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Cover Page Footnote

Director, Legal Division, Federal Emergency Administration of Public Works.

THE CASE OF TIERNEY v. COHEN

E. H. FOLEY, JR.†

DRY as discarded Christmas trees are cases dealing with the interpretation and construction of statutes. The case of *Tierney v. Cohen*,¹ decided by the Court of Appeals of the state of New York on October 22, 1935 is no exception. The case deals solely with the power of the City of New York to finance the construction of a municipal self-liquidating electric plant, without recourse to taxation and without a pledge of the faith and credit of the City to the payment of the bonds proposed to be issued for such purpose.

The *Tierney Case* lays down no new rule of law. It pronounces no novel judicial doctrine. It enunciates no new method for interpreting or construing a statute. The holding of the case will stimulate no controversial discussion. The attention of the entire country was attracted, however, by the prospect of the nation's largest city constructing and operating a yardstick electric light, heat and power plant to be operated in direct competition with privately owned public service companies.

There are occasions when a court is called upon to construe a statute which is susceptible to more than one interpretation and when the court's own views on the public policy underlying the statute perhaps can not be wholly ignored. But an analysis of the situation in respect of the attempt by the City of New York to establish a municipal self-liquidating electric plant will reveal that the statutes here in question admitted of only one reasonable interpretation. Even Mayor LaGuardia refrained from questioning the soundness of the construction placed upon the statute by the Court of Appeals. The Mayor simply asserted that "The way is now open for a clarification of the law—a law to be written for the interests of the city and consumers and not for the utility companies."² It seems fair to say that the Mayor's vigorous prosecution of an appeal was dictated more by a desire to bring to public notice the inadequacy of the statute rather than to correct an erroneous judicial decision.

The General City Law contains this clear and unequivocal mandate: "Notwithstanding the provisions of any general, special or local law or ordinance a city shall have no power to issue obligations to which it has not pledged its faith and credit for payment of the principal and interest thereof."³

† Director, Legal Division, Federal Emergency Administration of Public Works.

1. Matter of Tierney v. Cohen, 268 N. Y. 464, 198 N. E. 225 (1935).

2. N. Y. Times, Oct. 23, 1935, at 2.

3. Art. 2-A, § 20 (5). This provision was added to the General City Law by N. Y. Laws 1933, c. 390.

The Local Law of the City of New York⁴ held invalid in the *Tierney Case* purported to create an "authority" and purported to authorize such "authority" to establish, construct and operate a municipal electric plant on a site to be provided and owned by the City of New York.⁵ It purported to provide for a plant with a capacity of 140,000 kilowatts to a cost not to exceed \$49,500,000 which would supply electricity to public and private consumers within the territorial limits of the City.⁶ It purported to give the "authority" power to issue bonds in an amount not to exceed \$49,500,000 which might be a lien upon the plant and the facilities (and the income thereof) acquired or constructed with the proceeds of the bonds.⁷

It defined the "authority" as "an agency or other instrumentality of the City of New York to perform the functions and carry out the purposes" described in the Local Law.⁸ In violation of the mandate of the General City Law, the Local Law then purported to provide expressly that the faith and credit of the City was not to be pledged to the payment of the bonds to be issued by the "authority"⁹ and that the City would never be liable for any deficit arising from the operation of the proposed electric plant.¹⁰

Could there have been any doubt that bonds issued by such an agency or instrumentality would be held to constitute obligations of the City to which under the General City Law the faith and credit of the City should have been pledged? Could there have been any doubt that the New York Supreme Court would grant an order of peremptory mandamus to compel the Board of Elections to remove from the ballot the question which the Local Law directed should be submitted to the electorate and that such order would be affirmed by the Appellate Division and by the Court of Appeals? Could there have been any doubt from the very beginning that under the procedure followed by the City, the people necessarily would be denied an opportunity to express themselves on the question of the construction of a municipal electric plant?¹¹

4. N. Y. City Local Laws 1935, No. 25.

5. *Id.* § 2.

6. *Id.* §§ 2, 3.

7. *Id.* § 4.

8. *Id.* § 1 (d).

9. *Id.* § 4.

10. *Id.* § 5.

11. Edward J. Tierney brought a proceeding against the Board of Elections of the City of New York for a peremptory mandamus order to compel the Board to remove from the ballots to be used at the next general election the question whether Local Act No. 25 should be approved. John A. Sherman sought a mandamus order against the Board of Elections, asking for a direction to the City Clerk to reframe the proposition for the submission of Local Act No. 25. The Sherman petition was denied at the same time as the Tierney petition was granted and at such time the two proceedings were consolidated. The Appellate Division, First Department, affirmed both orders of the supreme court, and

The City relied upon Article 14-A of the General Municipal Law¹² for the power to issue bonds of an "authority" to which the faith and credit of the City would not be pledged.¹³ This Article authorizes any county, city, town or village to construct and operate an electric light, heat and power plant within or without its territorial limits for the purpose of furnishing services to itself or its inhabitants.¹⁴ It requires that the proposed method of acquiring such a utility, together with the maximum and estimated costs thereof, the plan for financing the utility, and the method of furnishing the services thereof, be submitted for the approval of the electors of the county, city, town or village at a general or a special election.¹⁵ It permits the cost of such a utility to be financed in whole or in part by levying taxes or by the issuance of bonds in the same manner as taxes are levied or bonds are issued for any permanent improvements pursuant to existing law.¹⁶

Among the provisions of the Article is one under which a local law submitting a proposition to the people may provide "a different method or authority or agency" for the purpose of constructing the utility. This language was the cornerstone of the City's case.¹⁷ It is patent that this language was not intended to authorize the City to create an independent public corporation with power to borrow money and issue bonds upon its own credit. And when this language is considered in the light of the qualifying phrase contained in the same section "not inconsistent with the state law applicable thereto"¹⁸ the weakness of the City's case is brought into bold relief. It is obvious that a local law such as that enacted by the City of New York attempting to authorize an agency of the City to issue bonds without pledging the faith and credit of the City is inconsistent with the General City Law. One need not have been a prophet to have predicted that the Court of Appeals would hold that a local law inconsistent with the General City Law was not within the compass of the powers conferred upon the City of New York by Article 14-A of the General Municipal Law.

granted Tierney leave to appeal. Leave to appeal from the decision of the Appellate Division was not sought by Sherman. The New York Edison Company brought a taxpayer's action to restrain the city from spending any funds for the purpose of having the proposition submitted to a referendum or from acting in any other way under Local Act No. 25. A temporary injunction was granted. The order was affirmed by the Appellate Division, which granted leave to appeal. The appeals from the orders on the Tierney petition and the Edison petition were argued before the Court of Appeals at the same time.

12. N. Y. Laws 1934, c. 281.

13. N. Y. City Local Laws 1935, No. 25, § 6.

14. N. Y. GEN. MUN. LAW (1934) § 360 (2).

15. *Id.* § 360 (3), (4).

16. *Id.* § 362.

17. Brief for Appellants, pp. 28-46, Matter of Tierney *v.* Cohen, 263 N. Y. 464, 198 N. E. 225 (1935).

18. N. Y. GEN. MUN. LAW (1934) § 363.

Even if the General City Law had not expressly prohibited the issuance of bonds to which the faith and credit of the City were not pledged, bonds issued under Article 14-A of the General Municipal Law would, under Article 2 of the General Municipal Law, probably have been held to constitute a charge upon the taxing power of the City. In the latter Article the General Municipal Law provides that when for any reason any portion of the principal or interest due upon the bonds of a municipal corporation shall not have been paid "the same shall be assessed, levied and collected at the first assessment and collection of taxes by such corporation."¹⁹

It is a general and indisputable proposition of law that when the legislature has authorized a municipal corporation to exercise a power and has prescribed a particular manner for its exercise, the right to exercise such power in any other manner can not be implied.²⁰ The sole power vested in the City of New York to finance a municipal electric plant for the purpose of serving private as well as public consumers is found in Article 14-A of the General Municipal Law. The particular manner prescribed by the legislature for the exercise of this power is the issuance of bonds under the General Municipal Law which by its own terms affirmatively provides that bonds issued thereunder shall be a charge upon the taxing power.²¹ Attempts by municipal corporations in states other than New York to finance revenue-producing public improvements by the issuance of bonds payable solely from the income of such improvements, where the only method prescribed by the legislature for financing such improvements is by the issuance of bonds payable from taxes, likewise have been repulsed by the courts of those jurisdictions.²²

The want of power in the City of New York to construct a municipal electric plant on a self-liquidating basis to serve private as well as public consumers may be remedied easily by the legislature. The enabling legislation may take two forms. One form would be the creation of a Power Authority for the City analogous to the power authority of the state of New York.²³ That a portion of the act creating the Albany Light, Heat and Power Authority²⁴ has been recently held by the Court

19. N. Y. GEN. MUN. LAW (1909) § 7.

20. 1 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §§ 237-239; 1 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1928) § 370; see Tooke, *Construction and Operation of Municipal Powers* (1933) 7 TEMPLE L. Q. 267.

21. See note 19, *supra*.

22. See for example *Kansas Power Co. v. Fairbanks, Morse & Co.*, 45 P. (2d) 872 (Kan. 1935); *State ex rel. City of Blue Springs v. McWilliams*, 74 S. W. (2d) 363 (Mo. 1934); *Van Eaton v. Town of Sidney*, 211 Iowa 986, 231 N. W. 475 (1930); *Hesse v. City of Watertown*, 57 S. D. 325, 232 N. W. 53 (1930).

23. N. Y. Laws 1931, c. 772.

24. N. Y. Laws 1935, c. 842.

of Appeals to be unconstitutional²⁵ need cause no concern. The Albany Authority Act failed to take into account the sharp distinction which the New York courts have drawn between a civil subdivision of the state and an independent public corporation.²⁶ The line of cleavage had recently been drawn by the Court of Appeals in sustaining the constitutionality of the legislation creating the Buffalo Sewer Authority²⁷ in *Robertson v. Zimmerman*.²⁸ Another form which the legislation might take would be the delegation of power to the City to construct and finance on a self-liquidating basis a municipal electric plant to serve private as well as public consumers. The General Municipal Law in Article 14-C²⁹ confers power upon counties, towns, cities and villages to construct revenue-producing undertakings of many types, not including, however, electric plants.³⁰ This Article confers power to finance such undertakings by the issuance of bonds payable solely from the revenues of such undertakings,³¹ and provides that the holders of such bonds shall have no right to compel any exercise of the taxing power to pay the principal or interest thereof.³² A simple amendment to the definition of the term "undertaking" in that Article to include electric plants would suffice. An equally effective solution would be an amendment to the Greater New York Charter to authorize the construction and financing of a light, heat and power plant as a self-liquidating enterprise. Such an amendment might be made by inserting a chapter in the Greater New York Charter substantially in the form of Article 14-C of the General Municipal Law.

If, in enacting the local law held invalid in *Tierney v. Cohen*, the proponents of the municipal electric plant had merely intended to establish a yardstick whereby the cost of the production and transmission of electric energy could be measured accurately for purposes of comparison with the cost alleged by the public service companies, it is difficult to understand why such a method was employed. Under existing law the City has ample authority to construct and finance a municipal electric plant to serve itself (but not private consumers) without submitting the proposition to a city-wide election.

The General City Law in Article 2-A specifically authorizes all cities to construct "lighting systems, for lighting streets, public buildings and

25. The act creating the Albany Light, Heat and Power Authority was held unconstitutional in part in *Gaynor v. Marohn*, 268 N. Y. 417, 198 N. E. 13 (1935).

26. *Ibid.*; cf. *Village of Kenmore v. County of Erie*, 252 N. Y. 437, 169 N. E. 637 (1930); *Town of Amherst v. County of Erie*, 260 N. Y. 361, 183 N. E. 851 (1933).

27. N. Y. Laws 1935, c. 349.

28. 268 N. Y. 52, 196 N. E. 740 (1935).

29. N. Y. Laws 1935, c. 525.

30. N. Y. GEN. MUN. LAW (1935) § 401 (a).

31. *Id.* § 403.

32. *Id.* § 409.

public places."³³ The construction of an electric light plant to serve the City's agencies and departments is therefore a proper city purpose. The Greater New York Charter in Section 169-c specifically authorizes the City by resolution of the Board of Estimate and Apportionment to issue bonds for the purpose of financing the construction of any improvement which is a city purpose.³⁴ The only limitation is that the improvement must be included in the federal public works program.³⁵ Although such bonds would constitute debts of the City, nevertheless, the City has ample additional borrowing power under the Constitution.³⁶

In conclusion, therefore, it should be emphasized that the decision in the *Tierney Case* does not preclude either:

- (1) The issuance by the City of New York, without a vote of the people, of bonds pledging its faith and credit to finance a municipal power plant for its own uses and purposes; or
- (2) The issuance by the City of New York, with a vote of the people, of bonds pledging its faith and credit to finance an electric power plant for private as well as public consumers.

All that the *Tierney Case* decides is that the City of New York can not issue bonds to finance a power plant for public and private consumers, under existing law, payable solely from the earnings of the plant. There are no constitutional barriers in the way of appropriate enabling legislation.

33. N. Y. GEN. CITY LAW (1927) § 20 (7).

34. N. Y. LAWS 1934, c. 349, as amended by N. Y. LAWS 1934, c. 871.

35. N. Y. LAWS 1934, c. 871, § 1.

36. N. Y. CONST. art. VIII, § 10. As of the close of business Oct. 1, 1935, the city had a net debt incurring power of \$317,169,137 of which \$138,044,406 had been reserved for specific purposes, leaving a total of \$179,124,731 as the city's unreserved margin of debt incurring power available for additional specific authorizations for any municipal purpose. See Statement of the Constitutional Debt Incurring Power of the City, issued by the Comptroller of City of New York, Aug. 30, 1935, supplemented by Statement of Oct. 25, 1935.

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