

1929

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Recommended Citation

Hall, Ford P., "Discontinuance of Service by Public Utilities" (1929). *Minnesota Law Review*. 1300.
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DISCONTINUANCE OF SERVICE BY PUBLIC
UTILITIES

By FORD P. HALL*

I INTRODUCTION¹

THE question of discontinuance of service by utilities is one of vital importance to the public. To deprive the public of means of transportation, telephone communication or electric power is indeed serious. For certain utilities, namely, common carriers, the question has taken on added significance in the past few years. Due to the rapid increase in motor bus transportation, they have found it desirable, and in some instances necessary, to curtail or to discontinue all or parts of their service. Naturally the question as to their rights and duties under such circumstances has presented itself.²

It is essential to bear in mind that there are various grades of regulation which a state may constitutionally exercise over public callings. All are manifestations of the police power. Even over strictly private enterprises the state enjoys some regulatory control. It may pass measures improving conditions of health, sanitation or safety for employees. In certain callings affected with a public interest, the state may regulate rates. In others it may make regulations concerning wages or service. Finally, there are those enterprises over which the state may exercise the greatest measure of control. Here under certain circumstances it may force a utility to continue operation although the company may have indicated its desire to withdraw.³ In some states this power is looked upon as one aspect of the state's control over service.⁴

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¹It is not intended in this article to deal with abandonment by interstate carriers. For a discussion of this subject see the article by O. P. Field, "The Abandonment Sections of the Transportation Act of 1920," 2 Ind. L. J. 445.

²See the discussion of the court on this problem in *Board of County Commissioners v. Public Utilities Commission*, (1923) 107 Oh. St. 442, 140 N. E. 87. See also the article dealing with the effect of motor bus competition upon railways and abandonment, by Geo. W. Anderson, *Atlantic Monthly*, March 1925, p. 393.

³See the discussion of the court in *Wolff Packing Company v. Court of Industrial Relations*, (1923) 262 U. S. 522, 43 Sup. Ct. 630, 67 L. Ed. 1103.

⁴Louisiana, Kansas, Colorado and Utah among others. See *Brooks Scanlon Lumber Co. v. Ry. Com. of La.*, (1919) 144 La. 1086, 81 So.

In others a distinction is made between the regulation of service and the regulation of withdrawal.⁵ If it is an aspect of service regulation, it is clear that it is its most extreme form.⁶

II SOURCES OF THE OBLIGATION TO CONTINUE SERVICE

(a) *Sources from which the obligation does not arise.*—

It is now generally conceded that there is not an unlimited right on the part of a public enterprise to withdraw.⁷ It becomes necessary first to determine the sources of this obligation to continue operation.

727; *People v. Colorado Title and Trust Co.*, (1919) 65 Colo. 472, 178 Pac. 6; *State v. Postal Telegraph Cable Co.*, (1915) 96 Kan. 298, 150 Pac. 544; *Re Emigration Canyon Ry.*, (1917) P. U. R. 1917F 464.

⁵*Georgia Ry. Com. v. Macon Ry. and Light Co.*, (1921) 151 Ga. 256, 106 S. E. 282; *Petition of the Boston and Maine Ry.*, (1925) 82 N. H. 116, 129 Atl. 880.

⁶The question is not entirely an academic one. The attitude which a court takes may be important in determining whether a commission has jurisdiction to pass on questions of abandonment. See Part V.

⁷*Brooks Scanlon Lumber Co. v. Ry. Com. of La.*, (1920) 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323; *Gates v. Boston and N. Y. Airline Co.*, (1885) 53 Conn. 333; *State ex rel. Little v. Dodge City M. and T. Ry.*, (1894) 53 Kan. 329, 36 Pac. 755; *State ex rel. Naylor v. Dodge City Co.*, (1894) 53 Kan. 377, 36 Pac. 747; *State ex rel. Grinsfelder v. Spokane Street Ry.*, (1898) 19 Wash. 518, 53 Pac. 719; *Day v. Tacoma Ry. and Power Co.*, (1914) 80 Wash. 161, 141 Pac. 347; *Southern Ry. v. Hatchett*, (1917) 174 Ky. 463, 192 S. W. 694.

There is, however, plenty of respectable authority stating that a public utility may withdraw at its own discretion. See, for example, *Jack v. Williams*, (C.C.S.D. 1902) 113 Fed. 823; *People v. Albany and Vt. Ry.*, (1861) 37 Barb. (N.Y.) 216; *San Antonio Street Ry. v. State*, (1897) 90 Tex. 520, 39 S. W. 926; *Coe v. Columbus, P. & I. R. R.*, (1859) 10 Ohio St. 372; 1 Wyman, *Public Service Corporations*, sec. 296. "But even in the case of a railroad company which has accepted extraordinary privileges, it would seem that, if it is ready to give up its charter, it may withdraw from its entire undertaking."

However, most of the above cases turned upon special circumstances and when properly understood can be harmonized with the general rule. In *Jack v. Williams* the road was in hopeless financial condition. The action was for mandamus to compel relaying the tracks. The court seems to have ignored the question of obligation and to have been impressed with the futility of attempting to order the impossible. In *Coe v. Columbus*, the court appears to have been dominated with the same idea when it said: "If a railroad can be operated profitably, the interest of those concerned will rarely if ever fail to keep it in operation so as to subserve the public use. If it cannot, we know of no mode by which the state can compel those by whom it was constructed to operate it at a loss." These are not authorities for holding that a company has an unlimited right of withdrawal although often cited for that proposition. They merely fall in line with those cases holding that where a company is losing money on its entire enterprise it will not be compelled to continue.

The case of *San Antonio Street Ry. Co.* seems to stand out, however, as a direct authority against the general rule.

The mere fact that a person engages in a business affected with a public interest does not of itself cast upon him an obligation from any source to continue service, although the language of certain courts might indicate this. Such a point of view fails to recognize that there are various kinds of callings affected with a public interest and that there are different grades of regulation which a state may constitutionally exercise over each. The courts in at least two famous decisions have stated that not all persons engaged in public callings can be compelled to continue operation. In *Munn v. Illinois* it was declared

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use*, but, so long as he maintains the use, he must submit to the control."⁸

In *Wolff Packing Co. v. Court of Industrial Relations*, a three-fold classification was made of public enterprises, (a) those carried on under a grant of privilege, (b) certain occupations regarded as exceptional, such as the keeping of inns, cabs and gristmills, etc., (c) businesses the owner of which had devoted them to a public use. The court then stated

"The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss, it may give up its franchise and enterprise but short of this it must continue. Not so the owner when by mere changed conditions his business becomes clothed with a public interest. He may stop at will whether the business be losing or profitable."⁹

In certain cases the obligation has been founded upon the extremely broad ground of a trust in favor of the public.¹⁰ If

⁸(1876) 94 U. S. 113, 24 L. Ed. 77

⁹(1923) 262 U. S. 522, 43 Sup. Ct. 630, 67 L. Ed. 1103.

¹⁰See the discussion of the court in *People v. N. Y. C. and H. R. R. Co.*, (1883) 28 Hun (N.Y.) 543; *Wright v. Milwaukee Elec. Ry. and Light Co.*, (1897) 95 Wis. 29, 69 N. W. 791. Here the court stated, "By the acceptance of the terms of the ordinance the railroad company assumed a public trust."

the relationship between the state and such enterprises is one of trust, then there are few limits to the extent of the state's control. Such a theory has little support in the cases, however

It has sometimes been asserted that the obligation to continue service arises from common law. However, the general rule seems to be that at common law apart from contract or grant of special privilege, there is no such obligation upon the operator of a public enterprise. Some early cases have indicated this. An innkeeper was allowed to withdraw,¹¹ a ferryman was permitted to discontinue,¹² and a teamster was allowed to abandon his calling.¹³

Certain modern cases have affirmed the rule. In *Lucking v. The Detroit and Cleveland Navigation Co.*, a common carrier by water was held under no obligation to continue, and in so deciding the court stated

"No authority has been called to my attention and I have discovered none, to the effect that a common carrier, such as the defendant here, not enjoying any public franchise or exercising any public powers or privileges, is bound, after commencing to operate vessels over a certain route, to continue such operation, if it finds it desirable to discontinue or abandon the same."¹⁴

Again in *San Antonio Street Ry. Co. v. Texas*, the court declared

"We would not be understood as holding, that the common law does not impose some duties upon companies chartered as common carriers, which may be enforced by mandamus, although no mention of such duties be found in their charters. All carriers who undertake to transport goods or passengers for the public assume certain duties to the public, but certainly carriers who

¹¹*Rex v. Collins*, (1623) *Palmer* 373. "An innkeeper may at his pleasure demolish his sign and leave off innkeeping."

¹²*Carter v. Commonwealth*, (1823) 2 Va. 354. Here the plaintiff discontinued his ferry and was indicted for failing to keep sufficient boats to carry traffic. The statute under which he was indicted provided that all ferries not used should be discontinued. Held that he was not guilty. Discontinuance was the penalty attached to failure to use the privilege. No law made discontinuance an offense, much less an indictable offense.

¹³*Satterlee v. Goad*, (1828) 1 Wend. (N.Y.) 272. The question of discontinuance arose only incidentally. A common carrier by wagon had withdrawn from service. At a later time goods were hauled for one D. The question arose as to whether the carrier was liable as a common carrier, or as a private carrier. The court determined that the liability was that of a private carrier.

¹⁴(D.C.Mich. 1921) 273 Fed. 577. See also the same case (1924) 265 U. S. 346, 44 Sup. Ct. 504, 68 L. Ed. 1047, where the decision of the lower court was upheld.

are not corporations may at any time discontinue the business, if they elect to do so¹⁵

It does not matter what may be the reason for such withdrawal, whether it be because operation has been carried on at a loss, or whether for other reasons. However, even at common law it is necessary to comply with certain prerequisites before withdrawal. There is an obligation to give notice to the public of abandonment. The duty here is to give such notice as will enable the public to make a proper adjustment. The utility is required also to withdraw in a reasonable manner. What is a reasonable manner is a question of fact and must be determined in each case by the surrounding circumstances.¹⁶

Likewise, there is no obligation at common law, apart from contract, to continue private spur tracks and switches.¹⁷

The commission has declared, however, that in the state of Wisconsin there is an obligation from this source to continue service.¹⁸ "It is a cardinal rule at common law, at least in Wisconsin, that a public function cannot be abandoned without the consent of the state." The commission cites three cases as authority for this proposition but they are not convincing.¹⁹

(b) *The obligation may arise from contract.*—A public utility may be compelled as the result of some contractual obligation to continue service. Such contracts may be contracts with the state itself, contracts with a subdivision of the state, such as a municipality or county, or contracts with a private person. The contracts may be *express* or *implied*.

The mere charter of incorporation, although a contract with the state,²⁰ does not of itself cast upon any company an obliga-

¹⁵(1897) 90 Tex. 520, 39 S. W. 926.

¹⁶See 1 Wyman, Public Utilities, sec. 316 and 317.

¹⁷Durden et al. v. So. Ry., (1907) 2 Ga. App. 66, 58 S. E. 299.
" in the absence of charter requirements, statutory regulation, or special contract to the contrary, there is no inhibition against a carrier using its discretion in abandoning the stations at which it has been accustomed to receive freight." Jones v. Newport News and M. V. Co., (C.C.A. 6th Cir. 1895) 65 Fed. 736.

¹⁸Re Eastern Wisconsin Electric Co., (1918) P. U. R. 1918E 748 (Wis.)

¹⁹Att'y Gen. v. West Wis. Ry., (1874) 36 Wis. 467. Wright v. Milwaukee Elec. Ry. and Light Co., (1897) 95 Wis. 29, 69 N. W. 791, State v. Frost, (1902) 113 Wis. 623, 89 N. W. 915. In each of these decisions which the commission cited, there were franchises and special privileges granted by the state. The obligation to continue service arose from these sources rather than from common law. The common law obligations as to withdrawal were not mentioned by the courts in any of these cases.

tion to continue service.²¹ This is evident from those cases in which a corporation has engaged in a business affected with a public interest and yet it has been declared that it is under no duty to continue.²² It appears also from the cases in which corporations, although engaged in a public service, but doing so without special privilege, have been allowed to withdraw.²³ Where there was no contract between a company and a municipality, it was decided that the articles of incorporation imposed no obligation to continue.²⁴

There may be an obligation to continue service arising either from a franchise to engage in a particular business or from a franchise to use the streets and highways. If either of these instruments contains *express* terms requiring continued operation, then there is an express contract and the franchise will be regarded as mandatory.²⁵ If there are no express contracts, and

²⁰*Dartmouth College v. Woodward*, (1819) 4 Wheat. (U.S.) 519, 4 L. Ed. 629; *State of Texas v. Enid O. and W. Ry.*, (1917) 108 Tex. 239, 191 S. W. 560. "The charter, when so issued and accepted, constituted a contract between the state and the railway company, and like other contracts its provisions and covenants are binding upon such party thereto."

²¹*Montell v. Consolidation Coal Co.*, (1876) 45 Md. 16; *Pacific Spruce Co. v. McCoy*, (D.C. Or. 1923) 294 Fed. 711, *St. Clairsville v. Public Utility Commission*, (1921) 102 Ohio St. 574, 132 N. E. 151, See *Conklin v. Prospect Park Hotel Co.*, (1888) 48 Hun (N.Y.) 619, 1 N. Y. S. 406. "Indeed we are by no means certain that the charter imposes any duty on the defendant of carrying on the hotel."

²²*Lucking v. Detroit and Cleveland Navigation Co.*, (D.C. Mich. 1921) 273 Fed. 577 (1924) 265 U. S. 346, 44 Sup. Ct. 504, 68 L. Ed. 1047. See the statement of the court in *Wolff Packing Co. v. Court of Industrial Relations*, (1923) 262 U. S. 522, 43 Sup. Ct. 630, 67 L. Ed. 756.

²³*Montell v. Consolidation Coal Co.*, (1876) 45 Md. 16. Here it was held that a company with a charter granted for the purpose of manufacturing iron and mining coal and with the right to build a railroad and carry its own products and reserving to citizens the right to transport products over the road when built, had the right to withdraw such road at its own election and the charter imposed no obligation to continue. *Pacific Spruce Co. v. McCoy*, (D.C. Or. 1923) 294 Fed. 711. Here was a private carrier operated by a lumber company. Upon petition of certain citizens it had been temporarily operated for the public. It was decided that it was under no obligation to continue.

²⁴*St. Clairsville v. Public Utility Commission*, (1921) 102 Ohio St. 574, 132 N. E. 151.

²⁵It should be noted that there are here three kinds or grades of mandatory franchises. The first would compel operation of an entire system which a company might be desirous of discontinuing, even where such continuance might entail a loss. The second would compel a company to operate a part or branch of a system which it might wish to abandon. The third would compel continuance of a particular service which the company might desire to curtail. A franchise might be mandatory so as to compel a certain service while the company continued its operation of a branch. Or a franchise might be manda-

if there are no implied contracts requiring continuance, there is no duty to continue operation.²⁶ To determine the express terms which make a franchise mandatory presents an extremely difficult question and the courts are not entirely in accord in answering it.

A franchise may in express terms permit withdrawal. However, such a franchise allowing a company to discontinue a branch was held not to entitle it to abandon any part of such branch.²⁷ Terms in a franchise which merely give permission to operate or to use for a certain number of years do not make the franchise mandatory.²⁸ A franchise may specifically state that a corporation shall continue service during a period of time.²⁹ In fact, it is safe to assert that only such a franchise would compel operation of a whole enterprise at a loss. This is talked of as a possibility,³⁰ but thus far no such franchise has been litigated before

tory so that it would require the continuance of a part of the system and still not compel operation of the whole.

²⁶*Lucking v. Det. and Clev. Nav. Co.*, (1924) 265 U. S. 346, 44 Sup. Ct. 504, 68 L. Ed. 1047.

²⁷*City of Helena v. Helena Light and Rail Co.*, (1922) 63 Mont. 108, 207 Pac. 337. Here a provision was found in the charter that the grantee should not be compelled to operate any or all of its system at a loss. Held to authorize abandonment of one whole branch, not a part of one.

²⁸*Gress v. Village of Fort Laramie*, (1919) 100 Oh. St. 35, 125 N. E. 112. In this case the company had a franchise to operate for twenty-five years, yet was allowed to discontinue. *State of Tex. v. E. Texas Ry. Co.*, (D.C. Tex. 1922) 283 Fed. 584. Here was a franchise to construct and operate a railroad for a period of twenty-five years. Held not mandatory so as to compel operation at a loss. *Gasser v. Garden Bay Ry.*, (1919) 205 Mich. 5, 171 N. W. 791.

²⁹*City of Salina v. Salina Street Ry. Co.*, (1923) 114 Kan. 734, 220 Pac. 203. The provision which was interpreted as requiring operation here stated, "That said A shall begin actual work within the corporate limits on said street railway within ninety days from the adoption of this ordinance, and shall have not less than one mile constructed in six months, and cars running on not less than four miles within twelve months from the adoption of this ordinance, and shall continuously operate said line during the life of this franchise." *City of Jamestown v. Penn. Gas Co.*, (C.C.A. 2d Cir. 1924) 1 F. (2d) 871. The franchise provided that the company was to furnish gas and the supply was to continue "so long as said company shall continue to bring natural gas to said village, not exceeding, however, the limit of its corporate existence, as fixed by its certificate of incorporation."

³⁰*See Re Fairview Transportation Co.* P. U. R. 1917E. 44 (Ill.). The commission was asked to approve a lease. The question of the duty of the company to continue operation under its charter was commented upon. "In the absence of an express contract embraced in a charter, the owner of a railway cannot be compelled to maintain and operate the same at a loss. Obviously there is an express contract embodied in the petitioner's charter, and this contractual obligation is enforceable without regard to loss sustained or gain enjoyed by the pe-

the courts. A franchise which provided among other things that a railway and light company should in the operation of its system maintain a schedule of not more than thirty minutes between cars, was held to be mandatory so as to compel the operation of a branch line the company was endeavoring to discontinue.³¹ Similarly a street railway company was held bound to operate a branch line, under a franchise which contained a provision requiring that a car should pass any given point each way on the route every twenty minutes for twelve hours, and at least once every thirty minutes for four hours during that part of the day that the road should be operated.³² If, then, a franchise contains a provision requiring the operation of a certain number of trains, these two cases indicate that it will be deemed mandatory so as to compel operation of every branch.

There are certain special privileges which the state or city may grant that give rise to implied obligations on the part of utilities to continue service.³³

"An express contract is not essential to establish reciprocal rights between a public service company and the public it undertakes to serve. Such rights arise by implication of law."³⁴

These special privileges are of various kinds. One of the most important is the power of eminent domain. In the case of *State v. Bullock* the court stated

"By the acceptance of its charter from the state, such a company is permitted to exercise certain rights not enjoyed by

tioner." *Potter Transportation Co. v. Warren County*, (1919) 182 Ky. 840, 207 S. W. 709. In this case the court stated, "We do not mean to say that where there is a contractual obligation to operate the road for a specified time it might abandon it if operating at a loss. It seems to us there is no reason why a contract should not be enforced in this class of cases with the same rigour and fullness as in others. Where contract obligations are assumed, the rights of the parties are determined by the terms of the contract and not by profit or loss."

³¹*Macon Railway and Light Co. v. Corbin*, (1923) 155 Ga. 1, 116 S. E. 305.

³²*City of Potwin Place v. Topeka Ry.*, (1893) 51 Kan. 609, 33 Pac. 309.

³³*State v. Bullock*, (1919) 78 Fla. 321, 82 So. 866; *Brooks Scanlon Lumber Co. v. Ry. Com. of La.*, (1920) 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323; *Town of Hinckley v. Kettle River Ry.*, (1897) 70 Minn. 105, 72 N. W. 835.

³⁴*City of Gainesville v. Gainesville Gas and Electric Power Co.*, (1913) 65 Fla. 404, 62 So. 919; but see *State v. Central Ia. Ry.*, (1887) 71 Ia. 410, 32 N. W. 409. "It may be admitted that no contract exists between the people and the railroad; but when taxes are voted, collected and paid to the company, and it has availed itself of public aid from taxation, it assumes a relation to the public of a higher and more sacred character than contracts between mere private individuals."

individuals. It is given certain of the attributes of sovereignty itself such as the power of eminent domain. Accordingly, therefore, the public has such an interest in the operation of such a road that, when once undertaken, it may not be discontinued by a proceeding in which the state is not represented."³⁵

Again in *Kansas v. Dodge City Ry. Co.* in discussing abandonment the court declared

"The right to exercise the very high attributes of sovereignty, the power of eminent domain, and of taxation to further the construction of railways could not be granted to aid purely private enterprises."³⁶

Another kind of special privilege is monopoly. In dealing with monopoly and the problem of abandonment one court said

"A distinction should be made between service obligations of a company holding a local monopolistic franchise and the obligations of one which, as a matter of public policy, is expected to meet unlimited competition."³⁷

The right to use the highways appears to be another such privilege, at least where the use is different from that accorded to the average private citizen.³⁸ The privilege of erecting poles and wires would be an example of such special use.³⁹

Grants of land, and grants of money by means of taxation, give rise to implied obligations on the part of utilities to continue operation.⁴⁰

"Another proposition well supported in the decisions is that where public aid has been given through taxes and grants of labor and material, so long as they are retained by the company, the said company is under obligations to operate its property"⁴¹

The reason for the rule has been well stated by one court.

"It would be at war with every principle of natural justice to hold that it [the railway company] might avail itself of this public aid, and then violate its obligations to the public incurred by reason of aid thus received."⁴²

³⁵*State v. Bullock*, (1919) 78 Fla. 321, 82 So. 866; see also *Gates v. Boston and N. Y. Air Line*, (1885) 53 Conn. 333.

³⁶*Kansas v. Dodge City, M. and T. Ry.*, (1894) 53 Kan. 377, 36 Pac. 747.

³⁷*City of Salina v. Salina Street Ry.*, (1923) 114 Kan. 734, 220 Pac. 203.

³⁸*City of Gamesville v. Gamesville Gas and Electric Power Co.*, (1913) 65 Fla. 404, 62 So. 919.

³⁹See footnote 38.

⁴⁰*Town of Hinckley v. Kettle River Ry.*, (1897) 70 Minn. 105, 72 N. W. 835; *Smith v. Atlantic So. Ry.*, (1915) P. U. R. 1915F 125 (Iowa).

⁴¹*Smith v. Atlantic S. Ry.*, (1915) P. U. R. 1915F 125 (Iowa).

⁴²*Iowa v. Central Ia. Ry.*, (1887) 71 Ia. 410, 32 N. W. 409.

The form in which the special privilege is accorded to the company is immaterial. It may be embodied in the charter itself.⁴³ It may take the form of a special and separate grant.⁴⁴ Or it may be allowed to the company by statute.

Certain cases deny that there is an obligation on the part of the public utilities to continue operation unless there are express contracts requiring continuance. The courts of Ohio in two cases have refused to recognize the existence of any implied obligations whatsoever and permitted withdrawal where no statutes or express contracts compelled continued operation.⁴⁵

In addition to contracts which a utility may have with the state it may also have contracts with subdivisions of the state. Such contracts usually take the form of franchises. The ordinance is passed and it is accepted by the company. This constitutes a contract between the city and the utility.⁴⁶ "A grant of a franchise and its acceptance constitute a contract."⁴⁷

If there is no contractual relationship between the city and the utility and no statute pertaining to abandonment then there is no obligation which the city may enforce in its own right to continue operation. There is no right to enforce against third parties, with whom there is no privity of contract, a duty to continue.⁴⁸ In *St. Clairsville v. Public Utility Commission*, a gas

⁴³*Lusby v. Kansas City M. and B. R. Co.*, (1896) 73 Miss. 360, 19 So. 339.

⁴⁴*Town of Hinckley v. Kettle River Ry. Co.*, (1897) 70 Minn. 105, 72 N. W. 835.

⁴⁵*E. Ohio Gas. Co. v. City of Akron*, (1909) 81 Ohio St. 33, 90 N. E. 40; *E. Ohio Gas Co. v. City of Cleveland*, (1922) 106 Ohio St. 489, 140 N. W. 410.

⁴⁶*Laghton v. City of Carthage*, (C.C.Mo. 1909) 175 Fed. 145. The court stated here that the relationship between the city and the company was contractual. *E. Ohio Gas Co. v. Akron*, (1909) 81 Ohio 33, 90 N. E. 40. "Whatever rights the city may have to maintain this action, they must arise out of its contract with the Gas Company for that the ordinance passed and its acceptance by the company constituted a contract." *City of Spartenburg v. S. C. Gas and Electric Co.*, (1924) 130 S. C. 125, 125 S. E. 295. The ordinance constituted a binding contract between the city and the street railway company. *City of Potwin Place v. Topeka Ry.*, (1893) 51 Kan. 609, 33 Pac. 309. *Union Light, Heat and Power Co. v. Ry. Com.*, (D.C.Ky. 1926) 17 F (2d) 143.

⁴⁷*City of Helena v. Helena Light and Ry.*, (1922) 63 Mont. 108, 207 Pac. 337.

⁴⁸(1921) 102 Ohio St. 574, 132 N. E. 151, Contra if the duty is statutory. *Cambria Steel Co. v. Johnstown Fuel Supply Co.* (1921) P U. R. 1921E 454 (Pa.) "The jurisdiction of the commission was created by statute creating and vesting in it authority to regulate the public service in which the Peoples Co. is engaged, and the company having undertaken through the Johnstown Fuel Supply Co. to supply

company held a franchise from the village of St. Clairsville. A second company supplied the first with gas, but had no franchise and no contract with the village. The court refused to enjoin the second company from discontinuing service, on the ground that there was no contract relationship between said company and the village, and hence there was no duty to continue.⁴⁹ Another example of the same principle appears where a utility has held a franchise but this franchise has expired. A water company had had a franchise to operate its plant and render service to the public of a municipality. Its franchise expired. It was decided that the company's right to operate the plant had ceased and with it the right of the city to demand service. After the expiration of the franchise each was free to go its own way.⁵⁰ Again, the franchise of a company furnishing gas had expired. The state commission directed the plaintiff to continue to furnish service. The court held that the order was beyond the power of the commission, and the company was under no obligation to continue.⁵¹

A utility may be bound to continue operation by reason of a contract with some private person.⁵² Lands had been conveyed to a railway company. The consideration was the erection and the location of a depot in the southern part of a particular city. The depot was removed. It was held that an action would be maintained against the company for the value of the land.⁵³ Again,

natural gas in the city of Johnstown, that service ipso facto came under the regulatory authority of this commission, and cannot be abandoned in the manner attempted."

⁴⁹See footnote 48.

⁵⁰*Laighton v. City of Carthage*, (C.C.Mo. 1909) 175 Fed. 145.

⁵¹*Union Light, Heat and Power Co.*, (D.C.Ky. 1926) 17 F. (2d)

143. "The franchise involved in this case, by its express terms ran for a period of ten years. Therefore under section 163 and 164 of the constitution of Kentucky the plaintiff had no right under that franchise to occupy the streets and the public ways of the City of Ft. Thomas after the 5th day of September, 1925, and the city was without power to confer upon it any such right, except in the same way as the original franchise was granted. " "Therefor, looking alone to the two state constitutional provisions it seems perfectly obvious that all obligation on the part of the plaintiff to furnish gas service to the citizens of Ft. Thomas terminated on the expiration of its franchise. " See also the report of the decision on the same case in the state court, *Union Light, Heat and Power Co. v. City of Ft. Thomas*, (1926) 215 Ky. 384, 285 S. W. 228.

⁵²It is not intended in this article to deal at length with private contracts, as they do not fall properly within the scope of this dissertation. One of the most important kinds of private contracts pertains to spur tracks. This subject is dealt with in Part IV

⁵³*International and G. N. Ry. v. Sallie Dawson*, (1884) 62 Tex. 260.

where certain lands were conveyed and the railway company agreed in another instrument, which was part of the original consideration, to maintain a side track and station on the lands, it was stated that the agreement was binding on the company unless public necessity required a discontinuance.⁵⁴ A covenant to erect a depot and to stop all trains in consideration for a conveyance of land is not against public policy.⁵⁵ However, such private agreements are made subject to public welfare and if for some reason it becomes necessary for the welfare of the public to break such contracts, the utility is no longer bound.⁵⁶ The mere building along the line of a railway or utility does not constitute a contract between the utility and such individuals and gives them no cause of action on behalf of themselves against the company as a result of discontinuance, even though such action greatly decreases the value of their property.⁵⁷ Such a doctrine once admitted would destroy the general convenience of a public utility. It would then become hampered and subject to the control of an individual and would be made to subserve such interest to the detriment of the public welfare.⁵⁸

(c) *The obligation may arise from statute.*—The duty which a public utility may be under to continue service may arise not only from contract, but also from statute. In fact, the latter source of obligation has become more important in recent years than the former. Of course, there may be a duty to continue arising from both contract and statute.

Most states now have certain acts governing abandonment. In some places there are express laws. Nevada, Maryland, Mississippi, California, Arkansas, Connecticut, New Mexico, Iowa, Texas, New York, New Hampshire, Michigan, Ohio, Minnesota, Vermont, Tennessee, and Alabama, have statutes expressly governing discontinuance by certain utilities.⁵⁹ In other states, there

⁵⁴Louisville and Nashville Ry. v. Johnson's Administratrix, (1925) 207 Ky. 813, 270 S. W. 50.

⁵⁵Gray v. Chic. M. and St. P. Ry., (1901) 189 Ill. 400, 59 N. E. 950.

⁵⁶L. and N. Ry. v. Johnson's Administratrix, (1925) 207 Ky. 813, 270 S. W. 58.

⁵⁷Day v. Tacoma Ry. and Power Co., (1914) 80 Wash. 161, 141 Pac. 347. Asher v. Hutchinson Light and Power Co., (1903) 66 Kan. 496, 71 Pac. 813.

⁵⁸Asher v. Hutchinson Light and Power Co., (1903) 66 Kan. 496, 71 Pac. 813.

⁵⁹Alabama: Gen. Acts 1927, p. 319, sec. 27, also Gen. Acts 1920 p. 92, sec. 10 and sec. 51.

Arkansas: Acts 1919, p. 411, sec. 10.

is implied from certain statutes requiring reasonable service, an obligation to continue operation.⁶⁰

Such statutes governing abandonment may be part of the charter or franchise contract, if the charter or franchise is granted after the passage of the statute.⁶¹ But if the statute is passed subsequently to the formation of the contract between state and utility, whether it is then part of the charter contract presents a difficult problem. One Ohio case⁶² held that the section of the

California: Civil Code 1923, sec. 468 (Statutes 1923, p. 443, sec. 1, amending sec. 468 of the Civil Code.)

Connecticut: Rev. St. 1918, chap. 191, sec. 3635.

Iowa: Code, sec. 2092-2095 (Iowa, Comp. Laws 1927, sec. 8162-8165).

Maryland: Acts 1914, chap. 445, p. 719, secs. 26½ and 33½.

Michigan: Acts 1887, act 275, p. 373, amended 1891, act 125, p. 147 sec. 1 and 2 (Comp. St. 1915, sec. 8363-8364).

Minnesota: G. S. 1923, secs. 4926-4930.

Mississippi: Laws 1926, chap. 128, sec. 5.

Nevada: Statutes 1919, chap. 109, p. 198, sec. 36½.

New Hampshire: Laws 1917, chap. 82, sec. 2.

New Mexico: Laws 1921, chap. 200, sec. 1.

New York: New York Railroad Law, sec. 184.

Ohio: General Code of Ohio, sec. 504-2 and 504-3.

Tennessee: Pub. Acts 1927, chap. 64, p. 209.

Texas: Acts 1918, 4th C. S. chap. 27, sec. 1 and 2 (Revised Civil Statutes 1925, art. 6349 and 6350.)

Vermont: Public Acts 1925, no. 91, p. 131.

⁶⁰Kansas: Laws 1911, chap. 238, sec. 10 (Comp. St. 1915, sec. 8337).

"Every common carrier and public utility governed by the provisions of this act shall be required to furnish reasonably efficient and sufficient service." State v. Postal Teleg. Cable Co., (1915) 96 Kan. 298, 150 Pac. 544. In states having no express statutes governing abandonment, the duty to continue operation would have to be implied from statutes similar to the Kansas Statute. See for example the statutes of the states listed below.

Maine: Rev. St. 1916, chap. 55, sec. 16.

Missouri: Laws 1913, p. 570 (Rev. St. 1919, sec. 10436).

Indiana: Acts 1913, p. 167 (Burns Ann. St. 1926, sec. 12678).

Utah: Laws Utah 1917, chap. 47, art 3, sec. 1.

Colorado: Laws 1913, chap. 127, sec. 13, b.

⁶¹State of Texas v. Enid O. & Western Ry., (1917) 108 Tex. 239, 191 S. W. 560. A charter of railway constitutes a contract with the state, and is granted on the implied understanding by the company that it construct and operate a railway between limits specified and under express statutory enactment constituting part of its contract, and that it will not abandon or remove any part of the main line once constructed.

⁶²East Ohio Gas Co. v. Cleveland, (1922) 106 Oh. St. 489, 140 N. E. 410. "The parties hereto having entered into a contractual relation, the terms of which construed in the light of decisions of this court entitled either to terminate the contract at will, such application of sections 504-2 and 504-3, General Code, would impair the obligations of those contracts, in that it would impose in Public Utilities Commission the power to require the East Ohio Gas Company to continue its service in the city of Cleveland after it had elected to terminate the contracts, in violation of the terms of the contracts as in-

statute⁶³ attempting to make the law applicable to contracts entered into prior to its passage was invalid as violating the contract clause of the federal constitution.⁶⁴ In that decision, the commission was attempting to force a utility to continue service, where it had discontinued without the commission's consent. A later decision in the same state upheld an order of the commission against the protest of a municipality, permitting the utility to discontinue under the statute passed after the franchise had been granted. The validity of the clause was upheld. It was stated that the authority to pass such legislation rested on the police power, and that the police power was inherent in sovereignty and would lose much of its potentiality if its operation could be defeated by contracts whose continued existence would be detrimental to the public welfare.⁶⁵ The rule seems to be that against the protest of a utility that the law violates its contract rights, such statutes will be held invalid, but against the protest of a municipality that the law violates its contract rights, such statutes will be upheld.

All statutes in existence at the time the charter or franchise is granted do not form part of the contract, unless the legislature intended to make them a part. For example, a statute allowing a private company to dissolve at its own volition by cer-

terpreted by this court; and in that it would make such continued service dependent not upon the obligations of the contract but upon the reasonableness of the proposed abandonment of service." "In so far as section 504-3 attempts to make the provisions of that and the preceding section applicable to 'all such service now rendered and facilities furnished,' it violates the provisions of the Ohio constitution and the federal constitution as to the impairment of contracts."

⁶³Sec. 504-3 and 504-2. The part in question provided that the section was to be applicable to "all such service now rendered and facilities furnished."

⁶⁴Art. I, sec. 10, U. S. constitution.

⁶⁵Board of Commissioners of Franklin County v. Public Utility Commission, (1923) 107 Ohio St. 442, 140 N. E. 87. In the case of E. Ohio Gas. Co. v. Cleveland, the company withdrew without the consent of commission as provided for by sec. 504-2 and 504-3 of Ohio General Code. In the instant case, the commission had ordered discontinuance under the same section of the act, and the city protested. The court rested its decision on the police power but that was not the only valid ground. It is conceivable that the act might not allow, under the federal constitution, a commission to order a utility to continue operation where its franchise contract allowed discontinuance, and yet such an act might permit the commission to order a utility to discontinue, contrary to its contract obligation with a municipality, and still not violate the federal constitution. As we have previously noted, such contracts with municipalities are not protected by art. 1, sec. 10 of the U. S. constitution.

tain procedure was held not to pertain to a public utility company⁶⁶ Nor did a statute which required the operation of one train per day over the main line, form a part of the charter contract. The reason for the rule according to the court is that the state has many laws on its statute books concerning railroads and it is apparent that there was no intention to make all of these a part of the charter. The occasion for keeping such matters where the legislature can deal with them as changing conditions require, forbids that they be regarded as part of the charter contract. In short, the fact that a particular provision is found in the statutes of a state relating to railroads does not of itself suffice to show that such provision is part of the charter.⁶⁷ If there was an intention to make a particular statute part of the contract and such intention had been disclosed plainly, then it would be so regarded.⁶⁸

When a utility is unincorporated, holds no mandatory franchise, and has no special privileges, the only basis for compelling continuance is statutory⁶⁹

⁶⁶*Freeo Valley Ry. Co. v. Hodges*, (1912) 105 Ark. 314, 151 S. W. 281, construing sec. 957 Kirby's Digest. However, see an Old Virginia Statute (Code of 1904, sec. 1105). This was held to apply to a public service corporation as well as private company in *Jeffries v. Commonwealth*, (1917) 121 Va. 425, 93 S. E. 701. This has since been changed as might be expected. See *Virginia v. Knight*, (1923) P U. R. 1923E 816.

⁶⁷*Ry. Com. of Tex. v. E. Tex. Ry.*, (1924) 264 U. S. 79, 44 Sup. Ct. 247, 68 L. Ed. 569. In this case the road discontinued operation because it proved a losing venture. Two state laws, it was argued, required continuity of operation. One required that every railroad train operate one passenger train per day over its main line, and the other that a company acquiring a railway under judicial decree shall not abandon any main track once laid. These two provisions were held not part of the charter contract.

⁶⁸See *Ry. Com. of Tex. v. E. Texas Ry.*, (1924) 264 U. S. 79, 44 Sup. Ct. 247, 68 L. Ed. 569; also *State of Texas v. Enid, O. and Western Ry.*, (1917) 108 Tex. 239, 191 S. W. 560. Here was a statutory requirement that railroad would not abandon any part of main track once constructed. The railroad sought to tear up part. Held that when the charter was granted and accepted, the law provided that main line should not be moved. The railroad company accepted the charter subject to the law and impliedly consented to obey it.

⁶⁹See *Re Mrs. G. Guerra*, (1922) P U. R. 1922A 237. *California Commission* denied application of owner of small telephone company to discontinue service. Also *Re William S. Van Hoosear*, (1920) P U. R. 1920B 924. Owner of a small water utility which apparently had no franchise and was unincorporated ordered to continue service. Also *State v. Mo. So. Ry.*, (1919) 279 Mo. 455, 214 S. W. 381. Company operated two spurs not included in its charter and which it had no franchise to operate. Held that spurs could not be abandoned without the consent of the commission.

(d) *The obligations to continue service are binding upon subsequent parties operating a public utility.*—The obligations to continue service from whatever source they arise are binding, not only upon the original parties, but also upon all subsequent parties operating the utility. Purchasers at a foreclosure sale are so bound.⁷⁰ Such an obligation is not like a debt wiped out by the sale, but inheres in the franchise, and the company which takes the franchise takes it burdened with the obligation to continue operation. The same obligation rests upon lessees,⁷¹ upon assignees,⁷² and upon receivers.⁷³ A utility consisting of a consolidation of several corporations was bound by the obligation of its predecessor to furnish service even after the exhaustion of the original field from which the first corporation furnished gas, where for some time prior to the exhaustion, the consolidation had supplied gas from other new fields as well as from the original source.⁷⁴ The duty to continue operation rests with a purchaser despite the fact that he may have no intention of continuing operation.⁷⁵ Purchasers, lessees and receivers have the same rights to discontinue as the original parties.

"Purchasers of a railroad at a foreclosure sale have the same rights as the railroad company to cease operation when it can only be operated at a loss."⁷⁶

Whether a road is sold as an entity or in parts is immaterial. Purchasers of a railroad take it subject to public interest in its continued operation, whether it is sold in its entirety or in different parts to different persons. Such persons take it affected with the same public interest in its continued operation as existed when it was in the hands of the former owner.⁷⁷

⁷⁰State v. Cen. Ia. Ry., (1887) 71 Ia. 410, 32 N. W. 409. Smith v. Atlantic So Ry., (1915) P. U. R. 1915F 125 (Ia), Cripple Creek Motor Club Co. v. Colo. Springs and Cripple Creek District Ry., (1924) P. U. R. 1924A 392 (Colo.), State of Tex. v. Enid O. and W. Ry., (1917) 108 Tex. 239, 191 S. W. 560.

⁷¹Re Charleston Interurban Ry., (1916) P. U. R. 1916F 338. (W Va.).

⁷²City of Potwin Place v. Topeka Ry., (1893) 51 Kan. 609, 33 Pac. 309.

⁷³Pittsburgh Coal Co. v. Delaware N. R. Co., (D.C. N.Y. 1923) 289 Fed. 133.

⁷⁴United Natural Gas. Co. v. Pub. Service Com., (1922) 79 Penn. Sup. Ct. 587.

⁷⁵Virginia v. Knight, (1923) P. U. R. 1923E 816 (Va.).

⁷⁶Bullock v. State of Fla., (1920) 254 U. S. 513, 41 Sup. Ct. 193, 65 L. Ed. 380.

⁷⁷Equity Trust Co. v. Ohio Peoria and St. Louis Ry., (1924) 314 Ill. 96, 145 N. E. 290.

III TOTAL ABANDONMENT⁷⁸

(a) *There are circumstances under which a public utility has a right of total abandonment.*—The better rule appears to be that there is not an unlimited right on the part of a public utility to discontinue all service without the consent of the state.⁷⁹ There are, however, circumstances under which total abandonment may take place as a matter of right; and there are circumstances under which it may take place with the consent of the state.

It is submitted, in the first place, that if a franchise contains express terms requiring continuance, then regardless of the circumstances which arise to make withdrawal desirable, there is an obligation to continue operation. Although there is no case so holding,⁸⁰ certain courts have used language which indicates that there is such a duty

"The rule that constitutional guaranties are infringed by compelling a railway corporation to operate at a loss does not apply when operation is a positive requirement of the franchise."⁸¹

Again one court has stated

"That a railroad company cannot be compelled to continue to operate its railroad when such operation can be carried on only at a loss is settled. To do so would be taking its property without compensation. Of course a railway company which has assumed contractual obligations requiring it to operate its road may be compelled to do so."⁸²

Where there is no contract expressly requiring continuance and the duty arises from some one of the many possible implied contracts, there is not an absolute obligation under all circumstances to continue operation. Certain situations, however, are not regarded as justifying discontinuance. A dispute with another utility over charges was held to be no grounds for discontinuing service.⁸³ Nor was a strike any excuse at law for suspended operation.⁸⁴ In *McCran v. the Public Service Ry.*, the

⁷⁸The citations in P. U. R. refer to commission decisions.

⁷⁹See footnote 7, Part II, a.

⁸⁰See the discussion in the article by O. P. Field, "Withdrawal from Service of Public Utility Companies," 35 Yale L. J. 169.

⁸¹*City of Salina v. Salina St. Ry.*, (1923) 114 Kan. 734, 220 Pac. 203.

⁸²*State v. Duluth and N. M. Ry.*, (1921) 150 Minn. 30, 184 N. W. 186.

⁸³*Miami Gas Co. v. Highleyman*, (1919) 77 Fla. 523, 81 So. 775; *Town of Gassaway v. Gas Co.*, (1914) 75 W. Va. 60, 83 S. E. 189; but see *E. Ohio Gas Co. v. Akron*, (1909) 81 Ohio 33, 90 N. E. 46.

⁸⁴*McCran v. Public Service Ry.*, (1923) 95 N. J. Eq. 22, 122 Atl. 205; see also *People v. N. Y. C. and H. R. R.*, (1883) 28 Hun (N.Y.) 543. Here, of course, it might be impossible for the court to compel

court stated that a company could not refuse to perform its duties because of a controversy with its employees over costs and operating expenses, and that this was not an excuse which had any validity at law for a company could not discharge its duties on and off as it happened to find it profitable.⁸⁵ Where a city placed upon a utility certain burdensome and arbitrary regulations, this was not regarded as giving a right to discontinue service.⁸⁶

Among those things which are regarded as justifying total abandonment, the most common is that of financial loss. As Wyman points out in his treatise on Public Service Corporations, the question of discontinuance of service divorced from loss is not likely to arise, for people do not as a practical matter abandon a solvent utility. This holds true as a rule but there are reasons other than loss, for abandoning such an undertaking. Generally, however, the question of loss will be found lurking, somewhere. One of these is shortage of supply.⁸⁷ Two reasons for allowing cessation here are possible—one valid at law, the other a mere excuse. The obligation of the company is to serve the public only so long as its supply lasts. This is a term of the contract. When the supply becomes exhausted, the contract has been fulfilled, and hence is terminated automatically. The other reason is the inability to compel continuance where there is nothing with which to continue. But a consolidated company was not allowed to discontinue service where the field from which its predecessor had supplied a town had become exhausted, and where for many years it had supplied the town not only from the original field but from certain new fields opened.⁸⁸ Where a telegraph company had vainly tried to renew its contract for a right of way along a railroad but was unable to do so, this was considered justification for discontinuance.⁸⁹

By far the largest and most important class of cases pertains to utilities which have been operating at a loss. On the question of under what circumstances it will be deemed that a utility is

continuance by mandamus or injunction. Even so there would be no right of discontinuance.

⁸⁵See footnote 84.

⁸⁶*City of Gainesville v. Gainesville Gas and Elec. Power Co.*, (1913) 65 Fla. 404, 62 So. 919.

⁸⁷*St. Clairsville v. Public Utility Commission*, (1921) 102 Ohio St. 574, 132 N. E. 151.

⁸⁸*United Natural Gas Co. v. Pub. Service Com.*, (1922) 79 Pa. Sup. Ct. 560.

⁸⁹*State v. W. U. Teleg. Co.*, (1922) 208 Ala. 228, 94 So. 466.

operating at a loss, there is a difference of opinion. So far as this problem is concerned, it matters not whether the utility is seeking to discontinue as a matter of right or whether it is seeking permission from the state to withdraw. Hence, both classes of cases have been gathered together. That a hopeless condition of insolvency is not necessary is clear. Some cases contend that if a company is not making expenses, depreciation, taxes and a reasonable return upon its investment, it is operating at a loss.

"It is fundamental, that a utility or other public service corporation cannot be required indefinitely to operate without a reasonable return upon its investment."⁹⁰ "It is earnestly contended on behalf of petitioners that service cannot be abandoned unless its operating revenues are insufficient to meet operating expenses. We do not think this contention is sound. A railroad is not a philanthropic enterprise and while it owes duties to the public, it also owes duties of perhaps equal importance to the investors in its securities. The holders of its securities are entitled to a return upon their investment and there is no basis in reason for requiring them to donate their capital." "It is the opinion of this commission that a loss results when a public service corporation fails to earn its fair operating expenses, maintenance charges, depreciation, taxes and a reasonable rate of return upon a fair valuation of its property"⁹¹

In most of the cases it will be found, however, that although the court discussed fair return and depreciation, actually the utility was not even earning operating expenses. In none of these decisions, with the exception of *Re Denver, Boulder and Western Ry.*,⁹² was the company allowed to withdraw merely because it was not making depreciation charges or a fair return.⁹³

Other cases have held that the company was not operating at a loss until it failed to make operating expenses and taxes. "We find no decision holding that a failure to yield a reasonable return constitutes a justification for abandoning the operation of a railroad."⁹⁴ In another case the railway's receipts were barely

⁹⁰*Re Red River Mfg. Co.*, (1924) P U. R. 1924D 385 (Wis.). Here company was allowed to discontinue. However, it was not making operating expenses in this case.

⁹¹*Virginia v. Knight*, (1923) P U. R. 1923E 816 (Va.). Here company was not allowed to discontinue, but it was on the grounds that no fair value was shown.

⁹²P. U. R. 1919F 9 (Colo.). In this case it appears depreciation expenses were not being made.

⁹³*Re Batesville Gas Co.*, (1917) P. U. R. 1917F 662 (Ind.); *Re Red River Mfg. Co.*, (1924) P U. R. 1924D 385 (Wis.); *Virginia v. Knight*, (1923) P. U. R. 1923E 816 (Va.).

⁹⁴*Smith v. Atlantic So. Ry.*, (1915) P U. R. 1915F 125 (Iowa).

enough to pay operating expenses, leaving nothing for dividends and new equipment. In that case it was decided, among other things that a fair return and depreciation were not items to be considered in determining whether a company was operating at a loss so as to entitle it to discontinue.⁹⁵ The true rule can be determined only by a consideration of the reason why a company need not continue operation at a loss. The reason is that compelling such continuance constitutes a taking of property for public use without just compensation,⁹⁶ in violation of the due process clause of the fourteenth amendment.⁹⁷ But it is difficult to determine what constitutes taking here without just compensation. It may be true for rates and rate purposes that it is taking property when a company is required to operate and in so doing cannot earn depreciation and a fair return. But what may be contrary to the fourteenth amendment for rate purposes may not be for discontinuance. There is more necessity for the exercise of police power in requiring continuity of operation than in maintaining a certain rate. The injury to the public is more serious in the former case than in the latter. Hence the police power is more extensive in the one case than in the other. Although a utility may be entitled to a rate which will give it a fair return, it ought to be required to continue service even though it cannot make a fair return at any rate level.

A statute of New Mexico may shed some light on this problem. There the fact that the road cannot pay more than operating expenses is not considered a sufficient excuse for discontinuance.⁹⁸

An interesting case is presented where a company has for years been prosperous but has set aside nothing for repairs, depreciation or reserve. Shall it then later when it incurs losses be entitled to discontinue?⁹⁹

See the statement of the court in *Ft. Smith Light and Traction Co. v. Bourland*, (1925) 267 U. S. 336, 45 Sup. Ct. 249, 69 L. Ed. 631.

⁹⁵*Re Durango Ry. and Realty Co.*, (1920) P U. R. 1920B 505 (Colo.). There were other reasons for refusing to allow discontinuance, in this case, however.

⁹⁶*Brooks Scanlon Lumber Co. v. Ry. Com. of La.*, (1920) 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323.

⁹⁷Article XIV, constitution of the United States.

⁹⁸New Mex. Laws 1921, chap. 200, sec. 5. So far as the section is important, it reads, "The fact that the income from the operation of the road is not sufficient to pay more than operating expenses shall not be considered as showing a loss."

⁹⁹The problem was presented in the case of *Re Oxford Elec. Co.*, (1920) P U. R. 1920A 852, (Maine).

Two principles are certain. In the first place, the loss must be permanent, not temporary. That is, either the loss must have existed for some time so as to demonstrate the impossibility of operation at a profit, or there must be no reasonable prospect of remunerative operation in the future.¹⁰⁰ And, secondly, there is a presumption against loss. The company must give satisfactory evidence that it cannot operate at a profit.¹⁰¹

Where there is no express obligation in the charter, and the only duty arises from some implied contract, the general rule is that companies may discontinue where operating at a loss.¹⁰² There are several reasons for this. The first has already been suggested. To require operation of a utility at a loss is a taking of property without just compensation for public use and hence a violation of the fourteenth amendment of the United States constitution.¹⁰³ If the company retains its charter or franchise, it would seem that it cannot then plead a violation of the fourteenth amendment.¹⁰⁴ The second reason sometimes given is that there has been a failure of consideration, hence the railroad is relieved of its obligation. It may be that neither has broken the contract, but a failure to use causes a failure of revenue and hence a failure of consideration. The contract is terminated by this failure of consideration.¹⁰⁵ Still another reason might be given. The public no longer needs the service as is evidenced by its failure to use, hence the company has fulfilled its charter ob-

¹⁰⁰Re Loyaltan Electric Co., (1915) P U. R. 1915C 804 (Calif.).

¹⁰¹See footnote 100.

¹⁰²Morris v. Atlanta No. Ry., (1925) 160 Ga. 775, 129 S. E. 68; Brooks Scanlon Lumber Co. v. Ry. Com. of La., (1920) 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323; State of Texas v. E. Tex. Ry., (D.C. Tex. 1922) 283 Fed. 584; Ry. Com. of Tex. v. E. Tex. Ry., (1924) 264 U. S. 79, 44 Sup. Ct. 247, 68 L. Ed. 569; Ft. Smith Light and Traction Co. v. Bourland, (1925) 267 U. S. 336, 45 Sup. Ct. 249, 69 L. Ed. 631, Contra State of Kan. v. Dodge City, M. and T. Ry., (1894) 53 Kan. 377, 36 Pac. 747

¹⁰³Brooks Scanlon Lumber Co. v. Ry. Com. of La., (1920) 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323; State of Tex. v. E. Tex. Ry. Co., (D.C. Tex. 1922) 283 Fed. 584; Ry. Com. of Tex. v. E. Tex. Ry., (1924) 264 U. S. 79, 44 Sup. Ct. 247, 68 L. Ed. 569.

¹⁰⁴See Ft. Smith Light and Traction Co. v. Bourland, (1925) 267 U. S. 336, 45 Sup. Ct. 249, 69 L. Ed. 631. The court stated, "This company is at liberty to surrender its franchise and discontinue operations throughout the city. It cannot, in the absence of contract, be compelled to operate its system at a loss. But the constitution does not confer upon a company the right to continue to enjoy the franchise and escape from burdens incident to its use."

¹⁰⁵State of Tex. v. E. Tex. Ry., (D.C. Tex. 1922) 283 Fed. 584. See page 592.

ligations or its duty by statute. Another reason has been suggested by the courts—that of the impossibility of compelling continuance. It is useless for a court to issue a mandamus against an impossibly insolvent utility¹⁰⁶

"Mandamus will not be issued to compel company to rebuild, equip or operate such a road since without money or financial resources of any kind whatsoever, the company would be unable to comply with such order and its issue would avail nothing."¹⁰⁷ "Refusal of permission to sell this property will not give an electric railway service. The corporation might be ordered to give such service but it cannot comply."¹⁰⁸ "Economic law, if no other, will prevent a utility from continuing business after it has been demonstrated beyond a doubt that it is a losing venture. Under the conditions named, no order could be made that the service be continued which could be enforced. The road cannot run without money, and no one will invest money in an undertaking which is known to be a failure."¹⁰⁹ This is hardly a reason but rather an acknowledgment of the failure of adequate legal remedies.

It may be that the obligation to continue service arises as a result of a special grant of money from the state, city, or private citizens. The obligation here may be the result of an implied contract, or it may arise from statute. Many states have special laws governing this situation.¹¹⁰ Even though the company is losing money, it may not quit, unless it repays the sums which it has received.¹¹¹ The rule in Michigan requires payment of in-

¹⁰⁶State ex rel. Collins v. L. S. W. Ry., (1922) 128 Miss. 312, 91 So. 7. Gasser v. Garden Bay Ry. Co., (1919) 205 Mich. 5, 171 N. W. 791, see also Coe v. Columbus, Piqua and Indiana Ry., (1859) 10 Ohio St. 372.

¹⁰⁷State ex rel. Collins v. L. S. W. Ry., (1922) 128 Miss. 312, 91 So. 7.

¹⁰⁸Re Rockland, So. Thomaston and St. Geo. Ry., (1918) P. U. R. 1918E 877 (Maine).

¹⁰⁹Re Exeter, Hampton, Amesbury Street Ry., (1919) P. U. R. 1919B 251 (N.H.).

¹¹⁰Iowa, Statutes: sec. 2094 and 2095; Iowa Compiled Code 1919, sec. 5141, sec. 5142. Michigan, Statutes of 1887 Act 275, p. 373 as amended 1891, Act 125, p. 147; Compiled Statutes of 1915, sec. 8363 and 8364. Illinois Statutes: Hurd's Rev. St. 1917, page 713, chap. 32, sec. 50. "And, provided, further, that no company shall by virtue hereof, change its place of business from any town, county or municipality where the inhabitants thereof, or any person therein shall have donated any money or valuable things to induce such corporation to locate in such town, county or municipality." Quoted in Re. Sidell & O. Ry., (1918) P. U. R. 1918E 660 (Ill.). Interpreted as forbidding a railway company to discontinue service.

¹¹¹State v. Beaton, (1920) 190 Ia. 216, 178 N. W. 1.

terest as well.¹¹² In one case, at least, the railway was not entitled to cease operation at all where the state had donated to it land. The railroad was seeking to abandon only one unprofitable branch of its whole system. Whether the rule would have been the same if the entire system was being operated at a loss, is hard to say. The court stated

"Where a railway company has received a grant of land from the state upon condition that it would build a road from one town to another it has no authority whatever afterwards to abandon any such portion of the line and take it up and remove the track. The unprofitableness of operating the road furnishes no excuse whatever for a failure to comply with the conditions of the grant."¹¹³

An interesting problem appears where the company is engaged in several enterprises which as a whole are profitable, but one of them, a public utility service, is not. This may take two forms. One of the enterprises may be a public utility venture but the other not.¹¹⁴ Or all may be public services but of different kinds, as gas, street railway, electricity, water and heating.¹¹⁵ So far as the rules are concerned in these two cases, there is no difference. In either, the utility may abandon the unprofitable undertaking.¹¹⁶ Each enterprise is regarded as a distinct entity, and the fact that they are accidentally connected through the same company is quite immaterial.

"Where a public utility corporation is engaged in furnishing to the public through various departments of its business different kinds of services, it cannot be compelled to carry on a branch of its business which furnishes one kind of such service at a loss, even though the entire business be profitable."¹¹⁷

There are two reasons given, but after all they resolve themselves into one. In the first place, it is a taking of property with-

¹¹²In *re Flint and Pere Marquette Ry.*, (1892) 91 Mich. 293, 51 N. W. 1001.

¹¹³*Nebraska v. Sioux City and Pac. Ry.*, (1878) 7 Neb. 357

¹¹⁴*Brooks Scanlon Co. v. Ry. Com. of La.*, (1920) 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323.

¹¹⁵*No. Ill. Light and Traction Co. v. Commerce Commission*, (1922) 302 Ill. 11, 134 N. E. 142; *Mt. Carmel Public Service Co. v. Commission*, (1921) 297 Ill. 303, 130 N. E. 693; *Re St. Croix Gas Light Co.*, (1919) P. U. R. 1919A 487 (Maine).

¹¹⁶*Brooks Scanlon Co. v. Ry. Com. of La.*, (1920) 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323; *No. Ill. Light and Traction Co. v. Commerce Commission*, (1922) 302 Ill. 11, 134 N. E. 142; *Mt. Carmel Pub. Serv. Co. v. Commission*, (1921) 297 Ill. 303, 130 N. E. 693; *Re St. Croix Gas Light Co.*, (1919) P. U. R. 1919A 487 (Maine).

¹¹⁷*Mt. Carmel Pub. Service Co. v. Commission*, (1921) 297 Ill. 303, 130 N. E. 693.

out due process of law and hence a violation of the fourteenth amendment.¹¹⁸ Another reason given is that justice requires that each utility should be supported by those receiving its service, and not by those receiving a service of some other kind.¹¹⁹

"Each branch or class of its [a public utility company's] business must be considered separately for purposes of rate making or discontinuance of service. The reason for the rule is quite obvious. A gas user ought not to be required to maintain an electric light service nor an electric light service a street railway service. The users of each utility must support it whether owned by one entity or three distinct entities.¹²⁰

Whichever reason is used, it comes to a question of taking property without due process of law. In the one case, it is a taking of the property of the company. On the other hand, if a commission orders an increase of rates in a gas service to support electric service, then it is the property of the gas consumers which is taken without due process of law. The general rule holds even where other contracts for electricity, etc., have been granted with the understanding that the railway would have to be operated for a considerable period of time at a loss.¹²¹ It was decided that where three services were linked together in one ordinance and as such all parts of the same contract between the city and the company, the utility could not cease operation of one of the enterprises which had proved unprofitable.¹²² The utilities were looked upon as one unit, and could not be separated one from the other. There is a danger in following this theory too far, especially if the doctrine is carried into the field of rate making. Rates in one service might be raised to a high level and made to support all other enterprises. In another case the utility was not allowed to abandon one of its unprofitable services where the rates were fixed at the request of the company so as to enable it to earn a fair return upon all enterprises.¹²³

¹¹⁸*Brooks Scanlon Lumber Co. v. Ry. Com. of La.*, (1920) 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323; *Mt. Carmel Pub. Service Co. v. Commission*, (1921) 297 Ill. 303, 130 N. E. 693.

¹¹⁹*Re Exeter, Hampton, Amesbury Street Ry.*, (1918) P. U. R. 1919B 251 (N.H.).

¹²⁰*Re Trinidad Electric Transmission, Ry. & Gas Co.*, (1922) P. U. R. 1922C 299 (Colo.).

¹²¹*Re Trinidad Elec. Transmission Ry.*, (1920) P. U. R. 1920F 707 (Colo.).

¹²²*City of Spartenburg v. S. C. Gas and Elec. Co.*, (1924) 130 S. C. 125, 125 S. E. 295.

¹²³*Re Helena Light and Ry. Co.*, (1923) P. U. R. 1923C 780 (Mont.).

Even though there is a right of discontinuance, a utility has no right to cease operation arbitrarily. An opportunity must be given the community to bid for and buy the utility, before it is discontinued. In *Gress v. Village of Fort Laramie*, a chancery court ordered the road discontinued and dismantled, but allowed an opportunity, first, to purchase within thirty days as a going concern.¹²⁴ If it be found that operation in any form or by any persons is impossible and abandonment is the only alternative still the utility will not be allowed to cease operation until the community has had an opportunity to adjust itself to changed conditions.¹²⁵ In any case, notice is essential before discontinuance. This was true even by the rules of common law.¹²⁶ In discussing the question of what is reasonable notice, Wyman declares

"It must be admitted that little law as yet exists as to the length of notice that must be given. But it may be asserted with confidence that what is reasonable notice in a particular case depends upon the character of the business. A teamster might withdraw upon a day's notice, doubtless, as his patrons may quickly make other arrangements. A canal boatman might tie up at the end of any trip, for the other opportunities for shippers over the canal are numerous. But a railroad company may not without a long notice abandon its line. And a gas company could only abandon after a long enough period to provide a new supply. It is not principally the special privileges which these service companies have received that makes their withdrawal difficult, it is because the duplication of these particular services takes a long time, and therefore the public is so dependent upon the established service that it would lead to intolerable hardships if proprietors were permitted to withdraw without long notice. A rule of law to meet all conditions would have to go so far as to say one cannot withdraw from public service without notice sufficiently long to enable those deprived of the service to make the necessary arrangements for the provision of other service."¹²⁷

The Ohio statutes have set forth certain requirements for notice.¹²⁸ The village must be given actual notice and the private consumers published notice.

We now come to a consideration of the question of sur-

¹²⁴*Gress v. Village of Fort Laramie*, (1919) 100 Ohio St. 35, 125 N. E. 112; *Gasser v. Garden Bay Ry.*, (1919) 205 Mich. 5, 171 N. W. 791.

¹²⁵*N. Y. Trust Co. v. Buffalo and Lake Erie Traction Co.*, (1920) 112 Misc. Rep. 414, 183 N. Y. S. 278.

¹²⁶See notice and rules at common law, Part II.

¹²⁷Wyman, *Public Service Corporations*, sec. 317. Quoted in *Re Tidewater and Western Ry.*, (1917) P. U. R. 1917E 798 (Va.).

¹²⁸Ohio, Gen. Code Sec. 504-2, 504-3.

rendering a franchise in connection with discontinuance. Wyman states that a company may by this device discontinue service.

"But even in the case of a railroad company which has accepted extraordinary privileges, it would seem that if it is ready to give up its charter, it may withdraw from its entire undertaking."¹²⁹

This is equivalent to saying that if a company desires to withdraw it may do so at its pleasure. As one author has put it, this merely begs the question.¹³⁰ This is going back to the doctrine of *Jeffries v. Commonwealth*,¹³¹ which the legislature has expressly overruled, that of allowing the same withdrawal privileges to public companies which are accorded to private companies. Of course, if the company is willing to give up its property to the public, this should alter the situation.¹³² Where there is a right to discontinue, there is some question as to whether the company must surrender its charter. In *Morris v. Atlanta Northern Ry.*, the court said that a company having the right to withdraw might discontinue whether or not it had surrendered its franchise.¹³³ In *McCran v. Public Service Ry.* it was said "So long as a company retains its charter it is obliged to operate. It cannot consistently keep the franchise and reason that such performance would be unremunerative."¹³⁴

There should be no great difficulty arising from a discussion of the right of a municipality to discontinue a public utility enterprise. Certainly its right will not be greater than that of a private company, and probably it will be less. It could not plead the taking of private property for public purpose if it were operating at a loss. There are not many cases in point. One held that a municipality could not discontinue service on a ferry¹³⁵ Nor could a city refuse to continue a water supply to a person

¹²⁹Wyman, Public Service Corporations, sec. 296. Quoted but not followed in *Re Denver, Laramie and No. Ry.*, (1917) P U. R. 1917F 744 (Colo.).

¹³⁰See the article in 35 Yale L. J. 169 by Oliver P. Field, "The Withdrawal from Service of Public Utility Companies."

¹³¹(1917) 121 Va. 425, 93 S. E. 701.

¹³²*Lyon and Hoag v. Ry Comm.*, (1920) 183 Cal. 145, 190 Pac. 795.

¹³³(1925) 160 Ga. 775, 129 S. E. 68.

¹³⁴*McCran v. Pub. Service Ry.*, (1923) 95 N. J. Eq. 22, 122 Atl. 205, see also *Batesville Gas Co.*, (1917) P U. R. 1917F 622 (Ind.). There the company had surrendered its municipal franchise and had given evidence of its willingness to surrender its charter. Was allowed to discontinue.

¹³⁵In *re Wheeler*, (1908) 62 Misc. Rep. 37 115 N. Y. S. 605.

outside the city, where the municipality had purchased the water plant from a private company which had been supplying outside customers.¹³⁶ The Ohio statute pertaining to discontinuance seems to make no distinction between municipal corporations and private companies or individuals.¹³⁷

There is some conflict of authority as to who is entitled to bring suit against a company for discontinuance. Logically it should be the party to the contract, the party against whom the breach has been committed. Where the contract is with the state itself, the state may sue.¹³⁸ In commenting upon the right of the state to sue, the court has declared

"But it is said that the state is not injured and has no interest in the question whether the corporation perform the duty or not. The sovereignty of the state is injured whenever any public function vested by it in any person for the common good is not used, misused or abused. Such an injury wounds the sovereignty of the state itself and thereby, in a legal sense, injures the body politic."¹³⁹

The suit may be brought, where permitted by various agencies in the name of the state, by the attorney general,¹⁴⁰ by private parties or by municipalities.¹⁴¹ If the contract is one between a municipality and a utility, such municipality is a proper party to bring the suit.¹⁴² Where the contract is with a private party, the

¹³⁶*Fellows v. City of Los Angeles*, (1907) 151 Cal. 52, 90 Pac. 137

¹³⁷Ohio, Gen. Code 504-2 and 504-3.

¹³⁸*State v. Ia. Cen. Ry.*, (1887) 71 Iowa 410, 32 N. W. 409; *Kansas v. Dodge City Ry.*, (1894) 53 Kan. 377, 36 Pac. 747; *State v. Western Union Teleg. Co.*, (1922) 208 Ala. 228, 94 So. 466; *Texas v. East Tex. Ry.*, (D.C.Tex. 1922) 283 Fed. 584; *South Carolina v. Jack*, (C.C.A. 4th. Cir. 1906) 145 Fed. 281, *People v. Col. Title and Trust Co.*, (1918) 65 Colo. 427, 178 Pac. 6.

¹³⁹*People v. N. Y. C. and H. R. R.*, (1883) 28 Hun (N.Y.) 543.

¹⁴⁰*McCran v. Pub. Service Ry.*, (1923) 95 N. J. Eq. 22, 122 Atl. 205; *Att'y Gen. v. West Wis. Ry.*, (1874) 36 Wis. 466.

¹⁴¹*People ex rel. Cantrell v. St. Louis, A. and T. H. Ry.*, (1896) 176 Ill. 512, 45 N. E. 824; *State ex rel. City of Carthage v. Public Service Commission*, (1924) 303 Mo. 505, 260 S. W. 973; *State ex rel. Grinsfelder v. Spokane Street Ry.*, (1898) 19 Wash. 518, 53 Pac. 719; *State ex rel. City of Bridgeton v. Bridgeton Traction Co.*, (1899) 62 N. J. L. 592, 43 Atl. 715; *State ex rel. Collins v. L. S. W. Ry.*, (1922) 128 Miss. 312, 91 So. 7; *State ex rel. Knight v. Helena Power and Light Co.*, (1899) 22 Mont. 39, 56 Pac. 685.

¹⁴²*City of Salina v. Salina Street Ry.*, (1923) 114 Kan. 734, 220 Pac. 203; *City of Helena v. Helena Light and Rail Co.*, (1922) 63 Mont. 108, 207 Pac. 337; *City of Gainesville v. Gainesville Gas and Elec. Power Co.*, (1913) 65 Fla. 404, 62 So. 919; *St. Clairsville v. P. U. Commission*, (1921) 102 Ohio St. 574, 132 N. E. 151, *City of Hampton v. Newport News and Hampton Ry.*, (1926) 144 Va. 29, 131 S. E. 328; *City of Jamestown v. Penn Gas Co.*, (C.C.A. 2d Cir. 1924) 1 F (2d) 871.

private party may sue.¹⁴³ Some courts hold that where the contract is with the state or municipality private persons have no right to sue even though they have been injured by the breach.¹⁴⁴ This seems the better rule. The injury is primarily to the state, the breach is of a contract with the state. The proper party to sue is the party to the contract. However, in some cases individuals have been allowed to sue in their own names.¹⁴⁵ "The contract with the city was made for the benefit of its residents and they are the proper parties to enforce their rights thereunder."¹⁴⁶ Where citizens are allowed to maintain such suits possibly it is on the grounds of third party beneficiary contracts, possibly on the grounds of agency for the state. It is difficult to determine. A minority stockholder has no right to sue for an injunction to prevent discontinuance.¹⁴⁷

Finally comes a consideration of the remedies available where there is an unlawful abandonment. Obviously, mandamus will lie to compel a utility to perform a statutory duty. It will also lie to compel the fulfillment of a duty arising from charter.¹⁴⁸ The writ of mandamus may be used to enforce a public duty growing out of contract as well as out of statute.¹⁴⁹ Mandamus may also be used to enforce a duty arising from a franchise granted

¹⁴³*Louisiana and N. Ry. v. Johnson's Administratrix*, (1925) 207 Ky. 813, 270 S. W. 50; *Gray v. C. M. and St. Paul Ry.*, (1901) 189 Ill. 400, 59 N. E. 950.

¹⁴⁴*Asher v. Hutchinson Light and Power Co.*, (1903) 66 Kan. 496, 71 Pac. 813; an injunction held not to lie at the suit of an individual to prohibit the removal of water mains, notwithstanding the fact that it greatly decreased the value of his property. *Day v. Tacoma Ry. and Power Co.*, (1914) 80 Wash. 161, 141 Pac. 347.

¹⁴⁵*Miami Gas Co. v. Highleyman*, (1919) 77 Fla. 523, 81 So. 775. Here residents of Miami were granted an injunction against a company which was threatening to discontinue service. *Macon Ry. and Light Co. v. Corbin*, (1923) 155 Ga. 1, 116 S. E. 305. See also *Central Bank and Trust Corp. v. Cleveland*, (C.C.A. 4th Cir. 1918), 252 Fed. 530. Here a number of nearby residents were allowed to intervene although they could not obtain an injunction. See *Helena and Livingston Smelting and Reduction Co. v. Nor. Pac. Ry.*, (1922) 62 Mont. 205, 204 Pac. 370. The court stated there that a private person may move for mandamus or injunction upon the theory that he is a member of the public and suffering some of the damage which affects the public generally, and that he sues not only for himself but as agent on behalf of the people. *Atlantic and B. Ry. v. Kirkland*, (1907) 129 Ga. 552, 59 S. E. 220.

¹⁴⁶*Miami Gas Co. v. Highleyman*, (1919) 77 Fla. 523, 81 So. 775.

¹⁴⁷*Moore v. Lewisburg and R. Elec. Co.*, (1917) 80 W. Va. 653, 93 S. E. 762.

¹⁴⁸*People ex rel. Cantrell v. St. Louis A. and T. H. Ry.*, (1896) 176 Ill. 512, 45 N. E. 824.

¹⁴⁹*McCran v. Pub. Ser. Ry.*, (1923) 95 N. J. Eq. 22, 122 Atl. 205.

by the city.¹⁵⁰ It is not, however, the proper remedy where the breach is discontinuance contrary to the provisions of a purely private contract entered into by a public utility.¹⁵¹ The courts have refused to issue a mandamus ordering a railway to relay its tracks and to recommence operation, where the line has been discontinued and dismantled for some time.¹⁵² "There is a wide difference between an effort by mandamus to compel action of this character, and a proceeding by injunction to stop the tearing up of a railroad track."¹⁵³ Courts are much less likely to grant the former than the latter. The distinction cannot be based upon a difference in obligation, but is rather based upon the inefficacy of a particular remedy. Where a railway had abandoned a road between two points named in its franchise although an action for mandamus might have been allowed, an action for specific performance was not the proper remedy.¹⁵⁴

As an alternative to mandamus the state may institute quo warranto proceedings to deprive the company of its franchise.¹⁵⁵ The difficulty with this lies in the fact that it is not the sort of remedy wanted for the breach. What is wanted is continuity of operation.¹⁵⁶ The remedy is effective, however, where a company has discontinued only a part of its system, or suspended operation.¹⁵⁷ Pending quo warranto proceedings or mandamus, a preliminary mandatory injunction may be granted to compel operation during a determination of these other suits.¹⁵⁸

If a utility is threatening to tear up its tracks or discontinue service in violation of its contract duties, an injunction is the proper remedy.¹⁵⁹ This is true even where the breach is one of

¹⁵⁰*City of Potwin Place v. Topeka Ry.*, (1893) 51 Kan. 609, 33 Pac. 309; *City of Salina v. Salina Street Ry.*, (1923) 114 Kan. 734, 220 Pac. 203.

¹⁵¹*State ex rel. Thiebaud v. Connersville Gas Co.*, (1904) 163 Ind. 563, 71 N. E. 483.

¹⁵²*Jack v. Williams*, (C.C.S.C. 1902) 113 Fed. 823; *State ex rel. Collins v. L. S. W. Ry.*, (1922) 128 Miss. 312, 91 So. 7.

¹⁵³*Brown v. Atlantic Ry. Co.*, (1906) 126 Ga. 248, 55 S. E. 24. See also *So. Ry. Co. v. Hatchett*, (1917) 174 Ky. 463, 192 S. W. 694.

¹⁵⁴*People v. Vt. and Albany Ry.*, (1861) 37 Barb. (N.Y.) 216.

¹⁵⁵*Att'y Gen. v. West Wis. Ry.*, (1874) 36 Wis. 466.

¹⁵⁶*People v. N. Y. C. and H. R. R. Co.*, (1883) 28 Hun (N.Y.) 543. "It (the state) may proceed, it is true, to annul the corporation, as has been held in many cases where corporations had neglected public duties. But that remedy is not adequate, for it only destroys functions where the public interests require their continued existence and enforcement."

¹⁵⁷*McCran v. Pub. Service Ry.*, (1923) 95 N. J. Eq. 22, 122 Atl. 205.

¹⁵⁸See footnote 157.

private contract.¹⁶⁰ As we have noted before, private parties are permitted by some courts to sue in their own names to enjoin discontinuance or relocation. In one case the court stated that if the suit was to be allowed, such persons must show special damages not merely as members of the public, but by reason of their residences or location of their businesses.¹⁶¹ A public service commission, however, is a purely administrative body and as such has no power to issue injunctions.¹⁶²

If the breach is one of private contract the injured party may maintain a suit for damages.¹⁶³ If the breach is a breach of a franchise or charter obligation, the private individual is not entitled to damages, even though he may have suffered a considerable loss by such relocation.¹⁶⁴ A member of the public has no such vested interest in the continuance of a railroad location as to entitle him to recover damages either at common law or upon the constitutional guarantee of compensation for private property taken for public use.¹⁶⁵

"When we come to consider the question of the right to maintain an action for damages, then complications arise which do not appear in an action for mandamus or injunction, for in the former is involved the attempt of the individual to secure for himself alone damages which he has suffered, but which are of the same nature as those suffered by other members of the public, although there may be a difference in the degree of damage."¹⁶⁶

Parties who have been negligent in not bringing action against public utilities apparently lose their right of action.¹⁶⁷

¹⁵⁹*Kansas v. Dodge City, M. and T. Ry.*, (1894) 53 Kan. 377, 36 Pac. 747; *Miami Gas Co. v. Highleyman*, (1919) 77 Fla. 523, 81 So. 775; *Town of Gassaway v. Gas Co.*, (1914) 75 W. Va. 60, 83 S. E. 189.

¹⁶⁰See *State ex rel. Thiebaud v. Connersville Gas Co.*, (1904) 163 Ind. 563, 71 N. E. 483.

¹⁶¹*Atlantic and B. Ry. Co. v. Kirkland*, (1907) 129 Ga. 552, 59 S. E. 220.

¹⁶²*Re Lake Erie, Bowling Green and Napoleon Ry.*, (1916) P. U. R. 1916F 553 (Ohio).

¹⁶³*Durden et al. v. So. Ry.*, (1907) 2 Ga. App. 66, 58 S. E. 299; *I. and G. N. Ry. v. Sallie Dawson*, (1884) 62 Tex. 260.

¹⁶⁴*Bryan v. Louisville and N. Ry.*, (C.C.A. 8th Cir. 1917) 244 Fed. 650; *Kinealy et al. v. St. L., Kan. City and Nor. Ry.*, (1879) 69 Mo. 658; *Helena and Livingston Smelting and Reduction Co. v. Northern Pac. Ry.*, (1922) 62 Mont. 205, 204 Pac. 370.

¹⁶⁵*Bryan v. Louisville and N. Ry.*, (C.C.A. 8th Cir. 1917) 244 Fed. 650; See also *Bryan v. L. and N. Ry.*, (1921) 292 Mo. 535, 238 S. W. 484.

¹⁶⁶*Helena and Livingston Smelting and Reduction Co. v. Northern Pac. Ry.*, (1922) 63 Mont. 205, 204 Pac. 370.

¹⁶⁷See *Public Service Com. v. Phil. B. and W. Ry.*, (1914) 122 Md. 438, 89 At. 726.

(b) *There are circumstances under which a public utility will be allowed to discontinue all service with the consent of the state.*—It is obvious that a public utility may discontinue all service with the consent of the other party to the contract. In most cases this would be the state. The legislative authority in a state can absolve a utility from its contract obligations to continue operation. This it does not do directly, but through statute it designates an agent, usually a public service commission, to allow abandonment under certain circumstances.

Many states have provided that public utilities shall be allowed to discontinue service upon certain grounds only. The statutes of New York and Minnesota, for example, allow discontinuance only when the public no longer requires the service.¹⁶⁸ If the company were operating at a loss, this would be no grounds for approval of discontinuance. However, there would be, it is submitted, a constitutional right to discontinue. The converse of the proposition would hold also. A company in obtaining the commission's consent would not be obliged to show a loss but to show only that the public did not need the service.

Public service commissions have worked out in a number of decisions the circumstances under which they will allow abandonment. A dispute with another utility over charges was held to be no grounds for discontinuing service.¹⁶⁹ Neither was fear of loss grounds upon which the commission would permit withdrawal.¹⁷⁰ Nor could one company shift the burden of service upon another merely by showing that such other company serves the consumers in the vicinity.¹⁷¹ A mere desire to escape the responsibility of operation was not deemed a valid excuse.¹⁷² Certain things are regarded as proper grounds for authorizing discontinuance. Among the most common of these is that the public no longer needs the service.¹⁷³ Again if the company is operating at a loss, this is grounds for approving withdrawal.¹⁷⁴

¹⁶⁸See the New York and Minnesota statutes cited in Part V.

¹⁶⁹*Kathryn Telephone Co. v. Strinden*, (1926) P U. R. 1926D 729.

¹⁷⁰*Re Durango Ry. and Realty Co.*, (1919) P U. R. 1920B 505 (Colo.). "A street railway having received valuable rights and privileges from the public and having entered upon the engagement or them cannot be permitted to cease its activities upon mere fear that decreased income will result."

¹⁷¹*Dwight v. Lyon and Hoag*, (1919) P U. R. 1919F 519 (Calif.).

¹⁷²*Re Gilmonton Roller Mills Co.*, (1920) P U. R. 1921B 815 (Wis.).

¹⁷³Commissions always emphasize this in allowing abandonment.

¹⁷⁴*Re Rockland, So. Thomaston and St. Geo. Ry.*, (1918) P U. R.

Shortage of natural gas supply appears to be an adequate excuse for allowing withdrawal.¹⁷⁵

Even though a commission may allow withdrawal it is clear that it will be allowed only as a last resort.¹⁷⁶ All other possible measures must first be exhausted.¹⁷⁷ A utility must first try a new schedule of rates in the hope that this may enable it to make a profit.

"A public utility will not without a previous application to increase rates be authorized by the New Jersey Commission to discontinue service, since the utility should exhaust every possible effort to give the service required."¹⁷⁸

It is not necessary to attempt a new schedule of rates in all cases before abandonment. Where it would be useless, and that fact appears obvious to the commission such a trial is not required. An electric utility was allowed to abandon service rather than increase its rates where in order to meet out-of-pocket expenses it would have been necessary to increase charges one hundred per cent over existing rates.¹⁷⁹

An effort should also be made to increase revenues by improving the quality of service rendered by a utility.¹⁸⁰ If revenues can be increased by diminished service, that is a pre-requisite to abandonment.¹⁸¹ Substitution of service is sometimes a pre-

1918E 877 (Me.), *Re Exeter, Hampton, Amesbury St. Ry.*, (1918) P U. R. 1919B 251 (N.H.).

¹⁷⁵See *re Ohio Fuel Supply Co.*, (1920) P U. R. 1921A 628 (Ohio).

¹⁷⁶The cases for total and partial discontinuance have been considered together here for the rules are practically the same.

¹⁷⁷*Up-to-date Mining Co. v. P U. Comm.*, (1921) 69 Colo. 309, 174 Pac. 617. The Public Service Commission will make an order for dismantling a railroad only after every reasonable effort made in good faith to increase the earnings, and if under such economical management public will not support it. See also *Seashore Gas Co.*, (1917) P U. R. 1918A 871 (N.J.).

¹⁷⁸*Re Seashore Gas Co.*, (1917) P U. R. 1918A 871 (N.J.). Also *Re Kampsville Elec. Light and Power Co.*, (1920) P U. R. 1920F 133 (Ill.). The Illinois Commission will not authorize abandonment of service by an electric company upon the ground that it is operating at a loss, where it appears that no application for an increase in rates has been presented before the Commission. See also *Re Mrs. Guerra*, (1922) P U. R. 1922A 237 (Calif.).

¹⁷⁹*Re Marshfield Elec. Co.*, (1918) P U. R. 1919B 572 (Mo.). Also *Ex Parte Cen. Ill. Pub. Service Co.*, (1915) P U. R. 1916B 920 (Ill.).

¹⁸⁰*Re Napa Valley Elec. Co.*, (1917) P U. R. 1918A 539 (Calif.). A Gas Company was refused permission to discontinue service where it appeared that company's lack of business was due to wretched service.

¹⁸¹*Re Boise Valley Traction Co.*, (1922) P U. R. 1923A 441 (Idaho). There the court indicated three steps which should be taken before abandonment:

requisite. In *Re Oregon Short Line Ry.*, a railway was allowed to suspend operation during the winter, but other facilities were ordered for transporting passengers, mail, express and freight.¹⁸² If none of the above remedies prove adequate, the community should be permitted to guarantee a return. But this return must be satisfactory.¹⁸³ Whether it should be merely enough to meet operating expenses, or a reasonable return as well, the cases do not say. An opportunity must also be given the community to bid for and buy the utility, before it is discontinued.¹⁸⁴ The purchase price should be the price at which it could be sold for junk. The New Hampshire commission declared that the owner of a public utility to be abandoned should offer the property for sale to anyone who might wish to purchase it for the purpose of continuing its operation as a public utility at a price not exceeding that which could be obtained for it if disposed of otherwise.¹⁸⁵

If it be found that operation in any form or by any persons is impossible and abandonment is the only alternative, the utility will not be allowed to cease operation until the community has had an opportunity to adjust itself to changed conditions.¹⁸⁶ A commission, for example, made an order which allowed consumers an opportunity to develop new water supplies.¹⁸⁷ A heating company was not allowed to discontinue service in the middle of August when patrons would not have had time to make new arrangements before cold weather.¹⁸⁸

a. Increase in revenue through increase in rates or decrease in operating expenses.

b. Guarantee of deficit by those who insist upon a continuance of the service.

c. A sale of facilities to those who desire the service continued.

¹⁸²(1914) P. U. R. 1915A 383 (Idaho). Also, *Re Union Traction Co.*, (1925) P. U. R. 1925E 503 (Calif.); *Re Indianapolis St. Ry.*, (1926) P. U. R. 1926D 658 (Ind.).

¹⁸³*Re St. Croix Gas Light Co.*, (1918) P. U. R. 1919A 487 (Maine).

¹⁸⁴See *Re Exeter, Hampton, Amesbury St. Ry.*, (1919) P. U. R. 1919B 251 (N.H.).

¹⁸⁵*Re Van Auken Public Utility Plant*, (1924) P. U. R. 1925A 460 (N.H.); also *Re W. S. Barnum*, (1926) P. U. R. 1926B 571 (Oregon). Owner of a railway operating at a financial loss should be permitted to discontinue service and dismantle the railway, but should first give notice to the public, then offer for sale to anyone who may wish to purchase for purpose of utilizing the same as a railway, for a price not in excess of that which could be obtained for it if dismantled.

¹⁸⁶*Re Richfield Public Service Co.*, (1921) P. U. R. 1922A 100 (Idaho).

¹⁸⁷*Re Olive Investment Co.*, (1924) P. U. R. 1924E 557 (Calif.).

¹⁸⁸*Re Winona Elec. Light and Water Co.*, (1920) P. U. R. 1920F 968 (Ind.).

Commissions have declared that it is unnecessary for a utility to attempt certain things before discontinuance. The commission will not deny an abandonment request on the ground that a utility could make an additional investment by extending its line to another community in order to increase its load.¹⁸⁹ The reason is obvious. It would involve an increased outlay of capital and be hazardous, at best.

The possibility that a street railway company might increase the volume of its business on a line sought to be abandoned by diverting the traffic from other routes, was not considered a sufficient reason for refusing to permit discontinuance.¹⁹⁰ In any case, notice is essential before discontinuance.¹⁹¹

A difficult problem presents itself where a public utility has a contract with a municipality requiring continuance and a public service commission is seeking to allow the company to discontinue. It is obvious that such contracts would not be effective against the sovereign will of the state. Since there seems to be no protection for such obligations of municipalities under the contract clause of the federal constitution,¹⁹² it would be possible for the sovereign to absolve utilities from their contracts made with municipal subdivisions.¹⁹³ The question then resolves itself into a proper construction of the statutes and constitution of a state. If the state constitution protects such contracts, the legislature cannot release the company from performance. If the municipal contract is not protected by the state constitution and the legislature can constitutionally relieve the utility from its obligation, it is largely a question of interpretation of the statutes as to which of the state agencies has been granted the authority to relieve utilities from the duty to operate. Ordinarily such contracts cannot be asserted against a public service commission hav-

¹⁸⁹Re Barnes-King Development Co., (1925) P U. R. 1925E 200 (Mont.).

¹⁹⁰Re Beaver Valley Traction Co., (1923) P U. R. 1924A 444 (I.A.).

¹⁹¹Ex parte Cen. Ill. Public Service Co., (1916) P U. R. 1916B 920 (Ill.), *City of Pana v. Cen. Ill. Pub. Service Co.*, (1916) P U. R. 1916B 177 (Ill.).

¹⁹²Constitution of the U. S. article I, sec. 10.

¹⁹³See the article by H. F. Kumm in 6 MINNESOTA LAW REVIEW 140-148. "The grant of franchise rights is a purely governmental function" "If the state foregoes the benefits which the municipality has gained under the contract, it is merely giving up that which has been gained for it by its agent, the city." Yet see *City of Spartanburg, v. S. C. Gas and Elec. Co.*, (1924) 130 S. C. 125, 125 S. E. 295. There the court stated, but did not decide, that the legislature could not give the commission the power to destroy or impair the obligations of such contracts.

ing jurisdiction over the utility in question. There are two reasons given for this. The first is that of agency

"Powers possessed by the legislature may be delegated by it to a municipality, a commission, or any other creature of the state, for their exercise in the public interests, powers thus delegated may in the same manner be withdrawn or modified, and if the legislative agent has, in pursuance of these powers entered into agreements with corporations the undoubted weight of authority is that the legislature as the repository of power, may either directly or through the commission modify the terms of any such agreements." ¹⁹⁴

The second reason involves the police power.¹⁹⁵ The courts have declared that the state in the exercise of its police power is not obstructed by the contract of the city with the utility, since the state cannot alienate any of its sovereign powers necessary to public health, welfare, morals and safety; and no municipality either by ordinance or contract can impose upon a public utility conditions confiscating its property or destroying its power to serve the public.¹⁹⁶ However, a commission is reluctant to relieve a company of its franchise obligations.¹⁹⁷ The Illinois commission has refused to take jurisdiction to adjudicate the rights of a street railway company under and by virtue of its franchise.¹⁹⁸ Where a company had surrendered its franchise for an indeterminate permit, it was held no longer bound by the obligations of its franchise.¹⁹⁹ There may still be a moral obligation, according to one commission.²⁰⁰

(To be concluded)

¹⁹⁴Re Belt Line Ry. Co., (1919) P U. R. 1919D 56 (N.Y.). Also see Re Bloomington and Normal Ry. and Light Co., (1922) P U. R. 1922E 770 (Ill.).

¹⁹⁵City of Carthage v. Public Service Commission, (1924) 303 Mo. 505, 260 S. W. 973, Portsmouth v. Va. Ry. and Power Co., (1925) 141 Va. 44, 126 S. E. 366; Re Trinidad Electric Transmission Ry. and Gas Co., (1922) P U. R. 1922C 299 (Colo.).

¹⁹⁶S. W. Mo. Ry. v. Pub. Service Commission, (1920) 281 Mo. 52, 219 S. W. 380.

¹⁹⁷Re Belt Line Ry. Co., (1919) P U. R. 1919D 56; see also Re Charleston Interurban Ry. Co., (1916) P U. R. 1916 F 338 (W Va.). "It is the policy of the West Virginia Commission not to interfere with municipal regulation of utilities whose existence depends upon municipal franchises, unless the necessity is clear."

¹⁹⁸Re St. Louis, Springfield Peoria Ry., (1922) P U. R. 1923B 422 (Ill.).

¹⁹⁹Chicago, Lake Shore and So. Bend Ry. v. Guilfoyle, (1926) 198 Ind. 9, 152 N. E. 167. It was decided that the surrender of its franchise by a street railway company under Acts of 1921, p. 197, terminated all its rights under the franchise and the franchise contract was no longer binding on the utility in favor of the city or the state.

²⁰⁰Re Evansville St. Ry. Co., (1918) P U. R. 1918D 685 (Ind.).