North Dakota Law Review

Volume 5 | Number 9 Article 5

1928

Public Utilities

N J. Bothne

district judges to six years and supreme court judges to ten years. These concurrent resolutions passed both houses and will be found as Chapters 97 and 98, pages 114 and 115 of the Popular Edition of the Session Laws of 1929. Such proposed constitutional amendments will be submitted to the people for approval or rejection in accordance with the provisions of Section 202 of the Constitution of the State of North Dakota as amended.

Messrs. Stutsman and Zuger, being in close proximity to the legislative mill, were designated by your chairman to keep track of the legislation and report the same to the chairman.

On April 24th, 1929, Mr. Zuger reported to your chairman as follows:

> "The committee used its best efforts to secure an increase of pay for the Supreme and District Court judges. It was found, however, that the sentiment in the Legislature was so adverse that nothing could be immediately accomplished. The committee sponsored constitutional amendments increasing the terms of judges of the Supreme and District Courts. These were adopted in the House Bills 165 and 167. Conditions did not seem auspicious for securing much legislation sponsored by lawyers, and the committee kept its hands off except as to the judges bills."

On April 13th, 1929, Mr. Stutsman reported as follows:

> "House Bills Nos. 165 (terms of district judges) and 167 (terms of supreme judges) were not prepared by me but I found them held up in committee, or rather, withdrawn by the member introducing them, by reason of objections to the form. I rewrote each of these bills at least twice to meet other objections, and after conference with Mr. Twichell and Judge Birdzell got them in shape to satisfy all parties and they were passed, I understand, without change.
>
> "I think these resolutions are of great importance to the Bar and Judges and if proper effort is put behind them by the members and their friends the amendments to the Constitution increasing these terms of office will be adopted, but the fight is only half won and we should put up a vigorous and concerted fight all along the line."

FRED J. TRAYNOR, Chairman.

PUBLIC UTILITIES

The members of this committee are located in widely separated parts of the state, so a meeting of the committee for the purpose of discussing this subject and drafting a report could not very well be held. This report, therefore, is simply the expression of the chairman's individual ideas. But it is sincerely hoped that at our next annual bar meeting in Valley City all the members of this committee will be present to express their views concerning this subject.

Few new laws affecting public utilities were enacted by our last legislature. An amendment to Chapter 235 of the 1927 Session Laws was made. It provides that a public utility need not secure a certificate of public convenience and necessity in order to exercise rights under an ordinance afterwards granted, where such utility has not suspended operation of its plant and where such franchise merely replaces or renews an expiring or expired franchise

An amendment was also made to Chapter 197 of the Session Laws of 1927 in regard to submitting to the voters the question of the purchase, erection, enlargement, improvement or extension of electric light and power plants by municipalities. This amendment provides that if the cost of any enlargement, improvement, or extension of such plant will be paid out of the earnings of the plant and such cost does not exceed five thousand dollars, it shall be unnecessary to submit the proposition of so doing to the voters of the municipality. The new law also provides that if the cost of such plant or improvement or extension thereof is to be paid out of the earnings, then such cost shall not become a general obligation of the municipality, but a special obligation payable solely and exclusively out of the earnings derived from the operation of such plant or system.

A law was also enacted by our last legislature empowering the boards of trustees of villages to enter into contracts with persons, associations or corporations to furnish electric energy or gas to the village, for all village purposes, and to the inhabitants of such village. Such contracts cannot be entered into for a longer term than ten years, and are also subject to the regulatory powers of the railroad commissioners with reference to rates.

Upon the report concerning this subject at our last annual bar meeting in Minot considerable discussion was had in regard to the question of control of public utilities. Some seemed to be of the opinion that the power of such control should be placed exclusively either with the railroad commissioners or with the local authorities, and that our law as it now stands is defective. But is there, in fact, any divided power or authority in regard to the control of public utilities?

The Constitution of our state provides that a public utility may not be constructed or operated within a municipality in this state without the "consent of the local authorities having the control of the street or highway proposed to be occupied for such purposes." The so-called Public Utilities Act confers upon the board of railroad commissioners the power to regulate utility service and rates. But our supreme court has lately held that the local authorities, on granting a franchise to a public utility, may impose certain conditions thereto which, when accepted by the utility, become a valid contract not subject to interference by the railroad commissioners. For instance, if a franchise be granted by a municipality to an electric light company upon condition that it shall furnish to the municipality electric current for street lighting at a fixed rate, the board of railroad commissioners have no power to regulate or interfere with the rates so fixed by the contract in the franchise.

But we are not so much concerned with who has the power and control over public utilities as we are concerned with the question of rates. Utility rates, directly or indirectly, affect the pocket-book of almost every person in the state.

What effect on utility rates will the decision in the celebrated O'Fallon case have? This case, lately decided by the Supreme Court of the United States, is perhaps one of the most far-reaching lawsuits in history. The case, while small and directly involving only a nine-mile railroad, is really a billion dollar lawsuit. The question involved and decided wasn't a matter of railroad rates, but a matter of valuation of railroad property. The Interstate Commerce Commission fixed the maximum value of the O'Fallon railroad at $987,874. The railroad claimed a valuation of $1,350,000. The Commission, in fixing the valuation of

the road, figured the cost of reproduction as of 1914, plus subsequent investments, with proper deductions for depreciation. The railroad, on the other hand, claimed that the valuation should be based on the present prices and cost of replacement. In other words, the Commission adhered to the so-called "prudent investment" theory of valuation; while the railroad contended for a valuation based upon the reproduction cost principle. The lower court refused to interfere with the findings of the Commission; but the Supreme Court reversed the case and held that the Commission, in ascertaining the value of the railroad property, had not given proper consideration to the present cost of construction or reproduction.

While rates were not directly involved in the O'Fallon case, yet that decision becomes a precedent not only for railroad valuation but for railroad rates. What effect will that decision have on public utility valuation and taxation? Will it become a material factor in determining utility rates? When we consider the fact that nearly $25,000,000,000 are now invested in public utilities of the United States, the importance of the O'Fallon decision becomes at once apparent.

There is another important question in this connection that might profitably be discussed by the attorneys of the Association, and that is the matter of taxation of public utilities. But the subject of taxation is a very complicated and difficult problem. It requires months of study and solution. So we shall not in this report even express our views in regard to it.

In conclusion, this committee, so far as the chairman is individually concerned, has no recommendations to make to the Bar Association.

N. J. BOTHNE, Chairman.

RECENT SUPREME COURT DECISIONS

State of N. Dak. v. Schock: Defendant was charged with violating Section 9971a1-a3 of the Supplement, which reads:

> Sec. 1. Every person, firm, company, copartnership or corporation who makes or draws or utters or delivers to any person any check or draft upon a bank, banker or depositary for the payment of money, and at the time of such making, drawing, uttering or delivery, has not sufficient funds in or credit with such bank, banker or depositary to meet such check or draft in full upon its presentation, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not to exceed $100 or by imprisonment in the county jail for not to exceed 30 days, or by both such fine and imprisonment.
>
> Sec. 2. The word "credit" as used herein shall be construed to be an arrangement or understanding with the bank, banker or depositary for the payment of such check or draft.
>
> Sec. 3. Whereas, an emergency exists in the fact that There is no adequate provision under the laws of North Dakota for protection against those who issue checks without having funds or without having a reasonable expectation of having funds in the bank when the checks shall be presented for payment, this act shall take effect and be in force from and after its passage and approval. (Chap. 52, Laws 1915.)

Defense of defendant was that at the time he delivered the check he told the payee that he had no money in the bank, but would put it