

discretion and as there was no abuse of this discretion it must be affirmed.

All impounded funds should be promptly released to the Gas Company subject only to deductions for such costs as are clearly assessable to the prevailing party. Costs of appeal No. 257 will be taxed to appellants; in No. 258 to the appellees. Modified as here indicated the decree below is affirmed. The cause will be remanded for further proceedings in conformity with this opinion.

It seems proper to add that we do not intend by anything said herein to intimate what would have been a reasonable rate for the sale of gas under the circumstances disclosed. The eighty-cent rate was confiscatory; the one dollar and twenty-cent maximum imposed by the court during a specified period as a condition to the injunction was a limitation in favor of the consumers.

*Modified and Affirmed.*

MR. JUSTICE CLARKE concurs in the result.

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NEWTON, ATTORNEY GENERAL OF THE STATE  
OF NEW YORK, ET AL. *v.* NEW YORK & QUEENS  
GAS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 296. Argued January 6, 1922.—Decided March 6, 1922.

Approving the conclusion of the master and the District Court that a gas rate fixed under Laws New York, 1906, c. 125, had become confiscatory.

269 Fed. 277, affirmed.

APPEAL from a decree enjoining enforcement of a statutory gas rate as confiscatory. See also the cases, *ante*, 165, and *post*, 180,

*Mr. Wilber W. Chambers*, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, and *Mr. Clarence R. Cummings* were on the brief, for Newton, Attorney General.

*Mr. M. Maldwin Fertig*, with whom *Mr. John P. O'Brien* and *Mr. James A. Donnelly* were on the brief, for Wallace, District Attorney.

*Mr. William L. Ransom*, with whom *Mr. John A. Garver*, *Mr. Charles A. Vilas* and *Mr. Jacob H. Goetz* were on the briefs, for appellee.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

This appeal brings up for review a final decree entered November 19, 1920, which adjudged that in so far as c. 125, Laws of New York of 1906, prohibited appellee from charging and receiving more than \$1.00 per thousand cubic feet for gas delivered and sold in the Third Ward, Borough of Queens, New York City, it was and had been confiscatory since January 1, 1919. 269 Fed. 277.

After taking a great mass of evidence the Master reported that the actual cost to appellee of manufacturing and distributing gas exceeded \$1.00 per thousand cubic feet and that the challenged act was confiscatory. With this conclusion the trial court agreed and entered an appropriate decree. We find no sufficient ground for disapproving the action so taken, and it is accordingly

*Affirmed.*