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PUBLIC UTILITIES - CONSTITUTIONALITY OF STATUTE IMPOSING REGULATORY COSTS UPON UTILITIES

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PUBLIC UTILITIES — CONSTITUTIONALITY OF STATUTE IMPOSING REGULATORY COSTS UPON UTILITIES — A state statute imposed an annual fee of one-tenth of one per cent of gross operating revenues upon public utilities.[1] The fees were placed in a state revolving fund used to defray the expenses of administration of the public service law.[2] Plaintiff railroad paid the fees under protest and brought an action to recover that amount, claiming that the act was unconstitutional.[3] The trial court held that the act was unconstitutional on its face. The state supreme court revised this decision, holding that act valid and placing the burden of proof on the plaintiff to show that it had become invalid in operation. On appeal the United States Supreme Court remanded the case for a new trial, holding that the act was valid but that the burden of proof rested on the state to show that it had not become unconstitutional in its operative effect. *Great Northern Ry. v. State of Washington*, 300 U. S. 154, 57 S. Ct. 397 (1937).

The state, by virtue of its police power, has regulatory control over public

[1] Wash. Comp. Stat. (Remington, 1922), §§ 10417, 10418, Wash. Laws (1929), c. 107, § 1.

[2] Pacific Tel. & Tel. Co. v. Seattle, 172 Wash. 649, 21 P. (2d) 721 (1933).

[3] *P* claimed that the fee, on gross operating revenues from intrastate commerce, was so excessive as to constitute a violation of the "due process," "equal protection" and commerce clauses of the Federal Constitution.

utilities[4] and may exact from them the legitimate costs of regulation.[5] The present statute has been construed to be a regulatory, not a revenue, measure.[6] A majority of the states have statutes that to some extent impose the costs of regulation upon the utilities regulated.[7] Recently, statutes providing for the assessment of the costs of investigation against the utility being investigated have been sustained.[8] The unique feature of the present statute is that it establishes a common fund to meet all expenses and to which all utilities contribute. A state act that merely exacts regulatory costs from public utilities violates neither the "due process" nor the "equal protection" guarantees of the Federal Constitution.[9] Moreover, if the utility is engaged in interstate commerce the imposition of a purely compensatory fee to defray the costs of regulation is not unconstitutional under the commerce clause.[10] The benefit theory of taxation justifies the imposition of these costs upon utilities.[11] State regulation benefits the user of utility service who will ultimately pay the charge. The Court's ap-

[4] Idaho Power & Light Co. v. Blomquist, 26 Idaho 222, 141 P. 1083, Ann. Cas. 1916E 282 (1914); State ex rel. Wells v. Western Union Tel. Co., 96 Fla. 392, 118 So. 478 (1928); Great Northern Utilities Co. v. Public Service Comm., 88 Mont. 180, 293 P. 294 (1930).

[5] See cases collected in Re Assessments against Public Utilities, Pub. Util. Rep. 1932B 314 (Wis. Pub. Serv. Comm. 1931).

[6] Pacific Tel. & Tel. Co. v. Seattle, 172 Wash. 649, 21 P. (2d) 721 (1933); see also state report of principal case, 184 Wash. 648, 52 P. (2d) 1274 (1935).

[7] Statutes summarized in Pub. Util. Rep. 1932B 327.

[8] Wisconsin Tel. Co. v. Public Service Comm., 206 Wis. 589, 240 N. W. 411 (1932); Bronx Gas & Electric Co. v. Maltbie, 268 N. Y. 278, 197 N. E. 281 (1935); Washington Ry. & Electric Co. v. District of Columbia, 64 App. D. C. 243, 77 F. (2d) 366 (1935).

These statutes have been held invalid only when poorly drafted. State v. Northwestern Electric Co., 183 Wash. 184, 49 P. (2d) 8, 101 A. L. R. 189 at 197 (1935), noted in 34 MICH. L. REV. 1255 (1936); Southern Bell Tel. & Tel. v. Louisiana Public Service Comm., (D. C. La. 1936) 15 F. Supp. 1056.

[9] Charlotte, C. & A. R. Ry. v. Gibbes, 142 U. S. 386, 12 S. Ct. 255 (1892); People ex rel. v. Squire, 145 U. S. 175, 12 S. Ct. 880 (1892).

[10] Interstate telegraph companies have been required to pay compensatory fees to defray the cost of inspection of their poles and wires by municipalities. Western Union Tel. Co. v. New Hope, 187 U. S. 419, 23 S. Ct. 204 (1903); Atlantic & Pacific Tel. Co. v. Philadelphia, 190 U. S. 160, 23 S. Ct. 817 (1903); Postal Telegraph-Cable Co. v. Richmond, 249 U. S. 252, 39 S. Ct. 265 (1919); Mackay Tel. & Cable Co. v. Little Rock, 250 U. S. 94, 39 S. Ct. 428 (1919).

[11] Charlotte, C. & A. R. Ry. v. Gibbes, 142 U. S. 386 at 394, 12 S. Ct. 255 (1892): "Requiring that the burden of a service deemed essential to the public . . . should be borne by the corporations in relation to whom the service is rendered, and to whom it is useful, is neither denying to the corporations the equal protection of the laws or making any unjust discrimination against them." See Nashville, C. & St. L. Ry. v. Walters, 294 U. S. 405 at 430, 55 S. Ct. 486 (1935).

The imposition of regulatory costs is closely analogous to the charging of compensatory fees by a state or municipality for the use of special facilities provided by that government. Lindsay & Phelps Co. v. Mullen, 176 U. S. 126, 20 S. Ct. 325 (1900); Western Union Tel. Co. v. Richmond, 224 U. S. 160, 32 S. Ct. 449 (1912).

proach in decisions under the commerce clause has been analogous to that adopted in decisions under the Fourteenth Amendment. Thus where the fee is excessive and disproportionate to the costs of regulation the act is unconstitutional under the Fourteenth Amendment or as a burden on interstate commerce.[12] In the analogous situation where state inspection laws require compensatory fees the same position has been taken.[13] Motor vehicle registration taxes present somewhat similar problems.[14] The legislature has a rather wide discretion in determining the amount of the fee, although its relation to the costs of the service must not be unreasonable.[15] Moreover, this discretion should be broader under a statute like the present one where the aim is to include all costs of regulation; for many of these costs are not readily ascertainable in advance even after several years of experience. The majority opinion assumes that the statute would be invalid if the fee were shown to be clearly unreasonable in relation to the service rendered, for then one utility would bear in part the costs of an unrelated utility.[16] State statutes involving the pooling or common fund feature have been sustained in other situations where a strong public interest has been present.[17] Granting that the costs should be

[12] Charlotte, C. & A. R. Ry. Co. v. Gibbes, 142 U. S. 386, 12 S. Ct. 255 (1892); Postal Telegraph Cable Co. v. New Hope, 192 U. S. 55, 24 S. Ct. 204 (1904); Postal Telegraph Cable Co. v. Taylor, 192 U. S. 64, 24 S. Ct. 208 (1904); Mackay Tel. & Cable Co. v. Little Rock, 250 U. S. 94, 39 S. Ct. 428 (1919).

[13] New Mexico v. Denver & Rio Grande Ry., 203 U. S. 38, 27 S. Ct. 1 (1906) (hide inspection fee); Red "C" Oil Co. v. Board of Agriculture, 222 U. S. 380, 32 S. Ct. 152 (1912) (oil inspection fee). Standard Stock Food Co. v. Wright, 225 U. S. 540, 32 S. Ct. 784 (1912) (cattle food inspection fee); and collection of cases in 47 A. L. R. 980 (1927) re gasoline inspection fees.

[14] The imposition by a state of reasonable registration taxes on persons operating motor vehicles in interstate transit has been upheld on the ground that they serve to defray the costs of motor vehicle regulation or as compensation for the use of the highways. Hendrick v. Maryland, 235 U. S. 610, 35 S. Ct. 140 (1915); Kane v. New Jersey, 242 U. S. 160, 37 S. Ct. 30 (1916). Moreover, special levies, realistically business franchise taxes, have been placed on the carrier for hire and sustained as compensation for the use of the highways. Clark v. Poor, 274 U. S. 554, 47 S. Ct. 702 (1927); Interstate Busses Co. v. Blodgett, 276 U. S. 245, 48 S. Ct. 230 (1928). The theory sustaining these taxes marks in general the limitations on the state's power to impose them. See Kauper, "State Taxation of Interstate Motor Carriers," 32 MICH. L. REV. 171-220 (1933).

[15] Western Union Tel. Co. v. New Hope, 187 U. S. 419 at 426, 23 S. Ct. 204 (1902): "It is a mistake . . . to measure the reasonableness of the charge by the amount actually expended . . . for a particular year. . . ."

Pure Oil Co. v. Minnesota, 248 U. S. 158 at 162, 39 S. Ct. 35 (1918): "the discretion of the legislature in determining the amount of the inspection fee will not be lightly disturbed. Its determination is prima facie reasonable. . . ."

[16] The dissenting opinion recognizes, but passes over, the issue as to whether the pooling feature of the statute would save it from invalidity if the fee were found to be unreasonable.

[17] Noble State Bank v. Haskell, 219 U. S. 104, 31 S. Ct. 186, 32 L. R. A. (N. S.) 1062 at 1065, Ann. Cas. 1912A 487 at 490 (1911). A state statute was upheld that required state banks to contribute a percentage of their deposits to a state guaranty fund. This fund was used to pay losses suffered by depositors in banks

imposed upon utility consumers, it is possible to treat them as a unit or allocate the costs of each class to that class. Utility regulation may involve costs that in practical administration cannot be definitely allocated to each class. Certainly if all utilities are under the control of a single commission this pooling may be more efficient for administrative purposes. The majority of the court held that the state had the burden of showing that the fee was not unreasonable in relation to the costs of the service rendered. The result may be salutory. It may compel the state to keep scientific accounts of expenses as far as is practical and thus lead more readily to future adjustments of the fees based on costs of regulation of each class of utility under a somewhat classified system. The holding is in accord with the rule of evidence that where the facts are peculiarly within the knowledge of one party, or within his control, then his is the burden of proof.[18] The imposition of a special tax on the operation of motor vehicles in interstate transit has been held to require of the state an affirmative showing of the compensatory nature of the levy, but the burden rested upon the complaining party to show the unreasonableness of the tax in relation to the privilege of using the highway, or to the costs of regulation.[19] The Court

that became insolvent. Mountain Timber Co. v. Washington, 243 U. S. 219, 37 S. Ct. 260, Ann. Cas. 1917D 642 at 650 (1917). A workmen's compensation act that established a state fund was held valid. The ratio of contribution of each class of industry was determined by the occupational hazard of that class. The objection will be raised that the present statute has failed to classify the utilities. Absent a contrary showing, the assumption that costs of regulation vary in proportion to the extent of the business is not unreasonable. Chamberlain, Inc. v. Andrews, (U. S. 1937) 57 S. Ct. 122, adopting and affirming, by an evenly divided court, the decision in 271 N. Y. 1, 2 N. E. (2d) 222 (1936). The New York Unemployment Insurance Law was upheld. A state fund was created and maintained by an annual payroll tax on employers. Unemployment benefits were paid from the fund. The pooling of funds in the first two cases cited in this note is basically insurance in that contributors get the benefit of protection. In the unemployment insurance case there is no benefit to contributors, in the way of protection against risk of loss, to help justify the pooling of funds. Thus the latter case is the nearest analogy to the principal case.

Compare with the above cases, Dayton Goose Creek Ry. v. United States, 263 U. S. 456, 44 S. Ct. 169, 33 A. L. R. 472 at 488 (1924), upholding, over the objection of want of due process under the Fifth Amendment, the recapture clause of the Transportation Act that required that one-half of the excess earnings of a railroad, above its fair return, be paid to a general railroad fund to be used in making loans to carriers, refunding, etc. And see Railroad Retirement Board v. Alton R. R., 295 U. S. 330, 55 S. Ct. 758 (1935), invalidating the railroad pension plan.

[18] West v. Kern, 88 Ore. 247, 171 P. 413 (1918); Price v. Haney, 174 Miss. 176, 164 So. 590 (1936).

[19] Interstate Transit Inc. v. Lindsey, 283 U. S. 183, 51 S. Ct. 380 (1931). The tax fell on the operation of motor carriers engaged exclusively in interstate commerce. The fee in the principal case is on intrastate revenues. Certainly the Lindsey case is no authority for the extent of the burden placed on the state in the principal case. See Kauper, "State Taxation of Interstate Motor Carriers," 32 MICH. L. REV. 171 at 185-191 (1933). And see the recent case of Ingels v. Morf, (U. S. 1937) 57 S. Ct. 439. A state act placed a fee of $15 per motor vehicle on "caravaning" traffic coming into the state. The legislative purpose was to meet the extra costs of

placed great reliance on *Foote and Company v. Maryland*,[20] an inspection fee case, where the burden of proof was placed on the state since it appeared from the statute that the fees could be expended for purposes other than inspection. That decision is reconcilable with the principal case.[21] Public utility regulation is more comprehensive than inspection of a specific commodity, and the reasonableness of the fee should be considered in the light of all state functions under the public service law. No presumption of invalidity should be indulged in because the proceeds may go for costs of unrelated utilities or to defray the expense of functions that are regulatory only because they are part of the statutory scheme. It would seem that the position of the dissenting justices is more forceful and that, as usual, the burden of showing actual harm from an alleged unconstitutional act should rest upon the complaining party.[22]

Charles W. Allen

police regulation necessitated by such traffic. The plaintiff sustained the burden of proof, showing the fee to be excessive in relation to these costs.

[20] Foote & Co. v. Maryland, 232 U. S. 494, 34 S. Ct. 377 (1914). See also Lugo v. Suazo, (C. C. A. 1st, 1932) 59 F. (2d) 386.

[21] The decision in the Foote case was based on Art. 1, § 10 of the Constitution. In his dissenting opinion Justice Cardozo says of that case, holding it inapplicable to the present, "A power has been granted to be used in exceptional conditions. The state must bring itself within the exception if it seeks to act within the grant." 57 S. Ct. 397 at 405.

[22] Norfolk & Western Ry. v. North Carolina, 297 U. S. 682, 56 S. Ct. 625 (1936); Premier-Pabst Sales Co. v. Grosscup, 298 U. S. 226, 56 S. Ct. 754 (1936).