

CITY OF ENGLEWOOD *v.* DENVER & SOUTH
PLATTE RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 106. Submitted December 19, 1918.—Decided January 7, 1919.

An ordinance provision respecting the service to be rendered by a street car company (in this case respecting the transfer privileges to be accorded passengers,) will not be adjudged to have created a contract obligation beyond legislative control if the power of the municipality under the state law, and its intention, to create such an obligation do not clearly appear.

Writ of error to review 62 Colorado, 229, dismissed.

THE case is stated in the opinion.

Mr. L. F. Twitchell for plaintiff in error. *Mr. S. D. Crump* and *Mr. H. C. Allen* were also on the brief:

The Act of 1913, known as the Public Utilities Act, if given the construction placed upon it by the majority of the state court, is a violation of the constitutional inhibition against impairing the obligation of contracts. *Atlantic Coast Elec. Ry. Co. v. Public Utility Commrs.*, 89 N. J. L. 407, 413; *Reed v. Trenton*, 80 N. J. Eq. 503-506; *Detroit v. Detroit United Railway*, 173 Michigan, 314; *Peoria Ry. Co. v. Peoria Ry. Terminal Co.*, 252 Illinois, 73; *Southern Bell Telephone Co. v. Mobile*, 162 Fed. Rep. 532; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *North Wildwood v. Public Utility Commrs.*, 88 N. J. L. 81; *Minneapolis v. Minneapolis Street Ry. Co.*, 215 U. S. 417; *Monett Electric Light Co. v. Monett*, 186 Fed. Rep. 364; *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368; *Shreveport Traction Co. v. Shreveport*, 122 Louisiana, 1; *Omaha Water Co. v. Omaha*, 147 Fed. Rep. 1; *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58; *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 536.

Mr. Fred Farrar for defendant in error:

A federal question cannot be raised for the first time in a petition for a rehearing in the state court unless in the consideration of that petition that court rules upon the federal question in denying the application. *McCorquodale v. Texas*, 211 U. S. 432.

The case is controlled by a long line of decisions, both state and federal, which recognize the distinction between cases in which the municipality has been granted the power to enter into irrevocable contracts with utility companies, and those in which the municipality either had no direct authority to enter into such a contract, or, having the power to contract, the contract was subject to revocation whenever the latent power of the State was called into action and the supervision of rates and fares undertaken. *Milwaukee &c. Co. v. R. R. Commission of Wisconsin*, 238 U. S. 174; *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 273; *Wyndotte County Gas Co. v. Kansas*, 231 U. S. 622; *Puget Sound Traction Co. v. Reynolds*, 244 U. S. 574; *Benwood v. Public Service Comm.*, 75 W. Va. 127; *State ex rel. Webster v. Superior Court*, 67 Washington, 37; *Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wisconsin, 13; *Minneapolis, St. Paul &c. R. R. Co. v. Menasha Wooden Ware Co.*, 159 Wisconsin, 130; *Woodburn v. Public Service Comm.*, 82 Oregon, 114; *Seattle Electric Co. v. Seattle*, 206 Fed. Rep. 955; *California-Oregon Power Co. v. City of Grants Pass*, 203 Fed. Rep. 173.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to compel the defendant to arrange for passengers on its road to be transported without extra fare over the line of the Denver City Tramway Company from a point of connection and in like manner for

passengers on that company's line to be carried over the defendant's line without additional charge. The defendant operates a street railway under a franchise granted by the plaintiff while a town. By § 6 of the ordinance making the grant the grantees were allowed to charge certain fares provided that they should make the arrangement stated above. The defence pleaded against being required to comply with these terms is that the Denver City Tramway Company charges five cents, the maximum fare allowed, for its part of the service, so that the defendant gets nothing, and that the defendant filed a schedule of rates with the State Public Utilities Commission which now are the defendant's established rates and charges. On demurrer the Supreme Court of the State held that this town, at least, deriving its powers from legislative grant, could make no contract of this sort that was not subject to control by the legislature, that the Public Utilities Commission had been authorized by the legislature to regulate the matter in controversy, that it had done so, and that this proceeding should be dismissed.

Of course we do not go behind the decision of the Court that the matter in controversy was subject to regulation by the Commission and was regulated by it in due form if the State could confer that power. The plaintiff says that the State could not confer it since to do so would impair the obligation of a contract. Upon that point we agree with the Court below that clearer language than can be found in the state laws and this ordinance must be used before a public service is withdrawn from public control. *Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin*, 238 U. S. 174, 180. The cases generally are cases where the railroad or other company sets up contract rights against the city. Whether when the railroad consents a legislature would not have all the power that the city could have to modify even a constitutionally protected contract need not be considered

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here. If we deal with the present case on the merits there seems to be no sufficient reason why the writ of error should not be dismissed. It is giving the plaintiff the benefit of a very great doubt if we assume that the question on the merits was saved.

Writ of error dismissed.

THE HEBE COMPANY ET AL. v. SHAW, SECRETARY OF AGRICULTURE OF OHIO, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 664. Argued December 11, 12, 1918.—Decided January 7, 1919.

The General Code of Ohio, § 12725, forbids, under criminal penalty, the manufacture, sale, etc., of condensed milk, unless made from unadulterated milk from which the cream has not been removed and in which the milk solids are equivalent to 12% of those in crude milk and 25% of them fat, and unless the container is distinctly labeled, stamped or marked with its true name, brand and by whom and under what name made; by § 5778 a food is adulterated if a valuable ingredient has been wholly or in part abstracted; and § 12720 allows skimmed milk to be sold only under restrictions. Appellants' product, assumed to be wholesome and nutritious, and consisting of condensed skimmed milk combined with cocoanut oil, was imported from another State in cases each containing a number of the one pound or six ounce cans in which it was retailed, each can being labeled "Hebe A Compound of Evaporated Skimmed Milk and Vegetable Fat Contains 6% Vegetable Fat, 24% Total Solids," with the place of manufacture and address of the company, and the words "For Coffee and Cereals For Baking and Cooking."

Held: (1) That the product was within the prohibition of § 12725. P. 302.

(2) That, as so construed and applied, the statute did not violate the Fourteenth Amendment. P. 303.

(3) That, as applied to the cans containing the product, the prohibition