

Montana Trade Commission—Salary, Increased.

In view of the fact that the law creating the Montana Trade Commission has been declared unconstitutional, the members thereof are not entitled to the additional compensation provided for by Chapter 30, Laws of Extraordinary Session, 1919.

February 3rd, 1920.

Board of Railroad Commissioners,
of the State of Montana,
Building.
Gentlemen:

By letter dated January 22nd, 1920, you have submitted to me, for opinion, the following question:

“By Chapter 30, Laws, Extra Session, 1919, a law distinct and separate from Chapter 21, it was provided that ‘each member of the Montana Trade Commission shall receive an annual salary of \$1,000.00,’ etc., is this Act in any particular affected by Judge Bourquin’s decision?”

In reply you are advised that, since the date of Judge Bourquin’s decision in *Holter Company v. Boyle*, January 13th, 1920, in consequence of the subject being brought to my attention by your Mr. Toomey, I have been giving the matter careful consideration, with the result that I am firmly of the opinion that Chapter 30, Laws, Extra Session, 1919, is now without force and effect to allow to the members of the commission the additional compensation therein provided.

Chapter 30 is, in form and enactment, a separate statute from Chapter 21 declared unconstitutional. This being true, it is elemental that the statute must be given a construction that will make it operative, if possible, and that its invalidity must appear beyond a reasonable doubt. Of course this interpretative principle must be applied in harmony with other principles of equal force, and remains subordinate to constitutional mandates. The statute in terms is:

“That each member of the *Montana Trade Commission* shall receive an annual salary of one thousand dollars (\$1000.00), to be paid out of the fund created for said commission, which salaries shall be paid at the same time and in the same manner as salaries of other state officers.”

By Chapter 223, Session Laws, Regular Session, 1919, there was created the Montana Trade Commission, for the regulation and control of public mills. (Approved March 18, 1919.) By Chapter 21, Session Laws, Extra

Session, 1919, there was created the Montana Trade Commission, for regulating of prices and charges of commodities. (Approved August 11, 1919.) The second act in no wise refers to the first mentioned. In each instance a new commission—a new entity—is created out of whole cloth, and operates on different subjects. The statutes are definitely distinct, separate and independent. The anomaly is that each bears an identical name.

(A) Now let it be assumed that the words "Montana Trade Commission" in Chapter 30 refers to the Montana Trade Commission created in August, 1919, and, frankly, this assumption would seem to be the only permissible one, for Chapters 21 and 30 were enacted at the same extra session, are complementary in terms, bear the same approval date (Chapter 21 being passed first) and in terms refer to the same thing, not to two commissions, but to one commission—the commission the legislature had in mind at the session then pending, i. e., the Montana Trade Commission it had just created. Further, while neither Chapter 223, Regular Session, or Chapter 21, Extra Session, "creates a fund" for either commission as expressed in Chapter 30, the language in Chapter 30 "to be paid out of the fund created for said commission" is more appropriately referable to Chapter 21 alone, where, in the Act, a specific appropriation of \$25,000.00 is made for the Montana Trade Commission thereby created, "said sum to be expended under the orders and directions and by the authority of the Montana Trade Commission," than to Chapter 223—wherein no specific appropriation whatever is made. Funds for the Public Mill Commission were provided for in the general appropriation bills. Assuming, as before, that the words "Montana Trade Commission" in Chapter 30 refer to the Montana Trade Commission created in August, 1919, what is the result? Chapter 21 has been declared unconstitutional by a Federal court of first instance. And while a declaration of unconstitutionality by a trial court does not carry the authoritative compulsion of a court of last resort, it is for all present purposes, decisive. The Supreme Court of the United States has said: "An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; *it is, in legal contemplation, as inoperative as though it had never been passed.*" (Norton v. Shelby Co., 118 U. S. 425, 442, 6 S. C. 1121, 30 L. Ed. 178.) Under this doctrine, and assuming that Chapter 30 refers to Chapter 21, alone, Chapter 30, by reason of its dependence upon, and association with Chapter 21, must fall with Chapter 21, and is "as inoperative as though it had never been passed."

(B) Now, let it be assumed that Chapter 30 refers, as well, to the "Montana Trade Commission" for the control of public mills. What is the result? It must now be borne in mind that, since Chapter 30 was passed at an extraordinary session of the legislature, its vitality is dependent on Section 11, Article VII of the Constitution of Montana.

"He (the Governor) may on extraordinary occasions convene the legislative assembly by proclamation, stating the purposes for which it is convened, *but when so convened, it shall have no power to legislate on any subjects other than those specified in the proclamation, or which may be recommended by the Governor.*"

This constitutional provision was construed by our Supreme Court in *State ex rel. A. C. M. Co. v. Clancy*, 30 Mont. 529, and the Court there said: "When the exigencies of the times require it, the legislature may be called in extraordinary session by the Governor to consider particular subjects of legislation. Those subjects must be enumerated in the proclamation or in the Governor's message to the assembly, *and the power of the legislature is limited to enacting laws affecting those subjects only.*" Careful inspection of the Governor's proclamation convening the Sixteenth Legislative Assembly in Extraordinary Session, dated July 17, 1919, and of each of the Governor's messages transmitted to the legislature from July 29, 1919, to August 7, 1919, fails to show that the subject of the Montana Trade Commission for control of public mills, or the subject of salaries for state officials other than farm land appraisers, was in any particular, directly or indirectly, touched upon, so as to warrant any foundation for the passage of Chapter 30, as referable to Chapter 223, creating the Montana Trade Commission for control of public mills. Under the constitutional provision referred to, Chapter 30, to be sustained at all under the call and messages of the extra session must refer to the Montana Trade Commission relating to the subject of the high cost of living (Governor's message of August 1, 1919) and this being true, it falls for the reasons set out in (A) above.

Your question suggests two other points:

(1) That the Montana Trade Commission (High Cost of Living) under Judge Bourquin's decision still exists, and may exercise any of the powers conferred upon it, save price fixing. As I view the Judge's opinion, the entire Act falls. The opinion expressly says "*The Act* is within the inhibition of the Fourteenth Amendment," and avers "all else" "subordinate" to the price fixing issue. A reading of the Act convinces me that its different parts "are so mutually connected with and dependent on each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently," and since some parts are now found unconstitutional, "all the provisions which are thus dependent, conditional or connected, must fall with them." *Pollock v. Farmers' Loan and Trust Co.*, 158 U. S. 601, 636, and cases there cited.

(2) Your further suggestion that Chapter 30 was intended to compensate you for all additional duties added to your board since the original Railroad Commission Act of 1907, i. e., additional duties as Railroad Commissioners, new duties as Public Service Commissioners, new duties as Montana Trade Commissioners (control of public mills) new duties as Irrigation Commissioners, meet with the difficulty that none of the statutes referred to, and whereby you are clothed with additional duties and responsibilities, directly or inferentially suggests that there is to be additional compensation for such added duties. The Irrigation Commission law, on the other hand, expressly provides: "No extra compensation shall be paid to any member or employee of the State Board of Railroad Commissioners, or the State Engineer or the Attorney General, by virtue of any duties imposed by this Act." (Section 1.) The Public Service Commission Law (Section 32) and the Montana Trade Commission Law for public mills (Section 31) seem content with allowing you, as members

of said commissions, your necessary expenses while traveling on official business of said commissions. Whatever may have been the declaration of members of the legislature, we have only to consider now the language of the statute that the legislature passed on us.

I am not unmindful of the equities of your position, for it would seem that the additional duties saddled upon you justified additional compensation, but the legislature has not said so in your cases, despite the fact it increased the emoluments of other state officers at the regular session in 1919. Its very failure to act indicates, powerfully, that it did not consider your case, with favor, from 1913 to August, 1919, when it passed Chapter 21, and it is clear that the increase then provided for was granted by virtue of the exceptionally onerous duties imposed upon you by the Montana Trade Commission Law, now held in contravention with the Federal Constitution.

Respectfully,
S. C. FORD,
Attorney General.