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Note and Comment

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NOTE AND COMMENT

DEEDS DELIVERED CONDITIONALLY TO THE GRANTEE.—Generally courts have shown a commendable disposition to get away from the formalism which in the past played such a large part in determination of questions of delivery. While the actual tradition of the instrument to the grantee or to someone on his behalf, on the one hand, or its retention in the hands of the maker, on the other, is still very important evidentially, such facts are not by any means controlling. Thus it is entirely possible for a deed to be delivered though it never has been out of the grantor's hands; likewise a deed may be undelivered though in the hands of the grantee by the voluntary act of the grantor. See the discussion by Professor Tiffany in 17 MICH. L. REV. 104, *et seq.*, citing many cases. This result has come from the growing appreciation by the courts that delivery after all is simply the manifestation of the grantor's intent that, as to him, the instrument is a completed legal act. This intent is normally shown by a handing over of the deed to the grantee or to someone for him, but there are other ways of showing such intent. A deed in the hands of the grantor *prima facie* has been delivered; if in the hands of the grantor, *prima facie*, it has not been delivered.

It is, however, remarkable that in certain types of cases there is adherence to the old, formalistic idea that the conclusions referred to above as *prima facie* are conclusive. This is especially striking in those cases where a deed is handed to the grantee to become final and operative only on the happening of an event or the performance of some condition. In *Whyddon's Case,* Cro. Eliz. 520, decided in 1596 by the Court of Common Pleas, and in *Williams* v. *Green,* Cro. Eliz. 884, by the same court in 1602, it was held that "the delivery of a deed cannot be averred to be to the party himself as an escrow." The contrary was held by the Queen's Bench in 1601 in *Hawksland* v. *Gatchel,* Cro. Eliz. 835. While it cannot be said that the English courts have repudiated *Whyddon's Case,* there are reasons for thinking that when the question comes up squarely for decision the doctrine of *Hawksland* v. *Gatchel* will be followed. See *Murray* v. *Earl of Stair,* 2 B. & C. 82; *Watkins* v. *Nash,* L. R. 20 Eq. 262; *London Freehold & Leasehold Property Co.* v. *Suffield,* (1897) 2 Ch. 608.

In this country the courts very generally have approved of *Whyddon's Case,* even the most recent decisions. *Weber* v. *Christen,* 121 Ill. 91; *Wilson* v. *Jenks,* 63 Ind. App. 615; *Wipfler* v. *Wipfler,* 153 Mich. 18; *Hamlin* v. *Hamlin,* 192 N. Y. 164; *Chaudoir* v. *Witt,* (Wis. 1919) 174 N. W. 925. The reasoning underlying these holdings, when any is disclosed by the opinion, is shown by the following from the opinion of Gray, J. in *Hamlin* v. *Hamlin, supra*: "If we should give full effect to the plaintiff's claim, it would be to hold the delivery by her of the deeds to have been conditioned and not absolute; but that would be violative of the settled rule in this state that a delivery cannot be made to the grantee conditionally. Any oral condition accompanying the delivery, in such case, would be repugnant to the terms of the deed and parol evidence to prove that there was such a condition attached to the delivery is inadmissible. The reason for the rule applies to every case where the delivery is intended to give effect to a deed without the further act of the grantor and such was this case * * * These deeds had passed out of the plaintiff's possession and into that of the grantee, by the deliberate act of the former, and no oral condition, at the time, will be admitted to contradict the import of the written instruments." In short, the trouble is, as these courts view it, that the admission of parol evidence to show the condition is to violate the parol evidence rule.

In his celebrated work on Evidence Dean Wigmore has pointed out with characteristic clearness the true nature of the so-called Parol Evidence Rule. 4 WIGMORE ON EVIDENCE, § 2400, *et seq.* The matter here under consideration involves that part of the Rule dealing with the "enaction, or creation, of the act." Parol evidence is almost invariably admissible to show that no legal act has been consummated. Ibid. § 2408. In *Curry* v. *Colburn,* 99 Wis. 319, it was held that a grantor could show that his deed, which was complete on its face, had been handed to the grantee only for the purpose of taking it to an attorney for examination. See, too, *Sample* v. *Greathard,* 281 Ill. 79. Yet both these courts hold that a grantor will not be permitted to show by parol that a deed handed to the grantee was to become operative only on the

happening of an event. In *Wilson* v. *Powers*, 131 Mass. 539, in an action on a promissory note it was held permissible to show that the note had been handed to the payee to take effect only on the performance of a condition. Devens, J., said: "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled in order to avoid its effect." In truth it seems that with reference to instruments other than deeds of conveyance such facts may be proved. See *Pym* v. *Campbell*, 6 E. & B. 370; 4 WIGMORE ON EVIDENCE, § 2410. There seems to be here a striking instance of a survival of a formalistic doctrine (explained by the relation between delivery of deeds of conveyance and primitive modes of conveyance) regarding which English courts have shown a more enlightened view than have courts on this side. Indeed this is characteristic of the attitudes of the courts in the two countries regarding the law of Real Property, generally.

Reference should be made to *Lee* v. *Richmond*, 90 Iowa 696, where the rule of *Whyddon's Case* was not applied. R. W. A.

LIABILITY WITHOUT FAULT.—In *Ives* v. *South Buffalo Ry. Co.*, 201 N. Y. 271, appeared, as a basis for the decision, the statement that "When our Constitutions were adopted, it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. That is still the law." Mr. Justice McKenna has recently voiced the same idea. In his dissenting opinion in *Arizona Copper Co.* v. *Hammer*, 39 Sup. Ct. Rep. 553, he contends that the Workmen's Compensation Act of Arizona is unconstitutional, because, "It seems to me to be of the very foundation of right—of the essence of liberty as it is of morals—to be free from liability if one is free from fault." Even the majority of the court seemed inclined to justify their decision, that the Act was constitutional, by the argument that, as the liability under it would be known in advance, employers could protect themselves by "reducing wages and increasing the selling price of the product, in order to allow for the statutory liability."

The fallacy of this proposition, as a principle of the Common Law, has been several times pointed out. One type of case, however, in which liability without fault not only exists, but is constantly being enlarged, seems to have been ignored. By the Common Law there is imposed upon sellers of goods, in certain instances, a liability of which they are not notified and which has no relation whatever to fault or free will on their part.

These are the cases in which sellers of goods are held to be absolute insurers of the harmlessness thereof. In *Parks* v. *Yost Pie Co.*, 93 Kan. 334, for instance, the plaintiff had been poisoned by some deleterious substance in a pie which he had bought from a retail dealer. There was no privity of contract with the defendant, but the latter, as a manufacturer, had made the pie and sold it to the intermediate dealer. The action for damages was in tort. There was absolutely no evidence of fault on the defendant's part even offered, beyond the facts stated. Nevertheless, the court held that the

defendant was liable, on the ground that "A manufacturer or dealer who puts human food upon the market for sale or for immediate consumption does so upon an implied representation that it is wholesome for human consumption. Practically he must know it is fit or take the consequences." In *Jackson* v. *Coca Cola Co.*, (Miss.) 64 So. 791, one who was a bottler of soft drinks was held liable for injury to one who drank thereof, although there was no contract between him and the plaintiff and although no evidence of his negligence was given, on the ground that he was "under a legal duty" to see that no one was injured by foreign substances in his product.

An even more obvious type of extraneously imposed liability is found in those cases where the liability was founded originally on free will—that is to say, where a seller is held liable as a "warrantor." The original basis of this liability seems to have been that of misrepresentation and deceit. AMES, HISTORY OF ASSUMPSIT, 2 HARV. LAW REV. 8. It has long been treated, however, as a contractual liability. In this theory, at first, the element of intent on the seller's part to assume a liability was considered essential. In some cases it is held that the intent must expressly appear, as by use of the word "warrant." *Chandler* v. *Lopus*, Cro. Jac. 4, discussed by Mr. Ames, 2 HARV. LAW REV. 9; *De Sewhenberg* v. *Buchanan*, 5 Car. & P. 343. In others it is held that it must at least be clearly implied in fact. *Borrekin* v. *Bevan*, 3 Rawle (Pa.) 23; *Henson* v. *King*, 3 Jones (N. C.) 419; *Coats* v. *Hord*, 154 Pac. 491. But at present the tendency is to ignore all thought of real intention on the seller's part and to "imply" a liability as a matter of law from the mere act of sale. Thus, in *Chapman* v. *Roggenkamp*, 182 Ill. App. 117, the defendant had sold a can of peas to plaintiff. There was some sort of toxin in the peas and the buyer was made violently sick. He sued the seller in damages on the theory of an implied warranty. The sale was the ordinary grocery store transaction and there was nothing to indicate intentional or conscious assumption of liability of any sort by the seller. Furthermore, he had not himself canned the peas, but had bought them from a well reputed packing house. He had no more knowledge of the contents of the can than the buyer, the plaintiff, had, and could not in any sense have been said to be at fault. Yet, despite this absence of either intent to assume a liability, or fault of any sort, on the defendant's part, he was held liable in damages. The same result was reached in *Ward* v. *Great Atlantic and Pacific Tea Co.*, 231 Mass. 90, where the defendant, a grocer, sold, in the usual way, a can of beans which he had bought from a well known wholesaler who used all modern and proper methods in the packing process. The defendant was wholly without actual fault, and, of course, without knowledge of anything wrong with the beans. The buyer broke a tooth on a stone that was with the beans and was allowed to recover damages from the seller. The decision was based upon a section of the Sales Act, but the court expressly said that the section was but a codification of the Common Law. See also, *Sloan* v. *F. W. Woolworth Co.*, 193 Ill. App. 620. In the most recent decision, *Carnavan* v. *City of Mechanicsville*, 177 N. Y. S. 808, decided coincidently with the statement of Mr. Justice McKenna quoted above, this absolute liability, as a matter of law, rather than of real intention, was extended to those

who sell water for household purposes. The defendant was held liable, on an implied warranty of wholesomeness, regardless of any negligence on its part, because the plaintiff had contracted typhoid fever from the water which its municipal waterworks had furnished.

The reason given for these holdings bases them squarely, not on any *real* assumption of liability, but on a liability *imposed by law as a matter of public policy.* In *Jackson v. Watson & Sons,* [1909] 2 K. B. 193, it was said by Vaughn Williams, L. J., that the cause of action, whether in form of tort or of contract arose out of a duty following the *relation* of the parties.

Should Mr. Justice McKenna ever desire to withdraw from his position in the *Arizona Copper Co. case,* without the appearance of having reversed himself, he might say boldly, on the precedent of *Parks* v. *Yost Pie Co.,* "Practically, an employer must know his employment is safe, or take the consequences." Or he might say, more euphemistically but none the less legitimately, "In every contract of employment there is, if public policy so requires, an implied warranty that the work is safe." J. B. W.

CONTRACTS FOR THE BENEFIT OF A THIRD PERSON IN MICHIGAN.—In the recent case of *Preston* v. *Preston* the supreme court of Michigan had occasion to consider the question as to whether or not one for whose benefit a contract is made has any enforcible rights. The suit was one in Chancery, the donee plaintiff was an invalid, and every consideration of justice and equity demanded that she be given relief. The court had, however, to face the fact that in recent cases it had indicated its opinion to be that the third party beneficiary has no rights. In *Modern Maccabees* v. *Sharp,* (1910) 163 Mich. 449, 456 the court speaking through the late Justice Ostrander had said, "The general rule in this state is regarded as settled. I see no reason for saying that it is not the same in proceedings at law and in equity." Again in *In re Bush's Estate,* (1917) 199 Mich. 192, 196, Justice Kuhn, the writer of the opinion in the principal case, had said, "No serious claim is made that a promise made by one person to another for the benefit of a third—a stranger to the consideration—will support an action by the latter according to the law of this state." And at page 199, "But the situation before us is not merely a question of applying the remedy to the rights of the parties, but under the law as it existed at the time this claim was filed, the claimant had no rights arising out of the transaction against the defending estate."

The court in its first opinion in the case, reported at 205 Mich. 646, took the position that the rule as above announced had been so far changed by Sec. 10, Chap. 12, Act No. 314, Pub. Acts 1915 (3 MICH. COMP. LAWS 1915, § 12361) as to enable the donee beneficiary to maintain a suit in equity on the promise made for her benefit. That this view is untenable was shown in a note in a recent number of this review (18 MICH. L. REV. 58) wherein the hope was expressed that a more satisfactory basis might be found for the holding. On rehearing, in an opinion recently filed but not yet reported, the court receded from the position originally taken and now supports its judgment on entirely different grounds. From a reconsideration of the evidence in the case it now finds as a fact that the promise was made directly to the

plaintiff, although the consideration was furnished by plaintiff's mother who, according to the original finding, was the sole promisee. As a result of this interpretation of the evidence the court concludes that the plaintiff is a privy to the contract and as such entitled to maintain the suit on the ground that this is an exception to the rule denying a right of action to one for whose benefit a contract is made. (175 N. W. 266.)

It is quite obvious that the court in its conclusion has confused two questions which are essentially different. If the plaintiff was a party to the contract—a promisee—,as the court finds, then the case is not one involving a contract for the benefit of a third person at all in the sense in which that phrase is commonly employed, and it simply makes confusion worse confounded to say that it is an exception to the general rule. There is under these circumstances no want of privity in the plaintiff—the usual ground for denying relief in third party cases—and the only question involved is whether or not a party to a contract may enforce a promise made to him, the consideration for which was furnished by another. This question has always been answered in the affirmative in Michigan, both at law and in equity, and it has never been asserted that this holding at all conflicts with the rule denying the right of a third party beneficiary. *Monaghan* v. *Agricultural Fire Ins. Co.*, 53 Mich. 238; *Clark* v. *Clark*, 134 Mich. 602 (*semble*); *Palmer* v. *Bray*, 136 Mich. 85. This is in accord with the generally prevailing rule in this country. *Van Eman* v. *Stanchfield*, 10 Minn. 255; *Rector* v. *Teed*, 120 N. Y. 583; *Palmer Savings Bank* v. *Ins. Co.*, 166 Mass. 189; *Williamson* v. *Yager*, 91 Ky. 282. *Contra*: *Dunlop* v. *Selfridge*, [1915] A. C. 847.

In view of the evident uncertainty in regard to the third party's rights it may be worth while to try to determine just what has been decided by the court. Where the action was one at law for breach of promise, the uniform holding has been that the third party has no enforcible rights, and this is true as well in the case of a sole or donee beneficiary as in the case of a creditor beneficiary. *Pipp* v. *Reynolds*, 20 Mich. 88; *Turner* v. *McCarty*, 22 Mich. 264; *Halsted* v. *Francis*, 31 Mich. 112; *Hicks* v. *McGarry*, 38 Mich. 667; *Hidden* v. *Chappel*, 48 Mich. 527; *Edwards* v. *Clement*, 81 Mich. 513; *Wheeler* v. *Stewart*, 94 Mich. 445; *Linneman* v. *Moross*, 98 Mich. 178; *Signs* v. *Bush Estate*, 199 Mich. 192. But where the defendant has received specific funds to be delivered to the third party, it is held the latter may enforce the obligation in general assumpsit. *Fay* v. *Anderson*, 48 Mich. 259. It has also been held that a sole beneficiary to whom the promisee has assigned his rights under the contract may enforce the claim at law as assignee, and it is intimated that he may recover substantial damages. *Ebel* v. *Pichl*, 134 Mich. 64. Such a result would, however, be difficult to justify in view of the fact that the ordinary rule would limit the recovery in such a case to nominal damages. See *Burbank* v. *Gould*, 15 Me. 118; *Adams* v. *Union R. R. Co.*, 21 R. I. 134. Search has failed to disclose any suit in Chancery brought by the beneficiary, except that of a mortgagee beneficiary to be mentioned later, in which a decision of this question was necessary to dispose of the case. *Modern Maccabees* v. *Sharp*, *supra*, is not an exception to this statement for the reason that in that case the court apparently found as a fact that the

promise sued on had not been made. See head note to the case. Assuming the alleged promise to have been made, it was clearly one which would only incidentally have benefitted the plaintiff and cannot therefore be said to have been made for his benefit. The court has, however, frequently expressed the opinion *obiter* either that relief in equity would be granted to the beneficiary or that the question is still an open one. See *Linneman* v. *Moross*, 9 Mich. 178; *Clare* v. *Warner*, 106 Mich. 695; *Palmer* v. *Bray*, 136 Mich. 85. In *Peer* v. *Kean*, 14 Mich. 354, where A contracted with B on a consideration furnished by the latter to build a ship and on its completion to convey a one-half interest to B's wife upon payment by her of certain charges, the court granted specific performance of the promise at the suit of B, the promisee. Whether the same relief would have been granted at the suit of the wife was not indicated. The mortgagee beneficiary has always been granted relief in equity as against the grantee of the mortgaged premises who assumed the mortgage, but whether on the theory of subrogation or by reason of a statute (COMP. L. 1915 § 12680) the court has not always definitely indicated. *Crawford* v. *Edwards*, 33 Mich. 353; *Miller* v. *Thompson*, 34 Mich. 9; *Corning* v. *Burton*, 102 Mich. 86.

It is quite clear that the third party, at any rate where he is a sole or donee beneficiary, ought to be given relief. The cases show that parents as well as others frequently make provision in this way for those dependent upon their bounty. To deny the latter a remedy is to enrich the unscrupulous at the expense of the needy. While the rule of *stare decis* probably precludes the giving of relief in an action at law, the question is apparently still an open one in equity, and relief in the nature of specific performance would not seem to be inconsistent with equitable principles. Such a holding would make it unnecessary to strain the facts to do justice in a particular case. Perhaps legislative action on the matter would not be untimely. G. C. G.

PUBLIC UTILITIES—FRANCHISE RATES AS AFFECTED BY THE WORLD WAR.—The economic convulsions due to the World War are abundantly reflected in the relations between the public and their public utilities operating under franchises fixing rates for service. The enormous rise in cost of labor and materials has, in many cases, so reduced the net income of such utilities as to make it a negative quantity at existing franchise rates. The utilities are crying to be saved from bankruptcy, but the unfortunate suspicion bred by past dealings of many such companies has made the public skeptical, and perhaps in many cases entirely unreasonable. In some cases plain selfishness may explain the attitude on both sides. The Supreme Court of the United States has recently held that a contract is still a contract, notwithstanding the critical conditions caused by the war. *Columbus Ry. P. & L. Co.* v. *Columbus*, (U. S. 1919) 39 Sup. Ct. 349, (see 17 MICH. L. REV. 689), followed in *Michigan Ry. Co.* v. *Lansing*, (1919) 260 Fed. 322. Though the German steamship company may have been justified in turning back and failing to carry out its contract to deliver at Plymouth and Cherbourg gold shipped on the Kronprinzessin Cecilie, since the imminent danger of capture by a belligerent which would have ended possibility of performance excused

performance entirely, *Kronprinzessin Cecilie,* 244 U. S. 13, yet this does not affect the general principle "that if a party charge himself with an obligation possible to be performed he must abde by it. unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance." *Ib.* The very essence of a contract is that the contractor takes the risk within the limits of his undertaking. *Day* v. *U. S.,* 245 U. S. 159; *North Hempstead* v. *Pub. Serv. Corp.,* 176 N. Y. S. 621. The courts cannot relieve nor make new contracts for the parties. *Muscatine Lighting Co.* v. *Muscatine,* (1919) 256 Fed. 928.

In the *Columbus case* the terms of the franchise were clear, the fare to be charged was explicitly stated, there was no room for interpretation. Though the War Labor Board had granted a fifty per cent increase in wages to the employees of the company, yet this was not an intervention by the government as in *Metropolitan Water Board* v. *Dick, Kerr & Co.,* [1918] A. C. 119. A rise in the cost of labor is one of the risks. Indeed it is not shown that the franchise would be unprofitable for the whole 25 years period. Would it make a difference if it were shown? The company, then, could not throw up its franchise and ask the aid of a court of equity to relieve it from its hard bargain. The city, acting under state authority, had made the contract and was bound by it. *Vicksburg* v. *Vicksburg Waterworks Co.,* 206 U. S. 496. Can it be supposed that the company would have revised the bargain in favor of the city if the advantages had been reversed? The company must be held equally bound though temporarily at least, the operation of the lines must result in a loss. The remedy, if any be needed, addresses itself to the duly constituted authorities. See also *Moorhead* v. *Union L. H. & P. Co.,* (1918) 255 Fed. 920; *Hillsdale Gaslight Co.* v. *Hillsdale,* (1919) 258 Fed. 485.

During 1919 many rate disputes growing out of this high operating cost have come to the courts of last resort. Some may be noted which involve contracts between the utility and the municipality which granted the franchise to operate. In 17 MICH. L. REV. 420 attention was called to the unpleasant surprise the public was having in discovering that franchise rates which had been upheld as fixed and binding against the public when in favor of the utilities, were no longer fixed, but subject to revision upward now that they were unprofitable and ruinous to the utilities. The utilities have cried for relief to the public utilities commissions, the people's own boards, and their cry is being heard, for experience shows that such commissions are much more likely than the local authorities to grant at least emergency relief. *State* v. *Lewis,* (Ind., 1918) 120 N. E. 129; *Ottumwa Ry. & Light Co.* v. *Ottumwa,* (Ia., 1919) 173 N. W. 270.

That a franchise between a municipality acting within its powers and a utility corporation is a binding contract is still undoubted law, *North Hempsteaa* v. *Pub. Serv. Corp.* 176 N. Y. S. 621; *Cleveland* v. *Cleveland City Ry. Co.,* 194 U. S. 517; *Interurban Ry. Co.* v. *Pub. Utilities Com.,* (Ohio, 1918) 120 N. E. 831; *Muscatine Lighting Co.* v. *Muscatine,* (1919) 256 Fed. 929; *Hillsdale Gaslight Co.* v. *Hillsdale,* (1919) 258 Fed. 485, but it is be-

coming much clearer how often the city in assuming to fix rates has acted without proper legislative authorization, *Ottumwa Ry. & Light Co.* v. *Ottumwa, supra; Georgia Ry. & Power Co.* v. *Railroad Com.*, (Ga., 1919) 98 S. E. 696; *Kalamazoo* v. *Circuit Judge*, (1918) 200 Mich. 146; *San Antonio Public Serv. Co.* v. *San Antonio*, (1919) 257 Fed. 467; *Atlanta* v. *Atlanta Gaslight Co.*, (Ga. 1919) 100 S. E. 439; *Winchester* v. *Winchester Waterworks Co.*, (U. S. Adv. Ops., Jan. 5, 1920), and that such rates when lawfully fixed are always subject to the police power of the state, which cannot be surrendered, *Koehn* v. *Pub. Serv. Com.*, (1919) 176 N. Y. S. 147; *St. Louis* v. *Pub. Serv.. Co.*, (Mo., 1918) 207 S. W. 799; *Atlantic Coast Electric Ry. Co.* v. *Pub. Utilities Com.*, (N. J., 1918) 104 Atl. 218; *Interurban Ry. Co.* v. *Pub. Utilities Com.*, (Ohio, 1918) 120 N. E. 831; *Salt Lake City* v. *Utah Light & Traction Co.*, (Utah, 1918) 173 Pac. 556; *Georgia Ry. & Power Co.* v. *Railroad Com.*, (Ga., 1919) 98 S. E. 696, and hence that in all cases except where the people have restrained the legislature in the constitution the rates fixed in the franchise, and which are binding as against the city, may be raised by the legislature, *Interurban Ry. Co.* v. *Pub. Utilities Com., supra,* or by a public commission to which the legislature has clearly committed such power. *Koehn* v. *Pub. Serv. Com.*, (1919) 176 N. Y. S. 147; *State* v. *Lewis*, (Ind., 1918) 120 N. E. 129. This is nothing more than to say that when the state through one of its minor subdivisions has made a binding contract it has the power, with or without the consent of such subdivision, to release the other party to the contract, even though it may be admitted the other party would not release the state if the conditions were reversed. This it does, not out of generosity, but because it regards it as good public policy to have its public utilities in good financial condition so as to insure good service. Just why the locality more immediately affected does not usually take this view of it is a study in psychology or sociology rather than in law. Most of the cases show the cities trying to prevent the commissions from hearing the cry of the utility, or granting relief. *Koehn* v. *Pub. Serv. Co., supra; Atlantic Coast Electric Railway Co.* v. *Pub. Utility Co.*, (N. J., 1918) 104 Atl. 218; *Salt Lake City* v. *Utah Light & Traction Co.*, (Utah, 1918) 173 Pac. 556; *Georgia Ry. & Power Co.* v. *Railroad Com.*, (Ga., 1919) 98 S. E. 696.

Such was the case of *International Ry. Co.* v. *Pub. Serv. Com.*, (1919) 226 N. Y. 474, which well illustrates how since 1917 the shoe pinches the foot of the other wearer, and the city after putting it on is struggling to kick it off, while the utility after trying to keep out of it is now eager to get in. In 1916 the city of Buffalo, claiming that the permitted fare was too high, petitioned the Public Service Commission to fix a just and reasonable rate. For two years the petition lay dormant. Then the company, claiming it was no longer a question of lower rates, but a choice between higher rates and bankruptcy, joined the now unwilling city in its forgotten prayer for a revision. The Commission, siding with the city, refused to accept the unwelcome and long delayed answer, but the Court of Appeals found the Commission must hear the case. In *Matter of Quinby* v. *Public Serv. Com.*, 223 N. Y. 244, the court

had held that in the absence of clear and definite language it would not be assumed that the legislature had authorized the commission to annul conditions imposed by local authorities, but the conditions in the Buffalo franchise necessarily implied an agreement for revisions. The New York constitution, like that of many other states, e. g., Missouri, *St. Louis* v. *Pub. Serv. Com.*, 207 S. W. 799; and Utah, *Salt Lake City* v. *Utah Light and Traction Co.*, 173 Pac. 556, forbids the construction or operation of a street railroad without the consent of the local authorities first obtained. This means the consent may be conditioned on charging a named rate of fare, but it does not remove beyond the control of the legislature in the exercise of its police power a revision of the rate so agreed upon. *People ex rel. Glen Falls* v. *Pub. Serv. Com.*, 225 N. Y. 216. Whether the municipality might revoke its consent if the legislature should raise the rate was left open in that case, and again in the recent case of *International Ry. Co.* v. *Pub. Serv. Com.*, 226 N. Y. 474, but apparently the New York Legislature has given to the Commission all the power it had over rates not already fixed by statute, *Niagara Falls* v. *Pub. Serv. Com.*, 177 N. Y. S. 861 (Sept., 1919), or by legislative sanction equivalent to a statute, *Quinby* v. *Pub. Serv. Com.*, 223 N. Y. 244; *Koehn* v. *Pub. Serv. Com.*, 176 N. Y. S. 147. In those cases even though the statutory rate might be confiscatory the Commission is not endowed with power to so adjudge. They are outside its jurisdiction. *People ex rel. Gas Co. of Albany* v. *Pub. Serv. Com.*, 224 N. Y. 156. Compare Maine cases appearing since this note was written: *In re Guilford Water Co's. Rates*, 108 Atl. 446; *In re Searsport Water Co.*, Ibid. 452; *In re Island Falls Water Co.*, Ibid. 459.

There is no longer any doubt that in general as against the municipality reasonable rates fixed by contract between the municipality and the utility are liable to be superceded by rates fixed by the legislature in the exercise of its police power, or by a commission under legislative authority clearly conferred. *Union Dry Goods Co.* v. *Georgia Pub. Serv. Corp.*, 248 U. S. 372 (1919). From this it often results that franchise rates cannot be changed as against the utility, because it would amount to impairing the obligation of a contract, but they may be changed by the legislature as against the municipality because the municipality is a subordinate division of the state and is always subject to the legislative power, except as restrained by the constitution. *Interurban Ry. Co.* v. *Pub. Utilities Com.*, (Ohio, 1918) 120 N. E. 831; *Salt Lake City* v. *Utah Light & Traction Co.*, (Utah, 1918) 173 Pac. 556; *Englewood* v. *Denver & So. Platt Ry. Co.*, 248 U. S. 294 (1919), followed in *Black* v. *New Orleans Ry. & Light Co.*, (La., 1919) 82 So. 81, refusing remedy in such a case to a citizen taxpayer; *State* v. *Lewis*, (Ind., 1918) 120 N. E. 129. But certainly if the statutes leave with the municipalities the power to fix rates they may enter into mutually binding contracts with reference thereto, and a recent case holds that when such a contract is once entered into the city as well as the company is protected against a change even by the legislature by reason of the Federal Constitutional prohibition against any state passing a law impairing the obligation of a contract. *Cincinnati* v. *Pub. Utility Com.* (Ohio, 1918) 121 N. E. 688. As to the municipality this may be doubted, and Jones, J., in dissenting points out that municipalities

are political subdivisions of the state, and mere agents subject to the power of the state to change its regulations. It would seem that only a constitutional provision could restrain the legislature. *State* v. *Lewis,* (Ind., 1918) 120 N. E. 129; *Westinghouse Electrical & Mfg. Co.* v. *Binghampton Ry. Co.,* (1919) 255 Fed. 378, 408. In such case it gets its power, not from the legislature, but from the people and the municipality is then, of course, beyond the reach of the legislature. *Interurban Ry. Co.* v. *Pub. Utilities Com.,* (Ohio, 1918) 120 N. E. 831.

What utilities will do that find themselves headed for bankruptcy and denied increase over franchise rates does not fully appear. They may try coercion by refusal to operate, as in Toledo and some other places, but so far as the courts are concerned it seems clear they cannot grant relief, even by establishing a receivership. The receiver must operate under the contract. *Westinghouse Electrical & Mfg. Co.* v. *Binghampton Ry. Co., supra. North American Construction Co.* v. *Des Moines City Ry. Co.,* (1919) 256 Fed. 107, in which the court suggests that if it is a question of a raise in rates or of a poorer service the class of service must yield rather than the rates. But what right can there be to yield either? It may be bad public policy to insist on such hard bargains against public utilities, but public policy addresses itself to the legislatures, not to the courts. *Muscatine Light Co.* v. *Muscatine,* (1919) 256 Fed. 929, *Ottumwa Ry. & Light Co.* v. *Ottumwa,* (Ia., 1919) 173 N. W. 270. See also *Pub. Utilities Com.* v. *Rhode Island Co.,* (R. I., 1919) 107 Atl. 871, 108 Atl. 66, *Michigan Ry. Co.* v. *Lansing,* (1919) 260 Fed. 322. Both the utilities and the public should learn that their interests are largely mutual, and that it may be neither just nor safe to insist on taking all the advantages of a hard bargain. No one can tell when conditions may reverse advantages. E. C. G.