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THE LEGAL RELATIONS OF CITY AND STATE WITH REFERENCE TO PUBLIC UTILITY REGULATION

By Harold F. Kumm*

INTRODUCTION

As suggested by the title, this paper is to deal with some questions concerning the relation of municipality and state which arise in connection with the state control of public utilities. These problems are a natural outgrowth of the present widespread system of regulation by state public service commissions.

The rapid development of this country, and the rise of large cities, have given a great stimulus to the growth of urban utilities. Among the most important of these are gas plants, electric light and power systems, water-works and street railways. No comment is needed to show the dependence of city dwellers on these industries or the importance of low rates and good service. There are involved other interests as well, sometimes conflicting. The state at large is interested in the maintenance of property rights and the people's welfare, the company in receiving a fair return on its investment, the municipal corporation in the following of that policy which will contribute most to the growth and prosperity of the city. That these interests make some sort of control necessary is fully recognized; but there is a difference of opinion as to the method to be employed, whether control should be by franchise, or by local regulation without franchise, or by a state public service commission. Municipal ownership has also been proposed and in many cases adopted, as a solution of the problem.

In connection with these questions of policy come legal questions

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of equal importance. Since an understanding of both law and policy is necessary to a full understanding of the subject it shall be our object first to outline the problems of policy, and to follow this by a more detailed discussion of the legal questions involved, though neither subject can be adequately considered in a paper of this length.

Although different forms of regulation have been witnessed at various periods in our history, the American doctrine of regulation has remained little changed. This fundamental doctrine is that the public is entitled to reasonable service at a reasonable rate, and it has never been so interpreted by the courts as to permit the company to charge all that the traffic would carry. Bearing this principle in mind, we are ready to examine the attempted control of public utilities by means of franchise provisions.

Under a system of franchise control, the fixing of rates is either the sole and deliberate act of some such group as the state legislature, the city, or the public utility; or it is a contractual agreement between two of the parties. Where the rates are fixed solely by municipality or utility, they cannot be strictly fair to the other party. One personally interested in the outcome must inevitably be prejudiced in his own favor. However honest the intention to act fairly, one's own interests will always loom larger in the mind than the interests of the other party and consequently the other party cannot consider the rate so fixed to be just.

Nor is the likelihood of reasonableness much improved when the charge is fixed by contract between two of the groups. The relation here is contractual and it arises out of a political struggle rather than out of a judicial determination. The representatives of the contracting groups do not meet as impartial judges to be guided by a standard that is above both parties, a standard which must be declared independent of conflicting personal interests. Instead, as would be expected in a contractual relation, the interests are foremost and the object of each party to the agreement is to gain the utmost for the group he represents. The council, acting in behalf of the city, must necessarily be guided by political considerations. The councilmen have not been chosen by the city to act as impartial outsiders in dealing with the utility. More probably they have been chosen in a heated campaign in which the franchise question has achieved prominence through appeals to

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1William Anderson, Local Control of Public Utilities, (an unpublished manuscript) 1914, p. 2.
passion, prejudice, and self-interest, rather than through an appeal to reasonableness; a campaign in which the highly technical but important questions of valuation, etc., could have but little consideration. Then the public utility, moved to self-defense, attempts to control the council through favors. Once started in this practice, self-interest prompts it to go beyond a merely reasonable rate, and to try to get all it can. The utility is no more competent to determine reasonableness than the city. But whether the city or company control the council the result is essentially a compromise contract in which politics, self-interest and the relative strength of the parties play a greater part than reasonableness. We must look to some other system than this to find a rate fair to public and company alike.

It might be argued that although political control is defective, such defects as exist can be remedied by the courts which under this system are open to the injured party. For although the primary control be political, the ultimate decision in case of appeal lies with the courts. It might be said that the judges are well fitted to handle the questions of public utility control. But let us take the question of rates. In a given case the court can merely say whether the contested rate is or is not reasonable, according to law; and no common standard of reasonableness has as yet been adopted. Even if the court after long drawn-out litigation decides that the charge in question is not reasonable, the proper rate is still undetermined. The court has not the power to fix what it considers a reasonable rate since that power is legislative or administrative rather than judicial.\textsuperscript{2}

Further, the highly technical

\textsuperscript{2}Freund, Police Power, 1904, Sec. 304-5. Among other cases Freund notes State v. Johnson, (1900) 61 Kan. 803, 60 Pac. 1068 in which a legislative act attempted to set up a court of visitation. The Supreme Court of the state declared the law unconstitutional as violating the principle of separation of powers since the proposed court had not only judicial powers but the power to fix rates, which the court held to be a legislative function.

In some recent cases the courts have in practice ignored this defect of power. Thus in a federal case the court declared that although the direct power of the courts in rate making was negative and not affirmative, the courts might nevertheless while acting within their judicial power grant an injunction against the enforcement of unreasonable rates, and condition the grant upon the acceptance by the plaintiff of a rate which the court regards as reasonable. City of Toledo v. Toledo Ry. and Light Co., (1919) 259 Fed. 450, 458. The judge made the rate in practice though not in theory.

questions involved in utility regulation demand that the persons settling these questions be trained not only in law, but in the valuation and control of public utilities as well. A judge can become a technical expert only by neglecting the remaining field of law. This he is not likely to do. To the extent then that the judge lacks the necessary technical training we may even say that the courts are unfitted for settling ultimately questions of regulation. And finally, the law's delays are such that the city may suffer irreparable injury or the company be forced into bankruptcy before a decision is finally handed down. Where the contest drags over several years, the decision may easily be obsolete by the time it is rendered. Thus the courts not only fail to remedy the evils of political control, but add the disadvantages of the delays of justice, the lack of the necessary knowledge; and sporadic rather than continuing supervision over the public service company.

To meet these evils and furnish speedy justice through the means of an impartial, competent tribunal the commission idea was brought forward for the control of public utilities. This control might take various forms so far as the different states were concerned; that is, there might be exclusive local control, or exclusive state control, or a division of regulatory powers between city and state.

A few words might be said at this point as to exclusive control by a local commission. Assuming the city to have been given the power of regulation, the final legislative control must remain with the council, since legislative power once delegated cannot be further delegated. We are here considering a locally established commission subordinate to the city council, which that body is free to follow or not as it pleases. In such case the final decision must still remain in the field of politics, and be subject to the grave objection already pointed out. That this is true is amply demonstrat-

Brooklyn Borough Gas Co., (1920) 113 Misc. Rep. 65, 184 N. Y. Supp. 651. In the latter at page 655 the court says: "It seems to me error to take the position that a court may determine that a gas rate is too low to be fair to the corporation and is too high to be fair to the consumer, yet has no power to determine the rate that will be fair to both." However, on appeal the court's fixing of the rate was held to be error. Morrell v. Brooklyn Borough Gas Co., (1921) 231 N. Y. 398, 132 N. E. 129.

The general principle that the legislature cannot delegate its power to any other body has an exception in the case of municipal corporations, and the general view is that a grant of power to municipal corporations for certain purposes is not unconstitutional on the ground of delegation of powers. 6 R. C. L. 168-9. Sec. 168. But this power cannot be further delegated by the municipality.
ed by the history of the St. Louis commission. Even where a local body may be set up independent of the council, politics will still creep in, though to a lesser extent; for those selected from that locality will naturally overestimate the interests of those who elect them. Were it possible to get unbiased commissioners, local control would still be subject to the criticism that the average city cannot afford to get the men best fitted for the task, nor conduct the extensive and costly investigation necessary to a proper decision. For these reasons it would appear that exclusive control in the hands of a local commission cannot be as satisfactory, from the standpoint of intelligent and impartial regulation, as exclusive state control.

Adequate control of utilities by state commissions began in 1907 when both New York and Wisconsin created public service commissions. Since these bodies were given wide regulatory powers, their work was followed throughout the country with much interest. That the state commission idea has since found rapidly increasing favor is evidenced by a study of state legislation during the next few years. By the end of 1910 five states had adopted this type of control. That it had come to stay was shown by the results of 1911 when nine states established public commissions, and in no state was any legislation passed lessening the powers of existing commissions. During 1912 the idea grew steadily as experience strengthened the conviction that state control was greatly superior to local control in handling the involved questions connected with the control of public utilities. The next year, 1913, found forty-two states holding legislative sessions, in seventeen of which the governors urged the passage of public service commission laws or the strengthening of existing laws.

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4William Anderson, Local Control of Public Utilities, (an unpublished manuscript) 1914, pp. 39-44. In a footnote to p. 40, Professor Anderson refers to the following for information concerning the St. Louis Commission: (a) King, the Regulation of Municipal Utilities, 1912, ch. XIII, (an article by Roger N. Baldwin, secretary of the Local Civic League); (b) Wilcox, Municipal Franchises, 1911, 750-754; (c) Report ... in Rates for Electric Light and Power (cover title), St. Louis, 1911, pp. 172; (d) Report ... in the United Railways Company ...; St. Louis, vol. I, 1912, pp. 382 plus; vol. II, 1913, pp. 34 and tables; (e) Report ... on the Southwestern Telegraph and Telephone Company ... (cover title); St. Louis, 1913, p. IV, 152.

5Georgia, Maryland, New York, Vermont and Wisconsin.


7R. C. Harrison in American Year Book of 1911, p. 446.

8R. C. Harrison in American Year Book of 1912, p. 280.

9R. C. Harrison in American Year Book of 1913, p. 294.
Ten states adopted the commission idea in this year. 10 1914 did not see the establishment of any new commissions. The year following, 1915, was again a year in which most of the state legislatures met, and a year in which public sentiment could be tested. But though in most of the states not having commissions bills were introduced for their establishment, only one new state was added to the list. 11 In some states the powers of the commission were slightly added to, in others proposals to add to the commission's powers were defeated. 12 By 1917 the regulation of public utilities by state commissions had become almost universal throughout the country. There still continued to be much objection to the part that political considerations played in the selection and reappointment of commissioners. The companies by this time had modified their earlier attitude of hostility toward all regulation, and now favored the commission idea as the greatest barrier against municipal ownership. 13 The agitation for state control had given added strength to the home-rule sentiment, and in such organizations as the Minnesota Home Rule League this sentiment actively combated the further extension of state authority. During the war the interest in this subject was naturally lessened by the more stirring events of the great conflict. But the high operating costs then and the continued high prices since have forced the commissions in many instances to grant increased rates, and the commissions have consequently lost popularity. Within the last year added interest has been given to this subject in Minnesota by the adoption of a statute which places street railways under the control of the state Railroad and Warehouse Commission. 14

At the present time the state commission idea seems to be firmly established. But though it appears that state control of public utilities is more desirable than exclusive local control, it is quite possible that the best results can be gained by a division of powers. Under such a division, we would give to the state control over those matters which are of statewide importance and to the

11 Wyoming.
13 R. C. Harrison in American Year Book of 1917, p. 272. Mr. Harrison is a former member of the New York Public Service Commission.
14 Laws 1921, ch. 278. Under this act the street railways in Minneapolis, St. Paul and Duluth applied for an increase in rates which the commission granted. But the charging of these higher rates was blocked by temporary injunctions issued by the district courts of the districts in which these cities lie. Thus the courts are presented with the problems here discussed.
city control over those which are essentially local. This may lead to some friction somewhat similar to that which exists between state and nation over the control of commerce, but at the same time the benefits of such a division would seem to outweigh its disadvantages. The extent of the control that can be granted the city varies of course with geographical conditions and the degree of home rule the cities enjoy. Generally, the more isolated the communities the more power they may properly have; and the greater the local self-government the greater the power they may be given. Bearing these considerations in mind, we may say, speaking generally, that the powers of regulation can be divided into three classes: 15

(1) Those of a state-wide character, to be exercised exclusively by the state.

(2) Those of an essentially local character, to be exercised exclusively by the municipality.

(3) Those of a mixed character, to be exercised primarily by the city, but subject to revision by the state commission.

The control in the first class of powers is vested in the state commission. This must be so since the problems which these powers must meet are so state-wide in their character, and their control is so necessarily uniform throughout the commonwealth that they can be properly exercised only by a body having a jurisdiction as wide as the problem to be met. Failure of the state to act within this field should not be so construed as to permit local regulation. Rather, it should be taken as an indication of an intent on the part of the higher authority that the field is to be left uncontrolled. As to the powers that can be properly handled by the state, a few may be enumerated. The subject of incorporation is a vital one in public utility control. Power over incorporation is ordinarily in the hands of the state, and the state commission might properly be given control over the issuance of stock, the general powers and duties of corporations, and intercorporate relations. In the latter, especially where there is extensive interlocking control, the cities are powerless to remedy conditions.

15The classification here presented cannot be referred to any one work, but the writer has examined the following authorities as to the division of regulatory powers between city and state: (a) 2 Wilcox, Municipal Franchises, 1911, 744-5; (b) A. L. Valentine, Address on Public Utilities reported in the Municipal League News (Seattle), April 27, 1912, p. 2; (c) J. M. Eshlemen, 2 Nat. Mun. Rev., Jan. 1913, pp. 24-30; (d) H. E. Wilson, Seattle Mun. Rev., Dec. 13, 1913, pp. 1-2, 5; (e) Report of Commission 3 Nat. Mun. Rev., Jan. 1914, pp. 13-27.
Other powers which the state commission should have by reason of its greater impartiality or wider knowledge are the right to fix rates, depreciation standards, and uniform accounting systems, and to make rules for valuation for the purposes of rate-making, capitalization, condemnation or purchase. Thus the state is to determine the settlement of those problems which are state-wide, or which the state by reason of its fuller knowledge and more judicial attitude can handle more justly than the city.

The second class of powers, a limited one, consists of those to be vested exclusively in the city. There are certain minor matters which the locality should have the right to regulate, even though its control be essentially political. In respect to some things essentially local in their nature the state commission would have neither the time nor the interest which is necessary for proper regulation. Exclusive local control would probably be most complete in the case of street railways. There it might properly be extended to questions of stops, schedules, re-routing of cars, and service. In the case of gas, telephone and electric companies, the city's control would be confined more or less to the question of service, although it might also include such matters as the placing of poles, etc.

There still remains the third class. This covers a broad field and includes such elements as the assignment of streets upon which railways or mains may be laid, orders for extensions of existing lines, and the granting of permits. The direction in which a city will build is determined in large measure by the direction in which street car lines or water mains are extended. Unless the community have some control over these matters, city planning is impossible. Questions of such importance, affecting so vitally the future of the locality should be left primarily to it, for after all the public utilities exist for the city and not the city for the public utilities. But that the utility may be protected against abuses of power, against attempts to build up outlying "speculation districts" at the expense of the company or other localities, there should be a right of appeal to the state commission. In case of appeal the higher body should content itself primarily with a determination of whether or not the regulation complained of is unreasonable; and not alter the city's finding without good cause. By allowing the municipality to make its own agreements in the field indicated above, the interest of the people in municipal affairs is maintained while the state prevents shortsighted action by its
power of review. Thus the best of both is kept; the particular needs of the people in any community will insure their attention and continued interest in the matter of regulation while the state will bring in that equality and impartiality which can only be obtained by a highly trained body unmoved by local self-interest.16

This concludes our discussion of the questions of policy. We now turn to the corresponding legal problems. These are many and include such questions as to the protection to be given municipal corporations and private persons by the national and state constitutions through the contract clause, the due process clause, and the like; questions as to the delegation of powers; and as to the nature of the powers given the commission, whether legislative, administrative or judicial; the problems of franchises and franchise rights; and finally the whole question of what is a public use. In a paper of this length but few of these problems can be considered. Certain constitutional questions concerning the relation of city and state have been selected as being of the greatest interest, and it shall be our object to inquire so far as space will permit into the following:

(1) To what extent is a municipal corporation, in its ownership of public utilities, protected against the state public service commission by the contract and due process clauses of the federal constitution?

(2) To what extent is the state's police power, when acting through a public service commission, hampered by franchises granted prior to the establishment of the commission?

The writer is fully aware of the fact that the state commissions have not yet reached this ideal condition. But there is in the state commission idea the possibility of progress toward such an end; whereas there can be no progress under the old system where the decision rests on the strength of the parties and where the question is one for political agitation rather than law. It is probable that while this new set of rules and law is in the making, political considerations will at times be given weight. No doubt the same was true when the common law was in the making, and the same is true today in those branches of international law which are still in a fluid state. But in spite of this present defect, the commission idea points the way toward a body of precedent which, when fully developed, it will be the province of the commission to enforce as thoroughly as the courts now enforce the common law. When such a state has been reached, an elected commissioner must necessarily be as impartial and aloof from politics as an elected judge. It is no extravagant assertion to say that when such a time comes, the commissioners will honor their established precedent as much as the courts do theirs, and follow it with as great fidelity.
II

ON THE PROTECTION WHICH THE FEDERAL CONSTITUTION
AFFORDS THE MUNICIPAL CORPORATION AGAINST
THE STATE

It is necessary briefly to inquire into the nature of municipal corporations, in order to determine what protection, if any, the federal constitution may give them against the state in their ownership of public utilities.\(^7\) It is apparent that if there are bounds beyond which the legislature cannot go in its dealings with the municipality, its creature, the public service commission, is likewise limited. Added importance is given this question by the large number of utilities which are municipally owned.

Before the state commission idea was adopted as a remedy, the inability of the city to settle the problems of regulation through the medium of political and judicial control had given great impetus to the movement for municipal ownership. This movement was especially noticeable in the period from about 1890 to 1907, and resulted in many cities becoming the owners of water plants, electric light and gas plants, etc. Municipal ownership was adopted as the only means by which the public could adequately safeguard its interests.\(^8\) This condition of affairs complicates our problem of state control, for the commission will be forced in many instances to deal with utilities owned by the city. To examine the constitutional principles governing the relations between city and state where the utilities are so owned is the main object of this article.

In this country municipal corporations, like private corporations, must be created by statute.\(^9\) It might be thought that inasmuch as they are the creation of the legislature for the purposes of government, the legislature as the higher governing body should be supreme over them at all times and in all things. If this view ever was held in an unqualified form it has been modified in this country by the recognition of the private or proprietary capacity of cities. The municipality has been held to be acting in this capacity in the maintenance and operation of a water works

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\(^7\) A municipal corporation is defined by Dillon as "the body corporate and politic constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof." Municipal Corporations, 5th ed., 58.

\(^8\) C. L. King, The Regulation of Municipal Utilities, 1912, p. 26.

\(^9\) Dillon, Municipal Corporations, p. 61.
system, gas plant, electric light plant, market house, wharf, and cemetery; and in the negligent operation of such business has been held to a liability corresponding to that of a private individual engaged in a like enterprise. With the idea of a private capacity and its corresponding liabilities, there appeared a principle of protection. The principle was this: that the city, acting in such capacity, was entitled to receive protection as against the state similar to that given the private corporation or individual engaged in a similar undertaking. This conception of a proprietary capacity was the result of "judicial legislation" which aimed to escape technical difficulties and do substantial justice. The principle so evolved is now clearly established, but there is still a very real difficulty in its application. For the creators of this principle did not mark clearly the boundaries of such proprietary capacity, nor did they indicate the basis upon which it was founded. Indeed, it would have been difficult to do so, for while from the viewpoint of the individual all municipal acts are public, yet from the viewpoint of the people at large many acts are not public in the sense that the whole state is politically interested. With no sound basis then for the distinction between the two capacities, governmental and proprietary, it is not surprising that succeeding cases show much confusion. But this confusion must not be erroneously interpreted as a denial of the principle but as a denial of its applicability to the particular facts presented by the case. It is interesting to note in this connection certain federal cases. While these relate to state rather than municipal activities the distinction between proprietary and governmental acts is clearly brought out. In Bank of the United States v. Planter's Bank of

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29See cases cited in footnote 57, post.  
21See cases cited in footnote 59, post.  
22See cases cited in footnote 58, post.  
23See cases cited in footnote 60, post.  
24See cases cited in footnote 61, post.  
25See cases cited in footnote 62, post.  
26A fundamental distinction, however, between private and municipal corporations exists in the power of the legislature to deprive the municipal corporation of its charter and thus of its corporate capacity to hold property. Cooley, Constitutional Limitations, 4th ed., 290.  
27"I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular action." Holmes, J., in Southern Pacific Co. v. Jensen, (1916) 244 U. S. 205, at 221, 61 L. Ed. 1086, 37 S. C. R. 524.  
28Dillon, Municipal Corporations, 184; David v. Portland Water Committee, (1886) 14 Ore. 98, 12 Pac. 174.  
29Dillon, Municipal Corporations, 184.  
30Rose's Notes on United States Reports, p. 979.
Georgia, the defendant numbered among its stockholders the state of Georgia. On this account it claimed immunity from suit in any but the highest federal court. This claim was denied by Chief Justice Marshall who said:

"It is, we think, a sound principle that when a government becomes a partner in any trading company it divests itself so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted."

This case was quoted with approval in Briscoe v. The Bank of Kentucky where the state had chartered a bank which was to be exclusively the property of the commonwealth. After quotations from previous cases, the court declared:

"They show that a state, when it becomes a stockholder in a bank, imparts none of its attitudes of sovereignty to the institution, and that this is equally the case, whether it own a whole or a part of the stock of the bank."

Finally, in the South Carolina Dispensary Case, where the state had engaged in the sale of intoxicating liquors, a federal tax on such state business was upheld by the United States Supreme Court. While recognizing that certain state agencies are immune from taxation, the court insisted that such immunity does not extend to those agencies "which are used by the state in the carrying on of an ordinary private business." An analogy is drawn between state and city while acting in a private capacity and the opinion contains several quotations from state cases in which the proprietary capacities of a municipal corporation are discussed.

Regarding it as an established principle that the municipal corporation is entitled to some degree of protection against the state where the corporation is engaged in a proprietary undertaking, it will be our object to define the limits of that protection.

As to the city in its public or governmental capacity, a few words may be said. It is to be observed that from the viewpoint

31 Bank of the United States v. Planter's Bank of Georgia, (1824) 9 Wheat. (U.S.) 904, 6 L. Ed. 244.
32 Ibid., p. 907-8.
34 Ibid., pp. 325-6.
36 Ibid., p. 461.
of the state the community has been incorporated for a political or governmental purpose, to assist the state in the government of its local subdivisions. It is correct, therefore, to consider the grant of purely governmental powers a contract within the sense of that clause of the federal constitution which prohibits any state from passing a law impairing the obligation of contracts. If the city is acting merely as a local or lesser legislature, must it not necessarily be subordinate to the greater legislature in all political questions on which the greater acts? Were it otherwise, were we to permit rights of local government to become vested as against the state, we should have within the commonwealth a number of petty governments, created by the legislature to assist it in expressing the political will of the state, but now beyond its control. Such purely governmental functions cannot become vested as against the state.

Connected with the absence of constitutional protection while the city is engaged in a public capacity is freedom from liability for the negligence of its employees while so acting. Consequently

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37 Dillon, Municipal Corporations, 58.
38 There are of course other reasons than this to account for the fact that in respect to governmental functions no contract exists between city and state. The point is given here by way of illustration, rather than as proof.
39 Dillon, Municipal Corporations, 142.
40 "No state shall . . . pass . . . law impairing the obligation of contracts." Art. 1, Sec. 10, The constitution of the United States.
41 Sloane v. State, (1847) 8 Black. (Ind.) 361, at 364.
43 See cases cited below in footnotes 44 to 51 inclusive. "The liability of cities for not keeping streets in repair would seem to be an exception to this general rule, which we think the courts would do better to rest either upon special considerations of public policy or upon the doctrine of stare decisis than to attempt to find some strictly legal principle to justify the decision." Mitchell, J., in Snider v. City of St. Paul, (1892) 51 Minn. 466, 472, 53 N. W. 763, 18 L. R. A. 151.
it has been held that the municipality is not liable for damages resulting from its inability to put out a fire where such inability was the result of negligently permitting the city water mains to become clogged with sand or mud,\textsuperscript{44} or the water system to get out of repair,\textsuperscript{45} and that there was no liability on the part of the city for the negligent operation of its fire department,\textsuperscript{46} police department,\textsuperscript{47} health department and hospitals,\textsuperscript{48} public schools,\textsuperscript{49} jails and workhouses,\textsuperscript{50} or ambulances,\textsuperscript{52} whereby damages were sustained. Hence the municipality acting as the political agent of the state has neither responsibility for its negligent acts in such capacity, nor the privileges of protection against the state legislature. The legislature may alter, abolish or modify the municipal corporation at will; its power unlimited save by its own state constitution.\textsuperscript{52}

When we turn to a consideration of the city’s acts in a proprietary capacity we find that there the city has both responsibilities and privileges. Its rights and liabilities while so acting may be said to resemble those of a private person engaged in similar enterprises. But inasmuch as the creation of this capacity in American law is the result of “judicial legislation” as noted above, it is evident that the limits set in this field will vary in the different jurisdictions, and result in much confusion. We may, however, lay down the general rule that in the construction and operation of water works,\textsuperscript{53} gas plants\textsuperscript{54} and electric light plants,\textsuperscript{55} the city is

\textsuperscript{44}Miller v. City of Minneapolis, (1898) 75 Minn. 131, 77 N. W. 788. Canty J., at 75 Minn. 133 says, “For purposes of protection from fire, the water plant and service must be regarded as part of the fire department.”


\textsuperscript{47}Cleveland v. Payne, (1905) 72 Ohio St. 347, 74 N. E. 177, 70 L. R. A. 841.


\textsuperscript{50}Nichols v. Fountain, (1914) 165 N. C. 166, 80 S. E. 1059, Ann. Cas. 1915C 152 and note, 52 L. R. A. (N.S.) 942 and note.


\textsuperscript{52}See cases cited in footnote 57, post.

\textsuperscript{53}See cases cited in footnote 59, post.

\textsuperscript{54}See cases cited in footnote 59, post.
acting in a proprietary capacity. It is to be observed that although
the object here is public, it is not recognized as governmental so
far as the state at large is concerned. It cannot matter to the
state as a whole whether gas light is furnished to private in-
dividuals in a particular locality by the city or private corpora-
tion. Whatever interest the state may have is a commercial or
neighborhood interest. The aim is not governmental but com-
mercial. The city has entered a field ordinarily occupied by private
enterprise and is operating a plant and selling service to consumers
after the manner of a private corporation. We may well ask:

"Should it be permitted to carry into this quasi-private enter-
prise the attributes of sovereignty and stand immune from actions
for negligence in the operation of such enterprises, or be free
from federal taxation? Should sovereignty protect that which
is not necessary to the government of the community?"56

Justice to those who have dealings with the city in such ca-
pacity would declare the enterprise entitled to no such protection.

If we deny the city in its private enterprises immunity from
suit, we may hold it liable for the negligence of its servants in such
undertakings. Accordingly, the city has been held liable for the
negligent construction of its water works system,57 electric light58

56See cases cited in footnote 58, post.

In a recent case the California supreme court decided that a municip-
ally owned electric light plant did not come within the terms of a statute
which permitted the State Railroad Commission to regulate public utilities.
Pasadena v. R. R. Commission, (Cal. 1920) 192 Pac. 25, 10 A. L. R. 1425
annotated. The statute in this case classed as public utilities, among other
industries, every private corporation engaged in the production, etc. of
light for the public. The court said that a plant owned by a municipal
corporation was not owned by a private corporation within the meaning of
the act.

57Exemption from liability for the negligence of its officers while
acting in a governmental capacity has been extended to the municipal
279 the city was held not to be liable for the negligence of certain build-
ing inspectors since the board represented the state and exercised its
sovereignty. In Levy v. Mayor, etc., of New York, (1848) 1 Sand. (N.Y.
Sup. Ct.) 465 multiplicity of suits was mentioned as a basis for denying
recovery for damages resulting from the failure to enforce a law since
"there would be no end to the claims against the city and state" if such
actions were permitted. Whether the city profited or not by the undertak-
ing seemed to be a vital point in the case of Hill v. Boston (1871) 122
Mass. 344 where the city was held not liable for the defective conditions
of its public school whereby a child was injured.

58McQuillin, Municipal Corporations, 1912, 182; Winona v. Botzet,
(1909) 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N.S.) 204 and note;
287; Pettingill v. Yonkers, (1889) 116 N. Y. 558, 22 N. E. 1095, 15 A. S. R.
442 and note; Brown v. Salt Lake City, (1908) 33 Utah 222, 93 Pac. 570,
619.
and gas plant, market houses, wharves and cemeteries. But as we have noted, the development of this liability has generally carried with it corresponding privileges. The extent to which these privileges protect the municipality against the acts of the state brings us to the main question of this article. For in its operation of public utilities the city acts in a private capacity and any protection afforded it by the federal constitution must to that extent hamper the powers of the public service commission. Attention already has been called to that section of the constitution which declares that "No state shall pass any law impairing the obligation of contracts," and we may also note at this point the due process clause of the fourteenth amendment. We are thus confronted with this question:

"Is the protection which the constitution affords private persons against state acts, extended as completely to a municipal corporation which is acting in a proprietary capacity?"

This point has never been directly adjudicated in the United States Supreme Court, although it often has noted the distinction between the two capacities. Story, J., in the celebrated Dartmouth College Case said:

"It may be admitted that corporations for mere public government, such as towns, cities, and counties, may in many respects be subject to legislative control. But it will hardly be contended, that even in respect to such corporations the legislative power is so transcendant that it may, at its will, take away the private property of the corporation."

In a more recent case the court remarks:

"It has been held that as to the latter class of property [that

63 "No state shall . . . pass any . . . law impairing the obligation of contracts." Art. 1, Sec. 10, the constitution of the United States. "Nor shall any state deprive any person of life, liberty, or property, without due process of law." Amendment XIV to the United States constitution.
MINNESOTA LAW REVIEW

held by the city in a proprietary capacity] the legislature is not omnipotent. If the distinction is recognized it suggests the question whether property of a municipal corporation owned in its private or proprietary capacity may be taken from it against its will and without compensation. Mr. Dillon says truly that this question has never been directly adjudicated in this court. But it and the distinction upon which it is based have several times been noticed.”

It would appear that the court has not committed itself irrevocably on the question. We cannot say that it has either recognized or denied the municipal corporation protection in a proprietary capacity.

We must turn then to the state cases for what light they may shed upon the problem. In view of the wide use of the contract clause in other fields it is surprising that we find so few cases where it has been directly presented in a contest between city and state. There are many dicta on the point, but few adjudications. However, these few cases clearly recognize a principle of protection.

Perhaps the earliest case deserving attention, though not directly in point, is that of *Benson v. New York.* There the state legislature had passed an act relating to ferries which it was claimed deprived the city of New York of property rights in certain ferries which it operated by ancient grant. The court after pointing out that by the doctrine of *Dartmouth College v. Woodward,* a grant of franchise when acted upon became a contract, declared that the principles of that case were equally applicable to all franchises coupled with a pecuniary interest. If this statute must then be so construed as to include existing ferries, it must be pronounced unconstitutional and void. The court, however, de-

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66 In *San Antonio v. San Antonio Public Service Co.,* (1921) 41 S. C. R. 428, where the Texas constitution prohibited the granting of irrevocable privileges, the United States supreme court held that since the city was not bound by the ordinance provision for street car rates the courts would not construe such ordinance provision as binding on the company, so as to permit the city to claim a contract right in such a rate.

CITY V. STATE UNDER UTILITY REGULATION

decided that the act did not include the city's ferries and so there was no necessity for declaring it void.68

What appears to be the first case directly in point arose in Wisconsin in 1860.69 This was an action of ejectment to recover forty acres of land which plaintiff town had formerly purchased, and which later by legislative act was included in the extended city limits of the defendant. If the legislature is supreme over all city property the plaintiff could have no valid claim here. But its claim was upheld since the property was held in a private capacity. Dixon, Chief Justice, says in this case:

"The difficulty about the question is to distinguish between the corporation as a civil institution or delegation of merely political power and as an ideal being endowed with the capacity to acquire and hold property for corporate or other purposes. In its political or governmental capacity, it is liable at any time to be changed, modified or destroyed by the legislature; but in its capacity of owner of property, designed for its own, or the exclusive use and benefit of its inhabitants, its vested rights of property are no more the subject of legislative interference and control without the consent of the corporators than those of a merely private corporation or person... In its character of owner of property, it is a private corporation, possessing the same rights, duties and privileges as any other."70

The grant of land to the plaintiff was held a contract entitled to the protection given by the federal constitution.

The next year the California supreme court decided the case of Grogan v. San Francisco.71 Here the city had attempted to sell certain of its wharf property but irregularities rendered the sale invalid. The state then attempted to ratify the sale. Whether its act was sufficient to pass title to the property in question depended on whether it had absolute control over the city's property. The court held that it did not and said through Chief Justice Field,

"Nor is there any difference in the inviolability of a contract between a grant of property to an individual and a like grant to a municipal corporation. So far as municipal corporations are

68Cooley points out that this case would not be supported by the weight of authority. Constitutional Limitations, 6th ed., p. 292 note. This attitude appears to be based upon the belief that ferries are not properly subject to being held in a proprietary capacity by a municipality. This is rather a denial of the applicability of the principle than a denial of the principle itself. It should be noted that the conditions in this case are peculiar, by reason of the antiquity of the ferry grants.
69Town of Milwaukee v. City of Milwaukee, (1860) 12 Wis. 103.
70Ibid., pp. 111-2.
invested with subordinate legislative powers for local purposes they are mere instrumentalities of the state. . . But though a municipal corporation is the creature of the legislature, yet when the state enters into a contract with it, the subordinate relation ceases, and that equality arises which exists between all contracting parties. And however great the control of the legislature over the corporation, it can be exercised only in subordination to the principle which secures the inviolability of contracts."\(^{72}\)

The state's attempt to deprive the city of its wharf property was held unconstitutional, as impairing the obligation of contracts.

In *Spaulding v. Andover*\(^ {73}\) this provision of the federal constitution again was successfully invoked to protect municipal property against state interference. The state of New Hampshire had issued bonds for the reimbursement of expenditures, incurred by various cities during the Civil War. A portion of them were assigned to the city of Andover. Subsequently, the state legislature attempted to assign to private individuals certain of the bonds still held by the city. The original grant was held a contract and the later act of the state was held to be invalid as impairing the obligation of contracts.

A decision a few years later by the Louisiana supreme court is of more than ordinary interest, since some preceding decisions of that court often have been cited in support of the contention that the city can receive no constitutional protection in a proprietary capacity. In this case New Orleans had been given the right by the state legislature to build docks and charge wharfage. It later leased these to the plaintiff. Subsequently a statute exempted from the payment of fees vessels of over a certain tonnage, built in the state. The defendant, owner of such a vessel, refused to pay plaintiff the customary fees and this action was brought. The court held the later act unconstitutional and in its opinion through Manning, Ch. J., declared:

"The exclusive right to regulate and make improvements to the wharves, and to lease them, having been thus lawfully conferred upon and delegated to the city, it became the private right of the corporation and not subject to divestiture without a due legal process and compensation therefor, as contradistinguished from a public right which may be abrogated by the state at its pleasure."\(^ {74}\)

\(^{72}\)Ibid., pp. 613-4.

\(^{73}\)Spaulding v. Andover, (1873) 54 N. H. 38.


\(^{75}\)Ibid. p. 191.
While the case does not state whether the decision is based on the contract or due process clause, it is probably upon the former, since the court quotes with approval an extract from Cooley which speaks of contracts arising in favor of cities, which cannot be divested. The fact that a private person is the plaintiff here, rather than the city, should not affect the decision, since the lessee can have no greater rights than the lessor, the city of New Orleans.\footnote{L. H. McBain says of this case, “The case of Ellerman v. McMains may also be excluded. The New Orleans charter of 1836 conferred upon the city power to construct wharves and to collect wharfage. In 1874 the legislature passed an act exempting from the payment of such charges boats built within the state. This act was held to be void, but no mention was made of the contract clause, the court declaring that the act operated to deprive the city of property without due process of law.” 3 Nat. Mun. Rev. p. 293, footnote.}

The last case to be noted, and perhaps the most able, is that by the Massachusetts supreme judicial court in \textit{Mount Hope Cemetery v. Boston}.\footnote{\textit{Mount Hope Cemetery v. Boston}, (1893) 158 Mass. 509, 33 N. E. 695, 35 A. S. R. 515.} The city of Boston owned a cemetery which the legislature by statute attempted to transfer to a corporation entitled “The Proprietors of Mount Hope Cemetery.” The act made no provision for compensation to the city. The court distinguishing the governmental and proprietary capacities of a city, declared that here the municipality had not acted strictly “for the accomplishment of general public or political purposes, but rather with special reference to the benefit of its own inhabitants. . . . In view of all these considerations, the conclusion to which we have come is that the cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and that its ownership is protected under the constitution of Massachusetts and of the United States so that the legislature has no power to require its transfer without compensation.”\footnote{\textit{Tbid.}, p. 519.}

The decision in this case was placed upon the due process clause of the federal constitution rather than upon that clause relating to contracts. But for practical purposes it makes little difference upon what ground the protection is based, so long as it is actually extended.

Since, however, what is a proprietary character varies with the varying “judicial legislation” as before noted, cases will be found in which rights proprietary in one jurisdiction will be held governmental in another, and protection denied. But that is not
a denial of the principle, but rather a denial of its applicability to the facts under consideration. That municipal corporations have a dual character must be regarded as firmly established.\footnote{79} And as to the protection to be afforded the city in a proprietary capacity, the weight of authority would seem to incline toward a considerable degree of protection, though as to this the law cannot be regarded as definitely settled.\footnote{80} We should note at this point H. L. McBain's opinion to the contrary, as expressed in an article on the "Rights of Municipal Corporations under the Contract Clause of the Federal Constitution."\footnote{81} In this article Mr. McBain comes to the conclusion that the federal constitution affords the city no protection in a proprietary capacity. He is considering the contract clause only. In a support of his conclusion he cites \textit{St. Louis v. Shields}\footnote{82} (a wharf case), \textit{Layton v. New Orleans}\footnote{83} (a tax case), \textit{Police Jury v. Shreveport}\footnote{84} (a ferry), \textit{City of Laredo v. Martin}\footnote{85} (a ferry), \textit{Trustees v. Tatum}\footnote{86} (a ferry), \textit{Board of Education v. Aberdeen}\footnote{87} (a case in which the legislature had changed the uses to which money received by the city for liquor licenses should be devoted), and \textit{People v. Vanderbilt}\footnote{88} (in which there is discussed the question as to the right of the state to establish a bulkhead without regard to a previous grant of waterfront property to the city). It will be noted that these cases all relate to borderline rights, rights which the courts when they were building up the doctrine of a proprietary capacity could either include or exclude from that category. That they have chosen to exclude in the above cases the particular rights there considered would not seem to be sufficient to prove that they would have denied protection if held in a proprietary capacity. That the courts were here concerned with the applicability of the principle rather than with its denial is shown by the fact that other decisions of these same

\footnotetext{79}{Dillon, Municipal Corporations 184. "As to municipal powers and rights held by the corporation in its proprietary or private character and as to contracts made with reference thereto, it is to be regarded nearly if not quite as a private corporation and is within the constitutional protection." 12 Corpus Juris p. 1004.}

\footnotetext{80}{Dillon, Municipal Corporations, pp. 186-7.}

\footnotetext{81}{Printed in 3 Nat. Mun. Rev. 284.}

\footnotetext{82}{St. Louis v. Shields, (1873) 52 Mo. 351.}


\footnotetext{84}{Police Jury v. Shreveport, (1850) 5 La. Ann. 661.}

\footnotetext{85}{City of Laredo v. Martin, (1880) 52 Tex. 548.}

\footnotetext{86}{Trustees v. Tatum, (1851) 13 Ill. 27.}

\footnotetext{87}{Board of Education v. Aberdeen, (1879) 56 Miss. 518.}

\footnotetext{88}{People v. Vanderbilt, (1863) 26 N. Y. 287.}
courts are often cited as showing the recognition of a proprietary capacity, and the right to a degree of protection for enterprises undertaken in that character. Thus McBain's second and third cases are from Louisiana. But we have already noted a more recent case from that state in which the principle of protection is clearly recognized. His fourth case is one from Texas. A later case from that state is often cited as supporting the principle of protection to rights held in a proprietary capacity. The fifth decision is by the Illinois supreme court. The case of Richland County v. Lawrence County from that state is frequently cited as showing the right to protection in a proprietary capacity. It is true that the additional Texas and Illinois cases to which we have called attention relate to counties rather than cities, but it would seem that the courts would recognize proprietary rights even less readily in the case of a county than in the case of a compact municipal organization. Mr. McBain's seventh citation is of a New York case but we have already noted the statements in Benson v. New York.

Approaching these cases from another angle we may note that three are ferry cases: one relates to taxation, and one to the use to which money derived from liquor licenses is to be put. Is there anything inconsistent in the reasoning which regards these rights as public? The United States Supreme Court in the Hartford Bridge Case spoke of a ferry as "being virtually a highway across the river, over another highway up and down the river." If such a view be followed, it is quite logical to exclude ferries from that class of enterprises which the city may engage in in a proprietary capacity. Nor should the fact that the court chose to regard arrangements for taxation and liquor licensing as the exercise of a governmental function lead to the conclusion that in all cases they will refuse to recognize a dual character, and a de-

90Milam County v. Bateman, (1880) 54 Texas 153.
91Richland County v. Lawrence County, (1850) 12 Ill. 1, 8 the court says, "That the state may make a contract with, or grant to, a public municipal corporation, which it could not subsequently impair or reserve, is not denied; but in such a case the corporation is to be regarded as a private company. A grant may be made to a public corporation for purposes of private advantage; and although the public may also derive a common benefit therefrom, yet the corporation stands on the same footing as respects such grant, as would any body or person upon whom like privileges were conferred."
gree of protection in the proprietary undertakings. In other words, it seems that these cases are concerned more with the applicability of the principle than with its assertion or denial.

Another point which Mr. McBain notes is the matter of free water for cities and he believes that this right ought to be proprietary if any right is. But it is to be observed that the water is to be used mainly, if not wholly, for governmental purposes, that is, for the sprinkling of the streets and the prevention of fire. And even if it were a proprietary right, the state in the exercise of its police power could require the city to pay for water used as the state can require any private consumer to pay for water used as will be brought out more fully in the next subdivision.

Our conclusion as to the protection to be given the city may be then summed up to this effect: that numerous dicta, certain learned commentators, and several adjudications, which appear to represent the weight of authority, unite in declaring that the protection which the federal constitution affords a city while acting in a proprietary capacity approaches that extended to a private individual or corporation engaged in a like enterprise.

(To be concluded.)