

Contracts, Obligations of. Impairment, of Obligation. Public Service Commission, Power to Abrogate Contracts.

The provision of the state and federal constitution, prohibiting the legislature from passing laws impairing the obligation of contracts, is binding upon the Public Service Commission, and they cannot alter contracts between power companies, or consumers which provide for a continuance for a further period upon the same terms.

September 11, 1914.

Hon. Board of Railroad and Public Service Commissioners,
Helena, Montana.

Gentlemen:

I am in receipt of your communication under date the 16th of July, asking my opinion as to whether contracts for the furnishing of light, power or heat, having within them an option of renewal upon the same terms and conditions as for the original period, are binding upon your commission. You state that you have contracts made for a term of one year, and carrying such clauses as the following:

"That this contract is to remain in full force and effect for the term of one year from this day and date, and thereafter until terminated by a written notice of cancellation from either party."

Again contracts having the following language:

"The company reserves the right at its option and upon giving the power company 30 days written notice prior to the expiration of this agreement to renew the same for an additional period of five years."

You state in your letter that it is your understanding that such a contract is indefinite in its nature, and therefore, not binding upon the parties thereto, and consequently not binding upon your commission in fixing the rates under Section 12 of the Public Service Commission Law. While it is true that such a provision at any time previous to the date when the option may be exercised is uncertain, in that it may never be exercised, nevertheless, such a provision is as binding upon the parties to the contract as any other part of the agreement. It is in the nature of a inchoate right; a right which is dormant until the happening of some event, or until exercised by the party entitled thereunder; and since it is binding upon the parties, and also because it could well be one of the most potent considerations leading to the making of the contract by one of the parties thereto, it is not within the power of the legislature or anyone acting under the authority of the legislature to impair its obligation.

Section 11 of Article III of the State Constitution, is as follows:

"No ex post facto law, nor law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the legislative assembly."

Even though our own state constitution did not prohibit such laws, still the legislature would be under the inhibition of the constitution of the United States in this regard. Section 10 of that instrument contains the following language:

"No state shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts * * *"

The extent to which this prohibition goes, has been defined by the Supreme Court of the United States and other courts on numerous occasions. One of the early cases was that of *Green vs. Bidde*, 3 Wheaton, 1.

"The objection to a law, on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law affects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not existing in the contract, or dispensing with those which are, however, minute or apparently immaterial in their effect on the contract of the parties, impairs its obligation."

In passing upon the right of a legislature to extend the period which a railroad company chartered by the legislature, should have to begin the construction of its road and be authorized to call upon subscribers to the stock for their unpaid subscriptions, a Pennsylvania court used the following language:

"A contract is an agreement between parties made by themselves. The legislature makes laws; but laws are not contracts; their natures are different, and cannot be confounded. The legislature could not make such a contract for the parties, nor impose upon the defendant the duty of subscribing."

Plankroad Co. vs. Davidson, 39 Pa. St. 435.

The Supreme Court of Indiana, in construing the provision of the constitution upon the impairment of the obligations, say:

"The Constitutional provision that no law impairing the validity of contracts shall ever be made, extends to all rights accruing under all contracts, whether written or parole, whether express or implied, whether arising from the stipulation of the parties, or accruing by the operation of law.

Lewis vs. Breckenridge, 12 American Decisions, 228.

A case arising in New Jersey, holding the same rule, is a good example upon the facts. After a lease had been entered into by which the lessee agreed to pay the rent for a certain time, a law was passed by the legislature which provided that the total destruction of leased buildings should terminate the lease. In a suit by the lessor after a fire for the balance of the rent for the term, the buildings having been destroyed by the fire, the defendant pleaded the statute in defense. The court held that since the lease had been entered into previous to the passage of the law, that the legislature could not by any enactment change the terms of the contract, as it was originally entered into by the parties.

Since the contracts which you speak of were entered into previous to the passage of the Public Service Commission law, and were val'd at the time they were made, the parties to such contracts, cannot be deprived of any right which they may have thereunder by any legislative enactment, or any order made by your commission in pursuance of such enactment.

You are, therefore, advised that such provisions in the contracts spoken of, are binding upon your commission.

Yours very truly,

D. M. KELLY,
Attorney General.