

gravity had been exemplified in various methods for centuries, and that long prior to the patent there in suit the principle had been applied to various substances such as grain, coal, crushed stone, sand, and iron ore, and said [p. 184]:

“The observations of common experience in the mechanical arts would lead one to expect that once the feasibility of using ‘wet’ concrete in building operations was established, the mechanical skill of those familiar with engineering and building problems would seek to make use of known methods and appliances for the convenient handling of this new building material.”

Here it appears that the use of compressed air for conveyance of granular and plastic materials had long been known and practised; so that the cited case is clear authority against invention in the instant cases.

The decree in No. 3 is reversed and the cause remanded with instructions to dismiss the bill of complaint. The decree in No. 4 is affirmed.

*No. 3, reversed.*

*No. 4, affirmed.*

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BROAD RIVER POWER COMPANY ET AL. v. SOUTH CAROLINA EX REL. DANIEL, ATTORNEY GENERAL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 528 (1929 Term). Argued on Rehearing, December 3, 4, 1930.—  
Decided December 15, 1930.

Upon rehearing of this cause, the Court, though divided upon the reasons, adheres to the view that the writ of certiorari should be dismissed for want of jurisdiction. See 281 U. S. 537.

*Mr. George M. LePine*, with whom *Messrs. C. Edward Paxson, W. C. McLain* and *Wm. Marshall Bullitt* were on the supplemental brief, for petitioners.

Even if the statute incorporating the Consolidated Railway and Electric Company created one unified franchise for street railway and electric service, the State could not require operation of the railway at a loss.

This Court is definitely committed to the rule that a State cannot fix a non-compensatory rate on one product on the theory that the losses produced can be absorbed in charges for other products. *Northern Pacific R. Co. v. North Dakota*, 236 U. S. 585; *Norfolk & Western Ry. v. West Virginia*, 236 U. S. 605; *Chicago, M. & St. P. R. Co. v. Public Utilities Comm.*, 274 U. S. 344.

The rule that a public service company may not be compelled to serve, even in a branch of its business, at a rate which is confiscatory, which was asserted in *Northern Pacific R. Co. v. North Dakota*, *supra*, is based on the principle that a utility is entitled to compensation for the use of its property devoted to such branch of its business, and that to require service without compensation constitutes confiscation. When, therefore, it appears, as in the case at bar, that varying rates of fare have been tried and found not to be compensatory, and that no rate of fare can be compensatory, to require service at any rate of fare (for there must be some established rate) must be deemed to constitute confiscation.

As a branch of utility service, the electric light and power business is far more distinct from street railways than wheat traffic was from coal traffic in the *North Dakota* case.

In the case at bar did the Court mean to hold that electric light and power consumers could by increased light and power rates be made to bear the losses in street railway operation, so that the total receipts from the unified franchise would be compensatory for the unified investment? If so, what becomes of the doctrine of the *North Dakota* case?

It is true that the case at bar is not a rate case, but in view of the certainty that street railway service by this company must be given at an operating loss, the case of *Northern Pacific R. Co. v. North Dakota*, *supra*, and the principle on which that case was decided are directly applicable.

The fundamental basis of that decision is that the power of the State to regulate rates (and service) is founded upon its police power, which extends to property which is employed in a public business, and reasonable regulations are to be sustained, while unreasonable regulations are in conflict with the property rights of the owners and are to be set aside.

That it is the dedication of the property to a public use, and not any contractual relation, which authorizes the State to make reasonable regulations as to the service which shall be rendered in the management of the property so dedicated, is evident from other decisions of this Court. These cases establish the rule that, once property has been devoted to a particular public use, the State may make reasonable regulations governing that use, and may require service to be rendered in connection with that use, though pecuniary loss must unavoidably be incurred, but that a State may not require property devoted to one public use to be applied to a different public use, and may not prevent the withdrawal of property devoted to a particular public use when the property can be operated only at a loss. *Chesapeake & O. Ry. Co. v. Public Service Comm.*, 242 U. S. 603; *Wolff Co. v. Industrial Court*, 262 U. S. 522.

The real basis for the obligations which arise in the case of a railway is the dedication of the property to a public use by putting the railway in operation under a legislative grant, rather than a contract relation which exists from the charter itself. Cf. *Atlantic Coast Line R. Co. v. Corporation Comm.*, 206 U. S. 1.

Applying this rule to the case at bar, it becomes evident that when the railway company constructed its line of railway in the city streets it dedicated the same to the carriage of passengers, and so long as it continued in that business it could not refuse to perform any railway service required of it, and it could not withdraw that property from the public service unless continued operation could only be had at a loss; when it engaged in the electric light and power business it dedicated its electric properties to the rendition of electric services, in the same way and subject to the same limitations, and the same limitations apply to its gas properties, but the power of regulation which a State possesses over private property devoted to public use gives no warrant for requiring that an electric property lawfully devoted to a particular public use, such as furnishing light and power, shall be devoted to a further public use, such as carrying passengers on a street railway. Distinguishing: *United Fuel Gas Co. v. Railroad Comm.*, 278 U. S. 300; *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649; *Puget Sound Traction Co. v. Reynolds*, 244 U. S. 574.

If the contention of the State of South Carolina and the decision of the state court are to be sustained on the ground that the business of the company must be treated as one public service enterprise, then, as held in *Texas v. Eastern Texas R. Co.*, 264 U. S. 79, that property must be considered to have been devoted as one entire property to the use of the public "on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return," and this means that if losses are incurred in the street railway they must be made up out of the electric rates. This results in requiring consumers of electricity to pay a portion of the cost of transportation of street car passengers, who may be an entirely different set of persons. Any such decision is contrary to the decision in the case of *Northern Pacific R. Co. v.*

*North Dakota*, 236 U. S. 585, and the other decisions which have followed it.

The principles contended for by petitioners have the sanction of other courts. *Mt. Carmel Pub. Util. Co. v. Public Utilities Comm.*, 297 Ill. 303; *Illinois Trust & S. Bank v. Doud*, 105 Fed. 123.

No binding effect can be given by this Court to the decision of the South Carolina court as to the effect of the consolidated charter or the existence or construction of alleged contracts, but this Court must reach its own independent conclusion thereon.

It is true that where a case involves both federal and non-federal questions, and a non-federal ground of decision has fair support, this Court will not inquire whether the decision of the state court is right or wrong (*Vandalia R. Co. v. Indiana*, 207 U. S. 359; *Enterprise Irrigation District v. Canal Co.*, 243 U. S. 157,) but if the non-federal ground is without substantial support, constitutional issues will not be permitted to be evaded. *Ward v. Love County*, 253 U. S. 17; *Leathe v. Thomas*, 207 U. S. 93.

Again, where property rights are claimed to have been interfered with, the nature and scope of those rights is a state question. *Sauer v. New York*, 206 U. S. 536; *Fox River Paper Co. v. Railroad Commission*, 274 U. S. 651. But where it becomes necessary to consider whether a State is depriving, or attempting to deprive, a litigant of property without due process of law in violation of the Fourteenth Amendment, and the question turns on the existence and terms of an asserted contract, this Court determines for itself whether there is a contract and what are its terms. *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 255; *Stearns v. Minnesota*, 179 U. S. 223; *Texas v. Eastern Texas R. Co.*, 264 U. S. 79, 86-87; *Georgia Ry. & Power Co. v. Decatur*, 262 U. S. 432; *Appleby v. New York*, 271 U. S. 364; *Louisiana Ry. & Nav. Co. v. New*

*Orleans*, 235 U. S. 164; *Douglas v. Kentucky*, 168 U. S. 488; *St. Paul Gas Co. v. St. Paul*, 181 U. S. 142; *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548; *New York Elec. Lines v. Empire City Subway Co.*, 235 U. S. 179.

The statute creating the Consolidated Railway and Electric Company did not create a unified franchise for street railway and electric service.

The evidence conclusively shows that the street railway system in question cannot be operated except at a devastating loss.

The statutes, ordinances and private contracts set up by the State do not justify a requirement that the street railway in question be operated.

*Mr. Irvine F. Belser*, with whom *Messrs. John M. Daniel*, Attorney General of South Carolina, *Cordie Page*, Assistant Attorney General, *Joseph L. Nettles*, City Attorney of Columbia, S. C., *H. N. Edmunds*, and *C. T. Graydon* were on the supplemental brief, for respondents.

PER CURIAM.

At the last term the writ of certiorari in this cause was dismissed for want of jurisdiction. 281 U. S. 537. A rehearing afterwards was ordered by the Court and the rehearing recently has been had. Upon this further consideration the Court adheres to the view that the writ of certiorari should be dismissed for want of jurisdiction, but the members of the Court differ in the reasons which lead to that decision:

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER concur in this disposition of the case, upon the rehearing, for the following reasons: The state court found that the petitioners here "did not make a bona fide effort to make the street railway business a success," but planned to discontinue it and pursued a course tend-

ing to depress the business and make it unremunerative; that "if the street car system had been properly maintained, as it could and should have been, the same would have been patronized by the public generally"; and that the "street railway system can be made to yield a fair return if properly managed and properly maintained." These findings, although opposed to part of the evidence, have such support in other parts that they should be accepted here. In the presence of such findings, so supported, it is apparent that on the present record petitioners are not in a position to maintain that enforced operation of the street railway system will be in contravention of rights secured by the due process of law clause of the Fourteenth Amendment. An essential basis in matter of fact for the right sought to be asserted under that constitutional provision is wanting; and as this is true regardless of whether the electric street railway franchise be independent or so unified with other franchises as to be interdependent, there is no present need to consider or determine its status in that regard.

The CHIEF JUSTICE, MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS and MR. JUSTICE STONE adhere to the views expressed in the opinion heretofore delivered. 281 U. S. 537.

MR. JUSTICE ROBERTS, considering himself disqualified, took no part in the decision of this case.