. *Downes* v. *Bidwell,* 182 U. S. 244. Indictment by a grand jury and verdict by unanimous vote of twelve petit jurors are not necessary parts of a valid criminal trial in unincorporated territory. *Hawaii* v. *Mankichi,* 190 U. 197; *Dorr* v. *U. S.,* 195 U. S. 138. Actual decisions carry us no further. *Kepner* v. *U. S.,* 195 U. S. 100, adds nothing, for while it holds that the accused in the Philippines cannot be subjected to double jeopardy, Congress had specifically provided such guarantee by statute for that territory. Act of July 1, 1902 (32 Stat. 691). The fact that Congress has given the Philippines and Hawaii bills of rights containing nearly all the provisions of the first ten amendments to the Constitution, explains, perhaps, why the Supreme Court has not been called upon more frequently to decide just which of these provisions are applicable in the absence of such act of Congress, to unincorporated territory. At any rate, actual decisions have not gone far in determining which provisions of the first ten amendments are applicable to unincorporated territory, and which are not.

If we turn, for a basis of division of these provisions, from authority to the principles and theories set forth by the various members of the court in the Insular Cases, we are met with a sharp conflict of views. The theory of Mr. Justice Brown that the Constitution is operative in a given territory only when specifically "extended" to that territory by Congress, *Rassmussen* v. *U. S.,* 197 U. S. 516, has met with but little approval. The theory which had the

sanction of more members of the court than any other was that all territory should be lumped together and that all the provisions of the Constitution should be applicable to all territory, except those provisions which could pertain to the states alone. The justices responsible for this proposition, however, were in the minority as to the actual decisions. Their theory seems necessary neither as a matter of logic nor upon authority, and from the view point of expediency would hardly be workable. The doctrine which is the basis of the decision in the instant case, namely, that certain provisions of the bill of rights are remedial or procedural only, and can be dispensed with in unincorporated territory, while other provisions guarantee rights that are fundamental, or natural, and cannot be denied anywhere under our flag, it is submitted, really dodges the difficulty. For instance, which of the rights stated in the Sixth Amendment are fundamental, or natural, and which remedial only? The doctrine sounds well, but it is likewise unworkable.

Under another test suggested in the Insular Cases it is very doubtful if the principal case could be sustained. Under this theory only those provisions of the first eight amendments are applicable to unincorporated territory which are in terms a prohibition upon the body which must act in order to deny the right, to so act. This test has the merit of greater certainty. The difference between "Congress shall pass no law" in the First Amendment, and "the accused shall enjoy" in the Sixth, is clear cut. To adopt this doctrine does not mean that, as a matter of constitutional law, the inhabitants of unincorporated territory could have none of the rights which by this test are found to be inapplicable to such territory. It simply means that Congress would be unfettered in its administration of such territory, except in so far as it is expressly prohibited from denying certain rights. True, this would permit Congress to withhold from such territory certain rights which in the states are highly valued, but government of new territory means meeting new conditions, and some measure of discretion is necessary for success. Congressional government of our territories has never tended to tyranny. Illustrations of this fact are to be found from the time of the adoption of the Constitution to the present day, including the Act of March 3, 1917 (39 Stat. c. 171) providing for the temporary government of the Virgin Islands. The bill of rights given the Philippines, Act of July 1, 1902 (32 Stat. 691) is convincing evidence of the policy of Congress to grant to the people of our unincorporated territories every right or safeguard they are prepared to receive and wisely use. As was said by Holmes, J., in *Kepner* v. *U. S., supra,* the danger now is that criminals will escape justice, not that they will be subjected to tyranny. Admittedly, the Virgin Islands are unincorporated territory. Admittedly, also, the decision of the instant case may unsettle the public mind there, and interfere with the administration of justice, coming as it does before the people are prepared for the change. The situation here is very nearly the same as that involved in *Hawaii* v. *Mankichi,* 190 U. S. 197, where the result of invalidating the customary criminal procedure was carefully considered—and avoided. It is submitted that the decision of the instant case could likewise have been avoided, upon sound principles, as outlined above, and without conflict with any previous authority.

For further authorities upon the subject in general, see *Fourteen Diamond Rings* v. *U. S.*, 183 U. S. 176; *Dooley* v. *U. S.*, 182 U. S. 222; 41 *Am. L. Rev.* 239; *Malcolm, Philippine Constitutional Law,* 149-157; *Willoughby, Constitutional Law,* Ch. 24, 25, 29 and 30. D. H. B.

DECLARATORY JUDGMENT—DECLARING RIGHTS UNDER THE GUISE OF GRANTING AN INJUNCTION—It has often been held that a party may obtain a judicial determination of his rights in respect to legislation alleged to be invalid, by means of an application to a court of equity for an injunction restraining the enforcement of the statute. *Ex parte Young* (1907) 209 U. S. 123, is the leading case of this type. There, a railroad rate statute was involved, which required compliance by all railroad companies in the state, under the threat of heavy penalties. The railroad actually violated the provisions of the statute after an injunction had been obtained by a stockholder restraining the company from complying, and prosecution for the violation was prevented by an injunction against the attorney general. The latter injunction, it must be noted, was an effective and appropriate order, because acts of violation were in fact taking place which would otherwise have called forth action by the attorney general. The injunction could not, therefore, be looked upon as anything but a genuinely operative remedy. *Truax* v. *Raich* (1915) 239 U. S. 33, *Michigan Salt Works* v. *Baird* (1913) 173 Mich. 655, and other like cases, were all similar in this respect. In each, the act for which the prosecution was feared had been committed, and the injunction was employed as a protection against a presently possible prosecution.

But let it be supposed that the case is one where no violation of the statute has taken place and where none is contemplated until after the court has passed upon its validity. Is there anything to enjoin? The attorney general cannot prosecute because nothing has been done upon which to base a prosecution. Can the attorney general be enjoined from prosecuting before any violation or even threat of violation has occurred?

In *Anway* v. *Grand Rapids Ry. Co.* (1920) 211 Mich. 592, an effort was made to obtain a decision from the court as to whether a contract could legally be made which the plaintiff alleged that he was desirous of making. The plaintiff feared the penalties of a statute. He had no intention of entering into the proposed contract unless he was first assured by the court that he would not be liable for the penalty. He asked for a declaration of rights, under the Declaratory Judgment Act, and got it, but the supreme court held that at this stage there was no controversy pending, and that the declaration was only a decision on a moot question and therefore invalid. Apparently it was the view of the supreme court of Michigan that until the plaintiff did some act upon which the penal statute could operate, there could be no judicial question. In this view of the proceedings the addition of a prayer for an injunction against the attorney general would have added nothing to the substance of the case, for no prosecution was possible because there was no violation of the statute, either actual or threatened. The infirmity in the case was held to go much deeper than a mere procedural failure to add a suitable prayer. The court held that there was no cause of action in existence

which could be employed by the plaintiff in a court of justice.

A case identical on its facts with the *Anway Case* has just been decided by the United States District Court for the Western District of Washington, three judges sitting and concurring. *Terrace* v. *Thompson* (1921) 274 Fed. 841. In that case the owners of certain land wished to lease it to a Japanese. A statute known as the Alien Land Bill in terms prohibited such a lease under heavy penalties, but the parties believed the apparent prohibition was not legally effective. They were not willing, however, to make the lease unless the court first assured them that it could safely be done, and they joined as complainants in a bill in equity, making the attorney general a party defendant, and asked for an injunction restraining the defendant from prosecuting under the statute. The court cited *Ex parte Young, supra,* as authority for taking jurisdiction, and the rights of the parties were determined. As in the *Anway Case,* no act had been done by the complainants contrary to the statute. No prosecution was therefore possible, and the complainants made it clear in their bill that they did not propose to render themselves liable to any prosecution. The attorney general was therefore enjoined from an impossibility, viz., from suing on a cause of action which not only did not exist but was not threatened or even contemplated. The injunction was therefore essentially premature, and apparently served only as a cloak to hide a mere declaration of rights. The court held that where parties contemplate entering into a contract which may or may not amount to a violation of a penal statute, the court will, in advance of any act on their part which could be deemed wrongful, pass upon their rights and tell them whether their contemplated action will or will not be a violation of the act. This is a pure declaration of rights, and it was made in this case as an exercise of inherent judicial power, without any authorizing statute. E. R. S.

JOINT TENANCY IN PERSONAL PROPERTY IN MICHIGAN—In *Lober* v. *Dorgan,* 215 Mich. 62, decided July 19, 1921, the court again wrestled with the problem which has troubled the Michigan courts for many years, as to whether the law of the state recognizes any such thing as joint ownership in personal property with the common law incident of survivorship. The facts presented a controversy between the estates of husband and wife, the latter having survived the former. A real estate mortgage had been given to "George W. Bush and Sarah Bush, his wife, of Gobleville, Michigan, as joint tenants, with sole right to the survivor." After the husband's death Mrs. Bush collected part of the sum due and the suit was for an accounting as to the sum so collected. It was held, Steere, C. J., and Fellows and Stone, JJ., dissenting, that Mrs. Bush by right of survivorship was entitled to the whole sum.

In arriving at this conclusion it was necessary for the majority either to repudiate *Ludwig* v. *Bruner,* 203 Mich. 556 (1918), or to distinguish it. The latter course was taken, and the distinction in facts seized upon was the presence in the *Lober* case mortgage of the words "with the sole right to the survivor." In the principal case Bird, J., does not go so far as to say that a joint tenancy in personal property with the common law incident of survivorship may be created in Michigan; he merely holds that the parties to the mortgage

may by *contract* provide for survivorship. Whatever may be thought of the basic question regarding joint tenancy in personal property with its common law incidents, it is believed that the learned court in its decision puts itself upon very dubious ground.

In the first place, the kinds of estates and tenancies which parties are allowed to create is not merely a matter of the parties' freedom of contract. The types of estates and tenancies which the law will recognize are few and in a sense arbitrary. For example, no court would give literal effect to a conveyance "to A and his male heirs," no matter how clearly the desire of the parties to the deed to have such estate may have been expressed. The common law recognized inheritable estates only as fees simple or fees tail. The example proposed is neither, and the construction of such limitation would be merely to eliminate the word "male." And it is of course common knowledge that within any particular class of estates there were distinct common law limitations upon the parties' freedom. The Rule against Perpetuities has interfered many times with the plans of grantors and devisors. For its conclusion regarding the freedom and potency of contract to provide for survivorship the court relies largely on *Equitable Loan and Security Co.* v. *Waring,* 117 Ga. 599, in which the court was considering whether an investment certificate scheme involving certain features of lapse and survivorship was illegal as a lottery. *Taylor* v. *Smith,* 116 N. C. 531, quoted from in the Georgia case, merely decided that co-owners of a note could make a valid contract that on the death of either without issue the note should belong to the survivor. And *Arnold* v. *Jack's Ex'rs.* 24 Pa. St. 57, also relied upon in the Georgia case, decided that it was possible to limit an estate in land to two or more for life as co-owners with cross remainders to the survivor.

The only possible support for the conclusions of the majority would seem to be in the possibility of treating the words "with sole right to the survivor" as creating an interest in the mortgage in the nature of a *remainder.* It is possible that Bird, J., had this in mind in speaking of freedom of contract. Whether the quoted words are sufficient to create a future interest in personal property is, it is submitted, extremely doubtful. It would be questionable whether they would be effective to create a remainder even in the case of real property.

In *Wait* v. *Bovee,* 35 Mich. 425, there was announced a decision which fairly warranted the statement thereafter frequently made by the court that "under our decisions the right of survivorship does not obtain in personal property held in joint ownership." *Hart* v. *Hart,* 201 Mich. 207, 213 (1918), in which Bird and Kuhn, JJ., dissented from the proposition quoted. The decision of the case, however, was neither an affirmance nor rejection of the view. Later in the same year in the *Ludwig* case, *supra,* Ostrander, C. J., and Steere, Stone, and Kuhn, JJ., concurred with Mr. Justice Fellows in application of the doctrine of *Wait* v. *Bovee.* Bird, Moore, and Brook, JJ., dissented, claiming that the law would recognize joint tenancy with right of survivorship in personal property if provided for by the parties. In the principal case the new members of the court, Wiest, Clark, and Sharpe, JJ., joined Bird and Moore, JJ., in the view expressed by the former in his dis-

senting opinion in the *Ludwig* case. Steere, C. J., and Stone, and Fellows, JJ., adhered to what had been their prevailing view in the earlier case, namely, that survivorship in joint ownership of personal property would not be recognized even though the parties make it clear that they intend such incident to attach.

The decision in the principal case purports, according to the prevailing opinion, to be entirely consistent with the earlier cases in the State. It is, however, a rejection of the view announced in the court's opinion in the *Ludwig* case that the quality of survivorship can not be attached by an expression of intention to that effect. In dealing with this question Michigan lawyers must address themselves to this inquiry: have the parties contracted for the incident of survivorship? According to the *Ludwig* case no such contract or intention is shown by a provision in the instrument of title that the co-owners are to hold "as joint tenants." But if there are added the words "with sole right to the survivor," then, according to the principal case, there is joint tenancy as at common law so far as survivorship is concerned.

There remains to be said only that at common law joint tenancy was applicable to personal as well as real property. LITT. 281; Co. LITT., 182a; 2 KENT'S COMM.* 350. An early exception was made as to the incident of survivorship in the case of property used in trade or agriculture. 2 KENT'S COMM., *350. And the same general policy against joint tenancies in realty has found some expression in the case of personalty. SCHOULER, PERS. PROP. § 156. The public policy of the State of Michigan regarding this matter is perhaps indicated in part at least by COMP. LAWS OF 1915, sec. 8040, wherein it is provided that deposits in bank in the name of the depositor or any other person, "and in form to be paid to either or the survivor" thereby become the property of such persons "as joint tenants," with right of survivorship. This statute which is a copy of a New York Act was held valid in *In re Rehfeld's Est.*, 198 Mich. 249. R. W. A.

POWER OF A COURT TO PUNISH WHEN THE PRESCRIBED PUNISHMENT BECOMES IMPOSSIBLE—"It is to be noted, that penal statutes are taken strictly and literally only in the point of defining and setting down the fact and the punishment, and in those clauses that do concern them, and not generally in words that are but circumstances and conveyance in the putting of the case, and so see the diversity; for if the law be, that for such an offense a man shall lose his right hand, and the offender hath had his right hand before cut off in the wars, he shall not lose his left hand, but the crime shall rather pass without the punishment which the law assigned, than the letter of the law should be extended."—BACON'S LAW TRACTS, 75.

The legislature of Washington in 1919 provided for the creation of a penal institution for women and appropriated funds for its maintenance during the ensuing biennium. The act provided that all women over 16 years of age *might* be and all women over 18 years of age *must* be, confined in this institution when convicted of any gross misdemeanor or of any felony except murder, arson, or robbery. At its biennial session in 1921, the legislature passed an appropriation bill for the maintenance of this institution for

another two years but this bill was vetoed by the governor after the legislature had adjourned. The institution was closed April 1, 1921, for want of funds. One week later, the defendant was convicted of the crime of adultery. The lower court committed her to this institution but, there being no way of carrying the committment into effect, the woman was held in the county jail. On an original application to the supreme court for a writ of *habeas corpus* seeking her discharge from custody, a majority of the court held that the failure of the legislature to make an appropriation for the institution in 1921 effected a repeal of the Act of 1919; that this exception to the prior law being now repealed, the prior law would be fully operative and she should be sentenced as provided in this prior law. *Ex parte Williamson* (Wash. 1921), 200 Pac. 329.

Admitting that the Act of 1919 was repealed and that this act was only an exception to the prior law as to felonies and misdemeanors, then the decision —that the exception being taken away, the prior statute is to be applied without the exception—is sound. 25 R. C. L. 934; *Manchester Township Supervisors* v. *Wayne Co. Comm.*, 257 Pa. 442.

But did the majority of the court come to the right conclusion when they held that failure by the legislature to make an appropriation for the institution effected a repeal of the law requiring offenders to be confined in that institution? Certainly the legislature did not intend that law to be repealed, for before adjournment it passed an appropriation measure for the institution. True, the governor vetoed the appropriation measure, but could that operate as a repeal of prior legislation? The three dissenting judges answered that question by saying: "While admitting the governor's power to veto an appropriation, I cannot consent to the idea that, by such a veto, the governor can, in effect, repeal prior, properly enacted, positive, statutory provisions for the punishment of crime."

If then the Act of 1919 was still in force, we have a case of one convicted under a statute where the prescribed mandatory punishment has become impossible of being enforced.

An analogy to this state of facts might be drawn from the case of *United States* v. *Union Supply Company*, 215 U. S. 50. In that case a corporation was proceeded against criminally for an offense punishable under the statute by fine *and* imprisonment. The corporation clearly could not be subjected to the imprisonment. It was held that when a statute prescribes that two independent penalties shall both be inflicted, the inference is that the legislature intended them to be inflicted as far as possible, and that, if one of them is impossible, the legislature did not intend on that account that the defendant should escape. Upon conviction the defendant corporation was subjected to a fine only. In the principal case, the whole penalty has become impossible of enforcement, but, applying the analogy, we would say that, although the punishment stipulated has become impossible, still the legislature did not *intend* on that account that the offender should go free, and it merely results in a law which prohibits certains acts but provides no penalty. Does a court then have power to punish one who violates such a statute? The common law rule in such a case is that "wherever a statute prohibits a matter of public

grievance to the liberty and security of the people, or commands a matter of public convenience, without enacting any penalty for disobeying its prohibitions or commands, an offender against such a statute is punishable by way of *indictment for his contempt of its enactments,* and may be sentenced to pay a fine for his offense." *State* v. *Fletcher,* 5 N. H. 257. Under such a rule, the court should have sustained the *habeas corpus* proceedings in the principal case, but the defendant could then have been indicted under the common law for her contempt of the enactment. But in a state where the common law is not in force and this common law indictment therefore not available, the court has no inherent power to punish one who violates a statute for which no penalty is provided and the result is that the offender goes free. *State* v. *Gaunt,* 13 Ore. 115.

Again, in a jurisdiction where the court will look behind the words of the statute to the intent of the legislature, one might suggest that, rather than construe the two statutes as together prohibiting the act but providing no enforcible penalty, the court should construe the later statute by reading into it the additional words: *"so long as this institution shall be maintained,* women over 18 years of age must be confined therein." With this interpretation, the former law would become operative as soon as the institution was closed. But these words should not properly be read into the statute. At first glance, it would seem to be analogous to the case where the statute prohibits selling liquor to a minor. The defendant sells to the minor not knowing he is a minor. The court feels that the legislature did not intend such a defendant to come within the statute and so reads the word *"knowingly"* in the statute. *Adler* v. *State,* 55 Ala. 16. But it is to be noted that in that case, reading the additional word into the statute resulted in favor of the offender while reading the suggested words into the statute of the principal case would result to the disadvantage of the defendant. The better rule is that "the benefit of the doubt should be given to the subject, and against the legislature which has failed to explain itself." MAXWELL on INTERPRETATION OF STATUTES (5th Ed.), p. 460.

Many courts, however, refuse to look for a legislative intent as to punishment when the prescribed mandatory punishment fails, for here the court is confronted with one of those cases where the legislature had no intent—where the court is called upon to guess what the legislature would have intended if the question had been brought to its mind. These courts follow the rule, as laid down by Bacon, *supra,* that "penal statutes are taken strictly and literally in the point of setting down the fact and the punishment" and "the crime shall rather pass without the punishment which the law assigned rather than the letter of the law should be extended." In *Weems* v. *United States,* 217 U. S. 349, the defendant was convicted of defrauding the United States Government of the Philippine Islands and was sentenced in accordance with the requirements of the statute. On appeal, the mandatory penalty was held unconstitutional as being a cruel and unusual punishment. The court there did not say that the evident intent of the legislature was that a defrauder of the government should be punished and, if the prescribed punishment failed, the court might substitute some other punishment. On the contrary, it said the case

could not be remanded for new sentence but the judgment must be reversed with directions to dismiss the proceedings. This, of course, would result in the defendant going free, but these courts hold that the fault is in the statute and it rests with the legislature to make the alteration. As was said by Lord Tenterden in *Rex* v. *Barham,* 8 B. & C. 104; "Our decision may perhaps operate to defeat the object of the statute; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act in order to give effect to what we may suppose to be the intention of the legislature." L. W. K.

PUBLIC UTILITIES—RATES FIXED BY MUNICIPALITY UNDER POWER TO REGULATE AND FIX RATES—The principal cases dealing with the power of municipalities to contract with public service companies for service rates, and of the legislature to override such contract rates, have been considered in 19 MICHIGAN LAW REVIEW 886 and previous notes there referred to. The rules of law have been gradually evolved, with results full of surprises to the public and to the companies. The latter felt the first painful jar in what may fairly be called the leading case in this field, *Home Telephone Co.* v. *Los Angeles,* 211 U. S. 265. In the more recent cases it has in general been the public that has suffered pain. Neither side has accepted punishment very gracefully, and the contest has not helped to develop that good feeling between them that is so desirable if the utility company is to prosper and the public is to be well and reasonably served. It is not the purpose of this note to refer to all of the many very recent cases as few of them make any material contribution to the subject, and these few have been considered in previous notes.

The attempt will be rather to try to state clearly such results as seem settled. That there is still room for such clear statement seems the more evident from the fact that judges continue to mis-apply the law in cases which seem so evidently governed by previous decisions that one would think that not even lawyers would argue to the contrary. Neither side seems willing to accept those results, and both continue to make contention of points which should be taken as settled unless and until the decisions are changed by statutes or constitutions. Not all the cases, of course, are so clear, but for the doubtful, clear distinctions are of great value. The doubt now rests mainly, not wholly, in the application, rather than in the statement of principles.

It is to be remarked on this whole matter that usually the golden rule would work better for both parties than any rules of law, but past experiences have bred so much suspicion as to the truthfulness and good faith of the parties, and left so much antagonism, that the public, remembering perhaps the insistence of corporations on the unreasonable advantages of franchise provisions obtained sometimes by false tampering with the representatives of the people, is now in most cases unwilling to release the corporations from any franchise provisions in its favor, even in cases where rates have become unremunerative, and involve the bankruptcy of the corporations. Perhaps this unwillingness to permit any increase in rates is because the public believes no claim made by the corporations, but certainly it can

never be well served by a corporation that is performing service at a loss. Some corporations have avoided the storm by taking the public into confidence and showing the actual condition, and many seem to be appreciating at nearer its par value the good will and confidence of the customers of a public utility.

Certain principles are too well settled to call for further citation of cases. In former notes (see 19 MICHIGAN LAW REVIEW 886), the leading cases have been discussed determining, (1) That the legislature, or the constitution, may confer on the municipality power to contract with its public service companies. (2) That such grant of power is not to be implied from general power to grant franchises, or to license use of the streets. (3) That when power to contract has been conferred on the municipality, any contract so made, though binding like any contract until modified or set aside by agreement of the parties, is after all a contract between the state and the company, and is therefore subject to the reserved right of the state in its police power, acting through the legislature or a commission clothed with such authority by the legislature, to revoke or modify the agreement without the consent of the municipality. Whether it is possible for the legislature so far to put off its function of acting for the state in the exercise of this sovereign power that it can confer upon a municipality power to contract in such manner that the legislature cannot later set aside agreements made by the city is not clear. *State* v. *Kansas City Gas Co.* 254 Mo. 515, 534. Cf. 18 MICHIGAN LAW REVIEW, 807. There is objection to the idea that any sovereign power can be irrevocably granted away by the legislature. Constitutional grants of course are not subject to recall by the legislature, or review by a commission. *Link* v. *Public Utilities Com.* (Ohio 1921) 131 N. E. 796.

That the public is far from satisfied is shown by the number of cases that continue to come up to the courts of last resort under a persistent claim that the legislature, or more often a commission, cannot set aside a rate fixed in a franchise granted by the city or in an ordinance passed by the city under its assumed power to control rates for public utilities. As stated above there may be a few cases where the power granted the municipality is irrevocable, but in nearly all cases this contention of the city is futile. *City Water Co.* v. *City of Sedalia* (Mo. 1921) 231 S. W. 942. *City of Bartlesville* v. *Corporation Comm.* (Okla. 1921) 199 Pac. 396. The interesting problems in recent cases usually involve another question, viz. whether the rate fixed is a regulation of rates, or a matter of contract. If the latter, it is binding though it may prove confiscatory; if the former, it must be remunerative or it takes property without due process. Such a rate, which has become unremunerative, is not binding on the company, even though the franchise was granted on the express condition that service should be furnished at the rates named in the franchise.

Here we may state three more settled rules. 1. Power in a city charter "to regulate charges" is no authority to enter into a contract to abandon such power to regulate. Any rate fixed by a city having such charter power may be lowered by the city, and, we are now learning, raised by the company, whenever it ceases to be a reasonable rate for the service. *Home Telephone Co.* v. *Los Angeles,* 211 U. S. 265. 2. The same rule applies when the city is

given power to regulate and fix rates under a provision that "these powers shall not be abridged by ordinance, resolution or contract." *Southern Iowa Electric Co.* v. *Chariton,* 41 Sup. Ct. 400. To allow a city to fix by a contract irrevocable for the franchise period the rates for service would be to abridge the power to regulate and fix the rates. And yet the district court of the United States in a recent case decided *contra,* perhaps because the above Supreme Court decision had not then been rendered. The Court of Appeals later held that the case was settled by the *Chariton* case, *supra. Central Power Co.* v. *City of Kearney,* 274 Fed. 253, (July 13, 1921). The city having power to regulate down the rate fixed, it followed that the company may regulate up, on a showing that the rate is not remunerative. Such a rate cannot be a contract rate binding the company, for the reason that it does not reciprocally bind the city. 3. The same thing follows where the city's grant of power over rates is under a provision in the Constitution of the state, to the effect that the "power to regulate rates shall not be surrendered," *City of Bartlesville* v. *Corporation Comm.* (Okla. 1921), 199 Pac. 396, or prohibiting "any irrevocable or uncontrollable grant of special privileges," etc. *City of San Antonio* v. *Public Service Co.* 41 Sup. Ct. 428. In view of this decision of the Supreme Court on April 11, 1921, it is surprising to find the district judge in *Water, Light and Power Co.* v. *City of Hot Springs, S. D.* 274 Fed. 827, decided July 13, 1921, the same day as the City of Kearney case, *supra,* holding that under such a constitutional inhibition against irrevocable grants a power "to regulate the distribution, sale and use of gas or other illuminative liquids" could fairly be inferred from the general powers given to cities by the South Dakota Statutes, and that such a power gave the city a right to enter into a binding contract for a rate irrevocable during the franchise period, but not any right of future control. It may well be doubted first whether the general language of the statutes gave cities any power to contract; second whether a power to regulate sale if specifically given includes a power to contract; and third whether under the constitutional provision against irrevocability the statutes could give any power to contract for such a fixed rate. As in the Kearney case the district judge was overruled by the Circuit Court of Appeals, so here it would seem the same fate must overtake the decision of the district judge.

E. C. G.