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Some Observations on the New York City Transit Authority

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interest in the relationship of the parties.⁷² This recognition of the decree as terminating the marital status of the parties is necessary for the benefit of the federal union.⁷³ Nevertheless, since the same considerations are not applicable to the *incidents* of marriage,⁷⁴ Section 1170-b appears to escape constitutional censure.

In order to guarantee the ex-wife the maximum economic protection provided for by Section 1170-b, she should be permitted to obtain the authorized support even if the New York courts cannot obtain jurisdiction over the husband or his property. It is submitted that this might be accomplished by amending the Uniform Support of Dependents Act to include in its definition of persons liable for support, an ex-husband, thereby providing that notwithstanding the fact that he has obtained in any state or country a final *ex parte* decree of divorce, he shall be deemed legally liable for the support of his former wife.



SOME OBSERVATIONS ON THE NEW YORK CITY TRANSIT AUTHORITY

Development of New York City Transportation Facilities

In 1827, Abraham Brower offered for the price of one shilling to transport passengers in a specially constructed carriage along Broadway as far as Bleeker Street, thus instituting the first urban transportation system in the United States.¹ Several years later horse-drawn omnibuses carried passengers from the Battery to Bond Street for twelve and one-half cents.² By 1835, over one hundred of these omnibuses regularly transported passengers in New York City;³ by 1855, 593 omnibuses were licensed to carry passengers over twenty-seven established routes.⁴ Despite this phenomenal expansion and widespread popularity, the omnibus was soon outmoded. Competition from a newly developed method of transportation—the

⁷² Since divorce jurisdiction depends on control over the marital res, the fora of both the husband and wife have concurrent power to grant a decree. The forum of the wife, however, has a greater interest in the incidents of the marriage, especially support, inasmuch as it may be called upon to support the wife should the husband fail to perform his duty.

⁷³ See *Esenwein v. Commonwealth*, 325 U. S. 279, 282 (1948). This recognition of the divorce decree will avoid bigamous relationships and the stigmatization of the innocent children of the remarriage.

⁷⁴ See *Esenwein v. Commonwealth*, *supra* note 73; *Russo v. Russo*, 62 N. Y. S. 2d 514, 522 (N. Y. City Ct. 1946).

¹ MILLER, *FARES, PLEASE!* 1 (1941).

² *Id.* at 5.

³ *Ibid.*

⁴ Hecker, *History of Urban Transportation* in *PRINCIPLES OF URBAN TRANSPORTATION* 1 (Mossman ed. 1951).

street railway—had begun in 1832.⁵ These horse-drawn cars, operating on steel rails laid in the street, carried riders along the Bowery from Prince Street to Fourth Avenue at Union Place for twelve and one-half cents.⁶ That street railways were preferred as a means of municipal transportation became apparent during the 1850's when routes were established on Third, Sixth and Eighth Avenues.⁷

Just as the omnibus bowed to the street railway, so too did the street railway make way for a more modern method of municipal transportation. Although the street railway survived until the 1890's,⁸ it became increasingly evident not only that the motive power supplied by horses was insufficient to attain greater speeds, but also that the traffic congestion problems which had arisen in the city were increased by the use of these lumbering vehicles. Consequently, agitation for statutory authorization to construct subway, and, to a lesser extent, elevated transportation systems resulted in the amendment of the Railway Act of 1850 to permit rapid transit.⁹ From that time forward, engineers with inventive genius proposed unique systems of rapid transit.¹⁰ However, only conventional railroad cars, set on rails elevated above the street, and using cable or steam as the motive power, were employed.¹¹

The 1870's witnessed the ascendancy of rapid transit as the primary method of mass transportation in New York City.¹² But high construction and operating expenses acted as a deterrent to its development. These expenses are justified only where the volume of passengers is sufficient to make the operation of rapid transit systems economically feasible.¹³ The introduction of electricity as motive power, the increasing population of the city, and the concentration of business in centrally located areas gave impetus to the demand for subways. Private capital, however, was lacking. Under such circumstances, the Rapid Transit Act, enacted in 1891, permitted cities of over one million inhabitants to construct such railroads at their own expense.¹⁴ Within a few years, however, an action was instituted to enjoin the mayor and other officials of New York from tak-

⁵ *Ibid.*

⁶ *Ibid.*; MILLER, FARES, PLEASE! 20 (1941).

⁷ *Id.* at 12.

⁸ *Id.* at 34.

⁹ *Id.* at 71.

¹⁰ See, e.g., SPEER, SOLUTION OF RAPID TRANSIT FOR NEW YORK CITY (1875). The endless train, which was suggested by Mr. Speer, has, in modern dress, been offered as a replacement for the Grand Central Shuttle. N. Y. Times, May 14, 1952, p. 29, col. 1.

¹¹ Hecker, *History of Urban Transportation* in PRINCIPLES OF URBAN TRANSPORTATION 5 (Mossman ed. 1951).

¹² *Ibid.*

¹³ See COMMITTEE REPORT, CITY PASSENGER TRANSPORTATION, CHAMBER OF COMMERCE OF U. S. 10 (1932).

¹⁴ Laws of N. Y. 1891, c. 4, as amended, Laws of N. Y. 1894, c. 752, § 7.

ing advantage of this law. The Court of Appeals, in affirming a dismissal of the complaint, stated that the expending of monies was for a "city purpose" and was permissible, although the subway would be leased to a private corporation for its operation.¹⁵ Legal objections having thus been removed, construction progressed on New York City's first subway, which began carrying passengers in 1904.¹⁶

Although the city owned and financed the construction of many miles of subways, it did not operate any rapid transit facilities until the Independent System was constructed in 1932.¹⁷ The operation of this system was entrusted to a Board of Transportation.¹⁸ Municipal ownership and operation of the city's rapid transit facilities was urged in the previous decade,¹⁹ and had received legislative sanction,²⁰ but the assumption of ownership of the facilities of the private companies could not be effected until constitutional prohibitions were overcome.²¹ Therefore, to finance the purchase of the rapid transit systems—one of which was in receivership²²—an amendment to the New York State Constitution was ratified, exempting the cost of the purchase of the transit facilities from New York City's constitutional debt limit.²³ The private companies and the city reached an agreement which was approved by the Transit Commission,²⁴ and municipal operation of the consolidated systems began in 1940.²⁵ The city's venture into the field of operation of transit facil-

¹⁵ *Sun Printing & Pub. Ass'n v. Mayor of New York*, 152 N. Y. 257, 46 N. E. 499 (1897).

¹⁶ Hecker, *History of Urban Transportation* in PRINCIPLES OF URBAN TRANSPORTATION 5 (Mossman ed. 1951).

¹⁷ N. Y. Times, Sept. 10, 1932, p. 1, col. 1.

¹⁸ N. Y. RAPID TRANSIT LAW § 32.

¹⁹ N. Y. Times, Oct. 26, 1920, p. 3, col. 6.

²⁰ N. Y. PUB. SERV. LAW § 122 *et seq.* (now incorporated in N. Y. RAPID TRANSIT LAW).

²¹ See CUTHELL, REPORT OF SPECIAL COUNSEL TO THE TRANSIT COMMISSION ON PROPOSED PLAN FOR ACQUISITION AND UNIFICATION UNDER PUBLIC OWNERSHIP AND CONTROL OF THE BROOKLYN-MANHATTAN TRANSIT SYSTEM 12 (1939) (hereinafter referred to as REPORT OF COUNSEL ON PROPOSED BMT UNIFICATION PLAN).

²² For disposition of funds paid to the bankrupt Interborough Rapid Transit System by the city, see PLAN AND AGREEMENT FOR ACQUISITION AND UNIFICATION UNDER PUBLIC OWNERSHIP AND CONTROL OF THE INTERBOROUGH RAPID TRANSIT SYSTEM 22 (1939) (hereinafter referred to as the IRT UNIFICATION PLAN).

²³ N. Y. CONST. Art. VIII, § 7(C) (1938). Under this amendment, city expenditures for rapid transit facilities up to \$300,000,000 were excluded from its constitutional debt limit.

²⁴ The BMT plan was approved on June 27, 1939, and included the purchase price of \$175,000,000. PLAN AND AGREEMENT FOR ACQUISITION AND UNIFICATION UNDER PUBLIC OWNERSHIP AND CONTROL OF THE BROOKLYN-MANHATTAN TRANSIT SYSTEM 19 (1939) (hereinafter referred to as the BMT UNIFICATION PLAN). The IRT plan was approved soon after and included the purchase price of \$151,248,187.18. IRT UNIFICATION PLAN.

²⁵ The BMT transferred its properties on June 1, 1940; the IRT on June 12, 1940. REPORT, BOARD OF TRANSPORTATION 1 (1940). With the unification

ities ended, at least temporarily, when the rapid transit and surface transit systems owned by the city were leased²⁶ to the New York City Transit Authority²⁷ this past year.

The Problem

In the area of mass municipal transportation, economics and politics are bedfellows. To inhabitants of large cities, mass transportation facilities are a necessity for reaching places of employment and amusement. The widescale use of automobiles in a large city would further complicate traffic problems.²⁸ In addition, such transportation is unavailable to many persons in the city.²⁹ It becomes the obligation of the government, therefore, to ensure adequate, safe and rapid transportation facilities for the city's inhabitants. Where the operation or regulation of transit facilities, which are constantly used by millions, devolves upon the local government, the management of the system becomes a politically significant factor. It is easy to see, therefore, why elected municipal officials would prefer to meet a transit deficit by a tax on real estate, rather than by an increase of fares. Since the value of property is enhanced by the availability of transportation facilities,³⁰ this viewpoint is not without justification. However, elected officials cannot realistically continue to charge transit deficits to real estate, particularly in periods of inflation.

By statutory authority³¹ which transferred to local officials the power to increase fares on municipal systems, the cost of a ride was raised to ten cents in 1948.³² The inadequacy of the increased fare to overcome continually rising transit costs was soon apparent.³³ The city's financial situation, as a result, was rapidly becoming precarious. The state rejected a city appeal for outright financial aid,

effected, however, and the assumption of claims against the private companies by the city, many persons were prevented by Section 289 of the Civil Practice Act from obtaining necessary testimony since a corporation could not be examined through a former officer. The legislature, therefore, in 1941 amended that section to permit the taking of depositions where the former officers of a corporation had become officers of the transferee. See PRASHKER, *NEW YORK PRACTICE* 537 (2d ed. 1951).

²⁶ See AGREEMENT OF LEASE BETWEEN THE CITY OF NEW YORK AND THE NEW YORK CITY TRANSIT AUTHORITY 2 (1953) (hereinafter referred to as the TRANSIT AUTHORITY AGREEMENT).

²⁷ N. Y. PUB. AUTH. LAW §§ 1800-1821, as amended, Laws of N. Y. 1953, cc. 880, 881.

²⁸ See Jordan, *Is Urban Transportation in Danger of Collapse?*, 50 P. U. FORT. 903 (1952).

²⁹ Wright, *Problems of Transit Finance*, 51 P. U. FORT. 611-612 (1953).

³⁰ Nehemkis, *The Public Authority: Some Legal and Practical Aspects*, 47 YALE L. J. 14, 33 (1937).

³¹ N. Y. RAPID TRANSIT LAW § 36.

³² REPORT, BOARD OF TRANSPORTATION 82 (1949).

³³ N. Y. Times, Nov. 13, 1952, p. 1, col. 4.

but granted the city increased taxing powers on condition that operation of the municipally owned transportation system be turned over to the Transit Authority.³⁴

Summary and Analysis of the Law

The New York City Transit Authority³⁵ is a public benefit corporation created by law to operate the transit facilities owned by the City of New York.³⁶ Pursuant to this law, the city has leased to the Authority its transit facilities for a term of ten years.³⁷ The Authority consists of five members,³⁸ who receive no compensation for their services.³⁹ All employees of the former Board of Transportation are now under the jurisdiction of the Authority.⁴⁰ That body is empowered to operate, construct, improve and maintain municipally owned transit facilities.⁴¹ Since these facilities must be maintained on a self-sustaining basis,⁴² the Authority has the power to fix rates.⁴³ It is also empowered to draw up a plan to dispose of municipally owned omnibus facilities to private interests.⁴⁴

To finance improvements, the Authority was given a loan of ten million dollars by the city,⁴⁵ and, in addition, it may issue short-term notes in anticipation of revenues.⁴⁶ Where the expenditures are for capital costs not formerly listed as operating expenses under municipal control, the Authority may expend up to five million dollars annually, to be supplied by the city, without prior approval of the Board of Estimate.⁴⁷ Any expenditures for capital improvements above that amount must meet with the consent of the Board.⁴⁸

Since the Authority is a public benefit corporation, it has a separate legal identity, and can sue and be sued.⁴⁹ Previously tort actions concerning the transit system were generally filed against the

³⁴ See Laws of N. Y. 1953, cc. 203, 205, 208.

³⁵ N. Y. PUB. AUTH. LAW §§ 1800-1821 (Laws of N. Y. 1953, cc. 201, 202, as amended, Laws of N. Y. 1953, cc. 880, 881).

³⁶ *Id.* § 1802(1).

³⁷ TRANSIT AUTHORITY AGREEMENT 2.

³⁸ N. Y. PUB. AUTH. LAW § 1801(1).

³⁹ *Id.* § 1801(4). Nor may the members of the board hold any other compensated office in either the city or the state administrations. *Id.* § 1801(3).

⁴⁰ *Id.* § 1810(1). The appointment, promotion and continuance of employment of employees of the Authority are still regulated by the Civil Service Law and the municipal civil service commission. *Id.* § 1810(2).

⁴¹ *Id.* § 1804(8), (15). Generally, contracts let by the Authority must be by public bidding. *Id.* § 1809.

⁴² *Id.* § 1802(1).

⁴³ *Id.* § 1805.

⁴⁴ *Id.* § 1806.

⁴⁵ *Id.* § 1803(2) (d); TRANSIT AUTHORITY AGREEMENT 8.

⁴⁶ N. Y. PUB. AUTH. LAW § 1807.

⁴⁷ *Id.* § 1803(1) (b), as amended, Laws of N. Y. 1953, c. 880.

⁴⁸ *Ibid.*

⁴⁹ *Id.* § 1804(1).

City. Nevertheless, a plaintiff suing the Authority in tort must still comply with Section 50-e of the General Municipal Law.⁵⁰ In addition, the complaint must allege that notice of the claim has been filed with the Authority for at least thirty days and no settlement has been reached.⁵¹ In any event, all actions must be commenced within one year from the occurrence of the injury.⁵²

Legal Considerations

The constitutionality of the Transit Authority Act was tested soon after it had been enacted in the case of *Salzman v. Impelliteri*.⁵³ In this taxpayer's action to restrain the Mayor and the Board of Estimate from appointing members to the Authority and from entering into an agreement to transfer rapid transit facilities to that body, the city's cross-complaint sought a judgment declaring the act unconstitutional. One argument offered by the city was that the New York State Constitution prohibited the city from giving money or property or lending credit to a public or private corporation. It further contended that the home rule provisions of the Constitution were violated. The Court of Appeals, in a per curiam opinion, stated that since the statute was permissive in nature, and since the state has a substantial concern in municipal transportation, the legislation was not on its face unconstitutional.⁵⁴

That the city may expend money for the Transit Authority seems well settled. Cases have repeatedly come before the Court of Appeals in which objections were made to the expenditures of municipal monies for the construction of rapid transit facilities. Each time the court pointed out that no constitutional mandates were contravened, although the completed lines were to be leased to private operating companies, since the city was to retain ownership of the facilities.⁵⁵ An analogous situation involving a public corporation was presented to the court in *Gaynor v. Marohn*.⁵⁶ In that case, the constitutionality of a law creating a light, power and heat district for

⁵⁰ *Id.* § 1812(2). There is also a provision for continuance against the Authority of actions pending against the city. *Id.* § 1818(2). However, the city has covenanted to be responsible for such claims. TRANSIT AUTHORITY AGREEMENT 8.

⁵¹ N. Y. PUB. AUTH. LAW § 1812(1).

⁵² *Id.* § 1812(2).

⁵³ 305 N. Y. 414, 113 N. E. 2d 543 (1953).

⁵⁴ The dissenting opinion stated that the legislation could not be justified on the theory that the state has a substantial interest in the city's transportation facilities and pointed out that never before has the state so intervened and assumed control of municipal matters. Finally, the opinion questioned whether the statute was entirely permissive since the city, by failing to accept the Transit Authority, would be deprived of taxes.

⁵⁵ See note 91 *infra*.

⁵⁶ 268 N. Y. 417, 198 N. E. 13 (1935).

Albany county was tested. The Court of Appeals, stating that such utilities were a state concern, indicated that the cost of erecting and maintaining these utilities may be charged to the area served.

However, it would seem that municipal home rule in New York is in need of more accurate definition. Historically, the concept of home rule may be found in the Roman Empire where many municipalities were granted certain privileges of local self-government.⁵⁷ Although municipal government in Great Britain closely parallels the Roman municipal organization, authorities are generally agreed that the system of local government as developed in English constitutional history had independent Anglo-Saxon origins.⁵⁸ During feudal times, barons in England enfranchised municipalities upon their lands and permitted them rights of local government.⁵⁹ So firmly was this idea of municipal self-rule implanted upon the minds of the English that the Magna Carta contained provisions preserving these local rights and liberties.⁶⁰ It is, of course, from this English concept of local self-government that municipal home rule stems.

In the period following the American Revolution, the problem of local self-government was negligible.⁶¹ New York was primarily concerned with establishing a stable and firm government. As industry developed and population increased, however, each locality had its own particular problems, which were not generally related to the interest of the state.⁶² The first attempt, therefore, to redefine the powers of the state in reference to municipalities was found in the Constitution of 1894. In that organic act, laws were classified as general and special, and cities were given the power to veto special legislative enactments relating to their property, affairs or government.⁶³

The principle of city home rule, which was considered an inherent right in New York,⁶⁴ found affirmative expression in the adop-

⁵⁷ 1 McQUILLIN, MUNICIPAL CORPORATIONS § 1.31 (3d ed. 1949).

⁵⁸ 1 *id.* § 1.56.

⁵⁹ 1 *id.* § 1.66.

⁶⁰ MAGNA CARTA § 13. "*Et civitas Londonarium habeat omnes antiquas libertates et liberas consuetudines suas, tam per terras, quam per aquas. Praeterea volumus et concedimus quod omnes aliae civitates, et burgi, et villae, et portus, habeant omnes libertates et liberas consuetudines suas.*"

⁶¹ N. Y. STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO HOME RULE AND LOCAL GOVERNMENT 2 (1938).

⁶² *Ibid.*

⁶³ N. Y. CONST. ART. XII, § 2 (1894). This section classified cities according to population. The legislature was permitted to enact general laws (those affecting all cities of one or more classifications) regarding their government, property or affairs. Special city laws, upon passage by the legislature, had to be submitted to the mayor of the particular city for approval. Where the city disapproved the bill, or failed to return it within fifteen days, the same session of the legislature could pass the bill again and, subject to the governor's approval, it would become effective.

⁶⁴ See *People v. Tax Comm'rs*, 174 N. Y. 417, 431, 67 N. E. 69, 71 (1903),

tion of a constitutional amendment in 1923 which not only forbade the legislature from enacting *special* laws relating to the property, affairs or government of a city,⁶⁵ but also enumerated the subjects over which the city had legislative power.⁶⁶ Unfortunately, that which was denied to the legislature was not specifically reserved to the cities, leaving a legislative "no man's land,"⁶⁷ and paving the way for judicial demarcation of the battle line. This much, however, was evident. The legislature could, by *general* law, regulate the property, affairs and government of the city.⁶⁸ It could, either by *general* or *special* laws, regulate cities in matters other than their property, affairs or government.⁶⁹ It could, by *special* law, regulate the property, affairs or government of a city under the emergency provisions of the constitution.⁷⁰

The courts, then, were confronted with two questions regarding home rule as far as the state legislature was concerned: Was this act a special law? Does this act apply to the property, affairs or government of a city?

The test to determine whether or not a law is special is provided in the constitution.⁷¹ Thus, if a particular city is named,⁷² or if less than all the cities of a class are encompassed by the law,⁷³ it is generally considered a special law. However, a law general in its terms, but local in its effect, was also held to violate home rule provisions.⁷⁴ Warning of the ever-present danger of nullifying the

aff'd, 199 U. S. 1 (1904); see PRASHKER, MUNICIPAL CORPORATIONS 14 (1927). *But cf.* Trenton v. New Jersey, 262 U. S. 182, 187 (1923).

⁶⁵ N. Y. CONST. Art. XII, § 2 (1894) (as amended in 1923).

⁶⁶ *Id.* Art. XII, § 3. This section gave cities power to enact laws relating to: (1) its officers and employes; (2) transaction of its business; (3) disposition of claims against it; (4) acquisition and regulation of its streets and property; (5) employment conditions of employes of any contractor performing work for the city; (6) the government and regulation of its inhabitants; (7) the protection of the property, health and safety of its inhabitants.

⁶⁷ N. Y. STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO HOME RULE AND LOCAL GOVERNMENT 23-24 (1938).

⁶⁸ See PRASHKER, MUNICIPAL CORPORATIONS 15 (1927).

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ N. Y. CONST. Art. IX, § 11. "The legislature shall act in relation to the property, affairs or government of any city only by general laws, *which shall in terms and in effect apply alike to all cities.* . . ." (emphasis added). This section is, in substance, former Section 2 of Article XII of the New York Constitution which was added in 1923.

⁷² Ops. N. Y. ATT'Y GEN. 263 (1921).

⁷³ Holland v. Bankson, 290 N. Y. 267, 49 N. E. 2d 16 (1943); Osborn v. Cohen, 272 N. Y. 55, 4 N. E. 2d 289 (1936) (by implication). *But cf.* Adler v. Deegan, 251 N. Y. 467, 472, 167 N. E. 705, 709 (1929) (concurring opinion) (The legislature is not precluded ". . . from making a proper classification, based on population . . . although only a single city is . . . affected. . ."); McAneny v. Board of Estimate, 232 N. Y. 377, 392, 134 N. E. 187, 192 (1922); Admiral Realty Co. v. City of New York, 206 N. Y. 110, 140, 99 N. E. 241, 250 (1912).

⁷⁴ Matter of the Mayor of New York (Elm St.), 246 N. Y. 72, 158 N. E. 24 (1927). The court pointed out that prior to the 1923 amendments, the form

Home Rule Article by such laws, Judge Cardozo stated that "[a]n act is not general when the class established by its provisions is at once so narrow and so arbitrary that duplication of its content is to be ranked as an unexpected freak of chance. . . ." ⁷⁵

The second question presented to the courts is not so easily solved. The constitutional amendment of 1923 not only failed to reserve exclusively to the municipality the power to legislate concerning its property, affairs or government, but also failed to define the terms in its grant to the state. Since these same words—property, affairs or government—had appeared in the 1894 constitution, the courts continued to give them the same narrow interpretation after the Home Rule Article had been adopted as before.⁷⁶ In *Adler v. Deegan*,⁷⁷ the Court of Appeals, in upholding the constitutionality of the Multiple Dwelling Law, rejected a broad definition of these terms. The state legislature knew and realized, the court observed, that health measures were state affairs and did not come within the constitutional prohibition.⁷⁸ The test to determine whether a law refers to the property, affairs or government of a city was suggested by Judge Cardozo:⁷⁹ If the subject of the legislation be in a substantial degree a matter of state concern, the legislature may act, though intermingled with it are concerns of the locality. In cases where both the city and the state are concerned, the city may act until the state intervenes. On the other hand, Judge Lehman's dissent⁸⁰ maintains that since the people have divided the police power of the state between the legislature and the municipality, the true test should be whether the subject matter *relates* to the property, affairs or government of the city. If it does, the state legislature may act in that field only by general law or by emergency measures.

Under the theory that the state has a substantial concern in the subject matter, the courts have also sustained state legislation redefining municipal boundaries;⁸¹ providing unemployment benefits by levy of a local tax;⁸² and regulating ticket brokers,⁸³ light and power

of the enactment, not the substance, was considered. Henceforth, however, the test would be whether the law was local in effect.

⁷⁵ *Id.* at 78, 158 N. E. at 26.

⁷⁶ N. Y. STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO HOME RULE AND LOCAL GOVERNMENT 38 (1938).

⁷⁷ 251 N. Y. 467, 167 N. E. 705 (1929).

⁷⁸ *Id.* at 476, 167 N. E. at 707.

⁷⁹ *Id.* at 491, 167 N. E. at 714 (concurring opinion); see OPS. N. Y. ATT'Y GEN. 316 (1942).

⁸⁰ See *Adler v. Deegan*, *supra* note 77 at 495, 167 N. E. at 715 (dissenting opinion).

⁸¹ *City of New York v. Village of Lawrence*, 250 N. Y. 429, 165 N. E. 836 (1929).

⁸² *N. Y. Steam Corp. v. City of New York*, 268 N. Y. 137, 197 N. E. 172 (1935).

⁸³ *Kelly-Sullivan, Inc. v. Moss*, 174 Misc. 1098, 22 N. Y. S. 2d 491 (Sup. Ct.), *aff'd*, 260 App. Div. 921, 24 N. Y. S. 2d 984 (1st Dep't 1940).

facilities,⁸⁴ sewers,⁸⁵ and transportation systems⁸⁶ of particular municipalities. On the other hand, the regulation by the state of working hours for firemen has been held primarily of local concern, and passage of a special law without fulfilling the constitutional conditions precedent is violative of home rule.⁸⁷

Much of the major litigation concerning home rule provisions has centered about New York City transit facilities. Prior to the adoption of the 1923 Home Rule Article, the Court of Appeals held that laws pertaining to the transit facilities in cities of over one million inhabitants—while in effect applying only to New York City—are, nevertheless, general laws, and buttressed their opinions by reiterating that rapid transit is considered a state affair.⁸⁸ In one of these cases, however, where the statute provided that the Board of Estimate provide funds requested by the State Transit Commission, Judge Cardozo, although concurring in the result, reserved his judgment as to how far the City of New York may be divested of its rights in railroads which it owns, without conformity to Article XII, Section 2 of the Constitution.⁸⁹ After the Home Rule Article had been adopted, New York City passed a local law authorizing the establishment of a municipal bus line. In *Browne v. City of New York*,⁹⁰ the Court of Appeals thwarted that attempt, observing that there was no specific delegation of such power in the home rule grant to cities.

The 1938 Constitution of New York, which exempted the purchase price of rapid transit facilities from the city's constitutional debt limit, also changed the home rule provisions. Under these new

⁸⁴ *Gaynor v. Marohn*, 268 N. Y. 417, 198 N. E. 13 (1935) (by implication).

⁸⁵ *Robertson v. Zimmermann*, 268 N. Y. 52, 196 N. E. 740 (1935); *Smith v. Zimmermann*, 268 N. Y. 491, 198 N. E. 369 (1935).

⁸⁶ See note 88 *infra*.

⁸⁷ *Holland v. Bankson*, 290 N. Y. 267, 49 N. E. 2d 16 (1943); *Osborn v. Cohen*, 272 N. Y. 55, 4 N. E. 2d 289 (1936).

⁸⁸ *McAneny v. Board of Estimate*, 232 N. Y. 377, 134 N. E. 187 (1922); *Admiral Realty Co. v. City of New York*, 206 N. Y. 110, 99 N. E. 241 (1912). In the *McAneny* case, the constitutionality of the act creating the Transit Commission was contested. By that law, the Commission was given the power to requisition funds from the Board of Estimate. The Board refused to honor the requisition; hence, the Commission, under statutory authority, petitioned for an order by the Appellate Division directing payment. The order was granted, and it is from that order that the Board of Estimate appealed. The Court of Appeals, in affirming, commented that "[a]ll of the legislation bearing on the subject has for many years recognized that a duty rested upon the Legislature to provide for rapid transit . . . a function which the state, in its sovereign capacity, had a right to exercise . . . since it concerned the whole state. . . ." *Id.* at 394, 134 N. E. at 193; see *McCabe v. Voorhis*, 243 N. Y. 401, 414, 153 N. E. 849, 852 (1926).

⁸⁹ See *McAneny v. Board of Estimate*, *supra* note 88 at 395, 134 N. E. at 193 (concurring opinion).

⁹⁰ 241 N. Y. 96, 149 N. E. 211 (1925).

amendments, cities not only were specifically given the right to enact laws relating to their property, affairs or government, but also were given the power to adopt local laws relating to the ownership and operation of its transit facilities.⁹¹ Since that amendment, courts have held that rapid transit continues to be a state affair,⁹² and, therefore, a proper subject of state legislation.

Although the courts have expressed approval of the concept of home rule for cities, they have nevertheless greatly restricted it. The disappearance of legislative abuse, the difficulty in establishing a uniform measure of home rule for cities of varying sizes and interests, and doubt as to the competency of local administrators without some state supervision are some reasons why the courts have interpreted home rule provisions narrowly.⁹³ Then, too, as the court pointed out in *City of New York v. Village of Lawrence*,⁹⁴ the city is merely a creature of the state by which it may be modified or abolished. Nor will the courts hesitate to sacrifice home rule in the face of socially desirable legislation, thus reaffirming the state's right to exercise its police power even though the subject matter concerns the property, affairs or government of a municipality.

It is unfortunate that while constitutional amendments attempted to liberalize municipal home rule, the courts have tenaciously adhered to a rather narrow interpretation of the concept. Judge Cardozo once said that

Home Rule for cities, adopted by the people with much ado and after many years of agitation, will be another Statute of Uses, a form of words and little else, if the courts in applying the new tests shall ignore the new spirit that dictated their adoption. The municipality is to be protected in its autonomy against the inroads of evasion.⁹⁵

How rapidly are the courts fulfilling this prophecy?

⁹¹ N. Y. CONST. Art. IX, § 12 (1938). "Every city shall have the power to adopt and amend local laws not inconsistent with the constitution and laws of the state relating to its property, affairs or government. Every city shall also have the power to adopt and amend local laws not inconsistent with this constitution and laws of the state, and whether or not such local laws relate to its property, affairs or government, in respect to the following subjects: . . . the ownership and operation of its transit facilities. . . ."

⁹² *Salzman v. Impelliteri*, 305 N. Y. 414, 113 N. E. 2d 543 (1953); see *Connolly v. Stand*, 192 Misc. 872, 875, 83 N. Y. S. 2d 445, 448 (Sup. Ct.), *aff'd mem.*, 274 App. Div. 877, 82 N. Y. S. 2d 922 (1st Dep't), *aff'd*, 298 N. Y. 658, 82 N. E. 2d 399 (1948).

⁹³ N. Y. STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO HOME RULE AND LOCAL GOVERNMENT 36 (1938).

⁹⁴ 250 N. Y. 429, 165 N. E. 836 (1929).

⁹⁵ *Matter of the Mayor of New York (Elm St.)*, 246 N. Y. 72, 76, 158 N. E. 24, 25 (1927).

Comparison with Other Transit Facilities

Municipal transit facilities in the United States may be classified according to operation into three groups: those operated by private companies with governmental regulation; those operated by municipal corporations; and those operated by public benefit corporations. Private operation of municipal transit facilities has been the traditional method—and the method which the American Chamber of Commerce advocates.⁹⁶ But private capital is not attracted to municipal transportation as a sound investment since the rate of return on the amount invested—if there is any return at all—is limited.⁹⁷ Municipal operation of transportation facilities⁹⁸ was the result of the hopeless financial situation in which many private companies found themselves. Authority operation, the latest experiment in the attempt to solve municipal transit problems, is the result of alarmingly high transit deficits. In addition to New York, statutes creating transit authorities have been enacted in Illinois,⁹⁹ Massachusetts¹⁰⁰ and Wisconsin.¹⁰¹ In the Chicago and Boston areas, these authorities are operating local transportation facilities; Milwaukee has not yet put the Wisconsin statute into operation.

⁹⁶ See COMMITTEE REPORT, CITY PASSENGER TRANSPORTATION, CHAMBER OF COMMERCE OF U. S. 14 (1932).

⁹⁷ *Id.* at 13.

⁹⁸ In Europe, almost all transportation facilities are municipally owned and operated. See Smith, *The Municipally Owned Utility: Profits or Service?*, 23 NAT. MUNIC. REV. 616 (1934).

⁹⁹ ILL. REV. STAT. c. 111½, §§ 301-344 (1949). Chicago passed an ordinance on April 23, 1945, granting to the Chicago Transit Authority the right to maintain and operate municipal transit facilities for a term of fifty years.

¹⁰⁰ Acts and Resolves of Mass. 1947, c. 544 (Metropolitan Transit Authority Act).

¹⁰¹ WIS. STAT. § 66.94 (1951).

CREATING TRANSIT AUTHORITIES

	<i>New York</i>	<i>Illinois</i>	<i>Massachusetts</i>
Name of body	New York City Transit Authority	Chicago Transit Authority	Metropolitan Transit Authority
Area included	City of New York	Metropolitan area of Cook County	Arlington, Belmont, Boston, Brookline, Cambridge, Chelsea, Everett, Milton, Malden, Medford, Newton, Revere, Summerville, Watertown
Type of organization	Body politic and public benefit corporation	Territory of area is body politic, political subdivision and municipal corporation	Inhabitants of area are a body politic and corporate and political subdivision
Number on governing board	5 (2 appointed by governor, 2 appointed by mayor, 1 appointed by others)	7 (3 appointed by governor, 4 appointed by mayor)	5 appointed by governor
Residential requirements of board	Must reside in city	Must be residents of area. At least one gubernatorial appointee must be from area outside of Chicago. All mayoral appointees must reside in Chicago	None
Political party requirements of board	None	None	Not more than 3 may be from the same political party
Compensation to board	None	\$15,000 per annum; Board may fix additional salary for chairman	\$8,000 per annum; \$10,000 per annum for chairman

Term of office	6 years	7 years—staggered so that one vacancy occurs every year	10 years—staggered so that one vacancy occurs every two years
Number of members necessary to conduct business	3	4	3
Quorum	3	4	3
Method of acquiring transit facilities	Agreement of lease for 10 years	Conveyance by cities after acceptance by referendum; ordinance of Chicago	Purchase from private companies
Finances	May issue short-term notes; obtain \$10 million from city as loan; capital costs paid by city	Sale of bonds; loans from Federal Government	Sale of bonds to district
Employees	Taken from Board of Transportation; all employees come under civil service	Taken over from existing transit facilities	Taken over from existing transit facilities
Pensions	Civil service	Must provide pension plan	Must provide pension plan
Power to sue and be sued in own name	Yes	Yes	Yes
Letting of contracts	Generally by public bidding	Generally by public bidding	_____
Power to fix rates	Yes	Yes	Yes, but must be approved by department
Period of limitation in tort actions against authority	One year	One year	Two years
Depreciation reserve	No	Yes	Yes

Conclusions

The transit authorities operating in the various states are required by statute to maintain the facilities on a self-sustaining basis. Under the Massachusetts¹⁰² and Illinois¹⁰³ laws, allowances for depreciation must be included in the cost of service, whereas under the New York statute,¹⁰⁴ such capital costs are not included as operating expenses. Consequently, in this state, transit facilities will not be literally self-sustaining. Capital costs will be furnished from funds supplied by the Board of Estimate as in the past, and the ultimate burden of these costs, of course, must be borne by the taxpayers.¹⁰⁵ In any event, the exclusion of capital costs from operating expenses is a tacit acknowledgment by the state legislature that passengers should not bear the full burden of transit expense. For many years, New York's transit facilities were operated on the theory that real estate values were increased by the availability of transportation facilities;¹⁰⁶ hence, real estate owners should assume part of the burden of transportation costs. There can be no doubt also that industry and business in the city has been greatly benefited by the development of New York's transportation facilities.¹⁰⁷ The mayor of New York, realizing this, sought to levy a tax on business to discharge part of the transit deficit,¹⁰⁸ and although his scheme was not carried into effect, the logical basis of the plan was recognized.¹⁰⁹

The transfer of municipally owned transit facilities to the Transit Authority resulted in further decentralization of transportation organization in New York. The city regulates the private bus line franchises; the Authority controls rapid transit facilities. In addition, a Long Island Railroad Authority¹¹⁰ regulates that inter-urban railway. There is no provision for a single, unified body to regulate

¹⁰² Acts and Resolves of Mass. 1947, c. 544, § 11.

¹⁰³ ILL. REV. STAT. c. 111½, § 338 (1949).

¹⁰⁴ N. Y. PUB. AUTH. LAW § 1802(1). Since the city did not include depreciation under operating expenses, there is no provision for the Transit Authority to maintain a depreciation fund. N. Y. Times, May 14, 1953, p. 1, col. 3.

¹⁰⁵ Other cities pay for various capital costs. See SUMMARY OF REPORT, BUREAU OF ENGINEERING AND ARCHITECTURE OF PHILADELPHIA 12 (1952). The Chamber of Commerce believes that cities should bear the cost of construction of transit facilities. COMMITTEE REPORT, CITY PASSENGER TRANSPORTATION, CHAMBER OF COMMERCE OF U. S. 23 (1932). Under the Massachusetts law, if the transit facilities do not become self-sustaining, any deficit will ultimately be charged *pro rata* to the participating cities. Acts and Resolves of Mass. 1947, c. 544, § 13.

¹⁰⁶ See Nehemkis, *The Public Authority: Some Legal and Practical Aspects*, 47 YALE L. J. 14, 33 (1937).

¹⁰⁷ See Keith, *The Cincinnati Transit Story*, 52 P. U. FORT. 86, 93 (1953); REPORT OF COUNSEL, BMT UNIFICATION PLAN 27.

¹⁰⁸ N. Y. Times, Jan. 5, 1953, p. 1, col. 4.

¹⁰⁹ See Wright, *Problems of Transit Finance*, 51 P. U. FORT. 611, 613 (1953).

¹¹⁰ N. Y. PUB. AUTH. LAW §§ 1700-1728.

transportation in the city; nor is there any provision for a single organization to develop and regulate suburban transportation. Since New York City and the surrounding area constitute a single economic-geographic unit, and since many who are employed in the city live in suburban areas, the utmost coordination of transit facilities is necessary.¹¹¹ The Illinois¹¹² and Massachusetts¹¹³ legislatures have recognized this principle and have given the transit authorities jurisdiction over all transit facilities in the metropolitan areas.

The main objective of the New York City Transit Authority is, of course, to operate the city's rapid transit facilities on a self-sustaining basis. Therefore, jurisdiction over the establishment of fares¹¹⁴ was transferred to the Authority from the Mayor and Board of Estimate, thus removing the pressure of local politics from this problem.

The Transit Authority Act transfers policy-making to the Authority; the day-to-day operations remain substantially unchanged. But the effect of the transfusion of new blood into the arteries of the transit system is becoming noticeable. If members of the board—the gubernatorial and mayoral appointees—can avoid conflict along political lines, much progress can be made. By reducing service during non-rush hours,¹¹⁵ and by a closer check over the transit union to prevent featherbedding,¹¹⁶ the Authority is attempting to reduce transit costs. The city, of course, could have accomplished all these innovations, if officials had taken a realistic view of the matter. Now

¹¹¹ See REPORT, BOARD OF PUBLIC UTILITIES AND TRANSPORTATION OF CITY OF LOS ANGELES ii (1952).

¹¹² ILL. REV. STAT. c. 111½, § 303 (1949).

¹¹³ Acts and Resolves of Mass. 1947, c. 544, § 1.

¹¹⁴ Pursuant to law, the Authority raised the fare to fifteen cents. In the first month of operation under this fare, the statistics released showed a 10.4% decline in passenger rides and an increase of 34.5% in revenues. N. Y. Times, Sept. 4, 1953, p. 17, col. 8. However, statistics covering the second month of operation indicated that passenger volume had dropped 15% and revenues increased only 29.6% in comparison to the corresponding period a year ago. N. Y. Times, Oct. 9, 1953, p. 29, col. 6.

¹¹⁵ N. Y. Times, Sept. 25, 1953, p. 23, col. 8. One of the immediate consequences of this announcement was the appointment by the mayor of a commission to study the proposed economies. N. Y. Times, Sept. 29, 1953, p. 23, col. 4. When the Authority rejected the arbitration committee, the Transit Workers Union instituted an action to enjoin the Authority from reducing the train schedules. N. Y. Times, Oct. 3, 1953, p. 1, col. 5. The suit was discontinued and Justice Hart of the Supreme Court was appointed as an impartial adviser to settle the dispute, but the Authority reserved the right to reject his findings. N. Y. Times, Oct. 10, 1953, p. 1, col. 1. *Quaere*: Whether a Justice of the Supreme Court has such power. See *Jacobs v. Steinbrink*, 242 App. Div. 197, 273 N. Y. Supp. 498 (2d Dep't 1934).

¹¹⁶ One of the members of the Transit Authority charged that such featherbedding and waste cost the transit lines \$12,000,000 annually. He stated that a fare reduction would be possible if such waste were eliminated. N. Y. Times, Sept. 19, 1953, p. 17, col. 8.

New York must be content with authority operation for ten years. Should the city, at that time, reassume control of the rapid transit facilities, it is to be earnestly hoped that the lessons derived from authority operation will not be soon forgotten. As for the Authority itself, it must beware the pitfalls which will necessarily be encountered where boards are, so to speak, a coalition of two opposing interests. A high standard of public duty and efficiency to provide the best transit service possible to the inhabitants of New York should be the aim of the Transit Authority.